



May 14, 2018

TO: Members, Subcommittee on Environment

FROM: Committee Majority Staff

RE: Hearing entitled “Legislation Addressing New Source Review Permitting Reform.”

I. INTRODUCTION

The Subcommittee on Environment will hold a hearing on Wednesday, May 16, 2018, at 10:15 a.m. in 2322 Rayburn House Office Building. The hearing is entitled “Legislation Addressing New Source Review Permitting Reform.”

II. WITNESSES

Panel 1

- **William Wehrum**, Assistant Administrator for the Office of Air and Radiation, U.S. Environmental Protection Agency;

Panel 2

- **Sean Alteri**, Director, Division for Air Quality, Kentucky Department of Environmental Protection;
- **Ross E. Eisenberg**, Vice President, Energy and Resources Policy, National Association of Manufacturers;
- **Kirk Johnson**, Senior Vice President, Government Relations, National Rural Electric Cooperative Association;
- **Jeffery R. Holmstead**, Partner, Bracewell LLP;
- **Bruce Buckheit**, Analyst and Consultant; and
- **Paul Baldauf**, P.E., Assistant Commissioner, Air Quality, Energy and Sustainability, New Jersey Department of Environmental Protection.

III. BACKGROUND

Under the Clean Air Act (CAA), when a project at an existing facility meets certain criteria, the project is considered to be a “modification” and the existing facility becomes subject to additional regulatory requirements. Congress has provided one statutory definition in section 111(a)(4) of the CAA for the term “modification.” This definition reads:

The term “modification” means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”

Within the CAA, this statutory definition applies to both the New Source Performance Standards (NSPS) program and the New Source Review (NSR) program.¹ However, the Environmental Protection Agency (EPA) has interpreted and applied the definition differently for each of these programs. Under the NSPS program, the EPA determines whether a project at an existing facility “increases the amount of any air pollutant emitted,” resulting in the project being a modification, by using an *hourly emissions rate test*. In contrast, under the NSR program, the EPA uses an *annual emissions projection* approach to make this same determination.

The *hourly emissions rate test* used by the NSPS program focuses on whether a project at an existing facility will increase that facility’s ability to emit pollutants at a higher *hourly rate* than was previously achievable prior to the completion of the project. If the project does result in a higher hourly emissions rate, then the project is determined to be a modification and the facility is subject to NSPS requirements. According to testimony before an Environment Subcommittee hearing in February of this year, this type of hourly rate test rarely results in controversy and is effective due to the fact that a facility’s maximum hourly emissions rate is easily ascertainable and is based solely on the design of the facility.²

The *annual emissions projection* approach used by the NSR program focuses on whether a project at an existing facility will result in an annual emissions increase that exceeds established significance thresholds.³ If a project at an existing facility results in a significant annual emissions increase, then the project is considered a modification and the owner must obtain an NSR permit prior to carrying out the project.⁴ This type of annual emissions projection approach necessitates the consideration of complex factors such as projecting future demand of the product being produced and the selection of baseline emissions to use as a comparison point.⁵

¹ For additional background on the NSR program see [hearing memo](#) from Subcommittee on Environment hearing held on Feb. 14, 2018.

² See [Testimony of Jeffrey R. Holmstead, former Assistant Administrator for Air and Radiation, EPA](#), pg. 5, before the Subcommittee on Environment, Feb. 14, 2018.

³ See 40 C.F.R. 52.21 (a)(2)(iv)(a) A project is considered a modification if it causes two types of emissions increases – a significant emissions increase and a significant net emission increase.

⁴ The NSR permitting process includes pollution control technology requirements. The [PSD NSR program](#) requires installation of “Best Available Control Technology” (BACT) technologies. The [Nonattainment NSR program](#) requires the installation of “Lowest Achievable Emissions Rate” (LAER) technologies.

⁵ See [Holmstead testimony](#), pg. 5, op. cit.

Additionally, in certain instances, this type of emissions projection results in an overestimation of emissions, which is shown by comparing the projected emissions with a source's true emissions after the fact.⁶ For these reasons and others, this annual emissions projection approach has been the source of substantial controversy. Testimony before the Subcommittee on Environment and filings with the EPA have indicated that uncertainties and controversies surrounding the emissions projections required in the NSR program have deterred investment in and the modernization of existing facilities, even when these actions would have resulted in increased efficiency, improved emissions control, or more reliable operations.⁷

Revising the emissions increase test under the NSR program to match the hourly emissions rate test used by the NSPS program may provide a more efficient, less controversial approach to determining whether projects should be subject to NSR permitting. For example, Mr. Stuart Spencer, the Associate Director at the Arkansas Department of Environmental Quality and the President of the Association of Air Pollution Control Agencies, testified that using the hourly emissions rate test for the NSR program would eliminate many of the issues associated with NSR and would streamline the program.⁸ Other testimony noted that reforming the NSR program to use an hourly rate test is more meaningful for protecting human health because the most stringent EPA standards are based on maximum concentrations of a pollutant averaged over one hour, eight hours, and 24 hours.⁹ The discussion draft under consideration at this hearing would revise the NSR program to adopt an hourly emissions rate test for purposes of determining whether a project at an existing facility is considered a modification, thereby triggering the need for an NSR permit.

Testimony before the Subcommittee on Environment and filings with the EPA have also indicated that projects at existing facilities designed to reduce emissions, enhance energy efficiency, maintain equipment reliability, and improve safety should not be subject to NSR, especially when these projects are beneficial for public health or the environment.¹⁰ A past report from the EPA found that, with regard to existing facilities, the NSR program impeded or resulted in the cancellation of projects aimed at improving reliability and safety, enhancing energy efficiency, and reducing air pollution.¹¹ Provisions in the discussion draft seek to address this concern.

⁶ See, for example, *U.S. v. DTE Energy Co.* (6th Cir. 2013).

⁷ See Testimony of Kevin Sunday, Pennsylvania Chamber of Business and Industry, before the Subcommittee on Environment, Feb. 14, 2018. Also See U.S. Department of Commerce report, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing."

⁸ See Testimony of Stuart Spencer, Associate Director of the Arkansas Department of Environmental Quality and President of the Association of Air Pollution Control Agencies, before the Subcommittee on Environment, Feb. 14, 2018.

⁹ See Holmstead testimony, pg. 6, op. cit.

¹⁰ See Spencer testimony, op. cit. and Testimony of Paul Noe, American Forest & Paper Association and American Wood Council, before the Subcommittee on Environment, Feb. 14, 2018. Also see Air Permitting Forum comments to U.S. Department of Commerce Docket: Doc-2017-0001

¹¹ See New Source Review: Report to the President (June 2002), pg. 1.

IV. DISCUSSION DRAFT

Section 1. Short Title.

Section 1 provides a placeholder for a short title.

Section 2. Clarification of Definition of a Modification: Emission Rate Increases, Pollution Control, Efficiency, Safety, and Reliability Projects.

Section 2 amends the definition of the term “modification” contained in section 111(a) of the Clean Air Act to clarify that a change at an existing source constitutes a modification only when the change increases the maximum achievable hourly emission rate of an air pollutant relative to the maximum achievable hourly emission rate for such source during the 10-year period immediately preceding the change.

Section 2 also provides that a modification does not include a change that reduces the amount of any air pollutant emitted by the source per unit of output or is designed to restore, maintain, or improve the reliability or safety of the source. However, if a change of this type increases the maximum achievable hourly emission rate of any air pollutant, and the EPA Administrator determines that such increase is harmful to human health or the environment, and the Administrator determines that the change is not environmentally beneficial, then the change is considered a modification.

Section 3. Clarification of Definition of Construction for Prevention of Significant Deterioration.

Section 3 provides that for the Prevention of Significant Deterioration New Source Review program, a change constitutes a modification only if the change results in a significant emissions increase and a significant net emissions increase.

Section 4. Clarification of Definition of Modifications and Modified for Nonattainment.

Section 4 provides that for the Nonattainment New Source Review program, a change constitutes a modification only if the change results in a significant emissions increase and a significant net emissions increase.

Section 5. Rule of Construction.

Section 5 provides that any change that would not have been treated as a modification before the date of enactment of this Act, will continue not to be treated as a modification after the date of enactment of this Act. The EPA has specified, through rulemaking, certain types of activities and changes that are not treated as modifications. This section provides that these activities and changes will continue not to be considered modifications after the date of enactment of this Act.

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Wyatt Ellertson, Peter Spencer, or Mary Martin of the Committee staff at (202) 225-2927.