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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
August 18, 1978

OFFICE OF GENERAL COUNSEL

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Re: Section 52.21 (i) (3) of the PSD Regulations

Dear Mr. Nickel:

This is in response to your letter dated July 31, 1978. In that letter you asked for my interpretation of section 52.21 (i) (3) of the regulations for the prevention of significant air quality deterioration ("PSD") which EPA promulgated on June 19, 1978. 43 FR 26388.

A set of circumstances common to some electric utilities prompted your request. According to your letter, these utilities had begun physical on-site construction on several power plants well before June 1, 1975. In the early 1970's, however, these utilities temporarily discontinued construction on the power plants, some for as long as 18 months or more, because of financial difficulties and reduced load growth. Nonetheless, by March 1, 1978, the utilities had restarted, and in some instances completed, construction on the plants. Your letter suggests, and therefore I am assuming, that construction on the power plants "commenced," within the meaning of Section 169 (2) of the Clean Air Act, before June 1, 1975. (See Footnote 1) In other words, the utilities had not only begun construction before then, but had also obtained all preconstruction permits required under the applicable state implementation plan ("SIP").

Footnote 1: I should note, too, that in using the phrase "power plant" I have in mind merely a single electric generating unit having no more than one boiler, not a project consisting of many units to be constructed in distinct phases.

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As you point out, if one were to apply the relevant provisions of the June 19 regulations literally to these circumstances, one might conclude that those regulations apply to those power plants whose construction the utilities discontinued for 18 months or more. Section 52.21 (i) (1) of the regulations gives the general rule that the regulations apply to any "major stationary source or major modification." These power plants are undoubtedly "major stationary sources," and none of the exceptions to the general rule which appear on the face of the regulations fit the facts. The exception in section 52.21 (i) (3) comes close to fitting, but that section only provides that the regulations do not apply to:

[a] major stationary source or major modification that was not subject to 40 CFR 52.21 as in effect before March 1, 1978, if the owner or operator

(i) Obtained all final Federal, State and

local preconstruction permits necessary under the applicable State implementation plan before March 1, 1978;

(ii) Commenced construction before March 19, 1979; and

(iii) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

43 FR 26406 (emphasis added).

In your view, EPA must have intended to exempt from the June 19 regulations those power plants whose construction the utilities temporarily discontinued, if the discontinuance ended before March 1, 1978. You would therefore, read into subparagraph (iii) of section 52.21 (i) (3) the phrase "after March 1, 1978," so that it would read:

(iii) after March 1, 1978, did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

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After examining the PSD provisions of the Clean Air Act and the June 19 regulations, I have concluded that those regulations do not apply to any source or modification on which construction commenced within the meaning of Section 169 (2) of the Act before August 7, 1977. (See Footnote 2) Since the June 19 regulations, and particularly Section 52.21 (i) (1) of these regulations are therefore inapplicable to the sources that concern you, it is unnecessary to consider the correctness of your interpretation of Section 52.21 (i) (3).

My conclusions are based primarily on Section 168 (b) of the Act. In pertinent part that section provides:

In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 169 (2)) after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to the enactment of the Clean Air Act Amendments of 1977.

Put differently, section 168 (b) declares that the PSD regulations in effect before August 7, 1977, not any in effect after that time, govern the review and permitting of any source on which construction commenced within the meaning of section 169 (2) between June 1, 1975, and August 7, 1977. Plainly, Congress thought that it should "grandfather" such sources. Since sources on which construction commenced within the meaning of section 169 (2) before June 1, 1975, are certainly no less deserving of grandfather status than sources on which construction commenced after that time, Congress must have intended to exempt them as well from any regulations in effect after August 7, 1977. In the face of this Congressional intent, EPA could not apply the new PSD regulations to any source on which construction commenced within the meaning of section 169 (2) before August 7, 1977. Section 52.21 (i) (1) must be read, consequently, as not applying to sources and modifications commencing construction before August 7.

Footnote 2: I am expressing here no opinion on whether a source which commenced construction before June 1, 1975, within the meaning of section 52.21 (b) (7) of the pre-August 7 regulations, but not within the meaning of section 169 (2), would be subject to PSD review. Also, I do not intend to affect the rules for grandfathering independent facilities at a multifacility source which was or is being constructed in distinct phases. For those rules, see 43 FR 26396 (June 19, 1978).

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My interpretation of Section 52.21 (i) (1) is supported by the preamble to the June 19, 1978 regulations. The portion of the preamble under the

heading "Commence Construction" explains:

It is important in many cases to determine whether a source has commenced construction by a certain date. If a source commenced construction before June 1, 1975, it would be exempt (or "grandfathered") from PSD review altogether. 40 CFR 52.21 (d). If a source commenced construction before August 7, 1977, it would be exempt from the amendments that EPA promulgated on November 3, 1977. 42 FR 57459.

43 FR 26395 (June 19, 1978) (emphasis added). One can find support for my interpretation also in the definition of baseline concentration (Clean Air Act Section 169 (4); Section 52.21 (b) (11), 43 FR 26404) and Section 165 (a) of the Act.

Therefore, with regard to power plants whose construction the utilities discontinued, I believe that they are not subject to the June 19 regulations, if indeed construction on them commenced within the meaning of section 169 (2) before June 1, 1975, and the discontinuances were temporary. I should note that, if the utilities in discontinuing construction intended in fact to close the projects permanently, rather than to suspend them temporarily, the reopening of the projects would be subject to the new regulations, since the power plants would upon closing have ceased to exist for PSD purposes. Whether a discontinuance were temporary or permanent would have to be determined on a case-by-case basis from all of the facts and circumstances. A discontinuance of 18 months or more might well raise a strong, but rebuttable presumption that the utility intended to close the project permanently. See especially, 40 CFR 52.21 (e) (3) (1977).

If you have any questions, please call Peter Wyckoff (755-0744).

Very truly yours,

Joan Z. Bernstein
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cc: Peter H. Wyckoff