



NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF AIR QUALITY



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AIR PERMITS SECTION

MEMORANDUM:

To: Regional Supervisors
Section Chiefs

From: Alan Klimek 

Subject: Guidance on Permitting and Enforcement Decisions when Earlier
Decisions are Rendered Incorrect by New Information

PURPOSE AND SCOPE

This memorandum establishes policy and procedures for responding to situations where new or revised emission information triggers changes in estimates of emissions from a specific facility or from a number of industrial facilities and when these changes affect previous regulatory decisions.

BACKGROUND

The DAQ has been confronted with three common types of regulatory situations involving new emissions information potentially leading to significantly revised emission estimates:

These regulatory situations include:

- Revisions to published or previously accepted emission factors (including but not limited to the EPA AP-42 document)

- Volatile Organic Compound (VOC) data expressed in terms of the actual compounds being emitted (speciated, or on the basis of average molecular weight), where previously VOC data had been reported on an "as carbon" basis, or on the basis of some other calibration standard
- Particulate emissions evaluated on the basis of both filterable and condensible components of a sample where previously particulate emissions were evaluated on the basis of filterable samples only

While recent attention has been focused mainly on the three examples noted above, other situations may arise that will create similar problems with earlier permitting decisions or with compliance determinations.

This policy applies to changes in information that have already undergone sufficient review by the DAQ such that the new information is accepted as a valid replacement for the old. Discussions with industry groups are always welcome regarding information used to make permitting decisions.

POLICY

Changes in Permitting Decisions:

Permitting decisions that are found to be incorrect as a result of new information should be corrected as soon as reasonably possible after the new information becomes available. For example - a new BACT analysis may be needed along with the issuance of an appropriately revised permit. "As soon as reasonably possible" is not simply a matter of administrative expediency. To the extent possible, the following factors should be considered:

1. The number of affected facilities [Facilities should be identified and listed as soon as possible.]
2. The pollutant(s) affected by the change
3. The environmental impact or effect on the surrounding area [If impact cannot be determined, judgements should be made in the most health protective way.]
4. The possibility of NAAQS violation(s) for the pollutant(s) of concern
5. Are sources located in areas that are non-attainment for the pollutant(s) of concern?
6. How far above an applicable limit or threshold will the facilities' reported emissions be as indicated by the new information?
7. Time and resources required for corrective action

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Making the determinations noted above and formulating decisions based on them, will be the responsibility of an Implementation Committee (IC) consisting of the at least one Permitting (Branch) Supervisor, the Stationary Source Compliance Supervisor, representative(s) from at least one affected regional office (or the appropriate "lead" region), and the Emissions Inventory Coordinator. The Emissions Inventory Coordinator will usually serve as committee chair person. The committee will be accountable to the Deputy Director. As a result of the IC review, a decision will be reached for each emission factor (or other) change as to the required time frame for implementing the change. **[This committee should not be confused with ad hoc committees who evaluate emission factors for validity (Emission Factor Task Force) or work units that prescribe changes in sampling methods or calculation protocols. As noted above, validation of emission factors and related emissions information is a separate and earlier step from implementation.]**

Implementation:

For situations that are deemed critical, based on a review of the above factors, and where substantive changes to process or control equipment are needed, the affected sources will be required to comply with applicable requirements within the "reasonable" time established by the IC. Facilities will be notified of the required changes in writing, and be given a deadline by which to respond. In order to provide for compliance schedules, mechanisms such as Special Orders by Consent (SOC) or Deferrals of Enforcement will be employed. The particular mechanism to be used will depend on the time required.

For situations that are deemed less critical (where only permit or other "paperwork" changes are required and where no equipment changes or emission reductions are needed), implementation of the change can be allowed to wait until the next permit renewal or re-opening. Nevertheless, affected facilities should be notified of the upcoming change.

Regardless of the time period for re-opening the permit, the next emissions inventory submitted by an affected facility should include emissions estimates based on the latest background information. Normally, previously submitted emissions inventories need not be corrected, unless such corrections are essential in order to determine what course of action is needed as a response to a change in emissions estimates.

Sharing Information and Establishing an Effective Date for New Emissions Information:

Regardless of whether new information is developed or discovered by the regulated community or by regulatory agencies (EPA, DAQ or local agencies), the person discovering the information has a responsibility to bring it to the attention of the appropriate permitting authority.

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As soon as an emerging body of emission related information is considered complete and deemed valid or sufficiently documented to be considered reliable, a technical memorandum will be issued acknowledging the fact and establishing an effective date for required use of the new information by DAQ and the affected industry facilities. This would usually be the publication date for published information or it might be the date a review is completed by DAQ staff in the case of emissions test data. This will enable DAQ and the regulated community to use the most accurate information for future decisions, whether or not past decisions need to be revisited. It will also enable DAQ to determine the extent of possible violations and track required compliance actions or responses, including calculating non compliance penalties, if appropriate.

For changes in emission factors, the technical memorandum or other determinations will be issued by the Emission Factor Task Force. For other changes in background information (test methods, or calculation protocols) technical memoranda will be issued by the appropriate Section within DAQ. It is left to the Implementation Committee to decide the best mechanism for communicating the information change to the regulated community and prescribing time lines for compliance. Such communication may be made through mass mailings or by including a notice in the Emissions Inventory Package. It will be the responsibility of the source to initiate contact with DAQ for the purpose of making changes to the permit or changes to process or control equipment. The mass mailing or notice will make this responsibility clear and encourage the source to solicit any needed assistance from the appropriate regional office or inspector. The appropriate DAQ regional office will determine, for each facility, if the required change is substantive or is merely a paperwork change, and direct the facility accordingly.

Validation of New Emissions Information:

As noted above, this policy assumes the validation steps have already been taken, but it is useful to address validation briefly here. Information changes may result from correcting an erroneous calculation procedure, or from changing the measurement method to a more accurate one, or in the case of emission factors, notification by EPA that an AP-42 factor is being changed or has been discovered to be in error. An explanation is expected to accompany each of these mechanisms, but as a general rule new information is considered better if it better withstands scientific scrutiny than the old information. It is expected that some discussion between DAQ and the regulated community will accompany most changes in the information upon which emissions estimates depend. These discussions should take place using information exchange mechanisms such as permit reviews, emission measurement protocols, compliance workgroups and permit workgroups, contact with compliance inspectors, and industry focus groups such as the "Outside Involvement Group" and other DAQ/industry meetings.

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Changes in Required Control Technology or Equipment:

Actions taken to correct earlier permitting decisions should be made on the basis of current technology. For example, a BACT analysis undertaken in 1998 to remedy an incorrect PSD permit determination made in 1995 should use 1998 BACT, not BACT defined in the earlier period. Note: some exceptions may be in order, as in the case of a BACT application that if done on time would have been integrated with the initial process design and construction from the ground up, but because of the lateness, must be done as a retrofit. Any resulting change in the economics of the installation should be taken into account. However, this accounting should not be done entirely independent of enforcement related concerns presented below.

Compliance Response:

For any regulatory requirement that would have been imposed if the new emission information had been known earlier, if that requirement is currently not being met, as a general rule, the facility will be considered out of compliance.

Enforcement Response:

In most cases, out-of-compliance implies enforcement and DAQ's standard enforcement policy is to take immediate enforcement action in accordance with current EPA "Timely and Appropriate Guidance for Significant Violators." However, in taking such action, consideration must be made as to whether the facility could reasonably have made a correct determination if information critical to that determination was not readily available at the time it was made. In certain cases the permitting authority may have to determine whether or not the "new" information is actually new, or if the facility could, or should, have known about it at the time the original decision was made. If it is concluded that the facility had little or no chance to make a correct emissions estimate or if it is believed that facility representatives acted reasonably or were technically justified in using earlier incorrect information or incorrect guidance relative to calculating emissions, then enforcement discretion may be in order, perhaps to the extent of not assessing penalties or assessing zero penalties.

The EPA "Timely and Appropriate Guidance" would normally call for issuing NOVs and proceeding with enforcement and making the decision to assess zero penalties within the context of the enforcement action. However, the number of enforcement actions brought by NC DAQ can make this approach an impractical exercise in paperwork. Also, NOVs and/or enforcement actions can sometimes create adverse consequences for a regulated facility that are out of proportion with the degree of responsibility or culpability. For these reasons it may be justified

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to apply enforcement discretion before formal enforcement actions are taken, if it is felt that facility representatives made reasonable use of available information and still found themselves out of compliance. In these cases, a Warning Letter or some other "Notification of Regulatory Requirements" may be a suitable substitute for an NOV. For sake of consistency, any departures from traditional interpretations of enforcement policies should be discussed with the enforcement staff. Any suggested leniency in the above situation is predicated on the premise that the source takes full corrective action, installs appropriate process or control equipment upgrades, applies for and receives a valid permit or permit modification, and otherwise comes into full compliance in the time frame allowed.

A recommended test for whether or not the source made proper use of available information and yet still found themselves to be out of compliance is: Could a reasonable person have chosen the same course of action and think he was doing the right thing? ["Reasonable person" is intended to mean someone who should reasonably be making such decisions, such as the plant manager, the environmental manager, or a competent technical person with a working knowledge of applicable regulations.]

Emissions Testing:

If a facility chooses to conduct emissions testing in order to verify a change in an emission factor, the results will be treated the same as the new emission factor itself. In other words, if the facility was believed to have had no prior knowledge of the newer (presumably higher) emission factor, then the same assumption would be made regarding the collaborative emission measurement. This assumption would be acceptable, provided the facility takes the same corrective action that would be expected based on the emission factor alone.

cc. Keith Overcash
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