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April 29, 1981

5EAE

Joseph M. Polito, Esquire
Honigman, Miller, Schwartz and Cohen
2290 First National Building
Detroit, Michigan 48226

Re: City of Detroit/General Motors Corporation; Central
Industrial Park Project

Dear Mr. Polito:

We are in receipt of your letter dated April 24, 1981, in which you have requested a formal determination from the United States Environmental Protection Agency (U.S. EPA) under the Agency's regulations for the Prevention of Significant Deterioration (PSD) (40 CFR 52.21) and certain nonattainment area regulations (40 CFR 51.18). More specifically, you have inquired as to whether either of these Federal rules prohibits the site clearing activities currently being undertaken by the City of Detroit in conjunction with the Central Industrial Park Project. After reviewing the information provided in your letter, as well as the applicable regulations, we have determined that the cited demolition activities do not fall within the Federal definitions of "begin actual construction" and are thus not prohibited by the Federal PSD or nonattainment regulations in question.

As you are aware, under the PSD rules, no subject stationary source or modification can "begin actual construction" prior to issuance of the appropriate permit. 40 CFR 52.21(i). On December 18, 1978, the Agency articulated its policy as to which activities could be conducted prior to receiving a necessary PSD permit. In a memorandum from Edward E. Reich, Director of the Division of Stationary Source Enforcement, to the ten U.S. EPA Regions, Mr. Reich concluded that certain limited activities would be allowed in all cases, and that this included site clearing. The memorandum distinguished those activities of a preparatory nature from those of a permanent nature (such as installation of building supports) for which a permit would be a prerequisite. Mr. Reich further stated that any such activities undertaken prior to permit issuance would be solely at the owner's or operator's risk. A copy of this document is attached for your information.

Under the August 7, 1980 PSD regulations, "begin actual construction" is defined as follows:

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"Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change. 40 CFR 52.21(b)(11), 45 FR 52736. Emphasis added.

This definition is based upon Mr. Reich's December 18, 1978 memorandum, and was intended to embody in regulatory form the Agency's policy that site preparation activities do not trigger Federal PSD requirements.

In addition to defining "begin actual construction," the new PSD rules of

August 7, 1980, also define the term "construction." 40 CFR 52.21(b)(8). This definition does include "demolition." It was not adopted, however, to subject site preparation activities to permit requirements. Rather, one purpose of this inclusion was to enable emission reductions resulting from demolition at major sources occurring after January 6, 1975, to be added to the available PSD increment. See 45 FR 52719-20, August 7, 1980.

In conclusion, U.S. EPA's PSD regulations do not prohibit the site clearing activities described in your April 24, 1981 letter without a permit, since the actions do not fall within the Federal definition of "begin actual construction." This definition is consistent with Mr. Reich's December 18, 1978 memorandum and is not affected by the addition of the term "demolition" to the definition of "construction."

In addition, the nonattainment regulations at 40 CFR 51.18 would not prohibit the demolition in question. Unlike the PSD regulations, they do not contain a prohibition against construction without a permit which applies directly to specific projects. Rather, 40 CFR 51.18 describes the elements that a State program for nonattainment new source review must contain in order to warrant U.S. EPA approval. Even if 40 CFR 51.18 did apply directly to specific projects, however, it would still not prohibit the demolition in this case because demolition does not fall within the phrase "begin actual construction" for nonattainment, as well as PSD, purposes. Although 40 CFR 51.18 does contain a definition of "construction" which encompasses "demolition," U.S. EPA did not intend to render demolition a permissible event. The Agency included the definition of "construction" in an effort to be consistent with the PSD regulations.

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Please be advised that this determination may be considered final agency action on your request for a final determination. As such, it will be published in the Federal Register. Under Section 307(b)(1) of the Clean Air Act, judicial review of this action will be available only by the filing of a petition for review in the United States Circuit Court of Appeals for the appropriate circuit within 60 days of Federal Register publication.

Sincerely yours,

Valdas V. Adamkus
Acting Region Administrator

Attachment

cc: Dr. Howard A. Tanner, Director
Michigan Department of Natural Resources

William Achinger, Assistant Director
Division of Air Pollution Control
Wayne County Health Department

Robert Miller, Chief
Enforcement Section
Michigan Department of Natural Resources

bcc: Peter Wyckoff
OGC (A-133)

Richard Biondi
DSSE (EN-341)

Michael Trutna
RTP

Barbara Sidler/Margaret Corrigan
ORC

Jim Filippini
ORA

David Kee/Steve Rothblatt
AHMD

Ullrich/M. Smith/A. Smith

REGION V

DATE: January 5, 1979
SUBJECT: "Constructed" under PSD
FROM: James O. McDonald, Director
Enforcement Division
TO: See Below

The attached memorandum describes the type of activity which constitutes construction for the purpose of determining whether a new source has violated the permit requirements of 42 U.S.C. Section 7465. See 40 CFR Section 52.21(i)(1), 43 FR 26406. No activities of a permanent nature are permitted before a PSD permit is issued. These include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, etc. Certain limited activities will be permitted at the owner's or operator's risk. They include planning, ordering of equipment and materials, site clearing, grading, and on-site storage of equipment and materials.

The above departs from EPA's previous case-by-case approach and is intended to provide a uniform enforcement policy as well as alleviate resource attention to the issue.

James O. McDonald

Attachment

Addressees:
Director, Enforcement Division
Deputy Director, Enforcement Division
Chief, Air Enforcement Branch
Chief, Legal Section
Chief, Engineering Section
Chief, Compliance Section
Chief, Legal Support Section
Chief, Air Programs Branch
Director, Air & Hazardous
Materials Division
Chief, Air Surveillance Branch
All Air Attorneys
Special Assistant to the
Director