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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

7 JUL 1986

MEMORANDUM

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SUBJECT: Prevention of Significant Deterioration (PSD)  
Definition of "Modification"

FROM: Gerald A. Emison, Director  
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air Management Division  
Regions I, III, V, and IX  
Director, Air and Waste Management Division  
Region II  
Director, Air, Pesticides, and Toxic Management Division  
Regions IV and VI  
Director, Air and Toxics Division  
Regions VII, VIII, and X

The Office of Air Quality Planning and Standards (OAQPS) has recently received an inquiry regarding the applicability of PSD review to two facilities which would replace wet scrubbers with baghouses. The baghouses would improve control of particulate matter but allow a significant net increase of sulfur dioxide (SO<sub>2</sub>) emissions. The question is whether the proposed change would be subject to PSD review under the Federal PSD regulations as a major modification. For the reasons discussed below, I have concluded that this change would constitute a major modification. The Office of General Counsel (OGC) has concurred in the conclusions of this memorandum.

The PSD review applies to new major stationary sources and to major modifications.[SEE FOOTNOTE 1] Subject to certain qualifications and exemptions, a "major modification" is a "physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act" [40 CFR 51.24(b) (2) and 52.21(b) (2)]. There is general agreement

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[FOOTNOTE 1] Note that, although the subject cases involve PSD review, the same issue exists with respect to major source nonattainment new source review (NSR) permitting pursuant to Part D of the Clean Air Act (Act). Because these cases involve PSD, and because nonattainment NSR has basic program requirements that make this issue less likely to arise in that area, this memorandum focuses on PSD. The conclusions of this memorandum apply equally to nonattainment NSR, however.

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that the proposed change constitutes a major modification within the express terms of the PSD regulations.[SEE FOOTNOTE 2] For purposes of brevity, I am omitting the specific details of that analysis.

The true area of controversy, and the focus of this memorandum, is the relevance of an exemption from review under the new source performance standards (NSPS). Specifically, the NSPS regulations provide that the

following shall not be considered a modification:

The addition or use of any system or device whose primary function is the reduction of air pollutants, except where an emission control system is removed or replaced by a system which the Administrator determines to be less environmentally beneficial [40 CFR 60.14(e) (5)].

The statutory definition of modification for both PSD and NSPS purposes is presented in section 111 of the Act. It has been stated that, for this reason, the subject exemption automatically applies to PSD even if it is not expressly part of the PSD regulations (memorandum from Edward E. Reich, Director, Stationary Source Compliance Division, OAQPS, and William F. Pedersen, Acting Associate General Counsel, OGC, to Allyn M. Davis and Paul Seals of EPA Region VI, dated April 21, 1983).

The better approach, which I am setting forth today, is that the subject exemption does not automatically affix itself to the PSD regulations. Rather, any such exemptions may be made applicable to PSD only by express rulemaking.

There are several reasons for concluding that EPA did not intend to make the exemption in question here part of the PSD system, beyond the obvious lack of language including it in the regulations. First, the program is oriented toward ambient air quality as well as technology based controls, in contrast to the NSPS program which addresses only the latter. The PSD review is a tool for air quality management and comprehensive consideration of increases of any pollutant regulated under the Act. The NSPS exemption is inconsistent with this approach. In addition, it seems very unlikely that EPA would have imported the "environmentally beneficial" test into the PSD applicability calculus, inasmuch as that calculus is strongly quantitative and objective in its orientation, yet the NSPS test is highly qualitative and judgmental. In any event, the overall PSD calculus is simply different from the NSPS approach, and hence one would have expected EPA to give express indication of an intention to bring the NSPS exemption into the PSD calculus if indeed it had had that intention.

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[FOOTNOTE 2] The owner of the facilities has argued that this activity constitutes routine maintenance, repair, or replacement, thus allowing it to rely on an exemption from review [40 CFR 51.24(b) (2) (iii) (a) and 52.21(b) (2) (iii)(a)]. I conclude, however, that this situation does not fall within that exemption.

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The fact that both programs use the definition of modification contained in section 111 of the Act is not, in itself, sufficient to prove that Congress intended that NSPS exemptions then in effect would automatically be incorporated into PSD. Congress has, of course, occasionally ratified existing regulatory programs or approaches (e.g. 40 CFR 51, Appendix S and uncodified section 129 of Public Law 95-95), but such is generally done with an express indication of that intent. I have found no such indication in this case. Apparently the only legislative history on this subject is the remark that Congress intended to conform the meaning of "modification" for PSD purposes to "usage in other parts of the Act" [123 Cong. Rec. H11957 (November 1, 1977)]. Given the distinct differences between the NSR regulatory processes promulgated in response to the 1977 amendments and the preexisting NSPS regulations defining "modification," it seems clear that Congress desired to conform the usage of that term in only a broad sense.

Finally, I believe that the Federal Register preamble segment cited in the April 21, 1983, memorandum (43 FR 26380, 26396, June 19, 1978) should not be read broadly in support of automatic incorporation of NSPS provisions. That preamble, involving review of fuel switches, addressed a regulatory reaffirmation of an exemption which had already been promulgated into the original 1974 PSD regulations.

For these reasons, the subject exemption does not apply to PSD and the earlier memorandum cited on this topic is withdrawn.

cc: R. Bauman  
A. Eckert  
T. Helms  
E. Reich  
D. Tyler  
P. Wyckoff