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

DEC 23 1987

MEMORANDUM

SUBJECT: Opinion in U.S. v. Louisiana-Pacific Corporation, D. Colo., Interpreting Certain PSD Regulations

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring

TO: J. Craig Potter
Assistant Administrator
for Air and Radiation (ANR-443)

On October 30, 1987, Judge Arraj of the U.S. District Court for the District of Colorado issued an opinion on cross motions for summary judgment in this case. The United States has sued Louisiana-Pacific (LPC) for construction of two major stationary sources without first obtaining prevention of significant deterioration (PSD) permits as required by the Clean Air Act and applicable regulations. LPC has alleged that the sources in question, waferboard production facilities located at Kremmling and Olathe, Colorado, were not major sources and so the requirement to obtain PSD permits did not apply to the facilities. Judge Arraj denied both motions for summary judgment, finding that questions of fact existed which need to be resolved in a trial. Trial is now set to commence January 19, 1988. However, Judge Arraj's opinion covers several legal matters which are important issues of first impression and may significantly affect enforcement under the Clean Air Act in the future.

I. The Jurisdictional Requirement for a 30 Day Continuing Violation After the Issuance of a NOV

In its complaint, the government had pleaded its first claim in the alternative, alleging that the LPC Kremmling waferboard facility was either a "major modification" or a "major stationary source", as defined by the PSD regulations. The Court granted LPC's motion for summary judgment on the government claim that the Kremmling facility was a major modification. The Court's reasoning was based on the jurisdictional requirements of the

Clean Air Act. LPC operated a saw mill which contained a teepee burner on the Kremmling site prior to commencing construction of the waferboard plant in 1983. The teepee burner was undisputedly a major stationary source (it had emitted over 250 tons per year of a regulated pollutant). A major modification is defined in the PSD regulations as a physical or operational change which produces significant net emissions increases. "Significant" is further defined as 40 tons per year of volatile organic compound, or 25 tons per year of particulates. There is no question that the waferboard plant increased emissions at Kremmling by those amounts.

EPA issued an NOV to LPC for construction of a major modification without a PSD permit on June 5, 1987. However, by the end of June, LPC had dismantled and permanently removed the teepee burner (the major stationary source). Judge Arraj held that EPA could not maintain its action on the major modification theory because the major source, upon which the major modification must be based, did not exist for more than 30 days after the NOV was issued. Section 113(b) (2) of the Clean Air Act allows the Administrator to bring suit in federal district court when a source violates the Act "more than 30 days after having been notified by the Administrator under section (a) (1) of this section of a finding that such person is violating such requirement."

EPA had also issued a second NOV to LPC for the construction of the waferboard Plant at Kremmling, however. This NOV, issued February 3, 1987, alleged construction of a major stationary source without a PSD permit. To prove this allegation, EPA must show that the Kremmling waferboard plant itself has the potential to emit 250 tons per day. The Judge allowed this claim (the plaintiff's first claim in the alternative) to stand and be heard at trial.

II. The Meaning of "Federally Enforceable Restrictions" as Limiting "Potential to Emit" Under PSD Regulations

LPC argued that the Kremmling and Olathe plants could not considered major stationary sources because conditions in their state permits limited their emissions to less than 250 tons per year of each regulated pollutant. Since these state permits were issued under an EPA-approved program, the permits are considered "federally enforceable". Therefore, LPC argued, conditions in these permits which limit emissions should be considered federally enforceable limits for purposes of determining potential to emit.

The Court disagreed. Judge Arraj first pointed out that the violation begins when construction commenced and that the state permits for Kremmling and Olathe were not issued until several months after construction commenced. Thus, the state permit limitations could not be a defense in the case because they did not exist when the alleged violation commenced.

After making this determination, Judge Arraj held that "even if the state permits had been in existence when the alleged violation occurred . . . defendant's motion would still have to fail because I cannot accept defendant's overly broad construction of the term 'potential to emit.'" pp. 17-18. The Judge rejected the notion that restrictions on actual emissions are properly considered in determining a source's potential to emit. He analyzed the opinion in Alabama Power v. Costle, 636 F.2d 322 (D.C. Cir. 1979), the seminal opinion regarding the meaning and requirements of the PSD program. He looked, as well, to the preamble of the 1980 PSD regulations, those regulations promulgated by EPA in response to the Alabama Power decision. From these sources and the language of the regulations themselves, the Judge concluded "that a variety of factors (in addition to maximum design capacity) are properly included in the calculation of a source's potential to emit. These factors clearly include the effect of pollution control equipment. Additionally, they include federally enforceable permit conditions which restrict hours of operation or amounts of material combusted or produced . . . . (T)hese factors do not include permit restrictions which limit specific types and amounts of actual emissions." In reaching his conclusion, the Judge found that the definition of "potential to emit" should be given a narrow construction. The opinion held that "not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of material combusted or produced are properly included, blanket restrictions on actual emissions are not." p. 23.

A copy of the opinion is attached. If you have any questions, please call Judy Katz at 382-2843.

Attachment

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