



Division of Air Pollution Control

NSR Reform Meeting 3 Comments

Commentors

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B	The Ohio Environmental Council
C	Industry Members of the PPEC (Permit Processing Efficiency Committee) Chris Korleski, Honda of America Mfg., Inc. Maxine Dewbury, Procter & Gamble Bill R. Miller III, Ph.D., General Motors Corporation

Topic: Plantwide Applicability Limit (PAL)

Commentor A:

RAPCA recommends against the adoption of the new federal language for PALs. USEPA's rule provides for what they term an "Actuals-Based PAL." However, as this provision uses the definition of "baseline actual emissions," it is not in fact an "actuals" based PAL.

A true "actuals-based" PAL, using the past two years of emissions in an area which meets the appropriate air quality standard would have a basis for approval. One could logically proceed on an assumption that current air quality is acceptable, further reductions are unnecessary, and therefore the setting of plantwide emissions caps at current emissions levels is acceptable.

Unfortunately, USEPA's rule for PALs sets baselines at emissions levels which exceed current emissions and allows such PALs to be established in nonattainment areas, where emissions reductions would appear to be necessary in order to provide for attainment of the appropriate air quality standard in the future.

By using baseline actual emissions to establish the PAL level, USEPA's rule allows a 10-year look back with the establishment of a PAL level which could exceed that which is specified in a maintenance inventory or that which may be necessary in an attainment SIP. This PAL establishment would then allow emissions increases above current levels. Furthermore, the PAL would allow new units to be installed at the plant, without appropriate controls or offsets.

RAPCA recommends the following with regard to USEPA's PAL rule:

?? Actuals-based PALs should use a plant's last two years of operation to set the baseline PAL emissions cap.

Commentor B:

Baselines set at levels within the past 10 years could exceed the emissions in ozone maintenance inventories, and a PAL that is set at a level exceeding the facility level in the maintenance inventory would require a SIP revision with equal reductions required from some other source in the inventory. Such baselines would also allow increases in areas that are nonattainment for the 8-hr standard, where the current inventory is obviously not low enough.

Ohio EPA Response:

Ohio EPA intends to adopt USEPA's rules as written. USEPA acknowledged in the Technical Support Document (TSD) that the "PAL baseline must be consistent with the current assumptions regarding the source's emissions that are used under the applicable SIP for planning or permitting purposes," and that "it is up to the States to use appropriate measures to ensure consistency between PALs and the emissions levels

used by them in their attainment demonstrations.” Furthermore, it is stated that the “reviewing authorities retain the discretion not to provide a PAL for a particular source.” After a PAL is established, the State has the ability to make adjustments for various reasons, such as incorporating “newly applicable requirements” or if the “reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation.” When these adjustments are made is at the discretion of the State but can not occur later than the next PAL or Title V renewal. However, if the adjustment is necessary because the State is taking credit for the reductions resulting from the change in its attainment demonstration, USEPA urges the State not to wait until renewal to incorporate the change. USEPA provides the State’s with discretion to take into consideration air quality planning needs.

Commentor A:

Additionally, the federal rule is overly complex. The provisions for establishing, reopening, renewal, and expiration of the PAL are very troubling in their complexity.

Ohio EPA Response:

USEPA also recognized that establishing a PAL, because of the necessary procedures and future requirements, may not be attractive to all sources. The TSD states that “a PAL concept many not be attractive to you if you do not believe the flexibility and regulatory certainty that PAL provides is worth the investment needed to operate a well-maintained facility with the necessary monitoring, recordkeeping, and reporting.” A PAL remains an option, not a requirement, so not all facilities may opt in. Also, Ohio EPA recognizes that it will be time consuming on both the part of the applicant and the Agency to process PALs. However, we are required to adopt PALs.

Commentor A:

Plus, the federal rule requires the entire plant to be covered under the PAL, as opposed to allowing partial PALs, which would be easier to manage.

RAPCA recommends the following with regard to USEPA’s PAL rule:

?? Partial PALs should be allowed for groups of sources which all employ BACT.

Commentor B:

An area where the PAL rule could be useful is an extension of the “Clean Unit” concept to a “Clean Facility.” Facilities that have BACT on all significant units would be accorded flexible operation under the BACT level cap. The idea of “partial PALs”, where a group

of sources (production line, boiler house, group of printing presses, etc) with BACT installed would be allowed flexible operation, seems workable.

Commentor C:

Ohio EPA should expressly recognize and encourage partial PALs. One way to facilitate more expeditious adoption of PALs in Ohio is to allow partial PALs. Partial PALs apply to a discrete subset of emissions units at a plant, rather than all of the plant's emission units. Partial PALs have the advantage of serving business and regulatory interests without the unduly ponderous distraction of addressing co-located emissions units that have nothing to do with the objectives of the PAL. Partial PALs not only conserve Agency and applicant resources, but they also provide the environmental benefits of PALs that would otherwise be discouraged by red tape and delay. US EPA's rules provide state agencies with authority and discretion to establish partial PALs in addition to facility-wide PALs. Ohio EPA should take full advantage of that authority and discretion, consistent with the policy preferences of the Ohio General Assembly. See ORC §§ 3704.036(M) and 3704.037.

Ohio EPA Response:

USEPA's TSD document states that they have not made a "final decision about whether partial PALs are permissible under the current regulations, " nor are they "adopting any partial PAL provisions." USEPA states they will consider exploring partial PALs on a case-by-case basis and that may later issue guidance or rule making regarding their use. If an Ohio source wished to pursue a partial PAL, we envision a process occurring similar to the pilot PAL programs that have occurred in other States prior to the NSR Reform rules.

In regards to the "Clean Facility" concept. USEPA's TSD stated:

"Most commenters and stakeholder participants did not support the clean facility exclusion. Some indicated that it would be similar to a PAL based on allowable emissions, although the allowables PAL would be preferable. We have taken no action on clean facilities in the final rules. We will continue to evaluate clean facilities as we consider allowables PALs."

Ohio EPA would consider a "Clean Facility" concept as part of a future rule making process if promulgated by USEPA.

Commentor A:

RAPCA recommends the following with regard to USEPA's PAL rule:

?? New significant units installed under a PAL should employ BAT.

Commentor B

Under the federal PAL, new units could be installed without controls, another unreasonable proposal for nonattainment areas. Ohio EPA should go on record as stating that they are going to retain their minor NSR rule and requirement for BAT on all new units.

Commentor C:

Harmonizing the Ohio minor NSR program rules with the PAL provisions should be a priority, and Ohio EPA should establish a working group to begin working on that goal. Ohio EPA has one of the most extensive minor NSR programs in the United States, imposing permitting requirements for very small changes at a facility. The Agency has taken some steps to streamline these requirements with respect to Title V revisions. In the context of PALs, more extensive steps are needed to harmonize the PAL provisions adopted in this rule with the minor NSR program requirements so facilities will be willing to adopt PALs. Without such changes, Ohio's air quality will not be able to realize fully the benefits of the PAL program. Ohio EPA was correct in its presentation at the January 20th meeting in stating that US EPA's rule does not address minor NSR and therefore, to the extent that the SIP continues to require minor NSR for changes under a PAL, those requirements would continue to apply.¹ US EPA explained in the Response to Comments on the final rule that it did not think it was appropriate for the federal program to dictate to the states how they should streamline their minor NSR programs to accommodate PALs. This was particularly important given the comments indicating the variability of requirements between states. US EPA also stated that it had not solicited comment in either the 1996 or 1998 proposals as to the relationship between minor NSR and PALs and therefore, it could not include provisions in the final rule to address that issue. *Response to Comments* at I-7-25.

Notably, however, US EPA did allow permit limits issued under a SIP to be changed in a PAL, providing that minor NSR requirements that were adopted to avoid major NSR can and should be eliminated in establishing a PAL. *67 Fed. Reg.* 80210. Ohio EPA has included many such limits in minor NSR permits and, even without changes to its minor NSR program, revision and elimination of these limits is permissible.

In the experience of PPEC members who have obtained PALs prior to the issuance of these rules, one of the most time consuming aspects of issuing the PAL was addressing the minor NSR requirements in the SIP. This was due in large part to the need for a source-specific SIP revision to excuse the facility from compliance with minor NSR requirements when it made changes under the PAL. Addressing and relieving the burdens of minor NSR was viewed as a critical element to make the PAL a worthwhile investment for the facilities. US EPA has found that since the issuance of the previous PALs, emissions have *not* increased and that substantial benefits have been derived even though facilities were excused from minor NSR requirements.

¹ Ohio EPA also noted the NSPS, NESHAP and other applicable requirements would continue to apply. While this is true, we note that Ohio EPA will have authority to streamline these requirements consistent with previous EPA guidance. See, e.g., *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* ("White Paper 2"), March 5, 1996.

Given the complexity of the interface between the minor NSR program in our state and the PAL provisions Ohio will adopt, we believe it is critical that the Agency establish a policy that will harmonize these requirements. Specifically, we are requesting that Ohio EPA initiate a stakeholder process to discuss and make recommendations on appropriate revisions to the minor NSR program. Members of the PPEC are ready and willing to work with Ohio EPA and urge that the Agency begin the process as soon as possible.

Ohio EPA Response:

USEPA acknowledged in the TSD that they did not believe that the major NSR regulations “should provide PALs for both minor and major sources, since PALs are an alternative applicability scenario to major NSR.” They further stated that it would not be appropriate to “dictated or encourage States to streamline their minor NSR program” and that the “State minor NSR program continues to apply to all changes at the source that are accomplished under a PAL.”

USEPA’s TSD also stated that during the PAL process, federally enforceable (r)(4) (synthetic minor) limits previously taken to avoid major NSR could be removed. However, before removing the limits, the State would make sure that all other requirements are being met and there is no adverse impact to the NAAQS or PSD increments. Furthermore, the baseline emissions that form the basis for the PAL limit would be based on the actual emissions, adjusted for the synthetic minor limit. It is important to note that USEPA states that all other unit specific applicable limits (such as BACT and NSPS) are not superseded or eliminated when the PAL becomes effective (see TSD I-7-66).

Ohio EPA does not intend to make changes to the minor NSR program as part of this rulemaking given the risk of missing the end of calendar year 2004 goal for incorporating these rules into Ohio’s program and the risk of obtaining SIP approval by modifying our SIP approved minor NSR and Best Available Technology (BAT) program for PAL purposes. Ohio EPA does agree it would be beneficial to initiate a stakeholder process to discuss minor NSR interaction with the PAL program, with perhaps the Permit Processing Efficiency Committee’s (PPEC) NSR Reform workgroup.

Commentor A:

RAPCA recommends the following with regard to USEPA’s PAL rule:

- ?? PALs should not be allowed in nonattainment areas, unless Ohio EPA constructs an allowables-based PAL approach which assures that the plantwide allowable emissions will not interfere with the attainment of the appropriate NAAQS.
- ?? Actuals-based PALs should be allowed in attainment areas only.

Ohio EPA Response:

Ohio EPA intends to be consistent with USEPA’s rule as to the applicability of PALs to

both attainment and non-attainment areas. After considering numerous comments and discussions at stakeholder meetings, USEPA decided to move forward with PALs in both attainment and nonattainment areas (except in extreme nonattainment areas). USEPA has expressed that it intends to further investigate the possibility of an allowables-based PAL by providing future rulemaking. If this occurs, Ohio EPA will take the appropriate action to incorporate an allowables-based PAL into Ohio's program.

Commentor A:

Additional options to USEPA's PAL rule are offered in the STAPPA/ALAPCO NSR Menu of Options. We recommend this document to Ohio EPA.

Ohio EPA Response:

Ohio EPA has reviewed this document and taken it into consideration.

Commentor B:

As an initial matter, the Ohio Environmental Council states that the final New Source Review rules promulgated by the U.S. EPA on December 31, 2002 violate the Clean Air Act and are less protective of the public health and the environment than the existing NSR regulations that they amended. Also, the OEC reiterates its position that applicable law provides that in order to receive delegated authority to enforce the Clean Air Act in Ohio, Ohio's air pollution control program needs to be at least as stringent as, yet can be more stringent than, the federal air pollution control program. In this instance, Ohio EPA should reject U.S. EPA's attempt to relax and weaken the requirements of the Clean Air Act through administrative fiat. A decision by Ohio not to adopt the federal PAL rule would make Ohio's program more stringent than the federal program and would avoid the legal defects associated with the new federal rules. Accordingly, the OEC recommends that Ohio EPA reject this federal rule in its entirety.

As a secondary matter, the Ohio Environmental Council reiterates that the PAL rule package ("the federal rule") presented by Ohio EPA at the NSR discussion group meeting on January 20, 2004 was not very clear. For example, there is no draft proposed Ohio rule that corresponds to the federal rule that Ohio EPA considers adopting. Moreover, it is not clear which of the December 31, 2002 federal revisions to the federal rule Ohio EPA is proposing to adopt; is Ohio EPA adopting the federal rule in its entirety or just portions of that rule? Moreover, it is not clear whether Ohio EPA is asking for comments to all of the revisions to the December 31, 2002 federal rule or just portions of it. In addition, it is not clear from the materials presented whether Ohio EPA is asking for comments to the federal rule as promulgated on December 31, 2002 or whether comments are being sought on existing Ohio EPA rules and the effect the

federal rule will have on existing Ohio EPA rules. Finally, it is not clear whether the adoption of the December 31, 2002 federal rule would result in Ohio EPA promulgating entire new rules or amendments to existing Ohio EPA rules. For all of these reasons, the OEC recommends that further rulemaking and public participation and comment take place before any proposed rules are submitted to JCARR.

In addition, the proposed PAL rule utilizes the definition of “baseline actual emissions.” Again, for the sake of consistency, clarity and certainty, the OEC again recommends that “baseline actual emissions” should have the same definition as “actual emissions” that is currently defined in 52.21(b)(21). Adding another definition to an already confusing, cumbersome and rather unwieldy regulatory program would result in the expenditure of more time and resources than Ohio EPA currently has, thereby lengthening the permitting process to the detriment of human health and the environment.

Moreover, the United States District Court for the Southern District of Ohio has already issued an opinion that discusses the definitions of “modification,” “actual emissions,” “representative actual annual emissions,” “net emissions increase” and “contemporaneous.” See United States v. Ohio Edison, Case No. 2:99-CV-1181 (August, 2003). This opinion provides for regulatory certainty and establishes legal precedent. Adding another exemption from the definition of “major modification” to an already confusing, cumbersome and rather unwieldy regulatory program, for which regulatory certainty and legal precedent have been established, would add more confusion and result in the expenditure of more time and resources than Ohio EPA currently has, thereby lengthening the permitting process to the detriment of human health and the environment.

Ohio EPA Response:

Ohio EPA has responded to these comments previously.

Commentor B:

OEC also reminds Ohio EPA that NAAQS designations for ozone and particulate matter will soon be made for Ohio by U.S. EPA. OEC cautions Ohio EPA that adopting the proposed federal rule, as well as the other NSR/PSD changes made by U.S. EPA, will have adverse economic impacts on industry throughout the state of Ohio. In essence, adopting the NSR/PSD changes will constitute a subsidy to the electric industry at the expense of all other industries in Ohio, whether those industries are existing entities already located in or new entities attempting to locate in or relocate to Ohio. OEC recommends that instead of adopting the strategy of U.S. EPA, Ohio EPA (and the Governor) address the problem of power plant pollution from a multi-state perspective.

Ohio EPA Response:

Ohio EPA must adopt the NSR Reform rules, or a version as stringent as, by no later

than December 31, 2005. The attainment plans for these future designations and any stakeholder input will be addressed separately from this future rule package.

Commentor B:

However, if Ohio EPA insists on being in lock-step with U.S. EPA on this issue, the OEC, without waiving its legal right to contest the current federal rules or to contest any rules proposed by or promulgated by Ohio EPA, incorporates each of the above general comments into each of the following specific comments to the proposed rule.

Ohio EPA Response:

Ohio EPA acknowledges your comment.

Commentor B:

51.165(a)(1) . . . (v)(D): the prefatory phrase that reads “a particular NSR pollutant” is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of “air contaminant” and “air pollution” that are contained in Revised Code Chapter 3704.

51.165(a)(1) . . . (xii)(A)

a. the prefatory phrase that reads “a particular NSR pollutant” is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of “air contaminant” and “air pollution” that are contained in Revised Code Chapter 3704.

b. the whole definition should be deleted, or at a minimum should have the same definition as “actual emissions” that is currently defined in 52.21(b)(21). Adding another definition to an already confusing, cumbersome and rather unwieldy regulatory program makes no sense.

c. this section refers to calculations that are specified in other parts of 51.165(a)(1), for example, paragraphs (a)(1)(xxvii) and (xxxv) are mentioned. OEC has already commented on those other paragraphs. Specifically, see OEC’s comments dated 10/24/03, numbers 1.a. through 1.o, and 12/1/03 numbers 1.a. through 1.f. Those other comments of OEC are incorporated as if rewritten herein.

51.165(a)(1) . . .(xxxv): This section refers to the “baseline actual emissions” calculation. OEC has already provided comments to this rule. Specifically, see OEC’s comments dated 10/24/03, numbers 1.a. through 1.o. Those other comments of OEC are incorporated as if rewritten herein.

51.165(a)(2) . . . (iii): the prefatory phrase that reads “a particular NSR pollutant” is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of “air contaminant” and “air pollution” that are contained in Revised Code Chapter 3704.

51.165(a)(6): this proposed section has already been the subject of comments. Specifically, see OEC’s comments dated 12/1/03, numbers 3.a. through 3.d.

Ohio EPA Response:

Ohio EPA has responded to these comments previously.

Commentor B:

51.165(a)(1) . . . (v)(D): the phrase “when the major stationary source is complying with” needs to be clarified. At what point in time does the major stationary source need to be “in compliance with” the requirements of paragraph (f)? At the time when paragraph (f) went final? At the time the federal PAL rule went final? At the time construction began? At the time a PAL, if any, was issued? At the time a PAL, if any, comes up for renewal? At the time the “physical change in or change in the method of operation” occurs? Clarity is needed on this issue.

Ohio EPA Response:

Ohio EPA will consider any necessary clarification requirements when incorporating the federal requirements into the Ohio Administrative Code (OAC).

Commentor B:

51.165(f): OEC does not see any benefit to this rule, thus, it should be deleted. The concept of a PAL has been embodied by Ohio EPA in various permits it has issued. This practice should continue through permitting rather than through a rule that is too lengthy and cumbersome to be of any value, to either industry, Ohio EPA, human health or the environment.

Commentor C:

Ohio EPA should adopt the PAL provisions directly from the federal rule. Based on

more than 10 years of experience, it is clear that PALs are environmentally beneficial. US EPA's study of previous PALs established that they resulted in emission reductions and pollution prevention even though these improvements were not explicit requirements of the PAL permits. US EPA also found that with the cap-based program, facilities strived to create headroom for future expansion by voluntarily controlling emissions. These benefits should be brought to Ohio by direct adoption of the federal rule.

PPEC members' extensive experience with the benefits of PALs in other states shows that Ohio can also benefit from this program. Several members of the PPEC have obtained PAL permits under the pilot programs that US EPA conducted over the past decade. The development of these permits leads us to two conclusions. First, significant environmental benefits result from PALs. Second, absent explicit SIP provisions authorizing PALs, the resources required to develop them can act to prevent their adoption.

Ohio EPA Response:

USEPA, and Ohio EPA, believe that PALs can be beneficial to the regulated community, the agency, the public and the environment. In the pilot PAL cases studies by USEPA, they found significant environmental benefits occurred. USEPA continues to assert that PALs will provide environmental benefit. Ohio EPA would be required to establish PALs through a SIP approved permitting process that provides for public participation and input. The rules will simply provide a unified framework for how the PAL program will be implemented through the permitting process.

Commentor B:

Because the PAL rule uses the definition of baseline actual emissions, it is possible to have a baseline that allows increased emissions which results in an exemption from NSR. Thus, an increase in actual emission should result in the installation of modern air pollution controls, rather than a reward in the form of being exempted from NSR.

Ohio EPA Response:

In actuality, a PAL does not allow such a reward. USEPA has stated they believe that "PALs will be equal to or more beneficial environmentally than major NSR." Installation of modern pollution control equipment is only required if a project results in a major modification where there is a significant emissions increase or a significant net emission increase, not when there is any increase in actual emissions.

Commentor C:

The PAL provisions in the regulations provide significant safeguards to ensure emission reductions. US EPA requires that emissions from permanently shut down units be subtracted when the PAL is established. In addition, the PAL must be adjusted

to reflect future applicable rules. Perhaps most significant, the PAL approach in the federal rule allows only a single addition of the significance level for applicable pollutants. Absent a PAL, a facility would be entitled to increase emissions up to the significance level *for multiple, independent projects* undertaken. The facility in effect gives up the ability to make these emission increases for the duration of the PAL, a significant environmental benefit. Finally, the PAL provisions explicitly require protection of air quality. With all of these provisions, any facility that accepts a PAL will clearly be providing an environmental benefit in Ohio.

Ohio EPA Response:

When the PAL is established it is based on the baseline actual emissions of all units under that PAL and is then capped at that level plus the significance level for that pollutant. As changes occur at that facility, the instance where that PAL level (representing the baseline plus the significant increase level) could be violated, a major PAL modification occurs and all units (new or existing) that are part of that project causing the PAL increase, must go through major NSR, including the installation of modern air pollution controls. Therefore, USEPA's TSD states that "serial, small unrelated emissions increase above the PAL, which otherwise can occur under major NSR and that could adversely impact air quality," will not occur under the PAL. In addition, under major NSR, "production increases at existing emissions units that can be accomplished without modifying the unit are not subject to review, thus, without a PAL, you can increase production at such units up to full utilization, with emission rising from historic levels up to the full PTE, without review. Such emissions increases are capped under a PAL."

Commentor C:

In sum, Ohio EPA should adopt all elements of US EPA's PAL provisions as expeditiously as possible. We appreciate Ohio EPA's consideration of our concerns. Please contact any of us with questions regarding these comments.

Ohio EPA Response:

Ohio EPA is on schedule to complete the incorporation of USEPA's NSR Reform rules into the OAC by the end of calendar year 2004.