



# NSR REFORM AND EPA AIR MEMORANDA

Presented by Derek McDonald  
Baker Botts L.L.P.  
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# Bill Wehrum on NSR Reform

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BNA Energy and Climate Report (November 27, 2017)

“I'm not so sure full-scale reform is what we need to do. The analogy I use is we're going to try to hit a few singles, maybe a couple of doubles, but we're not going to swing for the fences . . .”

“If we do enough of these more targeted things, then I think over time we will have a big impact on the program.”



# Recent and Anticipated NSR Reforms

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How familiar are you with these NSR Reforms?

- A. Projected Actual Emissions – Dec 2017
- B. Project Emissions Accounting (Netting) – Mar 2018
- C. Source Aggregation - Common Control – Apr 2018
- D. Draft ACE Rule NSR Reforms – Aug 2018
- E. Project Aggregation – Nov 2018
- F. Definition of Ambient Air – Nov 2018 (Draft)
- G. Revisit RMRR definition - Anticipated
- H. What constitutes construction – Anticipated
- I. Reactivation policy (reinstating permits) - Anticipated

# Federal Clean Air Act

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Federal Clean Air Act defines “modification” as “any physical change in, or change in the method of operation of, a stationary source which increase the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted.”

42 U.S.C. 7411(a)(4).

# NSR Reform, Projected Actual Emissions

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- Background
  - “Actual-to-projected-actual” applicability test for modifications
  - “Projected actual emissions” is defined as:
    - “The maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the unit’s design capacity or its potential to emit. . . .”
  - EPA enforcement based on reasonableness of pre-project projections. *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013).
- EPA Dec. 7, 2017 Guidance
  - EPA does not intend to “second guess” pre-project projections:
    - “When a source owner . . . performs a pre-project NSR applicability analysis in accordance with the calculation procedures . . . and follows the applicable recordkeeping and notification requirements . . . that owner has met the pre-project obligations of the regulations, unless there is clear error.”
    - Focus instead should be on actual emissions levels during 5- or 10-year period, as applicable.

# NSR Reform, Project Emissions Accounting

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- Background
  - Applicability test for “major modifications”:
    - If the project is “any physical change, or change in the method of operation of a stationary source,” then
    - Step 1: Will the project alone result in a significant emission increase (in tons per year); and
    - Step 2: Will the project’s net emissions, including contemporaneous and otherwise credible increases and decreases, result in a significant emission increase (in tons per year).
- EPA Mar. 13, 2018 Guidance
  - Emissions decreases that may result from a project are to be considered in Step 1 as “project emissions accounting.”
  - But see TCEQ SIP-approved rules.
- EPA Oct. 16, 2017 Affordable Clean Energy (ACE) Rule Proposal
  - Proposes addition of additional step, before Step 1, for EGUs.
  - Will the project alone result in an hourly increase in an emissions (in pounds per hour).

# NSR Reform, Source Aggregation

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- Background
  - “Stationary source” defined as “all of the pollutant emitting activities that are:
    - Located on one or more contiguous or adjacent properties; and
    - Are under common control of one person or person under common control; and
    - Belong to the same major industrial grouping (2 digit SIC code).”
  - Guidance and interpretation of “adjacent” and “common control” as mandate to avoid NSR circumvention.
  - Support/dependency relationships
- EPA Apr. 30, 2018 Guidance
  - Common control is based on “the power or authority of entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.”
  - Dependency relationships, “ability to influence,” should not result in presumption of common control.

# NSR Reform, Project Aggregation

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- Background
  - Guidance and interpretation of statutory language “any physical change” as mandate to avoid NSR circumvention
  - EPA June 17, 1993 Guidance [3M Memo]
    - Case-by-case evaluation to assess whether emissions increases from multiple physical changes should be combined
    - Multi-factored analysis considering intent, timing, funding, consumer demand, operation planning, objective assessment of economic realities, *relationship to plant’s overall basic purpose*, etc.
- EPA Nov. 15, 2018 Final Rule
  - Final action on 2010 reconsideration rule proposal
  - Case-by-case “substantially-related” test
  - Rebuttable presumption if greater than 3 years



# NSR Reform, Ambient Air

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- Background
  - EPA defines “ambient air” as “that portion of the atmosphere, external to buildings, to which the *general public has access.*”
- EPA Nov. 9, 2018 Guidance (Draft)
  - Draft expands the exclusions to “ambient air.”
    - Would replace specific requirement of a fence or other physical barriers with more general requirement of measures that are effective in deterring or precluding access by the general public.
    - These measures may include traditional fencing, but may also include video surveillance and monitoring, clear signage, routine security patrols, drones, and other potential future technologies.

# Questions?

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