UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

IN THE MATTER OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR BEKER PHOSPHATE CORPORATION DOCKET NO. AH FL 507 N	RECOMMENDED INITIAL DECISION

This decision arises from an adjudicatory hearing held pursuant to 40 C.F.R. §125.36 on the question of whether or not the proposed Beker Phosphate Corporation mine and beneficiation facility is a "new source" within the meaning of Section 306 of P.L. 92-500.

Administrative Background

On May 16, 1975, Beker Phosphate Corporation, a subsidiary of Beker Industries Corporation (Beker) filed with the Region IV offices of the Environmental Protection Agency (E.P.A.) an application for an NPDES permit for its proposed phosphate mine and beneficiation facility to be located in Manatee County, Florida. This filing also requested that the facility be found to be an "existing source" within the context of §306 of P.L. 92-500 (Act).

Following an extended exchange of letters between E.P.A., Beker and officials of Sarasota County, Florida, who were interested in the proposed facility, the Regional Administrator of Region IV E.P.A. issued his initial determination that the facility was not a new source.

Following publication of this determination on April 26, 1976, Sarasota County filed, on May 18, 1976, a request for an adjudicatory hearing with respect to this decision. This request was granted and, on July 8, 1976, a pre-hearing conference was held in Atlanta, Georgia to discuss the issues and set a date for the hearing. The Presiding Officer upon discovering that no permit had, in fact, been issued for the facility and, being further advised that the State of Florida had not yet made a final decision on the issuance of the permit, postponed any further proceedings on the matter pending a final resolution of the permit question.

While this question was being addressed by the State of Florida, the Presiding Officer (Judge Yost) certified several legal issues to the Office of General Counsel for resolution. [See 40 C.F.R. §125.36(m).] By Decision dated October 8, 1976, the E.P.A. General Counsel stated, inter alia, that for purposes of determining whether or not Beker is a new source, they must have commenced construction, as that term is defined in §306, prior to June 10, 1976. That is the date that E.P.A. published proposed standards of performance for the mining industry subcategory which includes the Beker facility.

The relevance of these factors is explained by §306(a)(2) of the Act, which states that:

> "The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section."

During this time, the State of Florida resolved the permit question and, accordingly, on March 21, 1977, the E.P.A. issued to Beker NPDES Permit No. FL0032522, reflecting the Regional Administrator's final determination that the Beker facility was an existing source. On April 1, 1977, Sarasota County filed another request for an adjudicatory hearing on the issuance of the permit. This request was granted on May 8, 1977 by public notice. Pursuant to this notice, the following requested and were granted party status in the hearing: Beker, Longboat Key Garden Club, Ms. Mary B. Greer and Save Our Bays Association, Inc. On June 27, 1977, the Regional Administrator ordered the consolidation of the two hearings and designated the case as AH FL 507 N.

Following a second pre-hearing conference, the matter was set for trial and heard on November 28-30, 1977 at the Sarasota County Court House, Sarasota, Florida.

Pursuant to Judge Yost's order, the parties filed on January 31, 1978, proposed findings of fact, conclusions of law and briefs in support thereof. Leave to file reply briefs by February 27, 1978 was also granted.

The sole issue raised by the parties was whether the Regional Administrator erred in his determination that Beker was an existing source within the meaning of §306 of the Act.

By order dated June 27, 1977, Jack E. Ravan, then Regional Administrator, delegated pursuant to 40 C.F.R. §125.36(1)(1) that Judge Yost prepare a recommended initial decision which will be reviewed by him and adopted,

amended or modified. John C. White, Mr. Ravan's successor, by order dated November 8, 1977, affirmed the designation with the same terms and conditions.

Factual Setting

In July 1973, after evaluating several phosphate rock sources at a number of alternative locations along the southeastern seaboard, Beker firmly committed itself to the acquisition and development of the Manatee County phosphate rock deposit. In September 1973, Beker began acquiring the Manatee tract. By mid-August 1975, Beker had acquired the entire Manatee property at a cost of $15,342,407.

Beginning in August 1973, Beker retained numerous technical consultants to: (a) conduct additional geological and metallurgical studies necessary to acquire complete mining prospect data for the Manatee tract; (b) develop supporting technical and environmental data for all of the required permit applications; (c) generate additional metallurgical and hydrology data essential for the process design of the phosphate rock beneficiation plant; and (d) provide preliminary cost information and design data for two hydraulic mining dredges.

Beginning in January 1974, Beker employed a number of mine engineering consultants to: (a) complete the process design for the beneficiation plant; (b) prepare the technical data for the construction bid solicitations for the plant; and (c) determine the special operating requirements and technical specifications for certain major plant equipment items.

Prior to June 10, 1975, Beker's expenditures in connection with the services performed by the consultants and engineers amounted to $822,369.43.

In October 1973, Beker began the process of obtaining all necessary construction and operating permits and other authorizations from the appropriate county, state and Federal administrative agencies. In January 1975, the Manatee Board of County Commissioners issued the orders, required under applicable law, for approval of the proposed facility. On January 26, 1977, after extensive administrative proceedings on the matter, the order of the Florida Department of Environmental Regulations granting a construction permit for the Manatee project was upheld by the Florida Environmental Regulations Commission. On May 16, 1975, Beker filed the NPDES permit application which subsequently led to the present proceedings. In all, for a period beginning 32 months prior to June 10, 1976, Beker was pursuing the necessary local, state and Federal permits and authorizations for the Manatee County rock phosphate beneficiation facility.

In July 1974, Beker employed a contractor to drill and case one production well and six associated monitor wells at the plant site. The wells, varying in depth from 200 to 1,200 feet, were completed in November 1974, at a cost of $152,853.94. The production well was initially used to perform certain hydrological tests. It was designed and constructed in accordance with the then applicable requirements for industrial wells, and is intended to provide process water for the phosphate rock beneficiation

plant. The monitor wells were utilized for initial hydrologic testing; during the life of the facility they will be utilized to insure that production well withdrawals will have no detrimental impacts on local ground water conditions.

In May 1975, Beker engaged a contractor to: (a) build more than one mile of access road and associated ditches and outfalls between the plant site and existing roadways, and (b) conduct clearing operations on the plant site and certain other areas of the Manatee property. This work was completed prior to June 10, 1976 at a cost of $26,868.13.

In July 1975, Beker employed an engineering consultant to perform a plant site soil investigation and to develop the foundation design data for the beneficiation plant. This work was completed in October 1975 at a cost of $43,719.75.

In January 1974, engineering consultants employed by Beker began work on the process design for the beneficiation plant. By April 1975, the process design was essentially completed. Preparation of the plant construction bid solicitation was completed immediately thereafter. On May 8, 1975, the engineering bid solicitation was delivered to a number of qualified engineering and construction companies.

By late May 1975, Beker had selected Jacobs Constructors, Inc., a subsidiary of Jacobs Engineering Company. On June 9, 1975, Beker executed a written contractual agreement with Jacobs (the Jacobs Agreement) for the detail engineering, procurement and construction of the Manatee County phosphate rock beneficiation plant.

Prior to June 10, 1976, over 25,000 manhours of engineering work were performed under the Jacobs Agreement. Total costs of $619,671.43 were incurred and paid by Beker for such work prior to June 10, 1976.

From March through June 1975, as the plant process design became more definitive, Beker conducted extensive negotiations with the suppliers and manufacturers of certain major plant equipment items. The equipment items in question included: (a) the log washers; (b) the vibrating screens; (c) the flotation feed conditioners, flotation machines and twin screw classifiers; and (d) the slimes thickener. The negotiations initially concerned such matters as equipment operating requirements, sizing and other technical specifications. Thereafter, Beker issued bid solicitations to selected manufacturers and suppliers for these major plant equipment items. Beker received manufacturers' equipment bid proposals in response to the foregoing solicitations and completed its evaluation of these proposals by early June 1975.

In order to obtain certified engineering drawings for each of these major equipment items, it was necessary for Beker to execute binding purchase order contracts with each of the manufacturers of the respective items. Detailed engineering drawings of each of the major equipment items prepared and certified by the manufacturers were necessary in order to proceed with the detailed engineering and construction of the beneficiation plant.

On June 17, 1975, Beker issued Purchase Order No. FLA-0001 to the H. F. Mason Equipment Corporation (Mason) for delivery of four Eagle paddle-type log washers, to be constructed in accordance with detailed engineering specifications and operating requirements furnished by Beker.

Prior to June 10, 1976, Beker fully performed its obligations under the purchase order contract for the procurement of the Eagle log washers. Also prior to that date, Beker made payments of $148,241.60 under the contract.

On June 17, 1975, Beker issued Purchase Order No. FLA-0002 for the construction of eight 8 x 16-foot vibrating screens, four 8 x 20-foot vibrating screens, and associated components and spares to be constructed by the Simplicity Engineering Company in accordance with detailed engineering specifications furnished by Beker.

Prior to June 10, 1976, Beker's payments to Simplicity Engineering Company for performance rendered under the contract amounted to $170,568.00, or 68 percent of the total contract price.

On June 18, 1975, Beker issued Purchase Order No. FLA-0003 to the WEMCO Division of the Envirotech Corporation for the construction of: (a) flotation machines, (b) flotation feed conditioner assemblies, and (c) twin screw classifiers, to be constructed in accordance with detailed engineering specifications furnished by Beker.

Prior to June 10, 1976, Beker's payments to WEMCO for performance rendered under the purchase order contract amounted to $565,736.80, or approximately 60 percent of the total contract price.

On July 31, 1975, in accordance with Article II, Section 2.1 of the Jacobs Agreement, Jacobs Constructors, Inc. issued Purchase Order No. 28-1365-08-P0401-001 to Dorr-Oliver, Inc. for the construction of a 500-foot diameter slimes thickener in accordance with detailed engineering specifications furnished by Jacobs. Under Article III of the Jacobs Agreement, Beker was fully liable for all costs incurred in the performance of the foregoing purchase order contract.

Prior to June 10, 1976, Beker's payments to Dorr-Oliver for performance rendered under the purchase order contract amounted to $47,400.00, or 20 percent of the total contract price.

In late November 1975, Mr. Erol Beker, Chief Executive Officer of Beker Industries Corporation, directed Mr. Bartow, Vice President and Project Manager, to suspend certain work activities in furtherance of the proposed mine. [IV Tr. 18-19; V Tr. 67.]

Mr. Bartow carried out the instructions of Mr. Beker and by February 1, 1976 these work activities in furtherance of the proposed mine had been brought to a halt. [IV Tr. 21.]

Jacobs and Pridgen ceased all work under the Jacobs Agreement as of January 20, 1976. [I Tr. 92, 95.] At the time of cessation, only 20 percent of the engineering design work was accomplished. [I Tr. 103.]

Beker and Jacobs issued stop orders to WEMCO, Simplicity and Dorr-Oliver in January and February of 1976 directing the vendors to cease all manufacturing and other activities under the previously issued pur-

chase orders. [Beker Exh. No. 14-2-13, -17, -21.] Beker made payments to these vendors in the amount of $781,000.00. None of this equipment was completed or delivered to Beker. [Beker Exh. No. 14.]

A fourth purchase order was issued to H. F. Mason for logwashers. The vendor had completed fabrication when the project was suspended. Beker paid Mason $148,000.00 and the logwashers are in Mason's storage yard. [Beker Exh. No. 14.]

Statutory and Regulatory Setting

This case, as indicated above, is concerned with whether or not the Beker facility is a new source, as defined in §306 of the Act. This determination is important for two reasons: (1) new sources must meet more stringent effluent limitations than a similar "existing" facility, and (2) new sources are subject to the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq. The application of NEPA to a facility means that an Environmental Impact Statement (E.I.S.) must be prepared, which statement must address all of the environmental impacts of a planned activity, discuss alternative courses of action, and make a final conclusion as to overall environmental propriety of the activity. In some cases, the conclusions of an E.I.S. is to recommend against the continuation of a particular undertaking.

§306 of the Act provides, in pertinent part, as follows:

> "(a)(1) The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable

through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

"(a)(2) The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section,

"(a)(3) The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

"(a)(4) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source.

"(a)(5) The term 'construction' means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises which such equipment will be used, including preparation work at such premises."

On June 10, 1976, pursuant to §306(b)(1(B) of the Act, the Administrator issued a number of proopsed new source performance standards for the mineral, mining and processing category, including the phosphate rock subcategory. [41 Fed. Reg. 23561, 23564.] These standards were promulgated in final form on July 12, 1977. Thus, June 10, 1976 is the governing date for determining whether or not Beker is a new source.

Additional guidance on this issue is provided in Regulations promulgated by the Agency on January 11, 1977 entitled, "New Source NPDES Permits, Preparation of Environmental Impact Statements,"

40 C.F.R. Part VI. Appendix "A" of these regulations entitled, "Guidance on Determining a New Source," is particularly helpful and reads, in part, as follows:

> "(1) A source should be considered a new source provided that at the time of proposal of the applicable new source standard of performance, there has not been any:
>
> "(i) Significant site preparation work, such as major clearing or excavation; or
>
> "(ii) Placement, assembly, or installation of unique facilities or equipment at the premises where such facilities or equipment will be used; or
>
> "(iii) Contractual obligation to purchase such unique facilities or equipment. Facilities and equipment shall include only the major items listed below, provided that the value of such items represents a substantial commitment to construct the facility:
>
> (a) structures; or
> (b) structural materials; or
> (c) machinery; or
> (d) process equipment; or
> (e) construction equipment.
>
> "(iv) Contractual obligation with a firm to design, engineer and erect a completed facility (i.e., a 'turnkey' plant)."

In the context of all of the above, we are faced with determining--to paraphrase Senator Baker in the Watergate hearings--"What did Beker do and when did they do it?"

The Regional Administrator's Final Determination

The hearing on this matter was to contest the Regional Administrator's determination, issued on March 26, 1976, which held that the Beker facility was an "existing" source, or to put it another way, that it was not a "new" source.

Although the request for an adjudicatory hearing set forth several issues, the parties agreed that the only real issue raised was the existing/new source issue. Under the Rules of Practice governing adjudicatory hearings involving NPDES Permits [40 C.F.R. §125.36], the person requesting the hearing have the burden of proof and of going forward with the evidence to demonstrate that the Agency's determination was in error. Thus, the burden of showing that the Beker facility is a new source falls upon Sarasota County and the other intervening persons and associations.

The determination, after discussing the applicable law, regulations and legislative intent, addressed the three actions taken by Beker which in Beker's judgement made them an existing source. They were: (1) site preparation, (2) execution of a "turnkey" contract, and (3) contracts for the purchase of unique equipment.

The determination concluded that: (1) the site preparation activities were not sufficient to render the facility an existing source, (2) no decision was necessary on whether or not the Jacobs Agreement constituted a "turnkey" contract, and (3) the contracts for the purchase of certain major equipment items were sufficient under the law to constitute "contractual obligation(s) to purchase such unique facilities or equipment", and, on that basis, the Regional Administrator determined that Beker was an existing source,

Discussion and Conclusion

The record in this case, consisting of the transcript of testimony and exhibits filed by the parties and admitted into evidence, produced only one major body of information not in the possession of the Agency at the time the Initial Determination of the Regional Administrator was issued.

That body of information concerns the fact that prior to June 10, 1976, and prior to the issuance of the determination, Beker issued the above-mentioned purchase orders which, in essence, stopped all further work on the major process equipment components of the plant.

Sarasota contends that the issuance of these stop orders effectively terminated any contractual obligations which Beker may have had prior thereto. Sarasota further contends that the failure of Beker to notify EPA that it had issued these "stop orders" amounted to the failure to "disclose all relevant facts" [Sarasota brief p. 15] which would authorize the Agency, under Section 402 of the Act, to revoke the determination and the permit.

Beker's reply to these contentions is that: (1) E.P.A. did not ask for the information and, therefore, Beker had no obligation to disclose it, and (2) that the issuance of the "stop orders" was not relevant to a determination of the status of the plant since the orders had no legal effect on Beker's obligations under the contract.

Let me first address the failure of Beker to advise the Regional Office of its issuance of the stop orders. Beker argues that the information was not requested and, therefore, nor forthcoming on the theory that such action

did not affect its contractual obligations. I am not impressed by this position. First, how could the Agency ask for the stop orders when they didn't know of their existence? Secondly, the Agency, not the permittee, should rule on the legal effect of the orders and should have had the opportunity to do so prior to the issuance of the determination. Having said that, what is the effect of such non-disclosure? I do not share Sarasota's feeling that such non-disclosure invalidates the determination or the permit. Although such failure reflects poor judgement, I am of the opinion that such omission does not rise to the level of a willful failure to disclose pertinent information such as would justify the sanctions proposed by Sarasota.

The Legal Effect of the Stop Orders

It is Sarasota County's position that the issuance of the stop orders constituted the abandonment of the project by Beker and amounted to a relieving of Beker of any further responsibilities or obligations under the Jacobs Agreement. As stated in their brief and reiterated in their reply brief, Sarasota states that:

> "The legal effect of the stop orders must be established under controlling principals of the contract law to determine whether binding contractual obligations existed on the cutoff date. As explained in the Sarasota initial brief, the issuance of such unauthorized stop orders by Beker constituted a material breech of contract which extinguished all further obligations of the vendors to perform several months prior to the cutoff date. Consequently, under the law of contracts, the vendors were not under a duty to fabricate and sell equipment to Beker in accordance with the terms of the original orders as of June 10, 1976, and those purchase orders could not be construed as contractual obligations in satisfaction of Section 306 of the FWPCA."

In its reply brief on page 5, Beker argues that:

> "Sarasota's argument misapprehends the case law principally because it views the transaction from the wrong side. Section 306(a)(5) defines construction to include: 'Contractual obligations to purchase...facilities or equipment...at the premises where such equipment will be used.' The statute therefore looks to the obligations of the purchaser, in this case, Beker. Even under analysis most favorable to Sarasota, none of the cases it cites establishes that the suspension of work under the Jacobs Agreement, and the executory purchase order contracts, agreed to by Jacobs and the equipment vendors respectively, extinguished Beker's obligations thereunder."

To put this matter in context, it must be remembered that Beker Corporation initiated actions in contemplation of the construction of its phosphate facility in 1973 and continued with actions in furtherance of that goal up to the present time. As stated in the discussion entitled, "Factual Setting", in this opinion, it is obvious that numerous permitting problems arose in the course of this project which substantially delayed the ultimate construction of the facility. These delays were occasioned at the county, state and Federal level, some of which due to litigation instituted by Sarasota County and others. This last statement should not in any way be construed as criticism of the actions taken by Sarasota County or other persons in the local area interested in this plant facility, in as much as, Sarasota County and any other interested person has the absolute right to take any action, not inconsistent with law, to assure themselves and others that all procedural and environmental reviews and investigations are undertaken and properly concluded in the course of constructing a facility such as the one Beker proposes, which admittedly involves environmental hazards unless properly designed and planned.

Faced with these continuing delays and the expenses attendant thereto, coupled with the uncertainty of the ultimate issuance of an E.P.A. permit, I am of the opinion that in issuing the stop orders, hereinabove mentioned, Beker Corporation was doing nothing more than exercising good management judgement and prudence in placing the project in a "hold" position to mitigate additional costs and expenditures pending a final resolution of the permit question.

The case law cited to the court by Sarasota on the question of the effect of the issuance of these stop orders is not persuasive inasmuch as they address cases wherein the courts held that in situations where a contractor or vendor is ordered or instructed by the owner to stop all work under the contract, the vendor or contractor is entitled to treat this action as a breech and sue for damages on the theory of quantum meruit for services and materials utilized in the construction of the facility. Unquestionably, these cases stand for valid principles of law, however, their application to the facts in this case is not merited. To the contrary, the testimony of Beker witnesses Pridgen, Asche and Bartow [I Tr. 105-6, 128; III Tr. 45] was to the effect that all of the vendors and contractors involved in the Jacobs Agreement concurred and acquiesced to the issuance of the stop orders and have not considered the contract breeched, nor have they brought any action against Beker for damages or expenses arising from such a breech. All of the Beker witnesses testified that they considered the contract to be still in full force and effect and that Beker continued

to have ongoing obligations thereunder. Beker witnesses testified that when work under the Jacobs Agreement is recommenced, due to inflationary pressures, it is likely that the costs involved will have to be renegotiated. I do not feel that this factor in any way is controlling as to whether or not Beker continues to have an obligation under the Jacobs Agreement.

There was a further attempt on the part of Sarasota, during the course of the hearing. to prove that the decision to issue the stop orders was based on factors unrelated to delays instant to the obtaining the necessary permits, to wit, the declining price of phosphate rock and the financial difficulties experienced by the parent Beker company. I am of the opinion that there is no substantial evidence in the record which would justify one to conclude that the primary reason for the issuance of the stop orders was, in fact, other than the delays experienced by permitting difficulties.

Based upon the entire record in this proceeding and upon examination of the case law cited to the undersigned by the parties in this case, I am of the opinion that the legal effect of the issuance of the stop orders was not to extinguish Beker's continuing obligation under the Jacobs Agreement or the purchase orders initially issued incident thereto, and that such legal obligations on the part of Beker continue as of this time.

Incident to this conclusion, one must consider the underlying statutory framework which governs the outcome of this case, which involves a decision as to whether or not construction was, in fact, commenced as of a certain date. If, in fact, construction was commenced, it is rather inconceivable

to describe subsequent events as constituting "uncommencement" of construction short of a total abandonment of a particular project by a permittee. In other words, once construction is commenced, some events much more significant than delays must be demonstrated in order for one to conclude that the project has, in fact, been completely stopped or abandoned and, thus, a course of conduct which one would characterize as commencement of construction has, in fact, "uncommenced".

Being of the opinion that the issuance of the stop orders did not constitute either abandonment of the project by Beker or have the legal effect of erasing its previously existing obligations under the Jacobs Agreement, one must now direct his attention to a discussion of whether or not the activities undertaken by Beker prior to June 10, 1976 did, in fact, constitute commencement of construction as defined by Section 306 of the Act and the regulations promulgated pursuant thereto.

The Regulations appearing as "Appendix A" to New Source NPDES Permits, Preparation of Environmental Impact Statements, heretofore cited in this decision, identify three primary activities, any of which if satisfied on the part of the permittee, will render such facility an existing source under the Regulations. The first category of such activity involves "significant site preparation work, such as major clearing or excavation."

The evidence in this case as to what has or has not been done on the premises is uncontested. Beker no where alledges that it has, in fact, commenced construction of the beneficiation plant itself on the property. Nor does it alledge that it has brought on to the subject property any major

equipment components of such plant. Beker instead relies upon two activities which it argues constitutes significant site preparation. These activites include the building of dirt roads and associated drainage ditches and the performance of a plant soil investigation to develop data necessary for foundation design of the beneficiation plant. I am of the opinion that the construction of the dirt roads and associated ditches do not constitute significant site preparation work for the reason that: (1) the cost associated with the building of such roads being $26,863.13 is insubstantial in terms of the estimated total cost of constructing the proposed mine which is estimated to be in the neighborhood of $50 million. Further, the construction of such roads involve a temporary activity and certainly did not constitute major excavation or clearing as indicated and demonstrated by the aerial photographs and testimony presented at the hearing [Sarasota Exh. No. 2-1 through 2-12; Sarasota Exh. No. 3 at 6; I Tr 68-69.]

Further, the plant site soil investigation for the development of foundation data cannot be characterized as site preparation work. Such studies are more properly characterized as design feasibility studies which did not involve any actual site preparation or excavation and, therefore, cannot be considered to constitute commencement of construction under that portion of the Appendix A.

This conclusion is consistent with the decision of the General Counsel No. 46 concerning the Seabrook Nuclear Facility in New Hampshire, which states on page 4 that:

> "P.S.C. points to various environmental, geological, hydrographic, etc. studies and surveys which it had conducted at the cost of several million dollars, in connection with the Seabrook station. This, however, mistakes feasibility and design studies for site preparation. In my opinion, the use of the term preparation work at the premises denotes physical preparation of the site for construction--for example, clearing of the land or excavation. It does not include mere preliminary investigations, particularly where, as here, it appears that much of those investigations were directed toward establishing the feasibility of the project and were not conducted at the plant site. To accept P.S.C.'s argument to the contrary would mean that virtually any observations of and reports on aspects of a potential site would constitute 'construction'--a result quite at odds with the language of the Section and its apparent purpose."

The second activity contemplated by the Regulations involves the placement, assembly or installation of unique facilities or equipment at the premises where such facilties or equipment will be used. The only object which could conceivably be classified as a facility installed prior to the cutoff date, is the plant production well constructed by Beker in November 1974. It is uncontested that this well and the associated monitor wells serve two purposes. The first purpose of the well was to perform certain hydrological tests to determine the volume of water present and the effect that the rate of withdrawals will have on the water producing aquifer. The second function of the primary well characterized as P-1 was to provide process water for the phosphate plant throughout its entire life. It was the testimony of various Beker witnesses that if it had been the intention of Beker to use this well solely as a means of monitoring and testing water availability and volumes, a well of considerably smaller dimen-

sions could have been utilized. The well in question was drilled to a depth of 1,200 feet, commencing with the casing of 24" in diameter extending to a depth of 75 feet; and 18" diameter from 75 to 250 feet; and a 12" casing from that point to a depth of 750 feet. From 750 feet to 1,200 feet, the well was uncased. The cost of constructing the well was $152,853.94. [Beker Exh. No. 14, 21.] Therefore, the wells serve a dual purpose, one of which could be characterized as feasibility or design functions and the second to provide process water for the beneficiation plant itself during the life of the facility.

The Initial Determination addressed these wells on page 7, wherein it is stated, as follows:

> "Presumably, Beker's submissions regarding construction of seven deep wells to secure process water for a beneficiation plant supports a claim that the facility should be found an existing source on the basis that it has installed unique facilities or equipment under the proposed regulations. Again, we find this information insufficient to sustain the claim. The Company has totally failed to demonstrate the unique character of these wells to its proposed operation. It is clear such facilities could be useful for any number of enterprises, both agricultural as well as industrial."

It is obvious from the above-quoted language that the Agency, at the time of the writing of the Initial Determination possessed very little detailed information concerning this well. It was brought out during the hearing that the well is currently being used for agricultural purposes on the Beker property. However, the testimony was uncontested on the point that the well is located on the premises at a location consistent

with its use as a source of process water for the beneficiation plant and that the agricultural use to which the water is now being made requires that several miles of pipe be utilized to transport the water from its present location to the location on the premises where the agricultural activities are being carried out. It was further testified to at the hearing that a well of the type normally used in this area of Florida for agricultural purposes can usually be drilled for a cost in the neighborhood of $15,000 to $20,000 drilled to a depth of 200 to 300 feet, as opposed to the present well which is drilled to a depth of 1,200 feet at a cost of over $150,000.00. The fact that the company is making use of undeveloped acreage on its mine property for agricultural purposes is, in my opinion, merely ancillary to the ultimate question of whether or not the well can be considered to be a installation of unique facilities at the premises where such facilities will be used.

Although I am satisfied that a good argument can be made that the primary purpose of the well, at this point in time, is that of a facility to be used in direct conjunction with the operation of a beneficiation plant; the question remains as to whether such well can be considered "unique" as contemplated by the Regulations. Obviously, one would not drill a well of this proportion for agricultural use. On the other hand, many manufacturing or commercial operations have need for water in some quantity for which this well may be used. The fact that the company drilled the well with a two-fold purpose in mind, one of which having to do with the produc-

tion of process water over the life of the facility cannot in my judgement render the well in of itself a facility unique to the phosphate mine industry. I am, therefore, of the opinion that although the well does constitute the installation of a facility to be used in conjunction with the phosphate mine operation, it fails to meet the test of uniqueness and substantiality both in terms of the utility to which the well could be placed and the cost of such facility when viewed in context of the total cost of the mine in its entirety.

The third category of activities undertaken by a permittee which will render such facility an existing one, involves contractual obligations to purchase unique facilities or equipment. Before discussing the contractual obligations undertaken by Beker, it is felt that it would be helpful to discuss the concept of "uniqueness" referred to in Appendix A of the Regulations. Both Beker and Sarasota have argued for differing applications of the term "unique" as it is applied to equipment and facilities.

Beker argues that the term unique as used in the Regulations imposes a site-specific interpretation of that term, such that all one must show is that the permittee has seriously and unequivocably dedicated himself to the construction of a facility or to the purchase of equipment for a facility at a particular site. Beker's concept of the interpretation of the term "unique" is summarized at page 7 of its original brief, which states that:

> "Accordingly, the 'unique(ness)' criterion set forth in Appendix A is fully satisfied if 'facilities or equipment' are (a) specifically designed and intended for use

> at a particular site, and (b) non-fungible. That design and that intention demonstrate the 'commitment which the concept of uniqueness is calculated to ferret out."

Thus, Beker's proffered interpretation of the word unique would be determined on the basis of whether or not the facilities or equipment were contracted for or purchased for use at the particular site where the facility is supposed to be constructed and that the term "unique" as used in the Regulations really has no particular meaning beyond the site-specific criteria, which Beker offers. I find this suggested interpretation to be unacceptable for the simple reason that it is contrary to the expressed language of the Regulation. The Regulation clearly sets forth a dual criteria for consideration, namely, that the facilities or equipment must be "unique" and that they must be intended for use at the premises where such facilities or equipment will be used. Any interpretation which attempts to ignore the clear language of the Regulations is obviously untenable. I am, therefore, of the opinion that in order for facilities or equipment to qualify under the terms of the Regulations and Statutes they must satisfy this dual test of both uniqueness and site specificity.

Sarasota's interpretation of the Statute and Regulations is more consistent with that set out above, in that they recognize that facilities and equipment must be both unique and purchased or contracted for with the intention of being used at the premises where the facility is to be constructed. However, Sarasota's proposed interpretation of the word unique is too stringent for useful applications in determinations of this nature.

The four major pieces of equipment of concern in this matter are the log washers, the vibrating screens, the flotation and screw classifiers, and the slimes thickeners. The record is uncontested as to the fact that these purchase orders contracts were issued and executed by the parties prior to the cutoff date of June 10, 1976. The testimony of the Beker witnesses was to the effect that all of the major items of equipment were specifically designed to handle the particular metallurgical and physiological characteristics of the phosphate ore contained on the Manatee property and it was their further testimony that such custom designing is essential for efficient operation of a phosphate rock mine of this type. Sarasota County through the use of its expert witnesses and through cross-examination of the Beker witnesses attempted to demonstrate that these pieces of equipment could, in fact, be modified for use on other ore bodies and, to a limited degree, be modified for use in activities other than a phosphate mine beneficiation process.

Mr. Maximo Munoz, appearing for Sarasota County, testified that two items of equipment, namely the slimes thickener and screw classifiers, could be considered unique to Beker's ore body. However, Mr. Munoz also testified that the vibrating screens and the flotation machines cannot be considered unique, even to the Florida phosphate industry, because such equipment is readily employed in other mineral extracting industries with only minor modifications. [Sarasota Exh. 1, p. 3. I Tr. 25, 27, 30, 33, 34.] Even accepting Mr. Munoz testimony as to these latter two pieces of equipment

as true, such interpretation of the word "unique" in the Regulations would lead to a result, in many cases, of concluding that almost any piece of equipment, knowing the engineering innovativeness of American technology, could be modified for use in another industry or at other locations of a like industry. The interpretation proffered by Sarasota would require one to find that in order for a piece of equipment to be considered unique, it would have to be so custom designed so as to render it incapable of being utilized for any other purpose at any location in the world. This argument is obviously untenable and contrary to the intent of Congress and the Regulations.

It was further testified to by the Beker witnesses that they were unaware of any situation wherein equipment from one phosphate mine was utilized in another phosphate mine at a different location. As explanation for this fact, the Beker witnesses pointed out that the operation of a phosphate rock beneficiation plant is extremely sensitive to the efficiencies of the primary equipment components and that the capital cost of these components are not as important in the overall scheme of things as is the efficiency at which the plant operates on a day-to-day basis. This point was probably articulated best by Beker witness, Mr. Quinta at page 56 of Volume 5 of the Transcript, wherein he states that:

> "The use of second-hand equipment or used equipment or equipment which is not sized and specifically tailored to the needs of that particular plant will be an extremely foolish decision for anyone in the business to make, simply because of the cash flow

> and the value of the product which you would have to get out, the output into the plant. The cost of the equipment becomes so insignificant, because just a few percentage, percentage loss and percent loss and recovery of this plant would be, you could pay for all new equipment within one or two years time.
>
> "So the cost function of the equipment itself becomes insignificant, so it would make it extremely foolish for someone to say, 'Well, I will save $10,000 on a piece of equipment,' and if that piece of equipment costs them just a fraction of a percent of recovering their plant, they would loose it almost immediately."

Therefore, it is apparent that neither of the interpretations suggested by Beker or Sarasota can be totally accepted. Beker's interpretation must be rejected because it ignores the language of the Regulations and attempts to render the application of the word "unique" to a meaningless verbage which is, of course, unacceptable. Sarasota's interpretation is likewise unacceptable, because it implies a too rigorous test for application of the word "unique" in that it would disqualify any piece of equipment, which although specifically tailored for use in a particular industry at a particular site, as not unique if such equipment could in some fashion be modified or re-worked for use either at another site or in an unrelated industry. The acceptance of this stringent interpretation would pose the likelihood of disqualifying any piece of equipment as being "unique".

As indicated above, these four major pieces of equipment were specifically engineered and designed to accomodate the metallurgical, physical and chemical properties of the phosphate ore contained on the Manatee property owned by Beker. There was considerable testimony by Beker witnesses as to

the particular features of these pieces of equipment which were, in essence, custom-designed to accomodate the Manatee ore and, in some cases, the design features incorporated new technology heretofore not utilized in equipment of this type in the phosphate industry. Taken in its entirety, I am of the opinion that the record amply demonstrates that these pieces of equipment are, in fact, unique not only to the phosphate rock industry, but more specifically to the ore found on the Beker Manatee property and, therefore, satisfy the "unique" aspect of the Regulations.

Prior to the issuance of the stop orders, the status of the contracts for these four pieces of equipment was as follows: the logwashers have been completed, fabricated and $148,241.60 out of a total contract price of $154,152.00 has been paid by Beker. As to the vibrating screens, $170,568.00 out of an initial contract price of $248,890.00, representing 68 percent of the contract has been paid; the flotation machines and twin screw classifiers, $565,736.80 has been paid out of an initial contract price of $942,894.00 and the contracts have been 60 percent performed. As to the slimes thickener, $47,400.00 out of a contract price of $46,250.00 has been paid. Therefore, payments under these major equipment items made prior to June 10, 1976 is approximately $938,000.00, or almost 13 percent of the estimated cost of all the beneficiation plant equipment. Although this figure of $938,000 is not a sizeable percentage of the total cost of the facility, when taken in conjunction of the other expenditures made by

Beker in furtherance of its attempt to establish a phosphate mine on the property, the record indicates that Beker has invested more than $20 million in this venture. The Regulations in Appendix A state that the value of such major items of equipment, eligible for consideration, must represent a "substantial commitment to construct the facility". One could interpret that language in two ways, one of which is to say that the word "substantial" means that the dollar value of the equipment contracted for must represent a substantial portion of the entire cost of the facility; the second interpretation would be that the value of such equipment must represent a substantial commitment to ultimately complete and construct the facility with the absolute dollar value involved being of secondary importance to a consideration of just what the obligation to purchase such items of equipment means in relation to the ultimate operation and completion of the facility in its entirety. I am of the opinion that the latter interpretation more accurately reflects the intent of both the Statute and the Regulations, promulgated pursuant thereto. One could be misled if he were to consider solely the absolute dollar amounts involved and ignore the commitment or the importance of the items of equipment in the context of the entire facility. To accept the first interpretation might cause anomalous results to occur. If, for example, the piece of equipment was extremely expensive, but was relatively unimportant in the context of the completed facility or, conversely, major and essential items of equipment may have a relatively small absolute dollar value, but they represent an essential and crucial piece of equipment needed for the operation of the facility.

Having determined that the issuance of the stop orders did not relieve Beker of its continuing obligation under the Jacobs Agreement or purchase orders issued incident thereto for these major pieces of equipment, I am of the opinion that the contractual obligations to purchase these unique pieces of equipment, which are major items of machinery or process equipment as set forth in the Regulations, satisfies the intent of the Regulations and renders the Beker facility an existing source within the meaning of §306 of the Act.

The Jacobs Agreement

Since I have decided that the Beker facility is an existing source within the menaing of §306 of the Act by virtue of the contractual obligations to purchase unique pieces of equipment, it would not be essential that I further consider the effect of the Jacobs Agreement. As indicated above, the Regional Administrator's determination did not address the question of whether or not the Jacobs Agreement constitutes a "turnkey" contract within the meaning of the Regulations. The Initial Decision of the Regional Administrator addressed this point on page 7, wherein it was stated that:

> "We need not decide the issue of whether the Jacobs' agreement is sufficiently broad to be characterized as a 'turnkey' contract. Beker, as alternative grounds upon which to sustain a finding as an existing source, also urges the Jacobs contract and the above-mentioned equipment orders represent contractual obligations to purchase unique equipment as described in the proposed new source regulations, and it is upon this basis that we find the Beker facility to be an existing source."

Since this decision arises out of an adjudicatory hearing rather than a request for determination, I am of the opinion that the applicable rules of procedure require that I address the Jacobs Agreement. Section (1)(iv) of Appendix A states that contractual obligation with a firm to design, engineer and erect a completed facility (i.e., a "turnkey" plant) will render a source an existing source within the purview of the Act and the Regulations.

The Jacobs Agreement which is found as item 6 of Beker Exhibit 14 was executed on June 9, 1975 between Beker Phosphate Corporation and Jacobs Constructors, Inc. Article 2 of the contract entitled, "Scope of Work," states that "Jacobs shall engineer, purchase and expedite materials and equipment for, and construct facilities (hereinafter, collectively referred to as the 'plant'), all as set forth herein and in Exhibit A." Exhibit A, which is appended to the agreement, entitled, "Description of Work and Facilities," states in Section 1.1, in part, as follows:

> "Owner plans to construct a 'grass-roots' phosphate beneficiation facility to be located in Manatee County, Florida..."
>
> "Owner has asked Jacobs to submit a turnkey contract to provide the professional services necessary to accomplish the detailed definitive engineering design procurement (except major items of equipment to be purchased by Beker), scheduling, construction of the start up of the planned 'grass-roots' phosphate rock beneficiation facility, by means of the bid request documents dated May 9, 1975..."

Sarasota County argues that the Jacobs Agreement does not qualify under the above-quoted section of Appendix A for several reasons as follows: (1) that the contract is not a binding agreement since the contract was placed "in limbo" in January 1976 and all work thereunder suspended; (2) that the contract contains a termination clause authorizing Beker to terminate the entire agreement in its sole discretion upon a 24-hour notice to Jacobs and is, therefore, not binding; and (3) that the agreement fails to qualify since it is a contract for the rendering of services rather than for the purchase of equipment or facilities. We have already discussed the first argument set forth by Sarasota County in the portion of this opinion discussing the effect of the so called "stop orders" and need not repeat that discussion here, except to reiterate that I do not feel that the issuance of the stop orders terminated Beker's obligation under the Jacobs Agreement. The second argument set forth by Sarasota County involves the fact that the contract contains a termination clause which Beker constructively implemented by issuing the stop orders. This argument is merely another way of interpreting the effect of the stop orders and is, likewise, determined to be not persuasive.

The third argument set forth by Sarasota County, however, deserves additional attention. In support of its argument, Sarasota directs our attention to the Decision of the General Counsel, No. 46, at page 13, involving the question of whether or not the Seabrook Nuclear Power Plant

facility of the Public Service Company of New Hampshire is a new source within the meaning of §306 of the Act. The contract referred to in the General Counsel's opinion involved a contract with United Engineers Contractors to provide engineering, design and construction management services for the Seabrook station. The services were to include the preparation of plans, specifications of equipment and construction work, the recommendation of materials, assistance in the preparation of bid solicitations, and the letting of purchase orders. The opinion goes on to state that:

> "The Region rejects this contract on the grounds that it is not a contract for the purchase of facilities and equipment. P.S.C. does not dispute the accuracy of this characterization and it does not specifically address the problem which this would seem to present to its reliance on the E/C contract."
>
> "The E/C contract is one for professional services; it is not a contract to purchase equipment and facilities. Therefore, its existence before March 4, 1974 does not render the Seabrook station an existing source."

Although we do not have a copy of the contract in question, apparently the contract was for the providing of professional services in the field of engineering and design specifications for the plant, but not for the actual construction of the plant itself. The fact that the utility in that case did not dispute the characterization placed on the contract by the staff of Region I lends credence to the assumption that it was, in fact, primarily a service contract.

However, both the General Counsel's decision and the argument set forth by Sarasota attempt to make a distinction between a contract for services as opposed to a contractual obligation to purchase equipment or facilities. It should be noted, however, that the Regulations under the subsection dealing with "turnkey" contracts nowhere uses the term purchase or sale of facilities or equipment. That language is used in subsection (iii) in discussing certain listed items, but the phrase "contractual obligation to purchase" in subsection (iii) no way modifies the language contained in the following subsection which only speaks about a contractual obligation with a firm to design, engineer and erect a completed facility. Therefore, arguments attempting to differentiate between contracts for services and contracts for sales is inappropriate in the context of this portion of the Regulations.

Even a casual perusal of the Jacobs Agreement makes it abundantly clear that its primary purpose is to require Jacobs to provide Beker with a complete and functioning phosphate rock beneficiation plant. The fact that Beker had independently contracted for the purchase of certain items of equipment to be used in the facility, prior to the execution of the Jacobs Agreement, in no way alters the obvious and express intent of the Jacobs Agreement. Any contract of the scope of the Jacobs Agreement would, of necessity, include the rendering of substantial services. A reading of the Jacobs contract clearly reveals that, in fact, Jacobs is to provide professional services in the course of completing the facility. One would be

amazed if it didn't. The language of the Regulations would almost require it, in order for a contract to comply with its terms, since it refers to a contract "with a firm to design, engineer and erect" a facility. Obviously, designing and engineering require the rendering of professional services.

As stated in Warren Motors, Inc. v. Chrysler Motors Corporation, 5 U.C.C. Reports 365 [U.S.C., E.D. Pa., 1968]: "Certainly, the fact that the agreement contained terms providing for services, franchising and the like in no way effects its character as determined by its overall objective, namely selling automobiles." (Emphasis supplied.)

In view of the above discussion, I am of the opinion that the Jacobs Agreement is a contractual obligation with a firm to design, engineer and erect a completed facility as that phrase is used in Appendix A to the Regulations and provides an additional basis for determining that the Beker facility is an existing source within the context of §306 of the Act.

Recommended Findings and Conclusions

I recommend that the Regional Administrator make the following findings and conclusions:

The items set forth above under the heading "Factual Setting" are hereby adopted as specific findings of fact in this case.

I conclude that the purchase orders for the log washers, slimes thickener, vibrating screens, flotation and screw classifiers are contractual obligations to purchase unique equipment as contemplated by the appropriate Regulations and render the Beker facility an existing source within the context of §306 of the Act.

I further conclude that the Jacobs Agreement constitutes a contractual obligation with a firm to design, engineer and erect a completed ("turnkey") facility and also renders the Beker facility an existing source within the context of §306 of the Act.

The proposed findings of fact and conclusions submitted by all of the parties have been considered. To the extent they are consistent with the findings and conclusions herein, they are adopted, otherwise they are rejected.

DATED: March 28, 1978

T. B. Yost

Thomas B. Yost
Administrative Law Judge

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

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OFFICE OF THE ADMINISTRATOR

IN THE MATTER OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR BEKER PHOSPHATE CORPORATION DOCKET NO. AH FL 507 N	CERTIFICATION OF RECORD AND RECOMMENDED DECISION

Pursuant to Section 125.36(2) of the Rules of Practice [40 C.F.R. 125] governing hearings under the Federal Water Pollution Control Act Amendments of 1972 [P.L. 92-500], I, Thomas B. Yost, Administrative Law Judge, designated by the Chief Administrative Law Judge to preside at the hearing on this matter held on November 28-30, 1977, in Sarasota, Florida, certify that, to the best of my knowledge and belief, the attached five volumes of testimony constitute a true, correct and complete transcript of the testimony etc., at the hearing, as corrected by the parties pursuant to the attached affidavit. The 18 exhibits associated with said testimony are also hereby certified.

I further certify the attached copies of proposed findings of fact, conclusions of law and initial and reply briefs submitted by the parties.

Pursuant to your order of designation dated November 8, 1977, I further certify the attached Recommended Initial Decision for your review. Inasmuchas you have reserved the right to adopt, modify or amend this decision and, therefore, my recommendation is not analogous to an initial decision which may be appealed to the Administrator, I have not provided a copy thereof to the parties involved in this case.

DATED: March 28, 1978

Thomas B. Yost
Administrative Law Judge

Attachments

Judge Thomas B. Yost
Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30308
Phone Number — 404/881-2681

CERTIFICATION OF SERVICE

I hereby certify that I have served a copy of the foregoing on each individual party by mailing a copy of the same by Regular U.S. Mail. Dated in Atlanta, Georgia this 29th day of March 1978.

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Secretary to Judge Yost

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