UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
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ATLANTA, GEORGIA 30303-8960

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BUREAU OF AIR REGULATION

Trina L. Vielhauer
Chief
Bureau of Air Regulation
Florida Department of Environmental Protection
Mail Station 5500
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Dear Ms. Vielhauer:

Thank you for your letter of October 30, 2009, which requested a determination regarding the applicability of New Source Performance Standards (NSPS) to the Bay County Resource Recovery Facility (BCRRF) in Panama City, Florida. According to your letter, Bay County plans to increase the charging capacity of each of the two municipal waste combuster (MWC) units at the plant from 245 ton per day (TPD) to 255 TPD. Based upon our review of information provided with your letter, the U.S. Environmental Protection Agency (EPA) Region 4 cannot conclusively determine which of two potentially applicable NSPS that BCRRF will be subject to following the planned increase in charging capacity. However, below are recommendations on information that you should obtain from Bay County in order to finalize a determination regarding which regulation will apply following the increase in charging rate.

History

The Florida Department of Environmental Protection (FL DEP) issued the original construction permits for BCRRF on September 24, 1984, and the plant started up on May 1, 1987. Under the terms of subsequent permits issued by the FL DEP on October 14, 1988, the charging capacity limit for each of the two units at BCRRF was increased to 255 TPD. Once the charging capacity of the units exceeded 250 TPD, BCRRF became subject to 40 CFR Part 60, Subpart Cb (Emissions Guidelines and Compliance Times for Large Municipal waste Combusters That Are Constructed on or Before September 20, 1994). This regulation had a compliance date of December 19, 2000.

Because Bay County did not want to incur the expense of installing the control equipment that would be needed in order to comply with Subpart Cb, the County requested approval of a derate that would reduce the charging capacity of the units at BCRRF to 245 TPD. The proposed derate was based upon modifying the forced draft fans at the plant in order to decrease the amount of combustion air available to each MWC unit. This derate was approved in an EPA Region 4 letter dated September 30, 1999, and by reducing the capacity of the units to less than 250 TPD, the County avoided applicability under Subpart Cb.

On December 6, 2000, EPA promulgated 40 CFR Part 60, Subpart BBBB (Emission Guidelines and Compliance Times for Small Municipal Waste Combusters Constructed on or Before August 30, 1999). This regulation had a compliance deadline of December 6, 2005. Based upon the date of construction and the charging capacity at BCRRF, the MWC units at the plant were subject to Subpart BBBB. Under the terms of a permit issued by FL DEP on March 5, 2004, the County installed several pieces of equipment needed in order to comply with the new regulation. This equipment included acid gas scrubbers, fabric filter baghouses, lime storage and slaking equipment, a carbon storage and injection system, induced draft fans, and new exhaust stacks. Equipment installation was completed by June 2005, and compliance was achieved by November 16, 2005. Therefore, Bay County met the December 6, 2005, compliance date in Subpart BBBB.

Re-rate Request

Your October 30 letter included an October 15, 2009, letter from Golder Associates, Incorporated (Golder) in which Golder indicated that Bay County wants to increase the charging capacity of the MWC units at BCRRF back to the previous rate of 255 TPD. According to Golder, the only change that needs to be made in order to return the charging capacity of the units to their previous rate is the replacement of the fan blades that were installed in order to derate the units under the terms of the EPA approval dated September 30, 1999. Since increasing the capacity of the BCRRF will increase the emission rate of several pollutants, the planned re-rate has the potential to trigger the applicability of 40 CFR Part 60, Subpart Eb (Standards of Performance for Large Municipal Waste Combustors for Which Construction is Commenced After September 20, 1994 or for Which Modification or Reconstruction is Commenced After June 19, 1996). In its letter, Golder maintains that the two units at the BCRRF will be subject to Subpart Cb following the re-rate.

Although most of the emission limits under Subparts Cb and Eb, are similar, the carbon monoxide (CO) limit for BCRRF under Subpart Eb is more stringent than the one under Subpart Cb. Under Subpart Eb, the CO limit for BCRRF would be 100 parts per million (ppm) and under Subpart Cb, the CO limit would be 250 ppm. Because of this difference in CO limits, it is important to determine which of the regulations will apply following the re-rate. Based upon our review of Golder's letter and provisions in the 40 CFR Part 60, Subpart A (General Provisions), the primary issue that must be resolved in order to determine NSPS applicability to BCRRF is whether or not replacing the fan blades at the plant will constitute a capital expenditure.

Under 40 CFR 60.14, a physical change or change in the operation of an existing facility that results in an emission rate increase of a regulated pollutant constitutes a modification that can trigger NSPS applicability. However, 40 CFR 60.14(e) lists a number of changes that does not trigger NSPS applicability even if they cause an increase in emissions. Among these exemptions is one in 40 CFR 60.14(e)(2) which lists emission rate increases resulting from production rate increases that are accomplished without a capital expenditure. The term capital expenditure is defined in 40 CFR 60.2 as "... an expenditure for a physical or operation change which exceeds the product of the applicable "annual asset guideline repair allowance percentage" specified in the latest Internal Revenue Service (IRS) Publication 534 and the existing facility's basis, as defined in section 1012 of the Internal Revenue Code. However, the total expenditure

for a physical or operational change to an existing facility must not be reduced by any "excluded additions" as defined in IRS Publication 534, as would be done for tax purposes." According to the enclosed EPA determination issued on April 7, 1998, the "basis" used for determining the applicability of the exemption in 40 CFR 60.14(e)(2) is the cost of the property, adjusted to reflect capital improvements, casualty losses, and defunct equipment. Additionally, the determination indicates that the existing facility's basis should not be adjusted to account for depreciation.

Since the applicability date for modified facilities under Subpart Eb is June 19, 1996, BCRRF would be an existing facility with respect to this rule. Therefore, the emission rate increase resulting from the planned re-rate would trigger the applicability of Subpart Eb unless one of the exemptions in 40 CFR 60.14(e) applies. Although Golder's letter discusses the exemption in 40 CFR 60.14(e)(2), it does not contain enough information for us to determine whether the cost of replacing the fan blades would constitute a capital expenditure. According to Golder, the estimated cost of replacing the fan blades that were installed in order to derate the MWC units is $45,640. However, the letter does not provide any information regarding the "basis" for the MWC units at BCRRF and without this information, we cannot determine whether the exemption in 40 CFR 60.14(e)(2) applies.

The latest edition of IRS Publication 534 was published in December 1984 and the annual asset guideline repair allowance listed for waste reduction and resource recovery plants in this document is 15 percent. Based upon this figure, the cost of the changes required to re-rate BCRRF would constitute a capital expenditure if the basis for the facility is less than $284,260. If the costs of the changes constitute a capital expenditure, the exemption in 40 C FR 60.14(e)(2) would not apply and the re-rate would trigger applicability under Subpart Eb. Since the re-rate will increase the charging capacity of the units at BCRRF to more than 250 TPD, the units will become subject to Subpart Cb if the exemption in 40 CFR 60.14(e)(2) does apply.

Recommendation

Since it is necessary to know the basis for BCRRF in order to determine regulatory applicability, we recommend that you ask Bay County to provide information regarding the facility's basis. When calculating the basis, the County should follow the guidance in the EPA determination issued on April 7, 1998. If the basis for the facility exceeds $284,260, the exemption in 40 CFR 60.14(e)(2) will apply, and the re-rated facility will be subject to Subpart Cb. If the basis for the facility is less than $264,260, the re-rated facility will be subject to Subpart Eb. Because the basis that would trigger the exemption in 40 CFR 60.14(e)(2) is relatively low, the most likely outcome is that Subpart Cb will apply following the re-rate. However, it would be better to obtain the information needed in order to make a determination than it would be to simply assume that Subpart Cb will apply following the re-rate.

If you have any questions about the determination provided in this letter, please contact David McNeal of the EPA Region 4 staff at (404) 562-9102.

Sincerely,

Kenneth R. Lapierre
Acting Director
Air, Pesticides and Toxics
Management Division

Enclosure

cc: ~~Dennis~~ Bruce Mitchell, FL DEP

David Buff,
Golder Associates, Inc.

Compliance Monitoring

Last updated on Friday, December 11th, 2009.

Search Applicability Determination Index

Determination Detail

Control Number: 9900074

Category: NSPS
EPA Office: OAQPS
Date: 04/07/1998
Title: NSPS Applicability--Modifications & Capital Expenditures
Recipient: William Guerry
Author: John Seitz
Comments:

Subparts: Part 60, A General Provisions

References: 60.14(e)(2)
60.2

Abstract:

Q. May depreciation be accounted for in the calculation of an existing facility's "basis" for the purpose of determining whether an expenditure meets the definition of a "capital expenditure" under the NSPS General Provisions, 40 C.F.R. □ 60.2, and evaluating whether to apply the exemption in 40 C.F.R. □ 60.14(e)(2)?

A. No. Depreciation may not be accounted for in determining an existing facility's basis.

Letter:

Mr. William M. Guerry, Jr.
Collier, Shannon, Rill & Scott, PLLC
3050 K Street, N.W.
Suite 400
Washington, D. C. 20007

Dear Mr. Guerry:

We apologize for taking so long in responding to your June 17, 1997 letter regarding the U.S. Environmental Protection Agency's (EPA) interpretation of the exemption in 40 C.F.R. 60.14(e)(2) for the New Source Performance Standards (NSPS) modification provisions. As you may know, there is a considerable amount of history on this rather complicated subject. In addition, this issue affects several offices within the EPA and it has taken us longer than expected to coordinate a response to your letter.

In your letter, you requested clarification on whether depreciation should be accounted for in the calculation of an existing facility's "basis" for the purpose of determining whether an expenditure meets the definition of a "capital expenditure" under the NSPS General Provisions, 40 C.F.R. 60.2, and evaluating whether to apply the exemption provided for in 40 C.F.R. 60.14(e)(2). As discussed below, EPA does not allow depreciation to be accounted for in determining an existing facility's basis.

To address this issue fully, it is necessary to consider the exemption within the context of the modification rules and the NSPS program in general, and to understand the original intent of the proposed exemption. Congress' intent in creating the modification provision of section 111(a) of the Clean Air Act was to subject certain facilities that increase emissions to "standards of performance" or NSPS. Section 111(a)(4) of the Act defines a modification as "... any physical change in, or change in 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." In promulgating the modification provisions under 40 C.F.R. part 60, EPA exercised discretion in interpreting the statutory definition of modification to exclude certain actions. One such action is described in 60.14(e)(2), which states that the following shall not be considered a modification by itself: "An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure."

When EPA promulgated the first NSPS regulations in 1971, this exemption appeared in the definition of "modification." Title 40 of the Code of Federal Regulations (C.F.R.) 60.2(h)(2)(i) stated that the following would not be considered a change in the method of operation for the purposes of the modification provisions: "an increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility." See 36 Fed. Reg. 24876, 24877 (Dec. 23, 1971). The EPA's intent was to allow for normal fluctuations in production rates that would be within a source's design capacity without triggering NSPS requirements.

On October 15, 1974, EPA proposed amendments to the modification provisions and added a new section, 40 C.F.R. 60.14(e), which set forth operational or physical changes which would not be considered modifications. In these amendments, EPA was clarifying the exemption in question by using capital expenditures as the criterion, in lieu of operating design capacity. See 39 Fed. Reg. 36946, 36 948 (Oct.15, 1974). These amendments did not change the original intent of the exemption, but rather were designed to facilitate its implementation. The preamble to the proposed rule explained the new wording as follows:

"The exemption of increases in production rate is no longer dependent upon the operating design capacity.' This term is not easily defined, and for certain industries the 'design capacity' bears little relationship to the actual operating capacity of the facility. The proposed exemption implicitly defines 'design operating capacity' as that production rate which can be accomplished without making major capital expenditures on the stationary source containing the

existing facility." 39 Fed. Reg. at 36948.

In promulgating these amendments, EPA sought to further clarify the term "capital expenditure" by incorporating the use of Internal Revenue Service Publication 534 and Section 1012 of the Internal Revenue Code as means for determining whether there was a capital expenditure. Title 40 of the Code of Federal Regulations 60.2 now defines a "capital expenditure" as:

"an expenditure for a physical or operational change to any existing facility which exceeds the product of the applicable 'annual asset guideline repair allowance percentage' [AAGRAP] specified in the latest edition of the Internal Revenue Service (IRS) Publication 534 and the existing facility's basis, as defined by section 1012 of the Internal Revenue Code...." See 40 Fed. Reg. 58416, 5841 8 (Dec. 16, 1975) (emphasis added).

Section 1012 of the Internal Revenue Code defines the basis of property as the "...cost of such property except as otherwise provided in this subchapter and [other specified subchapters]...". Other sections in the same subchapter describe how to adjust the original cost basis when determining the gain or loss from the sale of property; however, they do not address what, if any, adjustments should be made in a regulatory context such as this. EPA's reading of this section for the purpose of the NSPS program is that the "basis" is the cost of the property, as adjusted to reflect capital improvements, casualty losses, and defunct equipment. This reading is consistent with the original intent of the exemption, as these adjustments are related to operating capacity. In contrast, taking into account depreciation would be inconsistent with the original intent of the exemption, as depreciated equipment may remain fully functional.

It is worth noting that the latest version of IRS Publication 534 that contains a complete list of AAGRPs is the December 1984 edition. The IRS no longer publishes these guideline repair allowances in its Publication 534. Therefore, EPA recommends the use of the December 1984 edition for this purpose and will not construe the phrase "latest edition" in the definition of capital expenditure to refer to more recent versions of the publication.

In conclusion, when calculating an existing facility's basis for the purposes of a "capital expenditure" evaluation, depreciation should not be considered. However, an existing facility's basis should be adjusted to reflect capital improvements, casualty losses, and/or defunct equipment. I believe that this interpretation is consistent with the Wisconsin Electric Power Company applicability determination dated February 15, 1989, issued by Don Clay, EPA Acting Assistant Administrator for Air and Radiation, and cited in your letter.

If you have any questions on this response, please contact Mr. James Szykman in our Emission Standards Division, Policy Planning and Standards Group, at (919) 541-2452. Should you have future q uestions pertaining to the NSPS modification provisions and their applicability to a specific facility, our headquarters lead office is the Office of Compliance (OC). The NSPS contact for such issues in OC is Sally Mitoff at (202) 564-7012. This response has been coordinated with the Office of General Counsel, the Office of Compliance, and Region V.

I appreciate this opportunity to be of service and trust this is helpful to you.

Sincerely,
Original signed by
Henry Thomas for

John Seitz
Director
Office of Air Quality Planning and Standards

cc: Louise Gross, Region V Counsel
Ed Wojciechowski, Region V

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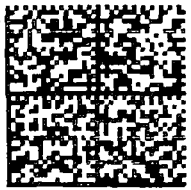

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