



# *The Committee on Energy and Commerce*

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## **Memorandum**

May 19, 2014

TO: Members, Subcommittee on Energy and Power

FROM: Majority Committee Staff

RE: Hearing on H.R. \_\_, the “Promoting New Manufacturing Act”

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On Wednesday, May 21, 2014, at 10:00 a.m. in 2322 Rayburn House Office Building, the Subcommittee on Energy and Power will hold a hearing on H.R. \_\_, the “Promoting New Manufacturing Act.” The legislation provides for greater transparency and timeliness in obtaining permits required under the Clean Air Act.

### **I. WITNESSES**

- **Ms. Lorraine Krupa Gershman**, Director, Regulatory & Technical Affairs, American Chemistry Counsel;
- **Mr. Ross Eisenberg**, Vice President, Energy and Resources Policy, National Association of Manufacturers
- **Mr. Ken Weiss**, Global Managing Partner, Air and Climate Change, Environmental Resources Management (ERM);
- **Ms. Karen Kerrigan**, President and Chief Executive Officer, Small Business & Entrepreneurship Council;
- **Mr. John Walke**, Senior Attorney and Director, Climate and Clean Air Program, Natural Resources Defense Council; and,
- **Mr. Ali Mirzakhali**, Director, Division of Air Quality, Delaware Department of Natural Resources and Environmental Control.

### **II. BACKGROUND**

Under the Clean Air Act (CAA), preconstruction permits generally are required before beginning construction of a new manufacturing facility or substantial expansion of an existing facility. In particular, under the CAA’s “New Source Review” (NSR) provisions, new or modified facilities are required to obtain preconstruction permits before commencing construction and to install emissions control equipment as a condition of the permit.

Preconstruction permits for a new major stationary source, or a major modification of an existing major stationary source, are issued under two permitting programs.<sup>1</sup> The “Prevention of Significant Deterioration” (PSD) program applies in “attainment” areas where the air quality meets national ambient air quality standards (NAAQS),<sup>2</sup> or cannot be classified as either in “attainment” or “nonattainment” with the NAAQS. The “Nonattainment NSR” (NNSR) program applies in areas that are not in attainment with the NAAQS.<sup>3</sup> Because the NSR requirements are pollutant-specific, a preconstruction permit application may require both PSD and NNSR reviews. Collectively, the Environmental Protection Agency (EPA) refers to the PSD and NNSR programs as the “major NSR program.”<sup>4</sup>

Under the major NSR program, EPA establishes the basic permitting requirements through Federal regulations. Although the majority of the major NSR permits are issued by State and local permitting authorities, EPA also may be the permitting authority in certain States.<sup>5</sup> Where EPA is not the permitting authority, EPA may review and submit comments on draft permits proposed by State or local permitting authorities.

By statute, a decision on a PSD permit application is required to be made within one year of the filing of a completed application. *See* CAA § 165(c), 42 U.S.C. §7454(c). In practice, however, the permitting process can take significantly longer.<sup>6</sup> EPA has estimated that during the years 2008 through 2012, the percentage of major NSR permits issued within one year of

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<sup>1</sup> The draft legislation applies only to “Major NSR” permits for major stationary sources. The draft legislation does not apply to the “Minor NSR” program, which is administered by States.

<sup>2</sup> EPA has established standards for six criteria pollutants: carbon monoxide, lead, ozone, particulate matter (PM<sub>2.5</sub>/PM<sub>10</sub>), nitrogen dioxide (NO<sub>2</sub>), and sulfur dioxide (SO<sub>2</sub>). *See* [National Ambient Air Quality Standards \(NAAQS\)](#).

<sup>3</sup> The PSD and NNSR programs are contained in parts C and D, respectively, of Title I of the CAA. *See* CAA [Part C of Title I](#), §§ 160-169, 42 U.S.C. §§ 7470-7479 (PSD); CAA [Part D of Title I](#), §§ 171-193, 42 U.S.C. §§ 7501 – 7515 (NNSR). For applicable Federal regulations, *see* 40 CFR 51.165, 51.166, 52.21, 52.24 and part 51, Appendices S and W.

<sup>4</sup> The PSD program, which applies to criteria pollutants, as well as certain non-criteria pollutants regulated by EPA that do not have a NAAQS (*see* 40 CFR 52.21(a)(23)), requires installation of “Best Available Control Technology” (BACT) technologies, based on a case-by-case determination and taking into account cost and other factors. *See* [Prevention of Significant Deterioration \(PSD\) Basic Information](#). The NNSR program, which applies to criteria pollutants in areas that are out of compliances with the NAAQS, includes more stringent requirements, including installing “Lowest Achievable Emissions Rate” (LAER) technologies without taking into account costs and other factors, obtaining emissions offsets and achieving a net air quality benefit, and an alternatives analysis. *See* [Nonattainment NSR Basic Information](#).

<sup>5</sup> In the majority of States, the States have developed NSR requirements and procedures that are defined and codified in a State Implementation Plan (SIP) approved by EPA. Other States rely on EPA’s NSR program, and in these states EPA has delegated authority on behalf of the agency (delegated States). In still other States, EPA may be the permitting authority. *See, e.g.* [“Where You Live.”](#)

<sup>6</sup> *See, e.g.* EPA Oct. 15, 2012 [Memo](#) entitled “Timely Processing of Prevention of Significant Deterioration (PSD) permits when EPA or PSD-Delegated Air Agency Issues the Permit” (summarizing “best practices and other recommended tools to foster timely and consistent permit processing”).

receiving a completed permit application ranged from 46 percent to 80 percent depending upon the year.<sup>7</sup>

One of the challenges associated with obtaining necessary preconstruction permits can be new or changing regulatory requirements, including new or revised NAAQS. Such new or revised NAAQS apply to preconstruction permit applications as soon as the new or revised standards become effective, except in limited circumstances.<sup>8</sup> At the same time, EPA's implementing regulations and guidance for how to comply with the new or revised NAAQS may be significantly delayed.<sup>9</sup>

An additional source of delay for PSD permits issued by EPA or delegated States can be the time for an appeal to the EPA's Environmental Appeals Board. EPA has estimated that the average time for resolution of such appeals is 5 months.<sup>10</sup>

### **III. SUMMARY OF LEGISLATION**

Section 1: This section provides the short title of "Promoting New Manufacturing Act."

Section 2: This section directs the Administrator of the EPA to publish on the agency's website: (1) the number of preconstruction permits issued annually under the Clean Air Act's New Source Review program for major sources, including "Prevention of Significant Deterioration" and "Nonattainment NSR" permits; (2) the percentage of such permits issued within one year after the date of filing of a completed application; and (3) the average length of time for the EPA's Environmental Appeals Board to resolve administrative appeals.

Section 3: This section directs the EPA Administrator, in publishing any final new or revised national ambient air quality standard, to publish concurrently implementing regulations and guidance, including information relating to the submittal and consideration of preconstruction permit applications under the new or revised standard. This section also provides that a new or revised NAAQS shall not apply to the review and disposition of a preconstruction permit

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<sup>7</sup> See [U.S. EPA Fiscal Year 2015 Justification of Appropriation Estimates](#) at pp. 224, 829.

<sup>8</sup> See, e.g. EPA Oct. 15, 2012 [Memo](#) (new or revised NAAQs "apply to any final permit issued after the effective dates of the requirements unless the EPA has provided for grandfathering of the specific requirements for applications pending on the effective date of the new requirement"); see also April 1, 2010 [Memo](#) ("EPA generally interprets the CAA and EPA's PSD permitting program regulations to require that each final PSD decision reflect consideration of any NAAQS in effect at the time the agency makes a final determination on a pending application").

<sup>9</sup> For example, EPA published a revised standard for particulate matter on January 15, 2013, see [National Ambient Air Quality Standards for Particulate Matter Final Rule](#), (Jan. 15, 2013), but has not yet issued final implementing regulations and guidance. EPA published a revised standard for ozone in 2008, but did not propose implementing regulations until 2013. See [Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements](#), 78 Fed. Reg. 34178 (June 6, 2013).

<sup>10</sup> See EPA Oct. 15, 2012 [Memo](#) ("EAB review historically has taken an average of 5 months from the time a petition is filed to the time the EAB issued its decision in the matter"). The EAB has a [Standing Order](#) giving priority to NSR permit appeals.

application unless final regulations and guidance concerning the submittal and consideration of permit applications have been published.

Section 4: This section requires that EPA annually submit a report to Congress on actions being taken by the agency to expedite the process for issuing preconstruction permits.

Section 5: This section contains the following definitions:

- (1) “Administrator” means the EPA Administrator.
- (2) “Major Emitting Facility” and “Major Stationary Source” has the meaning given to those terms in CAA Section 302(j).
- (3) “National Ambient Air Quality Standard” means a national ambient air quality standard for an air pollutant under CAA Section 109 that is finalized after the date of enactment of the Act.
- (4) “Preconstruction permit” means a permit that is required under part C or D of title I of the CAA for the construction or modification of a major emitting facility or stationary source, and includes any such permit issued by the EPA or a State, local or tribal permitting authority.

#### **IV. ISSUES**

The following issues may be examined at the hearing:

- Potential new manufacturing facilities and expansions in the United States;
- The need for timely air permits for new facilities and expansions;
- The potential for delays in obtaining air permits under the major NSR program;
- The impact of new or revised air quality standards on the permitting process;
- The cost and job impacts associated with permitting delays; and,
- Potential actions to expedite the process for air permits.

#### **V. STAFF CONTACTS**

If you have any questions regarding this hearing, please contact Tom Hassenboehler or Mary Neumayr at (202) 225-2927.