

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In the matter of the Proposed Title V  
Operating Permit for

GEORGIA-PACIFIC WEST, INC.  
Toledo Pulp & Paper Operations  
P.O. Box 580  
Toledo, Oregon 97391

Permit No.: 21-0005

Proposed by the Oregon Department of  
Environmental Quality

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO THE  
PROPOSED OPERATING PERMIT FOR GEORGIA-PACIFIC WEST, INC.'S  
TOLEDO, OREGON FACILITY**

**INTRODUCTION**

Pursuant to Section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Northwest Environmental Defense Center, Oregon Toxics Alliance, and Concerned Citizens for Clean Air (collectively, Petitioners) hereby petition the Administrator of the U.S. Environmental Protection Agency (EPA) to object to the Title V operating permit (Permit) issued for Georgia-Pacific's (GP's) Kraft Pulp Mill (Facility) in Toledo, Oregon.

Petitioners are non-profit groups whose members live or recreate in Lincoln County. During the public comment period, Petitioners and their members provided both oral and written comments regarding the proposed permit. This petition is based on

objections to the permit raised with reasonable specificity during the public comment period.

Petitioners contend that the permit as issued fails to adequately protect air quality in Toledo and the surrounding area, causing adverse health and aesthetic impacts to members of Petitioners' organizations and community members.

Furthermore, Petitioners maintain that the permit as issued does not comply with the provisions of the CAA or Oregon's State Implementation Plan (SIP). EPA "does not have discretion whether to object to draft permits once noncompliance has been demonstrated." *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2<sup>nd</sup> Cir. 2003) (EPA was required to object to Title V permits once petitioner demonstrated permits did not comply with the Clean Air Act.) Therefore, EPA must object to the permit on the following grounds:

- I. The Permit fails to limit and adequately monitor total reduced sulfur (TRS) emissions in spite of the fact that an odor problem has been amply demonstrated.***
- II. Permitted increases in NO<sub>x</sub> and SO<sub>2</sub> emissions were not conducted according to state New Source Review (NSR) provisions or the Prevention of Significant Deterioration (PSD) provisions of the CAA.***
- III. The permit allows the continued burning of tire derived fuel (TDF) contrary to DEQ's assertions at the public hearings and in the Presiding Officer's Report (POR).***

Petitioners believe that the Title V permitting program offers an unprecedented opportunity for concerned citizens to learn what air quality rules apply to facilities

located in their communities, and to determine whether those facilities are complying with legal requirements. Unless Title V permits are written correctly, however, these permits cannot live up to their promise. In fact, a poorly written Title V permit makes monitoring and enforcement under the Clean Air Act even more difficult than it already is, because each of Oregon's Title V permits includes a permit shield. Under the terms of the permit shield, a permittee is protected from enforcement action so long as the permittee's facility is complying with its permit, even if the permit incorrectly applies the law. Thus, a defective permit may prevent Petitioners and other Oregonians from taking legal action against a permittee who is illegally polluting the air in their community. Furthermore, a Title V permit that fails to include appropriate monitoring, recordkeeping, and reporting requirements will prevent Petitioners and other Oregonians from ever knowing whether a polluter is complying with legal requirements. Unless EPA requires correction of the deficiencies in the proposed permit that are identified in this petition, Petitioners and other Oregonians will be unable to adequately protect their air quality.

### **BACKGROUND**

On March 4, 2003, Georgia-Pacific West, Inc. submitted a Title V permit renewal application for its pulp and paper mill in Toledo, Oregon. The application was updated 14 times between the original submission date and May 2, 2005, due to requests for additional information or clarification from the Oregon Department of Environmental Quality (DEQ) and GP requests for approval of physical or operational changes. Notice of hearings on the proposed permit was issued on July 22, 2005.

DEQ held two public hearings regarding the permit renewal, one in Toledo on August 29, 2005, and an additional one two days later in Newport, Oregon, located approximately five miles from Toledo. The second hearing was scheduled in response to requests from members of the public who were not able or did not feel comfortable attending a hearing in Toledo. The comment period was extended until November 4, 2005, and a large volume of written comments, postcards, and petitions was received.

DEQ issued a Presiding Officer's Report (POR) on June 20, 2006 addressing the comments and outlining changes that had been made to the permit. The proposed permit was then sent to EPA for review on August 8<sup>th</sup>, and a final permit was issued on September 27<sup>th</sup>, 2006. This petition is timely filed within 60 days of the close of EPA's 45-day review period on September 22<sup>nd</sup>.

During the public hearings and in written comments, an impressive number of complaints repeatedly arose with respect to odors emanating from the facility. Residents spoke of numerous 'dumps' by the facility in the middle of the night, about which one resident spoke of being enveloped in a sulfur-smelling fog so thick it was difficult to see just ahead. Additionally, there were accounts of peeling paint on houses and cars in the area going back to the time the mill first began operation.

Physical symptoms accompanying the odors included various respiratory complaints, burning and watery eyes, headaches, coughing, insomnia, memory problems, and skin conditions. Graphic testimony related the common incidence of coughing up of a 'yellow crap' by local citizens and mill workers. In addition, statistics show an inexplicable cluster of certain types of cancer in Lincoln County. Residents are

understandably concerned about the odors, the chemicals accompanying them, and the potential harm to their health.

Residents expressed their frustration at DEQ's apparent indifference to these longstanding complaints and their concern about alleged attempts by facility personnel to silence any opposition among employees and nearby neighbors. One commenter spoke of lawsuits that were purportedly brought and then subsequently dropped when the complainant was bought off. Indeed, a complaint filed in Oregon District Court in February, 2005 appears in the facility file. The complainant, a GP employee for 13 years, alleges that GP wrongfully discharged him after he expressed concerns that facility managers intended to ignore or avoid their obligation to comply with state or federal environmental laws. Additionally, an anonymous letter in the file spoke of GP personnel threatening a teenage neighbor of the facility if he related his complaints about the situation.

Hearing attendees asked for two concrete solutions to these problems: lowered emissions of the odor-causing substance(s) and increased, independent monitoring to assure compliance with emissions levels. Although DEQ and GP agreed to a series of semiannual meetings and instituted a complaint hotline procedure (Permit at 26, Condition 73. and Permit at 52, Condition 121.), there were no requirements instituted for lowered emissions nor for ambient monitoring to determine exactly what and how much of it is being released into the local airshed. DEQ is 'currently investigating' the possibility of monitoring, but apparently has no concrete plans to institute such monitoring. POR at 40.

In fact, TRS emissions have increased by 50 tpy, up from 44 tpy, and are now allowed at the rate of 94 tpy. Permit Review Report at 3, Table. DEQ avers that this is mainly due to a new practice of including TRS emissions from the wastewater ponds. POR at 55.

Likewise, NO<sub>x</sub> and SO<sub>2</sub> emissions are increased, on the justification that unassigned emissions from the netting basis are simply being reinstated. POR at 26, 28, & 30. No mention is made of what year the emissions were originally reduced. DEQ further bases its rationale on the fact that the Emissions Unit (EU) with increasing NO<sub>x</sub> emissions, EU 22 or Power Boiler 5, recently underwent NSR, including a Best Available Control Technology (BACT) analysis. At that time, BACT was determined to be Low NO<sub>x</sub> technology. But no factual or legal basis or any explanation for that determination is given in the current permit, nor was it given in the 1999 Title V permit that originally incorporated the boiler. (Additionally, no pollution control device identification number (PCD ID) is listed for the boiler. Permit at 6.)

A 2005 decision for a boiler in a Kraft Pulp Mill in West Virginia was found to be Selective Non-Catalytic Reduction, a much more stringent and protective technology than LowNO<sub>x</sub>. *See* RACT/BACT/LAER Clearinghouse at <http://cfpub.epa.gov/rblc/cfm/PolDetl.cfm?facnum=23382&Procnum=94422&poltnum=119596>; last visited November 19, 2006. The current SO<sub>2</sub> increases are summarily explained as due to ‘emission factor’ adjustments.

The reputed source of the community odors, hydrogen sulfide or H<sub>2</sub>S, was previously monitored downwind of the mill, but was halted in December, 2004. Just prior to that the facility instituted a wastewater treatment system to inject dissolved

oxygen into the system as wastewater entered the ponds. *See* POR at page 35, B. One month's monitoring showed lower results. However, no long-term monitoring has been conducted since then.

A Center for Disease Control Report (Report) examining the toxicological effects of hydrogen sulfide names it as the primary component of TRS. *See* Draft Toxicological Profile for Hydrogen Sulfide at 1, found at [www.atsdr.cdc.gov/toxprofiles/tp114-c2.pdf](http://www.atsdr.cdc.gov/toxprofiles/tp114-c2.pdf), last visited November 19, 2006. Ambient concentrations are generally in the range of .11-.33 parts per billion (ppb), but much higher levels, often exceeding 90 ppb, are found in the vicinity of industries releasing hydrogen sulfide, including pulp and paper mills. *Id.* Oregon's Air Toxics program recently proposed an ambient benchmark of 1.4 ppb for hydrogen sulfide. The Toledo monitoring showed levels above the Oregon proposed benchmark until the last month of monitoring when the company instituted odor control measures.

Respiratory distress, pulmonary edema, cardiovascular effects, and 'knockdown' or unconsciousness are known to occur at concentrations of hydrogen sulfide greater than 500 ppb. *Id.* at 2. Lingering after-effects include impaired memory and motor function, headaches, and poor concentration. *Id.* Lower concentrations result in less severe effects, including poor memory, hallucinations, personality changes, and loss of sense of smell. *Id.* Many of these same effects have been found when exposures to very low doses occur over a long period of time. *See Literature Review of the Health Effects Associated with the Inhalation of Hydrogen Sulfide* at 3, Idaho Department of Environmental Quality, 2001; found at

[www.deq.state.id.us/air/prog\\_issues/pollutants/H2S\\_lit\\_review.pdf](http://www.deq.state.id.us/air/prog_issues/pollutants/H2S_lit_review.pdf), last visited November 19, 2006.

One specific concern was voiced in both the oral and written comments as to the hazardous air pollutants released when the company burns tire chips or Tire Derived Fuel (TDF), as the permit allows. DEQ answered the concerns by simply saying, “Rubber tire chips have not been burned since at least the beginning of 2003.” POR at 56. However, the permit as issued still allow the practice of burning tire chips. Permit at 21., Condition 52.

### DISCUSSION

**I. The Permit fails to adequately reduce and monitor total reduced sulfur (TRS) emissions in spite of the fact that an odor/nuisance problem has been amply demonstrated.**

The CAA mandates each state to prepare a state implementation plan (SIP) for achieving and maintaining the air quality standards set by the EPA. 42 U.S.C. § 7410(a)(1). Each state is required to submit its SIP to the EPA for approval. *Id.* The EPA will approve a SIP submitted by a state only if the SIP meets all of the requirements of the Act. 42 U.S.C. §§ 7410(a)(3)(A), 7502(b). Once the EPA approves a SIP, the requirements and commitments contained in the SIP are binding as a matter of federal law upon the state which has submitted the SIP until that state submits a formal revision of the SIP and that formal revision is approved by the EPA. 42 U.S.C. § 7413(a)(2); *American Lung Ass’n v. Kean*, 871 F.2d 319, 322 (3<sup>rd</sup> Cir. 1989).

Section 110 of the CAA, as well as EPA’s regulations at 40 C.F.R. Part 51, set forth detailed requirements for SIPs to obtain federal approval. Among other

requirements, SIPs must include enforceable emissions limitations and other control measures, specific schedules and timetables for compliance with NAAQS, a plan for monitoring and analyzing air quality data, and a program for regulating the construction or modification of stationary sources of air pollution. 42 U.S.C. § 7410(a)(2).

Title V of the 1990 Amendments to the CAA requires that certain air pollution sources, including every major stationary source of air pollution, obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source. *See* 42 U.S.C. §§ 7661a(a), 7661c(a) (2000); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir.1996) (describing the Title V permit as “a source-specific bible for Clean Air Act compliance”).

Title V permit conditions must “assure[] compliance by the source with all applicable requirements.” 40 C.F.R. § 70.19(b). ‘Applicable requirements’ include “any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act.” 40 C.F.R. § 70.2.

‘Standard permit requirements’ include the ‘[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements’ of the permit, and monitoring and related recordkeeping and reporting requirements. 40 C.F.R. §§ 70.6(a)(1), (a)(3)(i)(B). The necessity for monitoring and recordkeeping applies even where the requirement itself lacks monitoring and recordkeeping provisions. 40 C.F.R. (c)(1). If a state pollution control provision has been approved by EPA into the SIP, it is an applicable requirement under Title V. 40 C.F.R. § 70.2.

Oregon's SIP is contained in the Oregon Administrative Rules (OARs), Divisions 21-28 and 200-268. The OAR provisions addressing nuisance and odor are found in Chapter 340. Division 208 applies to Visible Emissions and Nuisances, while Division 234, Emissions Standards for Wood Products Industries, contains additional provisions applying only to Kraft Pulp and Paper Mills. OAR 340-208-0010 through 0630 and OAR 340-234-200 through 270.

According to the rules, nuisance includes "a substantial and unreasonable interference with another's use and enjoyment of real property." OAR 340-208-0010(7). Odor is defined as "that property of an air contaminant that affects the sense of smell." OAR 340-208-0010(8). No source regulated by DEQ shall be allowed to cause a nuisance. OAR 340-208-0300(1).

The Kraft Mill rules declare DEQ's policy to "[r]equire degrees and methods of treatment for major and minor emission points that will minimize emissions of odorous gases and eliminate ambient odor nuisances." OAR 340-234-0200(1)(b). The policy commands the use of a timetable to achieve 'highest and best practicable treatment' and an effective monitoring and reporting regime to achieve compliance. *Id.* at (a)&(c). DEQ is further commanded to attempt resolution of any observed nuisance and to follow the enforcement policy outlined in Division 12. OAR 340-208-0300(2). Enforcement procedures begin with warning letters, pre-enforcement notices, and notices of permit violation, and culminate in formal enforcement actions and civil penalties when a problem situation has not been adequately addressed. OAR 340-012-0038, 0041, & 0045..

TRS emissions may be limited below regulatory thresholds when a nuisance or odor problem has been documented. OAR 340-234-0220(2). And emission limits for SO<sub>2</sub> and Particulate Matter (PM) may be reduced where a ‘special problem area’ exists. OAR 340-234-0220(1) and OAR 340-234-0210.

EPA’s last oversight of these nuisance provisions occurred during a SIP revision in January, 2003. *See* 68 Fed. Reg. 2891 (January 22, 2003). At that time, EPA approved a recodification of all DEQ air quality rules that were submitted on November 5, 1999, including Divisions 208 and 234. *Id.* at 2892. EPA goes on to mention that some ‘errors’ in the rules are to be corrected below. *Id.* EPA then summarily proposes to delete references to TRS in the SIP, saying it is ‘not appropriate for inclusion’. *Id.*

EPA confirms that DEQ submitted a revision of Division 208 for EPA’s approval March 13, 2001, but defers action on this revision to a future rulemaking. *Id.* No such rulemaking was ever undertaken.

Courts have held that rules improperly removed from a SIP without EPA’s undertaking a proper rulemaking procedure remain federally enforceable. *See Concerned Citizens of Bridesburg v. EPA*, 843 F.2d 679, 681 (3<sup>rd</sup> Cir. 1988) citing *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777 (3<sup>rd</sup> Cir. 1987). In that case, Pennsylvania’s odor rules were deleted from the SIP after EPA published a proposed rule and allowed nine months of comment. 836 F.2d at 782-783. Without holding a public hearing, EPA then published the final rule deleting the odor rules, on the assertion that the previous inclusion of the rules in the SIP were an inadvertent error. *Id.* The court held EPA’s deletion without a public hearing a procedurally invalid revision of the SIP. *Id.* at 784. Here, the Kraft Mill rules were deleted in almost exactly the same fashion. And the

Division 208 rules never even made it to the direct final rule stage. Therefore Oregon Divisions 208 and 234 remain part of the federally enforceable Oregon SIP, subject to EPA oversight authority.

While some of the provisions remain as a strike-through form in EPA's web version of the SIP, the provision allowing more restrictive emission limitations upon a finding of odor or nuisance still appears without strike-through, indicating they are still considered part of the federally enforceable SIP. OAR 340-234-0220(2). *See* <http://yosemite.epa.gov/r10/AIRPAGE.NSF/283d45bd5bb068e68825650f0064cdc2/152a0ac58bcefce988256ce6005b71a1?OpenDocument> , last visited November 19, 2006. Likewise, the emission limitations for 'special problem areas' remain. OAR 340-234-220(2). One would have to assume that a special problem area exists when there is such a huge public outcry.

Courts have also looked at the odor and nuisance provisions of SIPs in the context of standing to proceed with a citizen suit under Section 304 of the CAA. The 3<sup>rd</sup> Circuit disallowed such suits on the basis that citizen suits are only permissible to enforce quantifiable emissions limits, not broad subjective standards. *See e.g., Satterfield v. J.M. Huber Corp.*, 888 F.Supp. 1561, 1566-67 (N.D.Ga. 1994). A district court from the 6<sup>th</sup> Circuit has recently taken the opposite approach, relying on the general legal approach that statutes should not be construed narrowly in remedial contexts. *See Fisher v. Perma-Fix of Dayton, Inc.*, 2006 WL 212076 (S.D. Ohio). The 9<sup>th</sup> Circuit allowed the same broad approach in the Clean Water Act context when it allowed citizen enforcement of water quality standards. *See Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9<sup>th</sup> Cir. 1995).

Additionally, the inconsistency described above as to the facility's TRS emissions must be resolved. A legal and factual basis must be supplied to justify the increase in TRS emissions. DEQ itself asserts that wastewater pond TRS emissions represent only 35% of all TRS emissions, while emission increases have more than doubled. *Id.* If the difference were only due to the wastewater pond TRS, one would expect that the emissions increase would be more on the magnitude of 22 tpy rather than the 50 tpy as is the case in the permit. DEQ must account for this inconsistency.

The permit conditions relating to nuisance, odor, and TRS emissions from Kraft Mills are a part of Oregon's federally enforceable SIP, despite the permit conditions' assertion that the conditions are state-only enforceable. Under *NYPIRG*, EPA must assert its oversight authority and object to the permit until DEQ properly revises it to comply with those provisions.

The emissions limit for hydrogen sulfide should be restricted in order to abate the odor nuisance that exists in the vicinity of the facility. Monitoring of hydrogen sulfide should be resumed in order to assure compliance with the lowered level of emissions and with the implementing regulations for Title V permits. Reinstating the monitoring of hydrogen sulfide would provide an objective basis for determining the ambient levels of the substance and determining whether the new controls are working at any given time.

**II. Permitted increases in NO<sub>x</sub> and SO<sub>2</sub> emissions were not conducted according to state and federal New Source Review (NSR) provisions or the Prevention of Significant Deterioration (PSD) provisions of the CAA.**

Part C of subchapter I of the CAA, §§ 160-169B, 42 U.S.C. §§ 7470-7492, establishes the requirements for the prevention of significant deterioration of air quality in those areas attaining the National Ambient Air Quality Standards (NAAQS) for criteria pollutants, including SO<sub>2</sub> and NO<sub>x</sub>. The PSD programs are designed to protect public health and welfare from actual or potential adverse effects which may reasonably be anticipated to occur from air pollution, notwithstanding attainment with NAAQS; to ensure that economic growth will occur in a manner consistent with the preservation of existing air resources; to preserve, protect, and enhance the air quality in national parks, national wilderness areas, and other areas of special value; and to assure that any decision to permit increased air pollution is made *only* after careful evaluation of *all* the consequences of a decision and *after* adequate procedural opportunities for informed public participation in the decision making process. CAA § 160; 42 U.S.C. § 7470.

The definition of modification in the PSD provisions of the statute incorporates the definition of “modification” used in a different section – the CAA Section 111 New Source Performance Standards (“NSPS”) provisions. That definition provides that a modification is “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4). The EPA regulations also provide that “any physical change or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act[.]” 40 C.F.R. § 60.14(a). Again, a modification is supposed to trigger permitting requirements under the CAA, as

well as the duty to install pollution controls. 42 U.S.C. §§ 7475(a), 7479(2)(C) and 7503(a).

In looking at whether a modification triggers NSR under the federal program, therefore, the two relevant questions are whether there was a change and whether it resulted in an emissions increase. With respect to the first inquiry, EPA regulations provide certain exceptions to the definition of “physical change.” One commonly invoked exception is that “routine maintenance, repair and replacement” will not be considered a modification for purposes of determining whether an existing plant has made a physical change that will trigger NSR. *See* 40 C.F.R. § 52.21(b)(2)(iii)(a); 40 C.F.R. § 60.14(e)(1). With respect to the second inquiry under the federal NSR program, to determine whether a change “increases” emissions, the source must first calculate its baseline level of “actual emissions.” Older versions of EPA’s rules defined “actual emissions” as “the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the [change] and which is representative of normal source operation.” 45 Fed. Reg. at 52,737 (codified at 40 C.F.R. § 52.21(b)(21)(ii)). This 1980 rule also provided for “the use of a different time period upon a determination that it is more representative of normal source operation.” *Id.* While EPA historically used the two-year period immediately preceding the change to calculate baseline actual emissions, “in some cases” it allowed use of “an earlier period.” 67 Fed. Reg. at 80,188.

In 2002, the Bush Administration issued controversial regulations which made substantial changes to the NSR program and were challenged by several states and environmental organizations. The 2002 rules reinterpreted the term “increases” by

adopting a new method for calculating baseline actual emissions. *See id.* at 80,191. For sources other than electric utilities, “baseline actual emissions” are defined as “the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the [source] within the 10-year period immediately preceding [the change].” *Id.* at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(ii)). A source must adjust its baseline downward to reflect any legally enforceable emissions limitations that have been imposed since the baseline period, *see id.* (codified at 40 C.F.R. § 52.21(b)(48)(ii)(c)), and it may not use a more “representative” baseline period outside the ten-year “lookback period,” *see id.* at 80,195. Finally, the regulations specifically state that “the 10-year period shall not include any period earlier than November 15, 1990.” *Id.*

The Bush Administration rules made numerous other changes to and exemptions from the NSR program. The rules were challenged by environmental groups and certain provisions were struck down by the D.C. Circuit. *See New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005); *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006). The provisions for measuring whether there has been an increase in emissions, however, were upheld by the DC Circuit. *See* 413 F.3d at 24-27.

EPA evaluated and initially approved Oregon’s NSR program on August 13, 1982 (47 Fed. Reg. 35,191), as being equivalent to EPA’s regulations on a program-wide basis. In 2003, EPA approved changes to Oregon’s rules, including changes to Oregon’s NSR program, but EPA noted that its approval did not address whether Oregon’s rules complied with the new NSR rules discussed above, which were then subject to federal court challenges. In December 2005, Oregon submitted a request for equivalency

determination to EPA, in which Oregon asks EPA to deem its NSR provisions equivalent to the now finalized federal NSR program. To date, EPA has taken no action on Oregon's request.

EPA does allow the use of Economic Incentives Programs (EIPs) to reduce and bank air emissions. *See, generally, Improving Air Quality with Economic Incentive Programs*, Environmental Protection Agency, Office of Air and Radiation, Document # EPA-452/R-01-001, January, 2001. The guidance document states that such programs cannot supersede the requirements of New Source Review (NSR) or Prevention of Significant Deterioration (PSD) programs:

“[T]his EIP guidance does not supersede the established requirements of the **new source Review [sic]** (NSR) program. The CAA and the EPA's rules and guidance describe the kinds of emissions reductions that may be used for **NSR offsets** and **NSR netting** in a number of ways that are different from the requirements for generating and using EIP emissions reductions that are set forth in this guidance. The NSR requirements continue, and they may not be lifted by the State's adoption of an EIP or by the approval of that EIP into a SIP.” *Id.* at 10 (emphases in original).

The Guidance specifically states that: “A major source or major modification may not avoid NSR review by using an EIP except for the use of emission reductions that meet the NSR/PSD requirements for netting when the EIP emission reductions occur *contemporaneously* with their use *and* occur at the same source as the emission increase.” *Id.* at 255 (emphases added). Thus, a source can not evade BACT provisions for a major modification unless the reductions are put into place contemporaneously with emission increases.

Oregon's rules differ from the federal regulations in a couple of different ways:

Oregon's practice of assigning 1977 or 1978 emission values as a measure of baseline emissions for calculating emission increases at the time of a modification is not

in keeping with federal PSD regulations nor with the Guidance on Economic Incentive programs. It is outside the ten-year lookback provision and can go beyond the ultimate cutoff of 1990.

Another of the differences in the programs is that Oregon uses a plant-wide cap approach to defining major modification rather than the contemporaneous net emissions increase approach EPA's rules and the EIP Guidance establish. EPA has even acknowledged that the effect of this plant-wide cap approach is that some changes which would be subject to review under EPA's rules are not subject under ODEQ's rules. *See* 68 Fed. Reg. 2891 (Jan. 22, 2003).

The plant-wide cap in Oregon, referred to as the plant site emission limit (PSEL), is defined as "the total mass of emissions per unit of time of an individual air pollutant specified in a permit for a source." OAR 340-200-0020(88). At an annual level, calculation of the PSEL determines the maximum emissions of each pollutant that may be emitted, generally in tons per year.

Oregon has promulgated an EIP, contained in OAR 340 Division 268, governing the use of Emissions Reduction Credits. OAR 340-268-0030. Emissions reductions credits are only viable for a period of ten years. OAR 340-268-0030(2)(a)(A). However, emissions reductions that are not banked within a two-year period become 'unassigned emissions' that have no expiration period. There is no parallel to unassigned emissions in the federal PSD provisions in the federal rules. Such unassigned emissions can be reinserted into the facility's PSEL at any time to offset a planned modification resulting in an emissions increase. But federal NSR rules clearly state that no emissions 'lookback' can go beyond the year 1990. It is not clear on the face of the permit whether

the unassigned emissions now being used to offset increases in the PSELs were generated during the last ten years or at a previous time.

DEQ's use of unassigned emissions dating back to the 1970s in order to avoid NSR/PSD rules must not be allowed. As explained above, the state rules do not present an equivalent or sufficient method of determining when an increase in facility emissions triggers NSR/PSD. It is impermissible to allow DEQ to create a convenient way of calculating emissions reductions and increases by calling them 'unassigned emissions', thereby allowing a facility to avoid going through NSR/PSD analysis. It is impossible to tell in the current permitting action when the unassigned emissions used to offset the current increases of SO<sub>2</sub> or the 1999 increases of NO<sub>x</sub> were originally generated and therefore whether the facility should be required to undergo a new BACT analysis at this time, perhaps resulting in a finding of Selective Non-Catalytic Reduction as BACT for NO<sub>x</sub>.

The very basis of the CAA technology forcing regimen is built around a program of ratcheting pollution controls ever tighter as old facilities are forced to upgrade or retire, improving our nation's air quality in the process.

**III. The permit allows the continued burning of tire derived fuel (TDF) without required control measures.**

If DEQ is answering public concerns regarding the continued burning of hazardous TDF with an assurance that tire chips have not been burned at the facility since "at least the beginning of 2003," it should back up that assurance with an enforceable

permit condition that TDF will no longer be used as a fuel. Otherwise, DEQ is in danger of misrepresenting the situation and failing to adequately comport with its mission to protect Oregon's air quality.

### CONCLUSION

For the reasons listed above, EPA should object to the Title V permit as issued. After taking a hard look at the rules, EPA must insist to adjustments of any and all permit conditions that are out of line with current law. EPA and DEQ can then set in motion the process of properly revising the SIP as needed, in accordance with the CAA and other applicable law.

Respectfully submitted November 20<sup>th</sup>, 2006,

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