UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

MAR 24, 1995

Mr. Henry V. Nickel
Counsel for Consolidation Coal Company
Hunton & Williams
2000 Pennsylvania Avenue, N.W.
Suite 9000
Washington, D.C. 20006

Dear Mr. Nickel:

This letter is to respond to your appeal dated June 29, 1994 on behalf of Consolidation Coal Company (Consol). Mr. Kostmayer has requested that I respond on his behalf. The appeal requests that this office reverse a decision made by the West Virginia Division of Environmental Protection (WVDEP) to require that Consol obtain Prevention of Significant Deterioration (PSD) permits for its Blacksville Number 2 and Dent's Run Coal Preparation Plants. These facilities currently operate under non-PSD permits that they received in the early 1980's.

Background

On July 8, 1993 WVDEP wrote to the chief of the New Source Review Section of the Region III office of the U.S. Environmental Protection Agency (EPA), requesting guidance in order to determine whether a coal cleaning facility in a mining complex would be governed by the 100 tons per year (TPY) or the 250 TPY threshold for PSD applicability. In response, EPA Region III issued a letter dated October 26, 1993, stating, among other things, that a September 23, 1993 EPA Region III file review of WVDEP revealed that Consol's Blacksville Number 2 facility was previously improperly determined to be exempt from PSD because its emissions would not exceed 250 TPY. According to the October 26, 1993 letter, the proper threshold was 100 TPY, so WVDEP was requested to require Consol to undergo PSD review and permitting requirements for Blacksville Number 2. As a result, WVDEP issued a letter dated May 2, 1994 to Consol requiring Consol to submit complete PSD permit applications for two coal mining facilities, Blacksville Number 2 and Dent's Run.

EPA's analysis of PSD applicability in its October 26, 1993 letter did not mention the Dent's Run facility because only the Blacksville Number 2 file was reviewed. EPA does not currently have enough information to analyze the status of PSD applicability of the Dent's Run facility. As a result, although WVDEP's letter and your appeal refer to both facilities, this response only addresses the Blacksville Number 2 facility.

Summary of Conclusions

This office will not reverse the decision to require Consol to undergo PSD review and permitting requirements for Blacksville Number 2 thermal dryer. First, as is discussed in more detail below, Consol violated its minor source permit by failing to meet the federally enforceable limitations to keep the source's sulfur dioxide (S02) emissions under 250 TPY. As a result of this violation, the Blacksville Number 2 thermal dryer permit limitations are deemed void and invalid, and the facility's annual potential to emit S02 is greater than 250 TPY. Regardless of the PSD trigger amount (100 TPY or 250 TPY) Blacksville Number 2 thermal dryer is now, and always was, a major source that must meet the requirements of PSD.

Second, because EPA's agency-wide policy is that a listed source cannot hide within an unlisted source in order to escape PSD review, the appropriate PSD trigger amount for Blacksville Number 2 (a coal cleaning plant with a thermal dryer within a coal mine) is 100 TPY.

Consol's Violation of the Blacksville Number 2 Permit

The Blacksville No. 2 mining complex received a permit (R13-718) on November 18, 1983 for the construction of a 115 mm BTU/hr coal-fired thermal dryer and a coal handling facility of two (2) covered conveyors and a fines cleaning circuit. At the time of the permit application, the West Virginia Air Pollution Control Commission (WVAPCC) determined that the PSD permit threshold was 250 tpy for SO2. The thermal dryer has the potential to emit approximately 390 lb/hr (807 TPY) of SO2. To control SO2 emissions a venturi scrubber was to be installed. Consol expected the SO2 emissions from the dryer to be 249.9 TPY.

To avoid PSD requirements, Consol proposed several conditions to insure that this dryer would not exceed the 250 tpy threshold for S02. Those conditions, which were added as requirements to the construction permit, are:

1. S02 emissions will be limited to 249.9 TPY (120.7 lb/hr).

2. A continuous time meter will be operated and maintained to record the number of hours the dryer operates. The log from the meter will be available for review by the agency.

3. The dryer will not operate more than 4140 hr/yr.

4. The amount of coal burned in the dryer will be recorded daily.

5. The dryer's feed will be sampled daily and analyzed for sulfur content. The results of the analysis will be maintained at the plant office.

6. A stack test will be performed to show whether or not this dryer will comply with the 120.7 lb/hr (249.9 tpy) S02 limitations.

7. Consol would install pH instruments for measuring the venturi scrubbers inlet and effluent water Ph and install monitors in the operating room so that the dryer operator can maintain the necessary influent pH to attain the required minimum S02 removal efficiency (69.1%).

On January 27, 1993, WVDEP conducted an unannounced audit of the Consol records required to be kept under permit R13-718. The results of this audit were as follows:

1. The dryer time meter log was not kept and therefore could not be made available for review.

2. The thermal dryer furnace feed was not sampled daily and analyzed for sulfur content.

3. A stack test was conducted within the first full year of operation. The test results were inconclusive in that the results show that the emission rate can be achieved at a certain sodium hydroxide (NaOH) addition rate, but the NaOH addition rate for normal operation is not given. The test did not reflect actual operating conditions and therefore compliance could not be determined.

4. None of the control room monitors for pH measurement were being used during the January, 1993 inspection of the control room.

5. The thermal dryer was being run without a sulfur dioxide removal system. A Consol employee, when asked about the sulfur dioxide removal system not being in operation, stated that the system had not been used, except during stack tests, for at least three years.

As a result of the above audit, on February 1, 1993, WVDEP sent a letter to Consol requesting information concerning the venturi plugging problem on the thermal dryer scrubbing system and the date that the caustic addition system was permanently shut down.

On February 18, 1993 Consol responded by letter to the WVDEP letter of February 1, 1993 by saying that the company was uncertain as to the exact dates on which the venturi plugging problem started or the caustic addition system was permanently shut down.

In 1983, when Consol applied for a permit for the installation and operation of a thermal coal dryer, the PSD threshold limits were interpreted to be 250 tpy. But, as seen in the above chronology of events after the issuance of the permit, Consol's Blacksville No. 2 coal preparation facility never operated within the permit conditions except during stack testing. As a result, the existing permit for the thermal dryer does not accurately reflect current operating practices at the facility. The conditions stated in the permit which were to limit the facility's potential to emit S02 to less than 250 TPY, may not be considered in order to determine the facility's potential to emit because of Consol's regular violations of one or more of those conditions. See, U.S. v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988). As a result, Consol is in violation of the PSD requirements, and has been in violation of these requirements since the time that it first violated the permit, and Consol must now submit a new PSD permit application for the thermal dryer reflecting the current practice of spraying caustic directly onto the dryer feed coal.

The PSD Threshold for Blacksville Number 2

Consol argues that the primary activity of the Blacksville Number 2 facility is the mining of coal, which is not one of the 100 TPY listed sources, and, thus, the PSD threshold should be 250 TPY and not 100 TPY.

It is true that EPA's PSD guidance in the early 1980's used the primary activity test in order to determine the PSD threshold. As a result, Blacksville Number 2 was then considered to be a 250 TPY source. However, neither the Clean Air Act nor the PSD regulations set forth the primary activity test, and EPA subsequently issued new guidance to clarify the method by which PSD trigger amounts are to be determined. This method is stated in various EPA documents, including the October 1990 Draft New Source Review Workshop Manual, at page A.23; a January 10, 1992 memorandum from Edward Lillis, Chief of the Permits Program Branch, to the Chief of the Region III Air Enforcement Branch; and a July 6, 1992 letter from Region III to counsel for Reserve Coal Properties Company. The documents explain that a listed source cannot hide within a non-listed source in order to escape PSD review. In other words, a source subject to the 100 TPY applicability test that emits greater that 100 TPY is subject to the PSD requirements even if that source is located within a facility for which the primary activity is subject to a 250 TPY applicability

threshold and emits less than 250 TPY. In this situation, only the source that exceeds its applicability threshold is subject to PSD, not the entire facility. Further, only the fugitive emissions from the 100 tpy source are considered in applying PSD and not those from the other activities within the entire facility.

EPA Region III will continue to follow this national guidance. As a result, the PSD trigger amount for the Blacksville Number 2 coal preparation facility is 100 TPY of SO..

If you would like to discuss this matter further please contact Ms. Donna J. Weiss, Chief, Permit Programs Section at (215) 597-9162.

Sincerely

Marcia L. Spink Associate Director
Air Programs

CC: G. Dale Farley (WVDEP)

Jerry MacLaughlin
EPA OECA, Mail Code 2242

David Solomon (OAQPS)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia Pennsylvania
19107

JUL 06, 1992

Mr. George Clemon Freeman,, Jr.
Counsel for Reserve Coal Proportion Company
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond,, Virginia 23219-4074

Dear Mr. Freeman:

This letter is to respond to your appeal dated May 21, 1992 an behalf of Reserve Coal Properties Company (Reserve). EPA Region III has reviewed your appeal and understands the position Reserve has regarding the "primary activities test." After consultation with EPA Headquarters, the Region has determined that the position detailed in the January 27, 1992 letter from Mr. Bernard Turlinski, Chief, Air Enforcement Branch, to Pamela Faggert, Assistant Executive Director, Regional operations, Department of Air Pollution Control, still applies. If you wish to receive a formal applicability determination based an our decision regarding the proper applicability threshold for the proposed facility, please provide Mr. Turlinski with the specifics on the proposed Reserve project including a description and analysis of all emissions units.

Reserve proposes to construct a coal mine and coal cleaning facility (including thermal dryers) at a single site in Buchanan County, Virginia. Reserve considers coal mining to be the primary activity at the site and on this basis argues that the threshold for new source review (NSR) applicability should be 250 tons per year (TPY). In his January 27, 1992 letter, Mr. Turlinski found that the presence of a coal cleaning facility with thermal dryers placed the facility within the list of enumerated sources in Section 169(1) of the Clean Air Act and subject to a 100 TPY threshold. You are now asking Region III to reconsider and reverse this determination. I decline to do so.

It is EPA's view that the plain meaning of Section 169(1) requires the coverage of a coal cleaning facilities. As you are aware, that Section provides:

> The term "major emitting facility" mean any of the following stationary sources of air pollutants which . . . have the potential to emit . . . one hundred tons per year or more of any air pollutant from the following types of stationary sources: . . . coal cleaning plants (thermal dryers) . . . .

Thus, Congress specifically identified coal cleaning facilities as one of the types of stationary sources that would be subject to the 100 TPY threshold for the prevention of significant deterioration (PSD) applicability. As EPA has previously noted, congress compiled the list of 28 source categories in Section 169(1) based on information that such sources contributed significantly to ambient air concentrations of air pollutants[1]. It follows that where a listed activity can emit more that 100 TPY, its emissions should be given the careful scrutiny that the PSD program affords.

Moreover, we cannot agree that the existence of collocated facilities somehow alters the reading of this provision. Coal preparation plants, like sintering plants and fossil fuel boilers of more than 250 million British thermal units per hour heat input, two other sources listed in Section 169(1), are frequently located within larger integrated facilities. Yet Section 169(1) provides no indication that the listed categories are somehow limited to those sources that stand alone. Indeed, if EPA were to limit Section 169(1) to only those listed facilities that are not part of other operations, many boilers and other listed sources that emit or have the potential to emit in excess of 100 TPY of an air pollutant would escape review.

Finally, even if Section 169(1) is considered ambiguous on this issue, EPA's position that it will consider listed sources to be subject to PSD if the 100-ton threshold is met, regardless of the proximity of other types of operations, is a reasonable interpretation of the statutory language. It focuses the PSD program on the very sources that Congress singled out for scrutiny. It also eliminates an inequity that would exist if Reserve's views were adopted -- it treats a 100-ton listed source the same whether or not it is part of a facility that includes a source subject to the 250-ton limit.

Reserve for its part does not contend that EPA's position is precluded by the statute. Rather it asserts that EPA took a contrary position in a preamble to the 1980 PSD regulations and that EPA is somehow still bound by this preamble language since it has never repudiated this position through rulemaking. Neither position is tenable.

Reserve principally contends that EPA, in the preamble to the 1980 PSD regulations, committed itself to using a "primary activity" test to determine the proper applicability threshold for a source that includes more than one pollutant-emitting activity. However, this

---

[1]Letter from William Hathaway, Director, Air, Toxics and Pesticides Division , EPA Region VI, to Mr. Steve Spaw, dated July 28, 1989.

argument confuses determining the scope of the source with determining the applicable threshold once the source is so defined.

As part of a new method for determining what activities at a site would be aggregated, EPA adopted in the 1980 regulations a new regulatory definition of "building, structure, facility, and installation" to include wall of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person . . . . "45 Fed. Reg. at 52695; see e.g., 40 CFR § 52.21(b)(6). The regulations further provided that pollutant-emitting activities would be considered to be part of the same industrial grouping if they belong to the same two-digit SIC code. Thus,, EPA stated it would group together as one "source" all pollutant-emitting activities falling under the same two-digit SIC code. 40 CFR §52.21(b)(6). EPA introduced the "primary activity" test as a means of discerning the scope of a source with operations falling into separate SIC codes:

> Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code.

45 Fed. Reg. 52676, 52695 (August 7, 1980). However, EPA's endorsement of this test to group disparate activities into one "source" does not amount to an adoption of this test to determine what applicability threshold applies to that source once it is defined.[2]

A different issue is presented when an activity within a single source, that may not be the primary activity, is subject

[2]Mr. Reich's letter to Mr. Daniel of May 32, 1983, which you rely on, makes this error. The letter states that the primary activity of the source is the "key" to determining the applicability threshold. However, it provides no explanation of this conclusion nor cites authority to justify it. In light of EPA's subsequent and more authoritative interpretations of this issue, we decline to follow that letter.

to the lower, 100 TPY applicability threshold and thus would constitute a major stationary source standing alone. EPA addressed this issue in the 1989 rulemaking on fugitive emissions (54 Fed. Reg. 48870 (November 28, 1989)) and specifically determined that a coal cleaning plant collocated with a surface coal mine would be subject to the 100 ton threshold.

> EPA position has been that stack emissions and fugitive emissions from a coal cleaning plant or coal preparation plant must be summed in determining whether it would be a major stationary source. If, standing alone, such a plant were "major", and therefore subject to review, then a collocated surface coal mine generally would also be considered part of the major source and subject to substantive PSD and NSR requirements regardless of whether surface coal mines are listed . (See Alabama Power, 636 F.2d at 369). Such operations typically must be aggregated as single source under EPA's rules because they belong to the same SIC two-digit code, and typically are located on adjacent or contiguous properties and are under common control[3].

54 Fed. Reg. 48881; see also 40 Fed. Reg. 7090, 7092 (February 28, 1986) (If the coal cleaning plant were major, than the mine would also be brought into NSR, regardless of whether. . .[fugitive emissions from surface coal mines are counted or not]").

In summary, EPA's policy is to use the primary activity test to determine which SIC code governs, and thus, which activities may be grouped into a single "source". However, once the source is so identified, EPA will determine the proper applicability threshold on the basis of the categories set out in Section 169(1). If a source includes an industrial operation listed under Section 169(1), the 100-ton threshold will apply to the listed operation no matter what the primary activity of the entire source.[4]

---

[3]For the same reasons, stack emissions from the mine must be added to the emissions of the preparation or cleaning plant in determining threshold applicability.

[4]The decision whether to include fugitive emissions from collocated mines for applicability purposes is decided on a case-by-case basis, depending on the primary activity of the

Finally, since EPA did not embrace a primary activity test for determining thresholds in the 1980 preamble and in subsequent proceedings has indicated that coal cleaning plants over 100 tons will be subject whether collocated with a mine or not, notice and comment rulemaking on the issued is unnecessary. [5]No further administrative action to implement this interpretation is necessary or warranted.

I note this ruling concerns coal cleaning facilities and does not affect the "commercial feasibility" of a new coal mine by "adding additional technology requirements", as you have stated in your letter. Assuming mining is the primary activity, the coal cleaning plant and only the non-fugitive emissions of a proposed mine would be considered in determining PSD applicability for the mine. With regard to PSD applicability for the coal cleaning plant -- and again assuming that mining is the primary activity at the site -- only the plants, emissions would be considered. Further, if the coal cleaning plant were to be subject to PSD review, only its emissions and not the mine's would be subject to Best Available Control Technology. However, the emissions of the mine and the coal cleaning plant, along with all other nearby sources, would need to be evaluated to ensure attainment and maintenance of the national ambient air quality standards (NAAQS) even if only a minor source permit were required by the provisions of 40 CFR § 51.160.

---

operation as a whole. 54 Fed. Reg. at 48875, 48887. It should be noted that EPA cites both the 1983 Reich letter and a preliminary determination in the same matter (Edward E. Reich to Allyn Davis, Director, Air and Hazardous Materials Division, EPA Region VI, June 8, 1980) for this proposition. As discussed, EPA also took the position in applicability decision that the primary activity test not only governs whether fugitive emissions are to be included but also must be used to determine what is the appropriate threshold. As noted above, this aspect of these two letters are superseded by the 1989 preamble language discussed above.

[5]The EPA's policy on this issue has also been reiterated in its NSR policy manual. See New Source Review Manual, p. A.23 (October 1990 Draft).

Because of these reasons and based upon the information currently available, it is EPA's position that the PSD threshold for Reserve's coal preparation facility is 100 tons per year. If you would like to discuss this matter further please contact Mr. Bernard Turlinski, Chief, Air Enforcement Branch at (215) 597-3989.

Sincerely,

Edwin B. Erickson
Regional Administrator

cc: The Honorable John W. Warner
United States Senate
Russell Senate office Building
Washington, DC 20515

The Honorable Mary Sue Terry
Attorney General
Commonwealth of Virginia
State Capitol
Richmond, Virginia 23219

The Honorable Elizabeth Haskell
Secretary of Natural Resources
Room 525
Ninth-Street office Building
200-202 North Ninth Street
Richmond, Virginia 23219

Wallace E. Reed
Chairman
Commonwealth of Virginia
Air Pollution Control Board
Ninth-Street Office Building
200-202 North Ninth Street
Richmond, Virginia 23219

Wallace N. Davis
Executive Director
Commonwealth of Virginia
Department of Air Pollution Control
Ninth-Street Office Building
200-202 North Ninth Street
P.O. Box 10089
Richmond, Virginia 23240

Michael D. Overstreet
Director, Region I
Commonwealth of Virginia
Department-of Air Pollution Control
Southwest Virginia Regional Office
P.O. Box 1190
121 Russell Road
Abingdon, Virginia 24210

Pamela F. Faggert
Assistant Executive Director
Regional Operations
Commonwealth of Virginia
Department of Air Pollution Control
Ninth-Street Office Building
200-202 North Ninth Street
P.O. Box 10089
Richmond, Virginia 23240

Bernard E. Turlinski
Chief, Air Enforcement Branch
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107