FAQ: Reversal of "Once In, Always In"

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On February 8, 2018, ERM and Bracewell presented a webinar that took a legal and technical look at the US EPA's January 25th memo reversing the long standing "once in, always in" policy. The reversal of the "once in, always in" policy for MACT applicability presents opportunities for companies to enhance operational flexibility and reduce operating costs and compliance risk. With this policy change, facilities that are able to be permitted as "area sources" under Section 112 will generally be able to reduce the burden of paperwork, monitoring, recordkeeping and reporting requirements and comply with air quality requirements with greater certainty and less headache.

Frequently Asked Questions

The following is a list of Frequently Asked Questions related to "Once In, Always In" and EPA's January memo.

1. **If a source was considered major under a consent decree that was rolled into a Title V permit (e.g., MACT HH), can the source be rolled back to an area source?**

   Yes, provided the CD doesn't create a separate "always in" obligation, you can create a federally enforceable minor source limit in your permit and become an area source not subject to major source MACT. However you would still need to comply with all the substantive requirements of the CD.

2. **I have some Title V permits up for renewal soon this year (application 6 months beforehand). Can I request changes in the permit application to get it changed to an area source? When would the requested changes be enforceable, when the new permit is issued, ort can I consider it an area source under an application shield?**

   Yes, you can request the restriction in the application for the Title V renewal. If you are a major source only for HAP emissions, then you may instead need to apply to the State for a minor-source permit with enforceable limits to keep your PTE below major source thresholds. The limits and removal of MACT requirements would only be enforceable after the permit is issued, regardless of whether it's a Title V permit or a state minor-source permit.

3. **Would a tribal source governed by EPA as a major source under an existing Title V need to get a tribal minor NSR permit (or FIP registration) to get enforceable limits that could eventually be rolled into a new Title V permit (or do away with Title V if less than 100 tpy)?**

   Yes – either from the tribe (if it has an approved minor NSR program) or from EPA (if the tribe does not have such a program). In either case, the general process is the same: to establish federally enforceable limits on HAP emissions through a federal or federally approved air permitting program. If the source exceeds major source thresholds for non-HAPs (100 tpy for attainment pollutants, less for nonattainment), then it could probably revise its Title V permit to add enforceable limits on HAP emissions.

4. **Do you report for the SAR of your MACT (say 4 months of the reporting period and then when you get your PTE limit - exclude the last 2 months). OR do you just report via letter "I'm out" of this MACT?**

   The reporting requirement would end once the new federally enforceable PTE permit limit is in place and the reporting conditions are removed from the permit. If that happens in the middle of a reporting period, then we recommend that you file the report on its due date, but that you can file only for the months that you were still subject to the reporting requirement.

5. **My petrochemical plant has three process units, each in a separate Title V permit. Which permit(s) need to contain the synthetic minor source limit?**

   Under 40 CFR 63.02, "Major source" means any stationary source or group of stationary sources located within a contiguous area and under common control…"

   Therefore the limit for HAPs would need to apply to all three units collectively. Ultimately it would be the permitting authority's call, but you would likely need limits in all three permits that, collectively, are below the major source thresholds.

6 **What are the pros and cons of different legal strategies EPA can take? Proceed only with rescission of the guidance by memo and hope it withstands challenge because it is not final agency action, but then policy could be reversed back in a future administration; or promulgate a rule and hope it withstands legal challenge given the courts' deference to EPA?**

There are numerous factors that the Trump EPA will need to consider before deciding whether to codify the new policy in a rule. Regardless of whether a future administration tries to go back to the old OIAI policy, there is little or no downside to becoming a minor source under the new policy. Even if a future administration tries to go back to the old policy (by rule or by guidance), this does not necessarily mean that the source would once again be subject to MACT. It is far from clear that a future EPA could re-impose a MACT standard on a source that becomes an area source under the new policy.

7 **What prevents a new administration overturning this?**

First, as noted above, it is not clear that a new administration could re-impose MACT requirements on sources that become minor sources under the new policy. Thus, there may not be much reason for a new administration to go back to the old OIAI policy. Second, it's not clear that going back to the old OIAI policy would stand up in court. Even (1) if a new administration tried to do so by guidance and (2) it convinced the DC Circuit that such guidance is not final agency action and is therefore not subject to judicial review, it would be relatively easy for companies to challenge the OIAI policy in individual permitting actions, and they would have a fairly good argument that OIAI is not lawful.

8 **What is involved in modifying Title V from major source of HAPs to area of HAPs and removing some requirements? (eg. Aerospace GG)**

It would involve an application to modify the permit to include the required limits including adequate compliance demonstration to verify compliance with said limits. As part of the application, the MACT provisions would be removed as applicable requirements.

It is recommended that once the analysis is completed, the permitting authority be briefed in a pre-application meeting to get their guidance on how the permit will be processed.

9 **If a source takes advantage of the policy reversal and a future EPA Admin decides to reverse course, would our permit shield protect us? Also, would they be able to turn back the clock and say we were always subject to the MACT in spite of our permit? What other compliance risks do you see? What about Citizen suits?**

There is little enforcement risk. It is unlikely that a future administration would bring an enforcement action to argue that a source that had become an area source under the new policy is violating the CAA by failing to comply with MACT requirements. If a new EPA decides to reverse course, it is much more likely that EPA would issue a new rule or guidance document that "requires" sources that have taken advantage of the new policy to come back into compliance with their former MACT requirements within a certain period of time, and it is not clear that this would stand up in court. Moreover, even if a new EPA tried to bring enforcement actions against individual sources for taking advantage of the new policy, it is very unlikely that a court would impose any type of penalty on the source. Realistically, the worst-case scenario is that a judge issues an order requiring the source to come back into compliance with its old MACT requirements or that EPA tries to pressure sources into CDs that re-impose old MACT requirements. You can never rule out citizen suits, but again, the worst-case scenario is probably a court order requiring the source to come back into compliance with its old MACT requirements.

Contacts

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