

# The Trump EPA and the World of New Source Review



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# Scope of New Source Review (NSR)

- **Prevention of Significant Deterioration (PSD) in attainment areas**
- **Nonattainment NSR (NANSR) in nonattainment areas**
- **Both PSD and NANSR can be required for a single project**

# NSR Implementation

- **Implementation on state-by-state basis:**

PSD:            Either by full or partial delegation (i.e., by contract) of 40 CFR § 52.21 responsibility, by incorporation into the SIP, or by EPA Regional Office

NANSR:        By incorporation into the SIP (by EPA *Regional Office only on Indian reservations*)

# New Source Review Basics

- **PSD preconstruction permits required for new major sources and existing major sources making a major modification in areas that attain the relevant NAAQS**
- **NANSR preconstruction permits required for new major sources and existing major sources making a major modification in areas that do not meet a relevant NAAQS (or are designated nonattainment by statute)**

# NSR Basics, continued

- **EPA has established the basic requirements for PSD and NANSR**
  - PSD: 40 CFR §§ 51.166 and 52.21
  - NANSR: 40 CFR § 51.165

# NSR in New York

- **For years, PSD permits were issued by DEC pursuant to a delegation agreement and now are issued under 6 NYCRR Subparts 231-7 and 231-8, approved into the SIP on 12/1/2010**
- **NANSR permits are issued by DEC through SIP-approved 6 NYCRR Subparts 231-5 and 231-6**

# Prelude to the Future

- **Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (1/24/17)**
- **Executive Order 13777: Enforcing the Regulatory Reform Agenda (2/24/17)**

# NSR Applicability Process

- **Longstanding two-step process**
  - Step 1: determine emissions increases from proposed project to assess significant emissions increase
  - If significant, Step 2: evaluate other increases/decreases in contemporaneous period to assess significant net emissions increase (netting)



# Aggregation

- **Aggregation is relevant to Step 1 and determining what is the “proposed project”**
- **EPA has been struggling with issue since day 1**
- **2006 proposed rule – never finalized**
- **Bush EPA’s 2009 NSR Aggregation Action (1/16/09)**
  - “substantially related” projects to be treated as one
  - projects that are related only to the extent they support the source’s “overall basic purpose” cannot be presumed to be substantially related
  - rebuttable presumption against aggregating projects that are 3+ years apart

# Aggregation, continued

- **1/30/09 NRDC petition for reconsideration to Obama EPA**
- **2/13/09 EPA commenced reconsideration proceeding and stayed the 2009 Aggregation Action, and it languished**
- **On 2/15/18, 2018, Trump EPA lifted the stay and reinstated the 2009 Aggregation Action (83 Fed. Reg. 57324)**

# Adjacent

- **“Adjacent” is key term for both NSR and Title V purposes**
- **“Stationary source” is any building, structure, facility, or installation” that emits a regulated pollutant**
- **“Building, structure, facility, or installation” means all pollutant-emitting activities that**
  - belong to same industrial grouping (i.e., same SIC code)
  - are contiguous or adjacent
  - and are under common control

# Adjacent, continued

- **“Contiguous” has always meant activities that are on parcels that are in physical contact**
- **“Adjacent” originally meant activities on parcels that, while physically separate, were “nearby” one another**
- **“Functional interrelatedness” concept started to creep into analysis of “adjacent” for activities that no one would define as “nearby”**

# Adjacent, continued

- **Thus, in a 1981 EPA memo regarding two GM facilities, EPA found them to be adjacent and one source even though they were a mile apart**
  - there was dedicated rail line between them and a shared production line, making them “functionally equivalent” (i.e., “functionally interrelated”)

## Adjacent, continued

- “Functional interrelatedness” overturned in 2012 by 6th Circuit in a Title V case (Summit Petroleum)
- EPA promptly took position that Summit Petroleum only applied in 6th Circuit and that everywhere else “functional interrelatedness” applied

# Adjacent, continued

- **In 2014, D.C. Circuit told EPA that inconsistent permit criteria in different regions conflicted with duty to promote uniform national regulatory policies**
  - D.C. Circuit did not address the merits of “functional interrelatedness”
- **11/26/19 Idsal Memorandum interpreting “adjacent” for NSR and Title V purposes**

# Adjacent, continued

- **EPA now interprets “adjacent” to be based solely on physical proximity**
- **“Functional interrelatedness” not a relevant consideration in inquiry as to what is a “stationary source”**



# Ambient Air

- **“Ambient air” is that “portion of atmosphere to which general public has access”**
- **Critical to PSD modeling in which source must demonstrate “ambient air” compliance**
- **For modeling, applicant can exclude its property if general public does not have access**
- **EPA now interprets “adjacent” to be based solely on physical proximity**
- **“Functional interrelatedness” not a relevant consideration in inquiry as to what is a “stationary source”**

# Ambient Air, continued

- **Historically, access had to be limited by appropriate barriers (natural or man-made barriers and “no trespassing” signs)**
- **12/2/19 Wheeler Memorandum revising policy on exclusions from “ambient air”**
- **Draft of revised policy was available for public comment from 11/10/18–1/11/19**

# Ambient Air, continued

- **New “ambient air” definition**
  - atmosphere over land owned or controlled by the source may be excluded where source employs measures (including physical barriers) that effectively preclude access by general public
  - allows consideration of other measures like video surveillance, monitoring, clear signage, routine security patrols, and drones

# Reasonable Possibility

- Issue dates to 2002 revised NSR rules imposing recordkeeping requirements when there is a “reasonable possibility” that a non-major project may nonetheless result in significant emissions increase (i.e. source’s “projected actual emissions” turn out to be wrong)
- 2005 remand of rule by D.C. Circuit

## Reasonable Possibility, continued

- **2007 EPA rule clarified “reasonable possibility” as where projected actual emissions are  $\geq 50\%$  of NSR significance level and thus post-change recordkeeping required**
- **In 2008, New Jersey petitioned for reconsideration on procedural ground**
- **EPA denied reconsideration before Bush term ended in 2009**

## Reasonable Possibility, continued

- **EPA flip flopped in March 2009 and granted reconsideration but never followed through with promised request for public comment**
- **11/5/159 Wheeler letter to New Jersey announcing that EPA was terminating reconsideration**

# New “Project Emissions Accounting”

- **3/13/18 Pruitt Memorandum allows consideration of project emissions decreases in Step 1**
- **Sources now free to define “project” more broadly**
- **Intent is to allow for “production efficiencies”**
- **On 8/9/19, EPA published a proposed rule that incorporates the Step 1 “emissions decreases” concept**

# Pruitt 12/7/17 NSR Memorandum

- **Triggered by EPA enforcement action against DTE Energy over “projected actual emissions”**
- **EPA will not “second guess” a source’s emissions projections**



# NSR Error Corrections

- **On 12/22/19, EPA proposed to revise NSR regulations to correct “non-controversial, non-substantive errors” (84 Fed. Reg. 70092)**
  - correct typos/spelling errors
  - remove court vacated language
  - remove or correct outdated or incorrect cross references
  - conform certain provisions to changes contained in 1990 CAA Amendments

# End of “Once In, Always In”

- **“Once in, always in” policy: If major (i.e.,  $\geq 10/25$  tpy) on MACT compliance date, always major no matter what**
- **Longstanding MACT Policy (May 1995) superseded by 1/25/18 Wehrum Memorandum**
- **Major HAP sources now are incentivized to take enforceable limits on PTE to become “area source” not subject to major source MACT standards**

# Does Any of This Matter in New York?

- **Not likely!!!!**
- **With the possible exception of the demise of “once in always in” for MACT purposes, the governing federal requirements for NSR purposes are the DEC regulations that EPA has approved in the SIP (i.e., 6 NYCRR Subparts 231-5 through 231-8)**
- **EPA’s latest interpretations likely are not binding on DEC because, absent a SIP call, state regulations have primacy.**

# QUESTIONS?



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