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January 8, 1990

Mr. Ken Waid, President
Waid and Associates
8000 Centre Park Drive, Suite 270
Austin, Texas 78754

Dear Mr. Waid:

This is in response to your November 22, 1989 letter to Gerald Emison in which you asked for clarification on two questions concerning "secondary emissions" as defined in the Code of Federal Regulations (CFR) at 40 CFR 52.21(b)(18). First, you asked whether the definition found in the 1988 edition of the CFR was the correct definition. Second, you asked whether any emissions from a vessel are considered secondary emissions.

You are correct in your conclusion that the secondary emissions definition in the 1988 CFR at 40 CFR 52.21(b)(18) is incomplete. The second sentence of the definition in the 1981 CFR apparently was inadvertently omitted when the CFR was revised by the Federal Register of June 25, 1982 (47 FR 27554), which promulgated an amendment to the definition.

Concerning whether any vessel emissions are secondary emissions, the June 25, 1982 revisions to the prevention of significant deterioration (PSD) regulations exempted all vessel emissions from consideration in PSD review of new or modified marine terminals on the basis that vessels are mobile sources and mobile source emissions are excluded by the Clean Air Act from attribution to a stationary source. However, on January 17, 1984 the Court of Appeals for the D.C. Circuit vacated and remanded to the Environmental Protection Agency (EPA) portions of the June 25, 1982 promulgation, including the way in which the Agency treated vessel emissions (Natural Resources Defense Council v. U.S. EPA, 725 F.2d 761). The Court stated that EPA was correct to interpret the term "mobile sources" to include vessels, but that the Agency acted "far too precipitously" in concluding that it therefore had no authority to attribute any vessel emissions to marine terminals. The EPA, the Court went on to say, should have examined the nature of the interactions between a vessel and a terminal to determine specifically which categories of emissions, if any, should be attributed to the terminal.

The Court affirmed the portion of the 1982 promulgation that excluded "to and fro" vessel emissions from attribution to the terminal as secondary emissions, but vacated EPA's 1982 blanket repeal of the dockside vessel emissions component from PSD emissions counting as either primary or secondary emissions. In so doing, the Court acknowledged that, with the exception of to and fro emissions, it implicitly reinstated the PSD regulations promulgated on August 7, 1980 (45 FR 52676). In essence, the Court removed from the CFR the total exclusion of vessel emissions counting which now appears in 40 CFR 52.21(b)(6) as the phrase "...except the activities of any vessel," and in

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40 CFR 52.21(b)(18) as the phrase "...or from a vessel." Consequently, the August 7, 1980 PSD regulations (with the exception of to and fro emissions counting) shall apply to determinations on how to treat vessel emissions.

The preamble to the 1980 regulations explains that emissions from certain activities of a ship docked at a terminal (i.e., when the vessel is

stationary) may be considered emissions of the terminal if the activities would "directly serve the purposes of the terminal and be under the control of its owner or operator to a substantial extent" (45 FR 52696). Vessel emissions which are not to be taken into account in determining whether a marine terminal is subject to PSD review (i.e., they are not primary emissions) are those which result from activities which do not directly serve the purposes of the terminal and are not under the control of the terminal owner or operator. The Court ordered EPA to perform the analyses necessary to distinguish which dockside emissions, if any, should be assigned to the terminal and which should be assigned to the vessel. However, EPA has not yet completed the analyses necessary to define which dockside vessel emissions, and under what conditions, should be assigned to the terminal and whether these would be considered primary or secondary emissions. States with Federally-approved PSD implementation plans are free to develop regulations more stringent than the Federal regulations, and some may have done so already with regard to the treatment of vessel emissions. Thus, I recommend that you check with individual States to learn whether any dockside vessel emissions are considered secondary (or primary) emissions in that particular State.

Finally, as you have noted in your letter, a correction of the Federal PSD regulations is in order. I prefer that any changes to the CFR with respect to vessel emissions not only correct the error of omission cited in your letter, but also carry out the Court's instruction to resolve the issue of dockside emissions attribution for PSD purposes. We hope that our resources will allow us to initiate work on such rulemaking in the near future.

I hope that this has answered your questions. Should you wish to discuss further EPA's policies concerning secondary or vessel emissions, please call Gary McCutchen of my staff at (919) 541-5592.

Sincerely,

John Calcagni
Director
Air Quality Management Division

cc: G. Emison
R. Bartley, Region VI