

28TH ANNUAL BUSINESS & INDUSTRY'S

Sustainability & Environmental, Health and Safety

S Y M P O S I U M

Tuesday & Wednesday, March 26-27, 2019 • Sharonville Convention Center, Cincinnati, Ohio

Workshop KK

Indiana:

**Major Air Permitting, Regulatory
& Compliance Developments**

**Wednesday, March 27, 2019
11:15 a.m. to 12:30 p.m.**

Biographical Information

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Scott is the Chief of the Air Programs Branch for the Indiana Department of Environmental Management's Office of Air Quality, a post he has held since November 2007. Prior to serving in his current capacity, Scott served as the Section Chief for the Program Planning and Policy Section within IDEM's Office of Air Quality for four years.

The primary responsibilities of Scott's Branch include: Technical support to rulemakings, State Implementation Plan development, administration of the state's vehicle emissions testing program, photochemical and dispersion modeling, and air toxics program development and implementation.

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Tony Sullivan, a partner in Barnes & Thornburg's Indianapolis office, concentrates on environmental law. His practice focuses primarily on air and water issues, but it also covers virtually all areas of environmental law, including solid waste issues, Superfund matters, underground storage tanks, and asbestos concerns. Mr. Sullivan's practice generally involves litigation, counseling, and negotiation. In addition to appearing before federal courts, state courts, and administrative courts on behalf of his clients, he has participated in numerous negotiating sessions with governmental agencies, taking the lead role in finding creative solutions to satisfy all the parties concerned.



National Ambient Air Quality Standards Implementation Challenges for Indiana

2019 Sustainability & Environmental Health and Safety Symposium

March 27, 2019

Scott Deloney

Indiana Department of Environmental Management

Office of Air Quality



Presentation Outline

- Unique classification conflict between 2008 and 2015 ozone standards.
- Nonattainment/attainment/redesignation stalemate for 2010 1-hour Sulfur Dioxide (SO₂) standard.
- Arbitrary inclusion of small source under the Data Requirements Rule for the 2010 1-hour SO₂ standard.

Comparison of 2008 Ozone NAAQS and 2015 Ozone NAAQS Lake and Porter Counties

	2008 Ozone NAAQS	2015 Ozone NAAQS
Level	75 parts per billion	70 parts per billion
Form	Three-year average of the annual 4 th -highest daily maximum 8-hour concentration	Three-year average of the annual 4 th -highest daily maximum 8-hour concentration
Boundary	Lake and Porter Counties	Lake County – Partial Calumet Township Hobart Township North Township Ross Township St. John Township
Classification	Originally as Marginal in 2012 Bump-up to Moderate in 2016 Expected bump-up to Serious in 2019	Marginal in 2018
Major Source Threshold	Marginal – 100 tons per year Moderate – 100 tons per year Serious – 50 tons per year	Marginal – 100 tons per year
Major Source Modification Threshold	Marginal – 40 tons per year Moderate – 40 tons per year Serious – 25 tons per year	Marginal – 40 tons per year
Offset Requirements	Marginal – 1.1 to 1 Moderate – 1.15 to 1 Serious – 1.2 to 1	Marginal – 1.1 to 1
Additional Planning Requirements for Serious Classification	Enhanced Monitoring Attainment Plan Reasonable Further Progress Enhanced Vehicle Inspection Program Clean-Fuel Vehicle Programs Transportation Control Contingency Provisions	



Hydraulic Press Brick

- Small brick plant in close proximity to a coal-fired power plant southwest of Indianapolis.
- Monitor downwind of coal-fired power plant was in violation of 2010 1-hour SO₂ standard at time of designation.
- Nonattainment designation effective 10/4/2013, boundary captured both sources.

Hydraulic Press Brick

- 2014 – Coal-fired power plant shut down and new natural gas facility put in place.
- 1-hour limits put in place October 2015.
 - Limit for Hydraulic Press Brick (HPB) called for 50% reduction from each kiln.
 - Limit was determined to be maximum achievable without shutting kilns down.
 - U.S. EPA defined reduction as adequate for outstanding settlement and for addressing the source's contribution to the receptor where violation occurred.

Hydraulic Press Brick

- Monitor attained the standard in 2015 and values have decreased by more than 25% since 2015.
- IDEM submitted attainment State Implementation Plan (SIP) with permanent and enforceable limits in October 2015.
- Upon receipt of submission, U.S. EPA determined limits to be insufficient to approve Indiana SIP.
- Without modeling demonstrating attainment of permanent and enforceable limits, the area is ineligible for redesignation.
 - Perpetual nonattainment area????

Hydraulic Press Brick

- HPB is a facility that is challenging to model.
 - Short stacks result in high dispersion at fence line.
 - Facility is surrounded by high terrain, which model does not handle well.
- Mid-2018 – U.S. EPA proposed approval of 1-hour attainment and SO₂ SIP limits, except for those associated with HPB and nearby power plant.
- HPB Emissions: 2010=350 tpy 2016=>15 tpy
- January 2019 – IDEM submits technical supplement to the SIP submission for HPB.
 - Technical demonstration that HPB's contribution to monitor receptors on days the facility is upwind is insignificant.



Isolatek (U.S. Mineral Wool)

- Small mineral wool manufacturer in northeast Indiana.
- Captured under the Data Requirements Rule (DRR) for the 1-hour SO₂ standard.
 - Emission threshold for DRR-2,000 tpy.
 - Isolatek emissions in 2017=117 tpy.
 - Low stacks and unvented screen house present challenges to modeling.

Isolatek (U.S. Mineral Wool)

- U.S. EPA motivated based on PM-10 settlement and lack of additional required controls.
 - U.S. EPA wanted scrubbers placed on kilns to same level of control as another facility in IN.
 - This level of control does not support modeled attainment.
 - Modeling of both sources indicates Isolatek has less impact on ambient receptors as the other source not impacted by DRR.
- IDEM refused to characterize source.
 - Arbitrary and capricious inclusion.
 - Comingling of enforcement.
- U.S. EPA designated area nonattainment, effective 4/8/2018, with attainment SIP due 10/9/2019.
 - SIP requires limits for which modeling supports demonstration of attainment.

Isolatek (U.S. Mineral Wool)

- IDEM and source have evaluated cost-effective control options.
 - No options support demonstration of attainment.
 - Source could not comply with required limits without limiting operations or shutting down.
- March 2018 – IDEM filed petition for reconsideration to U.S. EPA Administrator.
- March 2018 – Indiana Attorney General filed petition for legal review.
- Indiana’s core arguments:
 - Policy action is arbitrary and capricious.
 - Comingling of enforcement prohibited in policy action.
 - No monitoring or modeling information consistent with DRR guidance to support action.
 - In the absence of sufficient monitoring or modeling information consistent with the DRR, the area surrounding the facility should be classified as “unclassifiable,” consistent with hundreds of other facilities.
- U.S. EPA currently evaluating options to respond to Indiana’s petitions.



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Indiana: Major Air Permitting, Regulatory & Compliance Developments

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Major Clean Air Act Developments

Once-In-Always-In Rejected



Major Clean Air Act Developments

Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

- On January 25, 2018, EPA issued a memorandum (hereinafter called the “Wehrum Memo”) that a source that was previously classified as major, and which so limits its PTE, will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.
- A major source under the NESHAP is any source or group of sources within a contiguous area under common control that has the PTE considering controls of 10 TPY or more of any single HAP or 25 TPY or more of a combination of HAPs.

Major Clean Air Act Developments

Once-In-Always-In Rejected

- Switch from 1995 Seitz Memorandum.
 - The Seitz Memorandum sets forth a policy commonly known as “once in, always in,” under which “facilities may switch to area source status at any time until the ‘first compliance date’ of the standard,” with “first compliance date” being defined to mean the “first date a source must comply with an emission limitation or other substantive regulatory requirement.” Seitz Memo at 5. Thereafter, under the Seitz Memo, “facilities that are major sources for HAP on the ‘first compliance date’ **are required to comply permanently** with the MACT standard.” Seitz Memo at 9.

Major Clean Air Act Developments

Once-In-Always-In Rejected

- In the January Wehrum Memo, EPA pronounced that “the CAA contains no provision which specifies that, if a major source wishes to switch to area source status, by taking an enforceable limit on its PTE, it must do so prior to the ‘first compliance date,’ or that a major source MACT standard will continue to apply to a former major source that, subsequent to the first compliance date, takes an enforceable limit on its PTE to below the applicable thresholds.” Wehrum Memo at 2.

Major Clean Air Act Developments

Once-In-Always-In Rejected



- On February 6, 2018, IDEM issued a memorandum entitled New Clean Air Act Guidance – How IDEM Can Help.
- “With the new guidance, sources of hazardous air pollutants previously classified as “major sources” may be reclassified as “area” sources when the facility limits its potential to emit below major source thresholds.” IDEM Memo at 1.

Major Clean Air Act Developments

NSR Emission Projections

- December 7, 2017 Pruitt Memo regarding Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability
 - This EPA memo provides the following clarifications regarding the use of actual post-project emissions in determining compliance with the requirements.



Major Clean Air Act Developments

NSR Emission Projections

“EPA intends to apply the NSR regulations in accordance with this language such that **the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information** in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emission projection, as provided in the NSR regulations.”

December 7 Pruitt Memo at 6.

Major Clean Air Act Developments

NSR Emission Projections

“EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source’s pre-project conclusion that NSR does not apply **and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability.**”

December 7 Pruitt Memo at 7.

Major Clean Air Act Developments

NSR Emission Projections

“EPA intends to implement and exercise its authority under the NSR provisions to clarify that when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, **unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by ‘second guessing’ the owner or operator’s emissions projections.**”

December 7 Pruitt Memo at 7-8.

Major Clean Air Act Developments

March 13, 2018 Memo “Project Emissions Accounting Under New Source Review Preconstruction Permitting Program”

- “EPA now interprets the provision set forth in [PSD] as providing that any emissions *decreases* that may result from the given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase.”
- The EPA does not interpret the existing regulations as requiring that a decrease be creditable or enforceable as a practical matter in order to be considered at “Step 1.”

Major Clean Air Act Developments

September 4, 2018 Memo “Interpreting ‘Adjacent’ for New Source Review in Title V Source Determinations in all Industries Other than Oil and Gas”

- EPA interprets the term “adjacent” to mean physical proximity, and that the perceived functional “interrelatedness” of operations is not a relevant consideration.
- See April 30, 2018 Letter to the Pennsylvania Department of Environmental Protection.

In the Meadowbrook Letter, EPA considered whether Meadowbrook had the power to dictate whether KSL complied with the more general subpart WWW standards, and concluded that it did not.

Major Clean Air Act Developments

September 4, 2018 Memo “Interpreting ‘Adjacent’ for New Source Review in Title V Source Determinations in all Industries Other than Oil and Gas”

- October 16, 2018 Letter to WDNR regarding Ameresco.

“In EPA’s view, the phrase “persons under common control” suggests that the entities themselves are controlled from a central, unified position, such as through parent-subsubsidiary or other forms of corporate management relationships.”

Major Clean Air Act Developments

Project Aggregation

- November 15, 2018, Final Rule
 - EPA interprets that physical and/or operational changes should be combined into a single project for consideration of major NSR applicability when those changes are “substantially related.” In characterizing the substantially related criteria, the EPA further explained that:
 - a source need not group changes based on timing alone,
 - changes are not required to be aggregated simply because they support the plant’s overall basic purpose, and
 - EPA would apply a policy of presuming that changes separated by three or more years are not substantially related, unless the specifics of the activities rebut this presumption.

Major Clean Air Act Developments

November 2018 Revised Policy and Exclusions from “Ambient Air.”

- The EPA’s revised ambient air policy replaces “a fence or other physical barriers” with “measures, which may include physical barriers, that are effective in deterring or precluding access to land by the general public.”



Major Clean Air Act Developments

August 21, 2018 Proposed Affordable Clean Energy Rule (ACE)

1. ACE defines the “best system of emission reductions” (BSER) for existing power plants as on-site heat-rate efficiency improvements;
2. ACE provides states with a list of “candidate technologies” that can be used to establish standards of performance and be incorporated into their state plans;
3. ACE updates the New Source Review (NSR) permitting program to further encourage efficiency improvements at existing power plants; and
4. ACE aligns regulations under CAA section 111(d) to give states adequate time and flexibility to develop their state plans.

The proposed ACE Rule was informed by more than 270,000 public comments that EPA received as part of its December 2017 Advance Notice of Proposed Rulemaking (ANPRM).

Major Clean Air Act Developments

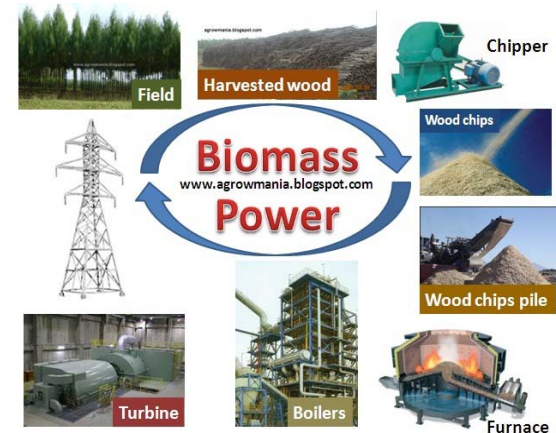
August 21, 2018 Proposed ACE Rule (ACE)

- Notable Concepts:
 - Inside the fenceline
 - Candidate technologies
 - NSR relief
- Several Alternatives for calculating whether emissions increase
 - Statistical evaluation
 - Maximum hourly level experienced in prior five years
 - Maximum achievable hourly rates (NSPS)

Major Clean Air Act Developments

What is BACT?

- Battery power?
- Solar power?
- Biomass?
- Cannot “redefine the source”



Major Clean Air Act Developments

Enforcement Changes

- January 22, 2018 Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States
 - With respect to inspections and enforcement, the EPA will generally defer to authorized States as primary day-to-day implementer of their authorized/delegated programs, except in specific situations.
 - The EPA believes that exceptions to this general practice should be identified through close communication and involvement of upper management of both agencies.

Major Clean Air Act Developments

Enforcement Changes

- EPA is proposing new compliance initiatives for fiscal years 2020-2023 that include eliminating the agency's priority on enforcement of the Clean Air Act New Source Review Permit Program while adding new priorities on non-compliance with drinking water standards and reducing children's exposures to lead.

Major Clean Air Act Developments

On the Horizon:

- RMRR Relief?
 - Possible EPA actions
 - Formalize list of default activities
 - Equipment replacement exclusion for:
 - Like-kind
 - 20% threshold for changes that do not change basic design.



Major Clean Air Act Developments

Results of De-regulatory Actions

- Litigation
- Calls for Investigation
- **Democrats want probe of ex-Hunton attorneys in EPA air office**

“EPA Assistant Administrator for the Office of Air and Radiation William Wehrum and senior counsel David Harlow were directly involved in the agency’s decision to craft new guidance, issued in December 2017, regarding when a facility must apply for a Clean Air Act permit,” according to a letter released by Senators Tom Carper, the ranking Democrat on the Senate Environmental and Public Works Committee, Sheldon Whitehouse (Democrat), and Representative Frank Pallone, Jr. (Democrat), who chairs the House Energy and Commerce Committee

Major Clean Air Act Developments

Results of De-regulatory Actions

“With respect to Mr. Wehrum, the facts suggest that he may have ignored ethics advice from the Office of General Counsel, which may have resulted in improper conduct.” the letter said.



Major Clean Air Act Developments

QUESTIONS

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