


Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Air Permits Division Staff
Interested Applicants

Date: December 11, 2008

From: Richard A. Hyde, P.E., Director, 
Air Permits Division,
Office of Permitting and Registration

Subject: Federal Clean Air Act (FCAA), §§ 112(g) and 112(j) Maximum Achievable Control Technology (MACT) "Hammer" Information

The U.S. Federal Courts have vacated several MACT standards recently:

1. Brick and Structural Clay Products Manufacturing, 40 Code of Federal Regulations (CFR) Part 63, Subpart JJJJJ, *Sierra Club v. EPA*, 479 F. 3d 875 (D.C. Cir 2007);
2. Clay Ceramics Manufacturing, 40 CFR Part 63, Subpart KKKKK, *Sierra Club v. EPA*, 479 F. 3d 875 (D.C. Cir 2007); and
3. Industrial, Commercial and Institutional Boilers and Process Heaters, 40 CFR Part 63, Subpart DDDDD, *Natural Resources Defense Council v. EPA*, 489 F. 3d 1250 (D.C. Cir 2007).

Additionally, the U.S. Environmental Protection Agency (EPA)'s decision to delist coal-fired and oil-fired power plants as a source category required to be regulated under FCAA, § 112 has also been vacated, *New Jersey v. EPA*, 517 F. 3d 574 (D.C. Cir 2008), which, if upheld, will require regulation of coal- and oil-fired power plants under FCAA, § 112.

The Texas Commission on Environmental Quality has received no guidance from the EPA regarding how EPA interprets the requirements of FCAA, §§ 112(g) and (j) to apply when MACT standards are vacated. Since EPA has not addressed the consequences of these court decisions in either rulemaking or guidance, these decisions have resulted in confusion about how, and when, states must implement FCAA, §§ 112(g) and (j). If EPA has failed to promulgate a MACT, then states are obligated to provide case-by-case MACT for major sources of hazardous air pollutants under FCAA, §§ 112(g) and (j).

Until EPA issues guidance, or there is further court action to clarify these federal requirements, the Air Permits Division (APD) encourages all regulated entities to review their potential applicability under FCAA, §§ 112(g) or (j), and assess their options under FCAA, §§ 112(g) and (j), in accord with EPA regulations under 40 CFR Part 63. Without guidance from EPA or further court action to clarify these federal requirements, APD staff is not taking action at this time to provide any notification of applicability or application due dates. The APD will, of course, process all applications that are properly filed with the commission.