

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: All Interested Persons **Date:** August 1, 2005

Thru: Richard A. Hyde, P.E., Director
Air Permits Division

From: Anne Inman, Manager
General/Standard/Permits by Rule Section
Air Permits Division

Subject: Pollution Control Project (PCP) Standard Permit Exemption from Federal New Source Review

Action: This memo supercedes all previous guidance, instructions, and rules regarding this issue. Based on a recent federal court decision¹ that vacated PCP exemptions from federal new source review (NSR), any PCP standard permit registration must clearly demonstrate that any emission increases associated with the proposed project do not trigger federal NSR review. Therefore, a netting demonstration and other supporting documentation may be required at the time of registration for a PCP standard permit registered after this date. For those PCP standard permits which have already been registered with the TCEQ, current rules require the increases and decreases associated with the PCP to be included in any future netting calculation. No additional action will be required at this time for those PCPs already registered under this rule.

Background: The current Texas PCP Standard Permit [30 TAC §116.617(8)-(9)] exempts potential major sources or major modifications from federal permit applicability reviews and netting demonstrations. These rules were based on EPA guidance which recognized that certain PCPs would be environmentally beneficial, but might have collateral emission increases that under existing rules, required them to be considered major for purposes of federal NSR review. The commission determined that these PCPs should not be discouraged or subjected to federal NSR permit reviews. Based on this logic and guidance, the commission adopted the PCP rules on April 13, 1994.

The EPA adopted rules in 1992 for certain PCPs undertaken by the electric utility industry and promulgated additional rule changes in 2002 which exempted certain PCPs from the federal NSR permitting program (40 CFR §52.21). These rules were challenged by several parties and addressed by the courts. EPA argued that, while PCPs are changes or new facilities, “Congress did not intend that PCPs be considered the type of activity that should trigger NSR.”¹

On June 24, 2005, D.C. Circuit Court of Appeals issued a decision (Case No. 02-1387), that addressed the exemption for environmentally beneficial PCPs. In the decision, the Court outlined the petitioners argument that “if Congress intended to exempt environmentally beneficial PCPs from NSR, it would have do so explicitly.”² The Court agreed that “Congress did not expressly authorize EPA to create regulatory exemptions to NSR....[and]...[a]bsent clear congressional delegation, however, EPA lacks authority to create an exemption from NSR by administrative rule.”³ Therefore, the court determined “that EPA lacks the authority to create PCP exemptions from NSR and we vacate those parts of the 1992 and 2002 rules”.⁴

Footnotes:

- 1 *State of New York, et al v. U. S. Environmental Protection Agency*, No. 02-1387, op. at 65 (D.C. Cir. June 24, 2005).
- 2 *Id.* at p. 66
- 3 *Id.* at p. 66
- 4 *Id.* at p. 67