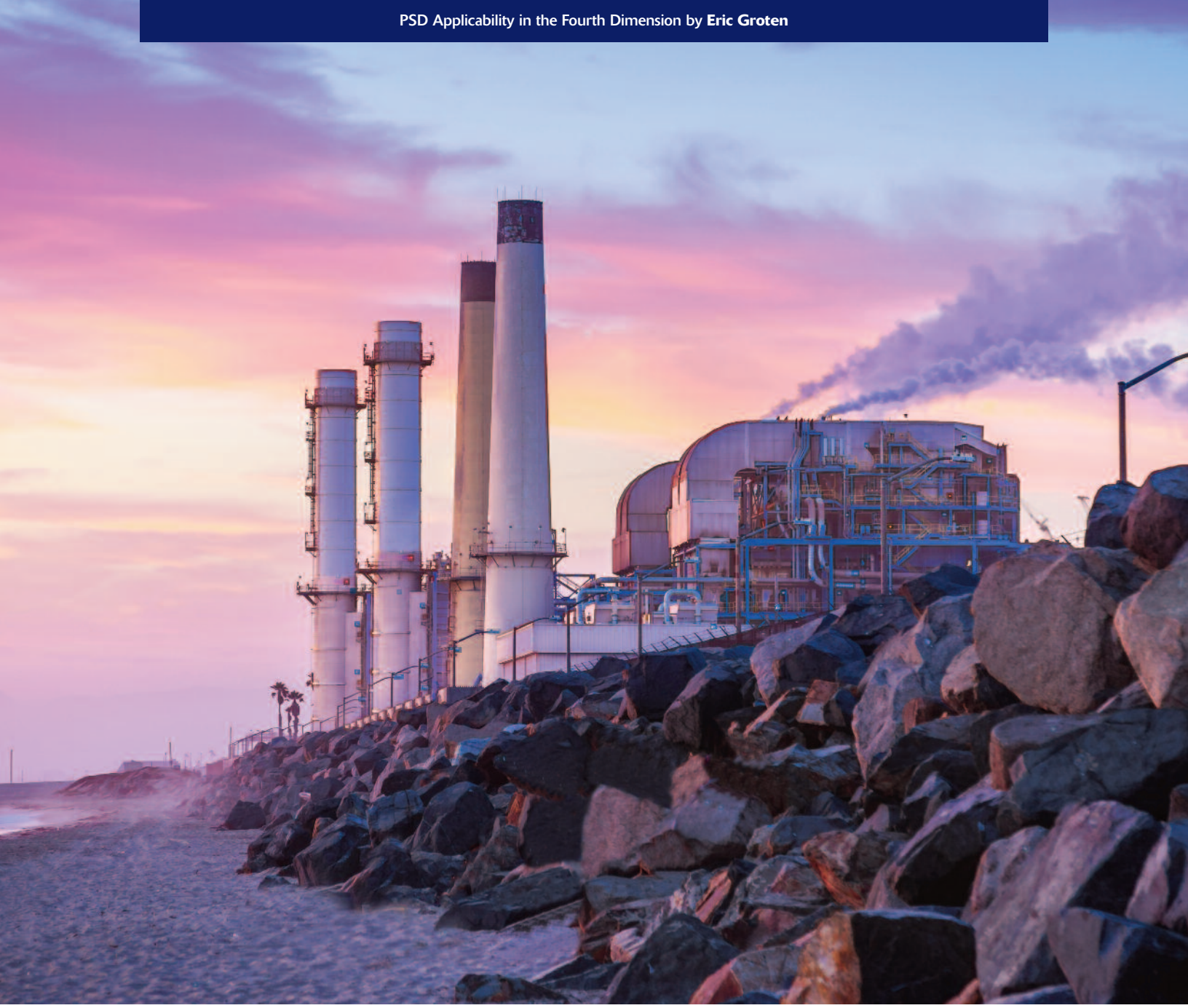

‘Project Aggregation’

PSD Applicability in the Fourth Dimension

This article considers ‘project aggregation’ as a part of the prevention of significant deterioration preconstruction permitting review process.

The U.S. Clean Air Act imposes prevention of significant deterioration (PSD) preconstruction permitting requirements on major sources and major modifications. PSD permitting requires intensive agency review of the applicant's proposed emission control technologies and effects on air quality, often taking a year or more.

PSD applicability generally depends on the magnitude of a project's proposed emissions, with lower thresholds applicable to major modifications of an existing major source than to a wholly new major source. Whether a proposed new activity that emits air contaminants must be analyzed as a "major source" or "major modification" depends on its relationship to preexisting activities. If there are no other activities (1) controlled by the same person, (2) within the same basic industrial category, or (3) on contiguous or adjacent property, then the proposed new activity—the "project"—may be analyzed as a possible major new source, with a "major" emissions threshold of 100 or 250 tons per year.[1]

Conversely, if there are other such activities, then the new project could be a "major modification," which has lower applicability ("significance") thresholds. These three dimensions of PSD applicability analysis—legal, functional, and geographical—each have their own complexities, some of which are the subject of articles published elsewhere in this issue. But this is about a fourth dimension in which emissions must be aggregated: Time. That dimension certainly has it complexities, which remain in flux notwithstanding (and to some extent because of) a November 2018 "final action" intended to resolve decades of ambiguity.

What Is 'Project Aggregation'?

Aggregation of emitting activities over time has been an established part of air quality permitting analysis for decades, requiring consideration of increases and possibly decreases in emissions as sources evolve, even including future projects that may occur before finishing up the one presently on the permitting table. The U.S. Environmental Protection Agency's (EPA) governing rules, and those of states that implement EPA's rules, require a two-step analysis in order to evaluate whether a proposed new project at an existing major source should be permitted as a major modification: Only if the p roposed project itself has estimated emissions above prescribed "significant levels" (Step 1 of the analysis) must it then (in a Step 2) be aggregated with other "contemporaneous" projects (typically those within 5 years) to determine whether a significant net increase has occurred, triggering PSD review as a major modification.

EPA's longstanding rules provide for a granular analysis of each change proposed to be permitted: "The requirements of this section apply to the construction of any new major stationary source … or any project at an existing major stationary source…."[2] Note that "project" has a simple, sensible definition: "Project means a physical change in, or change in method of operation of, an existing major stationary source." Note also the use of the singular article "a," which means that each change must (or at least should) be analyzed as proposed.

But EPA did not long leave well enough alone. Starting in the 1980s, it began to worry that applicants could purposefully disaggregate their intended projects so as to circumvent the first step of the two-step analysis. As EPA described its concern in a much later *Federal Register* notice (to which we will return in a few paragraphs):

> This [two-step] approach to applicability makes it necessary to accurately define what constitutes the 'project' under review to ensure that the proper emissions increase resulting from the project is used when comparing it with the applicable NSR significance threshold at Step 1 of the NSR applicability analysis. *Otherwise, a source could conceivably carve up a higher-emitting project into two or more lower-emitting "projects" and avoid triggering major NSR requirements*. "Project aggregation," therefore, ensures that nominally-separate projects occurring at a source are treated as a single project for NSR applicability purposes where it is unreasonable not to consider them a single project.[3]

The ensuing decades have brought us a litany of inconclusive and abortive proposals and withdrawn "final actions"—one as recently as late 2018—yet still EPA has not yet documented a problem, much less defined a real solution.

EPA still has not completed any final rulemaking announcing what applicants "conceivably" could do, or demonstrate that this was a real problem based on actual experience, or establish "project aggregation" as its solution in any actual rules (to which we could all now refer to understand that the "project" for "Step 1" purposes means something other than a physical or operational change). Instead, through the soft law of pronouncements in preambles that effectuated no changes in actual law, EPA announced its plan to undertake enforcement if it suspects that an applicant has intentionally obtained serial minor source permits for what the applicant had in fact intended as a major project:

> It is not possible to set forth, in detail, the circumstances in which EPA considers an owner or operator to have evaded preconstruction review in this way, and thus subjected itself to enforcement sanctions under sections 113 and 167 from the beginning of construction. This is ultimately a question of intent. However, EPA will look to objective indicia to establish that intent.[4]

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The preamble of this 1989 rulemaking (which made other changes to EPA's nascent PSD rules, but did not change anything to do with project definitions) went on as follows:

> EPA will also look carefully at the economic realities surrounding a transaction. For instance, where it appears obvious that a proposed source or modification, by its physical and operational design characteristics, could not economically be run at minor source levels for an appreciable length of time, EPA will take notice.[4]

Still, whether such devious project disaggregation was a real problem or not, at least this 1989 *Federal Register* pronouncement suggested the right place to look for a solution: In the presumably rare case in which EPA (or permitting authority) had reason to suspect that an applicant had gamed the system, enforcement awaited. The 1989 preamble did not require—in fact, did not even suggest—that this investigation of the applicant's intention (by examination of project economics and design) should be any part of an agency permit engineer's job in the course of reviewing a permit application for the project before them.

But inter- and intra-agency EPA memos as early as 1983 expressed the same concern and a role for permitting authorities to resolve it:

> Although the policy outlined in these documents allows a series of de minimis modifications to escape review, it is important that the reviewing agency not allow a source owner to circumvent the regulations by splitting up what would normally be considered a single major modification into two or more de minimis increases. Two or more increases should be considered by the reviewing authority to be part of the same project if they are considered part of the same project in the corporate planning of the source owner or if the emissions units being constructed or modified are interdependent.[5]

The most-cited determination is the so-called "3M Maplewood Memorandum" from 1993.[6] This memorandum identifies five "objective indicia" for either permitting or enforcement authorities to consider when making judgments about whether a "project" has been disaggregated for the purpose of circumventing review as a major modification, including (1) the filing of more than one application in a short period of time, (2) internal and public documentation related to project funding, (3) consideration of market demand for the products of the project at issue, (4) public statements from the applicant, and, most jarringly, or (5) "EPA's own analysis of the economic realities of the projects considered together." In other words, EPA was directing governmental air permit reviewers, trained and qualified to do emission control technology reviews and dispersion modeling, to become business analysts, forensic accountants, and, at least to some extent, criminal investigators. Where state agencies have tried to do this, they have failed.

The author is aware of several permit applications handled by the Texas Commission on Environmental Quality over the last several years in which many months of delay of multi-billion-dollar investments resulted from a permit engineer's efforts to decide for himself whether the applicant had a proper business case to develop its site as it proposed. The assessments included multiple rounds of information exchanges having nothing to do with emissions control or air quality protection; indeed, Texas is among the states in which even minor projects must use the best available controls and undertake ambient impact assessments, so that triggering PSD review would have small effect on the permitting decision. In the end, all of these projects proceeded without PSD review. It is reasonable to believe that the author's limited sample does not include all applications pointlessly delayed by a permit engineer's effort to judge whether the project under review is economically sustainable or technically dependent on another project approved by another permit application; indeed, the very existence of the current "policy" guarantees that this problem is pervasive.

EPA (in)Action

EPA has yet to fix the mess it caused by suggesting in some decades-old memos that permitting authorities can and

should become project analysts. And what efforts it has made to address the issue in rules have either been misguided or unsuccessful or both. The 1989 *Federal Register* discussion at least left the issue to the enforcement process, which would have the advantages of (1) not holding up all sequential projects so that the few (if any) projects resulting from intentional circumvention could be ferreted out, and (2) to leave the ferreting to trained investigators. But that 1989 preamble announcement was accompanied by no rules.

Since then…

- The outgoing Bush Administration issued midnight rules in 2009, in which EPA essentially endorsed the 3M Maplewood directive for permit engineers to evaluate the possible existence of a "substantial relationship" among projects filed within a year or two of each other, through an examination of "technical and economic dependence." The 2006 proposal that preceded this "final action" included an actual rule amendment to change the definition of "project" to actually effectuate that intent, but the rule change was not included in the 2009 "final action."[7]

- Even this general endorsement of 3M Maplewood's directive was not enough for the next Administration, which promptly announced its stay and reconsideration of the 2009 "final action."[8] After taking comments on reconsideration of the 2009 non-rule, nothing else happened until the next change of administration nearly eight years later.

- Late in 2018, EPA lifted the stay of the 2009 "final action," and published the conclusion of its reconsideration process as another *Federal Register* preamble.[9] That preamble, again without rules, reaffirmed the Bush EPA's "interpretation" of the longstanding PSD rules as to the factors that EPA considers relevant in deciding whether the applicant has properly identified its "project." One of those factors is time between "projects," with a presumption that a gap of three years creates a presumption that the projects are distinct. But, significantly, EPA admitted that—in the absence of actual rule changes—its interpretation was effectively binding on no one.

At the end of this extended game of preamble ping-pong, there is still no *rule* that defines the "project" to include all substantially related physical changes. Ultimately, all we have is an EPA interpretation that is not binding on permitting authorities, and imposes no affirmative duties even on itself, much less any applicant. Accordingly, on a going-forward basis, the author encourages the states to cease the practice of making "project aggregation" a part of their permit review processes altogether. Permit engineers should not be in the business of deciding whether the project for which an applicant has sought permission to build is really the project it seeks permission to build. Instead, if the state agency (or EPA) somehow finds reason to believe either it is dealing with the rare (or nonexistent) applicant that has sliced up individual physical changes that it would not pursue independently solely to game the PSD applicability question, then it may refer the matter to its enforcement section (even after the permit has been issued). PSD applicability is complicated enough, and applications take long enough, without forcing permit engineers to decide whether projects scattered over time are nonetheless economically or technically inter-dependent. **em**

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References

1. 40 C.F.R. § 51.166(b)(6). This is actually the definition of "building, structure, facility or installation," which the rules otherwise make synonymous with "stationary source." For simplicity's sake, and consistent with general practice, we refer here to defining the "source," even though the factors relevant to that exercise technically are nested in the definition of "building, stricture facility, or installation." Note also that this article cites to the permitting rules codified in 40 C.F.R. Part 51, which are the rules governing the approval of state preconstruction permitting programs. General similar rules are therefore and actually included in the permitting programs run by each state. The Part 51 rules are generally consistent with the Part 52 rules, which govern the relatively few jurisdictions in which EPA is the final permitting authority.
2. 40 C.F.R. § 51.166(a)(7)(i)
3. 87 *Fed. Regist.* 57,324, 57,325-26 (Nov. 15, 2018) (footnotes omitted) *(emphasis added)*.
4. 54 *Fed. Regist.* 27,274, 27,281 (June 28, 1989).
5. Memorandum from Harold Hodges (EPA Air Management Branch) to James Wilburn (Tennessee Dept. of Pub. Health) (Aug. 15, 1983).
6. *See* Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, OAQPS, to George T. Czerniak, Chief, Air Enforcement Branch, EPA Region 5, "Applicability of New Source Review Circumvention Guidance to 3M—Maplewood, Minnesota" (June 17, 1993).
7. 74 *Fed. Regist.* 2376 (Jan. 15, 2009). Per EPA:
   > In our 2006 proposal, we proposed to amend our rule definition for "project" to provide that "[p]rojects occurring at the same stationary source that are dependent on each other to be economically or technically viable are considered a single project." As discussed earlier in this notice, we have concluded that the terms "economically viable" and "technically viable," and what is meant to be economically or technically dependent, are difficult to define clearly and should not be adopted as regulatory bright lines. We are, therefore, not promulgating the proposed rule for aggregation, nor are we adopting the descriptions of technical and economic viability and dependence that were set forth in the 2006 proposal preamble. We believe the statements made in this notice better explain the NSR Aggregation policy and enable permitting authorities and sources to better implement the current rule text without revision. *Id.* at 2381 (footnote omitted).
8. 74 *Fed. Regist.* 7,284 (Feb. 13, 2009) (announcing temporary stay); 74 *Fed. Regist.* 22,693 (May 14, 2009) (extending stay to 2010); 75 *Fed. Regist.* 19,567 (Apr. 15, 2010) (proposed reconsideration).
9. 87 *Fed. Regist.* 57,324 (Nov. 15, 2018).