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EPA Withdraws the "Once In, Always In" Clean Air Act Policy

In a memorandum dated January 25, 2018, EPA announced it is withdrawing, its 20-year-old "Once In, Always In" (OIAI) Clean Air Act policy. This new EPA guidance allows stationary sources of hazardous air pollutants (HAPs) that are classified as "major sources" to limit their HAP emissions to below major source thresholds and thereby be reclassified as "area" sources at any time. This is potentially significant since area sources are subject to less onerous emission requirements than are major sources. The withdrawal of the OIAI Policy is effective immediately and reflects a substantial change to a controversial policy which could have significant impacts on many industrial facilities. All companies which own or operate a major source of HAP emissions should closely review this new EPA guidance document.

General Background of Major Sources of HAPs

The Clean Air Act requires major sources of HAPs to control those emissions to a level meeting maximum achievable control technology (MACT) standards. MACT is a type of technology-based emissions standard. MACT requires that a source undertake the maximum degree of reduction in HAP emissions (including a prohibition on such emissions, where achievable) that the EPA determines is achievable for a category of major sources. This determination is based on existing technology, taking into consideration cost and other specific factors.

MACT applies to major sources of HAPs. The term "major source" is defined as a stationary source that emits, or has the potential to emit, 10 tons per year of any HAP, or 25 tons per year or more of any combination of HAPs. Stationary sources with emissions below these thresholds are classified as "area sources" and generally do not need to meet MACT emission limitations.

The 1995 OIAI Policy

The OIAI Policy was issued by EPA in 1995. See "Potential to Emit for MACT Standards-Guidance on Timing Issues," John

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Seitz, Director, Office of Air Quality Planning and Standards, U.S. EPA (May 16, 1995). Under the OIAI Policy, major sources of HAPs were allowed to limit their emissions, so as to become an area source, only before the "first compliance date" of [a MACT] standard. The "first compliance date" is defined as the "first date a source must comply with an emission limitation or other substantive regulatory requirement" in a MACT standard. Thereafter, the OIAI Policy prohibited major sources of HAPs from restricting their emissions to attain area source status and thereby avoid being subject to the MACT. In other words, once a source became subject to a MACT standard, that source was always subject to MACT – *i.e.*, once in, always in. The source could not thereafter choose to voluntarily lower its emissions so as to become an area source (and thereby shed MACT requirements).

The OIAI Policy proved to be quite controversial. In 2003, EPA proposed rules that would have altered the legal interpretation of the Clean Air Act which underlies the OIAI Policy. See 68 Fed. Reg. 26,249 (May 15, 2003). That proposal was never finalized. In 2007, EPA more directly proposed a rule to replace the 1995 OIAI Policy. However, EPA again failed to take final action on the proposal, though it was never withdrawn.

As part of its deregulatory agenda, the Trump Administration solicited input from industry as to regulations which were impeding economic development in the United States. Various industry groups and the U.S. Department of Commerce had identified the 1995 OIAI Policy as being such a regulation. EPA's January 25, 2018 memorandum was issued in partial response to those concerns and appears to bring a final conclusion to the similar, earlier proposals under the Bush Administration.

The New Policy

EPA's recent memorandum concludes that the 1995 OIAI Policy is not supported by the language of the Clean Air Act. EPA found that Congress did not place any temporal limitations on when an industrial facility can restrict its emissions so as to avoid triggering major source MACT obligations. As such, EPA had no authority to impose a time limitation on when sources could accept HAP emission restrictions to become area sources.

Based upon this legal predicate, EPA's new policy directs that a major source of HAP emissions previously classified as a major source can accept enforceable restrictions and be reclassified as an area source at any time. This means that an industrial facility which has previously been classified as a "major source" complying with an MACT requirement can now limit its HAP emissions and become an area source. This could have significant impacts on many industrial facilities that are currently subject to MACT requirements. Indeed, sources that are meeting a MACT requirement could very well have HAP emissions low enough to be classified as an area source.

Next Steps

EPA plans to publish a notice in the Federal Register which will create regulatory text reflecting EPA's new policy and interpretation of the Clean Air Act. However, ENGOs almost immediately criticized the policy change and vowed to fight EPA's efforts "with every available tool." As such, it appears that EPA's effort to withdraw the OIAI Policy will be subject to legal challenge. It is unclear whether the January 25, 2018 policy memorandum itself could be subjected to legal challenge. However, any regulatory text created by EPA to implement this policy would likely be ripe for legal challenge. During this period of potential uncertainty, individual sources should consider whether adverse interests could challenge permit modifications that implement the new policy.

Stationary sources that are currently subject to a MACT requirement should closely evaluate whether EPA's new policy provides them with an opportunity to reduce their regulatory burden. If a source can accept enforceable limits restricting HAP emissions to area source levels, it may be able to take advantage of this policy.

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