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Client Alert: U.S. EPA Issues Policy Intended to Ease Pre-Construction Permitting Requirements for New and Modified Industrial and Manufacturing Sources

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In what is now clear to be a series of policy changes to ease air permitting requirements for industrial and manufacturing facilities, U.S. EPA has issued its second memorandum entitled “Project Emissions Accounting under the New Source Review Preconstruction Permitting Program” (Pruitt Memo.).

In February, I released a Client Alert regarding U.S. EPA reversing its “Once-In, Always-In” Policy. 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 addressed whether an industrial or manufacturing source was 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. U.S. EPA’s policy would allow sources emitting greater than 10 tons per year 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. *To read more about this Client Alert, click here.*

On March 13, 2018, U.S. EPA outlined its policy addressing its implementation of preconstruction permitting requirements under the Clean Air Act’s New Source Review (NSR) provisions. The goal of this policy is to further ease the regulatory burden and encourage new projects at industrial and manufacturing facilities.

What Is New Source Review?

The Clean Air Act requires the promulgation of primary and secondary National Ambient Air Quality

Standards (NAAQS). CAA §109. The primary NAAQS are set by considering "criteria and allowing an adequate margin of safety, [and] are requisite to protect the public health." CAA §109(b)(1). The secondary NAAQS are set by considering criteria that are protective of public welfare. CAA 109(b)(2). Since 1980, the NAAQS for the criteria pollutants have been reviewed from time to time and revised as necessary based on new science.

Once a NAAQS has been promulgated, states must either monitor or model the air quality within the state to determine if air quality meets the NAAQS. Areas with air quality that is at or below the NAAQS are considered to be protective of public health and welfare; these areas are designated as "attainment areas." Areas with air quality that is above the NAAQS are not considered to be protective of public health and welfare; these areas are designated as "nonattainment areas." Areas where there is a lack of information are designated as "unclassified areas." CAA §107.

In the 1977 Amendments to the Clean Air Act, U.S. EPA developed the NSR provisions that required a pre-construction permit for any new construction of a stationary source or a major "modification"[1] at an existing major stationary source in both attainment/unclassifiable areas and nonattainment areas. Permits for major sources for pollutants for which the area is designated attainment or unclassifiable are Prevention of Significant Deterioration (PSD) permits. Permits for major sources for pollutants for which the area is nonattainment are called Nonattainment New Source Review Permits (NNSR). NNSR permits have more stringent requirements due to the fact that the area is in nonattainment.

The NSR regulations outline how one determines if a PSD or NNSR permit is required. The policy discussed below addresses the issue of whether a source must obtain an NSR permit prior to construction at an existing source. Specifically, it addresses whether an owner or operator can consider both emissions increases and decreases in the first step of NSR applicability.

What Does This Policy Do?

For industrial and manufacturing facilities that are a source of pollutants, U.S. EPA requires an owner or operator to determine if a project[2] requires an NSR permit. Under Step 1, before beginning actual construction, one must determine if there is a "significant emissions increase" based on calculations[3] outlined in the regulations. If it is determined that there will be no significant emissions increase, an NSR permit is not required. If a significant emissions increase is projected to occur, one moves on to Step 2 where one determines whether a "significant net emissions increase" will occur taking into consideration "any other increases or decreases in actual emissions at the source that are contemporaneous with the particular project and are otherwise creditable."[4] Pruitt Memo., p. 2 (March 13, 2018). "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. 52.21(a)(2)(iv)*(b)*.

Previous U.S. EPA Administrations did not allow an owner or operator to consider both emissions increases and decreases in Step 1 of determining NSR applicability under 40 CFR 52.21(a)(2). That is, if a project included a modification of a source, retirement of another source, and refurbishment of another source, Step 1 only allowed one to look at emission increases due to the modification of a source; one had to ignore any resulting emissions decreases as a result of retirement or refurbishment. Thus, these projects were more likely to show a significant emissions increase, require an assessment of emissions under Step 2, and were more likely to require an NSR permit.[5] The current Administration believes "those prior agency statements that interpreted the NSR regulations as precluding project emissions accounting[6] have had the practical effect of preventing certain projects from going forward and significantly delaying others, even though those projects would not have resulted in a significant emissions increase." Pruitt Memo. at p. 2. Thus, U.S. EPA

has revised its interpretation of the NSR provisions to allow an owner or operator to consider both emissions increases and emissions decreases when determining if there has been a "significant emissions increase" under Step 1.[7]

The practical effect for industrial and manufacturing sources is that if, based on an accounting of emissions increases and decreases during Step 1, there is no significant emissions increase, it does not need to assess emissions under Step 2, and an NSR permit is not required. This decreases the regulatory burden on moving forward with new projects and it is U.S. EPA's anticipation that this will encourage companies to consider expansions to their current industrial and manufacturing facilities without triggering NSR.

It is important to note that even if a project does not trigger NSR, the State Authority still requires permits for any new construction; thus, before considering construction, it is important to consult with an attorney. U.S. EPA also warns that companies should not attempt to define new projects in a way to circumvent NSR "by characterizing the proposed project in a way that would separate into multiple projects those activities that, by any reasonable standard, constitute a single project." Pruitt Memo. at 9.

The memorandum concludes by indicating that U.S. EPA's next step in revising its air permitting policies is by addressing "project aggregation." Project aggregation is the determination of what constitutes a "single source" for assessing emissions and permitting applicability. It is anticipated that this policy, like the two we have seen thus far, will favor strengthening the industrial and manufacturing sectors.

Questions or concerns about Air Permitting, contact Cheri A. Budzynski.

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[1] Modification is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant not previously emitted." CAA §111(a)(4). A modification is considered "major" if the modification results in an increase of emissions above a specified rate.

[2] A project is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 CFR 52.21(b)(52).

[3] The regulations vary depending on the type of construction.

[4] "An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between: ***(a)*** The date five years before construction on the particular change commences; and ***(b)*** The date that the increase from the particular change occurs." 40 CFR 52.21(b)(3)(ii). "An increase or decrease in actual emissions is creditable only if: ***(a)*** The … reviewing authority has not relied on it in issuing a permit for the source …, which permit is in effect when the increase in actual emissions from the particular change occurs; and ***(b)*** The increase or decrease in emissions did not occur at a Clean Unit…. ***(c)*** As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the

listed source categories." 40 CFR 52.21(b)(3)(iii).

[5] *See, e.g.*, U.S. EPA, HOVENSA Gas Turbine Nitrogen Oxides (GT NOx) Prevention of Significant Deterioration (PSD) Permit Application – Emission Calculation Clarification (Mar. 30, 2010).

[6] That is, a consideration of both emissions increases and emissions decreases resulting from the project.

[7] When considering decreases, U.S. EPA's new policy does not require the decreases be credible or enforceable as is required under Step 2.