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EPA Finalizes Key NSR Reform Rule That Will Allow Consideration of Emissions Decreases When Assessing NSR Applicability

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On November 24, 2020, EPA published a final rule that changes how facilities can calculate their emissions when assessing permitting requirements under the Clean Air Act's New Source Review (NSR) program. Under the final rule, facilities will be able to include emissions decreases as well as increases when assessing NSR applicability for a particular project. This is a significant change that may help some facilities avoid triggering NSR requirements.

Key Takeaways

- This change codifies a 2018 memorandum from then?Administrator Scott Pruitt clarifying that both increases *and* decreases in emissions resulting from a proposed project can be considered in Step 1 of the NSR applicability test.
- EPA contends that the rule will allow sources to undertake projects that may be environmentally beneficial but that may be forgone if required to undergo burdensome Step 2 analysis.
- The size of the rule's impact will hinge on (1) the degree to which state and local air agencies that implement the NSR program through EPA-approved State Implementation Plans (SIPs) adopt the rule, (2) the outcome of inevitable legal challenges to the rule, and (3) whether the incoming Biden Administration declines to defend the rule or pursues a replacement rule.

NSR Permitting Background

The Clean Air Act's NSR program requires facilities to obtain a permit in advance of constructing a new major stationary source or undertaking a "major modification" to an existing major source. Since the early 2000s, EPA regulations have set out a two-step test to determine if a facility must obtain a NSR permit for a physical change or a change in the method of operation, each of which is often referred to as a "project." A project is a "major modification" if it would result in a significant emissions increase of an NSR pollutant (Step 1) and a significant net emissions increase of the NSR pollutant from the source, taking account of emissions increases and decreases attributable to other

projects undertaken at the source (Step 2).

The key difference between Step 1 and Step 2 is that Step 2 includes *source-wide* emissions decreases and increases over a five-year period. Therefore, *project* emissions decreases could be nullified by a previous project at the *source* that involved emissions increases during Step 2, which could trigger costly major NSR requirements.

What Is EPA Changing?

The rule amends EPA's NSR regulations to clarify that sources may consider both emissions increases and decreases during Step 1 (a method EPA refers to as "project emissions accounting"). Specifically, the rule adopts provisions specifying that the phrase "sum of the difference" in the NSR applicability tests for new and existing units allows a source to total both emissions increases and decreases. Additionally, for consistency, the rule revises the language of the hybrid test for projects that involve both new and existing units to change "sum of the emissions increase" to "sum of the difference."

The rule also states that sources should apply EPA's 2018 "project aggregation" policy when defining a project's emissions increases and decreases for purposes of Step 1. The policy's "substantially related" test calls for sources to "aggregate emissions from nominally separate activities when there is an apparent technical or economical interconnection between those activities." The policy also includes a "rebuttable presumption that activities that occur outside a 3-year period are not related and should not be grouped into one project." The final rule's embrace of the "project aggregation" policy marks a reversal from the proposed rule, which would have given sources even more leeway to determine the decreases attributable to the project and that could therefore be counted under Step 1.

What's Next?

The final rule becomes effective December 24, 2020 and will be binding on EPA and permitting authorities that have been delegated NSR federal authority. EPA did not make adoption of the rule mandatory for state and local air agencies with SIP-approved NSR programs, which means they can adopt these changes at their discretion.

While the final rule represents a common-sense NSR reform aimed at rationalizing NSR applicability determinations and permitting, it has its critics and is likely to be challenged in the D.C. Circuit. Although EPA addressed the concerns of many critics of the proposed rule by including the "substantially related" test for project aggregation in the final rule, critics of the rule have argued that it:

1. Could enable NSR circumvention by allowing facilities to proffer Step 1 emissions decreases that turn out to be only temporary reductions;
2. Does not require that Step 1 decreases be enforceable, unlike Step 2 decreases and even though EPA will not second guess those decreases in light of EPA's 2017 Actual-to-Projected-Actual Applicability Test memorandum; and
3. Creates an impermissible NSR exemption in light of D.C. Circuit case law in *New York v. EPA* finding that Congress's use of the expansive word "any" in describing the emissions-increasing changes that qualify as a "modification" under Clean Air Act § 111(a)(4) precludes EPA from excluding such changes from NSR.

It is unclear whether the Biden Administration will reverse direction on this and other NSR rules and guidance issued by the Trump Administration. Accordingly, regulated entities should carefully monitor future developments on this and related rules.

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