

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: February 15, 2019

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
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
12/07/2017	<u>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

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01/25/2018	<u>Wehrum Memorandum – Rescission of “Once In, Always In”</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"> • Could allow increases of HAP emissions from sources previously subject to major source MACT requirements 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
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

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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
08/21/2018	<u>Proposal: 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, the proposed rule would 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.	<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

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<p>Draft released 09/04/2018 for 30-day informal comment; final guidance expected spring 2019.</p>	<p><u>(Draft) 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. Going forward, it intends to 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.

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11/07/2018	<u>Project Aggregation Final Action</u>	<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

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Draft released 11/09/18 for informal public comment; final guidance expected May/June 2019	<u>(Draft) Guidance: Revised Policy on Exclusions from “Ambient Air”</u>	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 draft guidance replaces “fence or physical barriers” with “measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.”	<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
<i>Planned Future Actions</i>			
Proposed rule expected late spring, 2019	Rulemaking on Rescission of “Once In, Always In”	EPA plans to issue a proposed rule to codify the rescission of the OIAI policy announced in the 1/25/18 Wehrum Memorandum. In developing the proposed rule, the agency will review comments received on a similar proposal from April 2007.	<ul style="list-style-type: none"> • See above
Proposed rule expected April/May 2019	Project Emissions Accounting Rulemaking	EPA plans to issue a proposed rule to codify the interpretations in the 3/13/18 project emissions accounting memorandum.	<ul style="list-style-type: none"> • See above
Proposed rule expected April/May 2019	NSR Error Corrections Rulemaking	EPA plans to develop a proposed rule to correct typographical errors and incorrect cross-references in the existing NSR regulations.	<ul style="list-style-type: none"> • None

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Schedule under development	Guidance on “Begin Actual Construction”	EPA plans to release updated guidance on the interpretation of “begin actual construction,” as it refers to construction activities which may or may not occur prior to issuance of a PSD permit.	
Schedule under development	Routine Maintenance, Repair and Replacement (RMRR) Guidance	EPA anticipates clarifying its interpretation and appropriate application of the RMRR provision under NSR regulations.	<ul style="list-style-type: none"> • Will likely increase amount of projects considered RMRR, thus avoiding NSR and therefore avoiding the required air quality analysis and emissions control installation
Schedule under development	PALs Guidance	EPA plans to develop guidance on the Plant-wide Applicability Limit (PAL) provisions of the December 2002 NSR reform rule.	
Schedule under development	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). Acting 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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Schedule under development	Completion of administrative reconsideration proceedings on Bush-era NSR rules	EPA is considering whether to complete and finalize proceedings on petitions for administrative reconsideration of the following NSR rules that were promulgated and challenged during the George W. Bush administration: <ul style="list-style-type: none"> • <u>Reasonable Possibility in Recordkeeping</u> (Dec. 21, 2007)) • <u>Treatment of Certain Ethanol Production Facilities Under the “Major Emitting Facility” Definition</u> (May 2, 2008) • <u>Reconsideration of Inclusion of Fugitive Emissions</u> (Dec. 19, 2008) 	
Later	Additional Rulemaking	EPA intends to engage in notice-and-comment rulemaking to “lock in” other interpretations and policy changes announced above	