U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

February 12, 2018

TO: Members, Subcommittee on Environment

FROM: Committee Majority Staff

RE: Hearing entitled "New Source Review Permitting Challenges for Manufacturing and Infrastructure"

I. INTRODUCTION

The Subcommittee on Environment will hold a hearing on Wednesday, February 14, 2018, at 2:00 p.m. in 2123 Rayburn House Office Building. The hearing is entitled "New Source Review Permitting Challenges for Manufacturing and Infrastructure." The hearing will examine the impact of the Environmental Protection Agency's New Source Review (NSR) air permitting requirements on manufacturing and infrastructure expansion in the United States. It will provide information to help assess potential NSR reforms.

II. WITNESSES

- **Kevin Sunday,** Director of Government Affairs, Pennsylvania Chamber of Business and Industry;
- **Paul Noe,** Vice President Public Policy, American Forest & Paper Association and American Wood Council;
- **Stuart Spencer,** Associate Director, Office of Air Quality, Arkansas Department of Environmental Quality, testifying on behalf of the Association of Air Pollution Control Agencies;
- **Jeffery R. Holmstead**, Partner, Bracewell LLP;
- **John D. Walke**, Clean Air Director, Natural Resources Defense Council; and
- **Emily Hammond**, Glen Earl Weston Research Professor of Law, the George Washington University Law School.

III. BACKGROUND

Prior to beginning new construction or carrying out modifications to a major emissions source, such as a factory, industrial facility, or power plant, the Clean Air Act requires that the owner must first receive a permit. Preconstruction permits are issued under two primary

permitting programs: The Prevention of Significant Deterioration program (PSD) and the Nonattainment New Source Review program (NNSR). The intent of these preconstruction permit programs is to ensure that new and modified stationary sources utilize appropriate pollution control technologies to protect air quality. PSD permits are required for major sources in areas that are in attainment of the National Ambient Air Quality Standards (NAAQS), while NNSR permits are required for major sources in areas that are in nonattainment of one or more of the NAAQS.[1] Because NSR requirements are pollutant-specific, a preconstruction permit application may require both PSD and NNSR reviews. Collectively, the PSD and NNSR programs are referred to generally as the NSR program.[2]

Under the NSR program, the Environmental Protection Agency (EPA) establishes basic permitting requirements through federal regulations. Although the majority of the major NSR permits are issued by State and local permitting authorities, EPA may also be the permitting authority in certain States. Where EPA is not the permitting authority, EPA may review and submit comments on draft permits proposed by State or local permitting authorities.

Preconstruction permitting requirements were initially established in statute by the Clean Air Act Amendments of 1977 and were later expanded upon by the Clean Air Act Amendments of 1990.[3] Since its establishment, the EPA has issued a large number of guidance documents and promulgated several final rules affecting NSR permitting, which, combined with more stringent air quality standards, has created a complex, time-consuming pre-construction planning, application, and permit approval process.[4] Additionally, several of the EPA's NSR related actions have been the subject of legal challenges, resulting in an array of court decisions, which has only added further complexity to NSR program compliance.

IV. NSR CHALLENGES

Various stakeholders, ranging from manufacturing facility owners to state air regulators, have identified challenges and burdens related to the NSR program. In response to a recent request for information by the U.S. Department of Commerce, NSR permitting was the third

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[1] *See* EPA's "Learn About New Source Review." 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); *See* 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.

[2] 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 compliance 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. So called minor NSR permits may also be issued by states for stationary sources that do not require PSD or NNSR permits as part of a State Implementation Plan.

[3] *See* EPA's "Evolution of the Clean Air Act."

[4] Currently there are nearly 700 posted guidance documents related to the NSR program.

most frequently cited challenge identified as a burden for domestic manufacturing.[5] Furthermore, the EPA also identified NSR reform as a top priority after analyzing over 460,000 public comments on potential regulatory reforms.[6]

One common criticism of the NSR program is that the preconstruction permitting process is too lengthy and uncertain. From start to finish, the NSR application process involves six steps: (1) permit preparation, (2) determination of application completeness, (3) development of draft permit, (4) public notice and comment, (5) response to comments, and (6) possible administrative and judicial appeals.[7] In total, navigating the major NSR permit application process can take anywhere from several months to years.[8] Additionally, the processing time for NSR permits can vary significantly across different regions of the country. For example, from 2002 to 2014, the average time to obtain a PSD NSR permit in the States representing EPA's Region 7 was 217 days, whereas in the States representing EPA's Region 9 the average time was 777 days.[9]

Concerns have also been raised over what types of projects are being required to obtain a NSR permit, especially pertaining to modifications for existing facilities. Current NSR regulations define a "major modification" as a "physical or operational change" that results in a "significant emissions increase" and a "significant net emissions increase."[10] Determining what constitutes a "physical or operational change" and how one computes an "emissions increase" has been the subject of debate for many years. Under EPA's existing major NSR program rules, an existing facility is required to obtain an NSR permit in order to perform efficiency upgrades or to install new pollution control technologies. However, since many existing facility owners are not willing to undergo the lengthy and uncertain NSR permitting process, they are effectively foregoing the opportunity to increase the efficiency of their facility, while also reducing emissions.[11]

Another point of criticism concerns the partnership between EPA and the States in administering the program. In most areas of the country, States have elected to establish unique NSR requirements and procedures, meeting or exceeding the EPA's basic major NSR program requirements, in order to serve their State's individual air quality needs.[12] While recognizing the need for EPA's role in programmatic oversight, some stakeholders contend that the EPA has a history of overriding the principles of cooperative federalism by intervening or second-guessing States' individual preconstruction permitting decisions, such as decisions relating to NSR applicability, modeling guidance, or choice of appropriate control technology.[13] Some claim that the EPA's involvement in States' project permitting decisions has contributed to the uncertainty

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[5] U.S. Department of Commerce, Final Report on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (2017), pg. 7
[6] U.S. EPA, Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (2017)
[7] U.S. EPA, NSR 90-Day Review Background Paper (2001) pg. 5
[8] *See* Comments of Air Permitting Forum in Department of Commerce Docket No. 170302221-7221-01, pg. 8
[9] Art Frass et al., EPA's New Source Review Program: Evidence on Processing Time, 2002-2014 (2015), pg. 10.
[10] *See* 40 CFR 51.165 (v)(A) Major Modification
[11] U.S. EPA, New Source Review: Report to the President (2002), Pg. 31
[12] *See* EPA's "Learn About New Source Review"
[13] *See* Comments of Air Permitting Forum in Department of Commerce Docket No. 170302221-7221-01, pg. 5

and complexity surrounding NSR permitting, which is why certain stakeholder groups are calling for greater State autonomy and latitude in the administration of the major NSR program.[14]

Other concerns include the difficulty of obtaining required emissions offsets in nonattainment areas; the EPA's overly restrictive modeling guidance for projecting a new sources' impact on ambient air quality; the application of routine maintenance, repair and replacement exclusions; and the accounting process for determining a potential projects' future emissions. Due to these and other NSR permitting concerns, facility owners have an incentive to avoid the NSR process altogether and continue to operate older, inefficient facilities rather than to construct new facilities or upgrade existing facilities with the best pollutant control technology.[15] As a result, it can be argued that the NSR program, as currently administered, may be discouraging investment in the nation's infrastructure, industrial capacity, and manufacturing capabilities, while also inhibiting reductions in air emissions. It is for these reasons that various affected stakeholders are asking the Administration to address shortcomings associated with the preconstruction permitting process.

V. ISSUES

The following issues may be examined at the hearing:

- The role that NSR permitting plays in improving air quality.
- NSR permitting shortcomings or burdens that are negatively affecting American industry and infrastructure.
- How the NSR program impacts investment and project decisions for the manufacturing, industrial, and power sectors.
- The role that EPA and State regulators play in administering the NSR program.
- Potential legislative or regulatory reforms to reduce the burden and improve the effectiveness of the NSR program.

VI. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Wyatt Ellertson, Peter Spencer, or Mary Martin on the Majority Committee staff at (202) 225-2927.

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[14] Ibid, pg. 6, and *See* Comments of the Association of Air Pollution Control Agencies in the EPA's Docket No: EPA-HQ-OA-2017-0190

[15] Art Frass et al., EPA's New Source Review Program: Time for Reform? (2017), pg. 10030