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General Overview

H.R. ____, the "Promoting New Manufacturing Act," would require certain recordkeeping, tracking and reporting on preconstruction permits under the Clean Air Act (CAA). In addition, the discussion draft would require that the EPA publish guidance and regulations for implementing a new or revised National Ambient Air Quality Standard (NAAQS) at the same time the NAAQS is published, and would preclude the NAAQS from taking effect for preconstruction permitting purposes until the required guidance or regulation is issued. The scope of the discussion draft includes all preconstruction air permits issued to major sources of air pollution.

The information in this document is in response to technical assistance requests from the House Energy and Commerce Committee. It consists of descriptions of the current preconstruction program, the EPA's existing permit tracking database and the EPA's current practice for providing state and local air agencies with implementation guidance on the implementation of new and revised NAAQS. It also contains our initial, informal observations about the impact of the discussion draft, particularly the additional resource burdens that would be imposed on state and local governments, which are responsible for issuing the vast majority of the preconstruction permits air permits in the U.S. for this program.

Preconstruction Permit Program Overview

The CAA requires that an air permit be obtained before an owner or operator begins construction of any new "major source" of air pollution, or before the construction of any modification at a major source that would result in a significant net emissions increase of a regulated pollutant (i.e., a "major modification"). The CAA preconstruction permitting program has helped to prevent deterioration in air quality in clean areas and to expedite the achievement of clean air in areas not meeting the NAAQS, while industrial expansion has continued.

There are two types of air permitting requirements that may apply to a new or modified major source: the Prevention of Significant Deterioration (PSD) permit requirements and the Nonattainment New Source Review (NNSR) permitting requirements. Collectively, PSD and NNSR are often referred to as the EPA's New Source Review (NSR) program.

The PSD permit program applies to a new major source or a major modification if it is located in an area that has been designated as in attainment or as unclassifiable for a specific NAAQS pollutant. The NNSR permitting program applies to a new major source or major modification if the source is located in an area that has been designated as nonattainment for a specific NAAQS pollutant. The PSD program applies as of the effective date of the NAAQS, while the NNSR program applies as of the effective date of the nonattainment designation (generally two years after the effective date of the NAAQS).

In order to meet Congressional intent that new and modified major sources use state of the art control technologies so that they do not exacerbate air quality that does not meet health standards (in nonattainment areas) or that they help preserve clean healthy air quality (in attainment areas), the permitting process involves several steps. A PSD permit verifies that the source will use the Best Available Control Technology (BACT), that it has performed an air quality analysis demonstrating that it will not cause or contribute to a violation of any NAAQS or applicable increment, along with an analysis of other impacts such as on soils and vegetation, and that there has been an opportunity for public comment. A NNSR permit, which also has a public comment process, verifies that the source will meet the Lowest Achievable Emission Rate (LAER) and obtain emissions offsets for its increased emissions.

When a new or revised NAAQS for a pollutant is issued to protect public health as required by the CAA, the air quality analysis for a PSD permit is done with that standard as its reference.

The main effect of a new or revised NAAQS on NNSR permitting is to make NNSR rather than PSD the applicable permitting program, once an area is designated as not attaining that standard. For areas already nonattainment for the previous NAAQS for a given pollutant, the emissions threshold that defines a source as major may change, and, the emissions offset ratio (for ozone areas only) may change. Where the applicable permitting program changes from PSD to NNSR, the applicable requirement for emission control technology changes from BACT to LAER. A NNSR permit does not require an air quality analysis, so the level of the new or revised NAAQS is not an issue in the same way as for PSD.

Consistent with the cooperative federalism that is the spirit and intent of the CAA, state and local air agencies play a much greater role in issuing permits for new projects than the EPA does. In 45 states, PSD permits are issued by a state or local air agency either under an EPA-approved State Implementation Plan (SIP) or under a delegation agreement allowing the air agency to issue federal PSD permits on behalf of the EPA. When neither a SIP nor a delegation agreement is in place in an area (as is the case in all or part of the remaining five states and in all of the U.S. Territories), the EPA Regional Office issues PSD permits. In all 50 states and the District of Columbia, NNSR permits are issued by state and local air agencies. On Indian reservations, both PSD and NNSR permits are issued by the EPA, unless the Tribe has been authorized by the EPA to administer the program.

While the EPA oversees the state and local permitting programs, we recognize the primacy of states in issuing new source permits and their discretion to make decisions related to PSD and NNSR permitting. The EPA is available to assist state and local agencies with technical issues as requested, even before a proposed permit is issued for public comment. When offered the opportunity by an air agency to do so, the EPA strives to provide informal comments prior to the permitting authority seeking public comment. Doing so can result in a better draft permit, thereby reducing the effort required of the air agency to respond to public comments. This speeds the decision-making and permit approval process. In order to promote national consistency, the EPA may also submit written comments during the public comment period on draft PSD and NNSR permits that are being processed by state and local air agencies. These comment letters

may recommend improvements to the terms of a proposed permit and the supporting record, in order to assist the permitting authority.

Under the CAA, a PSD permitting authority (usually a state agency) is required to act on a PSD permit application not later than one year after the date of a completed application.[1] There are a number of steps that occur within the permit application and review process. The steps in obtaining a permit include: (1) pre-application consultation between the applicant and the air agency, (2) application, (3) draft permit preparation, (4) public notice and comment on the draft permit, and (5) final decision to issue or deny the permit, including preparation of the final permit as necessary.

The EPA is continually striving to increase efficiency and streamline the permitting process for the limited number of permits we issue, as well as those issued by state agencies. Toward this goal, on October 15, 2012, the EPA issued guidance on timely processing of PSD permit applications for permits issued by the EPA and delegated air agencies.[2]

Permit Tracking System

The EPA maintains a database that is capable of tracking and providing information for major source permits issued by the EPA Regional Offices and by state and local air agencies, provided that those entities enter the information into the database. State and local air agencies are only required to input information into this database on some of the permits that they issue, and we estimate that the database currently contains information for only about 50 percent of relevant permits.[3]

This database, called the RACT/BACT/LAER Clearinghouse, or RBLC, was established to provide a central database of air pollution technology information, including past BACT and LAER decisions contained in NSR permits and Reasonably Available Control Technology (RACT) requirements that have been applied to existing sources in nonattainment areas). It is intended to promote information sharing among permitting agencies and to aid in future case-by-case determinations of appropriate emission control technology and emission limits.

The RBLC is the primary mechanism for the EPA and state and local air agencies to share with each other permit data after a permit is issued. It was not designed to track all of the permit issuance procedural data that this discussion draft seeks. The system is available via the Internet, and allows for online queries of the permit information. The RBLC has been revised over the years to address needs raised by state and local air agencies. In January 2012, we clarified for air agencies how to consistently enter the date on which a permit application became complete, an important matter because the permit action deadline is calculated from the completeness deadline.

[1] The CAA does not establish a deadline for acting on NNSR permits.
[2] http://www.epa.gov/region7/air/nsr/nsrmemos/timely.pdf
[3] In our annual Budget Justifications, the EPA reports the percentage of major NSR permits issued within one year. This calculation is based on the best available information, i.e. the permits that are reported in the RBLC, and so reflects approximately half of the relevant permits.

While the CAA requires that state and local air agencies enter NNSR permit information into the RBLC, there is no legal requirement mandating entry of PSD permit data.[4] The EPA encourages voluntary entry of PSD permit data, but the level of participation by state and local air agencies can vary. As stated above, we estimate that the RBLC only contains information for about 50 percent of the issued major source permits. While some state and local air agencies upload the information to the RBLC as soon as each permit is issued, others may report well after a permit is issued or not report all permits.

Implementation Guidance

The CAA separates the setting of a new or revised NAAQS from the process to implement it. The Act's implementation process includes a schedule for the Governors to recommend and for the EPA to designate attainment, nonattainment and unclassifiable areas. It then provides a schedule for states to submit implementation plans for their areas, with the content of those plans tied to whether an area is meeting or not meeting the NAAQS. These implementation plans include preconstruction permitting requirements. The EPA recognizes the importance of providing timely implementation guidance for new or revised NAAQS standards to state and local air agencies and affected stakeholders, to assist them in developing implementation plans and permit applications. We make every effort to produce that guidance in a way that is helpful to those parties. Such guidance is often the result of consultation with both state and local air agencies and affected sources. Some of the input needed from these parties can best be provided by states and stakeholders and can only be fully considered by the EPA and stakeholders after the promulgation of a new NAAQS, because knowing the level of the NAAQS is needed to understand what new implementation questions the standard will pose. Thus, it would preclude meaningful input if states and stakeholders were only able to provide input on implementation guidance prior to the promulgation of the NAAQS.

We note that implementing *regulations*, which the discussion draft calls for, are sometimes but not always necessary. Where possible, our rules are written so that they can be applied to new NAAQS without revision. In such cases, guidance may only need to orient air agencies to how CAA provisions and the existing rules relate to the NAAQS.

When the need for implementation guidance or implementing regulations is identified, EPA provides that guidance. Because PSD program requirements are applicable to a new or revised NAAQS as soon as it becomes effective, providing timely guidance related to changes in permitting requirements is especially important for PSD major sources. As one example of our commitment to provide timely guidance, the EPA recently proposed and finalized transitional PSD requirements (including grandfathering of pending PSD permit applications) at the same time it promulgated the 2012 $PM_{2.5}$ NAAQS. Similarly, the EPA intends to issue necessary and appropriate PSD transition guidance along with future new or revised NAAQS.

Not all guidance will be applicable immediately after a new or revised NAAQS is published. As noted above, for example, NNSR does not apply until an area is designated nonattainment for a

[4] Because only the PSD requirements apply as of the effective date of the NAAQS issuance but those are the permits for which RBLC reporting is voluntary, the RBLC's utility at addressing this bill's concerns about NAAQS implementation is further limited.

new or revised NAAQS. States then have additional time before an attainment plan must be submitted. The EPA aims to issue guidance for these aspects of implementation after an opportunity for states and stakeholders to provide meaningful input and in time for the guidance to be available when needed.

Finally, a need for additional guidance may become apparent after NAAQS implementation has begun, once EPA, state and local air agencies, and regulated entities have had an opportunity to consider the effects of the new NAAQS. As the discussion draft recognizes, it may be appropriate for EPA to issue or modify guidance as implementation progresses. For example, since 2010, the EPA has issued several guidance documents to facilitate permitting, including guidance on timely processing of PSD permits to meet the one year deadline, implementation of the one hour NO_2 and SO_2 NAAQS, and air quality analysis.

Impact of the Discussion Draft

Tracking and Reporting of Permits

The discussion draft directs the Administrator of the EPA to collect and report certain information regarding numbers of permits issued and the time periods between applications and issued permits. Because state and local air agencies issue the majority of PSD permits and almost all NNSR permits, the draft bill would impose a significant burden on state and local air agencies to collect and submit this information to the EPA.

Because we estimate that the RBLC contains information on only about 50 percent of permits that are issued, it would be a substantial burden to produce a report tracking all major permit applications over the past five years. Because state and local air agencies are the ones with the data, most of this burden would fall to them. Such a requirement would consume already-stretched state permitting resources, requiring them to research past permits instead of processing pending ones. This would produce exactly the opposite effect of what the bill under discussion intends.

The discussion draft also requires that the EPA identify goals for expediting permit issuance and report to Congress on the reasons for delays in issuing permits beyond one year. State and local agencies are generally quite motivated to issue permits in a timely way, and it is an extremely high priority for them. The EPA does not currently ask states to set goals to expedite permit issuance, nor do we require state and local air agencies to explain the reasons for delays in issuing permits beyond one year. As a result, the discussion draft would result in the imposition of a significant burden on state and local air agencies to track and monitor the progress of permits and report to the EPA information concerning permits not issued within the one-year time frame. Similarly, this requirement would consume additional state and local air agencies' resources and could thus slow down the issuance of new permits.

Unachievable Deadlines

The 60-day deadline in the discussion draft for reporting of preconstruction permits for the fiscal years 2008-2013 is not adequate for the following reasons. As discussed above, the EPA does not issue most preconstruction permits, so in order to track and report on permits as required by the discussion draft, state and local air agencies would need to submit the required information to

the EPA. There are more than 30 such air agencies in California alone. We do not believe the data in the RBLC for the period from 2008 to 2011 would be sufficient to prepare the report to Congress, because, prior to January 2012, air agencies differed in how they reported the date of receipt of a complete application. This date would need to be consistent in order to calculate the time to issue a final permit accurately. Verifying the accuracy of this data element for permits already entered into the RBLC would be a significant task for the state and local air agencies, because they would have to review several years of permitting files to determine the necessary dates. In addition, state and local air agencies would have to find and enter data for permits they have not entered into the RBLC at all. The EPA would then have to review and format the data for publication. Sixty days would not be enough time to complete these tasks.

Similarly, because we do not currently gather information from state and local air agencies on the reasons that some specific permit reviews extend beyond one year[5], we do not believe that 120 days (part of which is needed to allow sufficient time for public comment and coordinating responses to those comments with the responsible state and local air agencies) would be enough time to report to Congress on actions to expedite review of preconstruction permits.

Issuance of Guidance

The discussion draft would require that the EPA issue implementation guidance and regulations at the same time as it promulgates a new NAAQS. If the EPA failed to do so, the new NAAQS would not take effect for NSR permitting until such time as guidance and regulations are issued. This would primarily affect PSD permitting, as nonattainment designations that would trigger NNSR generally do not happen until two years after the effective date of the NAAQS.

Requiring the EPA to issue implementing regulations at the time of NAAQS issuance could weaken the public's ability to comment meaningfully on those regulations and hinder us from providing certainty for regulated parties by preventing practical conversations about what regulations are necessary and appropriate. Requiring the EPA to produce unnecessary or unready implementing regulations or implementation guidance at the same time could further complicate both our ability to meet our legal obligations while creating a rulemaking record that will support the final action if it is challenged, and also the states' ability to meet their legal obligations. This might, in turn, exacerbate any uncertainty faced by regulated entities.

If the process of well-timed, progressively issued guidance informed by meaningful state and stakeholder input were not allowed to unfold, the result could be regulations and guidance that do not hit the mark, and that may need to be revised later. It could also increase the possibility of successful court challenges, requiring revisions through a new rulemaking process. This could create more uncertainty for states and permit applicants.

In the event that the EPA did not issue guidance and regulations at the same time as a new NAAQS, it is unclear what the ramifications of exempting some sources from applying the new NAAQS for particular purposes would be. Applying a new NAAQS for some purposes (e.g.

[5] It is important to note that lack of guidance is not the only reason for permit delays. There can be other reasons for delays in permit issuance, including the realization that additional information is needed from the applicant after the application has been determined to be complete, which can arise for example from the need to adequately address public comments alleging errors in the proposed emission control technology decision or the air quality analyses.

State Implementation Plans) but not others (e.g. PSD permitting) could create confusion and extra work for state and local air agencies trying to implement the NAAQS for some aspects of the Clean Air Act's regulatory scheme and not for others. It might also subject the regulated sources to differing requirements among different permits, such as between a PSD preconstruction permit and a Title V operating permit, or to changing requirements over time when the new NAAQS takes effect. Having two NAAQS in place at one time, each applying to different Clean Air Act requirements, would likely produce substantial uncertainty both among the regulated community, the state and local regulators, and the public.

Furthermore, exempting some sources from applying the new NAAQS could raise public health and welfare concerns. By definition, a NAAQS is intended to protect public health and welfare, so exempting sources from that standard could allow them to emit in ways that threaten public health. Such an exemption could thus interfere with a state or local air agency's ability to ensure safe, healthy air. Additionally, if the area is to achieve or maintain the standard in the future, after the issuance of guidance and regulations other sources might have to achieve additional emissions reductions to make up for the sources that were exempted from this NAAQS.