UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
OFFICE OF ENFORCEMENT

MEMORANDUM

DATE: June 19, 1980

SUBJECT: PSD and NSPS Applicability Determination for Guardian Industries' Flat Glass Plant in Corsicana, Texas

FROM: Director Division of Stationary Source Enforcement

TO: Diana Dutton, Director Enforcement Division, Region VI

I have reviewed your memoranda of March 11 and March 17, 1980, regarding Guardian Industries' (Guardian/the Company) claim that it "commenced construction" of a flat glass plant in Corsicana, Texas prior to [March 19, 1979, and is therefore not subject to the Prevention of Significant Deterioration (PSD) regulations of June 19, 1978. Guardian has also asserted, based on a "commenced construction" date, that the plant's furnace is not covered by the New Source Performance Standards (NSPS) for glass manufacturing facilities proposed on June 15, 1979. I agree with your conclusion that Guardian has failed to adequately demonstrate that it commenced construction of its Corsicana flat glass plant by March 19, 1979. Without an adequate showing of commencement of construction by that date Guardian is subject to the June, 1978 PSD regulations. I also agree with your conclusion regarding the applicability of NSPS to Guardian's glass manufacturing furnace. Because the Company has not adequately demonstrated that it entered into a contract for a continuous program of construction of the furnace by June 15, 1979, NSPS applies to the furnace.

PSD

Section 169(2) (A) of the Clean Air Act, the June 19, 1978, PSD regulations (40 CFR 52.21), the Strelow memoranda of December 18, 1975 and April 21, 1976, and Montana Power v. EPA, 13 ERC 1385 (9th Cir. 1979) provide definitions and establish criteria for determining whether a PSD source has "commenced construction." In general, EPA regulations allow the "grandfathering" or exemption of a source from the June 19, 1978, PSD review and permitting requirements only if, as of March 19, 1979, the source had either begun a continuous program of physical on-siteconstruction, entered

into binding agreements or contractual obligations for on-site construction which could not have been cancelled or modified without substantial loss or entered into binding agreements or contractual obligations for off-site construction which irrevocably committed the source to a specific site. In addition, the source must have obtained, by March 1, 1978, certain preconstruction permits necessary under the State Implementation Plan. "Construction" is defined in the PSD regulations as fabrication, erection, installation or modification of the source.

Assessment of "substantial loss" is a case-by-case analysis which involves calculating the loss a source would have sustained as of March 19, 1979, if contracts for continuous on-site construction were cancelled or modified. This loss is then compared to the total project cost. If the loss is greater than 10% of the total project cost, it is considered a substantial loss and the source is considered to have commenced construction for PSD grandfathering purposes. If the loss represents less than 10% of total project cost, it may or may not be considered a substantial loss depending on whether, as of March 19, 1979, the source had committed itself, financially and otherwise, to a particular site for a particular facility to the point that relocation was not possible and a delay or substantial modification would have been severely disruptive.

Assessment of "irrevocable commitment" is also a case-by-case analysis dependent upon whether, as of March 19, 1979, the Company had entered into contracts or binding agreements for the off-site construction of a source which, due to characteristics unique to the source or site, can only be located at a specific site. In these cases, the adequacy of the commitment is also dependent upon whether the site-specific contract or agreement could have been cancelled without a substantial loss under the foregoing analysis.

As outlined in your memoranda and attached documentation, Guardian had not begun what amounts to a continuous program of physical on-site construction by March 19, 1979. To avoid PSD requirements Guardian must rely on its State permit, issued on February 28, 1978, coupled with contractual obligations or binding agreements. Guardian points to the following expenditures and arrangements in support of its claim:

(1) 3400 hours spent by Guardian's Engineering Department during 1978 and the first quarter of 1979 preparing design criteria, specifications and drawings;

(2) various engineering authorizations including:

(a) June 1978, December 1979 and February 1979, arrangements with Efficient Engineering Company authorizing up to $140,000 in engineering services ($120,000 paid out as of March 19, 1979),

(b) June 1978, December 1978 and March 1979, arrangements with St. Clair Technical Services authorizing up to $185,000 in engineering services for process equipment ($146,000 paid out as of March 19, 1979),

(c.) a June 1978, arrangement with General Machine Design authorizing up to $25,000 in engineering services for process equipment ($14,000 paid out by March 19, 1979);

(3) a February 16, 1979, letter to Toledo Engineering Company, authorizing design of a glass melting furnace;

(4) purchase of land on September 7, 1978, for $205,081.05;

(5) a February 1979 arrangement, as evidenced by a letter to the Corsicana City Manager, to reimburse the City for installation of a sewer lift station and water line with reimbursement contingent on the development and installation of a revision to the City's water and sewer system;

(6) an April 24, 1978, arrangement with Southwestern Laboratories for soil borings, boundary surveys and other site work costing $14,700.

I have reviewed the documents submitted by Guardian regarding each of the above. I have the following suggestion concerning use of these items in finding the total project cost to loss ratio for substantial loss purposes and for determining the extent of Guardians commitment:

Item 1 - The 3400 hours of in-house design work cannot be counted in the ratio because Guardian's submission does not indicate that the work involved contracts for site-specific construction or contracts for continuous on-site construction. Further, no dollar amount or information which could be used to determine such an amount has been provided even if this in-house work could be shown to involve site-specific or on-site construction contracts.

Item 2 - The engineering agreements authorizing up to $350,000 in costs ($280,000 actually paid out by March 19, 1979), cannot be used unless the agreements are shown to be site-specific contracts for the construction of the source or contracts for continuous on-site construction of the source. The Guardian submission does not provide sufficient information in order to make these determinations.

Item 3 - The February 16, 1979, letter to Toledo Engineering regarding the glass furnace should not be used. As you point out, the letter represents, at best, an "authorization to proceed with design of one 500 ton/day regenerative flat glass furnace" rather than a contract for the construction of a site specific $11,000,000 furnace or a contract for continuous on-site construction of the furnace. Guardian has supplied no estimate of what would be an appropriate amount to use in determining exact liability to Toledo if Guardian had canceled or modified the February, 1979 arrangement as of March 19, 1979. Even if, for argument's sake, this letter does represent such a contract, I agree with your analysis of Guardian's probable liability as roughly one month of the usual contract measure of damages.

Item 4 - Because land can be resold or held for other purposes, a contract for its purchase is not an example of either a contract for the construction of a site-specific facility or for a contract for continuous on-site construction. Therefore, the land contract should not be used in determining substantial loss or irrevocable commitment.

Item 5 - The reimbursement arrangement with Corsicana, which was contingent on development and revision of the City's water systems and finalization of the plant plan, should not be used. Guardian has not provided information on what, if any, reimbursable costs were actually incurred by the City of Corsicana as of March 19, 1979, nor has it demonstrated any contractual obligation with the City as of that date.

Item 6 - Your memorandum discusses $14,000 in initial site work pursuant to a September 13, 1979, agreement with Metric Construction. Guardian's documentation, however, does not contain any indication of an initial site work agreement with Metric Construction. The Company's submission does contain a copy of an April 24, 1978, purchase order made out to Southwestern Laboratories authorizing $14,700 for field, laboratory and engineering reports and for boundary surveys. For the purposes of this memorandum I have assumed that the initial site work mentioned in your March 11, 1980, memorandum refers to the April 1978, Southwestern Laboratories purchase order. While this work was performed on-site, it can not be considered as a fabrication, erection, installation or modification of the source, and thus does not constitute a continuous program of physical on-site construction of the source. The work was also not performed pursuant to an off-site source construction contract. Thus, the $14,000 expenditure does not establish that continuous on-site construction had commenced, nor should it be used in determining substantial loss or irrevocable commitment.

Upon review of your memoranda and the attached documentation it appears that Guardian has not adequately demonstrated that the above items involved binding agreements or contractual obligations for construction of a site-specific facility or for continuous on-site construction of the source. Without more detailed information and documentation from Guardian regarding the Company's commitment to the Corsicana site, I must conclude that the Company had not commenced construction by March 19, 1979. For this reason, guardian is subject to the PSD regulations of June 1978.

I suggest that you issue a preliminary applicability determination providing a 30-day period during which Guardian would have the opportunity to present more detailed information on what items the Company feels should be included in determining whether it commenced construction by March 19, 1979. If Guardian does not submit additional materials by the end of the 30-period, I would issue a final determination at that time and would publish it in the Federal Register. If Guardian does submit additional information, it should be carefully evaluated prior to issuing a final determination. In any case, the final determination should be published in the Federal Register.

NSPS

The issue involved under NSPS is whether construction had commenced on the affected facility, the glass furnace, on or before June 15, 1979, the proposal date of the glass furnace standard. If construction commenced on or before June 15, the facility is not subject to NSPS.

For NSPS purposes, construction is defined under 40 CFR 60.2(g) as fabrication, erection, or installation of an affected facility. Commenced, under 60.2(i), 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 issue presented here is whether Guardian entered into contractual obligations to build a glass furnace prior to the proposal date of the glass furnace standard.

Evidence of entering into a binding contractual obligation can be established by proof of significant lost expenditures which would be directly attributable to the cancellation of a contract for construction or modification of the affected facility. Typically this evidence consists of a penalty in the nature of liquidated damages for contract breach. The Agency also has found that a letter of intent can establish a binding contractual obligation where cancellation of the order contemplated by the letter of intent would subject the prospective buyer to significant penalties.

Guardian's documents show that the purchase order for a glass furnace from Toledo Engineering was written October 25, 1979. But Guardian asserts its February 16, 1979, letter to Toledo Engineering as the contractual obligation which establishes the Company's commence construction date. The February 1979, letter, by itself, is difficult to accept as a binding contractual obligation for the construction of the furnace for several reasons. First, the letter expressly authorizes design of the furnace rather than its construction. Further, the letter does not appear to represent a final and binding agreement due to its references to a purchase order which will follow, a later finalization of contract details, and a firm price only after specifications and designs are finalized.

Guardian's February 22, 1980, letter to Diana Dutton, Director of the Region VI Enforcement Division, alleges that calculations, drawings, and studies were executed by Toledo in reliance on Guardian's February 1979 letter. However, these activities appear to relate to the design, and not to the construction, of the furnace. In the absence of clear data demonstrating that Guardian had entered into a contractual obligation for construction on or before June 15, 1979, I consider Guardian subject to NSPS requirements for glass manufacturing plants.

As I recommended in the PSD section of this memo, I would issue a preliminary applicability determination which would allow Guardian a 30-day period in which to show that a contractual obligation did exist on or prior to June 15, 1979.

If you would like to discuss this issue further, please contact Rich Biondi of my staff at 755-2564.

Edward E. Reich

cc: Michael James
Richard Rhoads
Don Goodwin

DATE: March 11, 1980

SUBJECT: PSD and NSPS Applicability Determinations for Guardian Industries' new float glass plant, Corsicana, Texas

FROM: Diana Dutton, Director Enforcement Division (6AE)

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

We received a letter dated November 6, 1979, from a law firm in North Carolina concerning the possible construction of a new float glass plant by Guardian Industries without a PSD permit. We sent a request for information to Guardian and received the response by letter dated January 2, 1980. Guardian claimed to have commenced construction prior to the proposed NSPS for the glass manufacturing industry, Subpart CC, 44 FR 34853, June 15, 1979. Guardian also claimed to have met the "grandfathering" provision for PSD, 40 CFR 52.21 (i) (3) by obtaining all preconstruction permits necessary under the SIP before March 1, 1978, by commencing construction before March 19, 1979, and did not discontinue construction for a period of 18 months or more.

Analysis for PSD Regulations

Guardian bases its claim to have commenced construction on its having so financially committed itself to a particular site for its glass plant that relocation or substantial modification would be severely disruptive and financially damaging to the company. As evidence of this commitment prior to March 19, 1979, Guardian gives:

(1) 3400 hours expended by the Guardian Engineering Department preparing design criteria, specifications and drawings for the plant,

(2) contracts for engineering services for $350,000,

(3) contract with Toledo Engineering and its construction subsidiary to initiate engineering and authorizing the ordering of long lead materials for the glass melting furnace for $11,000,000,

(4) purchase of plant site for $205,081.85,

(5) commitment to the City of Corsicana to reimburse the City for water and sewer systems for $105,000, and

(6) contracts for initial site work for $14,000.

In addition Guardian claims that its manner of doing business is somewhat different from other companies. Guardian claims that it does most of the engineering work in-house as opposed to other companies that let turnkey contracts. Only the glass furnace contract was a turnkey contract. Therefore, Guardian claims that its formal contracting point is later than most companies. Guardian says that each of its plants requires individual and specific design. Thus the commitment to the site is made prior to the letting of contracts.

Guardian points to its contract with Toledo as primary evidence of its commitment. Toledo has built each of Guardian's three glass furnaces. This contract was let without competitive bidding and was based on the long term relationship between the companies. The purchase order which was issued in October 25, 1979, is claimed to be just a formality. Guardian claims that Toledo initiated engineering, design, and procurement without a purchase order contract. Guardian has submitted evidence of the many discussions with Toledo establishing the design criteria of the furnace prior to the formal authorization. Guardian has obtained a letter from Toledo stating Toledo was of the opinion that Guardian had committed itself to the awarding of the contract to Toledo prior to the formal purchase order.

Moreover, Guardian claims that their commitment to this particular site should be judged in the overall plan of the company. Guardian is going to shut down an existing plant with the scheduled start up of the Corsicana plant in November, 1980. If the Corsicana plant is delayed, the company will not be able to fulfill its contracts and will suffer severe financial damage.

In our analysis of these facts we are guided by the Strelow memoranda of December 18, 1975, and April 21, 1976, the discussion in the preamble to the PSD regulations of June 19, 1978, and the decision in Montana Power Company v. EPA, 13 ERC 1385, 1979. For the purpose of this determination, the issue is whether Guardian has "entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator to undertake a program of construction of the source to be completed within a reasonable time." The crucial elements are that there be a contractual obligation and a contract that cannot be cancelled or modified without substantial loss. Contract law must answer the first and EPA 10% guideline must answer the second.

Items 4, 5, and 6 relate to on-site construction. The contract for on-site construction was not signed until September 13, 1979, with Metric Construction. The three listed items are not sufficient to demonstrate a continuous program of on-site construction or contracted on-site construction, nor has Guardian claimed this as the basis for commencement of construction.

Guardian's claim of grandfathering is based on having, in the words of the Ninth Circuit, "contracted for construction not amounting to a continuous program of on-site construction, but which nevertheless irrevocably committed the source to a specific site." Guardian is emphasizing the financial commitment and loss to the company if the plant does not go on line as planned and describing the contracts as just a formality. We are taking the position that the financial commitment must be evidenced by contractual obligation.

Guardian is saying that we should consider all the work it did before letting contracts as evidence of its financial commitment. Apparently it is true that the engineering staff completed detailed plans for the Corsicana site before letting contracts. However, we have rejected this factor in making our determination. There are no contracts involved so there are no legal obligations that can be cited as commitments. Allowing considerations of in-house work in this case would open the door to companies claiming some type of in-house work evidenced a financial commitment. Most importantly we believe we are bound by the statutory definition which may, unfortunately, work against a company like Guardian that does a great deal of preparatory in-house work prior to entering into contractual agreements.

We have the same view on Guardian's argument on the relation of this project to the shut down of another plant. We believe that we are bound to consider only the contractual obligations of the site in question in making our PSD applicability determination. If you have a different view on these two points, we would request formal guidance on how these factors should be considered.

Turning to the contractual obligations, we must decide if the company would suffer substantial loss based on a ratio of unavoidable losses to total project cost. We assume that all the engineering contracts can be counted in the contractual commitments category when computing the ratio of unavoidable losses to total project cost. These claims total $350,000. Using a total project cost of $51,000,000, we calculate that thesecontractual obligations for construction of the plant constitutes .686% of the project's cost and conclude that this sum is not substantial.

Under the court's analysis in the Montana Power Company case, it appears that a company must meet the irrevocable commitment or substantiality of loss test for contracts for on-site construction or for non-site work but the two cannot be added together to determine the substantial loss amount. Even if the two are added together, $350,000 plus $324,782, the ratio is only 1.32% of the project's cost and is not substantial.

This leads us to Guardian's claim that on February 16, 1979, it contracted with Toledo for construction of the glass melting furnace. The total cost as reflected in the purchase order of October 25, 1979, is $11,000,000. This amount would clearly demonstrate that Guardian had irrevocably committed to a specific site if the necessary elements are met by this agreement.

Is the letter of February 16, 1979, from Guardian to Toledo a binding agreement or contractual obligation? At this time, a year later, both parties are claiming there was an agreement.

The elements in question here are certainty of obligations and of price or compensation. A contract must be reasonably certain as to the obligations of the parties. Concerning the design of the furnace, it is clear that the design is not finalized. Previous discussions are cited as having taken place on the design. While there is a question on the certainty of the design requirements at this time, giving Guardian the benefit of interpretation, it is possible that Guardian could show from the discussions having taken place that the design was reasonably certain.

The crucial point here is lack of certainty of price compensation. The letter states that Guardian has taken under considerable information concerning fees but there is no indication of an agreement on price. In fact there is the explicit statement following the discussion of the fees that Guardian "will finalize the contract details at a later date." Clearly the contract details will include costs. Guardian has greatly emphasized the individuality of design of each of its glass plants. The furnace is by Guardian's own argument not a standard off-the-shelf item. Price then must be somewhat individual for each furnace and cannot be taken as a foregone conclusion or agreement.

Price or compensation is an essential ingredient and must be definite and certain or capable of being ascertained from the contract itself. As a general rule, an agreement which does not specify the price or any method for determining it, but which leaves the price for future determination and agreement of the parties, is not binding. (17 AM. Jur. 2d p. 423.)

Where a party is attempting to recover for work performance where price is not mentioned, a court will invoke the standard of reasonableness; and the fair value of the services or property is recoverable. Even if there is not a contract, a court will impose a constructive contract to prevent unjust enrichment. We are not in such a situation so the concerns are very different. Here the burden is on Guardian to demonstrate that all the requisites of a binding agreement have been fulfilled.

Where the material terms and conditions of a contract are not ascertainable and the negotiations have not reached the point where the agreement gives the parties an absolute right without further negotiations, no enforceable contract is created. (17 C.J.S. p. 696 note 1.) To be final, the agreement must extend to all the terms which the parties intend to introduce and material terms cannot be left for future settlement. (17 C.J.S. p. 697.) Simply put, where an essential element is left for future agreement, there is no contract.

Even considering the negotiations between Guardian and Toledo, we cannot conclude that there was a meeting of the minds on prices. Therefore, the letter fails to fulfill the requirements of a binding agreement.

If we assume for the sake of argument that the February 16 letter is a contract, what is it a contract for? The only authorization is to proceed with the design of the furnace. This contrasts with the purchase order of October 25, 1979, that authorized Toledo to "design and install complete and ready for operation" the furnace. We do not believe that this letter could be construed as doing more than authorizing the design of the furnace. There is just no basis for including the whole of the purchase order into the February 16, letter.

Given the limited authorization of the February 16 letter, what would the loss to Guardian be if Guardian had cancelled whatever agreement it had with Toledo on March 19, 1979. Certainly not $11,000,000. Even in Toledo's letter of February 21, 1980, which obviously was written at Guardians request, Toledo stated that it undertook the necessary studies, cost estimates and preliminary engineering prior to the purchase order in reliance upon Guardian's commitment. These actions taken by Toledo were limited in nature and did not encompass the scope of the purchase order. On March 19, 1979, Guardian would have been liable for only the costs Toledoinncurred relating to design work for that one month. These costs clearly would not approach several million dollars that would be necessary to demonstrate the substantial loss test had been met.

We believe that Guardian did not have a contractual obligation for the furnace which is the major piece of equipment at the plant until October 25, 1979. Even if there were a contract based on the February 16, 1979 letter, we believe that it would not enable Guardian to meet the irrevocable commitment test because of the limited authorization. Therefore, we conclude that Guardian did not commence construction by March 19, 1979, and is subject to review under the PSD regulations.

NSPS Regulations

The NSPS determination is somewhat easier. The questions to answer are when did the continuous on-site construction begin and when was the contractual obligation entered into for the piece of equipment regulated. The glass furnace is the equipment in question. For the reasons given above, we conclude that the earliest date for the contract is the October 25, 1979, purchase order and for the continuous on-site construction would be the Metric contract of September 13, 1979. Both dates are after the publication of the proposed NSPS for glass furnaces. Therefore, Guardian is subject to the New Source Performance Standards.

We ask your concurrence on these determinations. If Guardian is subject to PSD, Guardian is in violation of the regulations by beginning on-site construction without a permit. We will publish a Federal Register Notice of our determination for purposes of a Section 307 judicial review and issue a Notice of Violation to Guardian. We request your action as soon as possible. Delay on our part will only be detrimental to Guardian.

Enclosure a/s