

Important Federal NSR Guidance and Its Impact on State Run Preconstruction Permitting Programs

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Two recent Environmental Protection Agency (EPA) interpretive memos regarding New Source Review (NSR) source permitting have spurred great interest because they address the scope of information considered in conducting NSR applicability analysis. A December 12, 2017, memo expresses the EPA's intent to restrict enforcement efforts when assessing post-project actual emissions, rather than presuming causation or second-guessing a permittee's own pre-project applicability projections. This memo stands in contrast to a recent Federal Appeals Court decision upholding EPA's authority to take enforcement action with respect to pre-project applicability analysis. Next, EPA's March 13, 2018, memo impacts "emissions netting" with respect to project emissions accounting. While State agency receptivity to these developments remains to be seen, these memos create an opportunity to strategically consider or reconsider the viability of potential projects.

The CAA establishes the NSR permitting program for new major stationary sources and major modifications of existing major sources by requiring permitting prior to commencing construction. This program requires facilities undertaking a physical change or change in the method of operation to estimate expected emission increases from the project to determine

if such increases are significant, thus triggering NSR permitting. Historically, EPA has pursued enforcement based on its evaluation of a project's predicted emission increases rather than actual post-construction emissions and regardless of the permittee's reasonable projections. EPA's December 12, 2017, memo now defers to the permittee's projections and expands their allowable content. Historically, the "Projection" compared past actual emissions (average of 24 consecutive months over prior 10 years)

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with projected future actual emissions following the modification. Since 2002 the NSR regulations have provided that when the projection does not show a significant emission increase, it does not require a permitting action and does not need to be enforceable or receive permit authority review.

EPA's December 12th memo indicates that EPA will not second guess a permittee's projections and, provided they comport with regulatory requirements, they will not presume that emission increases following

the project were caused by the project, and they do not intend to initiate enforcement unless post-project emissions data indicates that a significant net increase occurred.

Projections must consider relevant information such as historical operating data and company's representations, projections of activities and filings with regulatory agencies. Historically, EPA has asserted NSR permitting can be required based on EPA's own projections, regardless of the reasonableness of permittee's projections; and, that the permittee cannot consider an intent to manage emissions post-project. Significantly, the December 12th memo indicates that a permittee can now consider as "relevant information" their intent to manage actual emissions post-project to avoid triggering a significant increase.

EPA's March 13, 2018, memo regarding Project Emissions Accounting further impacts the NSR applicability analysis. Projects not otherwise excluded from NSR applicability (e.g., routine maintenance and repair or an increase in hours of operation not otherwise limited) are required to conduct a two-step analysis to determine whether there is a significant emissions increase. Step 1 analyzes whether there is a significant increase in actual emissions associated with the individual project itself. Historically, "step 1 analysis" only considered emission increases and not associated emission decreases. If step 1

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suggested a significant increase, then step 2 evaluated whether there would be an associated significant increase for the whole facility.

Only at step 2 could a facility consider creditable decreases of emissions by engaging in netting analysis. The March 13th memo indicates that decreases may be considered in step 1 and are not required to be enforceable or creditable.

Most states require preconstruction permits for both minor and major sources. These memos may significantly change the approach a facility takes in conducting its projections and provides fodder for significant discussion points with the state permitting agency. However, states with EPA approved implementation plans are not required to follow federal guidance.

Currently, we anticipate a meaningful reduction in federal enforcement actions against preconstruction projections and a similar reduction in scrutiny of post-project emissions, given the potential to consider emission reductions in step 1 and to manage post-construction emissions. Whether state permitting agencies adopt these approaches remains to be seen. In that regard, knowing the state program is critical for a facility contemplating a significant project, as is working with a team familiar with the permit writing process and developing a reasoned, well-documented approach to projecting future actual emissions. Permittees should be mindful to not overreach, to avoid risks associated with future changes in administration, and potential subsequent post-project permit challenges by citizen groups. 🐼