

# Interoffice Memo

**To:** All Permit Writers and Reviewers  
**CC:** Drew Bergman, Dir. Office; Bryan Zima, Legal; Heidi Griesmer, PIC, Thad Driscoll, AG, Sam Peterson, AG  
**From:** Michael Hopkins, Assistant Chief, DAPC, through Bob Hodanbosi, Chief, DAPC  
**Date:** July 2, 2010  
**Re:** Permit Processing After U.S. District Court <10 Ton/Yr Exemption Decision

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This memo supersedes the February 19, 2010 memo concerning the same topic. It is being revised to release the restriction on not processing renewal permits, and to clarify a couple of other minor issues and questions.

On February 2, 2010, the U.S. District Court for the Southern District of Ohio issued a ruling in *Sierra Club v. Christopher Korleski, Director of Ohio EPA* (see attached). This ruling has significant ramifications concerning the processing of permits when it comes to determining BAT for sources less than 10 tons/year. This memo is being issued in order to comply with the court's decision and to prevent the disruption of the processing of installation permits by providing all permit writers and reviewers with guidance concerning developing BAT limits for permits impacted by the U.S. District Court decision.

The Division of Air Pollution Control has reviewed the U.S. District Court ruling. Based on this review, DAPC believes the main impact of this ruling involves the determination of BAT for sources that qualify for the less than 10 ton/yr BAT exemption (<10 exemption). In this ruling, the U.S. District Court instructed the Director to implement and enforce Ohio Administrative Code (OAC) 3745-31-05 as contained in the U.S. EPA approved State Implementation Plan (SIP). Since the currently approved SIP does not contain the <10 exemption, the <10 exemption cannot be used at this time. Therefore, case-by-case BAT must be determined for new or modified sources until such time as the exemption becomes approved as part of the SIP.

The following questions and answers provide additional detail concerning the changes required under this guidance:

1. Which version of the rule is currently in the approved SIP?

For the BAT rule (3745-31-05), U.S. EPA has approved the November 30, 2001 version. A copy of this version can be found at:

[http://www.epa.ohio.gov/dapc/regs/3745\\_31/3745\\_31\\_Historic.aspx](http://www.epa.ohio.gov/dapc/regs/3745_31/3745_31_Historic.aspx). A copy of this rule is also attached.

2. Has Ohio EPA submitted the current rule to U.S. EPA? What is the status?

Ohio EPA submitted several versions and parts of the permit to install rules to U.S. EPA for SIP approval. For many years (6), U.S. EPA chose not to process Ohio's NSR rule packages because of national issues concerning the federal NSR Reform rules. Ohio EPA originally submitted the Ohio NSR Reform rule changes to U.S. EPA for SIP approval in November 2004. U.S. EPA only recently approved them. The "hold" on Ohio's NSR Reform rules had the impact of also holding the processing of subsequent SIP submissions with later versions of the rules.

Ohio EPA submitted three other NSR rule SIP revisions after the NSR Reform submission. These include the Permit-to-Install and Operate (PTIO) revisions, the Ethanol Major Source revisions and the Senate Bill 265 revisions. After Ohio EPA submitted the Senate Bill 265 revisions, U.S. EPA did some initial review and asked Ohio EPA for some additional support for the <10 exemption. Ohio EPA has not yet been able to compile the information needed to support the <10 exemption due to staffing issues. Ohio EPA does expect to be able to compile this information sometime in the future and believes U.S. EPA will be able to approve these rules based on the additional supporting information.

3. Since the <10 exemption cannot be used, what should the permit writer do for sources less than 10 ton/year?

Permit writers should develop case-by-case BAT limits following the methods used prior to the implementation of Senate Bill 265. (The <10 exemption became effective on December 1, 2006.) This may include a short term limit and an annual limit. In certain cases, we have not historically established a short-term limit (i.e., no lb/hr limit for things like fugitive dust from roadways); these permits should be processed as has normally been done in the past.

4. Which rule citation should we use for the less than 10 ton/yr BAT limits?

DAPC has developed the below example of the *Applicable Emissions Limitations and/or Control Requirements* section of the permit. This example details the appropriate citations for the less than 10 ton/yr BAT limits. In summary, both the old rule and the current rule will be cited and some explanatory language will be added to detail when each rule applies.

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b) Applicable Emissions Limitations and/or Control Requirements

- (1) The specific operations(s), property, and/or equipment that constitute each emissions unit along with the applicable rules and/or requirements and with the applicable emissions limitations and/or control measures. Emissions from each unit shall not exceed the listed limitations, and the listed control measures shall be specified in narrative form following the table.

	Applicable Rules/Requirements	Applicable Emissions Limitations/Control Measures
a.	OAC paragraph 3745-31-05(A)(3), as effective 11/30/01 <sup>1</sup>	x.x lbs PM10/hr, y.y tons PM10/yr <sup>2</sup> , see b)(2)(a).
b.	OAC paragraph 3745-31-05(XXX) <sup>3</sup> , as effective 12/01/06	See b)(2)b.

(2) Additional Terms and Conditions

- a. The permittee has satisfied the Best Available Technology (BAT) requirements pursuant to OAC paragraph 3745-31-05(A)(3), as effective November 30, 2001, in this permit. On December 1, 2006, paragraph (A)(3) of OAC rule 3745-31-05 was revised to conform to ORC changes effective August 3, 2006 (S.B. 265 changes), such that BAT is no longer required by State regulations for NAAQS pollutant less than ten tons per year. However, that rule revision has not yet been approved by U.S. EPA as a revision to Ohio's State Implementation Plan (SIP). Therefore, until the SIP revision occurs and the U.S. EPA approves the revisions to OAC rule 3745-31-05, the requirement to satisfy BAT still exists as part of the federally-approved SIP for Ohio. Once U.S. EPA approves the December 1, 2006 version of 3745-31-05, then these emission limits/control measures no longer apply.
- b. This rule paragraph applies once U.S. EPA approves the December 1, 2006 version of OAC rule 3745-31-05 as part of the State Implementation Plan.

[Permit writers should insert language here containing the explanatory language for either why BAT does not apply (under today's rule) or for the restrictions needed to avoid BAT. This language should be similar to the language described in Q&A 15 of the *Senate Bill (SB) 265 Best Available Technology (BAT) Questions and Answers – March 2008* guidance document. Note that in some cases the answer may be different for different pollutants requiring more than one explanatory paragraph.]

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5. Does the U.S. District Court decision impact how BAT is determined for sources that don't qualify for the <10 exemption?

DAPC believes that the court decision does not change the current process for determining BAT for sources greater than 10 tons/year. The reason for this is that the current process (as described in the December 10, 2009 *BAT Requirements for Permit*

<sup>1</sup> Although the NSR Reform rules were approved this year, they did not include revisions to OAC rule 3745-31-05. So, the 11/30/01 date is still the correct recently approved SIP rule.  
<sup>2</sup> The format for these limits is simply an example. DO/Laa staff should decide on the format of limits based on the standard practice prior to the implementation of Senate Bill 265. Also, each pollutant affected by the <10 ton issue should be listed.  
<sup>3</sup> Note that this citation will change depending upon the method applicable to avoid BAT. In any case, the December 1, 2006 version of the rules should be used for the citation.

*Applications Filed on or After August 3, 2009* guidance) for sources greater than 10 ton/year does establish BAT. Therefore, we ask you to continue to use the December 2009 guidance to determine BAT for sources greater than 10 ton/year.

6. When should we use the new language described in question 4 above?

The new language should be used when you are processing any installation or operating permit where we originally used the <10 exemption. This includes permits for new or modified sources, chapter 31 or administrative modifications or any renewal permits.

7. Should DO/Laa staff go back and reissue permits where the <10 exemption was used?

DO/Laa staff should make these changes whenever the permit comes up for revision. At this point DAPC has not decided to search for all past permits issued with the <10 exemption in order to separately revise the permits. Other than renewal or modified permits, Ohio EPA does not currently believe that the Court's order requires the reissuance of permits where the <10 exemption was used.

8. Can DO/Laa staff process renewals of permits if they have the <10 exemption listed for an emissions unit?

Yes. CO/Laa staff should now process renewal permits. However, in order to process these permits, CO/Laa staff should revise the permit to include BAT for the <10 exemption sources. This approach should follow the same approach described in question 4 above for new sources and should use the same permit language described.

Note that for Title V source that come up for renewal, you should also simultaneously modify any PTI that used the <10 exemption so that we don't have a conflict between the Title V permit language and the PTI permit language.

9. Based on the decisions described in this memo, it appears that some sources less than 10 tons/year will have more stringent BAT limits than sources greater than 10 tons/year. Is this true and is that what is expected?

DAPC agrees that there may be some sources less than 10 tons/year that appear to have a more stringent limit than some sources greater than 10 tons/year. The main reason for this is that for some sources with less than 10 tons/year of emissions, the permit will include a short term limit and an annual limit. Sources greater than 10 tons/year will often only need one limit as described in the December 2009 guidance.

This apparent discrepancy was created because DAPC feels that it must go back to the methods we used to determine BAT for sources under the November 11, 2001 SIP approved rule. Since we do not feel the U.S. District Court decision requires us to change the method for determining BAT for sources over 10 tons/year, we plan to continue to use the method described in the December 2009 guidance (following SB 265 requirements).

10. Can we still use the approach to avoid BAT by putting in the restrictions that keep emissions to below 10 tons per year?

No, the avoiding BAT approach can no longer be used because under the current court decision, no new or modified sources can avoid the applicability of BAT.

This memo revises the restrictions detailed in Mike Hopkins' February 19, 2010 memo. All permits can now be processed as long as this guidance is followed. If you have any questions, please discuss them with the Central Office permit reviewer assigned to your office.

Thanks.

MH/mh

Post10TonExemptionCourtDecisionInfo04.docx

Attachments:

February 2, 2010, *Sierra Club v. Christopher Korleski, Director of Ohio EPA* ruling  
November 30, 2001 version of OAC rule 3745-31-05  
Hopkins February 2, 2010 E-mail to Staff re: Stop Issuance of Permits

