



## EPA Policy of Once In, Always for CAA Section 112 Becomes Once In, Sometimes Out

10.26.2020

Section 112 of the federal Clean Air Act (CAA) requires major sources of hazardous air pollutants (HAPs) to, among other things, control emissions using the maximum achievable control technology (MACT). A major source is a source that emits or has the potential to emit (PTE) 10 tons of any single HAP or 25 tons of any combination of HAPs. Sources that are not major sources are deemed area sources.

In 1995, EPA issued a guidance memorandum on timing issues for MACT standards that couched EPA's policy as once in, always in (OIAI). This 1995 policy specified that sources of HAPs that were major on the compliance date for an emission standard would always remain subject to those major source MACT emission standards. The issue as framed in the 1995 memorandum was EPA's stated desire to avoid potential backsliding by major sources. If a major source otherwise subject to MACT could reduce its emissions or PTE below the major thresholds, it might emit more HAPs than if it were required to comply with MACT. This OIAI policy meant that if a source was major on the date a National Emission Standard for Hazardous Air Pollutants (NESHAP) became applicable to the source, the source was considered major permanently, even if it subsequently reduced emissions or PTE below the major source threshold through controls or federally enforceable permit limits.

This policy was criticized as discouraging HAP sources from undertaking voluntary emission reductions efforts. It was also controversial in that, as applied by EPA, sources that had controls or permit limits in place on the NESHAP compliance date that allowed the source to be classified as an area source would be considered major sources subject to MACT if a subsequent noncompliance resulted in major source level emissions or PTE. The OIAI policy was applied in these circumstances, even if resolution of the noncompliance would bring the source back below the major source limits.

EPA published a proposed rule in 2007 which would have overturned the OIAI policy to allow major sources to become area sources at any time. This rulemaking was never finalized. In January of 2018, EPA issued a new guidance memorandum which superseded the 1995 OIAI memorandum and removed any timing restrictions on the ability of major sources of HAPs to reduce emissions or PTE to

allow them to reclassify as area sources. The 2018 memorandum also stated EPA's intention to engage in a rulemaking to formalize the policy stated in the 2018 memorandum.

In 2019, EPA published a proposed rule formally overturning the OIAI policy. After notice and comment and a public hearing, the final rule was signed by EPA Administrator Wheeler on October 1, 2020 and is awaiting publication in the Federal Register. The rule will become effective 60 days after its publication in the Federal Register

In order to effectuate the change in policy, the final rule amends the applicability section in the general provisions of 40 CFR Part 63 to state that “[a] major source may become an area source *at any time* upon reducing its emissions of and potential to emit hazardous air pollutants . . . to below the major source thresholds . . .” (emphasis added). The rule also alters the definition of PTE to remove the word “federally” from the phrase “federally enforceable.” Thus, any physical or operational limitation on the capacity of a source needs only to be legally and practicably enforceable by a state or local permitting authority, and need not be federally enforceable, in order for the source to limit its PTE to become an area source.

The final rule also states that area sources that become major sources generally must comply with the applicable emission limits upon startup, i.e. no grace period, if the source meets the definition of a new source, or the date specified for existing sources if it qualifies as such. The rule also adds notification requirements so sources that change status, either area to major or major to area, must electronically notify EPA within 15 days.

The final rule also clarifies that changes in source status do not affect enforcement actions for violations of requirements that applied prior to the change, e.g. changing from major to area source status does not absolve a source from potential liability for violations of major source requirements that occurred prior to the change. The converse is also true for sources that become major sources that have prior area source violations.

This rulemaking culminates a decades long effort by EPA under Republican administrations to overthrow the OIAI policy. But looming on the horizon is a national election, and the possible application of the Congressional Review Act to this and other Trump EPA rulemakings. But that is another story . . . .

[84 FR 36304](#) (July 26, 2019) (proposed rule)

[Pre-publication version of Final Rule](#) (October 1, 2020)

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