RECENT EPA AIR MEMORANDA AND POLICY CHANGES

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# Recent EPA Air Memoranda and Policy Changes

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Petitions for Objection Under Title V

• EPA may object to a proposed Title V permit
  - EPA has 45 days from receipt of proposed permit, 40 CFR 70.8(c)
  - Any person may petition EPA within 60 days of expiration of EPA’s 45 days, 40 CFR 70.8(d)
    EPA must object “if petitioner demonstrates ... that the permit is not in compliance with the requirements” of CAA, 42 USCA 7661d(b)(2)
  - Widely used by NGOs/EPA to ‘override’ state decisions and review prior preconstruction permit decisions

  - Announced limits on EPA’s review of Title V permits using the petition for objection process
  - Title V permitting process is not the appropriate forum to review prior preconstruction permitting decisions
  - Agencies and EPA “need not reevaluate ... previously issued final preconstruction permits, especially those that have already been subject to public notice and comment and an opportunity for judicial review.”
  - Where a final preconstruction permit has been issued, the terms and conditions of that permit should be incorporated as "applicable requirements" without further review of whether those conditions were properly derived or whether a different type of permit was required for the same construction activity.

• Sierra Club v. EPA, pending in DC Circuit
  - Appeal of the PacifiCorp Energy decision, claiming that the decision is a rule requiring notice and comment

• EPA will limit its review to whether the Title V permit:
  - Has accurately incorporated “applicable requirements” and
  - Includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit
  - Will not review prior PSD Program decisions that are incorporated into a Title V permit
May 1995 Seitz Memorandum
- First set out the OIAI Policy
- Facilities that are major sources on first compliance date of MACT standard must comply permanently with standard

Wehrum Memorandum, dated January 25, 2018
- Supersedes the May 1995 Seitz Memorandum, which is withdrawn “effective immediately”
- Must be withdrawn because “contrary to the plain language of the CAA”
- OIAI Policy forces area sources to comply with major source requirements
  - Nothing in definition of ‘major source’ or ‘area source’ supports this result
  - Congress placed “no temporal limitations” on the determination of whether a source emits or has PTE
    - EPA had no authority to impose temporal limitation (ie, before the ‘first compliance date’)

Major source can become an area source when it takes ...
  - An enforceable limit on its PTE HAP, and
  - Measures to bring HAP emissions below the applicable threshold, no matter when measures are taken

Source will not be subject to major source requirements, including MACT, “so long as the source’s PTE remains below the applicable HAP emission thresholds”

California Communities Against Toxics v EPA, pending in DC Circuit
- Wehrum Memorandum is a rule requiring notice and comment
Source Determination - Common Control

• Definitions
- Stationary source - any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.
- Building, structure, facility, or installation – all of the pollutant-emitting activities ...
  which belong to the same industrial grouping,
  are located on contiguous or adjacent properties, and
  are under control of same person (or persons under common control)

• Wehrum Memorandum, dated April 30, 2018
- Prior interpretations of control were too broad because EPA relied on the ‘ability to influence’
  That is, one entity either directing or influencing the operations of another entity
  Such as one facility dependent on another for a critical aspect of its operations, like raw materials
- Control: focuses on the authority of one entity to dictate decisions of the other that could affect the applicability of, or
  compliance with, relevant air pollution regulatory requirements
  Power or authority to dictate the outcome of decisions of another entity
    Restricts choices or dictates a specific outcome, such that no autonomy to choose a different action
  Focus is on air pollution and applicability of/compliance with air permitting requirements
    Entity determines whether a permitting requirement applies or does not apply to the other entity
    Entity determines whether the other entity complies or does not comply with permit requirement
- Examples provided
  Power to direct construction/modification of equipment that will result in air emissions
  Manner in which air emission units operate
  Installation or operation of air pollution control equipment
  Monitoring, testing, recordkeeping, and reporting obligations
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• Wood Letter, October 16, 2018
-Refines the Wehrum Memorandum, dated April 30, 2018
-Facts: Two entities each exercise some level of control over single, limited aspect of otherwise separate operations
  Under Wehrum Memorandum, would likely be a single source
-EPA warns against conflating “control of same person” with “persons under common control”
  EPA may have used shorthand of ‘common control’ and created confusion
-Persons under common control
  Entities themselves are controlled from a central, unified position, such as parent-subsidiary
  Common control does not include overlap of control of small portion of otherwise separate operations
-Under control of same person
  No guidance as to allocate activities that are controlled by otherwise separate entities
  Two possibilities:
    One entity controls the shared activity
    Multiple entities control the shared activity
  EPA believes that first approach is the better approach
  Permitting authority should ensure activity is allocated to a single source
  Must exercise reasonable discretion in determining which entity controls
Source Determination - Adjacent

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-Stationary source - any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant
-Building, structure, facility, or installation – all of the pollutant-emitting activities ...
  which belong to the same industrial grouping,
  are located on contiguous or adjacent properties, and
  are under control of same person (or persons under common control)

• Wehrum Memorandum, dated September 4, 2018
-When PSD regulations adopted in 1980, chose not to adopt functional relationship, or functional interrelatedness, test
  Did not comport with a ‘common sense notion of a plant’
-But, EPA began looking at functional relationship or functional interrelatedness
  Summit decision in Sixth Circuit struck down that interpretation
-Now, ‘adjacent’ means ‘physical proximity’ and functional interrelatedness is “not a relevant consideration”
-If not in physical proximity, functional interrelatedness “shall not be invoked to establish ‘adjacency’”
-Adjacent: close to, lying near, next to, not distant, nearby
-Adjacent can be contiguous (bordering, touching) but does not need to be

• Put out for public comment!
-Lesson learned from ‘once in, always in’ suit?

• Does not apply to SIC Major Group 13 – oil and gas activities
New Source Review

• Pruitt Memorandum, dated December 7, 2017
- Relates to construction/modifications at an existing source to determine if it is a major modification
- Major modification: significant emissions increase and significant net emissions increase
- Memo focuses on calculations for the ‘actual-to-projected-actual’ applicability test
  - Difference between projected actual emissions and the baseline actual emissions
- Regulations include very specific requirements as to how to perform the analysis
- EPA will not “second-guess” the emission projections if:
  - Applicability analysis is done in accordance with calculation procedures in regulations
  - Applicable recordkeeping and notification requirements in the regulations are followed
- EPA will not initiate enforcement action unless post-project actual emissions data indicate that a significant emissions increase or significant net emissions increase did in fact occur

• Pruitt Memorandum, dated March 13, 2018
- Major modification: significant emissions increase and significant net emissions increase
- Step 1: determine whether the project, by itself, is projected to result in significant emissions increase
  - Called ‘project netting’ in the past
  - Better to call it ‘project emissions accounting’ - accounts for true emissions impacts of the project itself
- Step 2: evaluate whether project will result in significant net emissions increase, considering any other increases and decreases at the source that are contemporaneous with the project and are creditable
- Allows consideration of emissions decreases as well as increases at Step 1 of NSR applicability process
  - If part of single project
- Will issue additional guidance on “project aggregation”
EPA FY 2018 – 2022 Strategic Plan, February 12, 2018
-Reduce nonattainment areas from 166 to 138 by Sep. 30, 2019 and 101 by Sep. 30, 2022
-EPA will prioritize key activities, such as ...
  - Provide technical assistance to states/tribes to develop plans and implement decisions
  - Approve SIPs/TIPs consistent with statutory obligations
  - Develop regulations and guidance to implement standards
  - Addressing transported air pollution

Presidential Memorandum to EPA, April 12, 2018
-Revised NAAQS create uncertainty, affecting planning and permitting for states and regulated entities
-Memo requires EPA to take action to ensure efficient and cost-effective implementation of NAAQS, including
  - Timely processing (18 months) of SIP revisions
  - Timely address petitions for events beyond control of states
  - Continually assess background concentrations
  - Timely issue implementing regulations and guidance

Pruitt Memorandum, May 9, 2018, Back to Basic Process for Reviewing NAAQS
-Establishes five principles for EPA to observe in future NAAQS reviews...
  - Meet statutory deadlines
  - Address all CAA provisions for NAAQS reviews
  - Streamline and standardize the process for development/review of key-policy relevant information
  - Differentiate science and policy judgments in the NAAQS process
  - Issue timely implementation regulations and guidance
Prior audit policies
- General Audit and Self-Disclosure Policy, April 2000
  EPA still had to collect economic benefit portion of penalty
- General New Owner Audit Policy, August, 2008
  EPA could waive all of economic benefit portion of penalty in certain circumstances

New Owner Clean Air Act Audit Program
- EPA seeking feedback on the program
- Applies to upstream oil and gas exploration and production sector
- Well sites, including associated storage tanks and pollution control equipment
- EPA observed significant emissions and noncompliance at these facilities
  Issued Compliance Alert in September, 2015
  Emissions from tank batteries due to undersized and poorly maintained vapor control systems

Implemented by a Draft Agreement
- New owner
  Cannot be responsible for environmental compliance prior to the date of acquisition
  New owner and seller cannot have the largest ownership share of each other
  New owner and seller cannot have a common corporate parent
  New owner must notify EPA with six month of the date of acquisition
- Scope of audit
  Must assess engineering and design of vapor control system for all facilities included in the audit
  Includes detailed instructions and guidelines for reviewing these systems
  Can be broader than the vapor control systems
  Must correct in a timely manner
  Must provide semi-annual report(s) and a final report
  If all done, EPA agrees to resolve civil penalty liability by not imposing a civil penalty
  Includes the gravity and economic incentive portions of the civil penalty
Compliance and Enforcement

• National Enforcement Initiatives to National Compliance Initiatives
  - Increased compliance is the goal and enforcement actions are not the only tool to achieve the goal
  - Will use full range of compliance assurance tools
    Such as compliance alerts and compliance assistance
    Enforcement actions will be a tool for addressing serious violators and deterring violations

• Air related NCI...
  - Reducing air pollution from largest sources
    Almost complete
    Focus on completing ongoing enforcement cases and monitoring compliance with settlements

  - Cutting hazardous air pollutants
    Continue to address the most significant sources of HAPs
    Especially as to vulnerable populations, addressing non-attainment areas, and timely return to compliance

  - Ensuring energy extraction activities comply with environmental laws
    Focus to be significant public health and environmental problems
    May merge with Cutting Hazardous Air Pollutants

  - Reducing toxic air emissions from hazardous waste facilities
    Continue to address most serious satiations of non-compliance
    Especially as to vulnerable populations, addressing non-attainment areas, and timely return to compliance
Compliance and Enforcement

• Sessions Memorandum, June 5, 2017
  - Bans agreements that direct or provide for a payment to a non-governmental person or non-party
  - Several exceptions, including a payment that...
    - Directly remediates the harm sought to be redressed, such as harm to the environment

• Wood Memorandum, January 9, 2018
  - Applies to DOJ’s Environment and Natural Resources Division
  - Payment must meet one of the Sessions Memo exception, or advance approval obtained
  - Specifically states that a defendant may undertake a SEP related to the violation
    - Must be consistent with SEP Policy, “which already expressly prohibits all third-party payments”
    - EPA SEP Policy (May, 2015):
      - Defendant may not simply provide funds to a third-party implementer/recipient
      - EPA cannot pick third-party and defendant remains responsible for SEP but...
      - Can use third-party contractors to assist with implementation of a SEP
      - Discusses “third-party recipients”

• Sessions Memorandum, November 16, 2017 and DOJ Memorandum, January 25, 2018
  - Prohibits Department from issuing guidance documents “that purport to create rights or obligations binding on person or entities outside the Executive Branch”
  - In civil enforcement, the DOJ “may not use its enforcement authority to effectively convert agency guidance documents into binding rules”
  - In civil enforcement, the DOJ “may not use noncompliance with guidance documents as a basis for proving violations of applicable law”
Questions?

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