

**Petitioner's Exhibit 18**



## Correspondence



August 25, 1999  
William Baumann, Chief  
Combustion and Forest Products Section  
Wisconsin Department of Natural Resources  
101 South Webster Street  
P.O. Box 7921  
Madison, Wisconsin 53707-7921

Dear Mr. Baumann;

This letter is in reply to your May 26, 1999, letter regarding the Oscar Mayer Foods facility in Madison, Wisconsin. You explain in your letter that Madison Gas & Electric (MGE) has proposed to construct six electric generating units on Oscar Mayer's property and that these units will have a dual purpose: (1) to provide backup electrical generating capacity to the Oscar Mayer facility; and (2) to provide surplus electricity to the MGE system. You have asked whether we would consider the generating units to be Oscar Mayer's "support facility" based on the United States Environmental Protection Agency's (USEPA) preamble to the Final Rule for Part 52 published in the August 7, 1980, **Federal Register** (45 FR 52695). According to that preamble, if the generators do constitute Oscar Mayer's support facility, then the generators and the Oscar Mayer facility may be one "stationary source" within the meaning of 40 CFR Part 52. We understand that, at least on this point, Wisconsin's Prevention of Significant Deterioration (PSD) regulations are nearly identical to the Federal PSD rule. In our discussion, we refer to Part 52 as we would if we were the permitting authority. Because your program is nearly identical to the Federal program under Part 52, we recommend that you look to the same guidance in making your analysis under Part 51 and your PSD program.

Part 52 defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act" and further defines "building, structure, facility or installation" as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)." 40 CFR Part 52.21(b)(5) and (6). The generators MGE proposes to construct will be contiguous or adjacent to the Oscar Mayer facility. Thus, if the generators and the Oscar Mayer facility also belong to the same industrial grouping and are under common control, then they constitute one stationary source under Part 52.

Pollutant-emitting activities are considered to be part of the same industrial grouping if they have the same first two digit SIC code. 40 CFR Part 52.21(b)(6). In addition, a support facility is considered to be part of the same industrial grouping as that of the primary facility it supports even if the support facility has a different two digit SIC code. One source classification encompasses both primary and support facilities, even when the latter includes units with a different two digit SIC code. Support facilities are typically those which convey, store, or

otherwise assist in the production of the principal product." (45 FR 52695) (August 7, 1980).

USEPA has provided a great deal of guidance to States and sources regarding support activities since 1980, in which the Agency has emphasized that determinations of this nature are very fact-specific. USEPA provided a detailed summary of the Agency's existing policy in a recent public draft of a proposed rulemaking. See Draft preamble to the Part 70 revisions (notice of availability published June 3, 1997, (62 FR 30289)). In short, where more than 50% of the output or services provided by one facility is dedicated to another facility that it supports, then a support facility relationship is presumed to exist. Even where this 50% test is not met, however, other factors may lead the permitting authority to make a support facility determination. Support facility determinations can depend upon a number of financial, functional, contractual, and/or other legal factors. These include, but are not limited to: (1) the degree to which the supporting activity receives materials or services from the primary activity (which indicates a mutually beneficial arrangement between the primary and secondary activities); (2) the degree to which the primary activity exerts control over the support activity's operations; (3) the nature of any contractual arrangements between the facilities; and (4) the reasons for the presence of the support activity on the same site as the primary activity (e.g., whether the support activity would exist at that site but for the primary activity). Where these criteria indicate a support relationship, permitting authorities may conclude that a support activity contributing more or less than 50% of its output may be classified as a support facility and aggregated with the facility it supports as part of a single source.

One could argue that the generators at issue here will serve as a support facility to Oscar Mayer. Although it is unlikely that 50% of their output will go to Oscar Mayer, the generators would not be at this location but for the presence of Oscar Mayer and its potential need for backup power in the event of an outage. Also, the contract between Oscar Mayer and MGE provides that when Oscar Mayer needs back-up power due to an outage, the generators will automatically send power to Oscar Mayer, regardless of whether or not MGE also needs power from these generators.

However, even if the facts here establish a support relationship, we are concerned that the Oscar Mayer facility and the six generators at issue may not be under "common control" so as to make them one stationary source under Part 52. In an August 2, 1996, memorandum regarding major source determinations for military installations (which can be located at the USEPA Internet website: <http://www.epa.gov/ttn/oarpg/t5/memoranda/dodguid.wpd>), John S. Seitz, Director of USEPA's Office of Air Quality Planning and Standards, indicated that a common control determination must focus on who has the power to manage the pollutant-emitting activities of the facilities at issue, including the power to make or veto decisions to implement major emission-control measures or to influence production levels or compliance with environmental regulations. Oscar Mayer "controls" the operation of the generators only to the extent that, in the event of an outage, Oscar Mayer would be entitled to 100 percent of the output until normal power distribution is restored. According to their contract, if an outage occurs and Oscar Mayer is receiving no electricity from the main grid, the backup generating system would automatically come on-line to supply electricity to Oscar Mayer. However, Oscar Mayer has no ownership interest in the generators and nothing in its contract with the owner, MGE, indicates that Oscar Mayer will have any power to manage the generators' pollutant-emitting activities or to make any decisions relating to emission control or compliance with environmental regulations.

The Seitz memo also indicates that where, as here, a contract provides that less than 100% of output will go to the primary activity, the permitting authority should consider the following

factors: (1) how integral the contracted activity is to the primary entity's operations; (2) the percentage of output that goes to the primary entity; (3) whether the activity must be on site to perform its service or produce its product; (4) whether the activity would remain on site if the primary entity no longer received the output; and (5) the terms of the contract between the primary and secondary entities. Although, in the event of an outage, the backup power from these generators would be crucial to Oscar Mayer's operations, it is not likely that the power provided during such outages will exceed 10% of total output. Also, although the generators probably would not be on the Oscar Mayer facility but for the presence of Oscar Mayer, these generators need not be on the Oscar Mayer site in order to fulfill their intended dual purposes. They could be located elsewhere and serve the same purposes.

As the permitting authority, you must ultimately determine whether the Oscar Mayer facility and these generators constitute one stationary source for purposes of implementing your PSD program. However, if we were making this determination based upon our own PSD regulations and our guidance as discussed above, we would find, based on the specific facts which have been presented to us, that the Oscar Mayer facility and the six generators to be located on the Oscar Mayer property are not under "common control", and, therefore, USEPA would not consider them one stationary source within the meaning of Parts 51, 52 and 70.

If you have any further questions, please feel free to contact me or contact Constantine Blathras at (312) 886-0671.

Sincerely yours,

/s/

Robert B. Miller, Chief  
Permits and Grants Section



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