



EPA Reconsiders New Source Review Final Rule

On February 10, EPA announced that it would delay implementation of a January 15th final rule that would fundamentally redefine the concept of “aggregation” as it relates to emissions from industrial facilities. The final rule, published in the final days of the Bush administration, may have allowed industrial facilities to avoid installing the costly pollution controls that are typically required when existing facilities modify their equipment due to necessary repairs or attempts at modernization. EPA’s recent decision to stay the effective date of the final rule for ninety days gives the Obama administration until May 18, 2009, to reconsider the rule.

The reasoning behind EPA’s tactical delay can be traced back to several sources. On January 20th, the day of President Obama’s inauguration, the White House sent executive agencies a memorandum entitled “Regulatory Review”; the following day, the Office of Management and Budget sent executive agencies a similar memorandum entitled “Implementation of Memorandum Concerning Regulatory Review.” Both “memoranda suggest[ed] that agencies consider extending for sixty days the effective date of rules that were published prior to January 20, 2009, but which ha[d] not yet become effective when these rules raise substantial questions of law and policy.” The Natural Resources Defense Council applied additional pressure on January 30th when it filed a petition for reconsideration of the final rule.

In general, modern pollution controls are mandated for facilities whose modifications increase emissions. But what happens when a facility makes multiple modifications? Should the emissions attributable to each modification be analyzed independently to determine whether pollution controls must be implemented for one or more of the modifications (the less costly and less burdensome alternative for businesses since it is less likely to result in a finding of an emissions increase), or should the emissions attributable to each modification be aggregated and analyzed collectively to determine the necessity of pollution controls (the more environmentally-friendly alternative since it is more likely to result in a finding of an emissions increase)?

EPA’s September 2006 proposed rule would have been more apt to adopt the latter approach, creating a greater likelihood of a

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permitting authority's finding that a facility's proposed modifications would result in an overall increase in emissions and, consequently, triggering the requirement that the facility adopt modern pollution controls before proceeding with its proposed modifications. Under the final rule published several weeks ago, however, emissions for modifications performed independently of one another would only be aggregated if the permitting authority determined "there [was] a substantial relationship among the activities, either from a technical or an economic standpoint." The final rule would also establish a rebuttable presumption that modifications performed three or more years apart are not substantially related and, therefore, need not be aggregated.

Because the final rule's test for aggregation would likely decrease the incidence of aggregation, industrial facilities would likely have greater opportunity to pursue modifications without also having to install costly modern pollution controls; whether or not the final rule is ultimately implemented in its current form remains to be seen. Between now and May 18th, EPA's reconsideration of the final rule may produce a new version of the rule that is far less friendly to industrial facilities.

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