January 21, 2000

4APT-ARB

Ronald W. Gore
Chief, Air Division
Alabama Department of
Environmental Management
P. O. Box 301463
Montgomery, Alabama 36130-1463

SUBJ: Request for Clarification of EPA Guidance on the Alternative Fuels Exemption under the Prevention of Significant Deterioration Program

Dear Mr. Gore:

Thank you for your letter, dated December 28, 1999, requesting that the U.S. Environmental Protection Agency (EPA) Region 4 provide clarification of our recent interpretation of the term "capable of accommodating" as it applies in the context of the definition of modification under the Prevention of Significant Deterioration (PSD) Program. Your letter refers to "recent actions by EPA Region IV concerning the objection of Title V permits in cases where petroleum coke has been added as a fuel to coal fired electric generating units built before January 6, 1975, which did not go through the new source review process," and requests that we provide a clarification of our "recent" interpretations in light of two past letters issued by EPA Regions 2 and 5.

As you are aware, a major source is subject to PSD requirements if a proposed modification, including a change in the method of operation, will result in a significant net emissions increase of regulated air pollutants. See 40 C.F.R. §§ 51.166(b)(2), 51.166(b)(23) & 51.166(i). The federal PSD requirements at 40 C.F.R. § 51.166(b)(2)(iii)*(e)(1)*, exclude from the definition of major modification the use of an alternative fuel or raw material which:

> the source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975. . . .

The alternative fuels exemption is not contained in the Act, but was added to the PSD regulations in 1974 such that the definition of modification would be consistent with that used under the New Source Performance Standards (NSPS). The stated intent of the NSPS exemption was to "eliminate inequities where equipment had been put into partial operation prior to the proposal of the standards," 36 FR 15,704 (August 3, 1971). Hence, the alternative fuels exemption was designed to eliminate inequities

faced by facilities which designed and constructed units to burn more than one fuel, but which were not burning all of those fuels as of January 6, 1975. For example, absent the exemption, a facility equipped to burn coal and oil, but which was only burning oil at the time the NSPS were adopted, would be subject to the NSPS and subsequently PSD review merely by switching back to coal. Therefore, EPA believes it is reasonable to interpret the alternative fuels exemption to apply only to fuels which were contemplated in the design and construction of a unit prior to January 6, 1975 and to which the unit remains continuously able to burn.

The current NSPS regulations, at 40 C.F.R. § 60.14(e)(4), contain an analogue to the PSD alternatives fuel exemption at 40 C.F.R. § 52.21(b)(2)(ii)(e), which provides that the use of an alternative fuel or raw material shall not be considered a modification if:

> . . . the existing facility was designed to accommodate the alternative use. A facility shall be considered to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. . .

While the original NSPS exemption was changed slightly to allow for changes to the "original" design specification (40 FR 58,416 (December 16,1975)), the alterations did not change the intent of the exemption --- to grandfather voluntary fuel switches that a facility had designed for and built into its system prior to January 6, 1975.

You also raise the issue as to whether the above interpretation extends to the addition of fuels, such as tire derived fuel (TDF), waste paper, wastewater treatment plant sludge, and other similar fuels. To the extent that a fuel qualifies as a fuel derived from municipal solid waste (MSW),[1] the use of such fuel would not be considered a physical change or change in method of operation pursuant to a separate provision found at 40 CFR 52.21(b)(2)(iii)(d). However, if the fuel is not derived from MSW, its use would result in a significant increase in a regulated pollutant, and the facility does not meet criteria for the alternative fuel exemption, as discussed above, EPA would consider the use of such fuel to be a major modification under the PSD regulations.

Your letter indicates that our "recent actions and interpretations" are a departure from EPA's historical interpretation of the capable of accommodating exemption. Our recent objections are, in fact, consistent with EPA's historical interpretation. There are several EPA guidance memoranda, including a June 7, 1983 document from this office to Mr. Steve Smallwood of the Florida DEP, that interpret the exemption to require that the facility be "designed" and continuously able to accommodate the use of a specified alternative fuel. This guidance clearly states:

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[1]As discussed in your enclosed memo from Region 2, EPA does not consider TDF to be derived from MSW.

> In order for a plant to be capable of accommodating coal, the company must show not only that the design (i.e., construction specifications) for the source contemplated the equipment, but also that the equipment actually was installed and still remains in existence. Otherwise, it cannot reasonably be concluded that the use of coal was "designed into the source."

The above referenced letter, as well as other guidance that speaks to this issue, is enclosed. Also enclosed are copies of the objection letters that Region 4 issued to the States of Florida and Kentucky to which your letter is likely referring. These letters provide additional detail on EPA's interpretation of the alternative fuels provision in the context of the those specific cases. It is important to note that in the Florida Power Corporation (FPC) case, it was EPA's determination, as well as a testimony of the State, that FPC had to make substantial physical modifications after January 1975 to enable the subject boilers to burn solid fuel. In the Reid-Henderson and D. B. Wilson Kentucky cases, the subject boilers were constructed after January 6, 1975 and, hence, do not even qualify for the alternative fuels provision.

With respect to the letter that you enclosed from USEPA Region 5 to Dennis Drake, Michigan Department of Natural Resources (April 6, 1993), this letter does not conflict with the positions articulated in our past referenced guidance or recent objection letters. EPA's determination did not rely on the "capable of accommodating" provision, nor was it at issue. EPA made a case-specific finding that, based on the available information, the proposed physical change would not result in a significant increase in emissions and therefore would not be considered a major modification under federal PSD regulations.

Your second enclosed letter, from USEPA Region 2 to Mr. Norman Boyce, NYSDEC (July 19, 1993), also does not contain any substantive guidance regarding the alternative fuels exemption or the interpretation of "capable of accommodating." Following a discussion of the provisions for fuels derived from municipal solid waste, the letter simply states: "However, EPA believes that paragraph (e), which refers to an exemption for switching to an alternative fuel that the source was capable of accommodating before January 6, 1975, is indeed applicable to the Jennison Station." There is no information regarding the nature of the source or it's present or past ability to accommodate the fuel. Without additional research, we cannot comment on the consistency of this determination. The letter on its face, however, is not inconsistent with our understanding of the alternative fuels provision.

Finally, your letter raises the concern that facilities interested in using an inherently less polluting fuel may forego its use if they are subsequently subject to PSD requirements. As you are aware, this is a function of the net emissions increase calculation and is not a direct outcome of the alternative fuels exemption. This may be a factor in all potential modifications, not just fuel switches at grandfathered facilities. If a facility is simply proposing to use an inherently less polluting fuel and is not considering physical modifications or capacity expansion, it could accept a permit limitation at close to the facility's existing actual emissions that would both allow the facility to avoid PSD requirements and allow for

considerable variance. In addition, a State may chose to adopt the provisions of the "WEPCO" rulemaking into the State Implementation Plan. Pursuant to this rulemaking, a utility may use an "actual to future actual test," rather than an "actual to potential test," for calculating the future emissions increase (See 40 C.F.R.
§ 51.166(b)(32); FR 32314, July 21, 1992), which would eliminate this concern.

No doubt, you may be able to find State and possibly EPA determinations related to this issue that raise different issues and may appear to be (or may be) inconsistent with our interpretation and recent actions. Our position, however, is based on a thorough review of the regulatory intent and history of this provision and on EPA determinations that speak clearly to the "capable of accommodating" provision. We have also reviewed and considered the legal analysis prepared by the Florida Power Corporation in their State proceedings. In addition, our recent determinations have been reviewed by our Office of Regional Counsel and Headquarters offices (OGC, OECA, and OAQPS) for their input and concurrence.

If you have any questions or wish to discuss this further, please contact Mr. Gregg Worley, Chief, Operating Source Section at (404) 562-9141. Should your staff need additional information, they may contact Ms. Kelly Fortin, Environmental Engineer, at (404) 562-9117 or Ms. Lynda Crum, Associate Regional Counsel, at (404) 562-9524.

Sincerely,

Original Signed by:

Winston A. Smith
Director
Air, Pesticides & Toxics
Management Division

Enclosures

cc: Lynda Crum, EAD
John Walke, OGC
Lea Anderson, OGC
Carol Holmes, OECA
David Solomon, OAQPS
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