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ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

February 13, 2018

To: Subcommittee on Environment Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "New Source Review Permitting Challenges for Manufacturing and Infrastructure"

On **Wednesday, February 14, 2018, at 2:00 p.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Environment will hold an oversight hearing on "New Source Review Permitting Challenges for Manufacturing and Infrastructure."

I. BACKGROUND

A. National Ambient Air Quality Standards

The Clean Air Act (CAA) requires the Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for certain pollutants that endanger public health and the environment.[1] These health-based standards are considered the cornerstone of the CAA. EPA sets primary NAAQS at concentration levels sufficient to protect the public health. These levels allow for an adequate margin of safety based on a thorough review of the medical and scientific evidence. For the six criteria pollutants,[2] the primary NAAQS identifies the level of ambient air pollution that is "safe" to breathe.

EPA must review each NAAQS every five years and make revisions as appropriate. Once EPA establishes a NAAQS for a pollutant, the states have primary responsibility for achieving pollution reductions to meet the standard. Within a year, each state must designate

[1] Clean Air Act § 109.

[2] Lead, particulate matter ($PM_{2.5}$ or PM_{10}), ozone, nitrogen dioxide (NO_2), sulfur dioxide (SO_2), and carbon monoxide.

areas within its borders as either in attainment (meeting the NAAQS) or nonattainment (exceeding the NAAQS or contributing to a nearby area's violation of the NAAQS).[3]

B. New Source Review (NSR) Program

The CAA requires the owner or operator of any new or expanding source of air pollution to obtain permits before starting construction. This requirement aims to ensure that a new facility, or an existing facility making a modification, will not increase air pollution above levels that are safe to breathe. The preconstruction permitting provisions achieve this by requiring new and modified sources to use control technology to reduce their emissions. The provisions also require such sources to assess their remaining air quality impacts and to address them, if necessary.

EPA's NSR program includes three types of permitting requirements: prevention of significant deterioration (PSD), nonattainment NSR, and minor NSR permits.[4] PSD and nonattainment NSR permits apply to new major sources[5] or major modifications[6] to existing sources. The permitting requirements differ depending on whether the source is or would be located in an attainment or nonattainment area. New minor sources or existing sources making minor modifications, regardless of location, have to comply with minor NSR permitting requirements. States, not EPA, issue the vast majority of these permits.

1. Prevention of Significant Deterioration

In clean air areas that meet the NAAQS, the facility owner or operator must obtain a preconstruction permit under the PSD program. PSD permit review is done on a case-by-case basis, taking into account the design and function of the specific facility. The review is typically carried out by state or local pollution control agencies, and the law specifies that a PSD permit must be granted or denied within one year. A PSD permit verifies that: (1) the facility is using best available control technology (BACT); (2) the applicant conducted an air quality analysis, demonstrating that the new emissions from the facility will not cause or contribute to a violation of the air quality standard; and (3) there was an opportunity for public participation.

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[3] Clean Air Act § 107(d)(1)(A). Areas can also be designated as "unclassifiable," if there is insufficient information available to determine whether an area meets a NAAQS.

[4] Clean Air Act §§ 165, 173, and 110(a)(2)(C).

[5] Clean Air Act § 112 defines a "major source" as a stationary source or group of stationary sources that emit or have the potential to emit 10 tons per year or more of a hazardous air pollutant, or 25 tons per year or more of a combination of hazardous air pollutants.

[6] NSR regulations define a "major modification" as any physical or operational change in a major source that would result in a significant emissions increase of a regulated pollutant, and a significant net emissions increase. *See* 40 CFR § 52.21(b)(2)(i).

2. Nonattainment NSR

For nonattainment areas, the facility owner or operator must obtain a preconstruction permit under the nonattainment NSR program. The nonattainment NSR permit review is done on a case-by-case basis, taking into account the nonattainment area where the specific facility is located. The CAA does not set a time limit for the permitting agency to act on a nonattainment NSR permit application. A nonattainment NSR permit verifies that: (1) the facility has installed pollution controls sufficient to meet the lowest achievable emission rate (LAER), which is the most stringent emission limitation required by a state plan or achieved in practice by that type of source; (2) new pollution from the facility is offset by reductions from existing sources; and (3) there was an opportunity for public participation.

3. Minor NSR

Owners or operators of facilities that do not require PSD permits or nonattainment NSR permits must still obtain a preconstruction permit under the minor NSR program. These permits are intended to prevent the construction of minor sources or modifications to existing sources that would violate an air quality standard or pollution control strategies already in place.

II. RECENT CHANGES TO THE NSR PROGRAM

William "Bill" Wehrum, the current Assistant Administrator for the Office of Air and Radiation at EPA, has said that reinstating Bush-era changes to the NSR program is a top priority for the agency. He has indicated that a series of administrative actions will "continue to chip away" at the existing pollution control requirements for industry.[7]

A. EPA's December 2017 NSR Memorandum

On December 7, 2017, EPA Administrator Pruitt sent a memorandum (NSR memo) to EPA's Regional Administrators informing them of the agency's new interpretation of several key considerations in the implementation, oversight, and enforcement of requirements for obtaining necessary pre-construction permits under the NSR program.[8] The NSR memo has no indication of input from the Office of Enforcement and Compliance Assurance, despite making explicit changes to EPA enforcement policy. It also initiates policy changes that are in dispute in an on-going NSR enforcement case, *U.S. v. DTE Energy Company*. The memo references that case as

[7] *OAR's Wehrum Prioritizes Piecemeal NSR Reform, Narrow Utility GHG Rule*, Inside EPA (Dec. 12, 2017) (insideepa.com/daily-news/oars-wehrum-prioritizes-piecemeal-nsr-reform-narrow-utility-ghg-rule).

[8] Environmental Protection Agency, *Memorandum from Administrator Pruitt to Regional Administrators on: "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability"* (Dec. 7, 2017) (www.epa.gov/sites/production/files/2017-12/documents/policy_memo.12.7.17.pdf).

justification for the policy changes; however, the Department of Justice (DOJ) is still defending EPA's enforcement action in the courts, and DOJ's defense is based on a policy position contrary to the one being initiated by the memo.

Currently, before applying for any preconstruction permit, the operator must conduct an analysis to determine whether the project constitutes a major modification. This requires calculating the difference between the "projected actual emissions"[9] and the "baseline actual emissions."[10] If the difference is significant, then the project is a major modification and is required to obtain a NSR permit. For existing sources, this is known as "the actual-to-projected-actual applicability test." The NSR memo makes changes to this applicability test. The new policy allows a facility operator to artificially adjust the estimate of the "projected actual emissions" by including an operator's intent to use "post-project emissions management" to reduce the pollution increase from the project.[11] Since the estimate of "projected actual emissions" is key to determining if a project constitutes a major modification, carve-outs from that estimate will likely to result in fewer projects adequately controlling pollution or adhering to the emissions limits of the NSR program.

In addition, the NSR memo also states that EPA will no longer review the estimates provided by a facility operator as part of their submission to determine the applicability of NSR requirements. EPA's authority to review the validity of the projected post-construction estimates was one of the issues raised in *U.S. v. DTE Energy Company*. If EPA does not enforce standards for determining projected actual emissions to ensure the estimates submitted by facility operators are valid, other enforcement problems arise. If the calculation is incorrect, subsequent monitoring of the facility's emissions will be compared to an incorrect baseline.

Also, the NSR memo states that EPA's enforcement of NSR requirements and any determination that a construction project has resulted in increased emissions will be based on monitoring data gathered in the five or ten year record-keeping or reporting period after the construction project has finished. A five to ten year enforcement delay is likely to run into a statute of limitations of five years for violations of preconstruction permitting requirements that several Circuit Courts have now upheld.[12] This means there would effectively be no enforcement of the NSR program.

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[9] 40 CFR § 52.21(b)(41). Current EPA regulations specify acceptable procedures, exclusions and information that may be used to produce an estimate of the "projected actual emissions" that will result from completion of the project.

[10] 40 CFR § 52.21(b)(48). The rate of emissions, in tons per year, of a regulated NSR pollutant.

[11] Operators are allowed to exclude from their projected post-construction emissions estimate, any emissions increase that would result from an "independent factor" (e.g. an increase in demand for their product) under current policy.

[12] *Recent Decisions Affecting EPA's Ability to Enforce PSD/NSR Violations*, George Washington Journal of Energy & Environmental Law (Feb. 23, 2014) (gwjeel.com/2014/02/23/recent-decisions-affecting-epas-ability-to-enforce-psdnsr-violations/).

B. Additional Regulatory Proposals under the NSR Program and the Clean Power Plan Replacement Rule

A number of additional changes to the NSR program have been requested in recent comments to the Department of Commerce and EPA's Regulatory Reform Task Force.[13] They are summarized in the Commerce Department's October 2017 report on streamlining, permitting, and reducing regulations that effect domestic manufacturing.[14]

In addition to the changes made by the memo discussed above, the other requested changes include:

- Expanding the type of activities that qualify as "routine maintenance and repair" that are exempted from NSR requirements;
- Enforcing the one-year deadline for approving or rejecting a permit; limiting appeals and challenges to permit decisions by state authorities;
- allowing construction to commence before receiving a permit; altering the determinations of BACT and LAER; and
- several other modifications which would increase air pollution by allowing several industries with older, existing facilities to avoid installing equipment that would reduce harmful air pollutants.

III. WITNESSES

The following witnesses have been invited to testify:

Jeffrey Holmstead
Partner
Bracewell LLP

Kevin Sunday
Director of Government Affairs
PA Chamber of Business and Industry

[13] Environmental Protection Agency, *Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources* (Oct. 25, 2017) (www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf).

[14] Department of Commerce, *Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing*, at p. 11-16 (Oct. 6, 2017) (www.commerce.gov/sites/commerce.gov/files/streamlining_permitting_and_reducing_regulatory_burdens_for_domestic_manufacturing.pdf).

Paul Noe
Vice President Public Policy
American Forest and Paper Association and the American Wood Council

Stuart Spencer
Associate Director
Office of Air Quality, Arkansas Department of Environmental Quality on behalf of the Association of Air Pollution Control Agencies

John Walke
Director, Clean Air Project, Climate and Clean Air Program
Natural Resources Defense Council

Emily Hammond
Professor of Law
The George Washington University Law School