Clean Air Act Regulatory and Permitting Developments

Doug Morrison | September 5, 2018

The Trump administration's Environmental Protection Agency has been quite active in reversing policies and guidance established by prior administrations. This initiative has resulted in the release of numerous EPA letters and memoranda with profound effect on Clean Air Act implementation. Time will tell whether these are of lasting effect. The critical factor will be whether state and local air quality authorities agree to implement the changes, which will make it harder for future administrations to rehash the issues.

TITLE V AIR OPERATING PERMITS/HAZARDOUS AIR POLLUTANTS

Action: EPA Memoranda Revoking 1995 Policy "Once Major, Always Major"
Date: January 25, 2018

A 1995 EPA memorandum states that sources with the potential to emit above the major source thresholds for hazardous air pollutants (HAP), as of the compliance date of any NESHAP standard, would forever be subject to that standard even if controls or other reductions brought emissions below the thresholds. This was called the "once in, always in" policy. The January 25 memorandum reverses that policy, and authorizes the reclassification of a major source to an area source at such time as the source takes enforceable limits on potential to emit below the major source thresholds.

This change provides opportunities to avoid the onerous burdens of compliance with NESHAP standards and can also result in avoidance of Title V Air Operating Permits. Some facilities are subject to Title V solely due to emissions of HAP and may be able to avoid Title V permitting by becoming an "area" or nonmajor HAP source. Because the burdens of NESHAP and Title V compliance can be extreme, this new policy can provide very significant regulatory relief for certain facilities. Some states are following EPA's lead, but they do not have to and we expect that some states will retain the "once in, always in" policy if their statutory authority allows them to be more stringent than federal requirements.

Action: EPA Memoranda on Source Aggregation and "Common Control" Test
Date: April 30, 2018

Facilities in close proximity can be judged to be the same "source" under a three part test: (1) same SIC code; (2) contiguous or adjacent; and (3) under common control. This is important because *aggregation* of several facilities that have "minor" source level emissions can result in a "major" source with significantly increased regulatory and permitting burdens.

Previously EPA relied on a support/dependency relationship factor, assessing whether one entity could direct or influence the operations of another entity, relying in large part on the contractual, economic and operational relationships between the two (e.g., the ability to influence production levels).

This memorandum invokes a new test that makes it harder to assert aggregation: Now, "control" means the power or authority to *dictate* decisions, not merely influence them. Thus, control exists when one entity has the power or authority to restrict another entity's choices and effectively dictate a specific outcome, such that the controlled entity lacks autonomy to choose a different course of action. This power and authority could be exercised through various mechanisms, including common ownership or managerial authority (the chain of command within a corporate structure, including parent/subsidiary relationships), contractual obligations (e.g., where a contract gives one entity the authority to direct specific activities of another entity), and other forms of control where, although not specifically delineated by corporate structure or contract, one entity nonetheless has the ability to effectively direct the specific actions of another.

[1] National Emissions Standards for Hazardous Air Pollutants (NESHAP), Clean Air Act § 112, 40 CFR Part 63.

EPA clarified that the focus of any common control issue should be on control over decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements and that dependency relationships should not be presumed to result in common control. If followed, this policy will enable joint ventures, partnership arrangements and other "sister" operations to be judged as separate sources and possibly avoid NESHAP, NSR, and Title V burdens.

NEW SOURCE REVIEW

Action: EPA Memoranda on Actual-to-Projected-Actual Test in Calculating Contemporaneous Emissions (2017 NSR Guidance)
Date: December 7, 2017

As part of its 2002 NSR reforms, EPA allowed the use of an Actual-to-Projected-Actual applicability test for major modifications, rather than the stricter Actual-to-Potential emissions test. The new test authorized *projections* of future emissions that sometimes in practice understated real emissions, and resulted in significant enforcement liabilities for failure to obtain permits. Under this test, EPA could "second guess" projections even when made in good faith with the best information available at the time.

The 2017 NSR Guidance clarifies the projected-actual test in meaningful ways: First, it says that the intent of an owner or operator to manage emissions can be considered in projecting future emissions. Second, it clarifies that a pre-project NSR applicability analysis prepared in accordance with the calculation procedures, that follows the applicable recordkeeping and notification requirements, will be deemed to meet pre-project source obligations, unless there is clear error (e.g. use of a wrong significance threshold). Most importantly, EPA claims that it will not substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

While quite helpful, this guidance is not codified in rule, and EPA expressly reserved the right to take enforcement action if projections are wrong. Care must be taken to prepare the best possible projections to avoid claims of "clear error." Caution is warranted when factoring future demand growth and excluding emissions increases resulting from that growth. It is imperative to keep good records related to all such projections.

Action: EPA Memoranda on Project Emission Accounting
Date: March 13, 2018

Major source new source review (NSR) permitting—either Prevention of Significant Deterioration (PSD) or nonattainment NSR—applies to sources that undertake physical or operational changes that result in a significant emissions increase. Prior EPA policy invoked a two-step NSR applicability test where EPA prohibited any consideration of emissions decreases in step one. Because a new emissions unit has zero baseline emissions and must be initially assumed to run 24/7, this skewed the applicability analysis toward a finding that the project is "significant" and "major." Then the only way to avoid major source permitting would be to conduct a complicated "netting" analysis to see whether emissions reductions can offset the inflated original estimate of emissions from the new boiler. This confusing and complicated process has over the years caused many business owners and managers to avoid environmentally beneficial equipment upgrades simply because the bureaucratic permitting costs and risks are too great.

This memorandum substantially changes step one in the NSR emissions calculation by allowing the consideration of emissions decreases if they are part of the same project. This will encourage inclusion of efficiency and pollution prevention efforts in project design. It also allows consideration of pollution controls as part of the project without the need to establish that such controls are already imposed by federally enforceable limits (such limits can be imposed upon project completion). The memo also reinforces the fairly well established notion that the permittee, and not the agency or citizen plaintiff, gets to define the "project."

Action: EPA Memoranda on PSD Significant Impact Levels (SILs)
Date: April 17, 2018

A proposed PSD source must demonstrate that it will not *cause or contribute* to a violation of the NAAQS or PSD increments. This is done through *air quality modeling*. SILs are levels below which emissions are presumed not to cause or contribute to a violation of ambient standards or increments and thus are very useful. EPA previously relied upon its authority under *Alabama Power v. Costle* to establish *de minimis* exemptions, but SILs promulgated in that manner were vacated by the D.C. Circuit in 2013. EPA's issuance of a 3-part package of memoranda establishes new grounds for SILs that will be helpful to sources navigating the complex world of PSD permitting. EPA issued a Guidance Memorandum, Legal Memorandum and a Technical Support Document to support this change.

In summary, EPA changed the technical basis for how it sets SILs, from the *de minimis* approach to a statistics based "air quality variability approach." The new method uses statistical analysis of variability to determine when changes are within the inherent variability of observed design values such that they are indistinguishable from the inherent variability in the measured atmosphere and may be observed even in the absence of the increased emissions from the new or modified source. Accordingly, EPA finds that such changes are "not meaningful" and "do not contribute to a violation of the NAAQS" or increments.

The Guidance should be of help to get projects permitted more easily, especially where impacts approach the levels of ambient standards or increments because it is statistically robust. The use of guidance rather than rulemaking avoids court challenges because it is by law nonbinding. This is counterintuitive, but when used the guidance will make it more difficult to challenge both the guidance itself as well as specific permitting decisions.