Project Emissions Accounting/Clean Air Act: U.S. Environmental Protection Agency Withdrawal of Proposed New Source Review Revision

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Environmental Protection Agency ("EPA") published a July 21st Federal Register notice withdrawing a proposed rule styled:

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related To Project Emissions Accounting; Withdrawal of Proposed Rule ("Withdrawal").

See Docket ID No. EPA-HQ-OAR-2022-0381.

The proposed rule being withdrawn is found at 89 Fed. Reg. 36970, May 3, 2024.

The Withdrawal is found at 90 Fed. Reg. 34206.

The proposed rule would have revised Clean Air Act New Source Review ("NSR") Preconstruction Permitting which encompasses both the Prevention of Significant Deterioration ("PSD") and Non-Attainment Programs.

The focus of the proposed rule was Project Emission Accounting ("PEA"). PEA Is the analysis used to determine whether a facility must undertake NSR Permitting.

Industry had generally taken the position that the proposed rule would make it more difficult to net out of NSR. PEA is a key component involved in calculating the net emissions that are derived from a facility's modification.

Environmental organizations had taken the position that the term "project") should be defined more narrowly. They argued that this was necessary to forestall facilities from aggregating changes with the goal of netting out of NSR review.

EPA states in the July 21st Withdrawal that:

…Based on a careful review of the proposed rule and comments received during the public notice period, the EPA has determined that the proposed rule did not provide sufficient justification of the benefits of the proposed revisions to the NSR regulations, and that the proposed revisions could result in additional burdens on regulated entities and State, Tribal, and local air agencies that implement the NSR regulations, which are not necessary to achieve the intended result. These burdens could disincentivize or delay environmentally and economically beneficial projects at stationary sources, including efficiency improvements.

EPA states agreement with what it describes as “State and industry commenters” that the proposed definition of “project” could lead to more uncertainty in permitting decisions rather than improve clarity. It also argues that there was insufficient evidence to indicate that aggregation concerns warrant making such changes to the NSR Program.

As to aggregation concerns, EPA also agrees with commenters that the federal agency did not identify examples of over- or under-aggregation in prior permitting decisions. It further argues that such issues could be handled through enforcement of existing NSR regulations.

In regard to the proposed clarification of monitoring, recordkeeping, and reporting requirements revisions, EPA again agreed with commenters that argued the additional data collection burden on regulated entities outweighs the theoretical benefits of increased transparency from additional reporting. It cites the federal agency’s failure to provide examples or empirical evidence of insufficient recordkeeping, reporting, or monitoring.

Finally, EPA states that the proposal to make decreases in emission accounted for in the Step 1 significant emissions increase calculation be enforceable, it once again agreed with those commenters that argued that it was inconsistent with other provisions in the NSR regulations and would restrict source operation for projects that involve projected decreases in emissions. Cited with the 2002 final rule that reformed the major NSR program applicability provisions, the EPA determined that:

…projected actual emissions should not be made enforceable through a permitting action, finding that doing so ‘‘may place an unmanageable resource burden on reviewing authorities’’ and that ‘‘the Act provides ample authority to enforce the major NSR requirements.’’

EPA states that the same reasoning applies regardless of whether a projection results in an increase or decrease in emissions.

A copy of the July 21st Federal Register notice can be downloaded here.