

NACAA Permitting and New Source Review Committee

Notes on EPA’s NSR and Title V-Related Actions Under Trump Administration

WORKING DRAFT IN PROGRESS / DISCUSSION DOCUMENT

Last Updated: January 27, 2020

Date	Action	Summary	Effects
10/16/2017	<u>PacifiCorp-Hunter Title V Petition Order</u>	Reversing longstanding precedent, EPA announces it will no longer review substantive NSR claims in a Title V petition	<ul style="list-style-type: none"> • Speeds EPA review of permits, petitions and S/L responses to comments • NSR issues need not be reviewed or addressed in Title V permitting/RTCs • Less opportunity for citizens/environmental groups to challenge NSR decisions • NOTE: Sierra Club petition for review in D.C. Circuit was dismissed for improper venue (court determined the order was not an action of “national scope and effect”)
10/31/2017	<u>Big River Steel Title V Petition Order</u>	Reiterates new interpretation from PacifiCorp-Hunter Order, in this case, in the context of a merged Title I and Title V program	<ul style="list-style-type: none"> • Same as above • States may have to consider separating Title I and V actions to preserve public participation process

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12/07/2017	<u>Actual-to-Projected-Actual Applicability Test Memorandum (a/k/a DTE Memorandum)</u>	EPA will no longer “second-guess” a company’s pre-construction emissions projections, so long as the company complies with procedural requirements. EPA will not bring NSR enforcement actions unless post-project actual emissions data indicate a significant emissions increase did in fact occur.	<ul style="list-style-type: none"> • Could invite risky behavior on the part of applicants in states that do not have SIP-approved programs • Combined with PacifiCorp and Big River decisions, erodes ability of third parties to intervene in permit actions • Makes NSR permitting more of a “trust based” program
01/25/2018	<u>Wehrum Memorandum – Rescission of “Once In, Always In” (a/k/a Major MACT to Area (MM2A) Memorandum)</u>	Rescinds the OIAI policy announced in 1995 Seitz Memo, which provided that once a source of HAPs is considered a major source under Section 112, it remains major even if its emissions drop below major-source levels. Henceforth, HAP sources previously classified as “major” sources may be reclassified as “area” sources at any time, provided the facility limits its PTE below major-source thresholds	<ul style="list-style-type: none"> • Sources previously subject to major-source MACT requirements that reclassify to area status could increase their HAP emissions to just below major-source thresholds, without any air quality analysis • Could increase public exposure to HAPs • May reduce disincentive to implement pollution prevention efforts or technological innovations to reduce HAP emissions
03/13/2018	<u>Project Emissions Accounting Memorandum</u>	EPA interprets existing NSR regulations to allow sources to consider emissions decreases as well as increases at “Step 1” of the 2-step NSR applicability process.	<ul style="list-style-type: none"> • Allows/incentivizes companies to selectively “bundle” unrelated projects to avoid NSR • Results in fewer sources triggering NSR and therefore avoiding the required air quality analysis and emissions control installation
04/05/2018	<u>Limetree Bay Terminals – Permitting Questions</u>	Signals that EPA intends to reconsider its “Reactivation Policy” in the near future, under which a major source that has been idled for 2 or more years is presumed to be permanently shut down and thus a “new” source subject to PSD upon reactivation.	<ul style="list-style-type: none"> • If the presumption is removed, would likely result in fewer sources triggering NSR and therefore avoiding the required air quality analysis and emissions control installation

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04/17/2018	<u>Final SILs Guidance for Ozone and PM_{2.5}</u>	Sets recommended threshold emission levels below which a source’s emissions can be presumed to not cause or contribute to a violation of the ozone or PM _{2.5} NAAQS	<ul style="list-style-type: none"> • Simplifies and speeds permitting • Allows small air quality impacts to be exempted from air quality analysis • Sierra Club petitioned for review in the D.C. Circuit, argues that SILs contravene the CAA; oral argument held 10//19, awaiting decision
04/23/2018	<u>Statement on Treatment of Biogenic CO₂ Emissions from Biomass Energy Plants</u>	Announces that EPA will treat CO ₂ emissions from combustion of forest biomass for energy production at stationary sources as carbon neutral in future regulatory actions and various programmatic contexts, including permitting.	<ul style="list-style-type: none"> • Would presumably exclude biogenic CO₂ emissions from PSD permitting (unclear how this will work under existing legal precedent)
04/30/2018	<u>Meadowbrook Energy and Keystone Landfill “Common Control” Analysis</u>	EPA has revised its interpretation of the term “common control” for purposes of source aggregation in NSR and Title V permitting. Henceforth, EPA’s assessment of “control” will focus on “the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.”	<ul style="list-style-type: none"> • Potentially creates incentive to structure owner/operator arrangements to avoid NSR

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Proposed rule published 08/21/2018; timeline for final rule unknown	<u>NSR Hourly Test for EGUs Rulemaking (proposed as part of Affordable Clean Energy Rule)</u>	In addition to defining the “best system for emission reduction” for GHG emissions from existing power plants as heat-rate efficiency improvements, EPA included in the proposed Affordable Clean Energy (ACE) Rule a proposal to amend the NSR permitting program to replace the annual emissions increase test with an hourly emissions-rate increase test for modifications at EGUs. Two alternatives are proposed: an hourly emissions-rate test based on maximum <i>achieved</i> emissions, or one based on maximum <i>achievable</i> emissions. The final ACE rule did not include the NSR component; this portion of the proposal will be finalized as a standalone rule.	<ul style="list-style-type: none"> • Because EGUs rarely increase hourly emissions, would likely result in most modifications at EGUs avoiding NSR • More EGU life extension projects = more operating years without updating pollution controls • Would allow plants to undertake efficiency improvement projects that would be cost-prohibitive if subject to NSR
10/06/2018	<u>Ameresco-JCL “Common Control” Analysis</u>	Following the Meadowbrook-Keystone analysis (above), further clarifies EPA’s interpretation of “common control.” In a situation where two entities each exercise some level of control of a single, limited aspect of otherwise separate operations, it is reasonable to conclude that they are separate sources. Separate activities should be allocated to a single source to avoid unworkable outcomes.	<ul style="list-style-type: none"> •

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11/15/2018	<p><u>Project Aggregation Final Action</u></p> <p><u>83 Fed. Reg. 57,324</u></p>	<p>EPA finalized reconsideration proceedings on a January 2009 action to clarify its interpretation of “project aggregation” for purposes of NSR permitting. EPA will retain its 2009 interpretation, which is as follows: Physical and/or operational changes at a source should be aggregated into a single project for NSR permitting when they are “substantially related.” In determining whether the actions are substantially related, (1) a source need not group changes based on timing alone; (2) changes are not required to be aggregated simply because they support the plant’s overall basic purpose, and (3) EPA will presume that changes separated by three or more years are <u>not</u> substantially related unless the specific activities rebut that presumption. EPA also lifted the administrative stay on the 2009 action.</p>	<ul style="list-style-type: none"> • Could lead to fewer emissions-increasing projects being aggregated which in turn reduces projects subject to NSR
04/30/2019	<p><u>Final MERPs Guidance</u></p>	<p>EPA’s final “Guidance on the Development of Modeled Emission Rates for Precursors (MERPs) as a Tier 1 Demonstration Tool for Ozone and PM_{2.5} under the PSD Permitting Program” provides a framework for using air quality modeling to arrive at values for MERPs and use them as a tool to satisfy compliance demonstration requirements for ozone and PM_{2.5} in PSD permit-related assessments. (MERP = an emission rate of a precursor pollutant that would result in a specific change in ozone or PM_{2.5} levels.)</p>	

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<p>Proposed rule published 07/15/2019</p> <p>Final rule expected late summer/early fall 2020</p>	<p><u>Minor Source Oil and Gas FIP for Indian Country Rulemaking</u></p>	<p>EPA issued a proposed rule to revise the FIP for new and modified true minor sources in Indian Country by allowing for concurrent, rather than sequential, submission of (1) the Part 1 Form to register applicability under the FIP for true minor sources in Indian Country in the oil and natural gas production and natural gas processing segments of the oil and gas sector, and (2) the screening procedures documentation for threatened or endangered species and historic properties under the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA).</p>	<ul style="list-style-type: none"> • EPA estimates the rule could reduce by up to 30 days the time between a source owner/operator’s submission of required ESA/NHPA screening documents and beginning construction.
<p>Proposed rule published 07/26/2019</p> <p>Final rule expected 2020</p>	<p><u>Rulemaking to Rescind “Once In, Always In” (a/k/a Major MACT to Area (MM2A) Rule)</u></p>	<p>EPA issued a proposed rule, “Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act,” to codify the rescission of the OIAI policy announced in the 1/25/18 Wehrum Memorandum, allowing sources that reduce HAP emissions to below major source thresholds to reclassify as area sources.</p>	<ul style="list-style-type: none"> • See above
<p>Proposed rule published 08/09/2019</p> <p>Final rule expected late summer/early fall 2020</p>	<p><u>Project Emissions Accounting Rulemaking</u></p>	<p>The proposed rule would codify the interpretations in the 3/13/18 project emissions accounting memorandum (see above).</p>	<ul style="list-style-type: none"> • See above

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10/21/2019	<u>Completion of Administrative Reconsideration of 2007 Ethanol Plants Rule</u>	<p>NRDC petitioned for reconsideration and a stay of the rule in 2009. The rule excluded ethanol manufacturing facilities from the listing of chemical process plants contained in the definitions of “major source” for the NSR and Title V programs. The effect of the exclusion was to increase the applicability threshold for these facilities from 100 to 250 tpy of any regulated pollutant for the PSD program. The rule also eliminated a requirement for fugitive emissions to be accounted for in determining the major-source status of ethanol manufacturing facilities for Title V and NSR purposes. EPA denied all objections in the petition except one: the agency will convene a rulemaking proceeding to reconsider specific portions of the rule applicable to nonattainment areas.</p>	<ul style="list-style-type: none"> •

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11/05/2019	<p><u>Closing of reconsideration proceedings on NSR “Reasonable Possibility” Rule</u></p>	<p>EPA informed the state of New Jersey that it is no longer reconsidering the 2007 “Reasonable Possibility in Recordkeeping” rule for New Source Review (NSR) permitting. The rule defines when there is a “reasonable possibility” that a project may result in a significant emissions increase, even though the project was determined not to be a major modification. It provides that “reasonable possibility” exists when the projected actual emissions increase resulting from a project equals or exceeds 50 percent of the NSR significance level for any pollutant. If a project meets the reasonable possibility standard, it is subject to recordkeeping, monitoring and reporting requirements, so as to hold the source accountable for the projected emissions calculations. New Jersey argued in its petition for administrative reconsideration that the final rule was not a “logical outgrowth” of the proposed rule.</p>	<ul style="list-style-type: none"> • New Jersey will now seek to remove from abeyance its D.C. Circuit challenge to the reasonable possibility rule, which was filed in February 2008.

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<p><u>Draft guidance</u> released 09/04/2018</p> <p>Final guidance issued 11/26/2019</p>	<p><u>Guidance: Interpreting “Adjacent” for NSR and Title V Source Determinations in All Industries Other than Oil and Gas</u></p>	<p>Interprets “adjacency” for purposes of source aggregation in NSR and Title V permitting. (Note: the three factors considered in determining whether sources should be aggregated are: 1) whether they are contiguous or <u>adjacent</u>; 2) SIC code; and 3) under common control). Previously, EPA considered both physical proximity and functional interrelatedness in determining adjacency. Under the new interpretation, it will focus exclusively on proximity, without specifying a fixed distance within which two or more operations will be assumed to be adjacent.</p>	<ul style="list-style-type: none"> • Discarding the functional interrelatedness test for adjacency probably would result in fewer sources being aggregated, and therefore, fewer sources subject to Title V and NSR permitting • Simpler test for determining adjacency could result in faster permitting decisions.
<p><u>Draft guidance</u> released 11/09/18</p> <p>Final guidance issued 12/02/2019</p>	<p><u>Revised Policy on Exclusions from “Ambient Air”</u></p>	<p>Revises EPA’s policy on the exclusion of certain areas from the scope of “ambient air” (defined by regulation as “that portion of the atmosphere, external to buildings, to which the general public has access”). Under the previous (1980) policy, an area could only be excluded from “ambient air” if public access is “precluded by a fence or other physical barriers.” The new guidance replaces “fence or physical barriers” with “measures, which may include physical barriers, that are effective in precluding access to the land by the general public.”</p>	<ul style="list-style-type: none"> • Reduces the amount/placement of modeling receptors where sources must demonstrate that emissions do not cause or contribute to NAAQS violation

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Proposed rule published 12/03/2019	<u>Rulemaking to Reform Environmental Appeals Board Permit Review Process</u>	Curtails the authority of the Environmental Appeals Board (EAB) in reviewing challenges to EPA-issued permits (and permits issued on behalf of EPA, including by states with “delegated” programs). The proposal would require parties in a permit dispute to engage in a 30-day alternative dispute resolution (ADR) process as a precondition to judicial review by the EAB. It would also: 1) eliminate EAB’s authority to review an exercise of discretion of “important policy consideration”; 2) eliminate amici curiae participation in EAB appeals; 3) establish a 60-day deadline for the EAB to issue a final decision once an appeal is fully briefed and argued; 4) limit the length of EAB opinions; 5) set 12-year term limits for EAB judges; and other provisions.	<ul style="list-style-type: none"> •
Proposed rule published 12/20/2019	<u>NSR Error Corrections Rulemaking</u>	Corrects typographical errors and incorrect cross-references in the existing NSR regulations.	<ul style="list-style-type: none"> • Non-substantive, will improve regulatory clarity

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Final rule signed 01/14/20	<u>Completion of Rulemaking to Revise the Petition Provisions of the Title V Permitting Program</u>	Revises rules regarding the Title V petitions process to facilitate efficient responses to petitions. Covers three key areas: (1) provides direction on how petitions should be submitted to EPA, including encouraging use of electronic submittal system; (2) establishes content and format requirements for Title V petitions; and (3) administrative record-related provisions applicable to state and local permitting authorities, including a requirement to respond in writing to significant comments on draft permits, and to provide the response to comments document to EPA along with the draft permit for EPA’s 45-day review period.	<ul style="list-style-type: none"> •
Planned Future Actions			
Proposed rule expected spring 2020	Biogenic CO₂ Permitting Rule	EPA plans to undertake rulemaking to clearly address how to handle permitting of biogenic CO ₂ emissions from combustion of forest biomass for energy production at stationary sources, in light of the April 2018 memo directing the agency to treat such emissions as carbon-neutral (see above). Administrator Wheeler has suggested in correspondence with Congress that EPA may develop a rule that would define combustion of biogenic fuels, by itself, as BACT for CO ₂ emissions at bioenergy facilities.	<ul style="list-style-type: none"> • See above

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Proposed rule expected spring 2020	Completion of administrative reconsideration proceedings on NSR Fugitive Emissions Reconsideration Rule	EPA will complete and finalize proceedings on petitions for administrative reconsideration of the 2008 reconsideration rule regarding the treatment of fugitive emissions under the major NSR programs. The rule requires that fugitive emissions be included in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to CAA Section 302(j). The rule also elaborates on guiding principles for determining fugitive emissions for purposes of NSR and title V permitting.	
Draft guidance expected summer 2020	PALs Guidance	EPA plans to develop guidance on the Plant-wide Applicability Limit (PAL) provisions of the December 2002 NSR reform rule.	
Draft guidance expected summer 2020	“Begin Actual Construction” Guidance	EPA plans to release updated guidance on the interpretation of “begin actual construction,” as it refers to construction-related activities that may permissibly occur prior to issuance of a PSD permit.	
Draft guidance expected fall/winter 2020	NSR Actual-to-Projected-Actual Applicability Test Guidance	The guidance will address certain elements of the 2002 NSR reform rule’s applicability provisions.	

For Internal NACAA Committee Use

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Later	Additional Rulemaking	EPA may engage in further notice-and-comment rulemaking to “lock in” interpretations and policy changes announced above.	