



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

Beverly Eaves Perdue
Governor

Sheila Holman
Director

Dee Freeman
Secretary

September 5, 2012

Floyd Whitmire
Mill Manager
International Paper Riegelwood Mill
865 John L. Riegel Road
Riegelwood, NC 28456

Dear Mr. Whitmire:

This letter is in your response to your request for clarification with respect 15A NCAC 2Q .1109 "112(j) Case-By-Case Maximum Achievable Control Technology [MACT]." On March 9, 2011 the North Carolina Division of Air Quality (NCDAQ) issued a permit to your facility containing enforceable permit conditions satisfying the Clean Air Act (CAA) Section 112(j) requirements. As part of the process to issue the permit containing the 112(j) conditions, the NCDAQ prepared a Notice of MACT Approval (NOMA). The NCDAQ provided its sister agency, the federal EPA, with the NOMA and a draft permit. The EPA approved the 112(j) conditions and a final and binding permit was issued by the NCDAQ on March 9, 2011. *See* Permit No. 03138R35. Subsequently, these same 112(j) conditions were included in the facility's initial Title V permit. That permitting process required a 30-day public notice and a 45-day EPA review period. The federal EPA approved the permit at the end of the 45-day period designed to allow for their comprehensive review. The initial Title V permit, containing all required Title V conditions as well as the 112(j) conditions became effective on July 1, 2012. *See* Permit No. 03138T37.

The NCDAQ regulations, consistent with federal CAA Section 112(j)(6), address the situation where the federal EPA promulgates a MACT standard under section 112(d) after the date a permit is issued containing 112(j) case-by-case MACT provisions. This was precisely the situation when the EPA issued the boiler MACT in 2011. The NCDAQ issued a final and binding permit containing 112(j) conditions on March 9, 2011. Subsequent to that action, on March 21, 2011 the EPA published their 112(d) boiler MACT in the Federal Register with an effective date of May 20, 2011. *See* 76 Fed. Reg. 15608.

Pursuant to 15A NCAC 2Q .0526(o), the "Director shall revise the permit on its next renewal to reflect the promulgated [112(d)] standard...The Director shall establish a compliance date in the revised permit that assures that the owner or operator shall comply with the promulgated [112(d)] standard within a reasonable time, but no longer than eight years after such standard is promulgated or eight years after the date by which the owner or operator was first required to comply with the emission limitation established by permit, whichever is earlier." The NCDAQ will, upon renewal of your Title V permit, establish a 112(d) compliance date no earlier than eight years after the promulgation of the 112(d) standard. However, consistent with subparagraph (o), the NCDAQ will also evaluate the comparative stringency of the 112(j) and 112(d) standards. If the level of control required by the emission limitation in your current permit (i.e. the 112(j) standard) is as effective as that required by the EPA promulgated [112(d)] standard the Director need not change the 112(j) emission limitation in the permit to reflect the promulgated 112(d) standard. In summary, the earliest the facility will be subject to the 112(d) will be May 20, 2019 – eight years after the effective date of the 112(d) standard. Moreover, if after evaluating the comparative risks resulting from implementation of the standards the NCDAQ determines that they are equivalent the permit may retain the 112(j) standards.

In addition to the EPA's careful review of both the NOMA and the Title V permit, both discussed above, the EPA Administrator, Lisa Jackson, in response to an inquiry from North Carolina Senator Kay Hagan agreed with the NCDAQ's

Permitting Section

1641 Mail Service Center, Raleigh, North Carolina 27699-1641
217 West Jones St., Raleigh, North Carolina 27603
Phone: 919-707-8405 / FAX 919-715-0717 / Internet: www.ncair.org

One
North Carolina
Naturally

Mr. Whitmire
September 5, 2012
Page 2


interpretation of the timing of the 112(j) and 112(d) standards. In a March 8, 2012 letter to the Honorable Senator Kay Hagan, Ms. Jackson stated "For those existing major source boilers for which North Carolina issued permits in compliance with section 112(j), the State may provide up to eight years to transition to federal standards pursuant to section 112(j). Thus, under the Clean Air Act, existing major source boilers with such limitations in their permits would have until at least 2018 [2019] to comply with the federal air toxics standards, unless the State sets an earlier deadline." While the Jackson letter has no legal value, it does, yet again, confirm that the EPA, our sister agency, agrees with North Carolina's interpretation and implementation of the 112(j) case-by-case MACT program.

Finally, based on the questions posed in your inquiry there appears to be some underlying concern with respect to the enforceability and finality of the 112(j) provisions. As noted earlier, Air Quality Permit 03138T37 was processed as a Title V permit and as such underwent the required public comment and a comprehensive EPA review. The Title V process is specifically designed to ensure finality with respect to the matters covered in the permit. Several recent court decisions have confirmed that Title V permits do, in fact, provide certainty and finality. *See Romoland School Dist. v. Inland Empire Energy Center, LLC*, 548 F.3d 738 (CAA Title V process and ability to challenge decisions made in that process are "use it or lose it" provisions and must be raised by the EPA within their 45-day review period or by a third party petitioner within the times prescribed under CAA section 505.); *Sierra Club v. Otter Tail Power Co.* 615 F.3d 1008 (5th Cir. 2010) (Finding that judicial review of issues that could have been challenged through the Title V process [CAA Section 505], an appeal of which can be made in federal court under CAA Section 307, cannot be obtained through the citizen suit provisions.); *Texas Campaign for the Environment v. Lower Colorado River Authority*, H-11-791, Southern Dist. of Texas, Houston Division (A Texas federal district court dismissed most of an environmental organization's claims finding them to be an impermissible collateral attack on a final Title V permit. Decisions concerning the content of Title V permits can be reviewed only as set forth in CAA Section 505 and the availability of review under TV divests district courts of jurisdiction over any claim that is the functional equivalent of a challenge to the appropriate provisions of a final Title V permit.)

These decisions are all based on the practicalities of the permitting process finding that if EPA or third parties were allowed to choose to either raise claims during the TV permitting process or wait and file the same claim later this could lead to simultaneous suits by multiple parties in multiple jurisdictions. Moreover, to allowing challenges to Title V permit terms after the deadlines prescribed under the Act (i.e. "late-hits") would upset the reasonable expectations of facility operators and undermine the significant investment of regulatory resources made by state agencies.

The NCDAQ is committed to protecting and improving outdoor, or ambient, air quality in North Carolina for the health, benefit and economic well-being of all. The 112(j) requirements are consistent with this commitment. If trust this response answers your questions about your boiler MACT compliance obligations. If you have any further questions please do not hesitate to contact me.

Sincerely,



Donald R. van der Vaart, Ph.D., P.E., J.D.

Chief



c: John C. Evans