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New US EPA Memorandum Suggests a Hand's-Off Approach to NSR Applicability Determinations

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On December 7, 2017, US EPA Administrator Scott Pruitt issued a memorandum to all Regional Administrators to offer guidance regarding the Agency's interpretation of New Source Review (NSR) preconstruction permitting requirements in response to recent decisions from the Sixth Circuit in *EPA v. DTE Energy Co*. Highlighting the lack of unanimity among the individual Sixth Circuit judges and the ambiguity left by the decisions, the Administrator's memo seeks to "explain to stakeholders how EPA plans to proceed in implementing and exercising its authority" relating to NSR applicability determinations.

In general, the guidance should be welcomed by the regulatory community as the Administrator provides a degree of clarity regarding US EPA's interpretation of the NSR requirements, takes the position that US EPA will not "second guess" applicability determinations performed by facility owners and operators, and that US EPA will effectively exercise a light touch when it comes to NSR enforcement decisions.

NSR Review Background and the DTE Energy Appellate Decisions

A central question in the DTE Energy litigation was what information may be considered in determining whether a proposed project triggers NSR permitting requirements. In a nutshell, NSR applicability involves the assessment of whether the anticipated air pollutant emissions from the project constitute a "major source," or a "major modification" when the emissions result in a significant emissions increase (and significant net emissions increase). Where NSR is triggered, a major source permit is required—applying the Prevention of Significant Deterioration rules for the pollutants for which an area is in attainment with the National Ambient Air Quality Standards (NAAQS), or the nonattainment NSR rules for the pollutants for which the area is not in attainment. Although the assessment may seem straight-forward, application of the regulatory framework is anything but simple, as illustrated by the DTE case.

As covered previously, DTE had performed an applicability determination for a boiler replacement project at its Monroe, Michigan power plant, which concluded that the project would not trigger NSR permitting. Although an emissions increase was identified, DTE determined that it fell under the "demand growth exclusion," which provides that any projected emissions increases unrelated to the project are assumed to result from growth in product demand and therefore may be excluded when

calculating the emission increase associated with the project. DTE provided notification of its non-applicability determination to the Michigan Department of Environmental Quality, which took no action on the notification. However, prior to commencing construction, US EPA issued a notice of violation and brought a suit for preliminary injunction, alleging that the project constituted a major modification and must obtain an NSR permit prior to beginning construction. Although the district court found that enforcement was premature until such time that there is actual emission data demonstrating that a major modification has occurred, the Sixth Circuit in March 2013 held that an enforcement action could be brought based solely upon objections to the source's determination of projected actual emissions before construction of the project commenced.

The case was then remanded back to the district court, which in March 2014 granted DTE summary judgment thereby blocking US EPA's request for preliminary injunction, and holding that US EPA does not possess "unfettered authority" to challenge DTE's emissions projections.

In January 2017, the Sixth Circuit disagreed and in a sharply worded decision stated that: "Apparently, it is necessary to reiterate that the applicability of NSR must be determined before construction commences and that liability can attach if an operator proceeds to construction without complying with the preconstruction requirements in the regulations." The matter was once again remanded to the district court, pointing out that post-construction data could not be used to show that a project is not a major source.

US EPA Adopts DTE's Position

Despite the Sixth Circuit's reemphasized position that post-construction data may not be used to justify pre-construction applicability determinations, the Administrator takes the contrary position in the memo, stating that "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."

The Administrator side-steps the Sixth Circuit's conclusion regarding post-construction data and instead focuses on an interpretation of the "actual-to-projected-actual applicability test." Under the test, any emissions increase is determined by comparing Baseline Actual Emissions to Projected Actual Emissions (both defined terms in the regulations), with the projected actual emissions based on the maximum emission rate in any year over the next five or ten years following the change (with the regulations defining "projected actual emissions" in part as the maximum annual rate projected over 5 or 10 years depending on whether the unit resumes regular operation after the project or there is an increase to design capacity or potential to emit). Applicable regulatory language authorizes the Administrator to consider "all relevant information" with regard to assessing projected actual emissions, including taking into account a facility's intent to actively manage future emission from a project to prevent a significant emissions increase.

US EPA highlights the 2002 NSR Reform objective, which was to "avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project." The Administrator observes that the approach taken by US EPA in the DTE case inserted pre-project review by the regulatory authority despite there being "no mechanism for agency review of procedurally compliant emission projections."

Consequently, the Administrator offers two key conclusions regarding NSR applicability determinations. First, that US EPA will not revisit a facility's applicability determination unless there

is a “clear error”:

> EPA intends to implement and exercise its authority under the NSR provisions to clarify that when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by “second guessing” the owner or operator’s emissions projections.

Second, US EPA will exercise its discretion and not pursue enforcement “unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur.” Here, US EPA will look to the actual emissions during the 5- or 10-year recordkeeping or reporting period to assess whether a significant emissions increase has occurred. As a result, the memo states that “the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.”

A Time for Optimism?

Although the memorandum offers some welcome certainty to the regulated community and a basis for optimism that NSR applicability determinations will be left unchallenged by the Agency, there are some notable limitations to the value of the guidance. While the memorandum is designed to “clarify the EPA’s current understanding regarding certain elements of the NSR regulations,” it also cautions that it “does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable.” Consequently, the absence of any binding effect means that this interpretation may change at any time and provides only persuasive authority.

Further, shortly after the memorandum’s issuance, the US Supreme Court declined to review the Sixth Circuit’s 2017 DTE decision, which effectively leaves the Sixth Circuit’s interpretation as the leading legal precedent. Remand proceedings may now proceed before the district court on the merits, which may produce additional developments independent of the Agency’s stated position in the guidance.

The memo also emphasizes that while US EPA-approved state NSR programs must be at least as stringent as federal requirements, they may be *more stringent* at the State’s discretion. Consequently, under established principles of cooperative federalism, any US EPA-approved state regulations would govern NSR applicability and state regulators may undertake enforcement more robustly than US EPA.

Although the Administrator’s more flexible approach to NSR applicability determinations should not come as a surprise to anyone following the Trump Administration’s goal of reducing regulatory burdens, the regulatory community should proceed with caution and give the memorandum appropriate weight in terms of long-range project planning. To the extent any planned projects may include an NSR applicability determination that relies upon projected actual emissions, owners and operators should consider engaging legal counsel to assess the applicability of the Administrator’s memorandum in the context of the Sixth Circuit’s decisions and to evaluate any potential risks.

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