



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

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OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Bart E. Cassidy
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, Pennsylvania 19004

Dear Mr. Cassidy:

We are in receipt of your letter dated March 13, 2018, requesting “clarification” from the Environmental Protection Agency (EPA) of certain elements of the New Source Review (NSR) regulations and the Plantwide Applicability Limit (PAL) provisions contained in those regulations. The EPA has reviewed your request, the applicable provisions in the NSR regulations, and statements in the preambles to those regulations. The agency does not agree with your reading of the regulations. Specifically, for purposes of determining the PAL emissions level for a facility, the EPA cannot accept your contention that “an emissions unit that had commenced operation within two years of the *selected baseline period* constitutes a ‘new source’ under the NSR regulations.” March 13 letter at 1 (emphasis added). Under the EPA’s NSR regulations, for purposes of setting a PAL, the point of reference for determining whether an emissions unit is a “new emissions unit” or an “existing emissions unit” is the date of the PAL permit application and not, as you propose, the “selected baseline period.”

The regulatory provisions for establishing a 10-year actual-based PAL level specify that the level “shall be established as the sum of the baseline actual emissions (as defined in paragraph (b)(48) of this section . . .) of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant...” 40 CFR § 52.21(aa)(6)(i).¹ Paragraph (b)(48), meanwhile, provides that, “[f]or a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(48)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(48)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph

¹ This letter cites the relevant EPA Prevention of Significant Deterioration regulations at 40 CFR § 52.21. The same rationale and conclusions apply to parallel provisions contained in 40 CFR §§ 51.165, 51.166 and appendix S to 40 CFR part 51. Approved state and local regulations may, of course, differ, and so this response does not speak to how this evaluation may work under differing regulations.

(b)(48)(iii) of this section.” *Id.* § 52.21(b)(48)(iv).² You claim that, “[b]ased on the regulatory definition of ‘new’ units, all existing emissions units at the source that had been constructed within two years of the baseline period should be characterized as *new* units and contribute to the baseline actual emissions rate for the PAL at the units’ potential to emit.” March 13 Letter at 3 (emphasis in original).

The regulatory language at issue here is clear and does not support your claim. The NSR regulations define “emissions unit” to mean, in relevant part, “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant,” while further specifying that “there are two types of emissions units” – *i.e.*, a “new emissions unit” and an “existing emissions unit.” 40 CFR § 52.21(b)(7). A “new emissions unit” is then defined as “any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.” *Id.* § 52.21(b)(7)(i). In turn, an “existing emission unit” is simply “any emissions unit that does not meet the requirements of in paragraph (b)(7)(i),” which defines what a “new emissions unit” is. 40 CFR § 52.21(b)(7)(ii).

The definition of “new emissions unit” contains no reference to a “selected baseline period,” nor does it otherwise indicate that a new unit is one that began operating “within two years” of such a period. Further, the definition uses the present tense (*i.e.*, “that has existed”). For your reading of this provision to be plausible, it would require the use of the past tense (*e.g.*, “that had existed”), combined with some sort of reference to the selected baseline period’s providing the time frame for the inquiry. Neither element is present in the applicable definition, rendering your interpretation both implausible and inconsistent with the regulatory text itself.

Underscoring this, as the EPA indicated in the *Federal Register* preamble to 2002 NSR final rule that established the PAL provisions, the determination of whether an emission unit is a “new emissions unit” or an “existing emissions unit” is the *first* step in the PAL determination process. On this point, the preamble states:

We calculate the PAL level for a specific pollutant by summing the baseline actual emissions of the PAL pollutant for each emissions unit at your existing major stationary source, and then adding an amount equal to the applicable significant level for the PAL pollutant under § 52.21(b)(23) or under the CAA, whichever is lower.

You must *first* identify all your existing emission units (greater than 2 years of operating history) *and* new emission units (less than 2 years of operating history since construction).

67 FR 80208 (December 31, 2002) (emphases added). That is, only after you have identified and classified all of the emissions units at the source would you go to the next step in the analytical

² An exception to the use of baseline actual emissions to determine an emissions unit’s contribution to the PAL level is for “newly constructed units” – *i.e.*, units on which “actual construction began after the [selected] 24-month [baseline] period.” 40 CFR § 52.21(aa)(6)(ii). In lieu of their actual emissions during the selected baseline period (which, of course, would always be zero), the emissions must be added to the PAL level at an amount equal to potential to emit. *Id.* Additionally, emissions from units that operated during the baseline, but thereafter have been permanently shut down must be subtracted from the PAL level. *Id.* § 52.21(aa)(6)(i).

process – selecting your baseline period. The classification of your emissions units in the first step, therefore, cannot possibly be based on the selected baseline period, since a baseline period has yet to be determined.

Another statement in the preamble to 2002 NSR final rule indicates that the selection of the baseline period has no bearing on the determination of whether an emissions unit is a “new emissions unit” or an “existing emissions unit.” Specifically, the agency stated that “[f]or any emission unit (*currently* classified as existing or new) that is constructed after the 24-month period, emissions equal to its PTE must be added to the PAL level.”³ This statement buttresses the EPA’s position that the classification of a unit as “new” or “existing” is to be based on an emissions unit’s status at the time of PAL permit application submittal.

Finally, your reading of the NSR regulations would necessarily entail that the same approach applies to the classification of emissions units for purposes of pre-project NSR applicability.⁴ Yet it is clear that the EPA did not intend, in this context, for the baseline period to serve as the point of reference for determining whether an emissions unit is new or existing:

We agree with the commenter in the case of a new emissions unit (unit that does not yet have a 2-year operating history) that the baseline emissions rate should be the unit’s potential to emit, since a unit with less than 2 years of normal operation *at the time of a physical or operational change* does not have sufficient operating history to determine its actual emissions.⁵

In the case of a unit that has 2 or more years of operating history at the time of a proposed physical or operational change, the source has adequate operating history to determine actual emissions. This is the very basis for those paragraphs in the EPA’s NSR regulations that govern how baseline actual emissions from existing units are derived. *See* 40 CFR § 52.21(b)(48)(i) and (ii).

Because some of the units covered under your interpretation would have been operating for 24 months or more as of the date of a complete PAL permit application, these units would have actual operational data to determine their baseline actual emissions for the purpose of setting the PAL level.⁶ Your interpretation, however, would allow an emission unit with more than a decade of actual operational data to continue to use its potential to emit as its baseline actual emissions rate. This is certainly not what we intended in the definition of baseline actual emissions adopted in the 2002 NSR final rule.

In summary, the EPA’s NSR regulations are clear that any emissions unit that has existed and begun operating less than 2 years from the time of PAL permit application submittal is a “new

³ 67 FR 80208 (emphasis added). Here, the EPA is referring to “newly constructed units” on which “actual construction began after the 24-month period.” *See supra* note 2.

⁴ As to this, your letter correctly points out that the “baseline actual emissions” provisions in the NSR regulations apply to both the determination of whether a project at an existing source requires NSR permit and to the setting of a PAL level. March 13 Letter at 5.

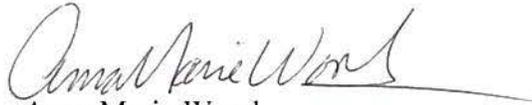
⁵ Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations, U.S. EPA Office of Air Quality Planning and Standards (Nov. 2002), at I-2-13 (emphasis added).

⁶ Aside from the exception for newly constructed units as noted above. *Supra* note 2.

emissions unit.” Such a unit contributes to the PAL level at an amount equal to its potential to emit. Equally clear is that all emissions units that have existed and operated for 2 or more years from the time of the PAL permit application are “existing emissions units” that contribute to the PAL level at an amount equal to average rate, in tons per year, at which the unit actually emitted the pollutant during the selected 24-month period.⁷

If you have any questions, please contact Juan Santiago of my office at santiago.juan@epa.gov or (919) 541-1084.

Sincerely,

A handwritten signature in cursive script that reads "Anna Marie Wood". The signature is written in black ink and extends to the right with a long horizontal flourish.

Anna Marie Wood
Director
Air Quality Policy Division

⁷ Aside from the exceptions for newly constructed and permanently shut down units as noted above. *Supra* note 2.