



# Federal and West Coast Update

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# The Trump EPA's Clean Air Act Agenda

David Friedland



# Today We Talk About...

## Limitations on Use of Agency Guidance

- **Two Key Memos Limiting Use of Guidance**

## New Emphasis on Federal-State Cooperation

## New Source Review

- **“Project Emissions Accounting” Memo**
- **Source Aggregation: Adjacency Memo**
- **Source Aggregation: Common Control Memos**
- **2009 Project Aggregation Rule**

## Withdrawal of Once In Always In (Litigation Update)

# Limitations on Use of Agency Guidance

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## Two Key Memos Limiting Use of Guidance

### November 16, 2017 Memo

#### Agencies may issue guidance, but . . .

- Not a substitute for rulemaking
- Cannot create binding standards for determining compliance
- Must self-identify as guidance, disclaim force of law
- Cannot require companies to go beyond the required law
- “Guidance” broadly defined

### January 25, 2018 Memo

#### DOJ may not:

- Use guidance as basis for Affirmative Civil Enforcement (“ACE”) cases
- Effectively convert guidance into binding rules through enforcement
- Prove violations of law by non-compliance with guidance

# New Emphasis on Federal-State Cooperation

January 22, 2018 Interim Guidance

Emphasis on “Cooperative Federalism”

- EPA to defer to state as primarily responsible for day-to-day implementation and enforcement
- Exceptions for state inaction/deficiency, multi-state or national issues (e.g., National Enforcement Initiatives), criminal investigations or emergency situations
- Disputes to be resolved by OECA

Enhanced Federal-State Planning

- Regions/states to hold joint planning sessions to discuss state’s needs, state and Regional priorities, inspections, etc.

# NSR: “Project Emissions Accounting” Memo

Major modification requires NSR permit

## Before:

- A 2006 EPA policy permitted consideration of only emissions increases during Step 1 of the typical two-step NSR applicability evaluation.

## Now:

- **3/13/18 Memo:**

- Can count emissions decreases during Step 1, provided part of a single project
- Unlike Step 2, Step 1 decreases need not be creditable or enforceable
- A source may “reasonably defin[e] its proposed project broadly to reflect multiple activities”

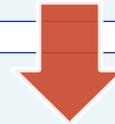
- **8/9/19 Proposed Rule:** Would transform this guidance into enforceable regulation. Comments due 10/8/19.

# NSR: Source Aggregation—Adjacency Memo

Facilities must be aggregated if they **(1) are located on one or more contiguous or adjacent properties**, (2) belong to the same industrial grouping, and (3) are under common control.

## Before:

- EPA considered not only physical proximity, but also “functional interrelatedness.”
- In 2012, *Summit* (6th Cir.) rejected “functional interrelatedness.”
- In December 2012, EPA responded with the “Summit Directive,” which states that *Summit* only applies in the Sixth Circuit.
- In 2014, D.C. Circuit vacated the Summit Directive.
- In 2016, final rule for onshore oil and natural gas sector bright line: adjacent if within ¼ mile and share equipment.



## Now:

- EPA’s 9/4/18 memo clarified that adjacency only refers to physical proximity and must comport with the “common sense notion of a plant.”

# NSR: Source Aggregation: Common Control Memos

Facilities must be aggregated if they (1) are located on one or more contiguous or adjacent properties, (2) belong to the same industrial grouping, and (3) are under **common control**.

## Before:

- Phase 1 (pre-1981): Common ownership
- Phase 2 (pre-1996): SEC definition of control
- Phase 3 (post-1995): Dictionary definition
  - “To exercise restraining or directing influence.”
  - Influential Spratlin Letter extended the concept to consider a number of factors, including dependency, shared facilities and workforce, and nature of contractual agreements.



## Now:

- **Meadowbrook Letter** (4/30/18): “Focus[] on the power or authority of one entity to *dictate* decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.”
- **WI DNR Letter** (10/16/18): Shared control over an *activity* does not necessarily indicate common control.
- **OCLC Letter** (7/12/19): Meadowbrook and WI DNR were “intended to assist with future source determinations and not intended to prompt permitting authorities to revisit prior permitting decisions[,] . . . especially where . . . relevant facts have not changed.”

# NSR: 2009 Project Aggregation Rule

EPA's 2009 Project Aggregation Rule spent 10 years on ice after the Obama EPA stayed and proposed to revoke it

On 11/15/18, the Trump EPA lifted the stay and set 11/15/18 as the effective date.

Under the 2009 Rule:

- Multiple changes at a facility are a single "modification" only if "**substantially related.**"
- "To be 'substantially related,' there **should be an apparent interconnection—either technically or economically**—between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity. We note that **these factors are not necessarily determinative** of a substantial relationship, but are merely indicators."
- Timing of projects alone is insufficient to aggregate projects.
- Rebuttable presumption that projects occurring 3+ years apart should not be aggregated.

On 1/14/19, NRDC petitioned for review

# Withdrawal of Once In Always In (Litigation Update)

Major sources of HAP are subject to major source MACT



**Before:** If the source was major when the “first compliance date” of a MACT standard took effect, the source would remain as a major source forever (and subject to MACT) (“Once-in-Always-in”)



**Now:**

**1/25/18 Wehrum Memo:** A major source can become an area source if the source takes an enforceable limit on the potential to emit and brings the emissions down below the threshold (10/25 tons per year) – at any time  
**8/20/19 D.C. Circuit Decision:** Rejected citizen groups’ challenge, holding that the memo was not final agency action.



# CAA Enforcement Updates

Felicia Barnes

# Recent Developments in the Enforcement Arena

- Change in enforcement priorities
- Three key cases:
  - DTE Energy
  - Luminant
  - Ameren
- Reduced judicial deference to agency?

# 2020-2023 National Compliance Initiatives (NCIs)

- **Extended:**
  - Cutting Hazardous Air Pollutants (HAPs)
  - Reducing Toxic Air Emissions from Hazardous Waste Facilities
  - Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
- **Modifying:**
  - Keeping Industrial Pollutants Out of the Nation's Waters
  - Ensuring Energy Extraction Activities Comply with Environmental Laws
- **Returning to Core Program:**
  - Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters
  - ***Reducing Air Pollution from the Largest Sources***
- **New:**
  - Increase Compliance with Drinking Water Standards

# U.S. v. DTE Energy

- 2010 EPA enforcement action re: Monroe Power Plant plant
- DCt granted SJ to DTE twice
  - First because post-project actual emissions confirmed projection of no significant emission increase
  - Then because EPA's enforcement action was second-guessing DTE's projections
- Sixth Circuit reverses DCt twice, issuing fractured, confusing opinions
- After second opinion, DTE appealed to the U.S. Supreme Court
- Dec. 2017, EPA released guidance memo, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability*
  - Reverse EPA's position on actual emissions and second-guessing
- DCt case stayed to allow for settlement negotiations

# ***U.S. v. Luminant Generation, LLC***

- In 2013, EPA sued for alleged NSR violations at two Texas plants (Big Brown Power Plant and Martin Lake Power Plant) occurring between 2005 and 2009
- Sierra Club intervened
- Suit raised two big questions:
  - Are PSD violations one-time or continuing violation?
  - Does the statute of limitations bar both penalties and injunctive relief?
- Defendants moved to dismiss on SOL basis, DCt agrees
  - NSR is one-time violation
  - Injunctive relief barred by concurrent remedies doctrine
- Early 2017: EPA appealed to the Fifth Circuit

# ***U.S. v. Luminant Generation, LLC***

- Oct. 1, 2018: Fifth Circuit affirms in part, reverses in part
  - Agrees re: one-time violation
  - Reverses on injunctive relief question
  - Remands case to DCt for ruling on injunctive relief
- Nov. 2018: Defendants petitioned for rehearing
  - Feb. 2019: DOJ opposed rehearing
  - July 2019: Fifth Circuit granted en banc rehearing
- Aug. 8, 2019: Motion to dismiss appeal
- Aug. 13, 2019: Fifth Circuit granted MTD appeal
- Aug. 15, 2019: Status Report in District Court says no further proceedings are necessary

# ***U.S. v. Ameren Missouri***

- In 2011, EPA sued for alleged NSR violations at Rush Island Plant in Missouri in 2007 and 2010
- Enforcement case split into liability and remedy stages
  - Issues with calculating baseline, meaning of RMRR, demand growth exception, use of GADS
  - After bench trial, DCt ruled Ameren violated the CAA
  - Sierra Club allowed to intervene after trial

# *U.S. v. Ameren Missouri*

- Remedy phase: Ameren fighting against injunctive relief
- Feb. 2019 Decision:
  - District Courts can order injunctive relief to remedy past CAA violations, even if DOJ has withdrawn claim for penalties
  - District Courts have the authority to determine what technology constitutes BACT
  - District Courts can require emission reductions at “non-offending” power plants
  - Court denied EPA’s SJ motion seeking flue gas desulfurization as BACT because of disputed facts regarding the balance of hardships and public interest factors
- Remedy trial in April 2019
- Post-trial briefing continues, including SA for Luminant decision

# Reduced Deference to EPA in Enforcement Cases?

- Recent Supreme Court case, *Kisor v. Wilkie*
  - *Auer* deference: agency's own regulations
  - Decision upholds *Auer* deference
  - But also introduces new limits
- Enforcement cases rely heavily on EPA's interpretations of its own regulations
- Will *Kisor* impact enforcement actions?



# California Air Enforcement Headlines and Forecasts

Jacob Duginski



# ...but first, some basics

- CARB's enforcement authority is generally cabined to things that can move throughout the state. Cars, fuels, products.
- Districts govern things that are in their respective air basins – in short, stationary and area sources

# CARB Enforcement Report June 2019

- **Cars**

- \$500 million settlement with Fiat-Chrysler
- Joint effort between CARB and EPA
- \$78.4 million to California

- **Fuels**

- \$1 million GE Warren and Shell settlement
  - Importation and distribution of approximately 11 million gallons of fuel violating CARBOB Standards
- LCFS \$1 million settlement for misreported fuels (over 1 billion gallons)

- **Products**

- \$700,000 settlement with Heinz. Sold cleaners with excess VOC concentration. Excess VOCs emitted estimated at 75.2 tons

# Environmental Justice → Environmental Enforcement

- AB 617 requires that certain “first-year” communities adopt enforcement plans to deal with pollution in disadvantaged communities
- AB 617 is being implemented by CARB in conjunction with air districts that have jurisdiction over first-year communities

# Two Major Districts – Two Different Approaches

- **The SCAQMD has three communities**
  - East Los Angeles, Boyle Heights, West Commerce
  - Muscoy, San Bernardino
  - Wilmington, West Long Beach, Carson
- **BAAQMD has one needing a CERP**
  - West Oakland

# SCAQMD – Draft CERP Enforcement Plan

- “As revealed over the course of the public process for CERP development, one such gap has been a lack of communication with members of the community, who have firsthand experience with local emissions sources and whose input can be quite valuable to enforcement efforts. South Coast AQMD has therefore prioritized outreach and added new positions to interact directly with the AB 617 communities, including dedicated compliance staff assigned in those communities.”

# SCAQMD Approach?

## Target Industries and Activities

- Refineries
- Oil wells and drilling
- Neighborhood Truck Traffic
- Ports
- Railyards

# BAAQMD Approach? Enforcement Strategies

- Increased inspection frequency of all stationary sources
- Annual reports to Community Steering Committee
- Enhanced enforcement referral process
- Updated complaint procedures

# Takeaways

- CARB will continue enforcement efforts in areas prone to violation or sectors with repeated violations (cheat devices, fuel reporting, consumer products)
- Air Districts with AB 617 communities will have enforcement efforts driven by community concerns

# Questions?



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Felicia has significant experience with Clean Air Act rulemaking and administrative proceedings before the US EPA. She also has substantial D.C. Circuit litigation experience both challenging and defending major Clean Air Act rules that are critical to her clients.

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