Project Emissions Accounting/New Source Review: DC Circuit Court of Appeals Addresses Challenge to US EPA Rule

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The United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") addressed in a July 28 Opinion an issue arising under the Clean Air Act New Source Review ("NSR") Preconstruction Permitting Program. See Environmental Defense Fund, et al v EPA, et al, No. 18-1149.

The DC Circuit addressed a challenge to a United States Environmental Protection Agency ("EPA") rule that alters the process to determine whether a stationary source of air pollution can be modified absent a permit under the Clean Air Act's NSR program.

The specific NSR issue being addressed involved what is denominated the project emissions accounting ("PEA Rule").

The Clean Air Act NSR constitutes a preconstruction permitting program that establishes and documents air pollution emission limits from "major" sources of air pollution. The NSR includes two permitting programs:

- Non-attainment.
- Prevention of significant deterioration ("PSD").

Non-attainment NSR applies in non-attainment areas where the air quality is classified as failing to meet the national ambient air quality standards ("NAAQS") for one or more criteria air pollutants regulated under the Clean Air Act. This program is intended to allow construction of newer modified sources of air pollution in areas while still making progress toward NAAQS.

PSD applies to in attainment areas. Such areas are classified as meeting the NAAQS. PSD review and permitting is intended to allow construction of new or modified sources of air pollution in these areas while protecting (i.e, not significantly degrading) air quality.

The NSR program is triggered by new major sources of air pollution and existing major sources that are making significant modification.

An existing major source proposing to undertake a project is required to determine whether it will constitute a major modification following a two-step applicability test. The two-step process is described below:

1. Determine if the proposed project will cause significant emission increase of a regulated NSR pollutant.

2. If the proposed project is expected to cause an increase, then there is a determination if there is a significant net emissions increase of that pollutant.

The DC Circuit's Opinion notes that in 2018 the EPA administrator published an interpretive memorandum indicating that:

…Emission decreases as well as increases are to be considered at step 1 of the NSR applicability process, provided they are part of a single project.

This approach has previously been referenced as "project-netting". Nevertheless, it was instead labeled:

…The consideration of a proposed project's emission increases and decreases at step 1 as "project emissions accounting".

The rule proposed by EPA in 2019 would mandate the consideration of the sum of the difference between existing emissions and post-construction emissions. The proposed PEA rule also defined the sum of the difference to include both increases and decreases in emissions. Therefore, EPA then took the view that step 1 requires a net calculation that accounts for a project's emissions increases and decreases.

Various environmental groups and others argued that the proposed rule was problematic because measuring net emissions on a project-by-project basis (as opposed to a source-wide basis) invites entities to circumvent NSR by bundling unrelated activities into a single project. EPA nevertheless finalized this PEA rule in 2020.

Various organizations then petitioned the DC Circuit for review thinking vacatur of the EPA memo and the rule.

The petitioners objecting to the rule articulated three arguments as to why the PEA rule is contrary to law which included:

- Utilizing a project-specific approach at step 1 and a source-wide approach at step 2 assigns inconsistent meanings to the statutory term "modification" (this argument is rejected because the Clean Air Act does not establish two different definitions of modification and therefore holds that petitioners are incorrect that the PEA rule rests of contradictory meanings of that word).
- PEA rule "excises 'any' from" the Clean Air Act's definition of modification by allowing certain emissions – increasing project to avoid NSR. (Note that the Clean Air Act does not require NSR whenever a project increases emissions but does so for 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).
- Contrary to law because entities can avoid NSR at step 1 by relying on an emissions decrease that occurs after a project causes an emissions increase. (Recognizes that petitioners identify factors that may preclude particular applications of the PEA rule but EPA's failure to required strict contemporaneity at step 1 does not invalidate).

The DC Circuit also rejects the petitioner's argument that PEA rules are arbitrary and capricious because:

- Regulated entities can circumvent NSR by bundling unrelated activities into a single project.
- Filed to explain how its existing record keeping rules are sufficient to ensure compliance with NSR under the project-emissions-accounting framework.

The petitioner's Petitions for Review are denied.

A copy of the Opinion is attached.