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ARKANSAS
Department of Environmental Quality

March 23, 2018

Kelly Collins
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

RE: Responses to Additional Questions for the Record

Dear Ms. Collins:

On February 14, 2018, I testified before the House of Representative's Committee on Energy and Commerce's Subcommittee on Environment at the hearing entitled "New Source Review Permitting Challenges for Manufacturing and Infrastructure." On March 9, 2018, the Subcommittee Chairman, the Honorable John Shimkus, caused to be delivered to me additional questions for the record. I have enclosed herewith my responses to the questions tendered to me.

Thank you again for the opportunity to present testimony before the Subcommittee and for the opportunity to supplement my testimony with the enclosed answers to the Subcommittee Members' questions.

Sincerely,



Stuart Spencer
Associate Director, Office of Air Quality

Enc.

Witness Stuart Spencer's Responses to Additional Questions for the Record

The Honorable John Shimkus

1.a. As an environmental regulator, I can tell you that complexity can breed uncertainty. Uncertainty can in turn have a chilling effect on projects that could otherwise improve a facility's efficiency and emission rates. We need guidance documents, rules, and - where appropriate - targeted legislation, that is clear and precise enough to encourage the facilities in our regulated communities to invest in modernization projects without fear of tripping or triggering cumbersome New Source Review (NSR). I am pleased that the U.S. Environmental Protection Agency (EPA) has recently taken steps to clarify its positions on key NSR issues. On December 7, 2017, the EPA Administrator Scott Pruitt (Administrator Pruitt) released a memorandum in which he relayed that the EPA would no longer "second guess" a company's estimate of future pollution levels under its NSR regulations before retrofitting a plant. Administrator Pruitt indicated this move would diminish regulatory uncertainty. I agree. It is a positive step.

On March 13, 2018, Administrator Pruitt issued another memorandum on NSR reform, this one re-interpreting "project netting". This latest memorandum marks an important shift in the EPA's methodology for calculating whether a project will result in a significant emissions increase at Step 1 of the NSR applicability analysis. Relying on certain rule language and regulatory and legislative history, the EPA found that under its current NSR regulations, both emissions increases and decreases resulting from a proposed project may be considered in Step 1 of the NSR analysis, in what the agency now calls "project emissions accounting"— "i.e., taking account of the true emissions impacts of the project itself." The effect of both of these EPA-

issued memoranda is positive, in that it helps provide needed guidance, clarity, and certainty to the application of the NSR program.

2. As I referenced in my answer number 1.a. above, Administrator Pruitt issued a memorandum on NSR project emissions accounting on March 13, 2018. This memorandum is a positive step in addressing the statement I made in my testimony that the NSR rules often times discourage rather than encourage pollution control and efficiency projects. In the March memorandum, the EPA stated that its prior interpretation of “project netting” had the effect of blocking certain projects and significantly delaying others, “even though those projects would not have resulted in a significant emissions increase” if considering both emissions increase and decreases at Step 1 of the analysis (underline added). Within the memorandum, Administrator Pruitt stated, “ The EPA recognizes that because of the complexities associated with doing multi-year contemporaneous netting under Step 2 at a large facility, some companies may have been dissuaded from undertaking some projects,” even if those projects may have resulted in increased efficiency and reduced emissions. I am encouraged that the EPA is taking steps to address this issue. Hopefully this will help promote additional pollution control and efficiency projects.

3.a. The term “cooperative federalism” has been referenced often in the past several years in regard to the relationship between the EPA and state environmental protection agencies. ADEQ Director Becky Keogh testified before the U.S Senate Environment and Public Works Committee that the prior administration of the EPA was demonstrably more coercive than cooperative in nature, where states were being made to be more pawns than partners. The states have supported a shift to cooperative federalism, a priority of the current administration, from a “coercive” federal role to one which supports the states’ proper role. I’m happy to report that the dynamic is changing. The EPA/state relationship is becoming more collaborative. That is the

key to improving the interaction between the federal government and the states: meaningful and early engagement and input in a truly collaborative fashion. The states are, in most instances, delegated to implement nearly all Clean Air Act programs. The EPA should recognize that the states have on-the-ground experience with regulating the facilities within their borders and defer to them and their expertise in appropriate instances on important permitting and planning issues.

4. As I suggested in my testimony, the terms “modification” and “routine maintenance, repair, and replacement” (RMRR) need to be clarified in order to allow regulated facilities to proceed with plant improvement and maintenance projects with more certainty. This proposed certainty is called into question when rules are muddy and open to interpretation. This in turn leads to a host of unanswered questions, including on issues such as how long a plant may operate under its existing air permit without having to renew and/or update its emissions control systems to current state-of-the-art technology. These questions are especially pertinent in regard to power plants. That particular industry sector wrestles with the question of when an upgrade or maintenance project at a power plant is significant enough to require a retrofit.

I have been encouraged by the memoranda the EPA issued in December 2017 and March 2018. I hope the EPA takes up the issue of clarifying what constitutes a RMRR project in a future memorandum and that the EPA engages the states on this issue when it sets meetings associated with its announced NSR Task Force.

5. Yes it would. In responding to this question, I defer largely to my fellow witness, Mr. Jeff Holmstead, because I agree wholeheartedly with his assessment. As he stated in page 5 of his witness statement, “Under the NSPS, EPA determines whether a project at a plant is a ‘modification’ by looking at the maximum hourly emission rate of the plant before the project

and comparing it to the maximum hourly emission rate of the plant after it. If a project does not increase this rate – that is, if the plant has not been changed in a way that would increase its maximum hourly emissions rate – then the project is not a modification. There is rarely any controversy about this issue because the maximum hourly emission rate is a readily available number that is based on the design of the facility.”

Mr. Holmstead goes on to say on page 6 of his witness statement, “Because of all the uncertainty and controversy caused by the “emission increase test,” [under NSR] it would be helpful for Congress to clarify this issue. In my view, the best approach would be to make clear that there is not a “major modification” under NSR if there is not a “modification” as defined under NSPS. Thus, companies (and EPA) would evaluate a project to determine whether it would increase the maximum hourly emission rate at the plant. If not, then the project does not trigger NSR. If so, then the project would be a modification and would then be evaluated under the current NSR test to determine whether it would be a “major modification” that would trigger NSR. There are at least two important reasons for Congress to consider such an approach. First, it would provide much more certainty to EPA, states, and the regulated industry. As opposed to the current NSR approach, the maximum hourly emission rate is an objective measure based on the design of the facility and is easily ascertainable. As recent experience has shown, there is much subjectivity under the current approach and many different ways to project future annual emissions and then determine the amount of those emissions that are unrelated to the project being evaluated. Second, from an environmental perspective, a one-hour test is much more meaningful because the most stringent EPA standards are based on maximum concentrations of a pollutant averaged over one hour (for SO₂ and NO₂), eight hours (for ozone and CO), and 24 hours (for PM_{2.5}). The only pollutant for which a longer “averaging time” is meaningful is lead, for which the air-

quality standard is based on a 3-month average (and which has rarely, if ever, been addressed by NSR.) Simply put, in terms of protecting human health, the maximum amount of a pollutant that a facility emits in one hour is much more important than the amount it emits in a year.”

I could not agree more with the points Mr. Holmstead makes. The following fix is simple and protective of the environment:

1. Evaluate a project to determine whether it would increase the maximum hourly emission rate at the plant.
 - a. If not, then the project does not trigger NSR.
 - b. If so, then the project would be a modification and would then be evaluated under the current NSR test to determine whether it would be a “major modification” that would trigger NSR.

6. Yes it has. Moreover, there has been relatively little controversy associated with the NSPS program, because, as Mr. Holmstead stated in his written statement, the maximum hourly emission rate is a readily available number that is based on the design of the facility. If a project does not increase this rate – that is, if the plant has not been changed in a way that would increase its maximum hourly emissions rate – then the project is not a modification.

6.a. Yes it would. Please see response number 6 above.

7. No I do not. First, I believe the NSPS hourly emissions rate test would be protective, because, as stated by Mr. Holmstead on page 6 of his witness statement, “in terms of protecting human health, the maximum amount of a pollutant that a facility emits in one hour is much more important than the amount it emits in a year.” Second, states are required to maintain a robust ambient air monitoring network to ascertain the design value of criteria pollutants throughout

their geographical boundaries. If, in spite of the safeguards present in facility permits, a monitor in an area or areas of a state were to violate a particular National Ambient Air Quality Standard (NAAQS) value, then steps could be taken in a State Implementation Plan (SIP) to address control of that pollutant. In order for this to occur, the state regulator would first need to determine if point sources were the primary contributors to the NAAQS violation, as opposed to non-anthropogenic sources or exempt categories (i.e., post-crop agricultural activities). If that was determined to be the case, a SIP addressing specific pollutant-emitting activities at regulated sources within a certain segment of the state would then be appropriate

The Honorable David B. McKinley

1. Yes I do. Please see response number 4 to the Honorable Shimkus's question above.
2. Please see response number 4 to the Honorable Shimkus's question above. Additionally, RMRR was not explicitly defined until the proposed Equipment Replacement Provision (ERP) of the final RMRR rule promulgated on August 27, 2003. The ERP was ultimately struck down. Thus, the need still exists to create a viable exemption, either through rulemaking or via an amendment to the Clean Air Act, to define the circumstances when RMRR activities will not trip or trigger NSR requirements.

Review for a new source is fairly clear. The "modification" definition is where the issue gets muddy. A modification is any physical change or change in the method of operation. Regulated facilities look to EPA's RMRR exclusion for guidance. Although RMRR is a listed NSR exclusion, the courts will generally assess five factors when determining whether or not a project is routine or non-routine. These factors are:

- a. The nature of the project;

- b. The extent of the project;
- c. The purpose of the project;
- d. The frequency of the project; and
- e. The cost of the project.

These factors are open to disparate judicial interpretation, as has been demonstrated in the outcome of court cases around the country on the RMRR issue. The EPA should endeavor to create industry-specific RMRR exemptions that account for criteria like those listed in a. – e. above. An amendment to the Clean Air Act to that effect would be an even stronger step to take to clarify the issue.

The Honorable H. Morgan Griffith

1. Yes it would. Please see response numbers 5, 6, 6.a., and 7 to the Honorable Shimkus's questions above.
2. Yes it would. Please see response numbers 5, 6, 6.a., and 7 to the Honorable Shimkus's questions above.
3. The EPA has already undertaken efforts to clarify and re-interpret issues of NSR applicability and implementation via the issuance of recent memoranda. Please see response numbers 1.a. and 2 to the Honorable Shimkus's questions above. While these memoranda are valuable to the regulated community and to the states in that they provide additional certainty as to how the EPA intends to implement components of the NSR program, they do not provide the durability and enforceability of a rule or regulation. I believe that the EPA does have the authority to undertake rulemaking to memorialize its latest efforts at clarifications to NSR.

4. Yes it would. As stated in my response directly above, I do believe that the EPA has the authority to promulgate regulatory revisions to the NSR program. That being said, Congressional action would be more impactful and longstanding in its effect.

The Honorable Frank Pallone, Jr.

1. For your review, I am providing the following link to the Arkansas Pollution Control and Ecology Commission's website:

<https://www.adeq.state.ar.us/commission/agenda.aspx>

Once you click on the link above, you will be able to access Commission meeting agendas with attachments. The attachments include the Arkansas Department of Environmental Quality's monthly permits report. The report includes a description of permits issued by the Office of Air Quality. The list includes all types of permit actions, including initial permits, major modifications, minor modifications, registrations, and administrative amendment. Each action includes a permit number and permit issuance date. Specific information regarding each permitted facility may also be located at the following on the following ADEQ website page:

<https://www.adeq.state.ar.us/home/pdssql/pds.aspx>

2. The definition of "modification" is the same under the NSR and NSPS programs. The analysis under the NSPS program is simple: the EPA determines whether a facility's project is a "modification" by looking at the maximum hourly emission rate of the plant before the project and comparing it to the maximum hourly emission rate of the plant after it. If a project does not increase this rate, then the project is not a modification. The analysis under the NSR program is much more cumbersome and complex. Fortunately, the EPA recently released a guidance

memorandum on March 13, 2018 regarding “project emissions accounting”. This memorandum memorializes the EPA interpretation that current NSR regulations provide that emissions decreases as well as increases are to be considered in Step 1 of the NSR applicability process, provided they are part of a single project. Thus, although there have historically been frequent instances where a “modification” under the NSPS program has not translated to a “modification” under the NSR program and vice versa, the EPA’s March 2018 memorandum will help true-up the initial accounting of “increases” so that only those true major modification projects will trip NSR review. Any increase in emissions should be offset and balanced with decreases, if they are part of the same project, in order to produce a true accounting for a particular project.

3. As stated in my response directly above, any increase in emissions should be offset and balanced with decreases, if they are part of the same project, in order to produce a true accounting for a particular project. Only after that accounting is done can the actual emissions impact be appropriately characterized.

4. As stated in my response number 3 directly above, any increase in emissions should be offset and balanced with decreases, if they are part of the same project, in order to produce a true accounting for a particular project. Only after that accounting is done can the actual emissions impact be appropriately characterized.