UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

APR 29 2009

CERTIFIED MAIL – RETURN RECEIPT REQUESTED: 7007 2560 0002 7737 0427

Mr. Shaun McMackin
V.P. of Manufacturing
Owens-Brockway Glass Container, Inc.
One Michael Owens Way
Perrysburg, OH 43551-2999

Re: Notices of Violation, Owens-Brockway Container Glass Manufacturing Facilities in Muskogee, Oklahoma, and Waco, Texas

Dear Mr. McMackin:

Enclosed are Notices of Violation (NOV) issued to Owens-Brockway Glass Container, Inc., for violations of the Clean Air Act at its container glass manufacturing facilities in Muskogee, Muskogee County, Oklahoma, and Waco, McLennan County, Texas. In the NOVs, the Environmental Protection Agency documents violations of federally enforceable provisions of the Oklahoma State Implementation Plan and the Texas State Implementation Plan.

Please note the opportunity to confer is outlined in each NOV. A request to confer should be directed to Ms. Jan Gerro, Assistant Regional Counsel, within 10 days of receipt of these NOVs. Ms. Gerro can be contacted at (214) 665-2121.

Sincerely,

John Blevins
Director
Compliance Assurance and
Enforcement Division

Enclosures

cc: Ms. Susan L. Smith, Counsel
Owens-Brockway Glass Container, Inc.
One Michael Owens Way
Perrysburg, OH 43551

Ms. Kendal Stegmann, Manager
Compliance and Enforcement Group
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

Mr. Gary Goldman, Air Section Manager
Texas Commission on Environmental Quality
6801 Sanger Avenue, Ste. 2500
Waco, TX 76710-7826

Bryan Sinclair, Director
Enforcement Division
Texas Commission on Environmental Quality
MC 219
P.O. Box 13087
Austin, TX 78711-3087

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
OWENS BROCKWAY	)	NOTICE OF VIOLATION
GLASS CONTAINER, INC	)	
	)	
ONE MICHAEL OWENS WAY	)	
PERRYSBURG, OHIO 43555-2999	)	

NOTICE AND FINDING OF VIOLATION

This Notice and Finding of Violation (Notice) is issued to Owens-Brockway Glass Container, Inc. (O-B), for violation of the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, at its container glass manufacturing plant located in Muskogee, Muskogee County, Oklahoma. Specifically, O-B has violated the Prevention of Significant Deterioration (PSD) and the New Source Review (NSR) permitting requirements of the Oklahoma State Implementation Plan (SIP) at its Muskogee, Oklahoma facility.

This Notice is issued pursuant to Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1). Section 113(a) of the CAA requires the Administrator of the United States Environmental Protection Agency (EPA) to notify any person in violation of a SIP or permit of the violations. The authority to issue this Notice has been delegated to the Regional Administrator of EPA, Region 6, and re-delegated to the Director, Compliance Assurance and Enforcement Division, EPA, Region 6.

A. STATUTORY AND REGULATORY BACKGROUND

(1) The National Ambient Air Quality Standards

1. Section 101(b)(1) of the CAA, 42 U.S.C. § 7401(b)(1), provides that the statute is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population.

2. Section 108(a) of the CAA, 42 U.S.C. § 7408(a), requires the Administrator of EPA to identify and prepare air quality criteria for each pollutant, the emissions of which may endanger public health or welfare and the presence of which results from numerous or diverse sources, including stationary sources.

3. For each such "criteria" pollutant, Section 109 of the CAA, 42 U.S.C. § 7409, subsequently requires EPA to promulgate national ambient air quality standards (NAAQS) requisite to protect the public health and welfare.

4. Pursuant to these requirements under the CAA, EPA has identified nitrogen oxides (NO_x), sulfur dioxide (SO_2), and particulate matter (PM) (now measured in the ambient air as PM_{10} and $PM_{2.5}$) as such pollutants, and promulgated NAAQS for each pollutant. 40 C.F.R. §§ 50.4 – 50.11.

5. Under Section 110 of the Clean Air Act, 42 U.S.C. § 7410, each state must adopt and submit to EPA for approval a SIP that provides for the attainment and maintenance of NAAQS.

(2) Federal Provisions Regarding New Source Review (NSR) and Prevention of Significant Deterioration (PSD)

6. Part C of Title I of the CAA (Sections 160 through 169) establishes the federal Prevention of Significant Deterioration (PSD) permitting program and requires each state to include a PSD program as part of its SIP.

7. Pursuant to the CAA, new and modified sources of pollution are required to undergo new source review (NSR), a permitting process that consists of two programs: a PSD program applying to areas of the U.S. that are classified as attaining air quality standards, 42 U.S.C. §§ 7470-7479; and a Nonattainment NSR program for areas classified as "nonattainment" of air quality standards, 42 U.S.C. §§ 7501-7515.

8. Section 165(a) of the CAA, 42 U.S.C. § 7475(a), specifically prohibits the construction and operation of a "major emitting facility" in an area designated as attainment or unclassifiable, unless a permit has been issued that comports with the requirements of Part C of Title I of the CAA.

9. On June 19, 1978, EPA established regulations implementing the federal PSD program at 40 C.F.R. § 52.21. *See* 43 Fed. Reg. 26,403 (June 19, 1978). Since that time, the PSD regulations have been revised, with subsequent revisions incorporated under 40 C.F.R. § 52.21.

10. The relevant regulations for purposes of this Notice are the regulations in effect at the time of the violation.

11. Under rules promulgated by EPA in Chapter 40, Section 52.21 of the C.F.R., requirements for a PSD program are set out, which include a major source preconstruction permit program that has been approved by the Administrator and incorporated into the SIP pursuant to § 51.166 of [Chapter 40] to implement the requirements of that section. [40 C.F.R. § 52.21(b)(1991) and (1992).

12. Specifically, if a major stationary source located in an attainment area is planning to make a major modification, applicable PSD regulations require preconstruction review and permitting for the modifications. To obtain this permit, the source must, among other things, undergo a technology review and apply Best Available Control Technology (BACT); perform a source impact analysis; perform an air quality analysis and modeling; submit appropriate information; and conduct additional impact analyses as required.

13. Section 161 of the CAA, 42 U.S.C. § 7471, provides that each SIP must include a PSD program. Accordingly, requirements for incorporating PSD regulations into SIP Approved programs were also promulgated, establishing requirements for "emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality" that must be contained in each state implementation plan. *See* 43 Fed. Reg. 26,382. These regulations were originally codified under 40 C.F.R. § 51.24 (1979) and subsequently redesignated at 40 C.F.R. § 51.166. *See* 51 Fed. Reg. 40,661 (Nov. 7, 1986) (effective Dec. 8, 1986).

14. The applicable air quality regulations, promulgated by the State of Oklahoma pursuant to the requirements of 40 C.F.R. § 51.166, have been incorporated into the Oklahoma SIP and subsequently approved by EPA.

15. Notwithstanding those sources specifically listed in the rules, "major stationary source" is defined to include "any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation." *See* 40 C.F.R. § 52.21(b)(1)(i)(*b*) (1991) and (1992); *see also* OAPCR 1.4.4(b)(1)(B).

16. For relevant purposes here, "major modification" means "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation." *See* 40 C.F.R. § 52.21(b)(2)(i) (1991) and (1992); *see also* OAPCR 1.4.4(b)(2).

17. "Net emissions increase" means, in relevant part:

> the amount by which the sum of the following exceeds zero:
>
> (*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and
> (*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise credible.

See 40 C.F.R. § 52.21(b)(3)(i) (1991) and (1992); *see also* OAPCR 1.4.4(b)(3)(A).

18. Attempts by applicants to avoid PSD air quality permit review by splitting a modification into two or more minor modifications constitute circumvention of the PSD requirements, and such modifications will, accordingly, be aggregated by EPA when reviewed for compliance.

19. "Significant" is defined in relevant part to mean, "in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:"

Nitrogen oxides (NO_x):	40 tons per year (tpy) …

40 C.F.R. § 52.21(b)(23)(i) (1991) and (1992); *see also* OAPCR 1.4.4(b)(22)(A).

20. "Stationary source" is defined to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation." 40 C.F.R. § 52.21(b)(5) (1991) and (1992); *see also* OAPCR 1.4.4(b)(5).

21. "Building, Structure, Facility or Installation" are defined to mean "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)...." 40 C.F.R. § 52.21(b)(6) (1991) and (1992); *see also* OAPCR 1.4.4(b)(6).

22. "Construction" is defined to mean "any physical change or change in the method or operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." 40 C.F.R. § 52.21(b)(8) (1991) and (1992); *see also* OAPCR 1.4.4(b)(8).

23. "Begin actual construction" is defined, in relevant part, to mean, "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures." 40 C.F.R. § 52.21(b)(11) (1991) and (1992); *see also* OAPCR 1.4.4(b)(11).

a. Specific PSD Requirements Regarding Preconstruction Permits

24. Subsection (i)(1) of section 52.21 provides that no stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. 40 C.F.R. § 52.21(i)(1) (1991) and (1992).

25. Title 40, Section 52.21(k) provides that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of : (1) Any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum allowable increase over the baseline concentration in any area. 40 C.F.R. § 52.21(k) (1991) and (1992).

26. Title 40, Section 52.21(m)(1)(i) provides that any application for a permit under 40 C.F.R. § 52.21 shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants: (a) For the source, each pollutant that it would have the potential to emit in a significant amount; (b) for the modification, each pollutant for which it would result in a significant net emissions increase. 40 C.F.R. § 52.21(m)(1)(i) (1991) and (1992).

27. Title 40, Section 52.21(n) provides that the owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under 40 C.F.R. § 52.21. 40 C.F.R. § 52.21(n) (1991) and (1992).

b. Specific PSD Requirements Regarding Application of Best Available Control Technology (BACT)

28. Under section 169 of the Act, 42 U.S.C. § 7479, "best available control technology" is defined in relevant part as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis…determines is achievable for such facility through application of production processes and available methods, systems, and techniques….

42 U.S.C. § 7479(3).

29. Similarly, applicable federal regulations provide, in part, that "best available control technology" (BACT) means:

> an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed…major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such…modification through application of production processes or available methods, systems, and techniques....

40 C.F.R. § 52.21(b)(12) (1991) and (1992).

30. The term "emission limitation" is subsequently defined in section 302 of the Act, 42 U.S.C. § 7602, in relevant part, as:

> a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuing basis*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under [the Act].

42 U.S.C. § 7602(k) (*emphasis added*).

31. At all times relevant to the violations alleged below, the regulations promulgated under 40 C.F.R. § 52.21(j) provide that "a major modification *shall meet* each applicable emissions limitation under the [SIP] and each applicable emissions stand and standard of performance under 40 CFR parts 60 and 61." 40 C.F.R. § 52.21(j)(1).

32. These same regulations promulgated under subsection (j) further provide that:

> [a] major modification *shall apply* [BACT] for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

40 C.F.R. § 52.21(j)(3) (1991) and (1992) (*emphasis added*).

33. Accordingly, pursuant to 40 C.F.R. § 51.166(j), each state, including the State of Oklahoma, is required to incorporate provisions in its respective state implementation plan providing that each major modification applies the BACT requirements already required under 40 C.F.R. § 52.21(j).

c. Specific Requirements for Obtaining Operating Permits

34. At all times relevant to the violations alleged below, Title 40, Section 52.21(r) of the Code of Federal Regulations provides that:

> [a]ny owner or operator who constructs or operates a…modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a…modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

40 C.F.R. § 52.21(r) (1991) and (1992).

35. Furthermore, under the rules promulgated under Title 40, Part 70 of the Code of Federal Regulations, each state is required to develop programs for issuing operating permits for major stationary sources, including those covered by New Source Performance Standards and its PSD requirements. *See* 57 Fed. Reg. 32,250 (July 21,1992) (effective July 21, 1992).

36. Pursuant to these rules, "Part 70 sources must obtain an operating permit addressing all applicable pollution control obligations under the [SIP]…or other applicable provisions of the Act." 57 Fed. Reg. 32,250. Accordingly, section 70.1 requires that "[a]ll sources subject to [regulation under the CAA] shall have a permit to operate that assures compliance by the source with *all* applicable requirements." 40 C.F.R. § 70.1(b) (2007) (*emphasis added*).

37. Pursuant to 40 C.F.R. § 70.5(c)(8), in addition to providing a description of how the source will continue to comply with applicable requirements, Part 70 sources are also required to provide a description of how the source will achieve compliance with those "requirements for which the source is not in compliance." 40 C.F.R. § 70.5(c)(8)(ii)(A) and (B) (2007).

38. The regulations promulgated under section 70.6 further specify that each permit issued under Part 70 must incorporate various elements, including "those operational requirements and limitations that assure compliance with *all* applicable requirements at the time of permit issuance." 40 C.F.R. § 70.6(a)(1) (2007) (*emphasis added*).

(3) NSR/ PSD Regulations in the Oklahoma SIP

39. On February 13, 1980, EPA approved the State of Oklahoma Air Quality Control Implementation Plan, which was later redesignated the State Implementation Plan for Oklahoma (hereinafter referred to generally as the "Oklahoma SIP"). 45 Fed. Reg. 09741. Numerous subsequent revisions and amendments to the Oklahoma SIP have been approved by EPA, and incorporated by reference into the Code of Federal Regulations. *See* 40 C.F.R § 52.1960 (providing a history of all actions taken by EPA and the state regarding the Oklahoma SIP).

40. On August 25, 1983, EPA approved Oklahoma's PSD program. *See* 48 Fed. Reg. 38,636 (Aug. 25, 1983) (noting that the approval took immediate effect); 40 C.F.R. § 52.1960(c); *and* 40 C.F.R. § 52.1929 (providing for the scope of PSD regulation by the state under the Oklahoma SIP). Pursuant to section 52.1929, the requirements of section 52.21 remain applicable to sources for which EPA retains enforcement authority, including those sources permitted by EPA prior to approval of the Oklahoma PSD program, and those sources located on lands over which Oklahoma lacks jurisdiction under the Clean Air Act. *See* 40 C.F.R. § 52.1929(a); *and* OAPCR 1.4.4(a). Pursuant to its PSD program, the State of Oklahoma issues permits governing the operation and construction of regulated facilities. 48 Fed. Reg. 38,636.

41. Oklahoma's PSD program is promulgated under Oklahoma Air Pollution Control Regulation (OAPCR) 1.4.1 – 1.4.4. *See* 40 C.F.R. § 52.1920(c) (2007); *with* 48 Fed. Reg. 38,636. Prior to January, 1992, EPA approved revisions to OAPCR 1.4, including PSD regulations under 1.4.4, with the approval taking effect on September 23, 1991. *See* 56 Fed. Reg. 33,717 (July 23, 1991). Prior to June, 2006, EPA approved additional revisions to OAPCR 1.4, including the PSD regulations under 1.4.4, with the approval taking effect on January 7, 2000. *See* 64 Fed. Reg. 60,685 (Nov. 8, 1999).

a. Oklahoma Preconstruction Permitting Requirements

42. The Oklahoma SIP requires that a facility obtain a permit "when the…modification of an existing source, results in a net increase in air contaminant emissions as the Commissioner determines appropriate." OAPCR 1.4.1 (c)(1) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

43. The Oklahoma SIP also provides that: "[n]o person shall cause or allow the … modification of any source without first obtaining an authority to construct or modify from the Commissioner as to comply with all applicable air pollution rules and regulations, and not to exceed ambient air quality standards or applicable federal new source performance standards. . . ." OAPCR 1.4.2 (a)(1) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

44. In addition to the requirements provided under 40 C.F.R. § 52.21(m), OAPCR 1.4.4(f)(1) provides that the owner or operator of a major modification shall conduct and submit as part of a permit application an ambient air quality analysis for each air pollutant subject to regulation under the Act for which the major modification would result in a significant net emissions increase at the source. OAPCR 1.4.4(f)(1)(B) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

45. In addition to the requirements provided under 40 C.F.R. § 52.21(k), OAPCR 1.4.4(f)(3) provides that the owner or operator of a major modification shall show that, at the time of start-up, the significant net emissions increase, in conjunction with other applicable emissions increases or reductions, will not contribute to a violation of any NAAQS, and that the increase will not be in excess of any applicable maximum allowable increase over the baseline ambient air concentration. OAPCR 1.4.4(f)(3) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

46. In addition to the requirements provided under 40 C.F.R. § 52.21(k), OAPCR 1.4.2(c) similarly provides that the applicant shall guarantee that all data included on the application is true and correct, while subsection (d) provides that the Commissioner will evaluate the permit application based on information provided by the applicant and other available information. OAPCR 1.4.2(c) and (d) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

b. Oklahoma Requirements for Application of BACT

47. The Oklahoma SIP provides that "best available control technology" (BACT) means "the control technology to be applied for a major…modification is the best that is available as determined by the Commission on a case[-by-case] [sic] basis taking into account energy, environmental, costs and economic impacts of alternate control technologies." OAPCR 1.4.4(b)(12) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

48. In addition to above-mentioned federal statutory and regulatory requirements regarding the application of BACT for major modifications, the Oklahoma SIP similarly requires that any major modification subject to regulation under the Oklahoma SIP apply BACT, providing in relevant part that:

> [a] major modification must demonstrate that the control technology to be applied is the best that is available for each regulated pollutant for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

OAPCR 1.4.4(e)(2) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

c. Oklahoma Requirements for Obtaining an Operating Permit

49. The Oklahoma SIP provides for a "dual permitting system," requiring that any source to be established in Oklahoma obtain both a permit to construct and a permit to operate. *See* OAPCR 1.4.1(b)(1) (approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991).

50. Specifically, the Oklahoma SIP requires a permit when the modification of an existing source "results in a net increase in air contaminant emissions as the Commissioner determines appropriate." OAPCR 1.4.1(c)(1) (approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991).

51. Subsection (b)(1) further provides that "a permit to operate is issued after construction is completed" and conditioned upon "demonstration that the source was constructed as designed and the facility does meet the requirements of the permit and the control regulations." OAPCR 1.4.1(b)(1) [relevant provisions approved by EPA at 56 Fed. Reg. 33,717 (July 23, 1991) (effective Sept. 23, 1991)].

52. The Oklahoma SIP expressly prohibits "the operation of a new source for more than a 60-day period without applying for a permit to operate" from the State of Oklahoma. See OAPCR 1.4.3(a)(1) (adopted into Oklahoma SIP, effective Aug. 25, 1983).

53. Pursuant to the federal statutes according to which OAPCR 1.4.3 and other Oklahoma PSD regulations were promulgated, Congress has defined "new sources" of pollution to include "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. § 7411(a)(2) (*emphasis added*).

B. FACTUAL BACKGROUND

54. Respondent, Owens-Brockway Glass Container, Inc. (O-B), is a Delaware corporation.

55. As a Delaware corporation, Respondent is a "person" within the meaning of Sections 113(a) and 502 of the CAA, 42 U.S.C. §§ 7413(a) and 7661a, and as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

56. The Muskogee Facility is located at the southeast corner of the intersection of N York Street and Old Shawnee Road, in the City of Muskogee in Muskogee County, Oklahoma.

57. The Muskogee Facility is owned and operated by Respondent, which is a wholly-owned subsidiary of Owens-Illinois, Inc. (O-I), and is engaged in the manufacture of container glass for the food and beverage industry. The Muskogee Facility began operation in approximately 1947 as Brockway Glass Company, Inc., and was obtained by Respondent from Brockway, Inc. in 1988 as part of O-I's acquisition of Brockway, Inc. and the formation of O-B. The Muskogee facility was owned and operated by Respondent at all times relevant to this NOV.

58. At the Muskogee Facility, Respondent operates two side-port natural-gas-fired regenerative glass-melting furnaces (Furnaces A and B) and other equipment that supports the glass manufacturing process, such as forming machines.

59. In December 2003, O-B obtained Permit 99-129-TV(M-1) for the Muskogee Facility from ODEQ.

60. By letters issued pursuant to the authority of Section 114 of the Act, 42 U.S.C. § 7414, dated July 5, 2006, and December 19, 2007, to the Muskogee Facility, EPA Region 6 required Respondent to submit specific information regarding its glass manufacturing facilities located within Region 6.

61. Respondent replied to EPA's Section 114 information requests to the Muskogee Facility with three separate submittals dated October 9, 2006, December 15, 2006, and February 11, 2008.

62. Based upon a review of information gathered pursuant to EPA's Section 114 information requests, at all times relevant to the present cause of action, the Muskogee Facility would meet the definition of a "major stationary source" of NO_x as the facility has the potential to emit more than 250 tons per year of NO_x.

C. VIOLATIONS

63. Violations of the Oklahoma federally approved PSD programs are federally enforceable pursuant to Section 113 of the CAA. 42 U.S.C. § 7413 (2008).

64. Respondent will be presumed to remain in violation as set forth herein, until it establishes continuous compliance with the above-cited requirements.

65. At all times relevant to the present action, Muskogee County, Oklahoma remained classified in 40 C.F.R. § 81.337 as being in an attainment area for the national air standard for SO_2, NO_X, and PM. Therefore, PSD rules applied to any modification or construction at the facility.

66. Upon review of the information provided by O-B, referenced above in Paragraph 611, EPA Region 6 has concluded that Respondent conducted systematic capital projects on furnaces at the Muskogee Facility which increased the facility's capacity to produce container glass.

67. Accordingly, these modifications to the Muskogee Facility represent a "new source," as Congress has defined that term under 42 U.S.C. § 7411(a)(2).

68. Furthermore, the modifications referenced below in Paragraphs 69 through 74, also meet the definition of major modification provided under both 40 C.F.R. § 52.21(b)(2)(i) and OAPCR 1.4.4(b)(2), because they represent: a physical change in or a change in the method of operation of a major stationary source that resulted in a significant emissions increase of a regulated NSR pollutant (specifically NO_x); and a significant net emissions increase of that pollutant from a major stationary source.

(1) **Violation One. Unpermitted major modifications made between October 1991 and February 1992**

69. In 1992, Respondent made several changes to Furnaces A and B in order to increase glass production. The changes included the installation of electric boost, sidewall overcoating, raising the shadow wall, and the replacement of raw material feeders to reduce batch cycles.

70. One or more of the changes detailed above in Paragraph 69 resulted in a significant increase in NO_x emissions, as defined in both the federal PSD regulations, and under OAPCR 1.4.4(b)(22)(A).

71. Pursuant to a review of information gathered pursuant to EPA's Section 114 information requests, it was determined that Respondent did "begin actual construction" to complete modifications, mentioned above in Paragraph 69, during or around October 1991.

72. In failing to apply for or obtain authority from the Commissioner, via necessary construction permits, prior to commencing construction at the Muskogee Facility to add the transformer and modify both furnaces (detailed above in Paragraph 69) between October 1991 and February 1992, Respondent continues to be in violation of federal and state requirements for preconstruction permits under applicable PSD regulations, specifically those provided under OAPCR 1.4.2(a)(1).

73. In failing to apply BACT to major modifications made at the Muskogee Facility between October 1991 and February 1992 (detailed above in Paragraph 69), and commencing operations each day thereafter without applying necessary technologies under BACT, Respondent continues to accrue violations of applicable federal and state PSD requirements for major modifications, specifically those provided under OAPCR 1.4.4(e)(2).

74. In reinitiating operations after major modifications, which included the addition of a transformer and modifications made to Furnace A and Furnace B, on or around February 1992, and in continuing to operate thereafter, without obtaining or applying for the required permit to operate following completion of major modifications (detailed above in Paragraph 69), since April 1992, Respondent continues to accrue violations of applicable federal and state PSD regulations, specifically those provided under OAPCR 1.4.1(b)(1) and 1.4.1(c)(1), and OAPCR 1.4.3(a)(1).

(2) **Violation Two. Failure to include BACT in the Title V permit for the Muskogee Facility.**

75. The Title V permit Respondent obtained from ODEQ in December 2003, referenced above in Paragraph 59, did not include BACT for NO_x.

76. Accordingly, the Title V permit issued to O-B in December 2003, referenced above in Paragraph 59, did not include emission limitations for NO_x that assure compliance with the PSD requirements of the Act and the Oklahoma SIP.

77. In failing to assure compliance with all applicable emission limitations, specifically those requiring that it incorporate BACT for NO_x into its permit application and the subsequent permit, Respondent violated and continues to violate Sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7761a(a) and 7761c(a), as well as 40 C.F.R. §§ 70.5 and 70.6(a) (2007).

D. ENFORCEMENT

Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), provides that any time after the expiration of 30 days following the date of the issuance of a Notice of Violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, issue an administrative penalty order pursuant to Section 113(d), or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), provides in part that if the Administrator finds that a person has violated, or is in violation of Title V of the CAA, including a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under Title V, the Administrator may issue and administrative penalty order under Section 113(d), issue an order requiring compliance with such requirement or prohibition, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

E. OPPORTUNITY FOR CONFERENCE

O-B may, upon request, confer with EPA. The conference will enable O-B to present evidence bearing on the finding of violation, on the nature of the violations, and on any efforts it may have taken or proposes to take to achieve compliance. O-B has a right to be represented by counsel. A request for a conference must be made within ten (10) days of receipt of this Notice, and the request for a conference or other inquiries concerning the Notice should be made in writing to:

Jan Gerro (6RC-EA)
Senior Enforcement Counsel
Air, Pesticides & Toxics Branch
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

If you have any legal questions, please feel free to call Ms. Gerro at (214) 665-2121, or Ms. Michelle Kelly for technical questions at (214) 665-7580.

F. EFFECTIVE DATE

This NOV shall become effective immediately upon issuance.

Dated: 4/29/09

John Blevins
Director
Compliance Assurance and
Enforcement Division

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
OWENS BROCKWAY	)	NOTICE OF VIOLATION
GLASS CONTAINER, INC	)	
	)	
ONE MICHAEL OWENS WAY	)	
PERRYSBURG, OHIO 43555-2999	)	

NOTICE AND FINDING OF VIOLATION

This Notice and Finding of Violation (Notice) is issued to Owens-Brockway Glass Container, Inc. (O-B), for violation of the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*, at its container glass manufacturing plant located in Waco, McLennan County, Texas. Specifically, O-B has violated the Prevention of Significant Deterioration (PSD) and the New Source Review (NSR) permitting requirements of the Texas State Implementation Plan (SIP) at its Waco, Texas facility.

This Notice is issued pursuant to Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1). Section 113(a) of the CAA requires the Administrator of the United States Environmental Protection Agency (EPA) to notify any person in violation of a SIP or permit of the violations. The authority to issue this Notice has been delegated to the Regional Administrator of EPA, Region 6, and re-delegated to the Director, Compliance Assurance and Enforcement Division, EPA, Region 6.

A. STATUTORY AND REGULATORY BACKGROUND

(1) The National Ambient Air Quality Standards

1. Section 101(b)(1) of the CAA, 42 U.S.C. § 7401(b)(1), provides that the statute is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population.

2. Section 108(a) of the CAA, 42 U.S.C. § 7408(a), requires the Administrator of EPA to identify and prepare air quality criteria for each pollutant, the emissions of which may endanger public health or welfare and the presence of which results from numerous or diverse sources, including stationary sources.

3. For each such "criteria" pollutant, Section 109 of the CAA, 42 U.S.C. § 7409, subsequently requires EPA to promulgate national ambient air quality standards (NAAQS) requisite to protect the public health and welfare.

4. Pursuant to these requirements under the CAA, EPA has identified nitrogen oxides (NO_x), sulfur dioxide (SO_2), and particulate matter (PM) (now measured in the ambient air as PM_{10} and $PM_{2.5}$) as such pollutants, and promulgated NAAQS for each pollutant. 40 C.F.R. §§ 50.4 – 50.11.

5. Under Section 110 of the Clean Air Act, 42 U.S.C. § 7410, each state must adopt and submit to EPA for approval a SIP that provides for the attainment and maintenance of NAAQS.

(2) Federal Provisions Regarding New Source Review (NSR) and Prevention of Significant Deterioration

6. Part C of Title I of the CAA (Sections 160 through 169) establishes the federal Prevention of Significant Deterioration (PSD) permitting program and requires each state to include a PSD program as part of its SIP.

7. Pursuant to the CAA, new and modified sources of pollution are required to undergo new source review (NSR), a permitting process that consists of two programs: a PSD program applying to areas of the U.S. that are classified as attaining air quality standards, 42 U.S.C. §§ 7470-7479; and a Nonattainment NSR program for areas classified as "nonattainment" of air quality standards, 42 U.S.C. §§ 7501-7515.

8. Section 165(a) of the CAA, 42 U.S.C. § 7475(a), specifically prohibits the construction and operation of a "major emitting facility" in an area designated as attainment or unclassifiable, unless a permit has been issued that comports with the requirements of Part C of Title I of the CAA.

9. On June 19, 1978, EPA established regulations implementing the federal PSD program at 40 C.F.R. § 52.21. *See* 43 Fed. Reg. 26,403 (June 19, 1978). Since that time, the PSD regulations have been revised, with subsequent revisions incorporated under 40 C.F.R. § 52.21.

10. The relevant regulations for purposes of this Notice are the regulations in effect at the time of the violation.

11. Under rules promulgated by EPA in Chapter 40, Section 52.21 of the C.F.R., requirements for a PSD program are set out, which include a major source preconstruction permit program that has been approved by the Administrator and incorporated into the SIP pursuant to § 51.166 of [Chapter 40] to implement the requirements of that section. 40 C.F.R. § 52.21(b) (1989), (1991), (1992) and (1997).

12. Specifically, if a major stationary source located in an attainment area is planning to make a major modification, applicable PSD regulations require preconstruction review and permitting for the modifications. To obtain this permit, the source must, among other things, undergo a technology review and apply Best Available Control Technology (BACT); perform a source impact analysis; perform an air quality analysis and modeling; submit appropriate information; and conduct additional impact analyses as required.

13. Section 161 of the CAA, 42 U.S.C. § 7471, provides that each SIP must include a PSD program. Accordingly, requirements for incorporating PSD regulations into SIP Approved programs were also promulgated, establishing requirements for "emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality" that must be contained in each state implementation plan. *See* 43 Fed. Reg. 26,382. These regulations were originally codified under 40 C.F.R. § 51.24 (1979) and subsequently redesignated at 40 C.F.R. § 51.166. *See* 51 Fed. Reg. 40,661 (Nov. 7, 1986) (effective Dec. 8, 1986).

14. The applicable air quality regulations, promulgated by the State of Texas pursuant to the requirements of 40 C.F.R. § 51.166, have been incorporated into the Texas SIP and subsequently approved by EPA.

15. Notwithstanding those sources specifically listed in the rules, "major stationary source" is defined to include "any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation." *See* 40 C.F.R. § 52.21(b)(1)(i)(*b*) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

16. For relevant purposes here, "major modification" means "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation." *See* 40 C.F.R. § 52.21(b)(2)(i) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

17. "Net emissions increase" means, in relevant part:

> the amount by which the sum of the following exceeds zero:
>
> (*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and
>
> (*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise credible.

See 40 C.F.R. § 52.21(b)(3)(i) (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

18. Attempts by applicants to avoid PSD air quality permit review by splitting a modification into two or more minor modifications constitute circumvention of the PSD requirements, and such modifications will, accordingly, be aggregated by EPA when reviewed for compliance.

19. "Significant" is defined in relevant part to mean, "in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:"

Nitrogen oxides (NO_x):	40 tons per year (tpy)
Sulfur dioxide (SO_2):	40 tpy
Particulate matter (PM):	25 tpy of PM emissions
	15 tpy of PM_{10} emissions

40 C.F.R. § 52.21(b)(23)(i) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

20. "Stationary source" is defined to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation." 40 C.F.R. § 52.21(b)(5) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

21. "Building, Structure, Facility or Installation" are defined to mean "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)...." 40 C.F.R. § 52.21(b)(6) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

22. "Construction" is defined to mean "any physical change or change in the method or operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." 40 C.F.R. § 52.21(b)(8) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

23. "Begin actual construction" is defined, in relevant part, to mean, "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures." 40 C.F.R. § 52.21(b)(11) (1989), (1991), (1992), and (1997); *see also* 30 Tex. Admin. Code § 116.160 (1995) [incorporating by reference 40 C.F.R. § 52.21 (1994)].

a. Specific PSD Requirements Regarding Preconstruction Permits

24. Subsection (i)(1) of section 52.21 provides that no stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. 40 C.F.R. § 52.21(i)(1) (1989), (1991), (1992), and (1997).

25. Title 40, Section 52.21(k) provides that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or

reductions (including secondary emissions), would not cause or contribute to air pollution in violation of : (1) Any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum allowable increase over the baseline concentration in any area. 40 C.F.R. § 52.21(k) (1989), (1991), (1992), and (1997).

26. Title 40, Section 52.21(m)(1)(i) provides that any application for a permit under 40 C.F.R. § 52.21 shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants: (a) For the source, each pollutant that it would have the potential to emit in a significant amount; (b) For the modification, each pollutant for which it would result in a significant net emissions increase. 40 C.F.R. § 52.21(m)(1)(i) (1989), (1991), (1992), and (1997).

27. Title 40, Section 52.21(n) provides that the owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under 40 C.F.R. § 52.21. 40 C.F.R. § 52.21(n) (1989), (1991), (1992), and (1997).

b. Specific PSD Requirements Regarding Application of Best Available Control Technology (BACT)

28. Under section 169 of the Act, 42 U.S.C. § 7479, "best available control technology" is defined in relevant part as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis…determines is achievable for such facility through application of production processes and available methods, systems, and techniques….

42 U.S.C. § 7479(3).

29. Similarly, applicable federal regulations provide, in part, that "best available control technology" (BACT) means:

> an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed…major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such…modification through application of production processes or available methods, systems, and techniques....

40 C.F.R. § 52.21(b)(12) (1989), (1991), (1992), and (1997).

30. The term "emission limitation" is subsequently defined in section 302 of the Act, 42 U.S.C. § 7602, in relevant part, as:

> a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuing basis*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under [the Act].

42 U.S.C. § 7602(k) (*emphasis added*).

31. At all times relevant to the violations alleged below, the regulations promulgated under 40 C.F.R. § 52.21(j) provide that "a major modification *shall meet* each applicable emissions limitation under the [SIP] and each applicable emissions stand and standard of performance under 40 CFR parts 60 and 61." 40 C.F.R. § 52.21(j)(1) (1989), (1991), (1992), and (1997) (*emphasis added*).

32. These same regulations promulgated under subsection (j) further provide that:

> [a] major modification *shall apply* [BACT] for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

40 C.F.R. § 52.21(j)(3) (1989), (1991), (1992) and (1997)(*emphasis added*).

33. Accordingly, pursuant to 40 C.F.R. § 51.166(j), each state, including the State of Texas, is required to incorporate provisions in its respective state implementation plan providing that each major modification applies the BACT requirements already required under 40 C.F.R. § 52.21(j).

c. Specific Requirements for Obtaining Operating Permits

34. At all times relevant to the violations alleged below, Title 40, Section 52.21(r) of the Code of Federal Regulations provides that:

> [a]ny owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a…modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

40 C.F.R. § 52.21(r) (1989), (1991), (1992), and (1997).

35. Furthermore, under the rules promulgated under Title 40, Part 70 of the Code of Federal Regulations, each state is required to develop programs for issuing operating permits for major stationary sources, including those covered by New Source Performance Standards and its PSD requirements. *See* 57 Fed. Reg. 32,250 (effective July 21, 1992).

36. Pursuant to these rules, "Part 70 sources must obtain an operating permit addressing all applicable pollution control obligations under the [SIP]...or other applicable provisions of the Act." 57 Fed. Reg. 32,250. Accordingly, section 70.1 requires that "[a]ll sources subject to [regulation under the CAA] shall have a permit to operate that assures compliance by the source with *all* applicable requirements." 40 C.F.R. § 70.1(b) (2007) (*emphasis added*).

37. Pursuant to 40 C.F.R. § 70.5(c)(8), in addition to providing a description of how the source will continue to comply with applicable requirements, Part 70 sources are also required to provide a description of how the source will achieve compliance with those "requirements for which the source is not in compliance." 40 C.F.R. § 70.5(c)(8)(ii)(A) and (B) (2007).

38. The regulations promulgated under section 70.6 further specify that each permit issued under Part 70 must incorporate various elements, including "those operational requirements and limitations that assure compliance with *all* applicable requirements at the time of permit issuance." 40 C.F.R. § 70.6(a)(1) (2007) (*emphasis added*).

(3) NSR/PSD Regulations Specifically Applicable for Texas Facilities

39. On May 31, 1972, EPA approved the Texas Air Pollution Control Implementation Plan, which was later redesignated the State Implementation Plan for Texas (hereinafter referred to generally as the "Texas SIP"). *See* 37 Fed. Reg. 10,895; *and* 40 C.F.R. §52.2299 (2007). Numerous subsequent revisions and amendments to the Texas SIP have been approved by EPA. Prior to approval of the Texas PSD program, regulations promulgated under Title 40, Section 52.21 of the Code of Federal Regulations were applicable for new source review purposes in Texas. *See* 56 Fed. Reg. 46,116 (Sept. 10, 1991); *and* 40 C.F.R. § 52.21 (1992).

40. On June 24, 1992, EPA approved the Texas PSD program, which was effective on July 24, 1992. *See* 57 Fed. Reg. 28,093 (June 24, 1992); *see also* 40 C.F.R. §§ 52.2299(c) (2007) and 52.2303. Pursuant to its PSD program, the State of Texas issues permits governing the operation and construction of regulated facilities. 57 Fed. Reg. 28,096.

41. Prior to 1998, the Texas PSD program was promulgated under Title 30, Chapter 116 of the Texas Administrative Code. *See* 59 Fed. Reg. 46,556 (Sept. 9, 1994) (approving revisions to the Texas PSD SIP, including the transfer of air quality control regulations from 31 TAC to 30 TAC). Effective October 20, 1997, EPA approved the recodification of Texas PSD regulations under Title 30, Section 116.160 of the Texas Administrative Code. 30 Tex. Admin. Code § 116.160 (1995); *and* 62 Fed. Reg. 44,085 (Aug. 19, 1997).

42. Pursuant to the rules approved by EPA for the Texas SIP and effective October 20, 1997, the Texas PSD program incorporated by reference the federal PSD rules at 40 C.F.R. § 52.21 (as amended June 3, 1993 and effective June 3, 1994), and specifically required "each proposed...major modification in an attainment or unclassifiable area" to comply with the federal regulations. *See* 30 Tex. Admin. Code § 116.160 (1995); *and* 40 C.F.R. § 52.21 (1994).

a. Applicable Federal Regulations Prior to Approval of Texas SIP for PSD

43. Prior to approval of the Texas PSD program in July 1992, EPA specifically provides that the regulations promulgated under Title 40, Section 52.21 of the Code of Federal Regulations were applicable for facilities in Texas subject to PSD review and permitting. *See* 56 Fed. Reg. 46,117; *see also* 40 C.F.R. § 52.21 (1989) and (1992).

i. Preconstruction Permit Requirements

44. Subsection (i)(1) of section 52.21 of the Code of Federal Regulations provides in relevant part that no major modification subject to the requirements in section 52.21 "shall begin actual construction without a permit which states that the...modification will meet those requirements" provided in subsections (j) through (r) of section 52.21. 40 C.F.R. § 52.21(i)(1) (1989), (1991), (1992), and (1997).

45. Title 40, Section 52.21(k) of the Code of Federal Regulations provides that the "owner or operator of...a modification shall demonstrate that allowable emissions increases from the proposed...modification, in conjunction with other applicable emissions increases or reductions..., would not cause or contribute to air pollution" in violation of applicable air quality standards and limits. *See* 40 C.F.R. § 52.21(k) (1989), (1991), (1992), and (1997).

46. Title 40, Section 52.21(m) of the Code of Federal Regulations provides that the owner or operator of a major modification shall conduct and submit as part of a permit application an ambient air quality analysis for each air pollutant subject to regulation under the Act for which the major modification would result in a significant net emissions increase at the source. *See* 40 C.F.R. § 52.21(m) (1989), (1991), (1992), and (1997).

47. Title 40, Section 52.21(n) of the Code of Federal Regulations provides that the owner or operator of the major modification shall submit all information necessary to perform any analysis or make any determination required under section 52.21. 40 C.F.R. § 52.21(n) (1989), (1991), (1992), and (1997).

ii. Application of BACT

48. The regulations promulgated under 40 C.F.R. § 52.21(j) provide that "a major modification *shall meet* each applicable emissions limitation under the [SIP] and each applicable emissions stand and standard of performance under 40 C.F.R. parts 60 and 61." 40 C.F.R. § 52.21(j)(1) (1989), (1991), (1992), and (1997) (*emphasis added*).

49. These same regulations promulgated under subsection (j) further provide that:

> [a] major modification *shall apply* [BACT] for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

40 C.F.R. § 52.21(j)(3) (1989), (1991), (1992), and (1997) (*emphasis added*).

iii. Operating Permit Requirements

50. Title 40, Section 52.21(r) of the Code of Federal Regulations provides that:

> [a]ny owner or operator who constructs or *operates* a…modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a…modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

40 C.F.R. § 52.21(r)(1) (1989), (1991), (1992), and (1997) (*emphasis added*).

51. Pursuant to 40 C.F.R. § 52.21(w), "*[a]ny* permit issued under [section 52.21] or a prior version of [section 52.21] *shall remain in effect*, unless and until it expires…or is rescinded." 40 C.F.R. § 52.21(w)(1) (1989), (1991), (1992), and (1997) (*emphasis added*).

b. Applicable PSD Regulations Approved Into the Texas SIP

52. The subsequently approved Texas SIP, promulgated pursuant to the requirements of 40 C.F.R. § 51.166, provide that "each proposed…major modification in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the United States [EPA] in Title 40 Code of Federal Regulations (CFR) at 40 CFR 52.21 as amended June 3, 1993 (effective June 3, 1994) . . . *hereby incorporated by reference*." 30 Tex. Admin. Code § 116.160 (1995) (*emphasis added*) [relevant provisions approved by EPA at 62 Fed. Reg. 44,086 (Aug. 19, 1997) (effective Oct. 20, 1997)].

i. Preconstruction Permit Requirements in the Texas SIP

53. Subsection (i)(1) of section 52.21 of the Code of Federal Regulations provides in relevant part that no major modification subject to the requirements in section 52.21 "shall begin actual construction without a permit which states that the…modification will meet those requirements" provided in subsections (j) through (r) of section 52.21. 40 C.F.R. § 52.21(i)(1) (1994).

54. Title 30, Section 116.1 of the Texas Administrative Code further provides that "[a]ny person who plans to…engage in the modification of any existing facility which may emit air contaminants into the air of [Texas] *must obtain a permit to construct* pursuant to 116.3(a)...before any actual work is begun on the facility." 30 Tex. Admin. Code § 116.1 (1991) (*emphasis added*) [relevant provisions approved by EPA at 60 Fed. Reg. 49,788 (Aug. 27, 1995) (effective Nov. 27, 1995)].

55. Title 40, Section 52.21(k) of the Code of Federal Regulations provides that the "owner or operator of…a modification shall demonstrate that allowable emissions increases from the proposed…modification, in conjunction with other applicable emissions increases or reductions…, would not cause or contribute to air pollution" in violation of applicable air quality standards and limits. 40 C.F.R. § 52.21(k) (1994).

56. Title 40, Section 52.21(m) of the Code of Federal Regulations provides that the owner or operator of a major modification shall conduct and submit as part of a permit application an ambient air quality analysis for each air pollutant subject to regulation under the Act for which the major modification would result in a significant net emissions increase at the source. 40 C.F.R. § 52.21(k) (1994).

57. Title 40, Section 52.21(n) of the Code of Federal Regulations provides that the owner or operator of the major modification shall submit all information necessary to perform any analysis or make any determination required under section 52.21. 40 C.F.R. § 52.21(n) (1994).

58. Title 30, Section 116.3 of the Texas Administrative Code further provides that "[i]n order to be granted a permit to construct, the owner or operator of the proposed facility shall submit information to the [Texas Commission on Environmental Quality] which will demonstrate" compliance with applicable state and federal air pollution limits and standards. 30 Tex. Admin. Code § 116.3 (1992) [relevant provisions approved by EPA at 62 Fed. Reg. 44,087 (Aug. 19, 1997) (effective Oct. 20, 1997)].

ii. Texas Requirements for Application of BACT

59. Even while incorporating by reference the federal PSD rules promulgated under 40 C.F.R. § 52.21, the PSD provisions promulgated under 30 Tex. Admin. Code § 116.160(b)(1) specifically excluded application of the federal BACT requirements under 52.21(j). *See* 30 Tex. Admin. Code § 116.160(b)(1) (1995).

60. Elsewhere, however, the applicable regulations promulgated by the State of Texas provide for the separate requirement that "[t]he proposed facility will utilize the best available control technology, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility." 30 Tex. Admin. Code § 116.3(a)(3) (1992) [relevant provisions approved by EPA at 62 Fed. Reg. 44,087 (Aug. 19, 1997) (effective Oct. 20, 1997)].

61. Furthermore, in approving the Texas PSD SIP, EPA explicitly required that the State of Texas follow EPA's statutory interpretations and applicable policies, including its interpretation of the BACT definition as containing the following two "core criteria":

> First, a PSD applicant must consider the most stringent control technology (and associated emission limitation) that is available in conducting a PSD analysis. Second, if the applicant proposes as BACT a control alternative that is less effective than the most stringent available, it must demonstrate to the State through objective indicators that case-specific energy, environmental, or economic impacts renders that alternative unreasonable or otherwise not achievable.

54 Fed. Reg. 52,825 (Dec. 22, 1989).

The EPA determined that commitments provided by the State of Texas as a part of its PSD SIP review process were sufficient to commit the state to carry out the PSD program, held to include the proper conduct of BACT analyses, in accordance with the federal requirements established in the Act, applicable regulations, and EPA's statutory and regulatory interpretations. *See id.*

iii. Texas Requirements for Operating Permits

62. Title 40, Section 52.21(r) of the Code of Federal Regulations provides that:

> [a]ny owner or operator who constructs or *operates* a…modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a…modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

40 C.F.R. § 52.21(r)(1) (1994) (*emphasis added*).

63. Title 30, Section 116.1 of the Texas Administrative Code further requires that, even "[i]f a permit to construct is issued by [the State of Texas], the person in charge of the facility must apply for an operating permit pursuant to Section 116.3(b) of this title…within 60 days after the facility has begun operation, unless this 60-day period has been extended by the Executive Director." 30 Tex. Admin. Code § 116.1(a) (1991) [relevant provisions approved by EPA at 60 Fed. Reg. 49,788 (Aug. 27, 1995) (effective Nov. 27, 1995)].

64. Title 30, Section 116.3(b) subsequently provides that the granting of a permit to operate is conditioned upon the facility demonstrating that:

> (1) The facility is complying with the Rules and Regulations of the [State of Texas] and the intent of the Texas Clean Air Act.
>
> (2) The facility has been constructed and is being operated in accordance with the requirements and conditions contained in the permit to construct.

(3) The facility is being operated in accordance with any applicable new source performance standards promulgated by the [EPA] pursuant to authority granted under Section 111 of the [CAA], as amended.

(4) The facility is being operated in accordance with any applicable emission standard for hazardous air pollutants promulgated by the [EPA] pursuant to authority granted under Section 112 of the [CAA], as amended.

30 Tex. Admin. Code § 116.3(b) (1992) [relevant provisions approved by EPA at 62 Fed. Reg. 44,087 (Aug. 19, 1997) (effective Oct. 20, 1997)].

B. FACTUAL BACKGROUND

65. Respondent, Owens-Brockway Glass Container, Inc. (O-B), is a Delaware corporation.

66. As a Delaware corporation, Respondent is a "person" within the meaning of Sections 113(a) and 502 of the CAA, 42 U.S.C. §§ 7413(a) and 7661a, and as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

67. The Waco Facility is located at 5200 Beverly Drive, in the City of Waco in McLennan County, Texas.

68. The Waco Facility is owned and operated by Respondent, which is a wholly-owned subsidiary of Owens-Illinois, Inc., and is engaged in the manufacture of container glass for the food and beverage industry. The Waco Facility began operation in approximately 1944 as Owens-Illinois Glass Company and was subsequently transferred to O-B. The Waco facility was owned and operated by O-B at all times relevant to this NOV.

69. At the Waco Facility, Respondent operates three natural-gas-fired regenerative glass-melting furnaces (Furnaces A, B, and D), as well as other equipment that supports the glass manufacturing process, such as forming machines.

70. In April 2005, O-B obtained Permit No. 56759 for Furnace B at the Waco Facility, and in May 2005, O-B obtained Permit O2716 for Furnaces A and D at the Waco Facility.

71. By letters issued pursuant to the authority of Section 114 of the Act, 42 U.S.C. § 7414, dated July 5, 2006, and October 21, 2007 to the Waco Facility, EPA Region 6 required Respondent to submit specific information regarding its glass manufacturing facilities located within Region 6.

72. Respondent replied to EPA's Section 114 information requests to the Waco Facility, Respondent responded with four separate submittals dated October 9, 2006, December 22, 2006, December 13, 2007, and February 8, 2008.

73. Based upon a review of information gathered pursuant to EPA's Section 114 information requests, at all times relevant to the present cause of action, the Waco Facility would meet the definition of a "major stationary source," based upon the facility's potential to

emit more than 250 tons per year of at least one criteria pollutant (NO_x, SO_2, or PM) at any given time during the period in question.

C. VIOLATIONS

74. Violations of the Texas federally approved PSD program are federally enforceable pursuant to Section 113 of the CAA. 42 U.S.C. § 7413 (2008).

75. Respondent will be presumed to remain in violation as set forth herein, until it establishes continuous compliance with the above cited requirements.

76. At all times relevant to the current action, McLennan County, Texas was classified in 40 C.F.R. § 81.344 as being in an attainment area for the national air standard for SO_2, NO_X, and PM. Therefore, PSD rules applied to any modification or construction at the facility.

77. Upon review of the information provided by O-B, referenced above in Paragraph 722, EPA Region 6 has concluded that Respondent conducted systematic capital projects on furnaces at the Waco Facility which increased the facility's capacity to produce container glass.

78. Accordingly, these modifications to the Waco Facility represent a "new source," as Congress has defined that term under 42 U.S.C. § 7411(a)(2).

79. Furthermore, the modifications referenced below in Paragraphs 860 through 915, Paragraphs 86 through 971, and Paragraphs 92 through 97, meet the definition of major modification provided under both 40 C.F.R. § 52.21(b)(2)(i), because they represent a physical change in or a change in the method of operation of a major stationary source that resulted in a significant emissions increase of a regulated NSR pollutant (SO_2, NO_X, and PM); and a significant net emissions increase of that pollutant from a major stationary source.

a. Violation One. Unpermitted major modifications made between September 1989 and January 1990

80. In late 1989, Respondent added a 1,150 kW unit to Furnace A, resulting in a 2,490 kW electric boost system.

81. Based upon a review of information gathered pursuant to EPA's Section 114 information requests, it was determined that Respondent did "begin actual construction" to complete modifications, mentioned above in Paragraph 80, in or around September 1989.

82. This modification triggered a significant increase in SO_2 and PM emissions as defined under 40 C.F.R. § 52.21(b)(23)(i) (1989), meaning it therefore satisfies the definition of "major modification," under 40 C.F.R. § 52.21(b)(2)(i).

83. In failing to apply for or obtain authority from EPA, via necessary construction permits, prior to commencing construction on modifications made to Furnace A (detailed above in Paragraph 80) at the Waco Facility between September 1989 and January 1990, Respondent continues to be in violation of federal requirements for preconstruction permits under applicable PSD regulations, specifically those provided under section 52.21(i)(1). *See* 40 C.F.R. § 52.21(i)(1) (1989).

84. In failing to apply BACT to major modifications made to Furnace A (detailed above in Paragraph 80) at the Waco Facility between Sept 1989 and Jan 1990 and commencing operations each day thereafter without applying necessary technologies under BACT, Respondent continues to accrue violations of applicable federal PSD requirements for major modifications, specifically those provided under section 52.21(j). *See* 40 C.F.R. § 52.21(j)(1) (1989).

85. In reinitiating operations at the Waco Facility, in or around Jan 1990, without obtaining or applying for the required permits prior to or following the completion of a major modification to Furnace A (detailed above in Paragraph 80), and in continuing operations thereafter, Respondent continues to accrue violations of applicable federal PSD regulations, specifically those under sections 52.21(r) and (w). *See* 40 C.F.R. § 52.21(r)(1) and (w) (1989).

b. Violation Two. Unpermitted major modifications made between April 1992 and May 1992

86. In 1992, Respondent completed a major rebuild at Furnace B of the Waco Facility. Concurrent with the major rebuild, Respondent made the following changes that resulted in an increase in glass production, including: changes to the furnace melter depth, furnace overcoating, and the installation of additional electric boost capacity.

87. One or more of these changes detailed above in Paragraph 866 resulted in a significant increase in NO_x and SO_2 emissions as defined under 40 C.F.R. § 52.21(b)(23)(i) (1991) and (1992).

88. Pursuant to a review of information gathered pursuant to EPA's Section 114 information requests, it was determined that Respondent did "begin actual construction" to complete modifications, mentioned above in Paragraph 866, on or about April 1992.

89. In failing to apply for or obtain authority from EPA, via necessary construction permits, prior to commencing construction on modifications made to Furnace B and the transformer (detailed above in Paragraph 866) at the Waco Facility between April 1992 and May 1992, Respondent continues to be in violation of federal requirements for preconstruction permits under applicable PSD regulations, specifically those provided under section 52.21(i)(1). *See* 40 C.F.R. § 52.21(i)(1) (1991) and (1992).

90. In failing to apply BACT to major modifications made to Furnace B and the transformer (detailed above in Paragraph 86) at the Waco Facility between April 1992 and May 1992, and commencing operations each day thereafter without applying necessary technologies under BACT, Respondent continues to accrue violations of applicable federal PSD requirements for major modifications, specifically those provided under section 52.21(j). *See* 40 C.F.R. § 52.21(j)(1) (1991) and (1992).

91. In reinitiating operations at the Waco Facility, in or around May 1992, without obtaining or applying for the required permits prior to or following completion of major modifications to Furnace B and the transformer (detailed above in Paragraph 866), and continuing operations thereafter, Respondent continues to accrue violations of applicable federal PSD regulations, specifically those provided under sections 52.21(r) and (w). *See* 40 C.F.R. § 52.21(r)(1) and (w) (1991) and (1992).

c. Violation Three. Unpermitted major modifications made between December 1997 and February 1998

92. In 1998, Respondent completed a major rebuild at Furnace D of the Waco Facility. Concurrent with the major rebuild, Respondent made the following changes that resulted in an increase in glass production, including: modifying forming lines along with new forehearths, new raw material charging to the furnace, a change in firing port configuration and the installation of additional electric boost capacity.

93. One or more of the changes referenced above in Paragraph 92 resulted in a significant increase of PM emissions, as defined in section 52.21(b)(23). *See* 40 C.F.R. § 52.21(b)(23) (1997).

94. Pursuant to a review of information gathered pursuant to EPA's Section 114 information requests, it was determined that Respondent did "begin actual construction" to complete modifications, mentioned above in Paragraph 92, on or about December 22, 1997.

95. In failing to apply for or obtain authority from the Commissioner, via necessary construction permits, prior to commencing construction on modifications made to Furnace D (referenced above in Paragraph 92) at the Waco Facility between December 1997 and February 1998, Respondent continues to be in violation of federal and state requirements for preconstruction permits under applicable PSD regulations, specifically those provided under 40 C.F.R. § 52.21(i)(1), as well as those rules promulgated by the State of Texas under Title 30, Sections 116.1 and 116.3 of the Texas Administrative Code. *See* 40 C.F.R. § 52.21(i)(1) (1997); *see also* 30 Tex. Admin. Code § 116.1 (1991) and 30 Tex. Admin. Code § 116.3 (1992).

96. In failing to apply BACT to major modifications made to Furnace D (referenced above in Paragraph 92) at the Waco Facility between December 1997 and February 1998, and commencing operations each day thereafter without applying necessary technologies under BACT, Respondent continues to accrue violations of applicable federal and state PSD requirements for major modifications, specifically those provided under 30 Tex. Admin. Code § 116.3(a)(3). *See* 30 Tex. Admin. Code § 116.3(a)(3) (1992).

97. In reinitiating operation of Furnace D at the Waco Facility without obtaining or applying for the required permit to operate following completion of major modifications (referenced above in Paragraph 92) on or around February 20, 1998, since May 1998, Respondent continues to accrue violations of applicable federal PSD regulations, specifically those provided under 40 C.F.R. § 52.21(r), as well as those provided under 30 Tex. Admin. Code §§ 116.1(a) and 116.3(b). *See* 40 C.F.R. § 52.21(r)(1) (1997); *see also* 30 Tex. Admin. Code § 116.1(a) (1991) and 30 Tex. Admin. Code § 116.3(b) (1992).

d. Violation Four. Failure to include BACT in the Title V permit for the Waco Facility.

98. The Title V permits Respondent obtained from TCEQ in April 2005 and May 2005, referenced above in Paragraph 700, did not include BACT for NO_x, SO_2, and PM.

99. Accordingly, the Title V permits issued to O-B in April 2005 and May 2005, did not include emission limitations for NO_x, SO_2 and PM that assure compliance with the PSD requirements of the Act and the Texas SIP.

100. In failing to assure compliance with all applicable emission limitations, specifically those requiring that it incorporate BACT for NO_x, SO_2, and PM into its permit applications and the subsequent permits, Respondent violated and continues to violate Sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7761a(a) and 7761c(a), as well as 40 C.F.R. §§ 70.5 and 70.6(a) (2007).

D. ENFORCEMENT

Section 113(a)(1) of the CAA, 42 U.S.C. § 7413(a)(1), provides that any time after the expiration of 30 days following the date of the issuance of a Notice of Violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, issue an administrative penalty order pursuant to Section 113(d), or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), provides in part that if the Administrator finds that a person has violated, or is in violation of Title V of the CAA, including a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under Title V, the Administrator may issue and administrative penalty order under Section 113(d), issue an order requiring compliance with such requirement or prohibition, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties.

E. OPPORTUNITY FOR CONFERENCE

O-B may, upon request, confer with EPA. The conference will enable O-B to present evidence bearing on the finding of violation, on the nature of the violations, and on any efforts it may have taken or proposes to take to achieve compliance. O-B has a right to be represented by counsel. A request for a conference must be made within ten (10) days of receipt of this Notice, and the request for a conference or other inquiries concerning the Notice should be made in writing to:

Jan Gerro (6RC-EA)
Senior Enforcement Counsel
Air, Pesticides & Toxics Branch
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

If you have any legal questions, please feel free to call Ms. Gerro at (214) 665-2121, or Ms. Michelle Kelly for technical questions at (214) 665-7580.

F. EFFECTIVE DATE

This NOV shall become effective immediately upon issuance.

Dated: 4/29/09

John Blevins
Director
Compliance Assurance and
Enforcement Division