NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES

DIVISION OF AIR QUALITY

NCDENR

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May 16, 2000

MEMORANDUM

TO: Regional Supervisors
Chiefs
Local Programs

FROM: Permits Workgroup SLA

THROUGH: Laura S. Butler, P.E., Chief

THROUGH: Keith Overcash, P.E., Deputy Director

SUBJECT: Using a Non-SIP Regulation to Avoid Title V and Assessing the Appropriate Fee Classification

The purpose of this memorandum is to clarify the issue of avoiding Title V based on limits contained in a permit to comply with a State Implementation Plan (SIP) approved regulation or a non-SIP approved regulation (e.g., North Carolina air toxics regulation). To address this issue, this memorandum will explain the Division of Air Quality and the Environmental Protection Agency's (EPA) interim position on "enforceability" of limitations on " potential to emit" (PTE). Furthermore, this memorandum will address the appropriate fee classification (small vs. synthetic minor) for a source avoiding Title V by having either 1) a permit limit to comply with an applicable regulation or 2) a permit limit for the sole purpose of avoiding Title V.

Enforceability

In a guidance memorandum from Laura Butler, dated September 2, 1994, sources were originally told that in order to avoid Title V, emission calculations had to be based on the source's PTE. At that time, the PTE definition in Part 70 required emission reductions, used to avoid Title V, to be "federally enforceable." To be federally enforceable, a permit condition had to satisfy certain criteria which includes taking the permit to public notice and that the underlying requirement of the permit condition be federally approved (e.g., part of the SIP).

In 1995 and 1996 industry challenged the EPA on the issue of federally enforceability, which resulted in several court decisions. The "federally enforceable"

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requirement was first remanded by the U.S. District Court of Appeals (in D.C.) for Section 112 in July 1995 (National Mining Association). The court later vacated the federal enforceability requirement in the definition of PTE for Title I (i.e. PSD/NAA) of the Clean Air Act in September 1995 (Chemical Manufacturers Association). Finally, and most importantly, in June of 1996 the D.C. Circuit court vacated the federal enforceability requirement for PTE under the Part 70 program (Clean Air Implementation Project). In Clean Air Implementation Project vs. EPA, No. 96-1224 (D.C. Circuit. June 28, 1996), the court remanded and vacated the requirement for federal enforceability for PTE limits under part 70 of Title V. Because the court vacated this requirement, the term "federally enforceable" in section 70.2 should now be read to mean "practically enforceable by a State or local air pollution control agency" pending any additional rulemaking by the EPA.

As a result of the court cases, the EPA has reviewed information provided through a stakeholder process and is preparing a proposed rule presenting several options related to "practically enforceable." Under each option, the EPA would consider amending current rules to require that emission limitations used to limit a source's PTE be "enforceable as a practical matter."

In brief, the EPA and the courts explained that a permit restriction need only be practically enforceable and not federally enforceable to define a source's PTE. Although the federal enforceability issue is a focus of attention, the EPA and the DAQ believe it is critical to recognize that the effectiveness of limits include considerations other than who may enforce them. Thus, just as we have never taken synthetic minor permits to notice (although we once believed we would need to, in order to satisfy the federal enforceability requirement), there is no longer a requirement that a permit restriction, which limits a sources emissions to maintain compliance, must be federally enforceable or pertain to a federally approved State Implementation Plan (SIP) regulation for the restriction to be practically enforceable. Accordingly, a source may calculate its PTE based on a permit restriction used solely to avoid Title V, or a required regulatory permit restriction necessary to maintain compliance with an applicable regulation even if the State regulation is not federally approved. **However, the DAQ has decided that a permit restriction pursuant to 2D .1100 "Control of Toxic Air Pollutants" shall not be used to calculate a facility's PTE.**

Fee Classification

For fee classification purposes, if a source's PTE is calculated above the Title V applicability threshold, and the applicant requests a permit limit (i.e., hours of operation, production rate limit, etc.) for the sole purpose of avoiding Title V, then the source is classified as a synthetic minor. However, if the source is required to take a permit limit for the purpose of maintaining compliance with an applicable regulation (SIP approved or non-SIP approved, excluding 2D .1100 "Control of Toxic Air Pollutants."), which reduces the source's PTE to below the Title V

applicability threshold, then the source is classified as a small.

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