

**Sierra Club Petition**

**Exhibit 16**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

DATE: August 20, 1979

SUBJECT: Permitting Multi-Phase Construction Under Prevention of Significant Deterioration Regulations

FROM: Director Division of Stationary Source Enforcement

TO: Diana Dutton, Director Enforcement Division - Region VI

I have received your memo of July 2, 1979, in which you specified three conditions which, as a matter of Region VI policy, must be met before a multi-phase source can be PSD permitted. The conditions specified in your memo were the following:

1. The phases are demonstrated by the applicant to be mutually dependent.
2. The affected phases have received all applicable State permits.
3. The plans for all phases are certain and well-defined.

While requiring multi-phase sources to meet, each of these requirements might be effective in preventing sources from reserving increment, the PSD regulations would not support Conditions 1 and 2.

The preamble to the June 19, 1978 regulations, is clear in its application of the phased permitting provisions to sources consisting of mutually independent facilities. In fact, the inclusion of phased permitting provisions was in large part prompted by the need to address phased construction of boilers in the electric utility industry. The U.S. Court of Appeals for the D.C. Circuit, in their June 18, 1979 summary decision, upheld EPA's phased permitting program and specifically mentioned the utility industry as an example of the program's application. As footnote 6 in the PSD preamble states, the boilers at a power plant are considered to be mutually independent facilities.

Condition 2 subjects multi-phase sources to a more stringent requirement than that which applies to single-phase sources and, like condition 1, has no basis in the regulations. Section 52.21(b)(8) of the regulations requires that sources obtain State permits (and meet certain other requirements) within 18 months of PSD permit issuance. There is no indication in the regulations or the preamble that phased projects should obtain State permits for each phase prior to receiving a PSD permit.

The preamble discussion on page 26396 recognizes the need to limit the conditions under which phased permits may be issued and details the criteria which must be met. Primarily, the plans for each phase of the project must be certain and well defined -- a criterion which was specified in your memo. In addition, the Administrator should specify at the time the permit is issued that BACT for the later phases may be reassessed prior to commencement of construction. Construction of each phase must commence within 18 months of the date specified in the permit. In this way, the Administrator would issue permits only to sources with well planned phases and would invalidate permits if construction of the later phases was delayed beyond a reasonable time period.

I believe the policy you have proposed for issuing phased permits goes beyond the scope of the regulations as they are now written. To implement such a policy would certainly require a regulatory change.

Should you wish to discuss this issue with my staff, please contact Libby Scopino at 755-2564.

Edward E. Reich

cc: Jim Weigold  
Peter Wyckoff  
Richard Rhoads, OAQPS  
Enforcement Division Directors  
Regions 1-5 & 7-10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

DATE: July 2, 1979

SUBJECT: Permitting Multi-Phase Construction Under Prevention of Significant Deterioration Regulations

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

TO: Ed Reich Director, Division of Stationary Source Enforcement (EN-341)

Current regulations for the Prevention of Significant Deterioration (PSD) of air quality do not clearly address how to process applications for PSD permits for multi-phase projects. In some areas of this Region we have received PSD permit applications from sources for large, multi-phased projects which can have the net effect of consuming nearly all the ambient air quality increment. Unfortunately, future phases though often well defined, may never be built. By permitting such sources we are in effect reserving air quality increment and limiting other industrial growth in the area. This also eliminates any opportunity for State or local officials to participate in a decision which can impact on areas potential for economic development.

This Regional Office recently conducting a public hearing on a proposed PSD permit for just such a multi-phase project involving a petrochemical complex. The comments received at that hearing have caused us to more clearly define the procedure we will go through in order to issue a PSD permit for a multi-phase project. We have decided to issue permits for two or more phases of a multi-phase project whenever the following two conditions are met:

1. The phases are demonstrated by the applicant to be mutually dependent. We will consider such factors as simultaneous start up and concurrent operation to be indicative of mutual dependence.
2. The affected phases have received all applicable State permits.
3. The plans for all phases after the first phase are certain and well defined.

We feel that by meeting these two conditions we will be able to issue a permit in those cases where it is actually required and yet avoid receiving a large number of applications submitted simply to reserve portions of the PSD increment. We think this policy will ensure that independent facilities are forced to compete for the air quality increment fairly. We also feel that by requiring the state permit process to be fulfilled, we are not foreclosing any options the State may have to partition the remaining increment in some other manner should they have any regulations addressing this.

There has been some concern over legal defense of this policy should it be challenged by a permittee. However we feel this approach, while admittedly a conservative policy, is the proper programmatic decision for EPA while it is in the "caretaker" role prior to delegation of PSD to the States.

We recommend this policy be adopted nationwide.

cc: Walter Barber, OAQPS  
Enforcement Division Directors, Regions 1-5, 7-10  
Richard Rhoades, OAQPS

## NEW SOURCE ENFORCEMENT DISCUSSION TOPICS

TO: Ed Reich, Director, DSSE

cc John Rasnic (same Division)  
Their telephone # 755 2550

1. Phased Construction - DSSE's memorandum of August 20 disagreed with two aspects of the Region's policy for granting phased construction permits. There are now 5 phased construction permits pending and 1 permit already issued which would be affected by this in Region 6; each is, or is likely to be, highly controversial. Before we change the permits we'd like to resolve the following issues:
  - a. Need for State Permits - We have been requiring issuance of State permits prior to issuance of EPA's permit based on 40 CFR 52.21(b)(19) -- DSSE's memo cites 40 CFR 52.21(b)(8) as the basis for not requiring prior issuance of State permits.
  - b. Mutual Dependence - We have cited the preamble provisions requiring mutual dependence for grandfathering from increment consumption and the preamble provision for projects as being clear and well defined to require phased construction permits to apply only to mutually dependent steps in a project. DSSE also cites the preamble (example of a power plant permit) as a clear message that phased construction permits are not limited to mutually dependent projects.
2. PSD Enforcement Actions - We, as other Regions, are unclear of the steps to take on enforcement of preconstruction requirements for PSD. We understand policy is (or has been) developed in this area:
  - a. Should the PSD permitting process proceed independently of any violations detected? (we believe it should)
  - b. If permitting does proceed independently, would issuance of a permit less than 30 days after the NOV is issued cancel the enforcement action?
  - c. Should penalties be calculated from the date the violation was known to commence? Or from 30 days after the NOV was issued?
3. Marine Operations - On 8/1/79 we sent a draft permit for vessels to DSSE for comment. Issues center on making terminal liable for emission from ships it doesn't own (the only way we could figure out how to make the permit enforceable). Public hearings will be held 1st week of October for permit in question; have received adverse comments from another terminal with similar draft comments. DSSE's opinion?

4. Enforceability of State Permits - In March 1979 we asked that a criteria we developed defining minimum requirements for enforceable permits be reviewed for national guidance. We have used the criteria to evaluate the enforceability of our PSD permits and have required our states to follow it as a Section 105 grant condition. Companies are complaining that they don't receive the same type of permits from other Regions and at least one of our states has objected to being treated differently than states in other Regions. Is there any problem with the criteria?
5. State Operating Permits - In your recent memorandum on this subject you indicated that preconstruction permits were enforceable by EPA but operating permits were not. One of our states issues operating permits after preconstruction permits that void the preconstruction permit limitations. Furthermore, the operating permit does not establish emission limits and many of the sources permitted are not covered by general SIP requirements. Does this mean that the SIP is invalid?
6. Other Issues - There's a number of other problems that we need to review with your staff, including:
  - availability of contractor funds for FY80 PSD, litigations, and investigations.
  - use of opacity requirements in our permits (subject of Section 307 suit).
  - use of continuous monitoring in our permits as the way of determining compliance.

[Handwritten Note]

Ed - John, This is an outline of the topics I'd like to touch on in our meeting on Thursday. Cal

## PHASED PERMITTING

### I. Obtain PSD permit

- A. Commence construction within 18 months including State permit issuance.  
If obtaining a PSD permit required first getting a State permit, then "commence construction" would not have to include obtaining a State permit.
- B. If all sources were meant to get State permits prior to PSD permits, the preamble would not have discussed offset sources and their req. to obtain State permit first.

[Handwritten Note]

1. Sources that are subject under current regs. but not under proposed -- they want to construct
2. Section 105 criteria

October 3: Public hearing on refineries