UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
APR 1976

OFFICE OF
AIR AND WASTE MANAGEMENT

MEMORANDUM

SUBJECT: PSD Regulations - Interpretation of "Commencement of Construction"

FROM: Roger Strelowl Assistant Administrator for Air and Waste Management (AW-443)

TO: Regional Administrators

Because several questions have been raised about my memo of December 18, 1975 on the above-referenced subject, I would like to stress one basic point and clarify another.

A. The "Contract" Exemption. For a contractual obligation to qualify a source for an exemption, 40 CFR 52.21(b)(7) requires that the obligation be for a "continuous program of construction or modification." Page 1 of my December 18 memo states that ordinarily, "only significant and continuous site preparation work, such as major - clearing or excavation or placement, assembly, or installation of unique facilities or equipment at the site should be considered a 'program of construction or modification'-" (Emphasis added).

Thus, as a general rule, for one to qualify for the contractual exemption, he must have contracted for continuous on-site construction work. The discussion in the first full paragraph on page 3 of my December 18 memo is not intended. to provide exceptions to this general rule. That discussion relates to situations in which even though a "contract"' for on-site work were executed prior to June 1975, the "contract" might still not qualify the source for an exemption.

Accordingly, the mere fact that a source had contracted for the fabrication of a piece of equipment prior to June 1975 (i.e., placing an order for a boiler) would not ordinarily exempt the source. Only if a non-site-work contract could fit within the "irrevocably committed"

exception (discussed in the first full paragraph on page 2 of my December 18 memo) would it qualify the source for an exemption from review. As my memo indicates, such situations should be "rare."

B. Permits Under 40 CFR 51.18. I did not intend to state that as an iron-clad rule, a source which had not received a 51.18 permit would be subject to PSD review. Since this is a reasonable inference from the discussion at the top of page 2 of my December 18 memo, I should clarify the matter.

What I did intend to say was that the absence of a 51.18 permit should be considered as a relevant factor in determining whether a source could meet the "irrevocably committed" exception (discussed in the first full paragraph on page 2 of my December 18 memo). A source's arguments regarding an "irrevocable commitment" would have to be looked at extremely skeptically if it had not yet even obtained a 51.18 permit.

I should note in concluding this point that the presence of a 51.18 permit, by itself, neither constitutes the commencement of construction nor an "irrevocable commitment" to do so.

cc: Regional Air Division Directors
Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: PSD Regulations - Interpretation of Commencement of Construction

DATE: DEC 18 1975

FROM: Roger Strelow, Assistant Administrator for Air and Waste Management (AW-433)

TO: Regional Administrators

This memorandum provides guidance on how the phrase “commence" as that term is used in EPA's regulations to prevent significant deterioration of air quality (40 CFR §52.21) is to be interpreted.

Section 52.21(d)(2) of the regulations requires that any of the 19 specified types of sources which commence construction or modification subsequent to June 1, 1975, are required to obtain a permit. 40 CFR §52.21(b)(7) defines commenced as follows:

> "Commenced" means that an owner or operator has undertaken a continuous program Of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

The purpose of the regulations to prevent significant deterioration is to ensure that a source is not located at a site which would result in emissions from that source violating the applicable increment. Thus the term "commencement of construction" as that term is used in the regulations to prevent significant deterioration, refers to on-site construction. Ordinarily therefore only significant and continuous site preparation work such as major clearing or excavation or placement, assembly, or installation of unique facilities or equipment at the site should be considered a "program of construction or modification" for purposes of §52.21(b)(7). However each case must be reviewed on its own facts, as noted below.

There are two additional factors that should be considered. Under 40 Part 51, Regulations for Preparation, Adoption, and Submittal of State Implementation Plans (SIP's), all SIP's are required to include a procedure for review (prior to construction and modification) of the location of

new sources (§51.18). Failure to obtain approval before commencing on-site construction of a source requiring such approval would, of course, violate the applicable plan. Therefore, any source of the type covered by the significant deterioration regulations that has not yet received approval to construct pursuant to the applicable plan should be subject to review. In any situation where such approval is not required for a source prior to commencement of on-site construction, the lack of such approval will not be determinative that the source has not commenced on-site construction.

There may also be situations where, although actual on-site work has not commenced or been contracted for, the source is so irrevocably committed to a particular site that it should be considered as having commenced construction. Such situations could include sources which are only a few days or weeks from commencing on-site construction or sources which have contracted for or constructed unique site specific facilities or equipment which are not yet being installed on-site. Such situations will be rare but may be taken into account in determining whether the source is in effectively the same position as if it had commenced on-site construction.

Because some sources may, in good faith, have construed §52.21(b)(7) differently before this guidance and have since entered into binding commitments on the assumption that they were exempt from review, it is necessary to provide for such cases. Therefore, where a source has, in good faith, begun on-site construction or entered into a contractual obligation to begin on-site construction after June 1, l975, on the good faith assumption that the source was exempt from the significant deterioration regulation, the source will not be subject to review. Reliance upon formal written statements by EPA personnel that the source in question would not be subject to new source review under these regulations would ordinarily be considered reasonable reliance in good faith on the assumption that the regulations do not apply to such sources. Conversely any source that is aware of this guidance at the time on-site construction commenced or a contractual obligation was undertaken could not be considered to have done so in good faith reliance that it did not need to be reviewed. Therefore you should revie w all major sources

intending to construct-in your Region and notify those sources which are subject to review in accordance with this guidance.

Finally, 40 CFR §52.21(b)(7) states that an owner or operator has commenced construction not only when he has undertaken a continuous program of construction or modification himself but also when he has entered into a "contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification". The question of whether a contract represents a "contractual obligation" will depend upon the unavoidable loss that would be suffered by a source if it is required to cancel such contract. It is clearly beyond the intent of these regulations, for example, to permit a source which has only a contract revocable at will to escape review under these regulations. Correspondingly, where the contract may be cancelled or modified at an insubstantial loss to the plant operator, the proposed source should not be allowed to escape review under these regulations. The determination of whether a source will suffer a substantial loss if the contract were terminated and therefore whether there is, in fact a "contractual obligation", must be made on a case-by-case basis as there are no general guidelines that would cover all situations. Factors that would be considered would include the question of whether or not the contract could be executed at another site or modified for the site in question and the amount of any additional costs of constructing at another site or of cancelling the contract.

Additional questions may arise concerning the applicability of the PSD regulations to phased construction projects. If a new stationary source will contain a number of facilities to be built in a program of phased construction, the entire project should not automatically be exempt from review just because one of the facilities is grandfathered. Only those additional facilities which are necessary for the operation of the grandfathered facility should be exempt from review.

For example, if a power company has commenced construction only on the first unit of a planned three-unit power plant prior to June 1, 1975, the other two units would normally not be exempt from significant deterioration review, since the first unit can operate completely independently of

the other two units. On the other hand, commencement of construction of the basis oxygen furnaces at a new grass-roots steel mill would exempt other facilities, such as a blast furnace, continuous casting operation, rolling mill, and sintering plant, which are necessary to operate the basic oxygen furnaces.

As this guidance indicates, there is no clear line dividing those sources which are grandfathered and those which are not. Judgments must be made on a case-by-case basis. For this reason it is not possible to predict without knowing the facts of each case which sources are subject to PSD review.

The policy contained in this guidance package has been discussed at length with Regions VIII and X and was also discussed and agreed to at the December 12 meeting in Dallas with the Regional Division Directors for Air and Hazardous Materials.