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EPA Tosses Out the "Once In, Always In" Policy For Major Sources of Hazardous Air Pollutants

On January 25, 2018, the Environmental Protection Agency (EPA) withdrew its longstanding but controversial "once in, always in" policy that a "major source" of hazardous air pollutants (HAP) was forever locked into "major source" status – and compliance with HAP major source regulations – upon the first compliance date of the regulations. As a result, sources that have been deemed major sources of HAP may now want to reassess their options, and consider whether reclassification to non-major status would be feasible and effective.

BACKGROUND: CLEAN AIR ACT REQUIREMENTS FOR MAJOR SOURCES OF HAP

Approximately 186 substances are designated as HAP under the Clean Air Act (CAA). A facility is a "major source" of HAP if it has the potential to emit one or more HAP above certain thresholds (10 tons per year of any individual HAP, or 25 tons of all HAP collectively). A facility's potential to emit (PTE) is essentially defined as the maximum emissions that could occur within enforceable legal limits on a 24/7/365 basis, regardless of the facility's actual emissions.

"Major source" status for HAP typically has two immediate consequences: it makes the source subject to "Maximum Available Control Technology" (MACT) requirements and to Title V permitting.

EPA has adopted MACT requirements in "National Emissions Standards for Hazardous Air Pollutants" (NESHAPs) for approximately 100 categories of industry activity. MACT standards typically include emission limitations, operational restrictions, recordkeeping, reporting, and other requirements. By contrast, NESHAPs adopted for non-major sources of HAP ("area sources," in CAA lingo) are typically less stringent than MACT.

Title V permits (a/k/a operating permits, required by Title V of the CAA) are premise-wide permits intended to collect into one document all requirements applicable to the facility concerning air emissions, whether HAP-related or not. Title V permits are often long, complex, and procedurally difficult to apply for and implement. Title V permit-holders are also subject to detailed periodic reporting and compliance certifications, and to hefty annual fees based on all the facility's emissions, HAP and non-HAP alike. While non-major sources in some industrial categories are subject to Title V permitting, most are not.

THE "ONCE IN, ALWAYS IN" POLICY

The "once in, always in" policy, adopted in 1995, asserted that if a source's potential emissions of HAP ever exceeded major source thresholds after the first compliance date of an applicable major source MACT standard, the source is "permanently subject" to that standard. This is the case even if the source's potential emissions of HAP later decrease to less than major source levels. In other words, once a source is "in" a MACT standard and derivative Title V permitting, it's always in.

The policy has been controversial and hotly contested by regulated parties since its 1995 release. On two prior occasions, EPA proposed to withdraw the policy, but neither effort was finalized. For a

critical review of the policy, see our prior article.

EPA WITHDRAWAL OF THE POLICY

On January 25, 2018, EPA withdrew the "once in, always in" policy as inconsistent with the CAA. In particular, EPA stated that the plain language of the CAA does not include or suggest a time limit on a source's ability to shift from major to non-major status, and therefore, the policy exceeded EPA's authority. EPA further noted unwanted practical impacts of "once in, always in" as a disincentive for sources to implement voluntary pollution abatement and prevention, or to pursue technological innovations to reduce HAP emissions. With the "once in, always in" policy withdrawn, EPA stated that a major source can become an "area source" upon taking an enforceable limit on its potential HAP emissions below major source thresholds.

EPA anticipates that it will soon propose regulatory revisions to reflect its revised position.

IMPACTS FOR REGULATED SOURCES

Facilities currently operating as major sources of HAP may now want to reconsider that status. Relevant considerations here may include:

- The facility's current "potential to emit" relative to major source thresholds
- Technology options for decreasing the facility's "potential to emit"
- Legal options for decreasing the facility's "potential to emit" through a "synthetic minor" permit or other enforceable limit
- Area source NESHAP requirements in the relevant industrial category
- Prospects for exiting Title V permitting
- Impact on settlement of any prior enforcement action based on the "once in, always in" policy

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The attorneys of Robinson+Cole's Environmental Practice Group have much experience with the "once in, always in" policy, and are now working with clients in assessing impacts and options following the policy's withdrawal. For further information regarding this matter, please contact one of the lawyers listed below or another member of Robinson+Cole's Environmental Practice Group:

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