



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

Project Emissions Accounting Rule/New Source Review: U.S. Environmental Protection Agency Denies Sierra Club Petition for Reconsideration

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U.S. Environmental Protection Agency (“EPA”) Administrator Michael S. Regan (“Administrator”) in an October 12th letter responded to a Petition for Reconsideration submitted by the Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, Environmental Integrity Project, and the Adirondack Council (collectively, “Sierra Club”) addressing the final rule:

Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting (“PEA Rule”)

The Sierra Club Petition for Reconsideration also requested the withdrawal of the EPA guidance memorandum:

Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program (March 13, 2018)(March 2018 Memorandum)

The Administrator denies the Petition for Reconsideration of the PEA Rule. The Petition for Reconsideration is deemed to not meet the criteria for mandatory reconsideration under Section 307(d)(7)(B) of the Clean Air Act. However, no action is being taken on the Sierra Club’s request that EPA withdraw the March 2018 Memorandum.

The Clean Air Act New Source Review (“NSR”) constitutes a preconstruction permitting program that establishes and documents air pollution emission limits from “major” sources of air pollution. The NSR program includes two permitting programs:

- Nonattainment
- Prevention of Significant Deterioration (“PSD”)

Nonattainment NSR applies in nonattainment 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 new or modified sources of air pollution in areas while still making progress toward NAAQS.

PSD applies 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 a significant modification.

The PEA Rule addresses what constitutes a major 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 as follow:

1. Determine if the proposed project will cause a 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 final rule revised NSR applicability provisions to clarify that:

... both emissions increases and emissions decreases that result from a given proposed project are to be considered at Step 1 of the NSR major modification applicability test.

The phrase “emissions accounting” derives from the fact that decreases could now be considered in the first step of the analysis.

Sierra Club’s January 22nd Petition for Reconsideration is described by the Administrator as containing three primary objections to the PEA Rule and March 2018 Memorandum:

1. The PEA Rule fails to ensure that offsetting emission decreases used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated;
2. The final rule unlawfully allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous emission decreases; and,
3. EPA has not ensured that project emission decreases will occur and will be maintained.

The Administrator concludes that the Sierra Club Petition for Reconsideration failed to establish that the objections to the PEA Rule meet the criteria for mandatory consideration under the referenced section of the Clean Air Act. He concludes that it was not impracticable for Sierra Club to raise the referenced objections. This is based on the determination that EPA specifically sought comment on the application of the “project aggregation” interpretation and policy in its proposed PEA Rule. It is further stated that:

... commenters had the opportunity to raise whether applying such an interpretation and policy would still be insufficient as the agency specifically asked for comments on this issue. The failure to make such comments means that the petitioners have not met the bar for mandatory reconsideration under CAA Section 307(d)(7)(B).

The remainder of the Administrator’s letter addresses each of the three objections along with the conclusion as to why the requirements for reconsideration have not been met.

Despite the fact that the Administrator denies the Petition for Reconsideration, he also acknowledges that it:

... identifies potential concerns that warrant further consideration by the EPA.

As a result, the Administrator states that EPA plans to initiate a rulemaking process to consider revisions to the NSR regulations that would address the issues raised in the Sierra Petition for Reconsideration and consider if withdrawal or revision of the March 2018 Memorandum is necessary.

A copy of the October 12th letter can be downloaded [here](#).