



Legal Context for 2018 “Air Repair” Amendments

**MASSACHUSETTS CHEMISTRY & TECHNOLOGY ALLIANCE
CONFERENCE**

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Recent MassDEP Air Program Revisions

- Legal context
 - Greater consistency with federal standards
 - Closing the “SIP lag”

State-federal consistency

- VOC RACT*: Catch-up to federal CTGs**
 - Including: Industrial cleaning solvents
 - But note: Some Mass.-specific exemptions
 - Work practices effective immediately, emission limits effective March 9, 2020
- Emergency engines/turbines: Harmonize with federal NSPS***, MACT° standards re: allowable operation
- Minor NSR°° – public participation

* Volatile Organic Compounds - Reasonably Available Control Technology

** Control Technique Guidance

*** New Source Performance Standard

° Maximum Achievable Control Technology

°° New Source Review

Closing the “SIP lag”

- Significant delays in submittal of new or revised Mass. air regs to EPA for addition into the SIP* (and in EPA review and approval of submittals)
- Result:
 - Some Mass. air regs are “federally enforceable”, some are not
 - Obsolete version of Mass. air regs in SIP are still enforceable by EPA
 - So: Two sets of rules to comply with, potential for conflicts
- MassDEP working to submit all of 310 CMR 7.02 for SIP approval

* State Implementation Plan



Ozone-Depleting Substances and HFCs: Sorting Out What's Where

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Prior EPA Extension to HFCs Struck Down

- Obama EPA had essentially extended refrigerant/ODS restrictions to substitute non-ODS refrigerants with high GWP (HFCs; SNAP Rules 20 & 21, 2015/2016)
- Court struck it down – CAA Title IV doesn't authorize EPA to regulate climate change (*Mexichem v. EPA*, D.C. Cir. 2017)
- EPA now abiding with the ruling

EPA Post-Decision Guidance (4/2018)

- Responds to *Mexichem* decision
- Guidance: EPA will not implement any part of the rule extending ODS regulations to HFCs, pending a forthcoming rulemaking
- Court challenge filed
 - Claims that guidance tosses the entire rule, but court struck down only part of it (i.e., regulating parties that had already switched from ODS to HFCs)

Proposed Rule Changes (9/18/18)

- Main proposal: Rescind certain leak repair and maintenance requirements for non-ODS refrigerants in larger systems
 - ≥ 50 lbs. of non-ODS no longer required to
 - conduct leak rate calculations when adding refrigerant
 - repair appliances exceeding certain leak thresholds
 - retrofit/retire appliances when not repaired

Proposed Rule Changes (9/18/18)

- Alternative: Rescind all of ODS regulations from non-ODS regulations – e.g.,
 - Certification for techs/contractors purchasing or handling refrigerants
 - Use of certified refrigerant recovery equipment to remove refrigerant before maintenance/disposal
 - Refrigerant recovery in small appliance disposal
- Interim measure: Extend 1/1/19 compliance deadline for LDAR of non-ODS appliances by 6-12 mos. (anticipating PR won't be adopted in time)

ODS Outlook

- Final rule: Almost certain to be challenged in court
- States moving ahead
 - CA: CARB has adopted now-rejected EPA extension to non-ODS, and has been authorized to further regulate non-ODS
 - MA, CT, NY: Planning to do likewise
 - Preemption not likely?
 - Significant industry support
 - Preserve value of non-ODS investments
 - Avoid state patchwork, impractical implementation
- Kigali Amendments: Trump Administration initially voiced support, but quiet since
 - Industry largely supportive, for same reasons as above



Federal Hazardous Air Pollutants After Withdrawal of “Once In, Always In”

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Federal Hazardous Air Pollutants After Withdrawal of “Once In, Always In”

- 1995 EPA policy memorandum
 - After the first substantive compliance date of a MACT,* no exit from “major source” status by reducing PTE**
 - So, no exit from MACT (or resultant Title V permit)
- 2007: EPA proposed to reverse course with a regulatory change, but Congress blocks

* Maximum Achievable Control Technology

** Potential to emit

Federal Hazardous Air Pollutants and “Once In, Always In”: Background

- January 2017: EPA withdraws the policy
 - Contrary to plain language of CAA:
 - Definition of “major source”: “emits or has the potential to emit”
 - No timing cut-off
 - Disincentive to voluntary pollution abatement/ prevention and technology innovations
 - So: At any time, a major source can take an enforceable limit on its PTE → become minor (“area”) source, and exit a MACT (and Title V, if not otherwise subject)

“Once In, Always In”, per NGOs: Down, but not out

- Court challenge pending
- Claims:
 - Violates APA*: Requires rulemaking, “arbitrary and capricious”
 - Violates CAA §112
- Status: Decision at least several months away
- Crystal ball says

* Administrative Procedures Act

Avoiding snares on the path out of OI/AI

- Beware OI/AI written into prior enforcement settlements
- Exit MACT → increase PTE → trigger permitting?
- Increased actual emissions?
- Increased ambient impacts?



Recent Federal NSR Changes: Impact in Massachusetts

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Select NSR reforms or potential reforms

- Project netting
(a/k/a project emissions accounting)
- Projected actuals vs. “actual actuals”
- Project aggregation
- Source aggregation: “Common control”
- Source aggregation: “Adjacent”

Select NSR reforms and potential reforms

- Project netting (a/k/a project emissions accounting) **GUIDANCE**
- Projected actuals vs. “actual actuals” **GUIDANCE**
- Project aggregation **GUIDANCE**
- Source aggregation: “Common control” **GUIDANCE**
- Source aggregation: “Adjacent” **GUIDANCE EXPECTED**

Project netting (project emissions accounting)

- New EPA interpretation: In “Step 1” (“significant emissions increase?”), consider **both** increases and decreases from any units that are part of the project.
- Court challenge – but on hold pending proposed rule to codify the new policy

Actual-to-projected-actual calculations

- For “Step 1”
- 12/7/17 guidance memorandum:
 - “Clear error” standard, no more “second-guessing”
 - No harm, no foul
 - Good-faith presumption for an intent to control actuals
- Result: More latitude for avoiding NSR

Project aggregation

- Revives Bush EPA re-interpretation put on hold by Obama EPA administration
- Key points:
 - Need “substantial technical or economic relationship”
 - Concurrent timing alone not enough
 - Furthering the plant’s “overall basic purpose” not enough
 - Rebuttable presumption: If changes ≥ 3 years apart, separate projects
- Result: Easier to separate changes, avoid NSR
- Court challenge expected

Source aggregation: “Common control”

- EPA letter to PADEP (4/30/18): Narrows the term
 - **Old**: “Substantial relationship” (e.g., ability to influence, esp. support or dependency relationship)
 - **New**:
 - “power or authority to dictate decisions” ...
 - ... AND these decisions must “affect the applicability of, or compliance with, relevant air pollution regulatory requirements”
- Proposed rule this fall?

Source aggregation: “Adjacent”

- EPA draft guidance to regional air chiefs (9/4/2018)
 - **Prior**: “functional inter-relatedness”
 - **Proposed new**: Physical proximity
- Stated goal: More objective, certain
- Court challenge likely if adopted

Practical consequences of guidance strategy

- Harder to directly challenge in court ...
- ... so challenges more likely in individual cases where applied
 - E.g., in permitting decision
 - Set up for NGO citizen suit against the source
- Upshot: Benefits, but more uncertainty for regulated parties

Questions?

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Audits and Self-Disclosure

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Why Perform Audits?

- The most common reason: Search for knowledge
- With knowledge, improvements can be made, opportunities secured, and risks or exposures managed
- Other reasons
 - Consistent with industry or company best management practices (e.g. Responsible Care)
 - Transactional due diligence – buy/sell/lease/joint venture/finance
 - Preparation for or response to agency inspections
 - Response to employee or third party complaints
 - Required by law, permit, judgment, settlement, consent
 - EPA/OSHA/State Agency – Audit Policy Incentives
 - DOJ – Self-disclosure Considerations

To disclose or not to disclose?

- What have you “discovered”?
- Driver: “prompt disclosure” deadline
 - Deadline runs from “discovery” ... discovery of what?
 - Beware: EPA emphasizes this includes possible non-compliance
 - Practical problems from such an approach

Self-Policing Policies: EPA and MassDEP

- Substance of both programs substantially the same
 - Basic benefits
 - Eligibility criteria
- Not identical
 - EPA eDisclosure system
 - Two categories of violation for automatic treatment

Basic Benefits

- Gravity-based penalty waived or reduced 75%
 - Policy is waive gravity-based penalties but collect economic benefit
- No criminal recommendations
 - Except in cases of egregious or bad-faith behavior
 - Only applicable to disclosing entities, not to individuals
- No routine request for audit reports

Some Common Audit Pitfalls

- Use of “bad words” / admissions (“spill” ... “release” ... “violation”)
- Failure to recognize potential triggers for additional action
- Not preserving confidentiality through the use of a control group and process
- Lack of preparation for reporting obligations
- Failure to understand and utilize agency protections

Some More Common Audit Pitfalls

- Creation of a potential “smoking gun” in the form of an audit report
- Not recognizing the “spectrum” of compliance options that may be available
- Appearing to benefit economically from noncompliance
- Failure to adequately prepare for an audit

Responding to Audit Findings

- **Identify Corrective Measures:**
 - Evaluate options (including second opinions)
 - Implement as appropriate
 - Remain aware of deadlines
 - Document completion and costs
- **Continue to Fine-Tune Audit Procedures**
 - Documentation/communications protocols
 - Team members (participation and performance)
 - Training
 - Lessons learned

Closing Thoughts on Audits

- Understand value of and corporate preference for managing or protecting sensitive information
- Understand legal and policy triggers for further involving corporate EHS and legal counsel
- Involve corporate EHS, consultants, and lawyers early, starting with the pre-audit planning process
- Get documentation in order
- Understand what you're getting into and how you'll get out of it before you start
- Establish, maintain and continue to refine the control process
- Take advantage of agency protections and a job well done

Questions?

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