

adjacent Borden Chemicals & Plastics, Inc. (BCP) facility.¹ Borden and BCP are on contiguous properties and under the common control of Borden, Inc., and therefore are considered one source for permitting purposes. LDEQ concluded that BCP reduced volatile organic compound (VOC) emissions from January 1996 until March 2000 (referred to as the “contemporaneous period”) sufficiently to net out the 24.19 tons per year (TPY) increase associated with the Borden facility.² Therefore, LDEQ concluded, construction of the Borden formaldehyde facility constituted a minor modification not subject to NNSR requirements.³ LDEQ issued Borden a permit modification to its Title V Operating Permit (Permit 2631-V1) on December 13, 2000 (the “Borden Permit Modification”).

On January 2, 2001, Ms. Suzanne Dickey of the Tulane Environmental Law Clinic, on behalf of LEAN (Petitioner), petitioned the United States Environmental Protection Agency (EPA) to object to the issuance of the Borden Permit Modification. The Petitioner requested that EPA object to the issuance of the Borden Permit Modification pursuant to Section 505(b) of the Act and 40 C.F.R. § 70.8(d), stating four grounds in support of the Petition (see section III(B) below). For the reasons set forth below, I deny the Petition.

¹ On March 1, 2000, BCP submitted an Application for Emission Reduction Credits to LDEQ, seeking approval of 258 TPY of VOC credits.

² “Netting” is defined as “the use of an ERC at an existing facility to compensate for emission increases associated with a proposed modification at the same facility and to, thus, avoid the requirements of new source review. ERCs used for netting are always internal to the source seeking credit.” L.A.C. 33:III.605.

³ Operating Permit, Formaldehyde Plant, Borden Chemical, Inc., Permit No. 2631-V1, Air Permit Briefing Sheet, at 2 (December 13, 2000) (Borden Permit Modification).

II. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each State to develop and submit to EPA an operating permit program which meets the requirements of Title V. The State of Louisiana submitted a Title V program governing the issuance of operating permits on November 15, 1993, and subsequently revised this program on November 10, 1994. 40 C.F.R. Part 70, Appendix A. In September of 1995, EPA granted full approval to the Louisiana Title V operating permits program. 60 *Fed. Reg.* 47296 (September 12, 1995); 40 C.F.R. Part 70, Appendix A.⁴ Major stationary sources of air pollution and other sources covered by Title V are required to obtain an operating permit that includes emission limitations and such other conditions necessary to assure compliance with all applicable requirements of the Act. 42 U.S.C. §§ 7661a(a) and 7661c(a).

The Title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the Title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document, and therefore enhance compliance with the requirements of the Act. *Id.*

⁴ This program, which became effective on October 12, 1995, is codified in Louisiana Administrative Code (L.A.C.), Title 33, Part III, Chapter 5.

Under Section 505(b) of the Act, the Administrator is authorized to review state operating permits issued pursuant to Title V, and to object to permits that fail to comply with the applicable requirements of the Act, including the requirements of an applicable implementation plan.⁵ In this case, the applicable requirements include Louisiana’s Nonattainment New Source Review (NNSR) Procedures, L.A.C. 33:III.504, and Louisiana Emission Reduction Credits (ERC) Banking regulations, L.A.C. 33:III.Chapter 6.⁶

When EPA declines to object to a Title V permit on its own initiative, Section 505(b)(2) of the Act provides that any person may petition the Administrator to object to the issuance of a permit by demonstrating that the permit is not in compliance with all applicable requirements. *See also* 40 C.F.R. § 70.8(d). These petitions “shall be based only on objections that were raised with reasonable specificity during the public comment period provided by the permitting agency

⁵ Under 40 C.F.R. § 70.1(b), “all sources subject to [Title V must] have a permit to operate that assures compliance by the source with all applicable requirements.” Applicable requirements are defined in 40 C.F.R. § 70.2 to include “(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] Part 52.”

⁶ Sections 110(a)(2)(C) and 172(c) of the Act require each state to revise its state implementation plan (SIP) to include NNSR. EPA approved L.A.C. 33:III.504 as a SIP revision on October 10, 1997. 62 *Fed. Reg.* 52948. EPA approved revisions to this section on September 20, 2002, which makes changes not relevant here.

Louisiana defines “federally applicable requirement,” in relevant part, to include “any standard or other requirement provided for in the Louisiana State Implementation Plan approved or promulgated by EPA through rulemaking under Title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T.” L.A.C. 33:III.502. EPA approved Louisiana’s ERC Banking regulations on July 2, 1999. 64 *Fed. Reg.* 35930. Louisiana revised its ERC Banking regulations on February 20, 2002, and EPA approved the revisions on September 20, 2002. 28 *La. Reg.* 301. All citations to Louisiana’s emission banking regulations are to the previous version in effect at the time the permit applications at issue were approved.

(unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period).” 42 U.S.C. § 7661d(b)(2).

III. BACKGROUND

A. PREVIOUS BORDEN TITLE V PETITION

As noted, on August 25, 1999, the LDEQ issued Borden Permit 2631-V0 (previously defined as the “Prior Borden Permit”) for a new formaldehyde facility in Geismar, Ascension Parish, Louisiana. The Prior Borden Permit constituted both a preconstruction permit issued pursuant to the Nonattainment New Source Review (NNSR) requirements of the Act, 42 U.S.C. § 7503, and a State operating permit issued pursuant to Title V of the Act, 42 U.S.C. §§ 7661 - 7661f. The Prior Borden Permit relied on ERCs Borden purchased from Georgia Gulf. Ms. Marylee Orr, Executive Director of LEAN, submitted a petition (the Prior Petition) to the Administrator on August 24, 1999, seeking EPA’s objection to the Prior Borden Permit to be issued for Borden’s formaldehyde plant in Geismar, Louisiana. The Prior Petition objected to issuance of the permit on nine grounds: (1) violation of public notice and comment provisions; (2) emission reduction credits proposed to offset its emissions are not valid; (3) the facility will hinder reasonable further progress in achieving the ozone standard for the Baton Rouge non-attainment area; (4) environmental impacts of facility significantly outweigh the social and economic benefits of the facility; (5) Borden failed to submit a complete application; (6) Borden’s environmental assessment of the site was inadequate; (7) no risk management plan on file; (8) failure to meet MACT standards; and (9) Title VI civil rights complaint.

As noted previously, on December 13, 2000, LDEQ amended the Prior Borden Permit to substitute internal netting credits for the disputed Georgia Gulf offset credits. On December 22, 2000, the Administrator of EPA issued an Order (the Prior Order), dismissing Items 2 and 3 of the Prior Petition as moot and denying the remainder of the Prior Petition. The Prior Order expressed the Administrator's agreement with the Petitioner on Items 2 and 3, regarding the invalidity of the Georgia Gulf ERCs used as offsets, and re-emphasized the Clean Air Act requirement that credits must be "surplus" of federal or state requirements at the time they are generated as well as when they are used. However, the Prior Order did not grant relief on those points because the Prior Borden Permit had been modified by the Borden Permit Modification to no longer rely on such offsets, thereby mooting the issue. The Borden Permit Modification is the subject of this Petition.

B. SECOND BORDEN TITLE V PETITION

As noted, on July 25, 2000, Borden submitted a request for an amendment to its Title V permit to LDEQ.⁷ The purpose of this amendment was to use emission reductions from the adjacent BCP facility⁸ to net out of NNSR. LDEQ submitted proposed permits for Borden and BCP to EPA on September 19, 2000. A notice of a public hearing and request for public comment on the proposed Borden Permit Modification, the BCP ERC Bank Application, and the

⁷ Borden's application, styled as a request for an administrative amendment, appears not to have met the requirements for an administrative amendment. *See* L.A.C. 33:III.521. However, in light of Petitioner's failure to comment on this issue or raise the issue in its Petition, and LDEQ's use of public participation procedures substantially equivalent to the procedures for significant modifications in accordance with L.A.C. 33:III.531.A, this appears to be harmless error, and EPA will not address it further.

⁸ On March 1, 2000, BCP submitted an Application for Emission Reduction Credits to LDEQ (BCP ERC Bank Application), seeking approval for 258 TPY of VOC credits.

BCP permit modification⁹ was published in *The Advocate*, Baton Rouge, Louisiana on September 26, 2000, and in the *Gonzales Weekly*, Gonzales, Louisiana, on September 29, 2000. The public hearing was held on November 2, 2000 at the Ascension Parish Department of Public Works in Gonzales, Louisiana. The deadline to submit written comments was November 9, 2000. On December 13, 2000, LDEQ issued the permit modifications for Borden (Permit 2631-V1) and BCP (Permit 2021-M1), and approved 118 TPY of VOC ERCs from reductions at BCP. Borden used the ERCs from BCP to net out the 24.19 TPY increase associated with the formaldehyde facility. LDEQ thus concluded that construction of Borden's formaldehyde facility constituted a minor modification not subject to NNSR.¹⁰ By letter dated January 2, 2001, LEAN petitioned EPA pursuant to Section 505(b) of the Act and 40 C.F.R. § 70.8(d), to object to the issuance of the Borden Permit Modification.

The Petition raised four broad objections to the Borden Permit Modification: (1) the BCP emission reductions are not real, actual, or allowable under federal law and regulations; (2) nonattainment new source review applies to the Borden formaldehyde plant because BCP emission reductions were not surplus under Louisiana regulations, and thus the ERCs with which Borden proposed to net out its emissions are not valid; (3) Borden should not be rewarded for violating the Clean Air Act, and the Borden Permit Modification is contrary to EPA policy and

⁹ BCP did not submit an application for a permit modification to LDEQ. Rather, LDEQ considered BCP's November 15, 1996 Title V Permit Application, and information received August 18, 2000 and September 13, 2000, as its permit modification application. Permit Modification, Acetylene Plant, Borden Chemical & Plastics, Permit No. 2021(M-1), Air Permit Briefing Sheet, at 1 (December 13, 2000).

¹⁰ Borden Permit Modification at 2.

the intent of the Clean Air Act; and (4) a new facility in the Baton Rouge nonattainment area will not provide sufficient reductions to achieve the ozone standard.

EPA has performed an independent review of Petitioner's claims. Based on a review of all of the information before me, I hereby deny the petition for the reasons set forth in this Order.

IV. BCP's EMISSION REDUCTION CREDITS ARE VALID AND, UNDER THE CIRCUMSTANCES OF THIS CASE, CAN BE USED TO OFFSET EMISSION INCREASES FROM BORDEN

A. BACKGROUND OF PERMITS AND REASONABLE FURTHER PROGRESS AGREED TO ORDER

To understand the basis of the BCP reductions at issue, it is instructive to review BCP's permitting history. On March 29, 1990, LDEQ issued Permit 2021 to BCP. This was a consolidated permit for methanol, acetic acid, and acetylene plants. The acetylene plant, previously owned and operated by Monochem, Inc., had recently been acquired by Borden.¹¹ Pursuant to Permit 2021, emission point 99-8 (cooling towers) was permitted at 463 TPY, but emission point 95-47 (decanters) was not permitted. Permit 2021, Air Quality Data Sheet at 3. According to Permit 2021, the acetylene plant was a "grandfathered" facility under Louisiana law, and retained grandfathered status when it was acquired by Borden. Permit 2021, Briefing Sheet at 1. Therefore, there was no limitation on the amount of emissions from the decanters. *See* L.A.C. 33:III.501.B.6.

According to General Condition I of Permit 2021:

This permit is issued on the basis of the emissions reported in the application for approval of emissions and in no way guarantees that the design scheme presented will be capable of controlling the emissions to the type and quantities stated. . . .

¹¹ Consolidated Permit for Methanol, Acetic Acid, and Acetylene Plants, Borden Chemical and Plastics, Permit No. 2021, Briefing Sheet at 1 (March 29, 1990) ("Permit 2021").

If the emissions are determined to be greater than those allowed by the permit or if proposed control measures and/or equipment are not installed or do not perform according to design efficiency, an application to modify the permit must be submitted.

According to BCP, the initial emissions estimates were based on incorrect assumptions derived from the original technology process flow information supplied by BCP's technology provider. BCP Title V Operating Permit Application at 6 (October 1996). In 1995, BCP conducted wastewater sampling in the acetylene plant, and determined that emissions from its acetylene plant cooling towers and decanters (emission points 99-8 and 95-47, respectively) in the barometric condenser system exceeded State permit limits and "may or may not be in compliance with the state-only toxics requirements contained in LAC 33:III.Ch.51." BCP Title V Operating Permit Application at 5. Actual emissions were 1791.2, consisting of 668.2 TPY from the decanters (emission point 95-47) and 1123 TPY from the cooling towers (emission point 99-8). BCP then notified LDEQ in accordance with General Condition I of Permit 2021. Basis for Decision on a State Permit Modification and Approval of Emission Reduction Credits, Acetylene Plant, Borden Chemical and Plastics Limited Partnership at 4 (BCP Basis for Decision). Although the actual emissions were determined to exceed the permitted emission limits, which were based on erroneous process flow information, BCP contended that actual emissions from these point sources did not exceed any federal regulatory control requirements. BCP Title V Operating Permit Application at 6.

BCP entered into a Reasonable Further Progress (RFP) Agreed to Order, AE-0-96-0170 (the "Agreed Order"), with the State of Louisiana, dated October 25, 1996, whereby BCP agreed to modify the cooling towers and decanters in order to reduce emissions at the BCP acetylene facility. The Agreed Order states that "[f]or the purposes of obtaining the reductions required for

Reasonable Further Progress, the Respondent agrees to commit to reductions of 1,157 tons/year (3.17 tons/day equivalent) in actual emissions of volatile organic compounds versus actual current emissions of volatile organic compounds from the Respondent's facility as reflected in Attachment I."¹² Agreed Order at 2. The BCP emission reduction project generally involved the construction of two new cooling towers and conversion of process related cooling systems from contact to non-contact service. *Id.* Attachment II. The Agreed Order required annual VOC emissions from the affected sources to be reduced 1157 tons per year, from roughly 1760 to 603 tons per year. *Id.* at 2. As a result of the project, BCP reduced VOC emissions from the decanters by 328.2 TPY, and reduced VOC emissions from the cooling towers by 1118.0 TPY.

B. THE EMISSION REDUCTION CREDITS ARE VALID

In order for the BCP emission reductions to be valid, the emission reductions must be surplus, permanent, quantifiable, and enforceable. L.A.C. 33:III.607.F.1. The Petitioner argues that the reductions fail to meet the first element.¹³ "Surplus Emission Reductions" are defined in L.A.C. 33:III.605 as:

emission reductions that are voluntarily created for an emissions unit and have not

¹² "Reasonable Further Progress" is defined as "such annual incremental reductions of the relevant air pollutant as are required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." 42 U.S.C. § 7501(1).

¹³ Petitioner does not challenge whether the reductions are quantifiable and permanent, issues adequately addressed by the BCP Basis for Decision. Petitioner does argue that the reductions are not federally enforceable. The requirement that emission reductions be "enforceable" is also stated in the State regulation setting forth the requirements for determining whether a significant "net emissions increase" has occurred that would result in a major modification. *See* L.A.C. 33:III.504.G. Because Petitioner raises the issue of whether the reductions are federally enforceable pursuant to this netting regulation, EPA addresses the enforceability of the reductions in its analysis of the net emissions increase, *infra*.

been required by any local, state or federal law, regulation, order, or requirement and are in excess of reductions used to demonstrate attainment of federal and state ambient air quality standards.

Thus, a two part analysis must be conducted to determine whether the credits are surplus.

First, the reductions must be voluntarily created and not required by any local, state, or federal law, regulation, order, or requirement. Second, the emission reductions must be in excess of reductions used to demonstrate attainment of federal and state ambient air quality standards.

1. The Emission Reductions Below the Previously Permitted Limit of 463 TPY (118 TPY) Were not Required by the Clean Air Act

As part of its evaluation of BCP's Application for Emission Reduction Credits, and BCP's permit modification embodied in Permit 2021(M-1), LDEQ determined that the BCP emission reductions were not "otherwise required" by State or federal law and regulatory requirements. LDEQ determined that the following rules could have potentially applied to the BCP cooling towers: 40 C.F.R. Part 63, Subpart F (the "HON"), 40 C.F.R. Part 63, Subpart Q, and L.A.C. 33:III.2153. LDEQ explained, however, that those rules did not apply: :

The HON does not apply because acetylene is not listed in Table 1 of Subpart F; moreover Subpart F is a work practice standard only, and does not require a percent reduction or outlet HAP concentration for compliance. Subpart Q is not applicable because BCP does not use chromium-based water treatment chemicals. Subpart Q does not address any compounds other than chromium. L.A.C. 33:III.2153 does not apply because the amount of volatile organic compounds (VOCs) in the wastewater was less than 1000 ppmw before the emission reduction project began. See the definition of *Affected Volatile Organic Compounds (VOC) Wastewater*.

BCP Basis for Decision at 4.

As a result, LDEQ concluded that there were no other regulatory requirements potentially applicable to BCP which would necessitate an additional discounting of creditable emission

reductions.¹⁴ BCP Basis for Decision at 4-5. EPA sees no evidence to controvert LDEQ's conclusions.

LDEQ also concluded that emission reductions required to comply with the Agreed Order were not available for use in netting or as offsets. Thus, no credit was given for the BCP reductions from the actual emission level of 1791.2 TPY to the limit set forth in the Agreed Order of 603.0 TPY. Furthermore, no credit was given for emission reductions from the limit in the Agreed Order (603.0 TPY) to the previous State permit limit (463.0 TPY). The amount credited by LDEQ, 118.0 TPY, represented the difference between the previously permitted VOC limit for the BCP cooling towers (463.0 TPY) and the new cumulative rate for both the cooling towers and decanters (345.0 TPY) established by the modified BCP permit, No. 2021(M-1).¹⁵ BCP Basis for Decision at 4.

It is important to note that while the BCP emission reduction project was undertaken as a result of the Agreed Order, all of the reductions which BCP achieved were not "required" by the Agreed Order. Although some of the details of the emission reduction project were set out in the Agreed Order (Attachment II), the purpose of the Agreed Order was not to mandate a specific control technology. Rather, the purpose was to achieve emission reductions to achieve RFP towards reaching attainment of the ozone standard. Agreed Order at 2. If it achieved emission

¹⁴ Since the decanters were not permitted in Permit 2021, LDEQ did not give BCP credit for reductions achieved from the decanters. As a result, LDEQ did not evaluate this point source as part of its evaluation of what was "otherwise required" by the Act or other federal or state requirements. BCP Basis for Decision at 4.

¹⁵ The cumulative rate for the BCP cooling towers and decanters is the sum of the permit limits for emission points 95-47 (decanters) and 99-8 (cooling towers). BCP Permit Modification, Annual Emission Rates at 1, 3.

reductions to the level of 603 TPY, BCP would have been in compliance with the Agreed Order, regardless of the method it used to achieve those reductions. Therefore, the actual control technology used was irrelevant to achieving the goal of RFP. Thus, any reductions below 603 TPY would not be required by the Agreed Order, and would meet the first part of the definition of “surplus emission reductions” in L.A.C. 33:III.605.

The Petitioner makes several different arguments that the BCP emission reductions upon which Borden relied to net out of NNSR were not creditable because they were required by the Clean Air Act. Petition at 2. First, the Petitioner argues that the emission reductions from the decanters and cooling towers were required by the Clean Air Act, and not creditable, because BCP was operating in violation of its permit and was required to reduce emissions. The Petitioner also claims that the reductions were not voluntary because they were required by the Agreed Order. Petition at 3, 5, 8-9.

First, LDEQ did not grant any ERCs for reductions from the decanters.¹⁶ BCP Basis for Decision at 4. Second, although the cooling towers had exceeded their permitted limits established by Permit 2021 (463 TPY), Borden did not obtain credit for any portion of actual emissions above BCP’s prior permit level. BCP Basis for Decision at 4. This is consistent with the EPA guidance cited by the Petitioner. *See* EPA New Source Review Workshop Manual at A-41 (“a source cannot receive emission reduction credit for reducing any portion of actual emissions which resulted because the source was operating out of compliance”). Because the emission reductions from the cooling towers were below the permitted limit, and because no

¹⁶ Thus, it is unnecessary to decide whether the decanters lost their grandfathered status, as Petitioner belatedly alleges in its letter dated September 20, 2002. *See* Letter from Sallie E. Davis, Tulane Environmental Law Clinic, to Gregg A. Cooke, Region 6, at 2-3.

credit was granted for reductions from the decanters, the reductions below the limits established by Permit 2021 were not required by any other local, state or federal law, regulation, or requirement. L.A.C. 33:III.605. Finally, as discussed, the Agreed Order only required reductions to 603 TPY. Any reductions below this limit were not required by the Agreed Order. Therefore, this argument is rejected.

The Petitioner next contends that contrary to the requirements of the Act, BCP's reductions relied upon in the Borden Permit Modification were "paper offsets," rather than "actual emissions of the source from which the offset reduction is obtained." Petition at 3. The Petitioner further contends that LDEQ must use actual emissions to calculate any emission reduction credit because Louisiana based its rate of progress and attainment demonstrations on actual emissions. *Id.* The Petitioner claims that the BCP reductions were "paper offsets" because although BCP received a permit with a limit of 463 TPY of VOCs, the plant was never designed or controlled to meet that level. Similarly, although the Agreed Order capped the emissions at 603 TPY, the BCP plant was never constructed or designed to meet that level and LDEQ never issued a permit to BCP to emit at that level. Thus, the Petitioner argues, neither the 463 TPY limit or the 603 TPY limit qualifies as "actual emissions" under 40 C.F.R. § 51.165(a)(3)(i). Petition at 3-4.

As a threshold matter, 40 C.F.R. 51.165(a)(3) on offsets required for new major sources and major modifications is not applicable to netting – that is, the calculation of a source's net emissions increase for purposes of determining whether a physical change at the source is a major or minor modification. Rather, the relevant regulation is 40 C.F.R. 51.165(a)(1)(vi), defining "net emissions increase," which sets forth the standards on creditable decreases in

emissions reductions that may be used in the netting calculation. This regulation states, in relevant part: “A decrease in actual emissions is creditable only to the extent that: (1) the old level of actual emissions *or the old level of allowable emissions*, whichever is lower, exceeds the new level of actual emissions.” 40 C.F.R. 51.165(a)(1)(vi)(E)(1) (emphasis added). Because BCP’s actual emissions of 1791.2 TPY were higher than the old level of allowable emissions (463 TPY under Permit 2021), the latter was appropriately determined by LDEQ to be the baseline for purposes of calculating whether any surplus credits resulted from the BCP reductions.

In any event, applying the offset rules cited by Petitioner would yield the same conclusion. Petitioner cites to the General Preamble for the Implementation of Title I of the Clean Act Amendments of 1990 (the “General Preamble”) in support of its contention that the BCP reductions were not creditable. Petition at 3 (citing *57 Fed. Reg.* 13498, 13552). This reliance is misplaced. That section of the General Preamble contemplates disallowing offsets calculated from a SIP allowable level that is *higher* than actual emissions. *57 Fed. Reg.* 13552. That is not the case here. In this case, the SIP level (603 TPY) and the prior permit level (463 TPY) were *lower* than actual emissions (1791.2 TPY). LDEQ determined that only those reductions in excess of the limits established by BCP Permit 2021 (463 TPY) were creditable.¹⁷ In an offsets analysis, use of the lower permitted level, as done here (463 TPY), as the baseline would be appropriate under 40 C.F.R. 51.165(a)(3)(ii)(A) (“Where the emissions limit under the

¹⁷ Basis for Decision, Modification of Borden Title V Operating Permit 2631-V1, at 4 (December 13, 2000) (Borden Basis for Decision)

applicable [SIP] allows greater emissions than the potential to emit of the source, emissions offset credit will be allowed only for control below this potential.”).

Furthermore, there is no dispute that BCP made “actual emission decreases” at its facility from the prior actual emissions level (1791.2 TPY) to a new actual level of 309 TPY, below the new permit level established by Permit 2021(M-1)(345 TPY). In October 1999, BCP submitted a report which summarized the results of tests performed by BCP designed to determine compliance with the Agreed Order. By letter dated April 10, 2000, LDEQ found the test procedures, calculations and conclusions to be acceptable.¹⁸ According to the results of the report, BCP was operating in compliance with the limits of the Agreed Order. Specifically, the test results indicated that the decanters (emission point 95-47) had post-project emissions of 309 TPY, and the cooling towers (emission point 99-8) had post-project emissions of 0 TPY. Therefore, under the methodology articulated in the language of the General Preamble, and cited by the Petitioner, the BCP emissions reductions from 463 TPY to 345 TPY¹⁹ are creditable. Therefore, Petitioner’s argument that these reductions are “paper” does not apply to these facts.

The Petitioner further contends that the BCP reductions were “paper offsets,” because the BCP acetylene plant was never designed or controlled to meet either the 463 TPY permitted limit or the 603 TPY limit of the Agreed Order. Specifically, Petitioner alleged that “no plant was ever designed, or constructed that had actual emissions consistent with the permit limit from which the offsets are calculated.” Petition at 4. Petitioner overlooks the point, however, that the

¹⁸ Letter from Bennett Farrier, P.E. Engineering Manager, LDEQ, to Marshall Owens, BCP, dated April 10, 2000.

¹⁹ The permitted limits for the decanters and the cooling towers are 340 TPY and 5 TPY respectively. Permit 2021(M-1).

reductions are real, not “paper.” The BCP plant, prior to the issuance of the credits, was designed to emit a lower volume of VOCs than is allowed by the previous permit limit of 463 TPY and the Agreed Order limit of 603 TPY, and, as discussed above, BCP has submitted data demonstrating that the limits in fact have been satisfied.²⁰ Therefore, this argument is also rejected.

The Petitioner also contends that BCP was violating the terms of its permit limit of 463 TPY of VOC emissions from 1990 until November 1, 1999. Petition at 9. Petitioner then argues that to allow Borden to claim credit for BCP emission reductions, after failing to meet permit limits and accurately report emissions in excess of those permit limits, is contrary to the Clean Air Act and EPA policy. *Id.* In support of its argument, Petitioner cites EPA policy which states that “a source cannot receive emission reduction credit for reducing any portion of actual emissions which resulted because the source was operating out of compliance.” *Id.* (citing Draft EPA New Source Review Workshop Manual at A-41 (October 1990)).

As previously discussed, BCP only received ERC credit for reductions made in excess of the 463 TPY permit limits established by Permit 2021. Therefore, BCP did not receive any emission reduction credit for reducing actual emissions which resulted because the source was operating out of compliance.²¹ The Petitioner is essentially arguing that LDEQ should not allow BCP to bank ERCs because of its past noncompliance with its permit. Petition at 5, 9. Such an

²⁰ Petitioner mistakenly relies on 40 C.F.R. § 51.165(a)(3)(i) to support its contention that a plant may not obtain credits unless its past actual emissions were consistent with its permit limit. This regulation does not impose such a requirement.

²¹ See Public Comments Response Summary, Acetylene Plant, BCP, and Formaldehyde Plant, Borden at 2.

argument does not pertain to whether the emission reductions were surplus and creditable, and is beyond the scope of the Administrator's authority under Section 505(b) of the Act.²² In any event, LDEQ has already addressed BCP's past noncompliance through the Agreed Order, and the record indicates that BCP is in compliance with that Order.

Therefore, EPA concludes that, based on the foregoing, the BCP emission reductions below the previously permitted limit of 463 TPY (118 TPY) were voluntarily created and were not required by any state or federal law, regulation, order or requirement.

2. The Emission Reductions are in Excess of Reductions Used to Demonstrate Attainment of Federal and State Ambient Air Quality Standards

The second part of the analysis to determine whether the emission reductions are surplus is whether the emission reductions "are in excess of reductions used to demonstrate attainment of federal and state ambient air quality standards." L.A.C. 33:III.605. Petitioner argues that this requirement has not been met. Petition at 5-6. However, Petitioner failed to raise this issue in its comments to LDEQ. Its only comment challenging the BCP credits as failing to meet the "surplus" requirement alleged that the emissions were not voluntary. *See* Letter from Suzanne Dickey, LEAN, to Dale Givens, LDEQ, at 1 (Nov. 9, 2000) ("LEAN Public Comments"). Thus, Petitioner is barred from raising it now. *See* 42 U.S.C. § 7661d(b)(2).

²² Under Section 505(b), the Administrator is authorized to review state operating permits issued pursuant to Title V, and to object to permits that fail to comply with the applicable requirements of the Act, including the requirements of an applicable implementation plan.

Even if this issue had properly been raised, for the reasons explained below, it would not warrant granting the petition.²³ The SIP submittal records at EPA for the November 10, 1994 Baton Rouge attainment demonstration,²⁴ are based upon 1989, 1990 and 1993 observed ozone episode days. The records indicate VOC emissions for the entire BCP facility in 1993 of 752 TPY that were modeled and included in the emissions inventory to demonstrate attainment. This was not only greater than the emissions level mandated by the Agreed Order (603 TPY), and relied upon by Louisiana to show RFP under the Act, but was also greater than the baseline from which BCP emissions reductions were credited (463 TPY). Therefore, EPA believes that the baseline from which BCP emissions reductions were credited was appropriately below that relied upon to demonstrate attainment.

This is supported by a periodic emissions inventory that was submitted to EPA by LDEQ for 1993. These records contain a summary of the VOC emissions for the entire BCP facility of 750 TPY. Again, the baseline from which BCP emissions reductions were credited (463 TPY) was below this level, and below the level used to demonstrate reasonable further progress toward attainment (603 TPY) under the Act.²⁵

²³ Likewise, the issue does not warrant exercise of EPA's discretionary authority to reopen the permit for cause pursuant to CAA Section 505(e) and 40 C.F.R. § 70.7(f)(1)(iv).

²⁴ EPA approved Louisiana's attainment demonstration on July 2, 1999. 64 *Fed. Reg.* 35930. EPA approved a revised attainment demonstration for the Baton Rouge area on September 24, 2002 (67 *Fed. Reg.* 50391 (Aug. 2, 2002) (proposed approval) which is not relevant here, as it was not in effect at the time LDEQ granted the permit modifications that allowed Borden to use the BCP credits.

²⁵ EPA approved the BCP Agreed Order as part of the Baton Rouge Post-1996 ROP Plan on July 2, 1999. 64 *Fed. Reg.* 35930.

The individual stack test data available also confirm that the BCP reductions credited were below that relied upon to demonstrate attainment. The reported actual emissions inventories for BCP for 1993, which was one of the years which formed the basis of the 1994 Baton Rouge attainment demonstration, were available by individual stack on the National Emissions Inventory (NEI) database maintained by EPA. EPA reviewed the 1993 BCP actual emissions inventory for each individual stack at the facility. The NEI point source data indicates that the BCP cooling towers (emission point 99-8) had actual VOC emissions of 416 TPY in 1993, below the level used to demonstrate attainment. There was no NEI entry for the BCP decanters (emission point 95-47). However, since LDEQ did not give BCP credit for reductions achieved from the decanters, this is irrelevant for determining whether the credits were valid.

Petitioner contends that the State used a 1990 base year emissions inventory that “included the excess Borden [BCP] emissions” to demonstrate attainment of the federal and state ambient air quality standards, which would result in the emissions not being “surplus.” *See* Petition at 5-6 (citing 63 Fed. Reg. at 44195). Petitioner is incorrect. Petitioner has confused inventories used to demonstrate “Rate of Progress” (“ROP”) reductions under 42 U.S.C. § 7511a(c)(2)(B) with modeling inventories which form the basis for an attainment demonstration under § 7511a(c)(2)(A). An ROP inventory is not the basis of an attainment demonstration. Thus, Petitioner’s argument is rejected.

Because the baseline for determining the BCP emission reduction credits (463 TPY) was below the BCP emission levels used to demonstrate attainment (752 TPY), the reduction of 118 TPY was in excess of reductions used to demonstrate attainment and properly considered “surplus” under L.A.C. 33:III.605.

V. BCP FOLLOWED THE PROCEDURES FOR BANKING ERC CREDITS

The Petitioner also maintains that the BCP emission reductions were not creditable because BCP failed to abide by the procedures outlined in Chapter 6 of the Louisiana Air Quality Regulations. Petition at 6 - 7. The Petitioner contends that BCP failed to timely bank its alleged emission reductions. The Petitioner also contends that at the time of the Borden Permit Modification application (July 2000), there were no ERCs available from BCP for Borden to use to compensate for the emission increases created by the formaldehyde plant (citing L.A.C. 33:III:605 and 607.F), and that there is no evidence that an ERC certificate was issued prior to the use of the ERCs, as required by L.A.C. 33:III.623.B. However, Petitioner failed to raise any of these issues in its public comments to LDEQ. Accordingly, it is barred from raising these issues now. *See* 42 U.S.C. § 7661d(b)(2).

Even if these issues had properly been raised, they would not warrant granting the petition. First, contrary to Petitioner's assertion, BCP timely submitted an application to bank VOC emission reductions prior to the Borden request for an amendment to its permit. BCP submitted an application to the Louisiana Emission Reduction Credit Bank on March 1, 2000. The emission reductions took place in the summer and fall of 1999. Therefore, BCP satisfied the requirement to submit its ERC application "by March 1 following the year in which the reductions occurred." L.A.C. 33:III.615.A.

Additionally, the timing of LDEQ's approval of the BCP credits and issuance of the ERC certificate provided full public participation. The request for a permit modification to the Borden Title V permit (Permit 2631-V0) to take "netting" credit for the BCP reductions was submitted to LDEQ on July 25, 2000. Louisiana approved the reductions as ERCs on or about

December 13, 2000, which was the same day it approved the modification to the Borden Title V Permit. BCP Basis for Decision at 4-5. Therefore, the ERCs, which were submitted for approval into the Louisiana Emissions Reduction Credit Bank on March 1, 2000, were in fact approved as ERCs at the same time LDEQ approved the permit modification to the Borden Title V permit. While this timing of events does not meet the exact timing requirements of L.A.C. 33:III.617.A-D, any delay in action was harmless error because there has been no consequence from LDEQ's failure to act more quickly. Thus, EPA denies these claims in the Petition.

VI. ANALYSIS OF DECEMBER 13, 2000 PERMIT MODIFICATION

A. NET EMISSIONS INCREASE

Once the ERCs are determined to be valid, the next step is to determine whether Nonattainment New Source Review (NNSR) must continue to apply in order for the permit modification to be approved. NNSR applies to the construction of any new major stationary source or to any major modification at a major stationary source, provided such source or modification will be located within a nonattainment area so designated pursuant to the Clean Air Act, and will emit a regulated pollutant for which it is major and for which the area is designated nonattainment. *See* L.A.C. 33:III.504.A. Pursuant to Section 107(d)(4)(A) of the Clean Air Act, the EPA designated the Baton Rouge area as nonattainment for the 1-hour ozone National Ambient Air Quality Standard (NAAQS) on November 6, 1991. *See 56 Fed. Reg. 56694.*

As noted above, the Borden formaldehyde plant is adjacent to the BCP acetylene plant. LDEQ considered the new formaldehyde plant as part of an existing major source because it is

under common control with BCP, which was already a major source.²⁶ Thus, the construction of the Borden formaldehyde plant was actually a modification of an existing (BCP) major stationary source. A key question then becomes whether the modification would be considered a major modification under NNSR. A modification is major if, *inter alia*, there is “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase, as listed in Table 1, of any regulated air pollutant for which the stationary source is already major.” L.A.C. 33:III.504.G. That determination is made by first quantifying the increase of emissions of each regulated pollutant from the proposed project. In this case, the estimated emissions in tons per year (TPY) are:

| <u>Pollutant</u> | <u>Emissions</u> |
|------------------|------------------|
| PM ₁₀ | 5.68 |
| SO ₂ | - |
| NO _x | - |
| CO | 75.78 |
| VOC | 24.19 |

If these emissions meet or exceed a trigger value stated in L.A.C. 33:III.504, Table 1, then for that particular pollutant, the source is required to perform a calculation of the net emissions increase over the contemporaneous period. As the estimated emissions of volatile organic compounds (VOCs) from the project of 24.19 TPY exceeded the relevant trigger value of 5 TPY, L.A.C. 33:III.504.A.4 dictated that Borden calculate the net emissions increase over the contemporaneous period.

²⁶ Prior Order at 8.

The contemporaneous netting period extended from January 1996 until March 2000, the time operations at the Borden formaldehyde facility commenced.²⁷ Since the Borden formaldehyde plant did not have emissions prior to March 2000, Borden calculated the net emissions increase using emissions from the BCP acetylene facility. If the result of that calculation was less than 25 TPY,²⁸ then LDEQ could conclude that Borden would not have to undergo NNSR review.

“Net emissions increase” is defined as:

any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source and any other creditable increases and decreases in actual emissions at the major stationary source over a period including the calendar year of the proposed increase and the preceding four consecutive calendar years.

L.A.C. 33:III.504.G.

The following is the net emissions increase for the Borden Permit Modification:²⁹

| Project Description | Date of Startup | Pre-project actuals | New PTE (TPY) | Change |
|--|-----------------|---------------------|---------------|--------|
| New formaldehyde plant | 3/00 | 0 | 24.19 | +24.19 |
| VCM and PVC Modification Permit No. 2302 | 8/97 | 12.18 | 14.78 | +2.60 |
| Vinyl Esters Small Source Exemption | 6/97 | - | 4.91 | +4.91 |
| Refining and Synthesis Surge Tanks | 1998 | - | 1.79 | +1.79 |

²⁷ Borden Permit Modification at 2.

²⁸ L.A.C. 33:III.504, Table 1.

²⁹ Borden Permit Modification at 3.

| | | | | |
|---|-------|---------------------------------------|-------|-----------------------|
| VEI Vinyl Ester Permit 0180-00078-VO | 2/99 | 4.91 | 7.34 | +2.43 |
| Agreed to Order AE-0-96-0170 | 10/99 | 1791.2 (Permit 2021 level: 463) | 345.0 | -118.00 ³⁰ |
| Net Emissions Increase | | | | -82.08 |

In order for decreases in BCP’s actual emissions to be creditable (118 TPY), L.A.C.

33:III.504.G (definition of “net emissions increase”), provides that the following conditions must be met:

- i. the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of allowable emissions;
- ii. it is federally enforceable at and after the time the actual construction of the particular change begins;
- iii. it has not been relied upon by the state in demonstrating attainment or reasonable further process; and
- iv. it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

Items i and iii have been addressed previously.³¹ Item 2 (federal enforceability) is addressed below.

³⁰ The 118.0 TPY represents the difference between the previously permitted VOC limit for the cooling towers, and the new rate for the cooling towers and decanters (345 TPY) established by Permit No. 2021(M-1). *See* Section IV, *supra*.

³¹As discussed in section IV(B) *supra*, the emissions level mandated by the Agreed Order (603 TPY), and relied upon by Louisiana to show RFP, were greater than the baseline from which BCP emission reductions were credited (463 TPY). Furthermore, in light of LEAN’s failure to comment on item iv (same qualitative significance for public health and welfare as attributed to the increase), or raise the issue in its Petition, EPA will not address it further.

B. FEDERAL ENFORCEABILITY OF EMISSION REDUCTIONS

The Petitioner contends that, contrary to L.A.C.33.III.504, Borden's calculation of the net emissions increase should not have included any decrease from the emissions reductions from BCP because BCP's reductions were not federally enforceable at the time actual construction began at the Borden formaldehyde plant. Petition at 7-8. However, Petitioner failed to raise this issue during the public comment period and, pursuant to Section 505(b)(2), is precluded from raising it now. *See* 42 U.S.C. § 7661d(b)(2). Even if Petitioner had raised the issue in its comments, it would not warrant granting the petition.

Emissions reductions are "federally enforceable" under LDEQ's regulations where they are enforceable by the EPA Administrator through, for example, SIP or federal permit limits, or federal New Source Performance Standards under 40 CFR Part 60 or National Emission Standards for Hazardous Air Pollutants under 40 CFR Parts 61 and 63. L.A.C. 33:III.504.G.³² The State requirement that emissions reductions be federally enforceable to be used as netting credits mirrors that of federal law. 40 C.F.R. § 51.165(a)(1)(vi)(E)(2).

As discussed in greater detail below, the BCP emissions reductions – while federally enforceable at the time of the Borden Permit Modification on December 13, 2000 – were not federally enforceable at the time specified by LDEQ's regulation – prior to commencement of construction of the Borden formaldehyde plant in September 1999. However, the Agency has

³² "Federally enforceable" is defined as: "all limitations and conditions which are federally enforceable by the administrator, including those requirements developed pursuant to 40 CFR parts 60, 61, and 63, requirements within any applicable State Implementation Plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I including 40 CFR 51.165 and 40 CFR 51.166." L.A.C. 33:III.504.G.

determined that Borden should be allowed to use the BCP reductions to determine whether its “net emissions increase” triggered NNSR requirements (i.e., to “net out” of NNSR) based on the following equitable circumstances presented in this particular case: (1) the BCP reductions were implemented before construction of the Borden plant commenced; (2) Borden reasonably relied upon the Georgia Gulf credits supporting its NNSR permit in not seeking to make the BCP reductions federally enforceable at an earlier time; and (3) the credits are otherwise valid and now federally enforceable through the BCP permit modification.

Moreover, the NNSR program is not compromised because the Borden Permit Modification contains control requirements virtually identical to those in the Prior Borden (NNSR) Permit. In consideration of these equitable circumstances, the EPA believes that failure to comply with the requirement that reductions be federally enforceable at the time of commencement of construction should be viewed as harmless error. Therefore, EPA concludes that LDEQ reasonably allowed Borden to use the BCP credits to calculate Borden’s “net emissions increase” and, thereby, “net out” of the NNSR program.

1. The BCP reductions were implemented before construction of the Borden formaldehyde plant commenced.

The BCP emissions reductions credited by LDEQ were implemented before Borden commenced construction, through actual physical and operational constraints at BCP which limited BCP’s potential to emit. *See Alabama Power Co v. Costle*, 636 F. 2d 323, 353 (D.C. Cir. 1979) (discussing importance of considering source’s air pollution control devices in determining its potential to emit). Actual construction of the Borden formaldehyde plant commenced in September 1999. Actual construction of modifications to the BCP acetylene plant and associated reductions in emissions occurred earlier, in the summer of 1999. Petition at

6; BCP ERC Bank Application at 3. These BCP modifications generally involved the construction of two new cooling towers and conversion of process related cooling systems from contact to non-contact service. Agreed Order, Attachment II. To make this conversion, BCP dismantled the cooling towers and revised the piping to convert from direct to indirect cooling. Actual deconstruction on the cooling towers at the BCP acetylene plant occurred in the summer of 1999. BCP ERC Bank Application at 3. The reductions resulting from these physical and operational changes are evidenced in post-project testing data submitted to LDEQ that indicates that the modified decanters (emission point 95-47) have emissions of 309 TPY, and the cooling towers (emission point 99-8) have emissions of 0 TPY. Letter from Bennett Farrier, LDEQ engineering manager, to Marshall Owens of BCP, April 10, 2000. Therefore, as a practical matter, the BCP emissions reductions were implemented before Borden commenced construction in September 1999. They became federally enforceable by EPA when LDEQ issued the modified BCP permit on December 13, 2000.

2. Borden reasonably relied upon its NNSR permit in not seeking to make the BCP reductions federally enforceable at an earlier time.

Equitable circumstances warrant against a strict application of the requirement of federal enforceability in this case because Borden reasonably relied upon its NNSR permit at the time of commencement of construction at Borden in September 1999. As a consequence of that reliance, Borden did not seek to lay the groundwork for netting out of NNSR by making the BCP emissions reductions federally enforceable at that same time. If Borden had known, or had reason to know, that its NNSR permit and the underlying Georgia Gulf offsets were flawed, Borden and BCP could have modified their permits prior to construction at Borden to make the BCP reductions “federally enforceable.”

A review of the history of the Prior Borden Permit (2631-V0) demonstrates why it would be inequitable to apply a strict reading of the federal enforceability requirement here. Initially, Borden elected to apply the lowest achievable emissions rate (LAER) to its formaldehyde plant, and to offset its VOC emissions at a 1.2:1 ratio, of 29.03 TPY (based on a project increase of 24.19 TPY). By letter dated March 12, 1999, Georgia Gulf Corporation notified LDEQ that Borden had purchased 32 TPY of their VOC emission reduction credits. Prior Order at 10. Borden attempted to apply 29.1 tons of those Georgia Gulf credits to offset new VOC emissions from the Borden plant. LDEQ issued Borden a Title V/NNSR permit (the Prior Borden Permit) on August 25, 1999, relying on those Georgia Gulf offsets. The Petitioner submitted its Prior Petition to the Administrator on August 24, 1999, seeking EPA's objection to the Title V operating permit for Borden's formaldehyde plant in Geismar, Louisiana. Construction of the Borden plant lawfully commenced the next month. During the Agency's review of LEAN's Prior Petition, Borden learned that EPA likely would determine that the Georgia Gulf offsets were invalid. However, by the time Borden learned this and submitted its request for a modification to its Title V/NNSR permit to LDEQ to instead rely on the BCP reductions to net out of NNSR on July 25, 2000, the actual construction on the particular change at Borden had not only begun, but had been completed. On December 22, 2000, the EPA Administrator issued the Prior Order finding that the Georgia Gulf credits were invalid because LDEQ applied its banking regulations in conflict with federal requirements, but dismissed the Prior Petition as moot because by that time the Prior Borden Permit had been modified to no longer rely on the Georgia Gulf offsets.

3. The BCP credits would be usable for netting or offset credits for other construction projects.

This equitable result of allowing the BCP credits to be used by Borden is further supported by the Agency's finding that the BCP credits are otherwise valid. BCP made actual emission reductions in excess of those required by the Agreed Order and Permit 2021. LDEQ concluded, and EPA agrees, that the portion of BCP reductions below the level of Permit 2021 (463 TPY) were "surplus" of federal, state and local requirements. Borden Basis for Decision at 4. Additionally, the reductions are presently federally enforceable under the BCP permit modification issued on December 13, 2000. Therefore, the BCP reductions could now be used by Borden, or another facility, as netting or offset credits for another project. In recognition of Borden's reasonable reliance on its NNSR permit in foregoing an opportunity to use its BCP credits to net out of NNSR, the EPA believes that it is reasonable to not insist upon strict application of the requirement of federal enforceability in this particular case.

4. The purpose of the NNSR program has not been compromised where, as here, NNSR control standards remain in the permit.

The purpose of the NNSR program has not been compromised because the Borden Permit Modification contains control requirements equivalent to those that would be required if NNSR requirements applied. LDEQ stated in its Basis for Decision supporting Permit 2631-V1:

This modification contains identical emission limits, control requirements, monitoring, recordkeeping, and reporting provisions, and other conditions as the original [NNSR] permit. No physical or operational changes will be made.

Borden Basis for Decision at 3. Thus, the Borden Permit Modification still requires Borden to comply with a VOC emission limit of 24.19 TPY and use the same pollution control technologies, including catalytic oxidizers on process vents (the major source of VOCs), subject

to the same conditions as set forth in the Prior Borden Permit. Borden has also represented to EPA that its permit modification involves no physical or operational change, and thus the emission controls in place at the Borden formaldehyde plant meet Lowest Achievable Emission Rate standards.³³ See Letter from Elizabeth M. Emery, Borden Chemical, Inc., to Gregg A. Cooke, EPA, at 4-5, 7, June 25, 2002.

VII. THE ERCs WERE NOT REQUIRED TO BE CONFISCATED FOR FAILURE OF BATON ROUGE TO REACH ATTAINMENT

The Petitioner next contends BCP had no surplus emission reductions available for netting or offsetting because, under the Baton Rouge SIP, “the reductions have been confiscated as part of the contingency measure for failure to attain the ozone standard in 1999.” Petition at 8. The Petitioner failed to raise this issue in its comments to LDEQ and thus is precluded from raising it now.

In any event, the EPA disagrees. Under sections 172(c)(9) and 182(c)(9) of the Act, many states, including Louisiana, were required to submit contingency measures to be implemented if reasonable further progress toward attainment is not achieved or if the air quality standard is not attained by the applicable attainment date. Louisiana elected to develop a contingency measure plan using Emission Reduction Credits held in escrow in the Louisiana

³³ The Agency has detected one minor difference between the controls required by the Prior Borden Permit and the Borden Permit Modification. Specifically, the controls required for the Tank Farm Vent Scrubber and various storage tanks (T-40, T-41, T-42, T-43, T-60, T-61, T-45, T-46, T-67, T-68, and the Rail Car Wash Tank) no longer specify a VOC control efficiency of 80%, as the Prior Borden Permit did. However, the VOCs emitted by these units amount to less than 1 TPY out of the 24.19 TPY emitted by the Borden plant. This minor difference does not warrant a different result. Additionally, the Agency understands LDEQ’s intent to be that the emission controls remain identical, as evidenced by LDEQ’s Basis for Decision, and the Agency will work closely with LDEQ to ensure that LDEQ’s intent is achieved.

ERC Bank, established pursuant to Louisiana's Emission Banking Rule, set forth in Title 33 of the Louisiana Administrative Code, Chapter 6. EPA approved that designation as part of the Louisiana SIP in a rulemaking promulgated on July 2, 1999. (64 *Fed. Reg.* 35930). Pursuant to a settlement of litigation challenging that approval, the State submitted a revised contingency measure to EPA on February 27, 2002, which EPA approved on September 17, 2002.³⁴ *See* 67 *Fed. Reg.* 35,468, 35,469 (May 20, 2002) (proposal).

While Section 172(c)(9) of the Act does provide that contingency measures should take effect without further action by the State or the Administrator, it also requires that the specific contingency measures be undertaken "if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part." At the time LDEQ granted the Borden Permit Modification, the EPA had taken no final action indicating that the area had failed to make RFP or to attain the National Ambient Air Quality Standards (NAAQS). Thus, the BCP credits were available for use at that time. Additionally, while EPA subsequently issued a final action finding that the Baton Rouge area did not attain the 1-hour ozone national ambient air quality standard by its attainment date of November 15, 1999, that action had a delayed effective date of October 4, 2002, and was withdrawn on September 24, 2002, when EPA granted an extension of the 1999 attainment date to November 15, 2005, allowing the area to retain its serious classification. *See* 67 *Fed. Reg.* 50391 (August 2, 2002); 67 *Fed. Reg.* 53882 (August 20, 2002). Therefore, EPA's finding that the Baton Rouge area did not attain the ozone NAAQS by its attainment date never took effect.

³⁴ The revised contingency measure consists of emission reductions from the Trunkline Gas Company - Patterson Compressor Station in St. Mary Parish.

Because Petitioner failed to raise the issue of confiscation during the public comment period, and because the credits in the Louisiana ERC Bank have not been confiscated, this claim is rejected.

VIII. REASONABLE FURTHER PROGRESS

The Petitioner also challenges the Borden Permit Modification on the grounds that a new facility in the Baton Rouge area will hinder reasonable further progress (RFP) in achieving the NAAQS for ozone, and contends that the Prior Borden Permit, including the Borden Permit Modification, should be revoked until such time as LDEQ has provided for reductions sufficient to achieve the ozone standard. Petition at 9.

For the reasons discussed below, the Petitioner's claim with respect to the RFP requirements of Sections 172 and 182 of the Act is denied as they are not "applicable requirements" for a source receiving an operating permit under Title V. In addition, the Petitioner's claim regarding RFP under Section 173 is also denied because that section only applies to emission reductions used as offsets, not for netting.

A. REASONABLE FURTHER PROGRESS UNDER SECTIONS 172 AND 182

As previously stated, to justify an objection by EPA to a Title V permit pursuant to Section 505(b)(2) of the Act, the Petitioner must demonstrate that the permit is not in compliance with the applicable requirements of the Act, including the requirements of the Louisiana SIP. However, as is discussed extensively in the Prior Borden Order (at 30), the general issue of whether a permit should be denied because the Baton Rouge ozone nonattainment area is not making RFP under Sections 172 or 182 of the Act cannot be addressed here because the RFP requirement that the State develop and submit a SIP that provides for RFP is not, as to any

individual source, an applicable requirement of the Act for purposes of an NNSR permit or an operating permit issued under Title V.³⁵

Under the Act, States are required to develop SIPs for nonattainment areas that provide a pathway for achieving the NAAQS. The SIP generally will include planning documents, such as an RFP demonstration applicable to the State. *See* 42 U.S.C. §§ 7502(c)(2) and 7511a(c)(2)(B). The SIP will also include control requirements that are directly applicable to sources. Although such control requirements may be adopted by the State to satisfy the State's planning obligation to achieve RFP, this does not change the fact that planning obligations such as the RFP provisions of Sections 172 and 182 are requirements applicable to States under the SIP. These requirements do not have any direct application to sources even where the RFP plan or attainment plan relies on specific control requirements that are applicable to the source and that are adopted into the SIP. Therefore, it is only the underlying control requirements, if any, not the general obligation of the State to achieve a certain level of reduction, that can be reflected in (and are, therefore enforceable under) a source-specific operating permit issued under Title V. Since planning obligations of the State, such as the requirements of Sections 172 and 182, cannot be directly implemented by a specific source through a Title V permit, it is not an applicable requirement under Title V of the Act. *57 Fed. Reg.* 32250, 32276 (July 21, 1992).

³⁵ The Act defines RFP as “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.” 42 U.S.C. § 7501(1).

This interpretation is consistent with the Agency's long-standing explanation of the relationship between Title V and SIPs. For example, in the preamble to the final rule promulgating 40 C.F.R. Part 70 (State Operating Permit Programs), EPA stated:

The EPA proposed that the NAAQS is a SIP requirement, not an "applicable requirement" for Title V permits. In the case of large, isolated sources such as power plants or smelters where attainment of the NAAQS depends entirely on the source, EPA proposed that the NAAQS may be an applicable requirement and solicited comment on this position.

An environmental group commented that excluding protection of ambient standards, PSD increments or visibility requirements as applicable requirements are unlawful and bad policy. It argued that section 504(e) expressly defines "requirements of the Act" as "including, but not limited to, ambient standards and compliance with applicable increment or visibility requirements under part C of title I." Although this provision applies only to temporary sources, the group asserts that it would be anomalous for Congress to impose more comprehensive permit requirements for temporary sources than for permanent sources.

The EPA disagrees with the comment that would apply section 504(e) to permanent sources. Temporary sources must comply with these requirements because the SIP is unlikely to have performed an attainment demonstration on a temporary source. To require such demonstration as on every permitted source would be unduly burdensome, and in the case of area-wide pollutants like ozone where a single source's contribution to any NAAQS violation is extremely small, performing the demonstration would be meaningless. Under the Act, NAAQS implementation is a requirement imposed on States in the SIP; it is not imposed directly on a source. In its final rule, EPA clarifies that the NAAQS and the increment and visibility requirements under part C of title I of the Act are applicable requirements for temporary sources only.

Id.; 40 C.F.R. § 70.2 (definition of applicable requirement).

In sum, the Petitioner's request that EPA object to the Borden Permit Modification on these grounds is denied because the general issue of whether the Baton Rouge ozone nonattainment area as a whole is making RFP toward attainment in accordance with Sections 172 or 182 is a SIP obligation applicable to the State, not to individual sources. As such, it

is not an "applicable requirement" for a source receiving an operating permit under a Title V program.

B. REASONABLE FURTHER PROGRESS UNDER SECTION 173

The Petitioner also contends that under Section 173(a)(1)(A) of the Act, Title V permits cannot be issued unless sufficient offsetting emissions reductions have been obtained to achieve RFP. Section 171(1) defines RFP as requiring annual incremental emission reductions “for the purpose of ensuring attainment of the applicable NAAQS by the applicable date.” The Petitioner argues that the Borden Permit Modification could not be issued because total emissions in Baton Rouge were not sufficiently offset to “present reasonable further progress.” Petition at 10.

This section only applies when a facility uses ERCs as offsets, not for netting. Since Borden used the BCP emission reductions to “net out” of NSR, rather than as offsets, Section 173(a)(1)(A) does not apply. Accordingly, the Petitioner’s objection that the Borden Permit Modification does not satisfy the RFP requirement of Section 173(a)(1)(A) is denied.

IX. CONCLUSION

For the reasons set forth above and pursuant to Section 505(b) of the Act and 40 C.F.R. § 70.8(d), I deny the petition submitted by the Louisiana Environmental Action Network.

Date: September 30, 2002

_____/s/_____
Christine Todd Whitman
Administrator