

Clean Air Permit Reforms Provide Flexibility and Environmental Benefits

The United States Environmental Protection Agency (EPA) recently made several significant revisions to its New Source Review (NSR) regulations under the Clean Air Act (CAA). The NSR reforms adopted by EPA will not allow any emission increases that were not already possible under the old rules, but they will allow industry to proceed with projects that will result in greater production while reducing energy consumption and waste.

The Role of NSR

NSR requires new, large sources of air emissions to undergo a rigorous review and to install state-of-the-art emission controls. The new NSR rules target two features of the old NSR rules that have hindered projects throughout the country. First, the “actual to potential” test for determining whether a project at an existing facility will result in an increase in emissions required companies to compare recent actual emission rates to unrealistic, hypothetical projections of future potential emissions. As a result, projects that would not increase emissions, including many that would actually decrease emissions, became subject to stringent NSR requirements. Second, industry groups have complained that EPA has suddenly and retroactively changed its interpretation of the rules defining routine maintenance activities, which are exempt from NSR. Many businesses delayed or cancelled plans to make repairs because of the uncertainty surrounding the routine maintenance exemption and the potentially enormous legal liability that could be imposed.

EPA concluded that air quality has suffered because many of the projects that were delayed or cancelled under the old NSR rules would have updated aging facilities with more efficient, modern designs. Therefore, EPA initially proposed a package of revisions to the NSR rules in 1996 that led to the revisions that were finally adopted by EPA in December 2002.

The NSR Reforms

The NSR reform rules make several important changes to the NSR program, each of which are discussed below:

The “Actual to Projected Future Actual” Test

The first revision made by EPA is to move away from the “actual to potential” test by adding the option of using a new “actual to projected future actual” emissions test that is intended to more realistically measure whether a change at an existing facility will result in an increase in emissions. The “actual to potential” test required companies to compare recent actual emission rates to hypothetical projections of future potential emissions assuming operating levels that were often unrealistic. As a result, projects that would not increase emissions, including many that would actually decrease emissions, became subject to NSR requirements.

Under the “actual to projected future actual” test, facility owners project the maximum annual emissions that are expected to occur during the next 5 to 10 years. If the projected emissions do not exceed the emission threshold for being considered a “major modification,” then the project is not subject to NSR. The facility owner must keep track of the actual emissions for at least 5 years (10 years if the project increases the design capacity of the plant or the maximum potential to emit of the plant) to confirm that the emission thresholds are not exceeded.

The old “actual to potential” test remains an option for those who cannot confidently project future production levels or who wish to avoid the need to re-evaluate their emissions each year for the next 5 to 10 years.

Plantwide Applicability Limits

The second NSR reform adopted by EPA is to allow companies to develop clear and enforceable emissions caps called “Plantwide Applicability Limits” or “PALs” based on the amount of emissions allowed under the old NSR regulations. As long as the total plantwide actual emissions remain under the PAL, the facility can make a wide variety of changes and improvements.

Pollution Control Projects Exemption

The third regulatory change adopted by EPA is to create an exemption for pollution control projects. Under the old NSR rules, companies (other than electric utilities) could not install new pollution control equipment, improve existing control equipment or make other changes that were clearly environmentally beneficial without experiencing the delays and potential liabilities associated with NSR. The new pollution control project exemption applies to projects, work practices or activities that work to reduce emissions.

Pollution control projects that reduce emissions of one pollutant but also cause a collateral increase in emissions of another pollutant can also qualify for the exemption if it is demonstrated to the permit authority (the Michigan Department of Environmental Quality) that the overall impact of the project will result in an environmental benefit. An example cited by EPA is a project to install a thermal incinerator on an existing emission stack. The incinerator may reduce emissions of volatile organic compounds (VOCs) by incinerating the organic gases, but the combustion process will result in emissions of nitrous oxides (NO_x) and other combustion gases. If the environmental benefit from reducing VOC emissions is greater than the detrimental effects of the increased NO_x emissions, then the project can qualify for the pollution control project exemption.

Clean Unit Exemption

The fourth change adopted by EPA is to allow a facility that has already installed state-of-the-art emission controls to be exempt from NSR in most circumstances for a period of ten years. Now companies will be able to make plans that include installing the best emission controls currently available without fear that only a few years later EPA may require the installation of even more advanced (and costly) emission controls before the investment in the original pollution control system has been recovered. This removes a major disincentive that has prevented emission reducing projects in the past.

Adjustment to the Emissions Baseline

The fifth change adopted by EPA will protect businesses that experience business cycles that last longer than five years. Under the previous NSR rules, cyclical industries were disadvantaged because the emissions baseline used to determine whether an increase in emissions will occur was generally based on the actual emissions from the source during the most recent two years. Although the old NSR rules allowed the use of a different time period than the past two years for determining the emission baseline, there was a presumption that the most recent two years should be used. Under the old NSR rules it was especially difficult to meet the criteria for setting the emission baseline based on the actual emission rates that occurred more than 5 years before. This method for determining baseline emissions particularly disadvantaged businesses in industries that experienced business cycles that lasted longer than five years.

Under the new NSR rules, the emission baseline will be based on any consecutive 24-month period within the past ten years, which will provide a more realistic baseline for measuring the environmental impact of changes at facilities in cyclical industries.

Conclusion

In summary, the NSR reforms by EPA will not allow any emission increases that were not already possible under the old rules. The reforms will, however, allow industry to proceed with projects that will result in greater production while reducing energy consumption and waste. All of this will be accomplished while upholding the environmental standards that currently apply to existing sources under federal law. In addition, all state air quality regulations, including standards for toxic air contaminants, will continue to apply to the projects authorized under the NSR reforms. Thus, the NSR reforms bring flexibility to air permit regulations while preserving air quality.

A second set of rules to clarify the types of activities that qualify as “routine maintenance” without triggering NSR requirements has been proposed, but not yet adopted. These clarifications are necessary because, in recent years, EPA has construed the definition of “routine” so narrowly that even maintenance projects that are necessary to assure worker safety may be illegal if they are conducted without first undergoing NSR procedures. EPA has proposed to adopt clear standards for defining “routine” maintenance that will clarify what maintenance activities are permissible without underlying NSR procedure. For many businesses, this second set of NSR reforms will be just as important as the reforms recently enacted. 67 Fed. Reg. 80185 (Dec. 31, 2002).

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