



North Carolina Department of Environment and Natural Resources
Division of Air Quality

Michael F. Easley, Governor

William G. Ross, Jr., Secretary
B. Keith Overcash, P.E., Director

July 3, 2008

Thomas Pritcher,
Program Manager
ENSR
7041 Old Wake Forest Road, Suite 103
Raleigh, NC 27616

Re: Applicability Determination for The SEFA Group

Dear Mr. Pritcher:

This is in response to your letter dated June 10, 2008 regarding the proposed SEFA Fly Ash Beneficiation ("FAB") installation proposed near the Duke Power Marshall steam station in Catawba County, NC. Your letter requested a determination as to whether the proposed FAB operation, owned and operated by The SEFA Group, would be "stationary source" separate and apart from the Duke Marshall steam station. In addition, you ask the NCDAQ to concur with your NSPS Subpart Db applicability analysis.

Stationary Source Applicability

As discussed below, because the FAB operation is owned and operated by The SEFA Group, it is not considered part of the Duke Marshall steam station and would be considered as a separate stationary source.

North Carolina's Title V operating permit regulations (15A NCAC 2Q .0500, et. seq.) defines "Major source" as,

... any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

Similarly, in substantive part, North Carolina's NSR regulations (15A NCAC 2D .0530) provide:

Permitting Section

1641 Mail Service Center, Raleigh, North Carolina 27699-1641
2728 Capital Blvd., Raleigh, North Carolina 27604
Phone: 919-715-6235 / FAX 919-733-5317 / Internet: www.ncair.org

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Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.

Building, structure, facility, or installation means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual. . .

The pertinent language common to both definitions provides that pollutant-emitting activities are only considered to be part of the same stationary source if they are under the common control of the same person. According to your June 10th letter, SEFA is a wholly owned private company of Thomas C. Hendrix and family and SEFA's board members are wholly distinct from Duke Energy or any of Duke's subsidiaries. SEFA and Duke are not under common control and therefore cannot be considered to constitute a single stationary source. Your letter also specifically requests that DAQ consider several design options when making this stationary source determination. The design options are described on page 2 of your letter are not relevant to this inquiry because the issue of common control does not turn on the operational interdependence of the two sources. To the extent that these design options are relevant, they are relevant to the SIC code test of the stationary source determination in so far as the SEFA operations act as a support facility to Duke's primary purpose. However, the common ownership test is a separate test from the SIC code (support facility) test. Because SEFA and Duke are not under common control, as stated above, the operational relationship between these two companies is not relevant.

This determination is consistent with North Carolina's regulations and prior determinations. Furthermore, simply by way of commentary, this determination is also consistent with the federal EPA's long-standing interpretation that common ownership does not depend on operational interdependence but rather turns on legal control. EPA's position is best expressed in their July 17, 1980 determination from the EPA Director, Division of Stationary Source Enforcement to Allyn M. Davis, Director, Air & Hazardous Materials Division, Region VI regarding the TEX-USS High Density Polyethylene Plant. In that determination EPA stated,

The 1978 PSD regulations and the preamble to them do not define the term "control". Presumably, therefore, the Administrator intended them to have the same meaning it has in common parlance. The Securities and Exchange Commission (SEC) has established a definition of "control which, in our view, states that common sense meaning with respect to business entities. The definition provides that: The term "control" including the terms "controlling," "controlled" by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership or voting shares, by contract, or otherwise. See, e.g., 17 CFR 230,405(F)(1979).

Similarly, EPA's guidance as provided in the September 11, 1980 Emission Offset Interpretative Ruling at 45 Fed. Reg. 59874, reaffirms the above interpretation.

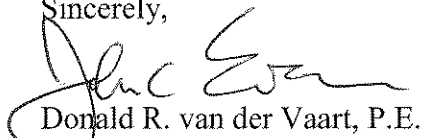
NSPS Subpart Db Applicability

To the extent that NSPS Subpart Db might apply to the proposed FAB, NSPS Subpart Db applicability turns on the issue of whether the proposed unit burns a fuel or waste product to produce steam (See 40 CFR 60.14b). The proposed unit burns a waste product (flyash) and therefore the only question is whether the unit produces steam or indirectly heats water or any heat transfer medium. While it is unclear what is meant by heat dissipation under design scenarios #2-#4 described in your June 10th letter, if the heat dissipation takes the form of producing steam or indirectly heating water or any heat transfer medium, then Subpart Db would apply. Alternatively, under design scenario #1, because there is no heat dissipation, NSPS Subpart Db would not apply.

Finally, please note that Catawba County, the location of the proposed facility, is a nonattainment area. Depending on the emission profile of the proposed FAB, regulations contained at 15A NCAC 2D .0531 and 2D .1400 should be carefully reviewed for applicability purposes.

If you have any questions please do not hesitate to contact me at (919) 715-6253
donald.vandervaart@ncmail.net

Sincerely,


Donald R. van der Vaart, P.E.
Chief
Permits Section

Enclosure (June 10, 2008 letter)

cc: Ron Slack – MRO