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Environmental Federation of Oklahoma
27th Annual Meeting & Trade Show
“2018 - Environmental Regulatory
Programs in Uncertain Times”

Certainty with Recent EPA Policy Changes?

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Recent EPA Policy Changes

- > Source determinations
 - ❖ Apr 30, 2018 letter: Interpreting “common control”
 - ❖ Sep 4, 2018 memo: Interpreting “adjacent”
- > PSD applicability
 - ❖ Dec 7, 2017 memo: Projected actual emissions
 - ❖ Mar 13, 2018 memo: Project emissions accounting
- > Other policy changes
 - ❖ May 9, 2018 memo: NAAQS Updates
 - ❖ Apr 17, 2017 memo: SILs for ozone and PM_{2.5}
 - ❖ Jan 25, 2018 memo: Once In, Always In
 - ❖ Aug 21, 2018 memo: “compliance”, not “enforcement”
- > More policy changes coming?

Source determination policy changes

- > Common control
 - ❖ 4/30/2018 letter from Bill Wehrum to PADEP (“Meadowbrook letter”)
- > Adjacent
 - ❖ 9/4/2018 memo from Bill Wehrum to Regional Air Div. Directors
- > *The third criteria, industrial source grouping (based on two-digit SIC code), including the support facility issue, has not been addressed*

Common control

(4/30/2018)

- > Focus should be on control over decisions that **affect the applicability of, or compliance with, air pollution requirements**
 - ❖ Power to *direct* (not just influence)
 - ◆ construction or modification of equipment
 - ◆ operation of equipment
 - ◆ installation or operation of pollution control equipment
 - ◆ monitoring, testing, recordkeeping, and reporting obligations
- > So, if each entity has autonomy with respect to its own permitting obligations, they are separate sources

Common control

(4/30/2018)

Example: A PCC plant that is bounded on all sides by a P&P mill



Adjacent

(9/4/2018)

- > 8 pages to define one word!
- > Comment period closed on 10/5
- > Does not apply to O&G industry
 - ❖ *81 FR 35622 (2016)*
- > Functional interrelatedness is not a consideration
- > ... “**proximity**,” which generally conveys the concept of side-by-side or neighboring (with allowance being made for some limited separation by, for example, a right of way), must exist, and the determination must ultimately comport with the “common sense notion of a plant”

Adjacent

(9/4/2018)

Example 1: Limestone quarry and lime processing plant separated by ~1.5 miles



Adjacent

(9/4/2018)

Example 2: Petroleum products terminal and refinery, ~6 miles apart



Source determination policy changes

- > Usefulness?
 - ❖ Need permitting action to separate sources that have historically been permitted as one.
 - ❖ What if the policies get reversed?

PSD applicability policy changes

> Projected actual emissions

- ❖ 12/7/2017 memo from Scott Pruitt to Regional Administrators

> Project emissions accounting

- ❖ 3/13/2018 memo from Scott Pruitt to Regional Administrators

> *These issues are part of the concept of “major modification” in PSD*

- ❖ *Note that the recent Affordable Clean Energy (ACE) rule also potentially changes the test for utilities*

Projected actual emissions (12/7/2017)

Background - PSD Applicability Step 1 "Test"

$$\begin{array}{|c|} \hline \text{Future} \\ \text{Projected} \\ \text{Actual} \\ \text{Emissions} \\ \text{(PAE)} \\ \hline \end{array} - \begin{array}{|c|} \hline \text{Could} \\ \text{Have} \\ \text{Accom'd} \\ \text{Emissions} \\ \text{(CHA)} \\ \hline \end{array} - \begin{array}{|c|} \hline \text{Baseline} \\ \text{Actual} \\ \text{Emissions} \\ \text{(BAE)} \\ \hline \end{array} = \begin{array}{|c|} \hline \text{Project} \\ \text{Emissions} \\ \text{Increase} \\ \text{(PEI)} \\ \hline \end{array}$$

If $\begin{array}{|c|} \hline \text{Project} \\ \text{Emissions} \\ \text{Increase} \\ \text{(PEI)} \\ \hline \end{array} \geq \begin{array}{|c|} \hline \text{Significant} \\ \text{Emission} \\ \text{Rate} \\ \text{(SER)} \\ \hline \end{array}$ Then $\begin{array}{|c|} \hline \text{PSD} \\ \text{Review} \\ \text{is} \\ \text{Required} \\ \hline \end{array}$

Projected actual emissions (12/7/2017)

Background - Definition of PAE (and CHA)

- > PAE...shall consider all relevant information...
 - ❖ historical operational data,
 - ❖ the company's own representations,...
 - ❖ the company's highest projections of business activity,
 - ❖ the company's filings...
- > ...shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project
 - ❖ 1. that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and
 - ❖ 2. that are also [*predominantly*] unrelated to the particular project, including any increased utilization due to product demand growth

Projected actual emissions (12/7/2017)

- > Intent to clarify the PAE test in light of DTE Energy cases
 - ❖ *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013)
 - ❖ *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017)
- > **EPA will not second guess a source's projections (PAE or CHA)**
 - ❖ Projections may consider intent to manage post-project actual emissions
- > **Enforceability is not required for PAE**
- > Post-project actual emissions are the ultimate determination basis
- > States with approved NSR programs have final say

Projected actual emissions (12/7/2017)

> Usefulness?

- ❖ Not far from ODEQ's historic view of PAE and CHA
- ❖ Using the PAE test has always required extensive case-by-case scrutiny

Project emissions accounting

(3/13/2018)

Background - PSD Applicability Step 1 “Test”

$$\boxed{\text{(PAE)}} - \boxed{\text{(CHA)}} - \boxed{\text{(BAE)}} = \boxed{\text{(PEI)}}$$

- > Historically, PEI must be > 0
 - ❖ 71 FR 54235 (2006) and 74 FR 2376 (2009)
 - ❖ 1990 Draft NSR Workshop Manual
- > Even if the “project” includes unit shutdowns or other emissions reductions
- > Decreases were considered only in Step 2 Contemporaneous “Netting”

Project emissions accounting

(3/13/2018)

- > All project-related emissions changes - increases and decreases - are considered in Step 1
- > The source is responsible for defining the “project”
- > A decrease need not be creditable or enforceable as a practical matter in order to be considered at Step 1

Project emissions accounting

(3/13/2018)

Example - 2018 Boiler Replacement Project (NO_x)

- > New Boiler: + 45 tpy
- > Old Boiler: - 25 tpy
- > Contemporaneous Changes: + 30 tpy
- > Old policy:
 - ❖ Step 1 PEI = 45 tpy
 - ❖ Step 2 NEI = $45 - 25 + 30 = 50$ tpy > 40 tpy SER
- > New policy:
 - ❖ Step 1 PEI = $45 - 25 = 20$ tpy < 40 tpy SER

Project emissions accounting

(3/13/2018)

> Pros:

- ❖ Simplifies permitting process
- ❖ Incentivizes modernization/efficiency projects

> Cons:

- ❖ Reverses years, if not decades, of fairly consistent policy decisions to exclude “project netting”
- ❖ *EDF v. U.S. EPA*, Case #18-1149 D.C. Circuit Court of Appeals (6/25/2018)

> Questions:

- ❖ Pushback from permit writers about enforceability of step 1 decreases?
- ❖ Enforcement risks if policy is re-reversed?
- ❖ Creditability of step 1 decreases in future projects?

Other policy changes

> NAAQS updates

- ❖ 5/9/2018 memo from Scott Pruitt to Assistant Administrators (“Back-to-Basics”)
 - ◆ Meet deadlines, address all CAA provisions, streamline/standardize, differentiate science and policy judgments, issue timely implementation regs and guidance

> PSD SILs for ozone and PM_{2.5}

- ❖ 4/17/2018 memo from Peter Tsigotis to Regional Air Division Directors
 - ◆ *Sierra Club v. U.S. EPA*, Case #18-1167 D.C. Circuit Court of Appeals (6/18/2018)

Other policy changes

- > Transition from National *Enforcement* Initiatives to National *Compliance* Initiatives
 - ❖ 8/21/2018 memo from Susan Bodine to Regional Administrators
 - ◆ Align NCIs with strategic plan, fully engage states/tribes, enhance the use of compliance assurance tools, extend priorities cycle to four years
- > Once In, Always In
 - ❖ 1/25/2018 memo from Bill Wehrum to Regional Air Division Directors
 - ◆ CAA places no temporal limitations on the ability of a [major] source to become an area source
 - ◆ Expect rulemaking

More policy changes coming?

- > Project aggregation (reconsidering 2009 rule)
- > Ambient air definition
- > Debottlenecking and identifying associated emissions units
- > RMRR
- > Pollution control projects
- > Permitting of biogenic CO₂ emissions (2/13/2018 letter from Pruitt to New Hampshire Governor)

For additional information

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