

# Texas and Louisiana's Struggles with Recent NSR Policy Changes

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Wednesday, October 16, 2019 1:30PM

## Recent NSR Developments

- ▶ Reconsideration of 2009 **Project Aggregation Rule**
- ▶ **Project Emissions Accounting**
- ▶ Enforceability & Use of **Actual-to-Projected Actual Applicability Test** in Determining Major Modification Applicability

# Project Aggregation

- ▶ Often times, large chemical manufacturing facilities plan to make numerous changes to operations within a given year and in some cases those changes affect the same equipment. The Challenge: Is this one project or many small projects?
- ▶ Historically, the EPA has been concerned that permittees may piece mill a single project into numerous smaller projects to minimize actual emission increases and avoid federal NSR permitting
- ▶ EPA Interpretations
  - ▶ 1993 3M Maplewood EPA Policy Memorandum
    - ▶ Individual portions of a project must be evaluated together for federal NSR applicability
    - ▶ Project aggregation assessed based on the project timing, shared economic benefits and operational interdependence

# Project Aggregation (Continued)

- ▶ EPA Rule Interpretation Actions
  - ▶ 2009 Project Aggregation Action
    - ▶ “Substantially Related” changes
      - ▶ Intent of aggregation not based on timing alone
      - ▶ Changes in support of a facility’s overall basic purpose need not be aggregated
      - ▶ Changes more than three years apart are not “substantially related”
    - ▶ Administratively Stayed in 2010
  - ▶ November 2018 EPA Reconsideration of 2009 Action
    - ▶ 2010 proposal to revoke 2009 action ultimately declined
    - ▶ EPA maintains “substantially related” clarification

# Project Emissions Accounting

- ▶ March 2018 EPA Memorandum on “Project Emissions Accounting”
  - ▶ Historically, emission increases only can be considered in the Step 1 of accounting (estimating) project related actual emission increases
  - ▶ EPA clarified Step 1 of accounting can include emission increases and decreases
  - ▶ Clarification affects aggregation definition since modifications including decreases can now be accounted for in the overall project which could avoid a major modification

# Project Emissions Accounting (Continued)

## ▶ Louisiana

### ▶ NNSR Applicability: LAC 33:III.504.A.3

- ▶ *The emissions increase that would result from a proposed modification, without regard to project decreases, shall be compared to the trigger values [...] to determine whether a calculation of the net emissions increase over the contemporaneous period must be performed*
- ▶ State definition in NNSR specific section contradicts EPA memo. In order to utilize decreases for a NNSR evaluation, the rule would need be updated.
- ▶ Rule updated by LDEQ on June 20<sup>th</sup> 2019

# Project Emissions Accounting (Continued)

- ▶ Louisiana (Continued)

- ▶ PSD Applicability: LAC 33:III.509 B Net Emissions Increase Definition

- ▶ *the increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated in accordance with Paragraph A.4 of this Section*

- ▶ No mention in PSD rules to not be able to include decreases in Step 1 evaluation. LDEQ has interpreted that since there is no mention of not utilizing decreases, this is an acceptable method for PSD applicability evaluations.

# Project Emissions Accounting (Continued)

## ▶ Texas

- ▶ 30 TAC Chapter 116.160(b)(1) de minimis threshold test...

*is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23)*

- ▶ State definition contradicts EPA memo
- ▶ TCEQ Air Permitting Division Director Sam Short Comments at 2019 TCEQ Autumn Environmental Conference
  - ▶ TCEQ considering rule making and SIP revisions to be consistent with EPA memo

# Enforceability & Use of Actual-to-Projected Actual Applicability Test

- ▶ December 2017 EPA Memorandum on “Enforceability and Use of Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability”
  - ▶ EPA clarifies that though the NSR rules require the 5 or 10 year post-project recordkeeping of actual emissions (when the PFAE approach is used for federal NSR applicability), they will not “second guess” the sources predictions unless there is a clear error in the pre-project applicability analysis or it violates the recordkeeping and notification requirements
  - ▶ EPA also clarifies that it will not enforce against the source unless its proven that a significant emission increases actually occurred post-project

## Bonus: Revised Policy On Exclusions from “Ambient Air”

- ▶ November 2019, EPA revised policy on what is excluded from federal definition of “ambient air” under 40 CFR § 50.1(e)
- ▶ Why is this important? – This definition provides permit applicants where to place modeling receptors for air quality analyses for PSD or state modeling demonstrations.
- ▶ Existing Definition and Policy
  - ▶ EPA defines “ambient air” as “that portion of the atmosphere, external to buildings, to which the general public has access.”
  - ▶ Existing policy states that “the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source **and** to which public access is **precluded by a fence or other physical barriers**”

## Bonus: Revised Policy On Exclusions from “Ambient Air”

- ▶ Revised policy

- ▶ Policy was updated to replaces “a fence or other physical barriers” with “measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.”
- ▶ More general concept of “measures” includes, but not limited to:
  - ▶ video surveillance and monitoring, clear signage, routine security patrols, drones, and other potential future technologies.

# Conclusions

- ▶ EPA has made considerable progress toward NSR reform during this new administration
- ▶ Unfortunately, these changes have been changes in policy rather than rulemaking. This approach provides risk that these policies will be overturned when the political pendulum swings the other direction.
- ▶ Changes are not substantial in streamlining the permitting process in most cases.
- ▶ Louisiana beat Texas in updating its rules to be consistent with the EPA's 'Project Emissions Accounting' memo and hopefully soon to be rule.

# Questions?

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