Dinsmore

AIR QUALITY Letter

DECEMBER 2017 ISSUE

EPA UPDATE

Senate Confirms Top EPA Positions

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On November 9, 2017, the Senate confirmed William Wherum as the assistant administrator for EPA's Office of Air and Radiation. Wherum previously served in the Office of Air and Radiation under President George W. Bush. Wherum has experience as an industry attorney representing a variety of clients including oil, gas, coal and chemical companies. Wherum is expected to lead the agency in rewriting the Obama-era Clean Power Plan.

On December 7, 2017, the Senate confirmed Susan Parker Bodine to serve as an assistant administrator for the Office of Enforcement and Compliance Assurance at EPA. Bodine has served as chief counsel for the Senate Committee on Environment and Public Works, has practiced law at a private firm and has also served as the assistant administrator for EPA's Office of Solid Waste and Emergency Response. Bodine has also served as a staff director of the Subcommittee on Water Resources and Environment of the House Transportation and Infrastructure Committee.

With the confirmation of these two top positions, it is more likely the administration can advance its environmental agenda.

Happy Holidays and welcome to the AIR QUALITY Letter, a periodic review and update of regulatory changes affecting air quality sources.

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AIR QUALITY Letter
DECEMBER 2017

EPA Ends "Sue and Settle" Litigation Strategy

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On October 16, 2017, EPA Administrator Pruitt issued the "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements." At the same time, Pruitt issued a memorandum to EPA assistant administrators, regional administrators and the office of general counsel explaining the rejection of "sue and settle" tactics by his administration. The memorandum cites the following main reasons for rejection of such tactics: (1) the risk that procedural safeguards will be bypassed or marginalized, (2) the tactics lead EPA to cede its statutory responsibilities to the courts, and (3) the approach is inconsistent with the concept of cooperative federalism found in many environmental statutes EPA administers.

In order to address these concerns, the directive focuses on two key concepts: (1) ensuring the public and potentially impacted parties are informed about lawsuits and potential settlements and have an opportunity to comment and (2) refusing to commit to requirements in a consent decree or settlement agreement that a court could not otherwise impose and are not consistent with the rule of law.

The directive requires the Office of General Counsel to publish online notices of intent to sue EPA within 15 days of receipt. Complaints and petitions regarding an environmental law, regulation or rule where EPA is a defendant or respondent in federal court are to be published online within 15 days of receipt as well. The listing can be found at **https://www.epa.gov/noi/notice**. EPA will directly notify states and regulated entities of complaints or petitions and will seek "concurrence" of affected states and/or regulated entities before entering into a consent decree or settlement agreement. EPA is also going to publish online consent decrees and settlement agreements that still affect agency actions and will add new agreements or decrees after entry. Proposed decrees and draft settlement agreements will be published and comments sought.

In addition, the directive addresses the substance of settlements. EPA will not agree to terms that go beyond what a court would have had authority to impose. EPA will not agree to terms that would convert a discretionary obligation into a mandatory one. Deadlines in consent decrees and settlement agreements that concern agency issuance of final rules as part of the resolution must allow time for modification of the proposed rule, meaningful consideration of comments and possible additional public comment on changes. Finally, if litigation is resolved by agreement, the plaintiff or petitioner should not be considered a "prevailing party" eligible for recovery of attorney's fees and costs. EPA must seek to exclude such payments and not resolve such claims informally. Importantly, however, Pruitt retains the ability to depart from the directive. Item nine of the 10-point directive states: "Where appropriate, I reserve the right to exercise my discretion and permit EPA to deviate from the procedures set forth in this directive."

The directive is prospective only and so has not affected EPA's position in pending matters. An example of this is the Environmental Integrity Project v. Pruitt case. There, EPA opposed North Dakota's motion to intervene in the proceeding initiated by environmental groups to force EPA to review certain solid waste regulations related to oil and gas operations under the Resource Conservation and Recovery Act. On November 28, 2017, the D.C. Circuit upheld the lower court decision that North Dakota did not have standing to intervene since the issue was establishment of a deadline for EPA to decide whether to act.

One of the concerns expressed since the directive was issued is whether it will create more problems for the agency. EPA has frequently been sued for failing to meet statutory deadlines for action. If the agency is unable to negotiate reasonable timelines for implementation, the risk is that a court will set a tougher schedule. There will shortly be opportunities to assess the significance of that risk. For example, pursuant to the Clean Air Act, EPA was to promulgate designations of attainment or nonattainment with respect to the 2015 National Ambient Air Quality Standard (NAAQS) for ozone by October 1, 2017. EPA did not meet that deadline, although on November 1 the agency published designations of attainment/unclassifiable areas. Public interest groups, 14 states and the District of Columbia filed Notices of Intent to Sue in October. Two complaints for declaratory and injunctive relief were filed in the U.S. District Court for the Northern District of California on December 4 and 5 respectively. Both complaints ask the court to declare EPA has violated a mandatory duty and to issue an injunction mandating the agency to act.

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PERMITTING

EPA Reverses Position on Review of PSD Issues Through the Title V Permitting Process

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On October 16, 2017, EPA Administrator Scott Pruitt signed an order reversing a long-standing EPA position that EPA has the authority to review previous state decisions on new source permitting applicability when reviewing Title V permits. The order denied a petition by Sierra Club requesting that EPA object to the issuance of a Title V operating permit to the Hunter Power Plant in Castle Dale, Utah.

Under the Clean Air Act (CAA), state and local permitting authorities must submit proposed Title V operating permits to EPA for review. EPA has 45 days to object to issuance of a proposed permit if it determines the permit does not comply with applicable requirements under the Clean Air Act (CAA). If EPA does not object, any person may petition the administrator, within 60 days of the expiration of EPA's 45 day review period, to object to the permit. In this case the Sierra Club petition raised several claims stating why the Hunter Power Plant Title V Permit should be denied. Sierra's Club's first claim was that EPA must object to the Title V Permit because it failed to include Prevention of Significant Deterioration (PSD) requirements. Sierra Club argued that PSD requirements were applicable because they were triggered by modifications to the Hunter Power Plant between 1997 and 1999 that should have been considered "major modifications."

EPA stated this claim "raised the fundamental issue of whether decisions made during previous preconstruction permitting . . . should be reconsidered when issuing or renewing a Title V operating permit." EPA noted it has previously considered similar preconstruction permitting issues when they were raised in a Title V petition. However, based upon "a review of the structure and text of the CAA and the EPA's regulations in part 70," EPA concluded "that the Title V permitting process is not the appropriate forum to review . . . preconstruction permitting decisions." Acknowledging its departure from past EPA guidance on this issue, EPA concluded its position "better aligns with the structure of the Act and the EPA's original understanding of the relationship between the operating and construction permitting programs under the CAA after the enactment of Title V."

EPA provided the following reasons supporting its decision:

- When enacting the Title V program, EPA "did not express the intention to use the Title V permitting process to review the 'applicable requirements' established in preconstruction permitting programs under Title I of the CAA" nor did it indicate the Title V process would give EPA another opportunity to review the merits of a preconstruction permitting decision.
- EPA and courts have noted on many occasions Title V was not intended to add new substantive requirements nor was it "intended to second-guess the results of state preconstruction permit programs."
- Case-specific preconstruction permitting decisions are better challenged under Title I of the Clean Air Act through a state appeals process or a citizen suit rather than a general Title V permit review.
- It would be inefficient for EPA to go back and review preconstruction permitting decisions that were already "subject to the safeguards of public notice and judicial review."
- The Title V review process only provides EPA 45 days to review the proposed Title V permit. EPA would not have enough time to complete an in-depth and searching review of every preconstruction permitting decision in this short time frame.

EPA also outlined its approach moving forward in the order. In Title V permit reviews, EPA will not reevaluate previously issued preconstruction permits. The terms of the preconstruction permit will be incorporated into the Title V permit as "applicable requirements" and EPA will "limit its review to whether the Title V permit has accurately incorporated those terms and conditions and whether the Title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit."

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EPA Reverses Position on Review of PSD Issues Through the Title V Permitting Process

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Finally, EPA explicitly stated this interpretation does not limit EPA's preconstruction permit oversight or enforcement authority under Title I of the Clean Air Act.

This order has not yet been published in the Federal Register. When it is published, a 60-day window will start for parties to sue the agency and challenge the decision. Some environmental groups have suggested they are seriously considering this option.

Environmental groups believe eliminating the ability to review the underlying permit requirements that are contained in a source's Title V permit will narrow the grounds on which a citizen can challenge a Title V permit. However, EPA appears committed to this policy. In an October 31, 2017 decision, EPA cited the Hunter Power Plant decision in denying another Title V petition based on a challenge to an alleged flaw in the underlying permit

STATE UPDATES

Kentucky Air Law Update

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Kentucky Regulatory Amendments

On September 15, 2017, the Division for Air Quality submitted amendments to 401 KAR 59:015 for new indirect heat exchangers and 401 KAR 61:015 for existing indirect heat exchangers. The Division stated the amendments were necessary to provide clarity for regulated entities and to remove duplicative requirements covered by federal regulations. In addition, the Division made changes to the regulations to establish work practice standards for startup and shutdown periods.

Under the proposed rules, the Division defined "startup periods" as beginning with either a combustion of any fuel in an affected facility for the purpose of supplying useful thermal energy for heating, cooling, progress purposes, or generation of electricity; or, the combustion of fuel in an affected facility for any purpose after a shutdown event; and beginning after the longest manufacturer-recommended time required to engage all control devices utilized by the affected facility applicable to the pollutant, not to exceed four hours after any of the useful thermal energy from the affected facility is supplied for any purpose. The proposed rule defines "shutdown period" as the period beginning when, whichever occurs first, the affected facility no longer supplies useful thermal energy for heating, cooling, process purposes, or generation of electricity; or fuel is not being combusted in the affected facility; and when the affected facility no longer supplies useful thermal energy for heating, cooling, process purposes, or generation of electricity; and fuel is not being combusted in the affected facility.

The work practice standard that the Division proposes to utilize during startup or shutdown periods includes operating the affected facility and all applicable control devices in a manner consistent with good air pollution control practices for minimizing emissions; minimization of the frequency and duration of startup periods or shutdown periods; taking all possible steps to minimize the impact of emissions on ambient air quality during startup and shutdown periods; documentation with signed contemporaneous logs or other relevant evidence of actions during startup and shutdown periods, including duration of the startup period; and conducting startup and shutdown according to the manufacturer's recommended procedures or recommended procedures for a unit of similar design for which manufacturers recommended procedures are available as approved by the Energy and Environment Cabinet based on documentation provided by the owner or operator of the affected facility. Further, facilities subject to 40 CFR Pare 63, Subpart DDDDD, 46 CFR 63, Subpart UUUUU, or 40 CFR Part 63, Subpart JJJJJJ must meet the work practice standards in the applicable federal requirements. The Division received comments on the proposed regulations and the amended regulations will be published in the January 1, 2018, Kentucky Administrative Register.

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EPA Reverses Position on Review of PSD Issues Through the Title V Permitting Process

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The Louisville Metro Air Pollution Control Board has also proposed numerous provisions to its air rules. Included in the revisions are updates to the current rules, reorganization of the fee structure to provide for annual fee adjustments with current fee schedules to be made available prior to the beginning of each Metro fiscal year, and updating the provisions for existing and new indirect heat exchangers. The various changes can be seen at https://louisvilleky.gov/government/air-pollution-control-district/services/proposed-actions-apcd. According to the Louisville APCB website, a hearing is scheduled for January 17, 2018.

Kentucky Federal Updates

September 18, 2017

EPA approved a SIP revision removing Stage II vapor control requirements for new and upgraded gasoline dispensing facilities and allowing for the decommissioning of existing Stage II equipment in Jefferson County, Kentucky. See 82 Fed.Reg. 43489 (Sept. 18, 2017).

October 12, 2017

EPA approved the Kentucky 2014 Progress Report detailing the state's progress regarding goals for regional haze. The approval also included Kentucky's determination that the regional haze plan is adequate to meet the reasonable progress goals for the first implementation period covering through 2018 and that no substantive revision is required at this time. See 82 Fed. Reg. 47378 (October 12, 2017).

November 3, 2017

In a final rule, EPA denied a petition by the states of Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont requesting that EPA add nine states, including Kentucky, Ohio and West Virginia, to expand the ozone transport region to include those states. EPA had issued a proposal to deny the petition in January 2017. In this final action, EPA stated it had reassessed the technical information submitted in support of the petition, both by petitioners and commenters on the proposed denial, but still found a sufficient basis to justify the denial action. EPA stated its belief that other Clean Air Act provisions, including Section 110(a)(2)(D)(i)(I), provide a better pathway to develop a tailored remedy most effective for addressing any air quality problems for the 2008 Ozone NAAQS which the petitioner states identified as problematic. See 82 Fed. Reg. 51238 (November 3, 2017).

Ohio Air Law Update

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Environmentalists Challenge Gallia County SO_2 Designation

Environmentalists are challenging the EPA's designation of Gallia County and portions of Meigs County, Ohio, alleging the area is not in attainment for the 2010 sulfur dioxide National Ambient Air Quality Standards (NAAQS). Before the United States Court of Appeals for the District of Columbia Circuit, the Sierra Club contests EPA's designation of the area as "unclassifiable." According to the Sierra Club, EPA made mistakes with technical analysis which rendered its designation unlawful and, thus, the area should be listed as being in nonattainment. EPA considers those areas that have air quality worse than the NAAQS as nonattainment. Nonattainment areas are required by EPA to, among other requirements, implement a plan to meet the standard or face penalties from the federal government.

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Environmentalists Challenge Gallia County SO2 Designation

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In 2010, EPA revised the primary, or health-based, NAAQS for SO_2. EPA's promulgation of the 2010 SO_2 NAAQS triggered the agency's statutory obligation to "designate" all areas of the country according to whether they comply with the standard. Areas that comply are designated "attainment." Areas that do not comply must be designated "nonattainment." In some cases, EPA is not able to determine an area's status after evaluating the available information and designates an area "unclassifiable."

EPA had previously concluded that Ohio had inappropriately used a 38 percent bias adjustment in its calculation of background concentrations. However, EPA determined the information provided by Ohio did not clearly indicate whether the use of unadjusted background concentrations without the bias adjustment would have violated the standards and thus designated the region "unclassifiable." The Sierra Club contends that, without the bias adjustment, the area would be in nonattainment.

NAAQS

EPA Issues 2015 Ozone NAAQS Designations

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In November, EPA concluded that 2,646 counties, out of more than 3,100 counties in the United States, are in attainment with the 2015 ozone National Ambient Air Quality Standards (NAAQS). On October 1, 2015, the Obama administration revised both the primary and secondary NAAQS for ozone to a level of 0.070 parts per million (ppm) (annual fourth-highest daily maximum 8-hour average concentration, averaged over 3 years). The 2008 ozone NAAQS specified an ozone concentration level of 0.075 ppm. For all designations released, EPA classified the area as "Attainment/Unclassifiable" and did not include any areas classified as nonattainment. The approximately 10 percent of counties excluded from designation at this time includes many metropolitan areas such as Jefferson, Kenton and Campbell Counties in Kentucky and Hamilton, Franklin and Cuyahoga Counties in Ohio.

Over the summer, EPA announced that it was delaying the October 1, 2017, Clean Air Act due date to release the 2015 ozone NAAQS designations. After states sued EPA, it rescinded the announced delay. However, EPA missed the October 1 designation deadline. Statements of EPA Administrator Scott Pruitt suggest that EPA is working to reconsider the more stringent 2015 ozone NAAQS and, in August, EPA announced the agency would be moving forward with the 2015 ozone designations on a case-by-case basis. EPA also announced that it is considering withdrawal of its guidelines for states to use in reducing ozone precursors in the oil and gas industry.

EPA's 2015 ozone NAAQS designations have already sparked litigation. On December 5, 2017, California, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia filed suit in the United States District Court for the Northern District of California challenging what these states characterize as EPA's failure to designate the attainment status of certain areas. The states allege EPA has a duty to designate all areas in the country as opposed to the partial designation of counties released so far. A lawsuit with similar claims was filed in the same court on December 4, 2017 by non-governmental organizations including the Sierra Club, Environmental Defense Fund and National Parks Conservation Organization.

On December 19, 2017, the D.C. Circuit issued an order requiring EPA to file a report describing when it plans to issue a final rule establishing air quality designations for the 2015 ozone NAAQS.

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GREENHOUSE GAS EMISSIONS

Clean Power Plan Update

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EPA continues to make progress in its effort to repeal and replace the Clean Power Plan (CPP). EPA held public hearings on November 28-29, 2017, in Charleston, West Virginia to take testimony on its October 10, 2017, proposal to repeal the rule. EPA is accepting comments on the proposal to repeal the rule through January 16, 2018. EPA announced it will hold three additional public comment sessions due to the "overwhelming response" to the West Virginia hearing. The sessions have not yet been scheduled but they will take place in San Francisco, California; Gillette, Wyoming; and Kansas City, Missouri.

At a conference on November 17, 2017, EPA Administrator Scott Pruitt indicated EPA is close to releasing an Advance Notice of Proposed Rulemaking (ANPR) that will solicit the public's input on how to regulate power plant greenhouse gas emissions. The ANPR will ask the public to comment on how carbon dioxide from power plants could be reduced under Section 111 of the Clean Air Act. This is consistent with an approach to regulate power plants only "inside the fenceline." Pruitt has stated that EPA does not plan to take comment on the Obama administration's greenhouse gas endangerment finding in this ANPR.

While the regulatory process moves forward to repeal and replace the CPP, the environmental groups challenging the CPP asked the D.C. Circuit Court of Appeals in October to issue a ruling in the case. However, the court denied this request and has extended its stay over the CPP. On November 9, 2017, the court issued an opinion extending the stay for 60 days, requiring EPA to issue status reports on its repeal efforts every 30 days.

On December 18, 2017, EPA released a pre-publication copy of an advanced notice of proposed rulemaking (ANPR) to solicit information on "on the proper respective roles of the state and federal governments in that process, as well as information on systems of emission reduction that are applicable at or to an existing EGU, information on compliance measures, and information on state planning requirements under the Clean Air Act (CAA)." The ANPR is expected be published in the Federal Register in due course.

ENFORCEMENT

EPA Reverses Position on NSR Enforcement

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For many years EPA has taken the position it could take enforcement action based on agency review and calculation of projected emissions in determining New Source Review (NSR) applicability for pre-construction permitting for modification of an existing source. Projects that trigger NSR must go through Prevention of Significant Deterioration (PSD) permitting review if the source is located in an attainment area for the National Ambient Air Quality Standards; if located in a non-attainment area, then a non-attainment NSR (NNSR) review must be performed. Both PSD and NNSR reviews are complex and resource intensive. Thus calculation of post construction emissions and NSR applicability is very important. The source is responsible for determining NSR applicability. Where a source has determined NSR was not applicable, EPA has traditionally taken the position it had authority to evaluate pre-construction potential emissions and if the source determination was incorrect take enforcement action for failure to obtain an NSR permit prior to construction, despite actual post construction emissions data showing that NSR requirements were not triggered.

On December 7, 2017, EPA Administrator Scott Pruitt issued a memorandum to regional administrators clarifying EPA's current understanding regarding certain elements of the NSR regulations and communicating the intended application and enforcement of the NSR applicability provisions reversing the longstanding EPA approach. The memorandum stated its intent to cover

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EPA Reverses Position on NSR Enforcement

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certain specific topics: "1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements."

The memorandum explains that NSR requirements are triggered if a project becomes a major modification. If "the project causes a significant emissions increase, the project is a major modification only if it also results in a significant net emissions increase" and significant increases are calculated for existing sources using the "actual-to-projected-actual" applicability test. The memorandum focuses on this test and discusses the applicability determination requirements placed on the source to: 1) consider all relevant information in making an emissions projection "including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan;" 2) exclude the portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions that are unrelated to the project; and, 3) follow the objective calculation requirements in the regulations. Additionally, the memorandum discusses the specific regulatory recordkeeping, monitoring and reporting provisions that apply where there is a "reasonable possibility," as defined in the regulations, that a project not expected to cause a significant emissions increase could do so. The memorandum further discusses the documentation that the source is required to maintain depending on the reasonable possibility criteria applicable to a project and the type of emission unit(s) involved.

The memorandum notes that "if an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules" and that the "NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules."

The memorandum specifies EPA's intent for application of the NSR rules:

- Application of the NSR rules in accordance with the provision to consider "all relevant information" in making a projection "such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations."
- "The EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirement provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability."
- "EPA intends to implement and exercise its authority under the NSR provisions to clarify that when a source owner or operator performs a pre-project NSR applicability in accordance with the calculation procedures in the regulations and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgment for that of the owner or operator by "second guessing" the owner or operator's emissions projections."
- "When an owner or operator projects that a project will result in an emission increase or a net emission increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10- year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur.

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EPA Reverses Position on NSR Enforcement

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While the memorandum specifies it does not constitute a final action, is not a rule or regulation and may not apply to every situation thus attempting to avoid litigation, the likelihood of a challenge to its implementation in a given situation is high. Further litigation could be bolstered by a December 11, 2017, United States Supreme Court order rejecting without comment a request from DTE Energy to hear an enforcement action wherein the Sixth Circuit Court of Appeals found that EPA could pursue enforcement based on a claim that the source had improperly projected emissions. *See United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). In the interim, however, the planned EPA approach discussed in the memorandum should be considered by sources wishing to expand existing facilities.

AIR QUALITY Letter

Readers are invited to provide comments, suggestions or newsworthy materials to the editors of the newsletter listed below. All input is welcome.

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