EPA Brings More Rationality Into New Source Review Proceedings

The Editor interviews ***David Friedland****, Director, Beveridge & Diamond, P.C.*

Editor: Would you summarize your background and your practice?

Friedland: After law school, I first worked for a law firm in Denver. I then taught for two years at Vermont Law School, from 1985 to 1987. I joined Beveridge & Diamond in 1987.

My practice consists entirely of environmental matters, mostly related to air pollution. I represent companies in rulemaking proceedings, and in court, challenging (and sometimes defending) rules. I also counsel clients regarding compliance. Finally, I defend companies in enforcement proceedings and citizen suits.

Editor: The Environmental Protection Agency (EPA) recently issued some final and proposed rules on the New Source Review (NSR) program. Would you describe for us the significance of those proceedings?

Friedland: There are two rulemakings relating to the NSR program. One is a proposed rule, the other a final rule.

The proposed rule consists of revisions to the routine maintenance, repair and replacement exclusion from NSR requirements. The proposal will be subject to sixty days of notice and comment after it is formally published in the Federal Register. Although EPA has signed the proposal, as of mid-December, it has not appeared in the Federal Register. EPA will issue a final rule after reviewing comments, perhaps as much as a year later.

The final rule addresses several issues. First, it supplements EPA's "actual to potential" test under NSR with an "actual to future actual" test. These are tests used to determine whether a proposed capital expenditure by a company causes an emission increase that will require review under the NSR program.

Second, the final rule changes the method by which companies determine their pre-change actual baseline. Under the final rule, companies can use any consecutive 24-month period in the preceding ten years as the baseline. This is a change from current law, which generally requires companies to use the most recent two years before the changes as the baseline.

Third, the new rule allows the establishment of plantwide applicability limits or PALs. Under a PAL, a cap on emissions for an entire plant is set in a permit. Thereafter, changes to process units at the plant can be made even if those changes result in increases in emissions from the unit in question as long as emissions from the entire plant will be no higher than the PAL. This provision will allow greater flexibility to plant operators by allowing them to look at the plant as a whole, rather than focusing on each change at possibly hundreds of pieces of equipment in a typical chemical plant, refinery or other major industrial operation. The PAL would be established through a permitting process, and the rule establishes standards for that process.

Fourth, the rule provides a "clean unit" exemption. This allows modifications to units that recently went through NSR review if that review would lead to the same pollution controls the second time around. For example, if, a few years ago, a company was required to install a scrubber to control emissions, next year the company could do another capital project without triggering NSR if the control requirement would still be a scrubber.

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Fifth, EPA has identified specific types of pollution control projects that are automatically exempt from NSR. For example, let's say a company decided to install an expensive regenerative thermal oxidizer (RTO) to destroy 95-99% of VOC emissions. This is a very effective pollution control technology, but the RTO also causes NOx emissions from the combustion process. The question, then, is whether the reduction in VOC emissions represents a benefit that outweighs the increased NOx emissions. Before the new rule, a company could ask a local permitting authority to exempt the RTO from NSR review by proving that it would be environmentally beneficial. Sometimes regulators agreed, sometimes they did not. The final rule would identify certain pollution controls that, if installed, would be exempt without the need to apply for approval from state regulators.

Editor: Can you give us some more detail on the significance of the change from the actual to potential test to the actual to future actual test?

Friedland: Let me use a hypothetical example to demonstrate why this change makes sense. Suppose that a chemical manufacturing plant has a limit in a permit of 100 tons of SO2 per year. The company, however, is actually operating at 20 tons per year. The company wants to do a capital project that it believes will have only a slight impact on emissions, say the increase will be from 20 to 25 tons per year. Under EPA's actual to potential test, the relevant comparison would be between 20 tons before the change and the permit limit of 100 tons, a difference of 80 tons, which would trigger NSR permitting. This is true even though the company has no plans to increase its production, and has never operated at a level of production that would reflect the 100 ton per year levels. Under an actual to actual test, the comparison is between 20 tons and 25 tons, thus not triggering NSR review, as long as the company meets the requirements of the new rule to demonstrate that these are its actual emissions.

We have always argued that EPA's reading of its regulations to require that permitting authorities use the actual-to-potential test for all modifications is illegal and environmentally counterproductive. This change brings EPA's interpretation more in line with the language of the regulations.

Editor: What is the significance of the new method of calculating the pre-change baseline of emissions?

Friedland: The new rule will allow use of any consecutive 24-month period within the past 10 years as the baseline. Under the prior rule, the baseline was generally two years prior to the change, unless the company proved that those two years were unrepresentative. Most companies used the presumptive two-year period. This change better reflects the realities of business cycles, and provides greater flexibility to the regulated community.

Editor: What about the plantwide limits for emissions?

Friedland: This change is particularly important for companies such as batch chemical processors, the electronics industry, and others that make frequent changes at their facilities in response to market demands. For these companies, the requirement to secure regulatory approval prior to each change would be burdensome, with little environmental consequence. Companies could not be sufficiently nimble to make the adjustments demanded by the market. The plantwide applicability concept requires that the company secure a permit that sets an emissions limit for the entire facility, taking into account the various processes that occur throughout the plant. So long as the company does not exceed the maximum emissions limit set out in that permit, the company will not trigger NSR, even if the emissions come from varying processes or parts of the plant over time.

Editor: The clean unit exemption sounds logical.

Friedland: This is pretty self-explanatory. If you go through NSR and install the technology mandated, such as an RTO, later modifications to the facility will not require regulatory approval if they would require technology no different from what was already installed. This change is designed to encourage companies to go through NSR review to take advantage of the exemption.

Editor: What happens if technology improves in the interim?

Friedland: If the technology that is later available is more advanced than what was installed in the original NSR process, the company would not be able to use the clean unit exemption.

Editor: The final part of the new rule exempts from regulation certain technology.

Friedland: Yes, this is the pollution control project exclusion. The best example is the RTO mentioned earlier. Other examples EPA sets forth in the rule are electrostatic precipitators, bag houses and low NOx burners. Other pollution controls are also listed. Use of these technologies had been subject to case-by-case exemption, but the new rule allows companies to use the exemption simply by filing a notice with the state environmental regulator prior to proceeding.

Editor: What are the major issues in the proposed rule?

Friedland: The proposed rule deals with only one issue: routine maintenance, repair and replacement (RMRR). EPA has long recognized that companies need to be able to undertake routine maintenance without triggering NSR each time, and that is what the RMRR exclusion provides. Unfortunately, over the years EPA has, on a case-by-case basis, and through unenforceable guidance, interpreted the exclusion to apply in a narrower and narrower manner, so as to render it almost meaningless.

The proposed rule would create two "safe harbors" — that is — categories of projects that would specifically qualify as RMRR. One, the "annual maintenance repair and replacement allowance," requires that a company aggregate its annual expenditures for maintenance, repair and replacement. If this sum does not exceed the "allowance" set for the particular source, the projects are excluded as RMRR.

The key, of course, is setting the allowances. EPA proposes to set the allowance by taking the replacement cost for a brand new facility multiplied by a percentage to be determined (after review of comments) on an industry by industry basis. As proposed, there are certain projects that cannot qualify for this safe harbor, for example, the construction of a new facility.

The second safe harbor is for functionally equivalent replacement projects that do not alter the basic design of the process unit. EPA has interpreted the RMRR exclusion so narrowly that if there is any difference between the new piece of equipment and the equipment being replaced, the Agency will not consider the change as routine. The proposed rule recognizes that technology changes rapidly, and that companies often seek to replace equipment with equipment that performs the same function, but reflects the next generation technology. Accordingly, EPA proposes to allow replacement of components in a process unit without triggering NSR as long as the replacement equipment is functionally equivalent, does not cost more than an as yet undetermined percentage of the cost of building a new unit, and does not change the basic design parameters of the unit. EPA is considering using 50 percent as the trigger, but seeks comment on that and many other issues related to this proposal.

Finally, if a particular project does not fit within one of the two categories described above, it may still be RMRR based on existing EPA interpretations.

Editor: How would you summarize these rulemakings?

Friedland: I think these rules are important because they make the NSR process much more rational. I also think that the media has done a disservice by reporting that these rules apply to power plants and refineries only. They are much more than that. They apply to any industrial operation that emits over the thresholds, and indeed much of my work in this area has been for companies in the chemical, glass, pharmaceutical, paper, cement, municipal waste combustion and food processing industries.

Please contact the author at dfriedland@bdlaw.com with questions about this interview.