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Michigan Manufacturers: Be Wary of Rule 290 Exemption

by Joseph A. Gregg

Many Michigan manufacturers may be operating their facilities believing that, as a minor source of air emissions, they are not required to have an operating permit because of the exemption provided by Rule 336.1290 (Rule 290) of the Michigan State Implementation Plan (SIP). That Rule, which was adopted by the Michigan Department of Environmental Quality (DEQ) in 1993, provides numerous exemptions from the general requirement to obtain a permit to install a new or modified air contaminant source. The DEQ has operated its air program on the basis of those exemptions since they were adopted. Indeed, DEQ reportedly has advised some applicants that even if a facility wanted to obtain an operating permit, the State would decline to act on its application if it was subject to a Rule 290 exemption.

The dilemma for minor emission sources is Michigan's exemption rules 336.1279 through 336.1290 were expressly disapproved by the U.S. EPA as part of the SIP on November 9, 1999. U.S. EPA found Michigan's exemption rules inconsistent with various sections of the federal Clean Air Act. U.S. EPA explained it was holding off from issuing a final disapproval of Michigan's SIP revisions in order to spare Michigan from being subject to sanctions under §179(a) of the Clean Air Act. Fourteen years have passed and the U.S. EPA has not issued a final disapproval of the rules that were the subject of the 1999 proposed disapproval nor has the federal agency issued sanctions against the State or promulgated a federal Implementation Plan. Nonetheless, since 1999's proposed disapproval, DEQ has continued to implement the exemption rules set forth in rules 336.1279 through 336.1290 without interruption.

One of our clients recently was ensnared in this dilemma. The client eventually resolved it by entering into an Administrative Consent Order with the U.S. EPA and paying a significant civil penalty. The client acquired an automotive parts manufacturing facility in 2007. At the time, the facility did not have an air permit and was believed to be lawfully operating under the minor source exemptions of Michigan Rule 290. Stack testing performed by the prior owner in the late 1990s confirmed the facility's eligibility for the exemption and a then-existing operating permit was voided by DEQ at the request of the owner of the facility. There were no significant changes to the manufacturing processes, materials and emissions when the new owner acquired the facility in 2007.

In 2010, DEQ conducted an inspection of the facility and requested documentation confirming the facility's entitlement to the Rule 290 exemption. Apparently frustrated

Offices

Toledo Office:
One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699
Phone: 419-241-6000
Fax: 419-247-1777

Columbus Office:
100 East Broad St.
Ste. 2100
Columbus, Ohio 43215
Phone: 614-564-1445
Fax: 614-280-1777

Findlay Office:
510 South Main St.
Findlay, Ohio 45840
Phone: 419-424-5847
Fax: 419-424-9860

Novi Office:
28175 Haggerty Rd.
Novi, Michigan 48377
Phone: 248-994-7757
Fax: 248-994-7758

www.eastmansmith.com

by what DEQ perceived to be delays on the part of the facility in providing the state agency with that information, they referred the matter to the U.S. EPA. U.S. EPA subsequently notified the facility they were operating unlawfully without a valid air permit in violation of the Clean Air Act and the Michigan SIP and the federal agency intended to file a civil administrative complaint as well as seek a significant civil penalty.

When it was pointed out to the federal agency the current owner of the facility was operating pursuant to Michigan's Rule 290 exemption, the federal agency informed the facility it did not recognize the validity of the exemption. The owner of the facility argued the proper course of action for U.S. EPA would be to use its enforcement powers to require the State of Michigan to fix or abandon the exemption provisions in its administrative rules and not to take enforcement action against a Michigan manufacturer for reliance on the State's exemption provisions. It also argued that U.S. EPA's enforcement action against the company was arbitrary and violative of equal protection and/or substantive due process. Attorneys for U.S. EPA stated that as far as the federal agency was concerned, Rule 290 does not exist and there was no exemption from the requirement to have a permit for a minor source. The fact there could be hundreds, perhaps even thousands, of facilities in Michigan operating unlawfully under the mistaken belief they are entitled to do so because of the Rule 290 exemption, is immaterial to the federal enforcement authorities. In the course of our representation of our client, we were unable to learn whether or not the federal agency has ever enforced against a Michigan company for operating without a permit where a matter has not been first referred to the federal agency by DEQ, but there apparently does not exist anything that would prevent them from doing so.

Owners and operators of Michigan air emissions sources have a predicament. If they are operating a minor source that meets the exemptions in Michigan Rule 290, but they apply for a permit to operate as a precaution against U.S. EPA enforcement, past practice indicates DEQ will decline to act on the application and will inform the applicant that it is covered by the Rule 290 exemption. That will not satisfy the U.S. EPA, however, which takes the position Rule 290 was never incorporated into the approved Michigan SIP, and therefore does not exist. A Michigan company operating pursuant to Rule 290 may never hear from the federal agency regarding this, unless and until something happens that causes DEQ to refer it to the federal agency. Once referral is made, the federal agency will take the position the company has been operating without a permit for however long it has been operating the facility and, pursuant to the Clean Air Act Penalty Policy, significant civil penalties likely will be demanded.

Michigan manufacturers should insist the DEQ address this problem by either submitting an approvable exemption rule to the U.S. EPA that can be incorporated into the SIP, or by acting on permit applications submitted by facilities unwilling to risk being contacted by U.S. EPA with a significant civil penalty demand for operating without a permit.

If you have any questions about this or any other environmental issue, please contact Joseph A. Gregg at 419-241-6000 or visit our website at www.eastmansmith.com.
