



**OFFICE OF THE CITY ATTORNEY**

301 KING STREET, SUITE 1300  
ALEXANDRIA, VIRGINIA 22314

<http://alexandriava.gov>

IGNACIO BRITTO PESSOA  
CITY ATTORNEY

(703) 838-4433

JILL R. APPLEBAUM  
SENIOR ASSISTANT CITY ATTORNEY

FACSIMILE  
(703) 838-4810

ASSISTANT CITY ATTORNEYS  
CATHERINE RICHARDS CLEMENT  
MARY ELLIOTT  
GEORGE MCANDREWS  
KAREN S. SNOW  
CHRISTOPHER P. SPERA  
RODERICK B. WILLIAMS

August 23, 2007

***By E-Mail and Hand Delivery***

David Paylor  
Director, Virginia Department of Environmental Quality  
629 East Main Street  
Richmond, VA 23219

**Re: Commencement of Mirant Stack Merger Project**

Dear Director Paylor:

On behalf of the City of Alexandria and its residents, we respectfully submit our grave concerns with the commencement of construction of the stack merger project at Mirant's Potomac River Generating Station ("PRGS"). Put simply, Mirant's current activities without proper authorization violate the Clean Air Act and the Commonwealth of Virginia's permitting regulations and fly in the face of public commitments made by the Commonwealth and the State Air Pollution Control Board ("Board").

As you are aware, on August 16, 2007, Mirant announced its intention "immediately" to begin work on the internal reconfiguration of the PRGS's stacks with an expected completion date in February 2008. See Mirant August 16, 2007 News Release, appended hereto as Attachment 1. Mirant's stated purpose for this project is to achieve greater dispersion of air pollution. In fact, the only credible explanation for the rush to construct is to increase the PRGS' operations and therefore its emissions. Mirant is proceeding despite the Board's expressed intent to withhold approval for the project pending receipt and analysis of additional data and public scrutiny of the overall impacts. Accordingly, we urge you to halt Mirant's construction related activities, which go far beyond an asserted staging of materials, until there is a full analysis and determination by the Board of permit applicability.

It appears that for quite some time Mirant has disregarded the Commonwealth's and the public's interests. It is clear that Mirant has already fabricated specialized materials, installed equipment and contracted for the re-routing of boiler exhaust ducts, the installation of larger internal draft fans and the connection of the new ducts to the two merged stacks. See site photos, August 20, 2007, appended hereto as Attachment 2. As set out below, Mirant's activities constitute pre-permit "commencement" of construction and are therefore prohibited.

**Regulatory Framework.** The proposed stack merge project requires a permit because it is a physical change and a change in operations at the plant that will result in a net emissions increase of one or more regulated air pollutants. 9 VAC 5-80-1100 *et seq.* In September 2006, the Virginia Department of Environmental Quality (“VDEQ”) received Mirant’s Air Permit Application (“Form 7”) for the construction of the stack merger. At that time, DEQ determined that the New Source Review (“NSR”) regulations applied because of the potential for increased emissions associated with the project. *See* James Sydnor letter dated September 6, 2006 to David Cramer and David Paylor letter dated September 20, 2006 to Bob Driscoll, appended hereto as Attachment 3. Such a situation requires a permit. Furthermore, as you stated in your September 20th letter, as part of this permitting process “public participation is required for applications which have the potential for public interest concerning air quality issues at the discretion of the board.” Alexandria and the public have relied on the Board’s direction for such a public process.

In its March 16, 2007 Memorandum to the Board, DEQ reiterated the requirement for a permit for the stack merge project based on increased emissions from the project. At that time, DEQ concluded that a permit is required under 9 VAC Chapter 80, Article 6 of the Virginia Administrative Code. Mirant’s stack merge proposal likely constitutes, however, a “major” modification requiring a permit under either Article 8 or Article 9 of 9 VAC Chapter 80. Subsequent to the March 16th Memorandum, DEQ issued a State Operating Permit (“SOP”) that sets an annual limit for sulfur dioxide (“SO<sub>2</sub>”) emissions at 3,813 tons per year. Pursuant to Article 8 of the Virginia Code, any increase in SO<sub>2</sub> emissions that exceeds the permit limit by 40 tons per year or more requires a Prevention of Significant Deterioration (“PSD”) permit. In light of the fact that Mirant projects PRGS SO<sub>2</sub> emissions at 15,629 tons per year with the stack merger, with an even greater potential to emit, the stack merge project requires a PSD permit.<sup>1</sup>

**Mirant’s Current Construction-Related Activities are Prohibited.** The Clean Air Act mandates a preconstruction review for sources subject to PSD and NSR requirements. Such preconstruction review is a necessary precursor to a public review process. The Virginia regulations require that “any owner of a source or modification subject to this article who commences construction or operation without applying for and receiving a permit hereunder, shall be subject to appropriate enforcement action. . . .” 9 VAC 5-80-1785. Both federal and Commonwealth regulations define “commence” to include (i) a continuous program of on-site construction or modification to be completed within a reasonable time or (ii) the entry into contractual obligations, that cannot be canceled or modified without substantial loss to the owner. 40 C.F.R. § 52.21(b)(9); 9 VAC 5-80-1615. Based on Mirant’s expressed intent, off-site fabrication of specialized materials and the ongoing activities at the site, Mirant has “commenced” construction. Thus, Mirant is in violation of permitting regulations and enforcement action is warranted.

The U.S. Environmental Protection Agency (“EPA”) has a long-standing interpretation concerning “commencement” of construction. *See* U.S. EPA Memoranda, December 18, 1975, March 28, 1986, May 13, 1993 and November 4, 1993, appended hereto as Attachment 4. In its

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<sup>1</sup> PSD permit applicability is valid even if one assumes the lesser SO<sub>2</sub> emission limit of 8,359 tons per year submitted by Mirant in its proposed Consent Order.

December 18, 1975 Memorandum, EPA stated that the "placement, assembly, or installation of unique facilities or equipment at the site should be considered a program of construction or modification". This is precisely the situation here—Mirant's purchase and on-site placement of unique equipment and materials for the stack merger project constitutes "commencement" of construction. EPA also recognizes that a source may be so "irrevocably committed" to a particular project even without actual construction, that it should be deemed to have "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." Mirant has gone beyond staging activities by fabricating materials that are site specific and unique to the project and committing to "immediate" construction with a completion date by February 2008.<sup>2</sup>

Although certain construction related activities may occur prior to issuance of the permit, Mirant has exceeded this allowable scope of activities. In addition to the "irrevocable commitment" and contractual obligation tests discussed above, EPA has addressed situations relevant to the stack merger project:

[C]onstruction is prohibited on any emissions unit or on any installation designed to accommodate the emissions unit. If the emissions unit (including any accommodating installation) is an integral part of the source or modification (i.e. the source or modification would not serve in accordance with its original intent, except for inclusion of the (emissions unit), the PSD permit must be obtained. . . .

EPA Memorandum, March 28, 1986. Mirant has fabricated and brought to the site equipment and materials that are an integral part of and necessary to accommodate the stack merger project.

EPA also recognizes equitable arguments in addition to the statutory and regulatory bases for prohibiting construction related activities prior to the issuance of a permit. In its May 13, 1993 Memorandum, EPA stated:

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 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.

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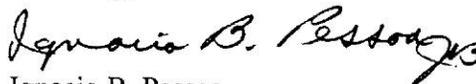
<sup>2</sup> With respect to contractual obligations, EPA has stated that the regulations do not "permit a source which has only a contract revocable at will to escape review under these regulations. Correspondingly, where the contract may be cancelled or modified at an insubstantial loss to the plant operator, the proposed source should not be allowed to escape review under these regulations." EPA Memorandum, December 18, 1975.

Mirant's assumption of the \$30 million cost of the stack merge project and its aggressive construction schedule are an attempt to circumvent the requisite air quality analysis and permitting review process. As DEQ's representative stated before the Board, allowing the stack merge to go forward without resolving outstanding issues would require "putting toothpaste back in the tube."

The requisite preconstruction NSR review is also important in determining the need for installation of pollution control or monitoring equipment that was not initially provided for in the stack merge design.<sup>3</sup> Thus, such pre-construction review is mandated both to ensure that Clean Air Act requirements are met and appropriate pollution control technology is achieved. The comprehensive NSR analysis of the stack merge project may result in the need to install additional pollution control and monitoring equipment, a determination that should also be subject to public scrutiny. Mirant's actions are a clear disregard of NSR permit review and reflective of Mirant's dismissal of the regulatory process.<sup>4</sup>

**Remedy.** Mirant's activities require immediate action by the DEQ. Alexandria is prepared to undertake all available legal remedies to protect the public health and welfare of its residents and those of adjacent jurisdictions.

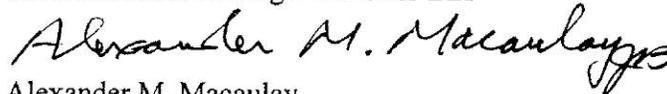
Sincerely,



Ignacio B. Pessoa  
City Attorney



John B. Britton  
Schnader Harrison Segal & Lewis LLP



Alexander M. Macaulay  
Macaulay & Burtch, PC  
Counsel for the City of Alexandria

#### Attachments

<sup>3</sup> Mirant's stated intent for the stack merger project is to gain modeling credit for this dispersion technique. Regulations prohibit this credit without installation of pollution controls and emission reductions. Proceeding on this construction project circumvents the Board's review of this matter and preempts any conditions the Board may place in order to allow this credit.

<sup>4</sup> Mirant's obvious disdain for its regulatory obligations is also evident in its arbitrary dismissal of the requirements of Paragraph E of the EPA Administrative Compliance Order, that Mirant submit to EPA and DEQ an analysis of the applicability of NSR/PSD to the PRGS due to the installation of a trona injection system. Further evidence of this disdain is Mirant's failure to take all appropriate measures to minimize emissions on February 23, 2007 which led to a monitored exceedance of the SO<sub>2</sub> NAAQS.

**ATTACHMENT 1**

## News Release

**Contact:**

Felicia Browder

O: 678 579 3111

M: 678 468 2506

[felicia.browder@mirant.com](mailto:felicia.browder@mirant.com)



August 16, 2007

### **Mirant Begins Final Phase of Major Environmental Improvement Project at Potomac River Plant**

#### *Stack merge will eliminate "downwash" of ground level emissions*

**Alexandria, Va.** – Mirant today announced that it is moving forward with an internal re-configuration of its stacks at the Potomac River Generating Station designed to substantially improve air quality in the surrounding community.

The five emissions stacks at the coal-fired plant will be "merged," or internally reconfigured, into two stacks with higher exit gas velocities, eliminating "downwash" of emissions in areas near the plant. The external physical structure of the stacks will not change.

Work will begin immediately and the project is expected to be complete in February 2008 at a cost of approximately \$30 million. The internal reconfiguration, or stack merge, is the final step in an environmental improvement project that was initiated by Mirant in early 2006 with the installation of its trona system to reduce emissions of sulfur dioxide.

Mirant has notified federal, state and local officials of its decision to begin the stack merge project.

"The stack merge does not increase capacity or emissions," said Debra Raggio Bolton, Mirant's Assistant General Counsel and Vice President. "It should eliminate any concerns that the community may still have about downwash."

Mirant has worked with regulators and local officials to try to reach consensus on the benefits of the stack merge by demonstrating empirically that it will materially improve air quality.

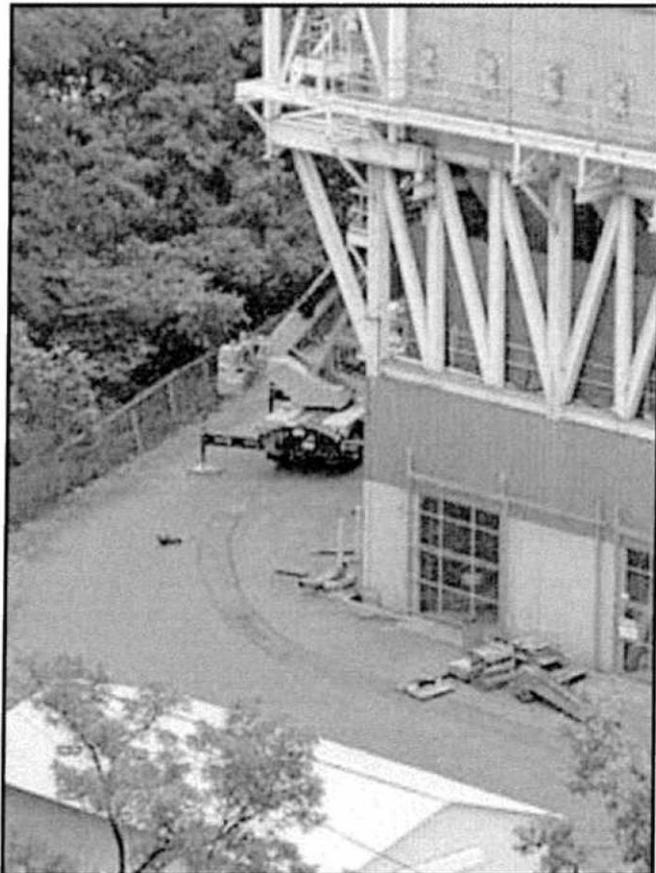
"We enhanced our environmental performance significantly with the installation of our trona system. Now we're completing this two-part environmental project that will create even greater improvements in air quality for the people of Alexandria. The science demonstrates that a stack merge at the Potomac River plant is best for the environment and public health," said Bolton. "As a 17-year citizen of the City of Alexandria and the mother of two school-aged children, I am pleased that we are moving forward with this solution. It is the right thing to do."

For more information and regular updates on the stack merge project, please visit [potomac.mirant.com](http://potomac.mirant.com). Join the e-mail notification list by clicking on the "request to be put on our e-mail notification list" link near the end of the page.

*Mirant is a competitive energy company that produces and sells electricity in the United States. Mirant owns or leases approximately 10,300 megawatts of electric generating capacity. The company operates an asset management and energy marketing organization from its headquarters in Atlanta. For more information, please visit [www.mirant.com](http://www.mirant.com).*

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**ATTACHMENT 2**



**ATTACHMENT 3**

September 6, 2006

Mr. David Cramer  
Manager – Air Compliance & Permitting  
Mirant Potomac River, LLC  
1400 North Royal Street  
Alexandria, Virginia 22314

RE: Mirant Potomac River, LLC Stack Merge Project

Mr. Cramer,

This letter serves as acknowledgement of your Form 7 air permit application dated August 30, 2006, received by the Central Office of the Virginia Department of Environmental Quality (DEQ) on August 30, 2006. DEQ has reviewed your permit application requesting to merge the stacks of Units 1, 2, 3, 4, and 5 at the Mirant Potomac River facility located in Alexandria, Virginia. Based on this review, a permit is required based on Article 6 of the Virginia Regulations for the Control and Abatement of Air Pollution (the Regulations).

Article 6 of the Regulations covers Virginia's minor New Source Review (NSR) permitting requirements. A determination that a minor NSR permit is required under Article 6 is based on a comparison of past actual to future potential emissions. Based on calculations provided in Mirant's Form 7 application, the stack merge project would require a minor NSR permit under Article 6.

The application appears to contain sufficient information for DEQ to make an Article 6 permitting applicability determination. However, during DEQ's review of the application, two primary additional deficiencies were identified.

The first relates to lack of sufficient air quality modeling in support of the application. Under 9 VAC 5-80-1180.A.3 it states that DEQ may not grant a permit to any source pursuant to Article 6 unless it is "designed, built and equipped to operate without preventing or interfering with the attainment or maintenance of any applicable ambient air quality standard and without causing or exacerbating a violation of any

applicable air quality standard." Without an approved modeling protocol and modeling specific to the stack merge project by itself, DEQ cannot issue a permit under Article 6.

The second deficiency relates to the lack of enough data for DEQ to make a major New Source Review (NSR) applicability determination for the stack merge project. It remains unclear why Mirant suggests that 2004 baseline emissions from the Potomac River facility were not representative of normal operation. DEQ does not believe that having to curtail production or operation simply in order to comply with an applicable standard or requirement in and of itself is justification for determining that the year was not representative of normal operations.

In order to continue further processing of the application, DEQ requests the following information:

- Please submit a dispersion modeling analysis using a DEQ-approved modeling protocol which estimates worst case impacts from the stack merge project alone. Any additional projects designed to further minimize the impact of the project on the NAAQS are not relevant in this applicability determination since they are not federally enforceable; or
- Mirant may choose to wait until the results of the MES are finalized and re-submit an application for the stack merge project at that time. If this option is chosen, the current application will be considered withdrawn; and
- In order for DEQ staff to make a major NSR applicability determination, please provide a more detailed justification for Mirant's determination that the year 2004 baseline emissions are not representative of normal source operation.

In addition, DEQ seeks clarification from Mirant on the following aspects of the calculations submitted as part of the Form 7 application:

- On Page 4 of the application, the maximum rated heat input for the units is listed as 970.1 million Btu/hour each for Units C1 and C2 and 960.7 million Btu/hour each for Units C3, C4 and C5. On Page 11, based on the data in the table, the maximum fuel burned per hour can be calculated for Unit C1 as 1,078.2 million Btu/hour; Unit C2 as 1,053.7 million Btu/hr; Unit C3 as 1,042.4 million Btu/hr; Unit C4 as 1,113.1 million Btu/hr; and Unit C5 as 1,133.6 million Btu/hr. Please explain why these differences exist as these values are important in determining future projected actual emissions.
- On Page 11, Existing Stack Configuration, the column listed as Max. % Sulfur in the fuel data section indicates that the sulfur content is 0.9%.

However, a footnote indicates that the value is something less than 1.45 lbs SO<sub>2</sub> /million Btu. Additional explanation is necessary to describe the basis of this difference.

- The calculation for particulate matter (PM) in the attachment to Page 14 of the application uses a value of 0.12 lbs/million Btu. However, DEQ calculates a value of 0.1710 lbs/million Btu. This difference in values leads to an increase of 281.15 tons per year of PM if the maximum heat input from Page 4 of the application is used and an increase of 299.45 tons per year if the maximum heat input from page 11 is used. Please re-calculate the estimated values for PM, PM<sub>10</sub> and PM<sub>2.5</sub> using the appropriate values and re-submit the appropriate pages.
- The example calculation for HF is labeled as HCl in the calculation example. This error should be corrected in the next submission. The calculation is correct.
- ENSR used 1.2 lbs SO<sub>2</sub> / million Btu in the modeling but the proposed emissions in the application reflect a value of 1.52 lbs SO<sub>2</sub> /million Btu. Please explain why different values are being used particularly with respect to the lesser value being used in the modeling. The worst case emission rates should be used for the modeling.

Please provide the above information within two weeks of the date of this letter. Otherwise your application may be considered withdrawn. An extension may be granted if requested in writing before the end of the two weeks. If you have any questions, please contact Tamera Thompson at (804) 698-4502 or Troy Breathwaite at (804) 698-4366 in the Central Office.

Sincerely,

James E. Sydnor  
Director, Air Division

September 20, 2006

Mr. Bob Driscoll  
Chief Executive Officer  
Mirant Potomac River, LLC  
1400 North Royal Street  
Alexandria, Virginia 22314

RE: Mirant Potomac River, LLC – Stack Merge Project

Dear Bob,

I am writing in response to your letter dated September 11, 2006, regarding the applicability of the proposed Stack Merge Project (the Project) at the Potomac River Generating Station (PRGS) to the New Source Review (NSR) program. While it appears that the Project when completed would be environmentally beneficial, it is imperative that Department of Environmental Quality (DEQ) staff adhere to the requirements of the Virginia Regulations for the Control and Abatement of Air Pollution (the Regulations) and to established permitting procedures. As you are aware, there has been and continues to be significant public interest in activities related to PRGS. For this reason, it would be especially prudent for both Mirant and DEQ to adhere as closely as possible to established permitting procedures and regulatory requirements.

DEQ staff met with representatives from Mirant on September 14, 2006, to discuss the Project. As you should be aware, DEQ's position regarding NSR applicability has not changed as a result of this meeting. We continue to believe that minor NSR is triggered by the Project.

I both understand and appreciate your sense of urgency regarding the implementation of this project. But as I previously mentioned, DEQ intends to follow the Regulations and established permitting procedures. In doing so, several issues prevent us from issuing a permit to Mirant prior to the end of September 2006. The first relates to the modeling requested by DEQ staff. The minor NSR permitting provisions found in Article 6 of the Regulations prohibit the approval of a permit by DEQ unless it is shown

Mr. Driscoll  
September 15, 2006  
Page 2

that the source can be "built and equipped to operate without preventing or interfering with the attainment or maintenance of any applicable ambient air quality standard or without causing or exacerbating a violation of any applicable ambient air quality standard" (9 VAC 5-80-1180 A.3). DEQ considers review and approval of the modeling specific to the stack merge project essential to ensure that this provision of the permitting requirements have been met. At this time, DEQ has not received a modeling protocol or modeling results specific to the proposed stack merge project.

Second, as part of the minor NSR permitting process, public participation is required for applications which have the potential for public interest concerning air quality issues at the discretion of the board (9 VAC 5-80-1170 D). Public participation includes legal notification to the public accompanied by a comment period of at least 30 days followed by a hearing. The public record then remains open for period of 15 days following the hearing. Based on the amount of public interest on air quality issues that PRGS has generated in the past and continues to generate, the application for a minor NSR permit would be subject to these public participation requirements.

As I previously mentioned, DEQ staff informed Mirant representatives in the September 14, 2006, meeting that a permit would not be issued by the end of September, due to the reasons I have discussed above. Staff has offered to review the possibilities of a phased NSR permit that may meet the needs of Mirant; however, any phased permit would not meet Mirant's planned construction at the end of September. DEQ remains committed to exploring other possibilities in the future that will provide Mirant flexibility to complete the project and that are also in compliance with the state permitting regulations.

If you have any questions, please contact Ms. Tamera Thompson at (804) 698-4502 or Mr. Troy Breathwaite at (804) 698-4366.

Sincerely,

David K. Paylor  
Director

cc: DEQ - Air Division  
DEQ - Northern Virginia Region Office

**ATTACHMENT 4**

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, 1975, 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 review 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 basic 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.

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

OFFICE OF  
AIR AND RADIATION

MAR 28 1986

SUBJECT: Construction Activities Prior to Issuance of a PSD Permit with Respect to "Begin Actual Construction"

FROM: Director  
Stationary Source Compliance Division  
Office of Air Quality Planning and Standards

TO: Robert R. DeSpain, Chief Air Programs Branch, Region VIII

This memorandum addresses the interpretation of "begin actual construction" as it refers to construction activities which may occur, or are prohibited prior to issuance of a PSD permit under 40 CFR 52.21(i). The Control Programs Development Division of OAQPS, the Office of General Counsel, and the Air Enforcement Division of the Office of Enforcement and Compliance Monitoring were consulted in the development of this memorandum, and all three offices concur with its content.

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 are satisfied]." Section 165 requirements, then, apply to major emitting facilities, i.e. major stationary sources. However, the PSD regulations at Section 52.21(i) (1) state that, "[n]o stationary source or modification... shall begin actual construction without a permit which states that the stationary source or modification... [has met various requirements]." The term "begin actual construction" at Section 52.21(b) (11) in the PSD regulations refers to "construction activities on an emissions unit." Emissions unit is defined at Section 52.21 (b)(7) as "...any part of a stationary source which emits or would have the potential to emit any pollutant subject

to regulation under the Act." Therefore, although applicability of PSD is determined on a source-wide basis, it may become necessary to distinguish the emissions unit from the major stationary source or modification in order to determine at what point in construction planning or construction activities a PSD permit is required.

The question of what type of construction activities may be conducted prior to issuance of a PSD permit has been covered by EPA policy for many years. On December 18, 1978 EPA issued policy addressing this issue. That memorandum specified that certain limited activities would be allowed, such as planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials. Any of these activities, if undertaken prior to issuance of a PSD permit, would be at the risk of the owner or operator. All on-site activities of a permanent nature aimed at completing a PSD source (including, but not limited to, installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature) are prohibited until the permit is obtained, under all circumstances. This December 1978 policy defines the type of construction activities allowed at a PSD-affected source prior to issuance of a PSD permit.

Since section 52.21 (i) (1) specifies that a source may not begin actual construction (on an emissions unit) until a PSD permit is obtained by that source, and "begin actual construction" at Section 52.21 (b) (11) refers to the emissions unit, it is necessary to clarify the definition of emissions unit. "Emission unit" as defined at Section 52.21 (b) (7) refers not only to units which emit pollutants subject to review under PSD, but to any part of the source which emits a pollutant subject to regulation under the Clean Air Act. By definition then, any part of a PSD source which would emit any pollutant subject to regulation under the Act is considered an emissions unit, even if that particular unit is not subject to PSD review. The emissions unit would include any installations necessary to accommodate that unit. Therefore, before issuance of the PSD permit, construction is prohibited on any emissions unit or on any installation designed to accommodate the emissions unit. If the emissions unit (including any accommodating installation) is an integral part of the

source or modification (i.e. the source or modification would not serve in accordance with its original intent, except for inclusion of the emissions unit), the PSD permit must be obtained before construction on the entire source commences.

The policy statement from 1978 reflects the current policy on the types of construction activities which are prohibited, or may occur at risk to the owner prior to issuance of a PSD permit. Language changes in the regulations after this guidance was issued did not alter EPA's interpretation of what a source may do prior to obtaining a PSD permit.

If you have any questions, please contact Sally M. Farrell at FTS 382- 2875.

Edward E. Reich

cc: Kirt Cox, OAQPS  
Gregory Foote, OGC  
Douglas A. Johns, DOJ  
Judith Katz, OECM  
Tim Osag, Region VIII  
NSR Regional Contacts

cc: The Honorable James P. Moran  
The Honorable Tim Kaine  
The Honorable L. Preston Bryant, Jr.  
The Honorable Richard L. Saslaw, Senate of Virginia  
The Honorable Patricia S. Ticer, Senate of Virginia  
The Honorable Mary Margaret Whipple, Senate of Virginia  
The Honorable Bob Brink, Virginia House of Delegates  
The Honorable Adam P. Ebbin, Virginia House of Delegates  
The Honorable David L. Englin, Virginia House of Delegates  
The Honorable Al Eisenberg, Virginia House of Delegates  
The Honorable Brian J. Moran, Virginia House of Delegates  
The Honorable Mayor and Members of City Council  
Mark E. Rubin, Office of the Governor  
Richard D. Langford, Chairman, Air Pollution Control Board  
Bruce C. Buckheit, Air Pollution Control Board  
John N. Hanson, Air Pollution Control Board  
Hullihen Williams Moore, Air Pollution Control Board  
Vivian E. Thomson, Air Pollution Control Board  
Judith Katz, EPA Region 3  
Richard Weeks, DEQ  
James K. Hartman, City of Alexandria  
Richard Baier, City of Alexandria  
Robert Driscoll, Mirant

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

OFFICE OF  
AIR AND RADIATION

MEMORANDUM

May 13, 1993

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 focuses 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 source would reasonably undertake only with the intended purpose of constructing the regulated project. Site clearing and grading are in general relatively inexpensive and could be used for a 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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
76 Hawthorne Street  
San Francisco, Ca. 94105-3901

November 4, 1993

MEMORANDUM

SUBJECT: Preconstruction Review and Cons

FROM: Dave Howekamp  
Director  
Air and Toxics Division

TO: See Below

This memorandum reiterates EPA's longstanding interpretation concerning the range of construction related activities that lawfully may occur prior to the issuance of a permit to construct or modify a facility or emissions unit.

The Clean Air Act mandates a preconstruction review program for sources subject to Prevention of Significant Deterioration (PSD) (§ 165) and New Source Review (NSR) (§§ 172 and 173) requirements. In addition, under § 110(a)(2)(c), State and local agencies are required to include in their State Implementation Plans preconstruction review programs necessary to assure that construction of any new or modified source is consistent with attainment of the National Ambient Air Quality Standards. To fulfill this requirement, most District rules require that any person building any article, machine, or contrivance which may cause the issuance of air contaminants shall obtain authorization for such construction prior to beginning actual construction.

Preconstruction review is a necessary precursor to engineering and public review processes. As a result of this process, the permitting authority may require installation of air pollution control or monitoring equipment that was not initially provided for in the design process. Thus, the pre-construction review process is mandated both to ensure that Clean Air Act requirements are met and to help sources avoid costly construction changes.

The question of what type of preliminary site activities may be conducted prior to permit issuance was addressed by EPA policy memoranda on December 18, 1979, March 28, 1986 and May 13, 1993. These memoranda explain that certain limited activities that do not represent an irrevocable commitment to the project would be allowed, such as planning, ordering of equipment and materials, site clearing, grading, and on-site temporary storage of equipment and materials. Any of these activities, if undertaken prior to issuance of a permit, would be at the risk of the owner or operator.

In contrast, all on-site activities of a permanent nature aimed at completing construction or of the source including but not limited to installation of building supports and foundations, paving, laying of underground pipe work, construction of any permanent storage structure, and activities of a similar nature are prohibited until after the permit is issued and effective, under all circumstances.

In addition, EPA has long maintained that in order to meet legal requirements, permits to construct must require enforceable emission limitations. Limiting the potential to emit of a stationary source is of primary importance in establishing whether a new or modified source is major and thus subject to PSD or NSR requirements. For any limit or condition to be a legitimate restriction on potential to emit, that limit or condition must be federally enforceable. Such conditions and limitations ensure that:

- a source that has the potential to emit in amounts that would constitute a major source or major is restricted from doing so in a manner that is federally enforceable;
- all contemporaneous emissions increases and decreases are creditable and federally-enforceable; and
- where appropriate, emissions offsets transactions are documented clearly and offsets are real, creditable, quantifiable, permanent, and federally-enforceable.

We are committed to working with you to ensure that sources participate in the preconstruction review process and obtain permits with federally enforceable emission limitations prior to beginning actual construction (as defined at 40 CFR 51.165 (a)(1)(xv), 51.166 (b)(11), and 52.21 (b)(11)). If you have any questions or would like copies of the memoranda mentioned above, please contact Jennifer Fox of my staff at 415-744-1257.

Addressees:

All Region IX Air Agency Directors  
All Region IX New Source Review Contacts