

EPA Announces Recommended Improvements to Air Permits

In response to President Bush's National Energy Policy Report, the United States Environmental Protection Agency (EPA) announced that it would propose sweeping changes to the New Source Review (NSR) program under the Clean Air Act. The announcement did not include the actual text of the regulatory revisions, which are still under development.

NSR refers to numerous regulatory programs under the Clean Air Act that require permits to be issued by state or federal authorities before commencing construction or modification of certain types of air emission sources. Many of these regulations have not been significantly revised since 1978.

EPA has identified seven issues that will be addressed in the reforms. According to EPA, “[t]hese changes would assure that the NSR program operates in a manner that provides greater regulatory certainty and flexibility for business investment decisions, while at the same time protecting the environment.” In addition, EPA anticipates that the reforms will relieve “extreme demands” that have been placed on electricity generators and refiners by the current NSR regulations.

The changes EPA recommended by EPA include the following:

Plantwide Applicability Limits (PALs) EPA would allow sources to apply for a PAL, which would allow the source to make changes without being subject to major NSR requirements. A PAL would be based on the source's actual emissions during the past ten years. The source would be allowed to make changes without obtaining an NSR permit for up to ten years, provided that the PAL is never exceeded. The PAL would be revised every ten years. During the renewal process, the PAL could be reduced to based on air quality needs, advances in

technology and control cost effectiveness. EPA stated that under certain (unspecified) circumstances, PALs could be increased.

EPA believes that PALs will offer advantages to industry, permitting authorities and the environment. PALs would provide operational flexibility and to source operators. PALs will also provide incentives for source owners to install good emission control systems to maximize operational flexibility under the PAL. For example, a facility owner could enhance its emission control system in order to allow for increased production while remaining below the PAL and without any regulatory delays. EPA says that the public will benefit by receiving a complete picture of the emission profile of the source and will have the opportunity to participate in any decision to allow increased emissions in the future.

Clean Unit Exclusion EPA would allow a “Clean Unit”, that is, a source that has been required to install Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) controls (BACT and LAER are terms of art under the Clean Air Act), to be exempt from NSR for 10 to 15 years. The exemption would apply as long as the emission rate allowed under the applicable permit is not increased. Sources that install emission controls comparable to BACT or LAER but under other regulatory programs would also be eligible for the Clean Unit Exclusion. In addition, sources that invest capital to install processes that are inherently less polluting and that have emission rates comparable to BACT or LAER could also qualify for this exemption.

Pollution Control and Prevention Projects EPA would exempt from NSR projects that result in a net overall reduction of air pollutants, such as switching to a cleaner burning fuel, even when the primary purpose of the project is not emission reduction. Specifically, EPA will exempt the addition, replacement or use of any process whose overall net impact on the

environment is beneficial, subject to certain conditions not fully specified in EPA's proposal. Such projects would not be allowed to cause a violation of a National Ambient Air Quality Standard (NAAQS) or Prevention of Significant Deterioration (PSD) increment. In addition, the complete replacement or reconstruction of an existing emission unit would not qualify for this exemption.

EPA intends to produce a list of environmentally beneficial technologies that will be presumed to qualify for this exemption. New pollution control and prevention technologies that are not included in the list can qualify for case-by-case approval if their effectiveness in reducing emissions is demonstrated in practice, they are shown to be environmentally beneficial and their use will not cause a violation of a NAAQS or PSD increment.

Sources that use this exemption would be required to provide prior notice to the permitting authority and to maintain records supporting the use of this exemption, but would not be required to obtain an NSR permit. In addition, a source would have the option to request a determination whether its project qualifies for this exemption.

Actual to Projected Future Actual Methodology Under the current NSR regulations, a modification at an existing facility triggers NSR if the change will result in an increase in emissions. Under the present rules, the amount of increase is determined by comparing the actual emissions from the facility before the change to the "potential" emissions after the change. This "potential to emit" generally represents the maximum annual emission rate assuming constant operation (24 hours/day, 265 days/year) under the worst case (most emitting) operating scenario. It is common for a source's potential to emit to exceed its actual emissions by a wide margin. This approach has been criticized by those who argue that the regulatory "potential to

emit” is based on unrealistic assumptions that greatly exaggerate the environmental impact of a proposed change.

For changes that do not involve addition of a new unit or complete replacement of an existing unit, EPA will replace the “actual to potential” test with an “actual to future actual” test. Under this test, only emission increases that are caused by a given change would be considered. EPA would exclude from the analysis any emission increase that could have been accommodated at the source before the change and that are attributable to increased capacity utilization at the source that is unrelated to the change. The “future actual” emissions would then be compared to a baseline emission level based on the emissions during the highest consecutive 24 month period within the past 10 years, taking into account any recent emission limits, required emission reductions or permanent shutdowns. When the “future actual” emissions do not exceed the baseline emissions by more than a specified quantity, the change will not be subject to NSR.

Routine Maintenance, Repair and Replacement The existing routine maintenance, repair and replacement exemption (the Routine Maintenance Exemption) in the NSR rules has been the subject of several contentious lawsuits filed by EPA against electric utilities and refineries in recent years. EPA intends to address this issue by creating a “safe harbor” in which projects that have an aggregate cost below certain (as yet unspecified) levels would automatically qualify for the Routine Maintenance Exemption. Projects whose costs exceed the “safe harbor” thresholds would still qualify for the Routine Maintenance Exemption if they would otherwise qualify under EPA’s current interpretation of this exemption.

The “safe harbor” cost thresholds would be based on “annual asset guideline repair allowance” percentages set by the Internal Revenue Service, which currently range from 1.5% to 15%, depending on the industry. EPA has not determined whether these percentages would be

applied to the historical cost of the unit or the replacement cost of the unit. In addition, EPA is considering applying these “safe harbor” cost thresholds on a rolling 5-year period basis or some other time period appropriate for the maintenance cycle in a particular industry. The “safe harbor” threshold would be designed to cover capital and non-capital costs necessary to facilitate the safety, efficiency and reliability of the emission source. Costs associated with installing and maintaining emission control equipment would not be included in the costs under the “safe harbor.”

With certain exceptions not yet determined, projects with an aggregate cost below the “safe harbor” threshold would automatically qualify for the Routine Maintenance Exemption, while projects with a higher cost would not be presumed to be subject to NSR.

EPA also intends to clarify that replacement of existing equipment with new equipment that serves the same function and that does not alter the basic design parameters of the unit will typically be covered by the Routine Maintenance Exemption (even if it does not qualify for the “safe harbor” based on cost). EPA also intends to establish clear guidelines for exempting activities undertaken to facilitate, restore or improve the efficiency, reliability, availability, or safety of equipment, within normal facility operations. EPA may also develop lists of specific activities in particular industries that qualify for the Routine Maintenance Exemption (but the absence of any project from any such list would not exclude it from qualifying for this exemption on a case-by-case basis).

EPA also intends to address energy efficiency projects in the context of the Routine Maintenance Exemption. Specifically, EPA plans to affirm that existing NSR rules are not intended to discourage activities that increase efficiency. EPA stated that energy efficiency projects will be considered to be routine maintenance if the improvement results from the

replacement of existing equipment with new equipment that serves the same function and that does not alter the original design parameters of the unit.

Debottlenecking EPA intends to clarify that, when calculating the “future actual” emissions associated with a change, only emissions from the unit undergoing the change would generally be considered. Emissions from other units or processes would be considered only when the emissions from those units would increase as a result of the change being evaluated or emissions from the other units would exceed permitted emission limits.

Aggregation EPA intends to clarify that individual projects will be considered separate and independent from any other project at the same facility unless: (1) the project is dependent upon another project to be technically or economically viable; or (2) the project is intentionally split from other projects to avoid NSR. EPA intends to generally defer to determinations by state agencies whether separate projects should be aggregated for purposes of determining whether NSR requirements apply.

EPA has not yet set a timetable for releasing proposed regulatory revisions to implement these changes.

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