



COUNSEL TO GREAT COMPANIES

4C Health / Safety / Environmental Conference

# EPA's Regulatory Reform Agenda, One Year In

April 3, 2018

**LeAnn Johnson Koch**

[leannjohnson@perkinscoie.com](mailto:leannjohnson@perkinscoie.com)

(202) 654-6209

# EPA Declines Review of PSD Permitting Decision in Title V Permit

## October 16, 2017

- Sierra Club petitioned EPA to object to the Title V permit issued to PacificCorp Energy on the basis that it did not include applicable PSD requirements triggered by boiler and turbine modifications years earlier.
- EPA found no error in UDAQ's decision to incorporate the terms and conditions of previously issued preconstruction permits into the Title V permit without further review.
- Title V permitting incorporates existing air pollution control requirements and is not an opportunity to reevaluate previous preconstruction approvals.
- EPA's preconstruction permitting oversight authority under Title 1 of the Clean Air Act can be exercised through the state appeal process or an order under sections 113 and 167.

# New Source Review, Actual to Projected Actual Test

## December 7, 2017

- Pending enforcement against DTE Energy has created uncertainty over the applicability of NSR permitting where the source projects that **the proposed construction will not cause an increase in actual emissions that triggers NSR requirements.**
  - When a source performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements, the source has met the pre-project source obligation of the regulations, unless there is clear error.
  - EPA does not intend to initiate enforcement unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur.

# NSR Reform, Project Emissions Accounting (project netting)

## March 13, 2018

- EPA issues clarification to “Project Emissions Accounting” in NSR preconstruction permitting.
  - Emissions increases **and decreases** are to be considered in “step 1” of the NSR applicability process, provided they are part of a single project.
  - Applies to projects involving only **existing emissions units and hybrid projects** (existing and new units).
  - EPA will no longer apply its prior interpretation:
    - HOVENSA not allowed to include decreases in NOx emissions from retrofitting five gas turbines in “step 1” of the NSR applicability analysis. EPA, Region 2, HOVENSA memo, Mar 30, 2010

# NSR Reform, More to Come

## What else is in the works . . .

- Project Aggregation
- Source Aggregation
- Ambient Air

# MACT, Once In, Always In

## January 25, 2018

- **EPA reverses 1995 “once in, always in” (OIAI) policy**
  - The definitions of “major source” in Clean Air Act section 112(a)(1) and of “area source” in 112(a)(2), compel the conclusion that a major source becomes an area source **at such time that the source takes an enforceable limit on its potential to emit (PTE) hazardous air pollutants (HAPs) below the major source thresholds** (10 tons per year of a single HAP, 25 tons per year of a combination of HAPs).
  - Prior guidance concluding that the limit on PTE must be taken before the “first compliance date” is contrary to the plain language of the Clean Air Act. Potential to Emit for MACT Standards (May 16, 1995).
  - EPA will publish the OIAI guidance in the Federal Register to take comment on adding regulatory text that will reflect EPA’s plain language reading of the statute.

# Limiting Use of Agency Guidance Documents In Enforcement

## January 25, 2018

- Attorney General issued “guidance policy” Nov. 16. 2017
- Prohibits Department components from issuing guidance documents that bind the public without undergoing the notice and comment rulemaking process.
- Guidance documents cannot create binding requirements that do not already exist by statute or regulation.
- DOJ may not use its enforcement authority to convert agency guidance documents into binding rules.
- DOJ litigators may not use noncompliance with guidance documents as a basis for proving violations of law.

# Prohibition on Settlement Payments to Third Parties

## June 5, 2017

- **Attorney General Issues Memorandum Prohibiting Payments to Third Parties**
  - Settlement required Volkswagen to spend \$2 billion on electric vehicle infrastructure
  - Congress had twice refused the funding
  - Volkswagen was an end-run around the Congressional power of the purse.
  - Since 2005 DOJ/EPA reached 18 settlements directing \$74 million to renewable energy projects.



# Questions?

[leannjohnson@perkinscoie.com](mailto:leannjohnson@perkinscoie.com)

(202) 654-6209