

The Trump Administration's New Source Review Reform Efforts

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As part of the Trump Administration's efforts to streamline regulatory permitting requirements for manufacturers and other facilities, the U.S. Environmental Protection Agency (EPA) has recently issued updated guidance clarifying construction permitting requirements under the Clean Air Act's New Source Review (NSR) program.

On March 13, 2018, former Administrator Pruitt sent a [memorandum](#) to all regional administrators announcing a change to the two-step process of determining whether a project at an existing major stationary source requires a permit, otherwise known as applicability testing. Per NSR regulations, a project will only be classified as a major modification requiring a construction permit if it results in both a significant emissions increase (Step 1) and a significant net emissions increase (Step 2). Step 1 determines whether the *project itself* will result in a significant emissions increase, while Step 2, typically referred to as netting, evaluates whether the project will result in a significant net increase in emissions, considering any other emissions increases or decreases at the source. Under prior EPA policy, emissions decreases were not considered at Step 1. The most recent guidance, however, provides that emissions decreases, not just increases, should be considered at Step 1 of the applicability process. In other words, projected increases and decreases will be treated the same at Step 1 going forward. To further clarify this change, EPA will now refer to Step 1 as "project emissions accounting" rather than "project netting."

Former Administrator Pruitt issued a second guidance document regarding the NSR applicability process on December 7, 2017 in a [memorandum](#) entitled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability." This memorandum was issued in response to the Sixth Circuit's decisions in *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). The memorandum explains that when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the regulatory requirements, that owner or operator has met its pre-project obligations unless there is a clear error. Thus, the EPA does not intend to substitute its own judgement for that of the owner or operator by "second guessing" the applicability analysis. The memorandum further states that the EPA will not initiate future enforcement actions unless post-project actual emissions data indicates that a significant emissions increase or significant net emissions increase did in fact occur.

In addition to these two memoranda from former Administrator Pruitt, the Agency has recently shed light on the applicability process for replacement units. On March 20, 2018, the Office of Air Quality Planning and Standards

shared its view on the applicability of the “Replacement Unit” provision under Prevention of Significant Deterioration (PSD) permitting program in relation to Newport News Shipbuilding facility’s boiler replacement. In a [letter](#) to Newport News Shipping, the Agency stated that a change in fuel type in and of itself does not preclude use of the Replacement Unit provision. This is because a fuel change does not determinatively “change the basic design parameter(s)... of the process unit.” 40 CFR § 51.166(b)(32).

Nevertheless, the office also indicated that a change in fuel type *may signal* that the basic design parameters have changed, thus precluding use of the replacement unit provision, as was the case with the Hilcorp Monopod facility in Alaska. In a May 12, 2017 letter, [Region 10 concluded](#) that Hilcorp’s replacement of five older reciprocating internal combustion engines with three new engines did not qualify for the Replacement Unit provision. While the change in fuel source was a factor in finding that the new engines changed the basic design parameters, Region 10 also relied on the fact that the new engines have a significantly greater total capacity (horsepower) than the five older engines in excluding modification from the Replacement Unit categorization. Moving forward, EPA encourages local offices to consider Replacement Unit provision matters on a case-by-case basis.

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