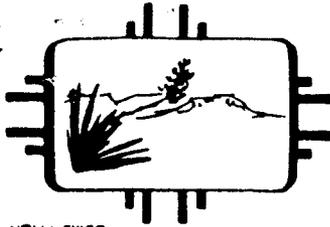


Kelly C.



NEW MEXICO
HEALTH AND ENVIRONMENT
DEPARTMENT

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Deputy Secretary

November 7, 1988

Mr. Harold Valencia, Area Manager
Department of Energy
Los Alamos Area Office
Los Alamos, New Mexico 87544

RE: Low Level/Mixed Waste Incinerator

Dear Mr. Valencia:

I have received your letter dated October 31, 1988 requesting an interpretation of certain definitions in the air quality new source review regulations adopted by the Environmental Improvement Board and a determination of "construction" as allowed by 40 CFR Part 61.06. As I understand the request, your questions related to a planned incinerator for low level and mixed waste at Los Alamos National Laboratory. This letter addresses the concerns expressed in your recent letter.

Part I of your enclosure raises the issue of how commencement of construction is defined for this project when two different permit regulations, i.e. AQCR 702 and AQCR 751, apply. There are two scenarios to consider in this regard. First, a permit may be required from the Division under AQCR 702, and AQCR 751 may apply also if the applicable national emission standard has been adopted by the Board. In the second case, AQCR 702 may apply but AQCR 751 does not because EPA has sole authority for the applicable emission standard. I will explain how start of construction is defined for both scenarios.

Assume your proposed project requires a permit under AQCR 702 - Permits and is also a new source under AQCR 751 - Emission Standards for Hazardous Air Pollutants. In this case, although the Division will issue one permit in response to both regulations, each of the two regulations must be interpreted and applied separately. Under AQCR 751, the definition of "commenced" found at 40 CFR 61.02 not only means "...that an owner or operator has undertaken a continuous program of construction..." but also includes the act whereby "...an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification". Based on the description provided in Part I of your enclosure, construction will commence per AQCR 751 on the date a contract is signed to provide the services as indicated. Under 40 CFR Part 61.05 as adopted by AQCR 751, construction must not commence prior to the issuance of a permit by this office.



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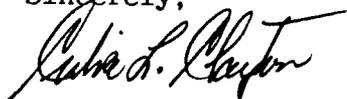
For the same project and scenario, the start of construction is defined separately under AQCR 702. AQCR 702 defines "commencement" to be "that an owner or operator has undertaken a continuous program of construction or modification." Contractual obligations play no part in determining the start of construction under AQCR 702. An applicant may engage in preconstruction activities up to the physical start of construction prior to the issuance of a permit under 702. Thus, regarding the effective date of the new Part III of AQCR 702 for toxic air pollutants, construction as defined per AQCR 702 must commence prior to December 31, 1988 in order for your project to be exempt from Part III requirements. The commencement of construction as defined under AQCR 751 has no bearing on the effective date of AQCR 702, Part III.

Under the second scenario, assume a permit is required under AQCR 702 but not under AQCR 751. This situation could arise for example if the only Part 61 standard that applies to your project is Subpart H- National Emission Standard for Radionuclide Emissions from Department of Energy (DOE) Facilities. Under AQCR 751, the Board has not adopted Subpart H. For this case, your permit application and questions should be directed to EPA Region VI. The Division would evaluate your permit application under AQCR 702. Under AQCR 702, construction would commence as defined in the regulation to essentially mean the physical act of building the facility. Construction could not begin until the necessary permit is issued under AQCR 702. Thus, regarding the effective date of AQCR 702, Part III, the Division would have to issue a permit under AQCR 702, and you would then have to begin construction prior to December 31, 1988 in order to preclude the application of Part III to your project.

Part II of your enclosure asked for clarification of the term "potential to emit" with respect to the new incinerator. Basically, you argue that the planned air pollution control equipment is "vital to production" and thus in applying the numerical thresholds of AQCR 702 we should allow the projected control efficiencies to reduce the emission estimates utilized for the new incinerator. I understand your argument, but continue to find that it lacks merit just as previously stated in the meeting on your new Special Nuclear Materials Building. I do not consider the control equipment described in your enclosure to be "vital to production". As previously stated, this phrase is intended to mean control equipment the purpose of which is to capture usable product and does not include equipment installed for the purpose of environmental or safety protection.

I hope this letter addresses your concerns. Please contact me if you need further clarification.

Sincerely,



Cubia L. Clayton
Chief
Air Quality Bureau

CLC:BB:cg

cc: Kirk Jones, Deputy Director, EID
Jack Ellvinger, Chief, Hazardous Waste Bureau
Benito Garcia, Chief, Community Services Bureau

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HAZARDOUS WASTE SECTION