

Déjà vu

Some 25 years ago, I prepared an introduction and acknowledgment to what, at the time, was just another of many EPA publications: the draft October 1990 *New Source Review (NSR) Workshop Manual*. Often referred to as the “puzzle book” because of the jigsaw puzzle pieces on the cover (and, presumably, because of the sometimes puzzling complicated regulation), the 1990 Manual was intended to replace the 1980 NSR Manual, for much had happened during the initial implementation of the August 7, 1980, NSR regulations. The 1990 draft Manual had gone through two extensive reviews and revisions within EPA, culminating in the October 1990 draft, when a chance conversation initiated a Freedom of Information Act (FOIA) letter that resulted in the release of the 1990 Manual to the public, still only in draft form. That first FOIA was soon followed by an avalanche of requests for the document; this demand eventually led to a mutually beneficial arrangement with the Air & Waste Management Association (A&WMA) where EPA provided a master copy of the 1990 Manual to A&WMA, which took over the responsibility of printing and distributing the Manual. It became A&WMA’s best-seller for a number of years.

For a draft document, the 1990 Manual has profoundly affected and shaped NSR implementation. It provided more detailed examples and discussions of the 1980 rules and of policies, including controversial ones like “top down” best available control technology (BACT) than did the 1980 Manual, so it quickly eclipsed that first document (despite the fact that the 1980 Manual is still the only final NSR manual ever produced by EPA). Whether readers loved or hated it, the draft 1990 Manual did provide a degree of clarity to some of the murkier aspects of the regulations. Citations to a draft document, particularly by courts and the Environmental Appeals Board (EAB) are rare, but the 1990 draft has been cited in court opinions, EAB decisions, preambles, countless permit applications, articles, and other documents.

But, little by little, the 1990 Manual has become more and more outdated, with the greatest change occurring with the December 31, 2002, promulgation of the NSR “Reform Rule.” As much as it would like to, the EPA, with a full plate of NSR regulatory and judicial challenges in this still-extremely contentious regulatory program, has indicated that it is unable to prepare or even to review or endorse a new NSR Manual. Ken Weiss of ERM, recruiting both Gale Hoffnagle of TRC and me, initiated an effort to have A&WMA coordinate a revision of the Manual with as much input and review as possible from EPA and other permitting agencies. John Evans, with the N.C. Department of Environmental Quality at the time (he is now with RTP Environmental Associates, Inc.), revised the permit writing chapter. That 2017 Manual featured brand-new materials on several topics not covered in the 1990 Manual, including a history of NSR, NSR implementation, administrative and judicial appeals, and enforcement—all of this material was developed by Eric Hiser, partner at Jorden Hiser & Joy, PLC.

That 2017 Manual and this 2019 edition differ significantly from the 1990 Manual in several respects. First and foremost, the 2019 edition, like the original 2017 Manual, is a “living” document that will be revised as NSR policy and rule continue to evolve. The e-version, available by subscription, has hyperlinks to the referenced documents and will be revised periodically to reflect new developments. Also, the 2019 edition is less prescriptive. Since it is not an EPA product, the Manual can neither declare nor authorize any new or revised policy. Instead, it focuses on collecting, distilling, and explaining existing policy and decisions (executive and judicial) into, we hope, a reasonably coherent and useful form. The pros and cons of issues are discussed, and the authors provide what they consider to be EPA’s stance on that issue, as well as their own view of whether that stance is a reasonable one (however, the authors’ views are solely theirs—A&WMA is publishing the 2019

Manual but does not necessarily support or endorse the views expressed herein, and the EPA, as stated above, does not have the resources to review or comment on the revised Manual, so does not endorse it). The 2019 Manual also recognizes the increasing role the courts have played in NSR implementation over the last 26 years; EPA's success rate in litigation in the air pollution field, particularly regarding NSR issues, has been low. As a result, more and more implementation policies in this complex regulatory program are, for better or worse, being driven by judicial decisions rather than EPA policies and interpretations.

Second, improved technology allows the 2019 Manual to include hyperlinks to the documents cited¹ in the text. Because the 2019 Manual cannot speak as the implementing agency on an issue, these links allow the reader to more readily find the referenced materials and make a decision based on his or her particular situation, understanding of the original policy documents, and risk comfort level.

Third, PSD and nonattainment applicability in this 2019 Manual is based on the 2002 Reform Rule, since this is the version of the NSR regulations being implemented in most of the United States (although in a few places, the 2019 Manual provides a comparison to applicability provisions in the 1980 and/or 1992 regulations). There are a few states where the 1980 (and in some cases, the 1980 plus the 1992) regulations are implemented; in such cases, the 1990 Manual applicability chapters may be more appropriate than this 2019 Manual. Regardless,

readers should carefully review their state or local air pollution permit regulations, since those regulations are usually the governing regulations.

Fourth, although the regulations (other than applicability) have changed little since 1980, there have been new developments in policy on the substantive NSR requirements (BACT, LAER, ambient impacts, offsets) that are addressed in those chapters.

Fifth, the entirely new portions of the 2019 Manual dealing with NSR history, implementation, appeals, and enforcement provide valuable insight and information to this complex program and are a welcome and useful addition to this document.

One thing is similar: Both Manuals were prepared by a terrific team of experts. I am pleased to once again be a part of this effort.

Addendum: In late 2019, the first update to the 2017 Manual revises and supplements the 2017 Manual, providing the reader with a number of policy changes and revisions, in particular those authorized and driven by a new administration during its first two years. The direction these policies takes is, unsurprisingly, a sharp contrast from those of the previous administration. These revisions help maintain a Manual reflecting current policy and practices in the continually evolving world of NSR permitting.

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¹ The document reference system used in this Manual, with a few exceptions, is an alphanumeric code. Document numbers start with 1A through 1Z, then 2A through 2Z, on up to the 60s (e.g., 9K, 40I, 55O). All of the referenced documents are listed in an index at the end of the document. This includes EPA documents, court decisions, EAB decisions, and other miscellaneous documents. The most common exception is Federal Register notices, which are referenced by volume and page number (and often the date of publication). It should be noted that the index includes all the documents referenced in RTP Environmental's Advanced NSR Workshop materials, and so is a more comprehensive listing. However, all of the documents referenced in the 2017 Manual and the 2019 Update to the 2017 Manual are available to the reader.