Project Aggregation/Clean Air Act: U.S. Environmental Protection Agency Concludes Reconsideration of 2009 Guidance

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The United States Environmental Protection Agency ("EPA") published a November 7th Federal Register Notice described as a "Final Action" that concludes:

. . . the reconsideration of an earlier action that the EPA published on January 15, 2009, titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.

(Hereinafter denominated 2009 Guidance)

See 74 Fed. Reg. 2376.

The aggregation issue is a key Clean Air Act concept. It involves a determination as to when operations in the vicinity of each other should be aggregated for Clean Air Act purposes. This can be a critical determination since sources falling within the scope of the phrase "located on adjacent properties" may be "aggregated" for purposes of determining whether a Clean Air Act Title V or New Source Review determination must be obtained.

EPA's November 7th Final Action includes the retention of the interpretation set forth in the 2009 Guidance. Further, the federal agency is not adopting changes to the text.

EPA also stated on November 7th:

- Clarified implications of the 2009 Guidance for EPA-approved permitting programs
- Lifts the stay of the 2009 Guidance that the agency had issued in May 2010 pursuant to the Administrative Procedure Act

The 2009 Guidance provided for aggregating emissions from nominally-separate activities when they are "substantially related" for the purpose of determining whether they are single modification resulting in a significant emissions increase under New Source Review at Step 1 of that analysis. The agency states that this "substantially related" criterion is based on an interpretation of the term "project" contained in the Clean Air Act New Source Review regulations.

Other key points from the 2009 Guidance include:

- Established (as a matter of policy) a rebuttal presumption that activities that occurred more than three years apart are not substantially related and therefore generally should not be aggregated for purposes of determining whether they are a single modification at Step 1
- Retained the existing rule text defining the term “project”
- Acknowledge the case-specific nature of a project aggregation determination but described factors that should be considered when evaluating whether changes are substantially related (including technical or economic dependence)
- Offered examples of what it means to be substantially related
- Addressed the timing element of project aggregation decision in multiple ways
- Timing alone should not be a basis for aggregating projects
- Activities that occur simultaneously are not to be presumed to be substantially related (although reasonable to presume that activities closer in time are more likely to be substantially related than activities separated by larger timeframes)
- Projects timed farther apart area less likely to be substantially related
- The test of a substantial relationship centers around the interrelationship and interdependence of activities such that substantially related activities are likely to be jointly planned (i.e., part of the same capital improvement project or engineering study)

A copy of the 37-page November 7th Federal Register Notice can be found here.