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

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Construction Activities at Georgia Pacific

FROM: John B. Rasnic, Director
Stationary Source Compliance
Office of Air Quality Planning and Standards

TO: Bernard E. Turlinski, Chief
Air Enforcement Branch
Region III

This is in response to your memorandum dated April 27, 1993, requesting a written opinion about the applicability of the Prevention of Significant Deterioration (PSD) regulations to certain Georgia-Pacific activities at a site in West Virginia. We also have a copy of the inquiry dated March 29, 1993 to you from Georgia-Pacific. As discussed below, this office concludes that the activities as described by Georgia-Pacific in its letter are construction activities prohibited prior to the issuance of a PSD permit.

Section 165(a) of the Clean Air Act states that "[n]o major emitting facility ... may be constructed ... unless - (1) a permit has been issued... [and various other requirements satisfied]." Section 52.21(i)(1) specifies that a source may not begin actual construction until the source obtains a PSD permit. The regulations and several memoranda specifically state that "begin actual construction means initiation of physical on-site construction activities ... which are of a permanent nature." A memorandum dated December 18, 1978 from Edward Reich, Director of the Stationary Source Compliance Division, "Interpretation of 'Constructed' as it applies to Activities Undertaken Prior to Issuance of a PSD Permit," specifically states that all on-site activities of a permanent nature aimed at completing a PSD source

for which a permit has yet to be obtained are prohibited under all circumstances. A memorandum dated March 28, 1986 from Edward Reich, to Robert DeSpain of Region VIII, "Construction Activities Prior to Issuance of a PSD Permit with Respect to "Begin Actual Construction," clarifies such prohibited activities to include any emissions unit or installation necessary to accommodate the PSD source. If the construction activity is an integral part of the

PSD source or modification, the source must obtain a PSD permit. In other words, if the construction prior to such construction would not serve in accordance with its original intent except for inclusion of the emissions unit, such construction is prohibited prior to obtaining a PSD permit.

In a memorandum dated October 10, 1978 from Edward Reich to Thomas Devine of Region I, "Source Construction Prior to Issuance of a PSD Permit," EPA referred to equity arguments in addition to the statutory and regulatory basis for prohibiting construction on a source prior to issuance of a PSD permit. Any activities undertaken prior to the issuance of a PSD permit, although solely at the owner's or operator's risk, should minimize or avoid any equity arguments at a later time that the permit should be issued. The memorandum stated that the permitting authority would be placed in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, activities of a permanent nature that also contribute to such equity arguments (such as they are an integral part of the PSD source, activities that are very costly or would result in significant irrevocable loss to the owner,) are prohibited construction activities prior to the issuance of a PSD permit.

In the letter to Region III, Georgia-Pacific stated that it blasted rock and removed rock and soil to create a pit 40 feet wide by 230 feet long by 35 feet deep in connection with the construction of an oriented strand board (OSB) plant. Georgia-Pacific requested to be allowed to complete what it describes as "preparatory" activities by constructing a retaining wall and backfill some of the press pit.

Your office agrees that construction of a retaining wall

involves more than preparatory activities under 40 C.F.R. SS52.21(b)(11). Although the memorandum from Edward Reich dated December 18, 1978 distinguished activities of a preparatory nature from those of a permanent nature, our policy also focusses on the relation of the activity to the PSD source. Construction of a retaining wall is considered an activity under "begin actual construction" because it is of a permanent nature. The excavation is also permanent and is an integral part of the PSD source.

The PSD regulations prohibit any construction activities that are of a permanent nature related to the specific project for which a PSD permit is needed, as opposed to general construction activities not related to the emissions unit(s) in question, prior to the receipt of a construction permit. This standard prohibits activities affecting the property in a permanent way that the of constructing the regulated project. Site clearing and grading are in general relatively inexpensive and could be used for a

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variety of possible construction-related activities. Moreover, even if site clearing and grading were not followed by any construction, it normally would not represent a significant economic loss to the owner or change in use of the property. Accordingly, such activities generally are not considered permanent activities related to the specific project. The excavation activities in this case, on the other hand, are costly, they significantly alter the site, are an integral part of the overall construction project, and are clearly of a permanent nature. Consequently, these activities are within the meaning of "begin actual construction."

Therefore, we agree with your opinion that construction of the retaining wall is a prohibited activity. In addition, we believe that the excavation is a prohibited activity, as well.

If you have any questions regarding this matter, please contact Clara Poffenberger at 703 308-8709.

Attachments

cc: Julie Domike, OE
Greg Foote, OGC

David Solomon, AQMD
Laxmi Kesari, SSCD
Charles McPhedran, ORC, Region III

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