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Critics Fear BACT Guide Opens Door To Broad Efficiency Reviews For GHGs

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State and industry officials are raising concern over the potentially broad scope of energy efficiency reviews allowed under EPA's best available control technology (BACT) guidance on assessing permit controls for greenhouse gas (GHG) emissions, fearing that activists could use the guide to force broad efficiency reviews beyond the permitted unit.

EPA's recently released guidance on assessing BACT for the purpose of GHG limits in Clean Air Act permits seeks to limit efficiency reviews at modified facilities. But in the same document the agency also says that states retain broad discretion to "redefine the source" subject to permit requirements, and says that states can conduct broader BACT reviews beyond that source if they so choose.

That provision is prompting state and industry fears that environmentalists opposed to permits will try to force states to use this discretion in the broadest possible terms, including filing lawsuits that could set precedents forcing plant-wide efficiency reviews at existing facilities and major design changes at new plants.

Other sources, however, downplay these concerns and say that even though it is inevitable activists will file legal challenges to force a broad reading of the definition of a source, including efficiency reviews, states' discretion also gives them broad authority to establish a reasonable cut-off point for how expansively they would consider the definition.

EPA [accepted comment](#) on its draft BACT GHG guidance through Dec. 1, rejecting requests to extend the comment deadline. In its Nov. 10 guidance, EPA seeks to limit efficiency reviews at existing plants only to the unit undergoing modification but also notes the agency has "recognized that permitting authorities have the discretion to conduct a broader BACT analysis if they desire," granting states discretion to redefine the source, providing it is well documented.

One state source says applying this discretion to the scope of efficiency reviews is particularly problematic because of the threat of activists trying to force overly broad reviews that would look at imposing efficiency requirements across an existing facility, rather than the unit at issue in a particular Clean Air Act permit, as well as imposing more efficient design changes at a new plant.

States and others have been discussing their concerns with EPA, the state official says, warning that they fear the discretion could become a legal mandate if tested in a court favorable to activists.

"Say you are putting in a new boiler at a plant. There are some who want the agency doing the permitting to look at efficiency not just at the boiler but at the whole plant, with the thought being you tighten up the efficiency of the plant you won't need as big of a boiler and you won't emit as many GHGs," the source says.

The states say this potential tool for environmentalists could allow them to significantly delay permits for coal-fired plants. "So all of a sudden, now because efficiency is BACT, there are [endless steps you can take] to improve efficiency," from replacing pipes and seals, to installing the most efficient turbine.

"And we are already hearing concern about" environmentalists challenging permits on the scope of the efficiency analysis to try and force the broadest possible reading of the definition of a source, the state official says.

Industry Concerns

Industry groups are raising similar concerns about the efficiency language in their comments on the draft BACT guidance. For example, Dominion Resources Inc. in Nov. 30 comments says, "While we support the concept of energy efficiency as a flexible option for BACT, we are concerned that the guidance as currently written provides a very broad interpretation of BACT applicability that extends well beyond the emitting source or unit for which BACT actually applies."

Dominion also criticizes the agency's encouragement of process efficiencies at new sources, writing, "It is not clear how far upstream from the actual emissions unit such process improvements should be considered. Without the establishment of some boundaries, BACT could apply to virtually every aspect of facility design."

Additionally, American Electric Power in Nov. 30 comments stresses its support for limiting efficiency reviews at modified facilities to the unit at issue in the relevant Clean Air Act permit. "In the context of a modification, EPA has historically made the interpretation that BACT applies to only an emission unit that has been modified or added to an existing facility. We agree with this assessment. . . EPA and state permitting authorities do not have authority to impose BACT requirements on operations within a facility that do not emit the regulated pollutant."

Lawyers with McGuireWoods also warned about the efficiency provisions of the BACT guidance in a Nov. 16 column on a legal website, writing, "The good news is that EPA identifies energy efficiency measures as the primary candidate for GHG BACT. . . . The bad news is that maximizing energy efficiency throughout an industrial facility is an entirely new and intrusive approach to BACT, and one that has the potential to greatly complicate the review and issuance of permits, and increase the cost of new projects and plant modifications."

The lawyers note that the guidance "anticipates a plant-wide efficiency analysis for new plants, and a full process line analysis and secondary impacts review for modifications. . . . But if permit authorities undertake the wide-ranging and detailed energy efficiency analysis EPA foresees, the aggregate capital investment required for the energy saving steps available for each component identified . . . could be huge."

However, one industry attorney downplays the ultimate significance of the discretion EPA is granting to states, saying that states can address environmentalist push-backs on efficiency and other efforts by issuing guidance on economic cutoffs, laid out in a dollars-per-ton basis for GHG reductions.

The source says such data already exists for criteria pollutants under BACT and the GHG cutoffs can be extrapolated from those figures. But the source warns, "That floor is going to have to be set early, because environmental groups are going to do exactly what" states are warning EPA about.

A second state source adds that while the guidance gives states broad efficiency discretion at existing sources, it is a noncontroversial issue, calling a modification that triggers BACT "a perfect opportunity to upgrade your boilers to more efficient boilers or inspect some of the flanges or related equipment so there's not fugitive emissions escaping. These are things that can make the operation work more efficiently but haven't been required in the past. [With the guidance], EPA gives permittees new authority to ask for connections to be inspected for efficiency."

One Sierra Club source acknowledges environmentalists are likely to push efficiency reviews in permits but says those pushes are not going to be random attempts for a broad reading of the guidance, and instead will follow the systematic, top-down, five-step BACT review process. "There is a long history of how courts . . . have dealt with how permitting agencies implement BACT" that include allowing permittees to reject controls suggested by environmentalists as long as those suggestions are acknowledged and then rejected on rational reasons.

The source does note that environmentalists are pleased that EPA included efficiency discretion in the BACT analysis, given that efficiency and fuel switching are the two main options to reduce GHGs. The group will reinforce that point in its comments on the guidance which as of press time had not been filed. -- Dawn Reeves