

## **Clean Air Act Compliance and Enforcement 2018: ODS, CAA §114 Requests, NSR, SSM**

TUESDAY, FEBRUARY 27, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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# ODS, NSR, & SSM

Margaret Campbell & Mack McGuffey

*February 27, 2018*

# Ozone Depleting Substances

## A C H I E V E M E N T S

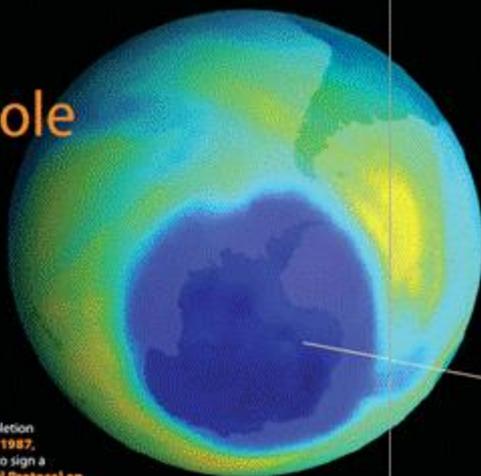
OVER THE PAST SEVERAL DECADES, EPA'S STRATOSPHERIC PROTECTION DIVISION AND ITS PARTNERS HAVE MADE SIGNIFICANT STRIDES TO PROTECT THE EARTH'S STRATOSPHERIC OZONE LAYER, THE ENVIRONMENT, AND PEOPLE'S HEALTH.

### Healing the Ozone Hole

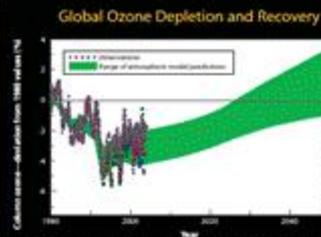
The ozone layer acts like a shield in the upper atmosphere (the stratosphere), to protect life on Earth from harmful ultraviolet (UV) radiation. In 1974, scientists discovered that emissions of chlorofluorocarbons, or CFCs, were depleting ozone in the stratosphere. CFCs were a common aerosol propellant in spray cans and were also used as refrigerants, solvents, and foam-blowing agents.

In the 1980s, scientists observed a thinning of the ozone layer over Antarctica, and people began thinking of it as an "ozone hole." Additional research has shown that ozone depletion occurs over every continent.

As our scientific knowledge about ozone depletion grew, so too did the response to the issue. In 1987, leaders from many countries came together to sign a landmark environmental treaty, the **Montreal Protocol on Substances That Deplete the Ozone Layer**. Today, more than 190 countries—including the United States—have ratified the treaty. These countries are committed to taking action to reduce the production and use of CFCs and other ozone-depleting substances to protect the ozone layer. Countries are phasing out the production and consumption of ozone-depleting substances in groups, focusing on those chemicals with the most ozone-depleting potential first, followed by those that pose the next greatest ozone-depletion risk (in this document, these chemicals are referred to as "first-generation" and "second-generation" substances, respectively).



Sustained recovery of the ozone layer will require worldwide phase-out of ozone-depleting substances.



The ozone layer has not grown thinner since 1998 over most of the world, and it appears to be recovering because of reduced emissions of ozone-depleting substances. Antarctic ozone is projected to return to pre-1980 levels by 2060 to 2075.

### OZONE: GOOD UP HIGH, BAD NEARBY

Ozone is a gas that occurs both in the Earth's upper atmosphere (the stratosphere) and at ground level. Ozone can be "good" or "bad" for people's health and the environment, depending on its location in the atmosphere.

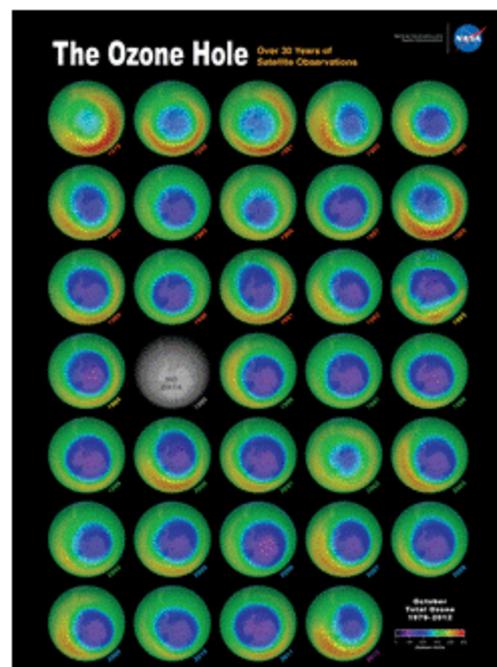
"Good" ozone is produced naturally in the stratosphere and is "good" because it blocks harmful UV radiation from reaching the Earth's surface where it can harm people and ecosystems.

"Bad" ozone is an air pollutant found at ground level and is "bad" because it is harmful to breathe and can damage crops, trees, and other vegetation. Ground level ozone is a main component of urban smog.

For more information, see: <[www.epa.gov/oai/oaqps/gooduphigh](http://www.epa.gov/oai/oaqps/gooduphigh)>.

## Ozone Depleting Substances

- **Montreal Protocol on Substances that Deplete the Ozone Layer**
  - Class I: Chlorofluorocarbons (CFCs)
  - Class II: Hydrochlorofluorocarbons (HCFCs)
- **Emission Reductions**
  - Venting Prohibition
  - “Consumption” Phase-out (production + imports – exports)
  - Significant New Alternative Policy (SNAP)
- **Maintenance: Appliances & MVAC**
  - Leak Rate Calculations & Repairs for Large Appliances
  - Training & Certification of All Technicians
  - Reporting & Proper Disposal



### Update to the Refrigerant Management Requirements, 81 FR 82272 (Nov. 18, 2016)



1. Extended rules to non-exempt “substitutes” to address non-ODS hydrofluorocarbons (HFCs) with high global warming potential
2. Lower leak rate trigger for repairs to “comfort cooling” appliances
3. Filling a leaking appliance is a “knowing” violation?  
“ ... while the addition of a refrigerant to an appliance known to be leaking above the threshold rate is a knowing release, that release does not violate the venting prohibition so long as the applicable practices ... are complied with ....”

## Ozone Depleting Substances

### ***Mexichem Fluor v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)**

- EPA *may* rely on climate change concerns in deciding whether a substitute is “safe” and in removing a substitute from the “safe” list
- EPA *may* NOT prohibit use of a non-ODS substitute previously deemed “safe”

**Kavanaugh**: “Here, EPA has tried to jam a square peg (regulating non-ozone-depleting substances that may contribute to climate change) into a round hole (the existing statutory landscape).”

Bottom Line: Statutory Text Matters!



### So what's next?

- Challenges to the 2017 rule revisions are currently held in abeyance (*NEDACAP v. EPA*, No. 17-1016), signaling reconsideration
  - Trump Administration may be less likely to reverse course than in other Clean Air Act programs
- **January 1, 2018:** Non-ODS “Substitutes” (HFCs) now regulated, except for the leak repair requirements
- **January 1, 2019:** Non-ODS and ODS subject to new leak repair rules, including new 10% leak rate trigger for comfort cooling

## Ozone Depleting Substances

### Take-Aways for Refrigerants / Ozone Depleting Substances

1. Hire a certified contractor to perform all maintenance
2. Don't forget about Motor Vehicle Air Conditioners (MVACs)
3. Recognize increased risk for Title V sources
4. Don't sell any refrigerant (virgin or recovered)
5. Think twice when retiring and replacing a system



# What is “New Source Review”?

## 1. Pre-construction Permits (PSD & NNSR)

Prevention of Significant Deterioration (PSD) & Nonattainment NSR (NNSR)

- *Applies to “New” Units or “Major Modifications” of Existing Units*
- *Case-by-case emission limits and emission control requirements*
- *Demonstrate the project will not cause / contribute to nonattainment (modeling or offsets)*

## 2. New Source Performance Standards (NSPS)

- *Apply to new, modified, or reconstructed major sources in regulated source categories*

## What “triggers” NSR?

### “Major Modification” @ “Major Source”



#### 1. Physical Change or Change in the Method of Operation

- “routine maintenance, repair and replacement” (RMRR)
- other exclusions

#### 2. Significant Emissions Increase and Significant *Net* Emissions Increase

- annual emissions increase must be “the result of” the project (causation)

## What is a “Physical Change”?

- Broad definition – (“any leaky pipe”)
- “RMRR” is NOT a “physical change”
  1. Nature & extent
  2. Purpose
  3. Frequency
  4. Cost
- Other exemptions: production rates, some fuel switches, etc.
- Change in the method of operation



## What is an NSR “Emissions Increase”?

## Can EPA “Second Guess” Your Analysis?

**PROJECTION – BASELINE = CHANGE**



1. New or Existing?
2. 5 or 10 year outlook?
3. “Demand Growth” / Independent Factors?



1. New or Existing?
2. High 24 out of 60 or 120 months
3. Sources of Data?

2017



## Pruitt EPA makes NSR Reform a Top Priority

- **October 25, 2017 Regulatory Reform Report:**
  - 4 “Key Initiatives” including “Comprehensive New Source Review Reform”

**TOP PRIORITY**



U.S. Environmental Protection Agency

Final Report on Review of Agency Actions that Potentially Burden  
the Safe, Efficient Development of Domestic Energy Resources  
Under Executive Order 13783  
October 25, 2017

## NSR Regulatory Reform – Take 2

- **Last round under the George W Bush Administration**
  - EPA Air Administrators Holmstead & Wehrum
- **New Initiatives**
  - Guidance clarifying the NSR emissions test
  - Title V Determination: No second-guessing state NSR permitting decisions in Title V context



## NSR Regulatory Reform – Take 2

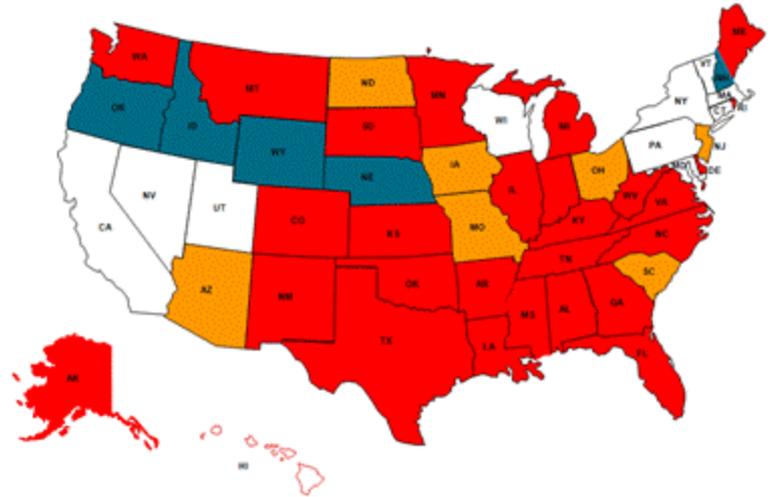
- **Unfinished business**
  - Aggregation Rule
    - Finalized January 2009 but stayed by the Obama Administration
    - Establishes a “substantially related” test for project aggregation
  - New emissions test for EGUs?
    - Proposed in 2005 and 2007 but never finalized
    - Added NSPS emission rate test to PSD / NNSR

## Legislative Reform?

- Showing Some Love for NSR Reform
  - February 14, 2018 House Committee on Energy & Commerce hearing: “NSR Permitting Challenges for Manufacturing & Infrastructure”  
<https://energycommerce.house.gov/hearings/new-source-review-permitting-challenges-manufacturing-infrastructure>
- Griffith Bill (Morgan Griffith R-VA)

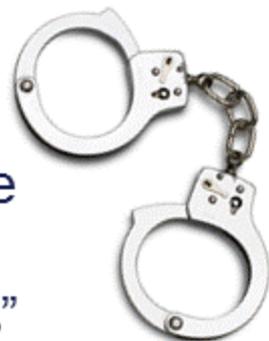
## EPA's Startup Shutdown Malfunction SIP Call (May 2015)

- Finding 36 states (45 jurisdictions) have “substantially inadequate” SIPs
- SIP Revisions were due to EPA by November 22, 2016
- 28 jurisdictions have proposed or finalized rule revisions to address the SIP call (EPA has approved 3)
- The rules have varied dramatically



### Two Parts of the SSM SIP Call:

1. Binding Requirement: Elimination / revision of certain state SSM provisions identified by EPA as unlawful affirmative defenses or “emission limitations” that are not “continuous”
2. Non-Binding Guidance: “recommendations” on what EPA believes to be an appropriate and approvable alternative



## Current Status & Outlook

- Legal challenge to the SIP Call is pending (DC Circuit)
  - 19 states plus trade associations and individual companies
  - Fully briefed but stayed prior to oral argument in 2017 pending new Administration's review / reconsideration
- EPA action on hold for the rest of the SIP revisions submitted, pending Administration review of the SIP Call
- State rules may be effective as a matter of state law

## QUESTIONS

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# CLEAN AIR ACT COMPLIANCE AND ENFORCEMENT 2018:

**CAA §114 Requests**

**February 27, 2018**

**Strafford Publications Webinar**

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# Clean Air Act Section 114 Requests:

- The U.S. Environmental Protection Agency (EPA) has broad authority under the **Clean Air Act (CAA) Section 114** to **request any information** “as the Administrator may reasonably require”, for purposes of determining compliance, investigating a potential violation, or developing or modifying **clean air** regulations.



# What is a Section 114 Request?

The U.S. Environmental Protection Agency (EPA) has broad authority under the Clean Air Act (CAA) Section 114 to request any information it may deem reasonable for purposes of determining compliance, investigating a potential violation, or developing or modifying clean air regulations.

This is a formal request for information regarding Clean Air Act related activities.

Under 42 USC 7414(a), EPA may require any person who owns or operates any emissions source to provide such information.

# General Purpose for EPA Section 114 Information Requests

The somewhat benign: In the rulemaking context, EPA may require sources on a one-time or continuous basis to sample emissions and collect operational data in manner prescribed by the agency and provide reports

To do so, EPA issues “Information Collection Requests”, or ICRs

# What do ICRs include?

- Survey – background information
  - Facility size, location, ownership, permit
  - Operations design, fuel and feed stock, control measures
  - Reported emissions and reductions
- Testing requirements (for some ICRs)
  - Pollutants and surrogates
  - Stack exhaust, fuel, and raw materials
  - Methods and procedures
  - Reporting requirements (ERT required)
- Deadline dates

# General Purpose for EPA Section 114 Information Requests (cont'd)

The more troubling/difficult scenario: where a Section 114 request is being served as part of an enforcement investigation

Such requests tend to focus on:

- Compliance with state and federal prevention of significant deterioration (PSD), new source review (NSR), new source performance standards
- Agency identified enforcement initiatives – e.g., EPA National Enforcement Initiatives (NEIs)
- Facility or industry sector based enforcement, including initial information requests, and additional requests to support NOVs or the like
  - May also involve multi-media/sector requests for information across different statutes/requirements

# Scope of Information Requests

- Courts have interpreted EPA's authority broadly:
  - “The breadth of this statutory grant of authority is obvious. In our view, the statute's sweep is sufficient to justify broad information disclosure requirements relating to the Administrator's duties, **as long as disclosure demands which he imposes are 'reasonable.'**” NRDC v. EPA, 822 F.2d 104, 119 (D.C. Cir. 1987) (CWA case)
- Request must pass the threshold test of reasonableness.

# Practical and Strategic Considerations

What do you do when your company is on the receiving end of a Section 114 request?

- Identify what categories of information are being sought, and where such material may reside
  - Full disclosure of relevant information is mandatory/required
  - Appropriate to clarify understanding of definitions, and to discuss scope and timing of request
- Attempt, as best as possible, to identify the Agency's focus, and in turn, assess the facility or company's potential for noncompliance and statutory/regulatory liability
  - Form a response team, and engage in appropriate internal investigation activities (at the direction of counsel) regarding potential noncompliance/liability
  - Potential criminal vs. "only" civil/administrative enforcement?
  - Develop a plan for disclosing/sharing information with the agency as the investigation develops, if appropriate

# Practical and Strategic Considerations

What do you do when your company is on the receiving end of a Section 114 request? (cont'd)

- Consider possible impact to other company facilities/operations and assess among other things, possible voluntary disclosure
- Consider possible State Agency interest/involvement
- Possible limits on disclosure through claim of Confidential Business Information (CBI) – see, e.g., 40 CFR 2.301
- Internal litigation/investigation hold

# The Response to EPA

- Letter transmitting the Response
  - General and specific objections
  - CBI claim
  - Narrative response and possible use of themes
  - Identification of responsive documents
  - Reservation of right to supplement response/obligation to continue production
- Implement enforcement defense strategy, as appropriate

# Enforcement Approach of the Current Administration

- EPA enforcement activity during the 2017 fiscal year
- January 25, 2018 DOJ “Guidance on Guidance”
  - In January, DOJ issued new “policy” that prohibits the Department of Justice from using its civil enforcement authority to convert agency guidance documents into binding rules
  - “Although guidance documents can be helpful in educating the public about already existing law, they do not have the binding force or effect of law and should not be used as a substitute for rulemaking,” Associate Attorney General Rachel Brand said. “Consistent with our duty to uphold the rule of law with fair notice and due process, this policy helps restore the appropriate role of guidance documents and avoids rulemaking by enforcement.”
- Possible impact on Agency enforcement? Boon to potential industry defenses in enforcement matters?
- State deference?

# Questions and Conclusion

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