Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act: U.S. Environmental Protection Agency Proposes Revisions to Clean Air Act NESHAP Regulations

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The United States Environmental Protection Agency ("EPA") proposed revisions to the General Provisions of the Clean Air Act National Emission Standards for Hazardous Air Pollutants ("NESHAP").

The proposed rule revises the "Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act rule" ("Reclassification Rule") enacted during the Trump Administration.

The proposed revisions to the Reclassification Rule would require those sources that choose to reclassify from major source status to area source status establish federally enforceable permit conditions.

EPA had issued a final rule during the Trump Administration allowing a "major source" of hazardous air pollutants ("HAPs") to reclassify as an "area source" at any time after acting to limit emissions. The federal agency argued that the rule would encourage facilities to pursue innovations in pollution-reduction technologies and relieve regulatory requirements intended for larger emission sources.

Environmental organizations argued in opposition to the Reclassification Rule that it created a loophole allowing facilities to opt out of the NESHAP requirements by reclassifying themselves as area sources exempt from Maximum Available Control Technology standards.

The EPA "once-in-always-in" policy was established in 1995. It provided that a facility subject to major NESHAP standards would always remain subject to such standards. This would be the case even where production processes were changed, or controls implemented that permanently reduced the facility's potential to emit HAPs.

EPA argues in support of the revisions to the Reclassification Rule:

- Facilities would still have the flexibility to pursue innovations in pollution-reduction technologies
- Facilities will still be allowed to innovate and adopt new ways of reducing emissions of air toxics while maintaining emission reductions after reclassifications

Limits taken to reclassify from major source to area source would have to be federally enforceable. This is argued to provide a level playing field for continued enforcement of limits taken to reclassify.

The proposed revisions would apply to all sources that choose to reclassify, including any sources which reclassified since January 25, 2018.

EPA has previously defined in guidance federally enforceable in the context of the Clean Air Act as requiring that an agency:

- Permit itself must be enforceable (i.e., contain emission limits with a reasonable averaging period, a method for determining compliance on a regular basis, an adequate recordkeeping)
- Permit program must be approved under federal regulations
- Permit and permitting procedures must fully comply with or exceed the requirements of the federally approved rule

Guidance from a 1995 EPA memorandum addressing enforceability requirements for limiting potential to emit through state implementation plans and NESHAP rules can be downloaded here.

A copy of the prepublication proposed rule can be found here.