Robinson+Cole

NSR Reform:
Courts, Crystal Balls and Cautions

AIR & WASTE MANAGEMENT ASSOCIATION – NEW ENGLAND CHAPTER FALL CONFERENCE

OCTOBER 11, 2018

BRIAN FREEMAN, ESQ.

© 2018 Robinson & Cole LLP

Background:
NSR wayfinding for the uninitiated (and the pros)



Select NSR reforms or potential reforms

- Project netting
  (a/k/a project emissions accounting)
- Projected actuals vs. “actual actuals”
- Aggregation: “Adjacent”
- Aggregation: “Common control”
- Proposed ACE rule – NSR provisions

Select NSR reforms and potential reforms

- Project netting
  (a/k/a project emissions accounting) **GUIDANCE**
- Projected actuals vs. “actual actuals” **GUIDANCE**
- Aggregation: “Common control” **GUIDANCE**
- Aggregation: “Adjacent” **GUIDANCE EXPECTED**
- Proposed ACE rule – NSR provisions

Practical consequences of guidance strategy

- Not "final action" subject to judicial review
- Delegated states: Must individually adopt
- So: Challenges will likely come once used
  - E.g., in permitting decision
  - Set up for NGO citizen suit against the source
- So: more uncertainty for regulated parties

Project netting (project emissions accounting)

	Old interpretation	New interpretation (3/13/18 guidance memo)
Step 1: "Significant emissions increase"?	Consider only increases from the project	Consider **both** increases and decreases from any units that part of the project. Need not be federally enforceable; need only be projected post-project.
Step 2: "Significant net emissions increase"?	Netting: Consider increases and federally enforceable decreases source-wide (including federally enforceable decreases from the project)	Netting: Consider increases and decreases source-wide (other than the project)

Project netting (project emissions accounting)

- Court challenge pending – but on hold pending …
- … proposed rule to codify the new policy
  - Also to address defining the scope of the "project" ("project aggregation")?
  - This fall?
- Beware:
  - Guidance does not address additional wrinkles under Nonattainment NSR
  - Regardless of court challenge, policy is reversible
  - State law

Actual-to-projected-actual calculations

- For “Step 1”

- 12/7/17 guidance memorandum:
  - “Clear error” standard, no more “second-guessing”
  - No harm, no foul
  - Good-faith presumption for an intent to control actuals

“Actual-to-projected-actual” calculations

- Result: More latitude for avoiding NSR
- Court challenge: ??
- Cautions:
  - Just a policy, subject to future reversal
  - State interpretations

Aggregation: "Common control"

- EPA letter to PADEP (4/30/18): Narrows the term
  - **Old**:
    - "Substantial relationship" (e.g., ability to influence, esp. support or dependency relationship)
  - **New**:
    - "power or authority to dictate decisions" …
    - … AND these decisions must "affect the applicability of, or compliance with, relevant air pollution regulatory requirements"
- Proposed rule this fall?
- Again, beware states …

Aggregation: “Adjacent”

- EPA draft guidance to regional air chiefs (9/4/2018)
  - **Prior**: “functional interrelatedness”
  - **Proposed new:** Physical proximity
- Stated goal: More objective, certain
- If adopted, court challenge likely

Note: Would not apply to oil & gas sector

Proposed ACE rule: “Emissions rate”

- For large fossil power plants only
- Goal: Allow power plants to comply with ACE requirements for efficiency improvements without triggering NSR
- Proposes to change NSR trigger basis from annual to hourly emissions
  - Comment sought on three alternatives for how to determine hourly emission rate baseline
  - All alternatives would be within a 5-year lookback period

ACE in the courts?

- Challenge likely to focus on GHG/§111 issues
- But NSR revisions as Achilles heel?

Bonus issue: "Once In, Always In"

- 1995 Memorandum from EPA's Office of Air Quality Planning & Standards
  - Policy: After the first substantive compliance date of a MACT, no exit from "major source" status by reducing PTE
- 2007: EPA proposed to trump it with a regulatory change – but tripped up by Congress
- January 2017: EPA withdraws the policy

“Once In, Always In” Is Out

- Contrary to plain language of CAA:
  - Definition of “major source”: “emits or has the potential to emit”
  - No timing cut-off
- Disincentive to voluntary pollution abatement/ prevention and technology innovations
- So: At any time, a major source can take an enforceable limit on its PTE → become minor (“area”) source

"Once In, Always In", per NGOs: Down, but not out

- Court challenge pending
- Claims:
  - Violates APA*: Requires rulemaking, "arbitary and capricious"
  - Violates CAA §112
- Status: Decision at least several months away
- Crystal ball says ….

_____

* Administrative Procedures Act

Questions?

Brian Freeman, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
(860) 275-8310
bfreeman@rc.com