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NSR Issues in Reform

Applicability, Project/Source Aggregation, Pre-permit Activities

CIBO Environmental Committee
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Topics

- > Actual to Projected Actual (ATPA)
 - ❖ Backbone of NSR applicability for existing sources
- > Proper Accounting of Emissions / Aggregation
 - ❖ Two separate matters: Source aggregation and Project aggregation
- > Pre-permit Activities
 - ❖ What may I do before I have a final PSD/NSR permit?
- > What Next in the Grand Scheme?

Actual to Projected Actual Guidance

Summary of Applicability Equations

- > Net Emissions Increase/Change (NEI)
 - ❖ $NEI = PEI - CCD + CCI$
- > Project Emissions Increase (PEI)
 - ❖ New Units (less than two years old)
 - ◆ $PEI = PTE - 0$
 - ❖ Existing/replacement Units (rule allows 2 calculation options)
 - ◆ $PEI = PAE - BAE$ OR
 - ◆ $PEI = PTE \text{ (post modification)} - BAE$

PAE = Projected Actual Emissions - Emissions unrelated to change and "could have accommodated" during baseline period are excluded

BAE = Baseline Actual Emissions

PTE = Potential to Emit - Often set by permit as a "synthetic minor" limit to avoid PSD permitting

CCD = Contemporaneous Creditable Decreases

CCI = Contemporaneous Creditable Increases

Emissions Documentation

2017 Pruitt (EPA) Memo

> Quotes from the Pruitt Memo

- ❖ “Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, **the court decision does not compel the EPA to pursue enforcement in such situations.**”
- ❖ “The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA’s discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.”
- ❖ “...the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations.”
- ❖ “It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source’s pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability.”
- ❖ “One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to **actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring.** The EPA notes that the rule language specifically provides that “all relevant information” shall be considered in making a projection....Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.”
- ❖ “...**the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur.**”

What's Next

- > Given this subject can be clarified by memo guidance or policy - expect some new, hopefully "helpful", guidance to deal with prior conflicting and constraining guidance
- > Possible topics: "Could have accommodated" and "Product demand growth"
 - ❖ Region 3 memo (Northampton Energy, 2010) on excludable emissions when changing fuels
 - ❖ *"In other words, the emissions that "could have been accommodated" are not defined by all the many different operating conditions that could have occurred during the baseline period; rather emissions that may be excluded are limited by the proposed operating conditions used to project emissions into the future."*
 - ❖ *"However, for this example none of the projected maximum annual emissions from the new fuel can be excluded because all of the emissions that will occur after the project are related to the change in fuel."*
 - ❖ Step 2 "netting" - Region 5 memo (April 4, 2011 to IDEM)
 - ❖ *"The PSD and NNSR rules do not provide for the use of projected actual emissions in "step two" of the applicability test for calculating contemporaneous emissions increases and decreases."*

Aggregation: Sources and Projects

Source Aggregation

What's emission units my stationary source?

PSD - Stationary "Source" Definition

- > All of the pollutant-emitting activities which:
 - ❖ belong to the same SIC major group (or "*support activity*"), and
 - ❖ are located on one or more contiguous or adjacent properties, and
 - ❖ are under common control

- > Related: Sixth Circuit Case (August 7, 2012) - Summit Petroleum v. EPA - Ruling that addressed the second criteria in the definition of a major source

Source Aggregation - Issues/Options

- > Longstanding regulation and guidance. Should sources near to one another under some form of common control have emissions aggregated to determine if a source is subject to NSR to Title V?
- > Recent issues stemmed from O&G sector and resulted in the Summit Energy Case (MI)
 - ❖ Court rules against EPA -- adjacent means adjacent - which has thrown EPA into a quandary
 - "Summit...argues that the EPA's determination that **the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term "adjacent." We agree.**"*
 - ❖ Obama EPA attempts to contain this outcome to the 6th District by reliance on additional Regional Consistency (inconsistency) mechanisms
- > Given Summit and historic guidance on what constitutes a "support facility" -- new guidance could issued on the how to apply the "adjacent" test and the "support facility" test

Project Aggregation

Is it one project or more than one?

- > Generic regulatory definition of “Project”
 - ❖ “Project means a physical change in, or change in the method of operation of, an existing major stationary source.”
- > Historical concerns of subdividing a larger “Project” into smaller projects to avoid PSD/NSR
 - ❖ 3M Maplewood Guidance - 1993
 - ❖ “EPA stated in the 1989 Federal register notice that it is not possible to set forth, in detail, *the circumstances in which EPA considers an owner or operator to have evaded preconstruction review through minor permits, and thus subject itself to enforcement sanctions under §§13 and 167 from the beginning of construction.*”
- > Bush EPA Proposed Reform Proposals never finalized, never full withdrawn either

Project Aggregation- Issues/Options

- > Given that determinations for project aggregation are governed by 3M Maplewood, additional clarification could be completed through memo
- > However, better yet, there are options to pickup the Bush EPA proposals and move them forward into regulation
 - ❖ Physical causation, legal causation

Pre (PSD) Permit Activities

Pre-Permit Activities

- > PSD/NSR is a “pre-construction” permit program
- > PSD/NSR projects are often time critical while NSR permits are issued at glacial speeds
- > What may I do in terms of construction before I have my final pre-construction PSD permits (even if I’m willing to conduct it at risk)?

EPA Region 3 Training Slide

“Begin Actual Construction”

- Initiation of physical, on-site, construction activities on an emissions unit:
 - Must be of a permanent nature;
 - Examples include building supports, foundations, underground piping, etc
 - Would not include construction of support facilities such as roadways, ancillary buildings, etc.
- This term is used to define the activities a facility may engage in prior to obtaining a permit.
- Conversely, by default, it defines activities a facility may not engage until a permit is issued.

Pre-Permit Activities Issues/Options

- > What constitutes “begin actual construction”?
- > Current guidance suggests any permanent installations related to a PSD project (more than just the emissions sources) is a prohibited pre-permit activity
- > Many (state) minor NSR programs allow for more lenient pre-permit activities than EPA does
- > Additional guidance on this subject would be helpful to reduce some “bright lines” on what constitutes “begin actual construction” established via memo
- > More timely permit review and issuance processes would mitigate some issues

What Next in the Grand Scheme?

What Next? (1/2)

- > Asst. Administrator Wehrum's 6 priorities:
 1. Clean Power Plan
 - ◆ Stay "inside the fence", traditional 111(d) NSPS
 2. MATS
 - ◆ Co-benefit analyses are incorrect, but can you un-ring the bell?
 3. 2015 Ozone NAAQS
 - ◆ The basis for the numeric standard is weak
 4. Methane for O&G
 5. NSR
 6. GHGs Standards for Cars/Trucks
- ❖ "Then, everything else..."

What Next? (2/2)

- > Things being openly discussed amongst allies:
 - ❖ Memo a month from EPA on NSR/Air issues
 - ❖ Some rulemaking to put “stakes in the ground”
 - ◆ Co-benefits
 - ◆ NAAQS setting
 - ◆ Etc
 - ❖ Lots of discussion on “The Hill”
 - ◆ House: Some action on legislation in the House
 - ◆ Senate: Can they get 60 votes for anything? How many presidential contenders are there on the EPW committee?



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