



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

**MASSACHUSETTS CHEMISTRY & TECHNOLOGY ALLIANCE  
CONFERENCE**

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# Prior EPA Extension to HFCs Struck Down

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- 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)

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- 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)

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- Main proposal: Rescind certain leak repair and maintenance requirements for non-ODS refrigerants in larger systems
  - $\geq 50$  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)

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- 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

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- 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”

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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)

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- 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

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- 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

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- 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  $\geq 3$  years apart, separate projects
- Result: Easier to separate changes, avoid NSR
- Court challenge expected

# Source aggregation: “Common control”

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- 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”

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- 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

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- 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?

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- 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?

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- 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

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- 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

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- 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

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- 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

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- 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

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- **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

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- 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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