

insights

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5 points to remember before relying on the EPA's new NSR guidance on projected future emissions

On December 7, 2017, EPA Administrator Scott Pruitt issued a memorandum entitled, "[New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability](#)" ("2017 NSR Guidance").

The purpose of the 2017 NSR Guidance is to present the new Administration's "intended approach" regarding enforcement of the New Source Review ("NSR") regulations in light of two confusing opinions from the Sixth Circuit regarding the 2002 NSR reforms.¹ The 2017 NSR Guidance is the first action following the EPA's previously announced decision to review and "streamline" the NSR regulations.

But, as we detail below, at this time the 2017 NSR Guidance is just that – guidance. It could be changed or reformed, and a number of other factors will continue to affect EPA and local enforcement in this area. In this article, we describe five key points your organization should keep in mind as you review the new guidance.

Background

The reforms adopted by the EPA in 2002 regarding what modifications at existing major sources "trigger" the Non-Attainment New Source Review ("Non-Attainment NSR") and Prevention of Significant Deterioration ("PSD") pre-construction programs (collectively "NSR") provided sources with new avenues to avoid the stringent consequences of triggering NSR. The 2002 reforms included, for instance, a new way to determine past-actual, or "baseline," emissions and a new approach allowing a source to compare past emissions to projected-actual emissions when determining whether a project will result in a modification triggering NSR ("projected-actual test"). Under the 2002 reforms, a source need not obtain a permit for a project that did not trigger the NSR requirements unless a permit was already required by the relevant state.

The 2017 NSR Guidance clarifies two points with respect to using the projected-actual test.²

First, the 2017 NSR Guidance explains that, "the intent of an owner or operator to manage emissions from a unit . . . after a project is completed represents relevant information in the context of projecting future emissions from that unit." This interpretation is based on the explicit language of the regulations that projections of future emissions must consider "all relevant information." 40 C.F.R. § 52.21(b)(41)(ii)(a). Second, the 2017 NSR Guidance explains:

When a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

According to the 2017 NSR Guidance, this interpretation is supported by the "key objective" of the 2002 NSR reforms "to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project."

5 points to remember

Although the clarifications provided in the 2017 NSR Guidance are helpful, relying on the projected-actual test is still not without its risks. Sources should keep in mind five points before relying on the past actual-to-projected-actual applicability test.

1. The application of the past-actual to future projected-actual emissions test must be done correctly.

The 2017 NSR Guidance explains that the EPA will not second guess a source's emissions projections unless there is clear error. What constitutes "clear error," however, is unclear. The 2017 NSR Guidance mentions applying the wrong significance threshold, but obvious math errors will also undoubtedly constitute "clear error."

In addition, because sources may exclude future increases in emissions from the projected-actual calculations based on unrelated increases in demand (i.e., "Demand Growth"), the EPA may also consider highly speculative predictions that emissions increases are related to Demand Growth and are unrelated to the project to be in "clear error." Even though sources are only required by the regulations to keep records for certain projects with the "reasonable possibility" to trigger the Non-Attainment NSR/PSD thresholds, keeping good records related to all past-actual to future projected-actual emissions analyses is a good idea (especially given that sources will likely need to track future actual emissions related to multiple projects at the same time).

2. The real issue is what happens if future actual emissions resulting from the project exceed the NSR/PSD threshold.

The 2017 NSR Guidance states, "[T]he EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur." (Emphasis added.) The 2017 NSR Guidance points to the explicit language of 40 C.F.R. § 52.21(a)(2)(iv)(b) to support this position. If a source's pre-construction projection that actual emissions will remain below the relevant significance levels is wrong, therefore, the source will still be subject to future enforcement. The significant penalties and injunctive relief that the EPA may seek against sources that trigger NSR by making a wrong prediction about future emissions remains a strong reason to get the projections right in the first instance.

3. States and citizen groups may be more stringent than EPA.

The 2017 NSR Guidance only reflects EPA's "intended approach" regarding enforcement of the EPA's NSR regulations (and approved state regulations that reflect those rules). Some states never adopted the 2002 NSR reforms or adopted regulations that are more stringent than what the EPA adopted. In addition, some states may have a different view than the current Administration regarding whether to pursue violations of the projected-actual emissions regulations. Finally, citizens' groups may also bring citizen suits alleging violations of the NSR requirements using interpretations of the regulations that differ from those of the EPA.

4. Even if a project is projected to result in an increase in actual emissions, it still may not trigger NSR.

The PSD rules apply to the construction of any new major stationary source or the major modification of any existing major stationary source in an attainment area. 40 C.F.R. § 52.21(a)(2)(i) - (iii). A "major modification" includes any physical change in or change in the method of operation of a source unless subject to a specific exemption (such as for routine maintenance, repair and replacement ("RMRR") projects). 40 C.F.R. § 52.21(b)(2)(iii).

As described at 40 C.F.R. § 52.21(a)(2)(iv)(a), a "major modification" must also result in two types of emissions increases:

- A significant emissions increase (as defined in paragraph (b)(40) of this section), and
- A significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section).

If a project is subject to the RMRR exemption, for instance, then whether the project results in a significant emissions increase or a significant net emissions increase is irrelevant. However, because the RMRR determination is based on a fact-specific, case-by-case analysis (considering the nature, extent, purpose (e.g., life extension), cost, and frequency) that may later be challenged by the EPA or a state agency, care should be taken when relying on the RMRR exemption.

5. The 2017 NSR Guidance is still just guidance.

By its own terms, the 2017 NSR Guidance is neither a rule nor "final agency action." It may, therefore, be revised as the Administration continues to review the NSR reforms or be changed by future administrations.

More importantly, the 2017 NSR Guidance cannot abrogate the clear language of the Clean Air Act or the relevant regulations. For instance, the 2017 NSR Guidance mentions in several places that it can be used with respect to determining whether both a significant emissions increase and a significant net emissions increase occur. The past-actual to future-projected test for determining PSD applicability, however, is used only to determine whether a significant emissions increase occurs. 40 C.F.R. § 52.21(a)(2)(iv)(c). If other contemporaneous emissions decreases are the basis for arguing that a project does not result in a significant net emissions increase, then obtaining a federally enforceable permit will still likely be necessary. 40 C.F.R. § 52.21(b)(3)(i).

If you have questions regarding this article or the NSR Guidance, please contact [Eric Boyd](#) in Thompson Coburn's [environmental practice area](#).

1. On December 11, 2017, the Supreme Court allowed the Sixth Circuit's most recent ruling to stand without comment. [↔](#)
2. The 2017 NSR Guidance refers to the federal PSD regulations at 40 C.F.R. Part 52 while acknowledging that other NSR regulations "contain analogous definitions and requirements." This memo, therefore, also only refers to 40 C.F.R. Part 52. [↔](#)

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