



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

MAR 10 2010

CERTIFIED MAIL NO. 7003 3110 0006 2000 8625
RETURN RECEIPT REQUESTED

IN REPLY: AIR-5
REFER TO: Docket No. R9-10-02

David Vickers
President
Lehigh Southwest Cement Company
12667 Alcosta Blvd.
Bishop Ranch 15
San Ramon, CA 94583

Dear Mr. Vickers:

Re: Lehigh Southwest Cement Company Notice and Finding of Violation

Dear Mr. Vickers:

Enclosed is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the "Act"), notifying you that the United States Environmental Protection Agency ("EPA"), Region IX, finds that Lehigh Southwest Cement Company ("Lehigh") has violated certain sections of the Act's Prevention of Significant Deterioration of Air Quality and Title V Operating Permit Program, at its Portland cement plant located in Cupertino, California (the "Facility").

You should be aware that section 113(a)(1), 113(a)(3) and 167 of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, section 306 of the Act, 42 U.S.C. 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the Cupertino Plant being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed NOV/FOV, you may request a conference with EPA within ten (10) working days of receipt of this NOV/FOV. The conference will afford Lehigh an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this NOV/FOV, please contact Charles Aldred of the Air Enforcement Office at (415) 972-3986, or have your attorney contact Ivan Lieben of the Office of Regional Counsel at (415) 972-3914.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan", written over a horizontal line.

Deborah Jordan
Director, Air Division

Enclosure

cc w/enc: BAAQMD
CARB



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

MAR 10 2010

IN REPLY: AIR-5
REFER TO: Docket No. R9-10-02

Jack Broadbent
Air Pollution Control Officer
Bay Area Air Quality Management District
939 Ellis St.
San Francisco, CA 94109

Dear Mr. Broadbent:

Enclosed for your information is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("Act") at Lehigh's Portland cement plant in Cupertino, California (the "Facility").

The purpose of the NOV/FOV is to notify Lehigh that EPA finds that it has violated the Prevention of Significant Deterioration and Title V Operating Permit Program requirements of the Act at the Facility. The violations are set forth more specifically in the enclosed NOV/FOV. The NOV/FOV has been issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Act, 42 U.S.C. § 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any action will be taken pursuant to Section 113 of the Act.

If you have any questions concerning this NOV/FOV, please contact Charles Aldred of the Region 9 Air Enforcement Office at (415) 972-3986, or aldred.charles@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan".

Deborah Jordan
Director, Air Division

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

MAR 10 2010

IN REPLY: AIR-5
REFER TO: Docket No. R9-10-02

Jim Ryden
Enforcement Division Chief
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Dear Mr. Ryden:

Enclosed for your information is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("Act") at Lehigh's Portland cement plant in Cupertino, California (the "Facility").

The purpose of the NOV/FOV is to notify Lehigh that EPA finds that it has violated the Prevention of Significant Deterioration and Title V Operating Permit Program requirements of the Act at the Facility. The violations are set forth more specifically in the enclosed NOV/FOV. The NOV/FOV has been issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Act, 42 U.S.C. § 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any action will be taken pursuant to Section 113 of the Act.

If you have any questions concerning this NOV/FOV, please contact Charles Aldred of the Region 9 Air Enforcement Office at (415) 972-3986, or aldred.charles@epa.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read "Deborah Jordan", is written over the typed name.

Deborah Jordan
Director, Air Division

Enclosure

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the Matter of:)	
)	
LEHIGH SOUTHWEST CEMENT COMPANY)	Docket No. R9-10-02
)	NOTICE OF VIOLATION
Proceeding under Section 113(a))	AND FINDING OF
of the Clean Air Act,)	VIOLATION
42 U.S.C. § 9613(a))	
)	

NOTICE OF VIOLATION/FINDING OF VIOLATION

This Notice of Violation and Finding of Violation ("NOV/FOV") is issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("CAA" or the "Act"), as amended, 42 U.S.C. §§ 7401-7671q, at its Portland cement manufacturing facility located in Cupertino, California (the "Facility"). Lehigh violated the Prevention of Significant Deterioration ("PSD") and Title Operating Permit Program requirements of the Act at the Facility. This NOV/FOV is issued pursuant to Sections 113(a)(1), 113(a)(3) and 167 of the Act. Section 113(a)(1) requires the Administrator of the United States Environment Protection Agency ("EPA") to notify any person she finds in violation of an applicable implementation plan or a permit. The federal PSD regulations also clarify that failure to comply with the PSD provisions renders a source subject to enforcement under Section 113 of the Act. See 40 C.F.R. § 52.23. The authority to issue this NOV has been delegated to the Regional Administrator of EPA Region 9 and further re-delegated to the Director of the Air Division in EPA Region 9.

SUMMARY OF VIOLATIONS

The Facility is a Portland cement manufacturing plant comprised of one kiln, and associated equipment used to produce clinker, including a preheater tower, precalciner, clinker cooler, induced draft ("ID") and other fans, cement finish mills, and extensive sections of ductwork.

This NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999. Lehigh subsequently operated the Facility with the modified equipment which resulted in significant net emission increases. As a result, the projects, either individually or in the aggregate, caused an increase in production of cement and an increase in emissions of air pollutants to the atmosphere from the Facility.

The Facility is located in an area that has at all relevant times been classified as attainment for nitrogen dioxide ("NO₂") and sulfur dioxide ("SO₂"). Accordingly, the PSD provisions of Part C, Title I of the Act apply to operations at the Facility for oxides of nitrogen ("NO_x")¹ and SO₂ emissions. EPA has determined that the physical or operational changes identified in this NOV/FOV, either individually or in the aggregate, were major modifications for PSD purposes since the Facility significantly increased both actual and potential emissions of NO_x and SO₂ as a result of the changes. Moreover, Lehigh failed to apply for one or more PSD permits for the modifications covering NO_x and SO₂

¹ NO_x serves as the regulated pollutant for the NO₂ standard.

emissions. Lehigh's failure to apply for a PSD permit or install and operate additional emissions controls meeting best available control technology ("BACT") covering these pollutants when it constructed and began operating the physical or operational changes was a violation of the PSD requirements of the Act.

Lehigh has also violated the Title V Operating Permit Program requirements of the Act set forth at 42 U.S.C. §§ 7461-7661f, the federal Title V regulations set forth at 40 C.F.R.

Part 70, and the approved Bay Area Air Quality Management District ("BAAQMD") Title V program set forth at Regulation 2 Rule 6. BAAQMD has administered an approved Title V Operating Permit Program since November 29, 1994. Lehigh's failure to identify PSD requirements in its application submitted to BAAQMD for a Title V permit, supplement or correct that application to include PSD requirements, or obtain a Title V permit that contains the PSD requirements after the construction and operation of the physical or operational changes are violations of Title V requirements. See 42 U.S.C. §§ 7661b(a)-(b) and 7661c(a); 40 C.F.R. §§ 70.5(a)(c); BAAQMD Regulation 2 Rule 6. As a result, Lehigh obtained a deficient Title V permit, i.e., one that did not include all applicable requirements, and therefore is operating the Facility without a valid Title V permit in violation of 42 U.S.C. §§ 7661a, 7661b, and 7661c; 40 C.F.R. §§ 70.1, 70.5 and 70.6; and BAAQMD Regulation 2 Rule 6.

STATUTORY & REGULATORY BACKGROUND

National Ambient Air Quality Standards

1. The Administrator of EPA, pursuant to authority under Section 109 of the Act, 42 U.S.C. § 7409, has promulgated National Ambient Air Quality Standards ("NAAQS") for certain criteria pollutants relevant to this NOV/FOV, including NO₂ and SO₂. See 40 C.F.R. §§ 50.4, 50.5, 50.7, 50.8, 50.9, and 50.10.

2. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region ("AQCR") in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the California AQCRs are listed at 40 C.F.R. §§ 81.305.

Prevention of Significant Deterioration

3. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA a plan that provides for the implementation, maintenance and enforcement of primary and secondary NAAQS in the state. Upon approval by EPA, the plan becomes part of the applicable state implementation plan ("SIP") for that state.

4. Section 110(a)(2)(C) of the Act, 42 U.S.C. § 7410(a)(2)(C), requires that each SIP include a PSD permit program as provided in Part C of Title I of the Act, 42 U.S.C. §§ 7470-7491. Part C sets forth requirements for SIPs for attainment areas to ensure maintenance of the NAAQS.

5. On June 19, 1978, pursuant to Sections 160 through 169 of the Act, 42 U.S.C. §§ 7470-7479, EPA promulgated federal PSD regulations at 40 C.F.R. § 52.21. 43 Fed. Reg. 26,402.

6. The federal PSD program was incorporated into all applicable implementation plans nation-wide and contains the applicable PSD program requirements for each plan until EPA approves into an individual SIP a replacement program. See 40 C.F.R. § 52.21(a); 42 U.S.C. § 7410(a)(2)(C).

7. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each AQCR in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The NO₂ and SO₂ attainment status designations for the California AQCRs are listed at 40 C.F.R. § 81.305.

8. The BAAQMD has primary jurisdiction over major stationary sources of air pollution sources in the San Francisco Bay Area Intrastate AQCR. 40 C.F.R. § 81.21. This jurisdiction includes the Facility.

9. Section 161 of the Act, 42 U.S.C. § 7471, requires that each SIP contains provisions to implement the Act's PSD program for areas of that state which are designated as being in attainment with any NAAQS for a criteria pollutant. The PSD program applies to major new sources of air pollution.

10. The PSD permitting program for the San Francisco Bay Area Intrastate AQCR is the federal PSD program, which is set forth at 40 C.F.R. § 52.21.

11. Subsequent to 1978, the PSD regulations have been periodically revised. As the PSD violations identified in this NOV/FOV first commenced from 1991 through 2003, the 1992 amendments to the PSD regulations contain the applicable provisions pertaining to the alleged violations identified in this NOV/FOV. See 57 Fed. Reg. 32314 (July 21, 1992).

12. 40 C.F.R. § 52.21 (b)(1)(i)(a) (1992) defined a "major stationary source" as any stationary source within one of 28 source categories which emits, or has the potential to emit, 100 tons per year ("tpy") or more of any air pollutant subject to regulation under the Act. Portland cement plants are included among the 28 source categories.

13. The PSD Regulations defined a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2)(i) (1992).

14. 40 C.F.R. § 52.21(b)(3)(i) (1992) defined "net emissions increase" as the "amount by which the sum of the following exceeds zero:

a. Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

b. Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and otherwise creditable."

15. 40 C.F.R. § 52.21(b)(21) (1992) defined "actual

emissions" as follows: "In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." The PSD regulations also provide that "[f]or any emissions unit ... which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date." 40 C.F.R. § 52.21(b)(21)(IV) (1992).

16. 40 C.F.R. § 52.21(b)(4) (1992) defined "potential to emit" as the "maximum capacity of a stationary source to emit a pollutant under its physical or operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including the air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable."

17. As such, the PSD regulations utilize an actual-to-potential test to determine whether an emissions increase occurred. Moreover, 40 C.F.R. § 52.21(b)(23)(i) (1992) defined "significant" and states that, in reference to NO_x and SO₂, significant net emissions increase means an increase that would equal or exceed 40 tons or more per year.

18. An applicant for a PSD permit to modify a stationary source is required to submit all information necessary to allow the permitting authority to perform any analysis or make any

determination required in order to issue the appropriate permit.
40 C.F.R. § 52.21(n) (1992).

19. 40 C.F.R. § 52.21(i) (1992) prohibited commencement of actual construction of a major modification to which the PSD requirements apply unless the source had a permit stating that the requirements of 40 C.F.R. §§ 52.21(j)-(r) had been met.

20. The PSD permitting process required, among other things, that for pollutants emitted in significant amounts, the owner or operation of a major source apply BACT to control emissions, 40 C.F.R. § 52.21(j) (1992); model air quality, 40 C.F.R. § 52.21(l) (1992); and perform a detailed impact analysis regarding both the NAAQS and allowable increments, 40 C.F.R. § 52.21(k) (1992).

21. Any owner or operator of a source or modification subject to 40 C.F.R. § 52.21 who commenced construction after the effective date of the PSD regulations without applying for and receiving a PSD permit is subject to appropriate enforcement action by EPA. 40 C.F.R. § 52.21(r)(1) (1992); Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477.

Title V Operating Permit Program

22. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for "major sources," including any source required to have a PSD permit. See Section 502(a) of the Act, 42 U.S.C. § 7661a(a). Regulations implementing the Title V permit program are set forth in 40

C.F.R. Part 70.

23. Pursuant to Title V, it is unlawful for any person to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V. Section 502(a) of the Act, 42 U.S.C. § 7661a(a).

24. Under Section 502(d)(1) of the Act, states were required to develop and obtain approval to administer Title V programs. 42 U.S.C. § 7661a(d)(1). EPA granted interim approval of BAAQMD's Title V Operating Permit Program effective July 24, 1995, and final full approval was effective November 30, 2001. See 40 C.F.R. Part 70 Appendix A.

25. Sources subject to Title V and falling under BAAQMD's jurisdiction are required to submit to BAAQMD timely and complete Title V applications that identify, among other things, all "applicable requirements," including PSD requirements. See 40 C.F.R. § 70.5(a); BAAQMD Rule 2-6-404 and 2-6-405.

26. Sources subject to Title V and falling under BAAQMD's jurisdiction who have submitted an application are required to supplement or correct the application to include applicable requirements that were not included in the original application. 40 C.F.R. § 70.5(b); BAAQMD Rule 2-6-405.10.

27. Sources subject to Title V and falling under BAAQMD jurisdiction must obtain a Title V permit that: 1) contains such conditions necessary to assure compliance with the applicable

requirements; 2) identifies all applicable requirements the source is subject to; and 3) certifies compliance with all applicable requirements, and 4) where a source is not meeting requirements, contains a plan for coming into compliance. Sections 503 and 504 of the Act, 42 U.S.C. §§ 7661b and 7661c(a); 40 C.F.R. §§ 70.1, 70.5 and 70.6; BAAQMD Rule 2-6-409.

28. Failure of a source subject to Title V to submit a complete application, supplement that application when new requirements become applicable, or to obtain a Title V permit that contains all applicable requirements, such as PSD requirements, are violations of the Act.

FINDINGS OF FACT

29. The Facility is a Portland cement manufacturing facility, which is located at 24001 Stevens Creek Boulevard, Cupertino, Santa Clara County, California.

30. The San Francisco Bay Area Air Basin, which includes Santa Clara County where the Facility is located, was designated as attainment/unclassifiable at all times for NO₂ and SO₂ by operation of law under Sections 107(d)(1)(C) and 186(a) of the Act, 42 U.S.C. §§ 7407(d)(1)(C) and 7486(a). See 56 Fed. Reg. 56694 (Nov. 6, 1991); 40 C.F.R. § 81.305.

31. Lehigh is the current owner and operator of the Facility. The Facility was formerly owned by Hanson Permanente Cement and Kaiser Cement Corporation.

32. The Facility includes one kiln, and associated

equipment used to produce clinker, including a preheater tower, precalciner, clinker cooler, induced draft ("ID") and other fans, cement finish mills, and extensive sections of ductwork.

33. The combustion of coal, petroleum coke, and natural gas at the kiln at the Facility produces emissions of NO_x and SO₂, which are released to the atmosphere through a collection of 32 individual mini-stacks exiting from the baghouse.

34. Between 1996 and 1999, Lehigh commenced construction of various physical and/or operational changes at the Facility, and has continued to operate the Facility with these modifications, including, but not limited to, the following:

- a. Upgrades to the finish mill; and
- b. Various other modifications, upgrades, and operational changes *[Note: The underlying documents identifying these other projects have been claimed by Lehigh as confidential business information, and therefore are not being specifically identified in this NOV/FOV. Regardless, as the NOV/FOV raises allegations relating to all physical or operational changes commencing from 1996 through 1999, these other projects are covered within the scope of the NOV/FOV.]*.

35. Lehigh intended that these physical or operational changes, either individually or in the aggregate, would increase the production capacity of the Facility.

36. These physical or operational changes, either

individually or in the aggregate, resulted in an increase in annual clinker production at the Facility.

Prevention of Significant Deterioration

37. The Title V Permit issued by BAAQMD included, among other conditions, the following annual emissions limits for NO_x and SO₂ emissions from the Kiln at the Facility:

	NO _x	SO ₂
Emissions limit (tpy)	5,072	2,106.8

38. As the limits in the Title V Permit for the Facility are federally enforceable, they constitute the Facility's Potential to Emit ("PTE").

39. Based upon a comparison of pre-construction actual emissions to post-construction PTE, the physical or operational changes identified in Paragraph 34, either individually or in the aggregate, resulted in net emissions increases from the Facility of NO_x and SO₂.

40. The net emissions increases of NO_x and SO₂ as a result of the physical or operational changes identified in Paragraph 34, either individually or in the aggregate, constitute a PSD significant net emissions increase since the increases were above 40 tpy for NO_x and SO₂.

41. Each of the physical or operational changes identified in Paragraph 34 constituted, either individually or in the aggregate, a "major modification" to the Facility for PSD purposes, as defined by 40 C.F.R. § 52.21 (b)(2)(i).

42. Lehigh did not apply for a PSD Permit covering NO_x and

SO₂ emissions for any of the physical or operational changes identified in Paragraph 34.

43. Lehigh failed to install and operate BACT-level emission controls for NO_x and SO₂ emissions from the Facility either at the time each of the physical or operational changes identified in Paragraph 34 were commenced or any time since their completion and operation.

Title V Operating Permit Program

44. As alleged in Paragraphs 34 through 43, Lehigh commenced one or more major modifications at its Facility commencing from 1996 through 1999, and the modifications triggered the requirements to obtain a PSD permit, undergo a PSD BACT analysis, and operate in compliance with the PSD permit. Lehigh failed to satisfy these requirements.

45. Lehigh first submitted a Title V application to BAAQMD on June 21, 1996. The final permit was issued by BAAQMD on November 5, 2003.

46. Prior to issuance of the Title V permit, Lehigh failed to supplement and/or correct its Title V permit application to identify all applicable requirements, including PSD requirements for NO_x and SO₂, a plan to come into compliance with those PSD requirements, and an updated certification of compliance that included the PSD requirements.

47. As a result of Lehigh's failure to provide complete information in its application or to supplement and/or correct

its application to include PSD requirements, Lehigh obtained a deficient Title V operating permit that did not contain all applicable requirements.

48. Pursuant to Section 502(a) of the CAA, 42 U.S.C. § 7661a(a), it is unlawful for any person to operate a source required to have a PSD permit except in compliance with a permit issued by a permitting authority under Title V. Similarly, 40 C.F.R. §§ 70.1(b), 70.6(a) and BAAQMD Rule 2-6-409 require sources subject to Title V to have an operating permit that assures compliance with all applicable requirements.

49. Lehigh has operated and continues to operate the Facility without a valid Title V operating permit in violation of Sections 502, 503 and 504 of the Act, 42 U.S.C. §§ 7661a, 7661b, and 7661c; 40 C.F.R. §§ 70.1, 70.5 and 70.6; and BAAQMD Regulation 2 Rule 6.

FINDING OF VIOLATION

Prevention of Significant Deterioration

50. Pursuant to Section 113(a)(1) of the Act, notice is hereby given to Lehigh that the Administrator of the EPA, by authority duly delegated to the undersigned, finds that Lehigh is in violation of federal PSD requirements at the Facility described in this NOV/FOV. EPA reserves the right to amend this NOV/FOV or issue a new NOV/FOV based on additional information obtained through Section 114 of the Act or any other source available to the Administrator at any point.

Title V Operating Permit Program

51. Notice is also given to Lehigh that it failed to supplement or correct its Title V application submitted to BAAQMD to include PSD requirements or obtain a Title V permit that contained PSD requirements, and therefore is in violation of Title V of the Act.

ENFORCEMENT

52. For any violation of a SIP, such as for PSD violations, Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of a notice of violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIP, issue an administrative penalty order, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation that occurs on or before January 30, 1997, not more than \$27,500 per day for each violation that occurs after January 30, 1997, not more than \$32,500 per day for each violation that occurs after March 14, 2004; and not more than \$37,500 per day for each violation that occurs after January 12, 2009. 42 U.S.C. § 7413(a)(1); Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended; 40 C.F.R. Part 19.

53. Sections 113(a)(3) and 167 of the Act, 42 U.S.C. §§ 7413(a)(3) and 7477, provide additional authority for EPA to enforce against violators of the Act.

54. Section 113(c) of the Act, 42 U.S.C. § 7413(c), provides for criminal penalties, imprisonment, or both for persons who knowingly violate any federal regulation or permit requirement. For violations of the SIP, a criminal action can be brought 30 days after the date of issuance of a Notice of Violation.

55. Section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in Lehigh and/or the Facility being declared ineligible for participation in any federal contract, grant, or loan.

PENALTY ASSESSMENT CRITERIA

56. Section 113(e)(1) of the Act, 42 U.S.C. § 9613(e)(1), states that the Administrator or the court shall determine the amount of a penalty to be assessed by taking into consideration such factors as justice may require, including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, and the seriousness of the violation.

57. Section 113(e)(2) of the Act, 42 U.S.C. § 9613(e)(2),

allows the Administrator or the court to assess a penalty for each day of violation. This section further provides that for purposes of determining the number of days of violation, where EPA makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of an NOV, the days of violation shall be presumed to include the date of the NOV and each and every day thereafter until the facility establishes that continuous compliance has been achieved, except to the extent that the facility can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

OPPORTUNITY FOR CONFERENCE

58. Lehigh may confer with EPA regarding this NOV/FOV if it so requests. A conference would enable Lehigh to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. If Lehigh seeks such a conference, it may choose to be represented by counsel. If Lehigh wishes to confer with EPA, it must make a request for a conference within 10 working days of receipt of this NOV/FOV. Any request for a conference or other inquiries concerning the NOV/FOV should be made in writing to:

Ivan Lieben
Office of Regional Counsel
U.S. EPA (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105

(415) 972-3914

Dated: 3-9-10



Deborah Jordan
Director, Air Division