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United States
Environmental Protection
Agency

Region
345 Courtland Street NE
Atlanta GA 30308

Alabama, Georgia, Florida,
Mississippi, North Carolina,
South Carolina, Tennessee,
Kentucky



MAR 02 1979

REF: 4RC

Mr. Stephen C. Watson
Assistant City Attorney
City of Lakeland
World Citrus Center
Lakeland, Florida 33802

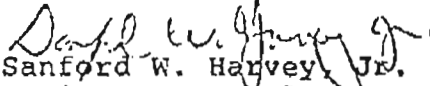
Re: City of Lakeland McIntosh
Power Plant Unit 3

Dear Mr. Watson:

We have reviewed the materials previously submitted on whether Clean Air Act new source performance standards (NSPS) promulgated in the September 19, 1978, Federal Register, apply to the above. The materials disclose that **Unit 3 is not subject to those NSPS.** The basis for this conclusion is described in the attached memorandum.

If you have any questions on this, please call (telephone 404/881-2335).

Sincerely yours,


Sanford W. Harvey, Jr.
Regional Counsel

Enclosure

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JAN 11 1979

NSPS "New Source" Determination for City of
Lakeland McIntosh Power Plant Unit 3

Office of Regional Counsel

Brian L. Beals
Air Engineering Branch

FACTS:

You requested us to make a determination on whether McIntosh Unit 3 is a "new source" for purposes of the Clean Air Act 1970 new source performance standards for electric utility boilers over 73 MW capacity, which standards were proposed September 19, 1970. Factual materials reviewed in making this determination include: (1) a September 29, 1978, letter from Mike Opalinski of the City of Lakeland ("Lakeland"), with attachments; (2) a December 13, 1978, letter from Stephen C. Watson of Lakeland; (3) a December 20, 1978, letter from H. Kerner Smith of Babcock & Wilcox ("B&W"); and (4) a December 18, 1978, letter from Stephen C. Watson, with attachments. These materials evidence the following events.

Lakeland, in a joint venture with the Orlando Utilities Commission, intends to build a 364 MW fossil fuel fired steam generator to be used primarily for power production, and to be designated "McIntosh Unit 3". On March 21, 1978, Lakeland signed a letter of intent with B&W to purchase the McIntosh Unit 3 boiler and associated SO₂ scrubber and electrostatic precipitator, for \$35 million. To cover the schedule of cancellation charges outlined in the letter of intent (among other reasons), Lakeland secured \$80 million in short term notes. Lakeland also entered into a letter of intent on April 17, 1978, for manufacture of a turbine for the boiler. Additional financing for the boiler and the turbine (as well as for extensions and improvements to the City water system) in the form of a bond issue for \$125 million was obtained on September 19, 1978.

QUESTION:

Is McIntosh Unit 3 subject to the NSPS for electric utility boilers, proposed September 19, 1970?

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ANSWER:

No.

DISCUSSION:

Section 111 of the Clean Air Act defines a "new source" as:

"...any stationary source, the construction or modification 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."

Since McIntosh Unit 3 will be a fossil-fuel boiler with a 364 MW capacity, its capacity is greater than the 73 MW minimum for coverage under the September 19 NSPS. The only remaining issue is whether construction "commenced" on McIntosh Unit 3 before September 19, 1978.

The regulations define "commenced" as meaning:

"that an owner or operator has undertaken a continuous program of construction or modification or that 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." (emphasis added) 40 C.F.R. §60.2(i) (1977)

Lakeland has sought to qualify under the "contractual obligation" ground of this definition.

The first element of this ground requires a showing that there is a contractual obligation for McIntosh Unit 3. The materials reviewed include a January 11, 1978, B&W "Proposal" to Lakeland, in response to an earlier request for bids on Lakeland Specification No. 3297-1-3200 and 7 addenda thereto. This Proposal included a boiler arrangement drawing, a boiler platform arrangement drawing, drawings on the boiler precipitator and SO₂ scrubber, a boiler performance summary sheet, and a schedule of shipping dates for the boiler and related apparatus. In response to this proposal, on March 21, 1978, Lakeland sent B&W a letter of intent to purchase

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the boiler in accordance with the earlier Lakeland Specification and the B&W Proposal. The letter of intent also accepted the B&W price of \$35.55 million for the boiler and related apparatus. A schedule of cancellation charges was also specified in the letter of intent. Under that schedule, if Lakeland had cancelled its intent to purchase on September 19, 1978, cancellation charges would have been \$500,000.00. This is a significant amount showing that the letter of intent was not a contract terminable at little or no cost, thus indicating that it was a contractual obligation. See "Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §124.36(m), No. 46", at 19 (June 30, 1976). In reliance on this letter of intent, B&W started engineering work on the subject boiler on March 21, 1978. Final decisions on arrangement and design of the boiler, precipitator, and scrubber, were made by July 28, 1978. By September 1, the majority of the subcontracted components had been purchased by B&W. B&W considers itself presently bound, and bound since the March 21, 1978, letter of intent, to the shipment dates set forth in its Proposal. In light of the above-mentioned factors, we conclude that there was a "contractual obligation" for the McIntosh Unit 3 boiler as of the September 19 deadline.

The second element of the "contractual obligation" ground is that the contractual obligation be one to complete construction of the boiler within a reasonable time. Under the construction schedule set forth in the B&W Proposal, final shipment of the main structural steel and platform steel will occur in October, 1979; final shipment of the steam drum and pressure parts will occur in December, 1979; and final shipment of most of the other components by May, 1980. The December 20, 1978, letter from B&W (attached) states that the Company still considers itself bound to meet this schedule. We thus conclude that the contractual obligation was one to complete construction within a reasonable time.

The third and final element of the "contractual obligation" ground is that the contractual obligation provide for a continuous program of construction. The construction schedule contained in the Proposal, together with the December 20, 1978, letter from B&W describing work on the boiler since March 21, and stating that the Proposal schedule is still binding, together satisfy this element.

Original Signed By

William R. Phillips
Assistant Regional Counsel

Enclosure