

20 DCMR CHAPTERS 1 AND 2: Proposed Rulemaking to Amend New Source Review (“NSR”) Permitting Program

**COMMENT PERIOD: FEBRUARY 17, 2012 TO MARCH 19, 2012
Response to Comments***

** Please note that the comments in this document are paraphrased. Copies of the original comments are posted at <http://green.dc.gov/>.*

The District Department of the Environment (“the Department”) proposed regulations to amend the New Source Review (“NSR”) permitting program on February 17, 2012. 59 DCR 001217. The comment period officially closed on March 19, 2012, with the Department having received comments from four (4) members of the regulated community: JBG Companies (“JBG”), the U.S. Department of Defense (“DOD”), the U.S. General Services Administration (“GSA”), and the D.C. Water and Sewer Authority (“DC Water”). The comments and the Department’s responses are compiled below.

- 1. *Include a synthetic minor permit provision or clarify that the Department can issue synthetic minor permits under the current structure (JBG; GSA; DC Water).*** Several commenters requested that the Department implement a synthetic minor permitting program. Two commenters suggested the new notice and comment provisions in § 210 would permit the Department to begin implementing such a program. The Department recognizes the need for a synthetic minor program and does intend to create such a program in the future. However, the Department will not have the resources to do this until it creates a fee schedule for chapter 2 permits and amends the fees for chapter 3 permits. The synthetic minor program will be created at the same time as these fee amendments through a separate rulemaking action.
- 2. *Make the applicability threshold consistent with adjacent jurisdictions within the same non-attainment area (JBG).*** One commenter noted that the District’s proposed rule is more stringent than the federal nonattainment NSR rule and the rules of the neighboring non-attainment jurisdictions of Maryland and Virginia. Specifically, the commenter noted that the District’s proposed rule has a major NSR applicability threshold of twenty-five (25) tons per year of NO_x and volatile organic compounds (VOCs), whereas Virginia has a major source threshold of one hundred (100) tons per year for NO_x and fifty (50) tons per year for VOCs. The Department has determined that a lower applicability threshold is more protective of air quality in the District, and is also legally required in order to comply with the anti-backsliding prohibition in § 172(e) of the federal Clean Air Act (42 U.S.C. § 7502), due to the District’s former designation as being in “severe” nonattainment for the 1-hour ozone standard. See *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 902 (D.C. Cir. 2006).
- 3. *Replace the actual-to-potential test with an actual-to-projected actual test (JBG; GSA; DC Water; DOD).*** All four commenters noted that the District proposed an “actual-to-potential” test for nonattainment NSR applicability, whereas the federal rule applies an “actual-to-projected actual” test. These commenters noted that the actual-to-potential test would subject a large number of projects to NSR requirements, even though they

may only result in a slight increase in actual emissions. The commenters argue that this would be overly burdensome. One commenter stated that use of the actual-to-potential test would put District businesses at a disadvantage compared to Virginia and Maryland, which employ the actual-to-projected actual test. One commenter noted that EPA deemed the actual-to-potential test overly broad in its 2002 NSR reform rule. All commenters suggested that the District follow the federal rule actual-to-projected actual test. The Department is very familiar with the federal NSR rule and has submitted numerous drafts of its own proposed rule to EPA for comment, and determined that the actual-to-potential test is more protective of air quality in the District. The District has elected to be more stringent than the federal rule and its neighboring jurisdictions in this respect. The actual-to-potential test is intended to encourage industries to use state-of-art technologies to limit their potential to emit below the NSR threshold when undergoing modifications, and in the event that this is not possible, to use the opportunity when they are already making changes to install the most effective pollution control technology and reduce overall emissions in the District through offsets. Therefore, the District has retained the actual-to-potential test.

- 4. *Determination of actual emissions should be consistent with the federal rule (GSA; DC Water).*** Two commenters requested that the District follow the federal NSR rule by allowing sources to select any consecutive 24-month period during the previous 10 years for establishing the source's baseline actual emissions and also by allowing sources to use different 24-month periods for different regulated pollutants. The District's proposed rule requires sources to use the 24-month period preceding the date of the permit application, unless another 24-month period within the previous 5 years is more representative of normal source operations. The District incorporated a 5-year "look back" instead of a 10-year look back in order to limit a source's potential to find a higher baseline. The proposed look back is also intended to be more representative of current operations at the source, rather than permitting the source to just pick the 24-month period when emissions were the highest. Two commenters also requested that the District allow sources to use different 24-month periods for each pollutant, as allowed by the federal rule. The current proposed rule requires the source to use the same 24-month period for all pollutants. Restricting sources to one baseline is intended to prevent a source from selecting the highest baseline for each regulated pollutant. The District's rule is inherently more restrictive, rather than equivalent to, the federal rule. The Department is very familiar with the federal NSR rule and has submitted numerous drafts of its own proposed rule to EPA for comment, and has determined that the proposed 5-year look-back period is more protective of air quality in the District, as is requiring sources to use the same 24-month period for each pollutant. Therefore, the District has retained the method for determining actual emissions as proposed.
- 5. *The determination of PAL baseline emissions should be consistent with the federal rule (GSA; DC Water; DOD).*** Several commenters requested that the District clarify why it proposed a more stringent method for determining the PAL baseline period than the federal requirements, and suggested that it follow the federal rule. The District's proposed rule uses the immediately preceding 2 calendar years for the PAL baseline period, unless the District determines that a different 24-month period within the

previous 5 years is more representative of normal source operations. The federal rule permits a source to use any consecutive 24-month period within the previous 10 years. The District only allows a 5-year look back instead of a 10-year look back in order to limit a source's potential to find a higher baseline. The lower baseline will result in a lower PAL and therefore likely also lower actual emissions. The federal rule also permits sources to select a different PAL baseline period for each PAL pollutant, whereas the District's rule provides less flexibility. One commenter requested that the District allow the selection of different baseline periods for different pollutants, as in the federal rule. Because the PAL baseline period is generally going to be the immediately preceding two (2) calendar years, if a source applies for different PALs at different times, the baseline period will likely be different for each pollutant. (An exception would be if the Department determines that a different twenty-four (24) month period is more representative of normal source operations.) If a source applies for multiple PALs at the same time, then the baseline period for each PAL would be the same. Restricting sources to one baseline is intended to prevent a source from selecting the highest baseline for each regulated pollutant, and therefore will also result in a lower PAL and be more protective of air quality in the District. Therefore, the District has retained the proposed method for determining the PAL baseline period.

6. ***The renewal time period for chapter 2 permits should be eliminated (JBG).*** One commenter commended the District on extending the renewal period for chapter 2 permits from 3 years to 5 years, however also recommended that the Department eliminate the expiration of chapter 2 permits altogether. The Department has considered this comment, and determined that the expiration period is necessary in order to reassess permits from time to time and ensure that all of the applicable requirements are included and that the permit is up to current standards. The 5 year period is also consistent with the duration of a 20 DCMR chapter 3 permit, which will help streamline permitting processes.
7. ***Clarify the PAL effective date (GSA).*** One commenter noted that a PAL becomes effective on the date of issuance but that an increased PAL becomes effective on the date that the emissions unit that is part of the PAL major modification becomes operational. See § 299 definition of "PAL effective date" and § 208.23(b). The commenter requested clarification on whether an initial PAL application is considered an increased PAL or whether an increased PAL only applies if an existing PAL is increased. The Department clarifies that an increased PAL only applies if an existing PAL is increased.
8. ***Clarify whether a source may have multiple PALs (GSA).*** One commenter noted that § 208.6(e) states that each PAL may regulate only one pollutant and requested clarification whether a facility may obtain separate PALs at one time for different pollutants. The Department clarifies that a facility may obtain multiple PALs covering different pollutants at the same time.
9. ***Extend the PAL effective period to 10 years (GSA).*** One commenter requested that the District follow the federal PAL effective period allowance of 10 years, rather than the current proposed period of 5 years. The Department has considered the federal rule in development of § 208 and determined that a 5 year period is more appropriate because

it is consistent with the effective period for 20 DCMR chapter 2 and chapter 3 operating permits.

- 10. Clarify the PAL deviation reporting requirements (GSA; DC Water; DOD).** Three commenters requested that the Department clarify whether a deviation report required under § 208.35(b) is considered prompt if it complies with the overarching semi-annual reporting requirement of the proposed section. Deviation reports must be submitted in accordance with the requirements in the source's individual permit, which will be consistent with the requirements of 20 DCMR § 302.1(c)(3) and other reporting requirements deemed necessary under 20 DCMR § 500.1. While this means that some deviation reports may be considered prompt if they are submitted with the source's semi-annual reports, many deviations may require reporting sooner, such as those resulting from an emergency or deviations that pose an imminent and substantial danger to public health. The Department currently includes the specific reporting requirements in its operating permits and also intends to incorporate these requirements in the PAL permit.
- 11. The authority to reopen a PAL should be discretionary and the reasons for reopening a PAL should be clarified (DC Water; DOD).** Section 208.12(d) requires the Department to reopen a PAL permit if a reduction in the PAL is "necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area". One commenter suggested that the authority to reopen a PAL for this reason should be discretionary, rather than mandatory, as permitted under the federal regulation. The Department has considered the federal rule in the development of § 208 and determined that a threat to the District's NAAQS attainment should be a mandatory reason for reopening a PAL permit. One commenter requested that the Department clarify the conditions for which a reduction is necessary pursuant to § 208.12(d). The Department modeled the proposed language regarding reductions of the PAL after the federal rule (40 C.F.R. § 51.165(f)(8)(ii)(B)(3)) and therefore does not agree that it needs clarification. Determinations under § 208.12(d) will be made on a case-by-case basis, but will most likely be made in response to modeling that demonstrates a source is causing or contributing to a NAAQS or PSD violation.
- 12. Allow applicants to petition the Department for clarification of the rationale for establishing a new PAL level or provide additional information to suggest an alternative PAL level (DOD).** One commenter noted that the Department is permitted to set the PAL at a different level in the renewed permit pursuant to § 208.20. The commenter requested that the District add language allowing applicants to comment or seek clarification on the revised PAL level prior to the public comment period. The Department does not agree that this language is necessary because it intends to engage permit applicants informally throughout the permitting process to the extent that it is practical. In addition, the proposed procedures are consistent with other 20 DCMR chapter 2 permitting procedures and adding an extra formal step would unduly delay the permitting process. If the applicant's concerns are not fully addressed prior to issuance of the draft permit then they may use the public comment period to express them.

- 13. Clarify vague requirements in the provisions on source category permits (JBG).** One commenter requested clarification on whether source category permits were intended to be federally enforceable, and if so whether an existing major source could obtain a source category permit as an alternative to a 20 DCMR chapter 3 permit. The District intends to submit § 200 to the U.S. Environmental Protection Agency (EPA) as a revision to the District's State Implementation Plan (SIP), therefore source category permits will be federally enforceable. However, the Department does not intend to use these permits as a substitute for chapter 3 permits. As stated in § 200.6(d), a chapter 2 source category permit is not a substitute for a permit required under chapter 3. (Section 302.4 of the air quality regulations creates a separate "general permit" that may substitute for Part 70 permits for particular source categories. This is a different permit with different requirements than the source category permits established in chapter 2.) The commenter also asked whether § 200.6(e) means that a source category permit does not require the 30 day public notice and comment period specified in § 210.4(f). The 30 day public notice period is required for the initial establishment of the source category permit, but not as it is issued to each individual source, therefore source category permits that have a passive approval period established pursuant to § 200.6(e) will not be subject to the 30 day notice requirement.
- 14. Clarify vague requirements in the application fees provision (JBG).** One commenter requested that the District spell out the process for establishing application fees under § 200.10 more clearly. The District does not currently have a fee structure in place for 20 DCMR chapter 2 permits and plans to address application fees in the future through a separate rulemaking action.
- 15. Clarify definition of "construction" (JBG).** One commenter requested that the Department clarify which activities are allowed prior to obtaining a construction permit. The commenter references the definition of "begin actual construction" under the federal Prevention of Significant Deterioration (PSD) regulations. 52 C.F.R. § 52.21 (b)(11). This definition mirrors the federal nonattainment NSR definition in 40 C.F.R. § 51.165(a)(1)(xv). The air quality regulations have a preexisting definition of "begin actual construction" under § 199, which is consistent with the federal definition, therefore further clarification is not necessary.
- 16. Clarify permit requirements for demolition of sources (JBG).** One commenter requested that the Department clarify whether § 200.1 requires a permit before demolition of a source, because demolition is included in the definition of "construction". The permit requirements of § 200.1 do not apply to the demolition of sources. The chapter 2 construction permitting requirements apply to the construction of new sources and modifications of existing sources. Demolition of an existing source would not be considered construction of a "new" source and the proposed definition of "modification" in § 199 explicitly exempts the decommission or removal of existing sources.
- 17. Clarify permit requirements for operation of a temporary source (JBG).** One commenter requested clarification on whether the Department intends to issue a separate construction and operating permit under §§ 200.1 and 200.2 when the Department allows for the temporary operation of a source pursuant to § 200.3. The

requirements of these sections are not being amended by the current rulemaking; however, the Department clarifies that a permit applicant would still be required to submit the application for a construction and operation permit at the same time. Section 200.3 is only intended to serve as a temporary substitute for a permit to operate under § 200.2, in the event that the Department does not issue the construction and operation permit at the same time and time is needed to evaluate the operation of a source prior to issuance of an operation permit under § 200.2 or in the case where a timely permit application to operate has been received, but “due to delays attributable to the Mayor, the permit has not been issued” in a timely fashion.

18. Expand exempted sources under § 200.12 (JBG; DC Water). Two commenters requested that the District expand the list of exempted sources under § 200.12. One commenter requested that the Department create an exemption for temporary, portable sources, such as portable generators. Another commenter requested that the Department add general language that it will develop a list of exempted sources and physical changes and publish such list for 30 days of public comment in the DC Register. The Department recognizes that there may be a need to exempt additional sources from the chapter 2 permitting requirements and may consider adding such exemptions at future date; it does not intend to address additional exemptions through the current rulemaking. However, it is the Department’s policy is that it does not consider portable generators to be a “stationary source” subject to the requirements of § 200 provided that it does not remain in one place for more than 12 consecutive months and is not replaced by a similar unit used for the same purpose to avoid the 12-month trigger. This is consistent with the definition of stationary source in the federal Clean Air Act, which does not include emissions from a nonroad engine. 42 U.S.C. § 7602(z). The term “nonroad engine” is defined by the EPA as including “any internal combustion engine ... [t]hat, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another,” but not including an engine that “remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source.” 40 C.F.R. § 89.2.

19. Reconsider the minor NSR program (DC Water). One commenter suggested that the District drop the proposed minor NSR program under § 209. The commenter argued that the program effectively lowered the major source and major modification threshold to 5 tpy. The Department disagrees with this characterization of the minor NSR program. Minor NSR provides more flexibility with respect to the required control technologies than major NSR and does not require that emissions increases be offset. Also, minor NSR applicability is determined through a potential-to-potential test rather than an actual-to-potential test. The intent of the minor NSR program is to discourage sources from installing used or other substandard emissions units with outdated pollution control technologies, and instead require them to install new state-of-the-art equipment.

20. Change the project PTE threshold for minor NSR sources (JBG). One commenter requested that the District change the applicability threshold for minor NSR under § 209. The commenter stated that this threshold could require a source to reduce its

actual emissions by installing control technologies or using pollution prevention methods on small emission sources that aggregate to make up a “project”. The Department disagrees that this scenario will occur. The minor NSR threshold only relates to an increase in the source’s potential to emit rate, and therefore would not require any source to reduce its actual emissions. In addition, the Department only intends minor NSR to apply to individual pieces of equipment, so it will not aggregate small pieces of equipment when determining applicability.

- 21. Clarify Minor NSR applicability (JBG; DC Water).** Two commenters requested that the Department clarify whether minor NSR applicability is determined based on individual pieces of equipment or whether it was intended to aggregate multiple pieces of equipment into a “project”. One commenter requested that the Department do this through the addition of a definition for “project” that would apply to § 209, the other requested that the Department clarify the meaning of “collateral emissions increase”. The Department only intends minor NSR to apply to individual pieces of equipment, so it will not aggregate small pieces of equipment when determining applicability. This has been clarified in § 209.1(b).
- 22. The Department should publish a manual of state of the art pollution controls for the minor NSR provision (DC Water).** One commenter requested that the Department publish a manual of “state of the art” (SOTA) performance levels for compliance with § 209, as done by the New Jersey Department of Environmental Protection. The Department appreciates this suggestion, however does not have the resources at this time to publish such a manual, therefore compliance with the requirements of § 209 will be determined on a case-by-case basis. The Department may consider publishing a document that provides guidance on SOTA at a future date.
- 23. Clarify whether LAER applies to “affected emissions units” (GSA).** One commenter asked whether the requirement to install LAER applies to “affected emissions units” or whether emissions from these units are just used to calculate NSR applicability. The Department clarifies that emissions from an emissions unit that is affected by the project, as described in § 204.6(d), are factored into the applicability determination, however the emissions unit itself is not required to install LAER. This is consistent with the federal interpretation. See EPA Memorandum from Director Division of Stationary Source Enforcement: Determination of Emission Points Subject to LAER, dated September 30, 1977.
- 24. Clarify how minor NSR applies to emergency generators and fire pumps (GSA).** One commenter requested clarification on how minor new source review would apply to sources such as emergency generators and fire pumps that are typically limited in their permits to 500 hours per year of operation. To the extent that EPA has an established policy considering such hourly limitations a limit on the source’s potential to emit (PTE), as is the case for emergency generators, the Department will consider these limitations when determining minor NSR applicability. See EPA Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards: Calculating Potential to Emit (PTE) for Emergency Generators, dated September 6, 1995. However, the Department emphasizes that the chapter 2 permit does not establish the limitation on PTE, rather

the operational limitations are considered inherent limits on the PTE. Therefore, this should not be construed as creation of a synthetic minor permitting program.

- 25. Clarify minor NSR control technology requirements (GSA).** One commenter sought clarification on whether minor NSR technology requirements were determined on a pollutant-by-pollutant basis or “by the project”. Section 209.3 states that the operating emission control technologies or pollution prevention methodologies shall be applied “relative to each pollutant for which [the source] meets the applicability requirements.” Therefore, the technology requirements shall be determined on a pollutant-by-pollutant basis.
- 26. Clarify permit renewal requirements and prohibition on operating without a permit (GSA; DC Water).** Two commenters requested clarification on whether the requirement to submit a timely permit renewal application under § 200.5 applies to both construction and operating permits. The Department clarifies that construction permits do not generally need to be renewed, *except* in the rare instance that construction activities continue beyond the expiration date of the permit. The operating permit supersedes the construction permit in most cases. This language has been clarified in § 200.5. One commenter also stated that the prohibition on a source continuing to operate with an expired operating permit in § 200.5 is overly severe. The commenter recommended that the Department incorporate language similar to that used in New Jersey which would provide for a permit shield when the renewal application is filed in a timely manner but the permit is not renewed prior to the expiration date. The Department has considered this suggestion, however does not intend to incorporate such language at this time. The Department amended § 200.5 in order to clarify the preexisting requirement that a source must have a valid permit under § 200.2 at all times that it is operating. In situations where a source has submitted a timely application for renewal of an operating permit but not been issued a new permit prior to its expiration, the Department may permit the source to operate on a temporary basis pursuant to § 200.3.
- 27. Clarify the criteria for source category permits and whether they will be issued for emergency generators (GSA).** One commenter suggested that the criteria for source category permits established pursuant to § 200.6(b) should be submitted for public comment and also asked how these criteria would differ from the permit application. The criteria for the initial source category permit will be subject to the public notice requirements of § 210, but the permits issued to individual sources will not be. The individual permit applications for each source category will be tailored to establish whether the criteria for the source category permit have been met. The commenter also asked whether the Department is considering a source category permit for emergency generators and what the timeline is for developing such a permit. The Department will consider establishing a source category permit (or multiple permits) for emergency generators, but has not yet established a time line for doing so.
- 28. Create an Emission Reduction Credit (ERC) registry and allow interpollutant trading of VOCs and NOx (GSA).** One commenter requested that the Department establish an Emission Reduction Credit (ERC) registry pool system that guides the management of qualified ERCs that can be used in the District. The Department does not have plans to

establish an ERC registry at this time because it does not have the resources to maintain such a system. The commenter also asked whether ERCs purchased in upstream states will qualify as offsets. The Department clarifies that the location of ERCs is determined in accordance with § 204.12 of the rulemaking. The Department will determine on a case-by-case basis whether the proposed ERCs meet these requirements. The commenter also asked whether the District would consider interpollutant trading between VOCs and NO_x at a ratio of one to one. Pursuant to § 204.21 of the proposed regulation, “emission offsets obtained shall be for the same regulated NSR pollutant”, therefore interpollutant trading of NO_x and VOCs is not permitted. The District has retained this language as proposed, because it is required by the federal nonattainment NSR rule, which states that “[t]he plan shall require that in meeting the emissions offset requirements ... the emissions offsets obtained shall be for the same regulated NSR pollutant unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph.” 40 C.F.R. § 51.165 (a)(11). The paragraph goes on to state that a plan may allow for interpollutant trading of direct PM_{2.5} and PM_{2.5} precursors, but does not specify that the plan may allow for interpollutant trading of ozone precursors.

29. *The requirement for reporting of NSR applicability for sources that experience a significant increase but not a major modification is overly burdensome (DC Water).*

Section 204.17 requires projects that result in a significant emission increase but are not considered major modifications to submit an applicability analysis to the Department. One commenter stated that this requirement is unnecessary and overly burdensome. The commenter is correct in its interpretation that this requirement would apply to sources that are not subject to NSR requirements because the significant emissions increase is netted out by contemporaneous emissions decreases; however, the Department disagrees that the requirement to submit this applicability analysis pursuant to § 204.17 is unnecessary or overly burdensome. The Department needs to maintain this documentation in order to keep a record of why certain sources were not subjected to NSR permitting requirements. Sources will have to make an applicability determination prior to applying for the permit regardless; therefore, the District is not making an overly burdensome request by asking that they submit information with the permit application that they will already have developed, and also make it available on future request.

30. *Clarify definition of Continuous Parameter Monitoring System (CPMS) (DC Water).* One

commenter requested that the Department clarify the definition of Continuous Parameter Monitoring System to provide examples of the types of parameters. The Department’s definition was modeled after the federal NSR definition (see 40 C.F.R. § 51.165(a)(1)(xxiii)) and the Department does not agree that it needs to be clarified. More specific details about the parameters to be monitored will be included in the source’s chapter 2 permit.