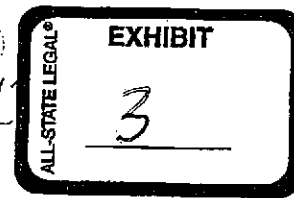


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November 15, 2006

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Sam Napolitano, Director  
Clean Air Markets Division  
U.S. Environmental Protection Agency  
OAP-Office of Air and Radiation  
Mail Code 6204J  
1200 Pennsylvania Avenue  
Washington, DC 20460

Dr. Mike McDaniel, Secretary  
Louisiana Dept. of Environmental Quality  
P.O. Box 4301  
Baton Rouge, LA 70821-4301

Re: Supplement to Request for Determination of Nonapplicability  
Clean Air Interstate Rule ("CAIR")  
Nelson Industrial Steam Company  
Westlake, Calcasieu Parish, Louisiana  
Agency Interest No. 9142

Dear Mr. Napolitano and Dr. McDaniel:

Our firm has been retained to assist Nelson Industrial Steam Company ("NISCO") in connection with issues under the Clean Air Interstate Rule ("CAIR"). On March 13, 2006, Nelson Industrial Steam Company ("NISCO") submitted a request to each of your agencies for a determination that its two cogeneration units at its Westlake facility were exempt from CAIR. This request was made on the basis that these two units meet the definition of cogeneration units under the Public Utilities Regulatory Policies Act ("PURPA") and under the Clean Air Act's Acid Rain rules and because neither of the units provides more than 1/3 of its potential electrical output capacity or 219,000 MWe to a utility power distribution system for sale. Subsequent discussions with the agencies have centered on whether the two units, which are fueled by petroleum coke, meet the definition of cogeneration unit under the Clean Air Interstate Rule ("CAIR") found at 40 C.F.R. 51.123(cc). This is because the CAIR rule imposes an additional efficiency test to demonstrate that a unit is a cogeneration unit. Thus, although a unit may be

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classified as a cogeneration unit under PURPA and the Acid Rain rules, it may not be a cogeneration unit under CAIR. NISCO has been working with the EPA to determine the appropriate data for determination of the efficiency standards under CAIR and requests that EPA continue to review the information submitted on this issue.

The purpose of this letter is to request a determination of nonapplicability of CAIR for the additional reason that the NISCO units do not meet the definition of electric generating unit ("EGU") contained in 40 C.F.R. 51.123(cc) and in the Federal Implementation Plan ("FIP") because the units have never sold *sufficient* electricity to a utility power distribution system to fall within the meaning of "producing electricity for sale." Under CAIR and the FIP an EGU is defined as follows:

Electric generating unit or EGU means:

- (1) Except as provided in paragraph (2) of this definition, a stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine serving at any time, since the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe *producing electricity for sale....*"

In the final CAIR Preamble, EPA emphasized that it proposed to regulate only EGUs under CAIR because its cost-effectiveness analysis reviewed only the ability of EGUs to reduce NOx and SO2 in a cost-effective manner. In responding to a comment about why non-EGU power sources were not included in EPA's CAIR model rule (basis for the FIP), EPA stated:

[For non-EGUs], EPA has less reliable SO2 emissions data and very little information on the integration of NOx and SO2 controls. Although EPA has more information on NOx emissions from [sources subject to the NOx SIP call] (and other programs in the northeastern U.S.), the geographic coverage of the CAIR includes some States that were not included in the NOx SIP Call, some of which states contain significant amounts of industry. The EPA has even less emissions data from non-EGUs in these non-SIP call states affected by the CAIR. While EPA has incorporated State-submitted emissions inventory data for 1999 into its analysis for the CAIR, even this data is generally lacking information on fuel, sulfur content, and existing controls. Without this data, it is very difficult to assess the emission reduction opportunities available for non-EGU boilers and turbines. Furthermore, with regards to NOx, many non-EGU boilers and turbines are making reductions using low NOx burners (the control technology EPA assumed in making the cost-effectiveness determinations in the NOx SIP Call). Since these controls are operated year-round, annual emissions reductions are already being obtained for many of these units. Additional reductions would likely be less cost effective.

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70 Fed. Reg. at 25214, May 12, 2005.

The two pet-coke-fired NISCO units were not evaluated by EPA with respect to emissions or pollution control equipment in the background documents supporting the CAIR. To the best of our knowledge, EPA did not evaluate any pet-coke fired units in its cost-effectiveness analysis which was central to the basis for the rule. Louisiana was not in the NOx SIP call, so data concerning the NOx control technology for the two units was not available to EPA, as indicated in the above Preamble. The two NISCO units are subject to a PSD permit issued prior to construction of the units. PSD Permit No. PSD-LA-557. Both units are considered to have best available control technology ("BACT") for the control of SO2 and NOx. BACT for NOx was determined to be good operating techniques and the use of staged combustion. The facility already achieves control of NOx emissions at level of approximately 0.1 lb. NOx/MMBtu. BACT for SOx was determined as the use of limestone in the fluidized beds (which achieves 90% SO2 control). Additional controls would not be cost-effective.

Neither of the NISCO units has ever sold more than 1% of its electrical output to a utility power distribution system, except during the aftermath of Hurricanes Katrina and Rita in 2005 when the annual sale of electrical output was only 2.58%. In five of the fifteen years since 1990, NISCO has not sold any electricity to the grid. In six more of those years, sales were below 0.2 % of total generation. Only in 2005 did sales to the grid exceed 0.82%. Because 2005 was the year of Hurricanes Katrina and Rita, the special *force majeure* circumstances of those storms account for these extra sales.

The NISCO units were constructed and are operated to produce power only for three of the companies which own 100% interest in NISCO: Sasol, CITGO and ConocoPhillips. Each of these three entities uses the power for manufacturing purposes. Any sales of electricity to the grid are the result of only incidental or accidental swings in electrical production due to a manufacturing unit being temporarily off-line. The NISCO units are operated in order to tailor output to the demands of these three entities, not to produce power for sale. The miniscule amount of power sold is not done so on an intentional basis, but rather to avoid waste. The only exception to this mode of operation was due to back-to-back natural disasters of unprecedented magnitude.

NISCO provided some power to Southwest Louisiana after Hurricane Rita. Before Hurricane Rita, NISCO hadn't sold any power in 2005. The NISCO units were the first two units back on line in the entire SW Louisiana/SE Texas area and were intentionally run at maximum rates to supply badly needed power.

The annual sales of electricity from the NISCO units since they first fired the Circulating Fluidized Bed Boilers have been as follows:

| Year | MWHN PBS Total Generation | MWHN Avoided Cost (sold) | Percentage MWHN Avoided (sold)* |
|------|---------------------------|--------------------------|---------------------------------|
| 1992 | 883,541                   | 494                      | 0.06%                           |
| 1993 | 1,404,540                 | 11,462                   | 0.82%                           |
| 1994 | 1,416,159                 | 2,229                    | 0.16%                           |
| 1995 | 1,469,516                 | 10,902                   | 0.74%                           |
| 1996 | 1,441,529                 | 522                      | 0.04%                           |
| 1997 | 1,561,879                 | 48                       | 0.00%                           |
| 1998 | 1,468,807                 | 50                       | 0.00%                           |
| 1999 | 1,342,403                 | -                        | 0.00%                           |
| 2000 | 1,289,062                 | 8,611                    | 0.67%                           |
| 2001 | 1,620,472                 | -                        | 0.00%                           |
| 2002 | 1,621,741                 | 1,016                    | 0.06%                           |
| 2003 | 1,552,336                 | 88                       | 0.01%                           |
| 2004 | 1,559,327                 | -                        | 0.00%                           |
| 2005 | 1,613,791                 | 41,636                   | 2.58%                           |

NISCO believes that EPA has the inherent authority to interpret the phrase "producing electricity for sale" within the definition of EGU so as to exclude: a) incidental production of electricity for sale when it amounts to less than 1% of the unit's annual output and b) production of a small amount of electricity for sale only for limited periods during or in response to natural disasters. In the alternative, NISCO believes that EPA has the authority to either amend the FIP to create such *de minimis* exemptions from the definition of EGU or to allow the State of Louisiana to include such a *de minimis* exemption in its SIP.

It has been recognized in many court decisions that EPA has inherent authority to make *de minimis* exceptions to its rules. In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) the court considered whether EPA had the authority to create *de minimis* exceptions to the Clean Air Act statutory requirement that all modifications to major stationary sources should be subject to PSD review. The Court found that EPA did have such authority and noted that the principle of recognizing the agency's inherent authority to make exemptions "is a cousin of the doctrine that, notwithstanding the "plain meaning" of a statute, *a court must look beyond the words to the purpose of the act where its literal terms lead to "absurd or futile results."* (citing *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1939); *District of Columbia v. Orleans*, 132 U.S.App.D.C. 139, 141, 406 F.2d 957, 959 (1968)). 636 F.2d at 360, note 89, emphasis added. EPA has recently exercised just such inherent authority to craft exemptions in the following cases: *Ober v. Whitman*, 243 F.3d 1190 (9<sup>th</sup> Cir. 2001) and *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996).

Regulation of NISCO's two units under CAIR as EGUs when such units generally sell less than one half of one percent of their electrical output to a utility power distribution system would be

an absurd result in light of the fact that additional controls for reductions are infeasible and would make no material difference to the ozone contributions in the Texas counties<sup>1</sup> at issue or in the SO<sub>2</sub> contributions to Alabama.<sup>2</sup> That was the underlying basis for regulation of any EGUs in Louisiana. Such rationale is not supported in the case of NISCO, certainly. While NISCO understands that CAIR is not premised on a direct correlation of reductions in emissions from specific sources, but rather on reductions from the state as a whole, Louisiana has already projected achieving the required reductions without including any reductions from NISCO in its estimates. NISCO has not been identified by LDEQ as even being subject to CAIR in any of LDEQ's notifications to potentially affected facilities.

For these reasons, NISCO requests that EPA make a determination that NISCO's units should not be classified as EGUs because they do not supply a sufficient amount of power for sale to be considered to be "producing electricity for sale" within the EGU definition. In the alternative, NISCO requests that EPA amend the FIP and/or make a written determination that Louisiana may amend its proposed SIP to exclude from the definition of EGUs any unit that produces less than 1% of its electrical output to the grid for sale (on a three calendar year average basis) and to provide for an exclusion where sales above the 1% average are due to response to natural disasters or other state declared emergency conditions.

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<sup>1</sup> It should be noted that the modeling analysis performed to support the CAIR rule ozone impacts is technically suspect in its conclusion that Louisiana is an upwind source of ozone contaminants for Harris and Tarrant counties in Texas. This conclusion is directly contrary to a number of more specific modeling runs performed by Louisiana DEQ and approved by EPA Region 6 in connection with Louisiana SIP approvals. In each of those modeling exercises, it was concluded that Texas emissions contribute to Louisiana ozone nonattainment – not the other way around. The basic meteorological data does not support that prevailing winds are from Louisiana – quite the reverse is true. See the following EPA Region 6 press release dated July 26, 2002 stating "that air pollution is transported to the area [5 parish area around Baton Rouge] from southeast Texas." <http://yosemite1.epa.gov/r6/press.nsf/346f458dede7637d8625693d004ec51d/fd2043e8013ddb7786256c02006fa331!OpenDocument> The SIP approval supporting this action was published in 67 FR 61786 on October 2, 2002. The SIP approval was later rescinded only because the U.S. Fifth Circuit found that EPA lacked authority for its Transport Extension policy, not because of any underlying finding that there was not transport of ozone forming constituents from Texas to Louisiana. NISCO requests that all such modeling data supporting the October 2, 2002 SIP approval and transport extension, already within EPA's and LDEQ's records, be considered to be incorporated into these comments.

<sup>2</sup> It also should be noted that SO<sub>2</sub> modeling was performed for NISCO in conjunction with its application for a Title V permit. The modeled maximum SO<sub>2</sub> emissions were less than 15% of the short term and long term ambient standards. This certainly is indicative that the NISCO contributions of SO<sub>2</sub> are not likely to affect ambient air quality in Alabama. As noted, NISCO employs BACT control for SO<sub>2</sub> already. Further reductions are neither feasible nor cost-effective.

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Thank you for your consideration of this supplement to NISCO's request for a determination of non-applicability of CAIR. If you need further information, please contact me as soon as possible.

Very truly yours,

A handwritten signature in black ink, appearing to read "Maureen N. Harbourt". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Maureen N. Harbourt

cc: Adina Wiley, EPA Region 6  
Teri Lanoe, LDEQ  
Allen Hile, NISCO