To: Chapman, Apple[Chapman.Apple@epa.gov]; Brooks, Phillip[Brooks.Phillip@epa.gov]
From: Dykes, Teresa
Sent: Thur 3/1/2018 1:07:43 PM
Subject: RE: Project Netting Guidance

The only thing I can think of regarding this is that OAR may think that the draft letter to Limetree Bay Terminals (the old Hovensa site in the Virgin Islands) that discussed project netting for existing units was enough notice for this guidance- but that is a stretch.

Terri Dykes

Senior Attorney

Office of Enforcement and Compliance Assurance

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From: Chapman, Apple
Sent: Thursday, March 01, 2018 7:56 AM
To: Brooks, Phillip <Brooks.Phillip@epa.gov>
Cc: Dykes, Teresa <Dykes.Teresa@epa.gov>
Subject: Re: Project Netting Guidance

We did not get a copy earlier. Raj called me last Friday to let me know it was coming.

Sent from my iPhone

On Feb 28, 2018, at 8:27 PM, Brooks, Phillip <Brooks.Phillip@epa.gov> wrote:

Sent from my iPhone

Begin forwarded message:

From: "Bodine, Susan" <bodine.susan@epa.gov>
Date: February 28, 2018 at 8:14:31 PM EST
To: "Brooks, Phillip" <Brooks.Phillip@epa.gov>, "Kelley, Rosemarie" <Kelley.Rosemarie@epa.gov>, "Traylor, Patrick" <traylor.patrick@epa.gov>
Subject: Fwd: Project Netting Guidance

Who in AED got a review copy earlier?

Sent from my iPad

Begin forwarded message:

From: "Wehrum, Bill" <Wehrum.Bill@epa.gov>
Date: February 28, 2018 at 6:47:17 PM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>
Subject: RE: Project Netting Guidance

Hi Susan. Thanks for the comments on the memo.

With regard to process, I'm told that OECA staff received a copy of the draft memo at least a week before you and Patrick got it last Friday. It was still very much a work in progress prior to that point. I offer this not for purposes of litigating the process issue, but solely as a data point for you. Looking ahead, we will make sure OECA is fully in the loop.

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

From: Bodine, Susan
Sent: Wednesday, February 28, 2018 12:10 PM
To: Wehrum, Bill <Wehrum.Bill@epa.gov>
Subject: Project Netting Guidance

Bill,

AED staff are providing a technical clarification to the netting guidance to OAR staff, described below.

But on our process issue –OGC staff apparently have told OECA staff that they have been directed to NOT share draft Air policy documents with OECA. I don't know where that direction came from.

Bill, can you reiterate to your staff what you told me on the phone – that OECA will have the normal workgroup opportunity to comment on OAR guidance that have enforcement implications – and not get jammed at the last minute again. We should be brought in by OAR directly and the fact that guidance is under development and being discussed between OAR and OGC, with OECA excluded, is very troubling.

Susan

From: Bodine, Susan
Sent: Wednesday, February 28, 2018 8:43 AM
To: Brooks, Phillip <Brooks.Phillip@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Cc: Traylor, Patrick <traylor.patrick@epa.gov>; Starfield, Lawrence

<Starfield.Lawrence@epa.gov>
Subject: FW: Project Netting Guidance

Has AED raised the issue discussed below with OAR?

Susan

Begin forwarded message:

> **From:** "Traylor, Patrick" <traylor.patrick@epa.gov>
> **Date:** February 26, 2018 at 5:58:20 PM MST
> **To:** "Dykes, Teresa" <Dykes.Teresa@epa.gov>
> **Subject: Re: Project Netting Guidance**
>
> I think it makes sense to explore a clarification. I can't imagine that the intent of the guidance is to allow unenforceable decreases in PTE—which would be contrary to the plain language of the regulations. More likely is an oversight in the very limited case in which a newish unit has decreased emissions in a project. So I wouldn't think a clarification would be controversial.
>
> **Patrick Traylor**
>
> Deputy Assistant Administrator
>
> Office of Enforcement and Compliance Assurance
>
> U.S. Environmental Protection Agency
>
> (202) 564-5238 (office)
>
> (202) 809-8796 (cell)
>
> On Feb 26, 2018, at 2:33 PM, Dykes, Teresa <Dykes.Teresa@epa.gov> wrote:
>
>> Patrick- Adjusting a "New" units PTE with revised enforceable limits is not what is intended according to my conversations with staff and

according to underlined sentence below- that is on pg. 8 of the draft.

Further, in the September 2006 proposal, EPA had proposed to adopt regulatory language that specified, for the purposes of what was then termed "project netting," that emissions "[d]ecreases must be creditable according to all the requirements of paragraph (b)(3)" of 40 CFR § 52.21, or "otherwise enforceable as a practical matter." See 71 Fed. Reg. 54252. Having reviewed the considerable number of comments that EPA received on this particular issue, in which objections were raised to EPA's adopting what amounted to "synthetic minor-like" requirements at Step 1, the Agency no longer believes that such requirements are either necessary or appropriate. As has been explained, project emissions accounting does not constitute "netting" as that term, and that concept, have generally been understood. Rather, accounting for emissions decreases at Step 1 of the NSR applicability analysis gives effect to the fundamental requirement, expressed by the court in New York, that for a particular change to trigger NSR, that change – standing alone – must result in an increase in "actual emissions." 413 F.3d at 40.

At the same time, the 2002 NSR Reform rule has already implemented, as part of its adoption of provisions addressing the use of the "projected actual emissions" methodology, provisions pertaining to the tracking, documenting, and, as necessary, the reporting of post-project emissions increases. See, e.g., 40 CFR § 52.21(b)(41), § 52.21(r)(6). With the understanding that a source must comply with those same requirements with respect to <u>any</u> emissions decreases that are taken account of at Step 1, <u>the source will not be obligated either to establish that the decrease is creditable or that it is enforceable as a practical matter</u>.

The use of "any" decreases includes any decreases from a new unit's PTE- and that decrease is no longer required to be enforceable. Granted- this is a limited subset of situations. If you want the position taken as you outlined in your note (and maintain that enforceability is still needed with regard to PTE)- it may be worthy of an additional sentence or clarification that "with respect to any emission decreases <u>at an existing unit</u> that are taken account of at Step 1, the source…" and add a footnote that stresses that the PTE requirements for units defined as new units still apply. Re: 52.21(r)(6) applies only to sources uses the PAE applicability method- and now EPA is implying that those MRR requirements are to situations when the hybrid test is used.

Terri Dykes

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From: Traylor, Patrick
Sent: Monday, February 26, 2018 4:02 PM
To: Dykes, Teresa <Dykes.Teresa@epa.gov>
Subject: Re: Project Netting Guidance

The memo says that for "new-ish" units, the decrease would result in a decrease in the unit's PTE, not the unit's PAE. See page 7. This means that a PTE could only be decreased by enforceable limits (as you point out below), and that the other portions of the memo that address enforceability would not apply to reductions in PTE.

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

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On Feb 26, 2018, at 2:40 PM, Dykes, Teresa <Dykes.Teresa@epa.gov> wrote:

Patrick- I just want to point out that a "new" unit- which would include the "new-ish" units discussed in the preamble- must use PTE per the regulations- See 52.21(a)(2)(iv)(d). The memo allows a "new" unit to use PAE. For what it is worth, I do not see how the regulations allow this.

(d) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the ***potential to emit*** *(as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).*

And even the paragraph for hybrid units refers back to (d)-

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

The definition of PTE does not allow for unenforceable limits-

(4) Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or the amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on the emissions is federally enforceable.

Terri Dykes

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From: Traylor, Patrick
Sent: Monday, February 26, 2018 12:52 PM
To: Brooks, Phillip <Brooks.Phillip@epa.gov>; Dykes, Teresa <Dykes.Teresa@epa.gov>; Chapman, Apple <Chapman.Apple@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: Project Netting Guidance

All:

I've evaluated the project netting guidance memorandum.

Regretfully, I have to catch a flight soon and won't be able to sit down in person to discuss this matter. Instead, I've included my thoughts in comments to the memorandum. Process issues aside, I believe that the substance of the guidance reflects permissible interpretations of the regulations. FYI, this is headed for signature on Wednesday.

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

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