UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
August 8, 1980

Office of
Enforcement

MEMORANDUM

SUBJECT: PSD Applicability Determination: Babylon 2

FROM: Edward E. Reich (EN 341)
Director, Stationary Source Enforcement Division

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

This is in response to your memo dated July 28, 1980, concerning the Babylon incinerator #2. Babylon #2 is a municipal incinerator capable of charging more than 250 tons of refuse per day and will have the potential to emit greater than 100 tons per year of particulate matter. The incinerator has been shutdown since 1975 and has been removed from the state's emission inventory. The source now wishes to reopen and the question is what are the implications as to the PSD permitting requirements.

Consistent with an earlier determination dated September 6, 1978, (copy attached), a source which has been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. Under the facts you have given us, we would presume that the shutdown was permanent, since it has lasted for five years, and the State has removed the incinerator from its emissions inventory. Consequently unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source (or modification if it occurs at an existing major source) for PSD purposes. Babylon #2 will be required to meet the BACT standards, but will not necessarily have to meet a limit at least as stringent as 40 CFR 60.52, unless this facility is itself subject to the requirements of NSPS. BACT sets NSPS as the minimum level of control when such source is subject to the NSPS. This means that the individual source would have to be subject to NSPS not just that NSPS applies to the source category.

This response was completed with the concurrence of the Office of General Counsel, should you have any additional questions or comments, please contact Janet Littlejohn EN-341.

[SIGNED BY WILLIAM J. JOHNSON]
Edward E. Reich

cc: Peter Wyckoff
Jim Weigold

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

DATE: AUG 7 1980

SUBJECT: Memo Dated July 28, 1980 from William Sawyer to Edward Reich

Concerning Applicability of PSD Regulations to the Babylon #2 Incinerator

FROM: Charles S. Warren
Regional Administrator

TO: Richard D. Wilson (EN-339)
Deputy Assistant Administrator for General Enforcement
Division

Michael James (A-133)
Associate General C.
Air, Noise & Radiation

Region II is conducting negotiations with the town of Islip and the New York State Department of Environmental Conservation on the issue of re-opening several incinerators to burn solid waste presently being disposed of in a local landfill. Pursuant to these negotiations, William Sawyer of the Enforcement Division in Region II has communicated by telephone with Rich Biondi and Janet Littlejohn, both of the Division of Stationary Source Enforcement, as well as to Edward Reich by the above-referenced memorandum. The issue he has raised is whether one of the incinerators (Babylon #2) will be required to meet PSD regulations upon reopening. We are operating under serious time constraints since the landfill is a severe health and environmental hazard. I hope that we will be able to receive a determination from headquarters on this issue by no later than Monday, August 11.

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

SEP 6 1978

OFFICE OF ENFORCEMENT

SUBJECT: PSD Requirements

FROM: Director
Division of Stationary Source Enforcement

TO: Stephen A. Dvorkin, Chief
General Enforcement Branch
Region II

In response to your memo dated June 29, 1978, we have consulted with the Offices of General Counsel and Air Quality Planning and Standards and provide the following responses to your questions regarding the applicability of several PSD requirements.

Q - 1(a). Is a source which shut down approximately four years ago because of an industrial accident, and which was not and is not required to obtain a permit under a SIP, subject to the requirements of PSD? This source was not subject to PSD requirements prior to March 1, 1978.

A - This is a question which we have not previously addressed, but we believe that EPA policy should be as follows. A source which had been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent,

and of overcoming any presumption that it was. Under the facts you have given us, we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.

We assume that your statement that the source was not subject to the PSD regulations in effect before March 1, 1978, means that it was not in one of the nineteen source categories listed in Section 52.21(d) (1) of those regulations. A proposed new source which was not in one of those categories would be subject to the PSD regulations promulgated on June 19, 1978, unless (1) all required SIP permits had been obtained by March 1, 1978, and (2) construction commences before March 19, 1979, is not discontinued for 18 months or more and is completed within a reasonable time. See Section 52.21(i) (3), 43 FR 26406. Here, all required SIP permits were obtained by March 1, since none was required. Consequently, the source would not be subject to the new regulations, assuming that the reopening is commenced before March 19, 1979, is not discontinued for more than 18 months and is completed within a reasonable time.

If we were to treat the source as an existing source for PSD purposes, we would also conclude that it is not subject to the new regulations.[SEE FOOTNOTE 1] No source on which construction commenced before June 1, 1975, would be subject to those regulations. [SEE FOOTNOTE 1] See Clean Air Act Sections 168(b), 169(4); 40 CFR 52.21(d) (1) (1977). Here, since the source was in operation about 4 years ago, construction on it presumably commenced before then, well before June 1, 1975. Hence, it would (presumably) not be subject to the new regulations.

Q - 1(b). Would your answer to 1.a., above, change if the source is or was required to obtain a SIP permit?

A - If the source shut down temporarily, it would not be required to obtain a PSD permit in order to start up.

[FOOTNOTE 1] Application of this rule requires special guidance for multifacility sources which construct in phases. Generally, if one phase of a multifacility source commenced construction by June 1, 1975, all other mutually dependent phases specifically approved for construction at the same time will also be "grandfathered". On the other hand, each independent facility must have commenced construction individually by June 1, 1975, to have achieved grandfather status. See 43 FR 26396, 19 June 1978.

On the other hand, if the source shut down permanently, it would, upon reopening, be required to obtain a PSD permit unless the following two conditions were met: 1) the SIP permit was obtained prior to 3/1/78 and 2) any construction necessary for reopening is commenced prior to 3/19/79, is not discontinued for 18 months or more and is completed within a reasonable time.

Q - 2. Is the EPA required in all cases to forebear from issuing a PSD permit until a SIP permit has been issued or is such forbearance required only when the source is subject to the "Interpretative Ruling" (41 FR 55524, December 21, 1976)?

A - EPA should refrain from issuing a PSD permit prior to issuance of a SIP permit only in cases where the source is also subject to the Interpretative Ruling. (See 43 FR 26402, column 3.)

Q - 3. In the evaluation of BACT, does equipment reliability play a part, i.e., should a unit capable of 80% control with a 20% downtime, be preferred to a unit capable of 90% control with a 35% downtime? Can backup equipment be required for BACT purposes?

A - Questions concerning BACT should be addressed to the Control Programs Development Division in Durham, N.C.

Q - 4. For the purpose of determining what constitutes "air pollution control equipment," what is meant by the phrase ". . . normal product of the source or its normal operation"? (43 FR 26392, mid. col., June 19, 1978). Does that refer to the quantity or quality of the product or both, i.e., if a baghouse collects 100% of the product, a settling chamber collects 20%, and without some device no product is collected, what is deemed to be "air pollution control equipment"?

A - If a source (such as one which produces zinc-oxide) cannot capture any of its product without the use of some type of control device, the least efficient control device used in the industry will be considered vital to the process. For example, if sources in such an industry typically employ either settling chambers or baghouses, potential emissions will be calculated as the emissions from such a source with a settling chamber installed.

Q - 5. Do the provisions of Section 167 of the Clean Air Act, which refer to issuance of an Order and seeking injunctive relief for PSD violations, create enforcement authorities independent of those created in Section 113 for SIP violations, or do they simply incorporate Section 113 by reference?

A - We believe that Section 167 provides the Agency

with enforcement authority which is not necessarily otherwise provided by Section 113. The Office of Enforcement is drafting guidance on implementation of Section 167. This guidance should be completed shortly. In the interim, the Agency should enforce against violations of the PSD requirements under the mechanisms established by Section 113, generally. There is one important situation, however, in which resort to Section 167 may be necessary. This would occur when a state had issued a permit that EPA considered to be invalid. In this situation, we believe that Section 167 provides the Agency with the authority to halt the construction of the source directly, without first having to resort to the cumbersome process of seeking a judicial declaration that the state permit is invalid. (See 42 FR 57473 (1977)). In this respect, Section 167 provides the agency with authority similar to that provided by section 113(a) (5) and (b)(5) to prevent sources with invalid permits from constructing in nonattainment areas. Please note, however, that no delegations for enforcement of the PSD requirements have been signed yet, and so any action under Section 167 would have to be taken in close coordination with DSSE, and any Section 167 orders would have to be signed by the Administrator.

If you have any further questions on these issues, please contact Libby Scopino at FTS 755-2564.

Edward E. Reich

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460
OFFICE OF THE GENERAL COUNSEL

DATE: February 14, 1973

FROM: Michael A. James, Attorney
Air Quality and Radiation Division

MEMORANDUM OF LAW

FACTS

Your memorandum of February 2, 1973, briefly discusses the issue of the reopening of existing plants which have been closed for a period of time. Some have closed because of lack of demand for their products, others operate on a seasonal basis. You have inquired regarding the applicability of new source performance standards to these sources.

QUESTION

May a source which was in existence prior to the proposed date of a new source performance standard (applicable to that class of sources) be subjected to the standard when it resumes operations following the proposal?

ANSWER

No, the source would not be a "new source" within the meaning of section 111 (a) (2) of the Clean Air Act.

DISCUSSION

The sources which your memorandum describes are "existing sources", not "new sources" which may be regulated under Section 111. The section defines "new source" as follows:

> [A]ny stationary source, the construction or modification of which is commenced after the publication of regulations

(or, if earlier, proposal regulations) presuming a standard of performance under this section which will be applicable to such source.

Under the facts given it [ILLEGIBLE] struction" activity is [ILLEGIBLE] to plant to its former operating condition and we do not think this could legitimately be characterized as "fabrication, erection, or installation of an affected facility". (See Footnote *) In addition, no modification within the meaning of the section is involved, since it appears that neither the source's physical structure nor its method of operation is changed from its condition under previous operations.

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[FOOTNOTE *]: Which is the definition of "construction" under EPA regulation 40 CFR 60.2 (g).