THE TEXT YOU ARE VIEWING IS A COMPUTER-GENERATED OR RETYPED VERSION OF A PAPER PHOTOCOPY OF THE ORIGINAL. ALTHOUGH CONSIDERABLE EFFORT HAS BEEN EXPENDED TO QUALITY ASSURE THE CONVERSION, IT MAY CONTAIN TYPOGRAPHICAL ERRORS. TO OBTAIN A LEGAL COPY OF THE ORIGINAL DOCUMENT, AS IT CURRENTLY EXISTS, THE READER SHOULD CONTACT THE OFFICE THAT ORIGINATED THE CORRESPONDENCE OR PROVIDED THE RESPONSE.

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

JAN 5 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Determination of Interpretative Ruling (IR)

FROM: Director, Division of Stationary Source Enforcement

TO: James O. McDonald, Director
Enforcement Division - Region V

This is in response to your memo dated September 6, 1977, concerning the applicability of the IR to the construction of the #3 and #11 coke batteries at the Youngstown Steel Indiana Harbor Plant. Before responding to this question, I would like to apologize for the delay in sending this reply. It appears, from our records, that the original request never reached our office and our first knowledge of its existence did not occur until December 7, 1977. Your request seems to ask two questions, (1) does the construction of #3 and #11 coke batteries constitute a new source and (2) does the issuance of a state permit prior to the effective date of the IR insulate the source from applicability to the IR.

1. Since the state of Indiana has been delegated EPA's authority for new source review (51.18), the states determination of whether the #3 and #11 coke batteries are new sources must be at least as stringent as EPA's own evaluation of the facts. The criteria which EPA uses in making a determination in a case such as this are those which the Agency has established in the New Source Performance Standards (40 CFR 60.15). It appears from the limited facts provided in your memo that #11 coke battery certainly qualifies as a new source and that cases similar to that for the #3 battery resulted in them being considered as new sources.

2. Since the State of Indiana was not delegated the Section 51.18 new source review program until November 24, 1975, and did not have an approved SIP provision for new source review, the construction permits issued by Indiana on April 28 and July 2, 1975, cannot qualify as SIP preconstruction permits in accordance with Section 51.18. Such permits were to have been issued by EPA. In addition, the State permits were granted without compliance with the requirements of Section 51.18 or with the requirements of the IR. The IR of course, is an interpretation of Section 110 of the Act and 40 CFR Section 51.18, permitting growth under some circumstances where a literal interpretation of those requirements could bar all growth in nonattainment areas. Therefore, Youngstown Steel has undertaken construction of these facilities without the required SIP new source review permit. An April 7, 1977, memo (copy attached) outlines the Office of Enforcement's position for such sources. It would seem appropriate in this case for Youngstown Steel to be required to cease construction of these facilities until such time as it can obtain a new source review permit which conforms to the requirements of the IR. The Clean Air Act Amendments of 1977 have, of course, added new administrative and judicial enforcement provisions in Sections 113(a) (5) and 113(b) (5), to effect this result where a State has violated the IR. Although these mechanisms may not be available for these permits, the source and State are clearly subject to enforcement under Section 113(a) and (b) for violation of the SIP. Please keep us advised of your proposed action in this case.

If you have any additional questions or comments, please contact Rich Biondi (755-2564) of my staff.

Edward E. Reich

Attachment

cc: Mike Trutna - CPDD

REGION V

[DATE:] September 6, 1977

[SUBJECT:] Request for Determination of Interpretive Ruling Applicability

[FROM:] James O. McDonald, Director
Enforcement Division

[TO:] Edward E. Reich, Director
Division of Stationary Source
Enforcement (EN-341)

Pursuant to the August 24, 1977, telephone conversation between my staff and Diane Smith of your staff, I am requesting a determination by the Division of Stationary Source Enforcement of the applicability of the Interpretive Ruling to the construction of #3 and #11 coke batteries at the Youngstown Steel Indiana Harbor Plant. On April 28, 1975, the State of Indiana issued a construction permit for the #11 coke battery. On July 2, 1975, the State approved the "pad-up" rebuild of #3 coke battery as an amendment to an October 1, 1973, Consent Order. On November 24, 1975, the United States Environmental Protection Agency delegated to the State responsibility for the preconstruction review requirements of 40 CFR Section 51.18. Underground construction is complete, but no construction has begun above the pad at either battery.

The State of Indiana has taken the position that the provisions of the Interpretive Ruling do not apply to the construction of these facilities since approval was granted by the State long before the publication of the Ruling. Please inform this office of the Ruling's applicability in this case.

Original signed by
James O. McDonald, Director
Enforcement Division

M Smith/myb 3-2083 8/30/77

MEMORANDUM

DATE: April 7, 1977

SUBJECT: New Source Review/Emission Offset Policy -- Legal Action Against State Permits that Have Been Improperly Issued

TO: Enforcement Division Directors;
Air & Hazardous Materials Division Directors;
Regions I-X

As you are aware, the Agency has published its new source review/"emission offset" policy in the form of an interpretative ruling (41 FR 55524, December 21, 1976). Since implementation of the policy is an essential tool for purposes of attaining and maintaining the national ambient air quality standards, we believe it imperative that EPA carefully examine State and local permits and other forms of new source review approvals to determine whether they comply with EPA's minimum new source

review requirements as articulated in the ruling. In certain cases, it may be necessary to initiate legal action to obtain a judicial declaration that a State or local construction permit or approval is invalid and to seek injunctive relief against construction of a new source.

We consider a thorough overview by the regional offices of State and local construction permits and approvals issued since the publication of the ruling to be one of the Agency's highest priorities. Where deficiencies are noted, swift EPA action to prevent construction until a valid approval is obtained is critical to assuring that the new source review program will not be undermined.

In those instances where a State or local new source review approval was obtained prior to the publication of the ruling and such approval meets at least the minimum requirements of the ruling, the approval would still be valid. If, however, a State or local approval issued prior to publication of the ruling does not satisfy its terms, or if construction of a new source has been undertaken without a new source review approval, the EPA regional office should examine the facts in the case before deciding whether to take action to prevent further construction until a valid approval is obtained. In making judgments on whether to take action on approvals issued prior to the ruling, the regional offices should consider the following:

(1) the extent to which the source had (or should have had) actual notice of the Federal new source review requirements;

(2) the extent to which the State or local permit or approval was issued in reliance on and is consistent with earlier drafts of the "emission offset" policy;

(3) the extent to which on-site construction had progressed prior to publication of the ruling;

(4) the degree of actual good faith reliance on a State or local permit or other indication of new source review approval;

(5) the degree of hardship which compliance would impose upon the owner or operator of the source;

(6) the seriousness of the impact of the source's projected emissions on ambient air quality and the degree to which mitigating measures are being applied.

The fact that a source appears to satisfy one or more of these criteria is not necessarily determinative. The regional office should consider the total circumstances of each situation (including availability of resources and likelihood of success on the merits) in making any decision on whether to proceed.

Recent permits or approvals issued prior to the December ruling should be reviewed to the maximum extent possible consistent with the need to devote primary attention to those permits and approvals issued after the ruling. We would recommend that, as a general rule, a low enforcement priority be placed on halting construction or operation where a new source has already been constructed or has commenced on-site construction and the owner or operator of the new source has relied in good faith on a State or local permit or other indication of new source review approval. Of course, where there are other actions which might be taken practicably (including installation of controls while the facility is in operation), EPA action may still be appropriate. Again, it should be emphasized that priority should be given to a prospective application of the policy. We recognize that the resources constraints on many regional offices may severely limit the ability to review permits or approvals issued prior to the ruling's publication.

A formal notification to the State or local reviewing authority and to the source that EPA has determined a permit or approval to be invalid may be sufficient in many cases to obtain compliance from the affected source. Where such notice is not sufficient, however, it may be necessary to secure

a judicial declaration that the permit or approval is invalid. The source's construction may be enjoined pending the resolution of the issue. Once a court rules that there was no valid new source review approval, the source's construction will be subject to Section 113 enforcement as a violation of the SIP. In addition, there may be a number of other possible remedies, the pursuit of which may be advisable in certain situations. The regional office should consult the Division of Stationary Source Enforcement (DSSE) before initiating any action to have the permit or approval declared invalid and/or the source's construction enjoined.

If you should have any questions or comments on the policy set forth in the memorandum, please feel free to contact Ed Reich, Director, DSSE, at 755-2550 or Martha Prothro, Chief, Enforcement Proceedings Branch, DSSE, at 755-2523.

Stanley W. Legro

Attachment

DSSE:DIANNE SMITH:EAB:x52581 EN-341:Rm3202:3/23/77