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FEBRUARY 5, 2020 | PUBLICATION

Client Alert: U.S. EPA Withdraws 'Once-In, Always-In' Policy for Sources Regulated Under Section 112 of the Clean Air Act

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On January 25, 2018, U.S. EPA issued a memorandum entitled "Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act." The memorandum addresses whether a source is subject to the stringent Maximum Achievable Control Technology (MACT) standards for sources that emit Hazardous Air Pollutants (HAPs) listed under Section 112 of the Clean Air Act. This policy could allow sources emitting greater than 10 tons per year or more of a single HAP or 25 tons per year or more of a combination of HAPs to avoid MACT standards by taking federally enforceable limits below these thresholds.

What is MACT?

Section 112 of the Clean Air Act identifies 187 HAPs and mandates that a source is a "major source" if the source "emits or has the potential to emit considering controls, in the aggregate 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." CAA §112(a)(1). Sources that emit or have the potential to emit below these thresholds are deemed "area sources." U.S. EPA has promulgated over 130 MACT standards, which can be found at 40 C.F.R. Part 63.

In developing MACT standards, U.S. EPA looks at the level of emissions control that is achievable by the best

performing sources for similar source categories (e.g., dry cleaning facilities). Methods of control can include process changes, substitution of materials, modifications, enclosed systems to eliminate emissions, collection and treatment of pollutants, and design, equipment, work practices, or operational standards that would help reduce emissions. CAA §112(d)(2). The level of control establishes a "MACT floor." The MACT floor is the minimum level of control requirements allowed for new and existing sources.

What Does This Policy Do?

The policy issued in late January reverses former guidance that was outlined in a May 16, 1995, memorandum issued by John Seitz entitled, "Potential to Emit for MACT Standards – Guidance on Timing Issues." Under this policy, major sources could obtain a synthetic minor permit by accepting federally enforceable limits that "capped" emissions below the thresholds discussed above as long as those limits were obtained prior to the initial compliance date of the relevant MACT standard. If a major source failed to secure a synthetic minor permit prior to the compliance date, the source was automatically subject to the MACT standard and could not request synthetic minor emission limits (hence – "once-in, always-in"). Thus, facilities that either installed controls or downsized so that their emissions were below the MACT thresholds were still subject to the more stringent MACT standards.

This new policy will allow sources to be reclassified as area sources and thereby avoid the MACT standards. The memorandum states "the plain language of the definitions of 'major source' in CAA section 112(a)(1) and of 'area source' in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit (PTE) [HAPs] below the major source thresholds …." Jan. 25, 2018 Memorandum, p. 1. Thus, sources currently subject to MACT could limit their PTE below the threshold and be reclassified as an area source not subject to MACT.

For those sources that already have a PTE below the 10 tons per year or more of any HAP or 25 tons per year or more of a combination of HAPs, if reclassified as an area source, this policy will reduce the monitoring, recordkeeping, and reporting requirements under MACT. For sources still classified as a major source, this policy could encourage voluntary emission controls in order to achieve synthetic minor enforceable emission limits, thereby reducing their regulatory burden.

U.S. EPA intends to publish a Federal Register notice and take comments on regulatory language that will reflect its "plain language" interpretation of Section 112 of the Clean Air Act. Jan. 25, 2018 Memorandum, p. 2.

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