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Amid Pushback, U.S. EPA's Reversal on "Once In Always In" Policy Opens Door to Reduced Clean Air Act Obligations

Written by [John Lazzaretti](#) and [Lianne Mantione](#) – 3/15/18

On January 25, 2018, Bill Wehrum, the new Assistant Administrator of US EPA's Office of Air and Radiation, issued a memorandum to all Regional Air Division Directors rescinding US EPA's historic "Once In Always In" (OIAI) policy for major sources under US EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) program. Under the "Once In Always In" (OIAI) policy, major sources subject to Maximum Achievable Control Technology (MACT) standards were prohibited from reclassification that would allow them to escape major source MACT standards. Effectively, once in, always in. US EPA's new policy retracts that position. As Administrator Scott Pruitt [testified](#) before the Senate Environment and Public Works Committee, this updated guidance presents an opportunity to reward major emission sources who have invested the time and money to significantly reduce hazardous air pollutants and that now fall below the major source threshold.

US EPA [anticipates](#) publishing a document in the Federal Register to take comment on adding regulatory text that will reflect US EPA's current legal interpretation; a move that, if successful, will help solidify and address the bounds of this new policy. Of course, we expect that legal challenges to both the updated OIAI guidance and any subsequent rulemaking will occur. US

EPA's proposal is already receiving push back from a group of 16 Senate Democrats who, in a letter to Administrator Pruitt on March 14th, are [urging US EPA to reinstate](#) its prior OIAI policy, at least until US EPA has performed a thorough analysis of the policy change and received public comment.

Background

US EPA's NESHAP program applies emission limitations, work practices, recordkeeping, and reporting requirements to sources that emit any of 187 listed air pollutants (the so-called "hazardous air pollutants"). The NESHAP program divides covered sources into two categories: (1) major sources; and (2) area sources. While the Administrator can establish different criteria in certain circumstances, in general "major sources" are sources that emit, or have the potential to emit, in the aggregate, 10 tons per year or more of any hazardous air pollutant (HAP) or 25 tons per year or more of any combination of HAPs. 42 U.S.C. § 7412. Generally, any source that is not a "major source" is treated as an "area source." Once US EPA determines that a source category is to be regulated under Clean Air Act (CAA) Section 112, MACT is required for all major sources of hazardous air pollutants in that category, while area sources in that category are typically subject to lesser controls or even no controls. In addition, whether a facility is a major or area source of HAPs may affect the applicability of other CAA requirements, such as when or whether the facility is required to obtain a Title V operating permit (major HAP sources must obtain Title V operating permits).

Shortly after US EPA began establishing MACT standards, questions arose whether a source category could accept federally-enforceable emission limitations below the major source threshold, and thereby avoid being categorized as a major source, becoming a so-called “synthetic minor” source. Under US EPA’s [prior policy](#), memorialized in a 1995 guidance memorandum from the Office of Air Quality Planning and Standards, facilities could become synthetic minor sources, but only “until the ‘first compliance date’ of the standard.” In that memorandum, US EPA recognized that the CAA itself did not establish a deadline for sources to avoid being categorized as “major,” and in fact that it was reasonable to presume that “Congress intended a source to have some opportunity to avoid a standard by becoming an area source once it has been identified as subject in a promulgated standard”. Despite this, US EPA determined that once a source was subject to a MACT standard, it must always be subject to that MACT standard. Otherwise, “facilities could ‘backslide’ from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emissions to the major-source threshold (10/25 tons per year).”

US EPA’s New Policy

Emphasizing the absence of any statutory limit on reclassification of major sources to area sources, US EPA’s new guidance memorandum concludes that, contrary to another [prior policy](#) also issued in 1995, “the plain language of the definitions of ‘major source’ in CAA section 112(a)(1) and of ‘area source’ in CAA section 112(a)(2) compels the conclusion

that a major source becomes an area source at such time that the source has taken an enforceable limit on its potential to emit (PTE) HAP below the major source thresholds (*i.e.*, 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP).” Under these circumstances “a source that was previously classified as major . . . will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.” As US EPA reasons, “Congress placed no temporal limitations on the determination of whether a source emits or has the PTE Hap in sufficient quantity to qualify as a major source. To the extent the OIAI policy imposed such a temporal limitation (*i.e.*, before the ‘first compliance date’), EPA had no authority to do so under the plain language of the statute.”

US EPA’s latest guidance memorandum explicitly supersedes and withdraws its prior “Once In Always In” policy.

What are the Practical Implications?

US EPA’s new policy is intended to afford “meaningful incentives” for sources to undertake projects that reduce HAP emissions below the major source thresholds. As Administrator Pruitt testified, elimination of EPA’s “Once In Always In” policy is intended to reward facilities investing in emission reductions that take them below the major source threshold. Facilities that have already reduced their emissions below the major source threshold, either through the installation of pollution controls or by accepting production or process limitations, may be able to reduce their regulatory burdens and gain new flexibility by

reclassifying themselves from major sources to area sources. Moreover, those sources that are close to the major source threshold may benefit from new voluntary pollution control projects or permit restrictions that will allow them to operate as area sources rather than major sources.

Four categories of sources in particular should closely consider the potential benefits of US EPA's new policy:

(1) Sources that have changed process or product since becoming major sources.

Sources that have switched inputs, revised their process, or reformulated their products may find their potential to emit today is much lower than it was when applicable MACT standards went into effect. For those sources that have significantly reduced or eliminated the HAPs that made them a major source in the first place, the benefits of US EPA's new policy may be significant.

(2) Sources that have accepted operational limits after becoming major sources.

Sources that accepted operational limitations, such as annual restrictions on operating hours or annual production limits, to avoid major source thresholds before MACT standards took effect are already treated as area sources. Facilities that subsequently accepted similar restrictions, however, were previously stuck in the major source category for MACT purposes. Operators that accepted a recent operational limit, for example became a limited use boiler or process heater under Boiler MACT, or for an

emergency generator under RICE MACT, may find their testing, reporting, and recordkeeping burdens reduced now that they are an area source.

(3) Sources whose potential to emit is above the major source threshold, but whose actual emissions are significantly below the threshold.

As US EPA pointed out in 1995, a source with PTE above the threshold was still a major source even if it subsequently reduced HAP emissions to a fraction of the major source threshold. While facilities will want to be careful in accepting new limitations that reduce their future growth potential, if a facility has a significant gap between its potential to emit and its actual emissions, the potential now exists to accept federally enforceable emission limits that will allow the facility to continue to operate without the burdens associated with a major source MACT standard.

(4) Sources unduly constrained by their current MACT standards.

MACT standards tend to apply on a short timescale, imposing restrictions on an hourly or even minute-by-minute basis. The major source threshold, on the other hand, is on a tons per year basis. As a result, even for sources whose actual emissions are close to the major source threshold, there can be a significant benefit in moving from a restrictive set of short-term MACT standards to a set of federally-enforceable annual emissions limitations tracked on a monthly basis that ensure the facility is no longer a major source.

Are There Any Drawbacks?

The interaction of CAA programs can be complex and make what seems like a straightforward permit amendment either much more difficult or even unadvisable. An emission limit that has been incorporated into a State Implementation Plan (SIP), for example, may be much more difficult to remove due to anti-backsliding provisions that apply to SIP revisions. Similarly, a source that may benefit from relaxed MACT standards should also consider the effect of such relaxation on the PTE for other pollutants and whether relaxing MACT standards could trigger new obligations under other CAA programs (e.g., New Source Review). For this reason, it is important to carefully consider the implications of any change to the emission limits in a source's operating permit before proceeding towards reclassification.

So What Now?

Permittees who are regulated as major HAP sources should review their current emission profiles to see if they have fallen below the major source thresholds or are close enough to the threshold to make further investigation worthwhile. If a source is now below the threshold or can become so without great cost, it may well be worth a close look to see if a permit amendment will help make life easier by cutting back on recordkeeping, reporting, and in some cases, operational or emissions limitations that are no longer necessary under US EPA's current OIAI policy.

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