

May 3, 2001

(AR-18J)

Thomas Rigo, Chief
Field Operations Section
Ohio Environmental Protection Agency
122 South Front Street
P. O. Box 1049
Columbus, Ohio 43266-1049

Dear Mr. Rigo:

Thank you for the opportunity to respond to comments received on the proposed changes to Ohio Administrative Code (OAC) 3745-77-01 which would clarify when a unit would be considered insignificant under Ohio's Title V program. In a March 28, 2001, electronic mail to Genevieve Damico, you specifically requested the United States Environmental Protection Agency's (USEPA) position on the issues which Andrew Bergman, Porter, Wright, Morris and Arthur, raised to the Ohio Environmental Protection Agency (OEPA) on March 1, 2001. Mr. Bergman represents the Ohio Printing Industry and the Ohio Chemistry Technology Council. This letter is a response to your March 28, 2001, request.

OEPA is proposing to revise OAC 3745-77-01(U)(3) and (MM) to add the term "uncontrolled potential to emit". The term is being added to clarify that controls should not be considered when determining whether the emissions unit can be considered an insignificant emission unit. Mr. Bergman argues that the use of "uncontrolled potential to emit" creates a more stringent definition of potential to emit. Mr. Bergman further asserts that these changes to OAC 3745-77 are in direct contradiction to the holdings of Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1979) and United States v. Louisiana-Pacific Corp., 682 F.Supp. 1141 (D. Col. 1988).

USEPA disagrees with Mr. Bergman. The proposed revision to rule 3745-77-01(U) makes clear that the term "uncontrolled potential to emit" applies only for evaluating whether or not an emissions unit is insignificant under Ohio's Title V program. The general definition of "potential to emit" at rule 3745-77-01(BB) continues to take into account all physical or permitted constraints on operation. Therefore, OEPA is not creating a

more stringent definition of "potential to emit", but is creating a new term for a specific purpose. While Mr. Bergman is correct in asserting that Alabama Power generally requires consideration of controls in determining PTE, the use of "uncontrolled potential to emit" in this context is consistent with Alabama Power and Louisiana-Pacific.

In Alabama Power, the Court held that USEPA could exempt de minimus situations from the clear mandate of a statute when applying the literal terms of the statute would be "pointless expenditures of effort." 636 F.2d at 360. The Court noted that the difference between a situation subject to a regulation and one that truly is de minimus is one of degree, and that the authority to provide for a de minimus exemption arises when the "burdens of regulation yield a gain of trivial or no value." Id. By exempting only those emissions units that emit a small amount of pollutants in the absence of controls, Ohio ensures that only sources which are truly de minimus avoid regulation under Title V. In fact, the consideration of controls in determining emissions units that fall into the de minimus exemption could run counter both to 40 C.F.R. § 70.5(c) and the dictates of Alabama Power.

For example, a well-controlled emission unit would more than likely be controlled because of requirements imposed on the unit by a Prevention of Significant Determination permit, New Source Review permit, federal regulations or State rules. It is precisely these types of units for which the Title V permit is intended.

Would one consider units that are major in and of themselves (emitting over 100 tons per year) and are controlled by at least 95% to be insignificant? Under Mr. Bergman's reasoning these emission units would be considered insignificant. Clearly, this scenario demonstrates that considering controls when determining whether or not an emission unit is insignificant violates the intent of the Clean Air Act and Part 70.

It is our position that OEPA's approach to this insignificant emission unit issue is not contrary to Alabama Power and Louisiana-Pacific. It is also our position that the definition of "uncontrolled potential to emit" is not more stringent than "potential to emit" because they are two different terms. If you have any questions or wish to discuss this issue further, please call Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Pamela Blakley, Chief
Permits and Grants Section

