

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

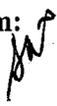
To: Region Directors
Air Section Managers

Date: November 10, 2008

Bryan Sinclair, Director
Enforcement Division

Thru:  John Sadlier
Deputy Director, Office of Compliance and Enforcement

11/10/08
 Jennifer A. Sidnell
Director, Field Operations Support Division
11-10-08

From:  Salal Tahiri
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Subject: Compliance Reviews of Maximum Achievable Control Technology (MACT) recently vacated by the Federal Courts

BACKGROUND:

A recent court ruling vacated several MACT rules as listed in the table below. When a MACT is vacated, it is as if the MACT was never promulgated (never existed). When EPA fails to promulgate a MACT according to the schedule, then sources that are subject to the requirements of the intended industry source category must obtain a case-by-case MACT control (in a permit). The Air Permits Division has guidance for affected sources under these rules, and that guidance describes what is needed by those sources subject to the vacated MACTs in terms of permitting requirements.

The purpose of this guidance is to establish consistent enforcement discretion based on deviations or potential violations related to the vacated MACTs, the presence (or lack) of a case-by-case MACT determination and compliance with a case-by-case MACT should one be established in an affected source's permit.

<i>MACT Regulatory Citation</i>	<i>Date of Court Decision</i>	<i>Date Mandate Issued</i>	<i>How many sites are subject to the vacated MACT?*</i>	<i>How many would be subject to 112(j) (existing sources)?**</i>
Brick JJJJ May 2006	03-13-2007	06-18-2007	11	11
Clay Ceramics KKKKK May 2006	03-13-2007	06-18-2007	1	1
Boiler DDDDD September 2007	06-08-2007	07-30-07	468	539
CAMR	02-08-2008	03-14-2008	18**	18**

*Data is from the Title V Information Management System, and is based on sites, not units. Data for the boiler MACT may be less than the number that might be indicated if data was based on emission inventory data (63). This may be due to Title V sites voiding permits or not submitting applications due to the vacatur.

** Solid fuel-fired only.

The information in the right two columns represents the estimated number of Title V permits that contain the vacated MACT rules as applicable requirements.

GUIDANCE:

Because sources (facilities) subject to these vacated rules are by definition major, they are subject to Title V permitting. Therefore, this guidance for enforcement discretion applies to potential violations whether they are discovered through deviation reporting, or by an investigator's normal course of files review or on-site investigations. Essentially, all of the potential violations related to this topic fall under one of four categories.

(1) Deviations reported or violations found against a vacated MACT:

Because the MACT has been vacated (as if it never existed), the agency will exercise enforcement discretion and the deviation will not be further alleged as a violation.

(2) Failure to report a deviation against a vacated MACT:

Because the MACT has been vacated (as if it never existed), the agency will exercise enforcement discretion and the deviation will not be further alleged as a violation. The permit holder will not be required to amend a report just for this reason.

(3) Failure to obtain a case-by-case MACT for the affected sources of a vacated MACT (or a deviation reporting the same):

Due to the ongoing litigation and until EPA publishes regulation or guidance outlining the requirements for the affected source, the agency will exercise enforcement discretion and the deviation will not be further alleged as a violation.

(4) In the case where the source has moved forward and obtained a case-by-case MACT determination to take the place of the vacated MACT:

Deviations or violations of the case-by-case MACT requirements will be processed under current agency guidance for deviations and violations.

It is important to keep in mind that the enforcement discretion suggested in this guidance only applies to deviations or violations of the vacated MACTs, and in no way be interpreted to prohibit or limit compliance determinations and enforcement actions on any other requirement, rule, or law by any regulatory agency having jurisdiction.

cc: Carlos Rubinstein, Deputy Executive Director