

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

OFFICE OF AIR AND RADIATION

MEMORANDUM

SUBJECT: Applicability of New Source Review Circumvention
Guidance to 3M - Maplewood, Minnesota

FROM: John B. Rasnic, Director
Stationary Source Compliance Division

Office of Air Quality Planning and Standards

TO: George T. Czerniak, Chief
Air Enforcement Branch
Region V

This is in response to your memorandum dated March 16, 1992, requesting guidance on New Source Review (NSR) permitting for the Minnesota mining and Manufacturing (3M) Center located in Maplewood, Minnesota. Specifically, you requested guidance on the applicability of the circumvention guidance to this source and other sources in similar situations. We also received from your staff more information about the modifications at 3M and we suggested that you issue a SS114 request to the source for more information. In early November, we received a copy of the response to the SS114 request dated October 30, 1992. We hope this memorandum provides sufficient guidance on permitting this source and other sources in similar situations.

Background

In your memorandum of March 16, 1992, you notified us that the 3M Center in Maplewood, Minnesota received four synthetic minor permits for modifications between October 1991 and March 1992. The permits for the four modifications combined allow emission increases of 33.6 tons per year (tpy) of particulates, 39.8 tpy of sulfur dioxide, 39.4 tpy of nitrogen dioxide, 22.0 tpy of carbon monoxide, and 119.2 tpy of volatile organic compounds. You learned

during the Region's discussions with Minnesota that in 18 months, the source received 12 minor permits, and applied for several other minor permits. As a result, you indicated to the Minnesota Pollution Control Agency (MPCA) that 3M may be circumventing the Prevention of Significant Deterioration (PSD) regulations through these small projects. The MPCA, however, felt that these modifications were justified as separate modifications based on each 3M division pursuing its own research schedule.

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Although it is somewhat unclear, the response to the SS114 request arguably supports 3M's justification. Yet in light of criteria for identifying circumvention situations, as further explained below, the Stationary Source Compliance Division (SSCD) believes the source may not have been permitted properly for its modifications.

EPA Policy and Authority

EPA stated in the June 28, 1989 Federal Register notice on the definition of federally enforceable (54 FR 27274) and in its June 13, 1989 guidance on "Limiting Potential to Emit in New Source Permitting" that it is not only improper but also in violation of the Clean Air Act to construct a source or major modification with a minor source permit when there is intent to operate as a major source or major modification. Permits with conditions that do not reflect a source's planned mode of operation are sham permits, are void ab initio, and cannot shield a source from the requirement to undergo preconstruction review. 40 CFR SS52.21(r)(4) requires application of NSR requirements to a source that asks for a relaxation of permit limits which would make the source major. EPA stated that it will require application of SS52.21(r)(4) even where a source legitimately changes a project after finding it cannot comply with the operating restrictions which were taken in good faith.

Generally in "sham" permitting, a source attempts to expedite construction by securing minor source status through permits containing operational restrictions from which the source intends to free itself shortly after completion of construction and commencement of operation. Such attempts are treated as unlawful circumvention of the preconstruction review requirements. Similarly, attempts to expedite construction by securing several minor source permits and avoiding major modification requirements

should be treated as circumvention. A memorandum dated September 18, 1989 from John Calcagni to William Hathaway stated this position (see Memorandum 4.42 in the NSR Guidance Notebook).

EPA stated in the 1989 Federal Register notice that it is not possible to set forth, in detail, the circumstances in which EPA considers an owner or operator to have evaded preconstruction review through minor permits, and thus subject itself to enforcement sanctions under SSSS113 and 167 from the beginning of construction. However, EPA will look to objective indicia to identify circumvention situations. For example, EPA provided examples of objective criteria in the June 13, 1989 guidance on limiting potential to emit. EPA also stated some criteria in the Federal Register notice which include: the filing of an application for a federal PSD permit at or near the same time as a state minor source permit; the economic realities surrounding a transaction; and projected levels of operation as portrayed to

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lending institutions and other records of projected demand and output. EPA stated that where it appears obvious that a proposed source or modification, by its physical and operational design characteristics, could not economically be run at minor source levels for an appreciable length of time, EPA will consider minor source limits taken by the source unrealistic and sham.

Specific Criteria

Similar to the 1989 guidance, this memorandum provides criteria to permitting and enforcement authorities to apply when making determinations whether a source is circumventing major NSR through the minor modification process.

1. Filing of more than one minor source or minor modification application associated with emissions increases at a single plant within a short time period.

If a source files more than one minor source permit application simultaneously or within a short time period of each other, this may constitute strong evidence of an intent to circumvent the requirements of preconstruction review. Authorities

should scrutinize applications that relate to the same process or units that the source files either before initial operation of the unit or after less than a year of operation. The September 18, 1989 memorandum from John Calcagni to William Hathaway states that two or more related minor changes over a short time period should be studied for possible circumvention.

2. Application of funding.

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has treated the projects as one modification for financial purposes. If the project would not be funded or if it would not be economically viable if operated on an extended basis (at least a year) without the other projects, this should be considered evidence of circumvention.

3. Reports of consumer demand and. projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. If reported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

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4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to State or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

5. EPA's own analysis of the economic realities of the projects considered together.

EPA may determine that it is reasonable to expect that company management would coordinate the planning and execution of projects

considering their intrinsic relationship with each other (physical proximity, stages of production process, etc.) and their impact on economic viability of the plant (scheduling down time in light of production targets, economies of scale, etc.).

Analysis of 3M-Maplewood

Although 3M applied for and received several minor source permits within 18 months, in response to the SS114 request, 3M stated that independent divisions at the plant made the funding decisions for each independent project and that each project is independently viable. Thus, they suggest, the projects are not part of an attempt to circumvent preconstruction review. 3M and Minnesota have indicated that the divisions, actions should be reviewed separately and should not be treated as parts of a whole. However, the law plainly treats the Maplewood plant as one major emitting facility for NSR purposes. The NSR regulations do not provide special treatment because it is a research and development plant. Further, given the nature of this source, under normal conditions, a certain level of production or research development of new products can be expected. Although the NSR program generally allows sources to modify below significance levels without aggregating other contemporaneous net increases, sources cannot use the minor modification process to circumvent major modification requirements.

Where a source is permitted for several minor modifications that may in good faith be intended to be separate but result in the source's aggregate increases to be major even considering decreases over a short time period (e.g., one year or 18 months), the modifications may require major new source review. Such modifications could require NSR if they are viewed as being consistent with the source's overall production goals or plans for a short planning period. In other words, 3M should not benefit from the absence of a plant-wide production plan. Given the nature of the plant's work, 3M may be able to reasonably anticipate that modifications will occur within a relatively short period of time.

Reports on consumer demand and projected production or emission levels may provide evidence that this plant is expected to modify regularly in response to such demands or research needs.

some minimum level of research activity and commensurate emissions, source-wide, perhaps could be expected from year to year, as would be expected to keep the 3M plant productive or operable. These emissions and thereby modifications cannot be presumed to be independent given the plant's overall basic purpose to support a variety of research and development activities. Therefore, even though each research project may have been individually conceived and separately funded, it is appropriate to look at the overall expected research activity in assessing NSR applicability and enforcement.

without regard to whether 3M intended to circumvent NSR requirements, this source and the State should discuss alternative permitting that could minimize the uncertainty of intent. Although we cannot require aggregation of all de minimis net increases, we believe that net increases should be aggregated for each "planning period" of the plant. One way to treat this source is to set a plant-wide emissions level, that can be raised only by going through major NSR. Recently, we worked with you and the MP CA to develop a plantwide emissions cap permit for a 3M facility in St. Paul. Although there are a number of concerns that must be addressed in such an approach, we believe that the source and the State would benefit from the certainty that such an approach provides.

If you have any questions regarding this matter, please contact Clara Poffenberger at (703) 308-8709.

cc: Karen Schapiro, OE
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