

# EPA Continues Reforms to NSR and Other Clean Air Act Permitting Programs



On March 13, 2018, the U.S. Environmental Protection Agency (EPA) released a guidance [memorandum](#) announcing a new policy designed to clarify when a proposed project will trigger New Source Review (NSR) under the Clean Air Act. Under the policy, facilities may now take into account emissions decreases in calculating whether a proposed project will trigger NSR in the first instance. This key change provides facilities with greater flexibility in assessing whether a pre-construction permit is required for major projects. In the past, EPA has not allowed such emissions netting during the “Step 1” analysis under the NSR program. This policy shift marks the latest in a series of reforms to Clean Air Act permitting programs. Such reforms also include a deferential EPA position on the use of “projected actual” calculations and the retraction of EPA’s “once-in-always-in” policy for the classification of major sources of hazardous air pollutants under section 112 of the Clean Air Act. These changes are discussed below, followed by a list of key takeaways.

## NSR Permitting Reforms

### EPA will Now Allow Consideration of Emissions Decreases

The Clean Air Act’s NSR program requires facilities to obtain a permit in advance of constructing a new major stationary source or undertaking a “major modification” to an existing source. A project is a “major modification” if it would result in a significant emissions

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increase of an NSR pollutant (determined first in a "Step 1") and a significant net emissions increase of the NSR pollutant (determined second in a "Step 2").

Two applicability tests are used in Step 1 for determining "significant emissions increase": the "actual-to-projected-actual" test for existing emissions units and the "actual-to-potential" test for new emissions units. In both tests, if the "sum of the difference" between the baseline actual emissions and the emissions after the project (of the "projected actual" emissions for existing units or "potential to emit" for new units) equals or exceeds a threshold for the relevant NSR pollutant, the project is deemed to have a significant emissions increase of that pollutant. An evaluation regarding the significant net emissions increase will then follow to determine whether a preconstruction permit is required.

An important consideration in the Step 1 calculation is how to account for both emissions increases and emissions *decreases* resulting from a given project. In the past, EPA at times [took the position](#) that Step 1 required that "only emissions increases for a pollutant resulting from the units in a Project be added to determine if the resulting increase is significant."

EPA's March 13 memorandum reversed this position. It declared that "EPA now interprets the [NSR] provisions . . . as providing that any emission decreases that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase." EPA now intends to "give attention to not only whether emissions may increase from those units that are part of the project but also whether emissions may at the same time decrease at other units that are also part of the project."

**In a January 2018 memorandum, EPA clarified that a major source can become an area source at any time.**

EPA's explanation for its shift in interpretation boiled down to its understanding of the phrase "sum of the difference." EPA asserts that because the "difference" could be either a positive or negative number, the summation of any "difference" can be taken into consideration for Step 1 purposes. As a result, sources undertaking projects having a net emissions decrease can seek to rely on that decrease for purposes of NSR permitting.

## **EPA's Policy Shift is Consistent with Its Announcement in December**

In December, EPA issued a [memorandum](#) announcing a related change in the NSR program concerning the "actual-to-projected-actual" test. In that memorandum, EPA stated that it would no longer "second guess" the pre-construction projection of a company unless there was a clear error (such as the application of a wrong significance threshold); that it would not enforce NSR rules unless the post-construction actual emissions indeed show a significant emissions increase; and that it would allow a source to include its "intent" to manage emissions from a unit as relevant to projecting future actual emissions. In the past, when a company projected no significant emissions increase after the project but EPA believed the opposite, EPA would enforce its NSR regulations, even if the actual post-construction emissions did not show a significant emissions increase. That practice was previously subject to litigation twice in federal court.

## **EPA Reverses "Once In, Always In" Policy**

EPA has also provided more flexibility in the hazardous air pollutants program by reversing its long-standing position that a major source of a hazardous air pollutant would permanently remain a "major" source, irrespective of any subsequent emission reductions. Dubbed as the "once in, always in" policy and

documented in a 1995 [memorandum](#), this position prevented a major stationary source of hazardous air pollutants from becoming an area source that might be subject to less strict emissions control.

In a [memorandum](#) issued in January, EPA clarified that a major source can become an area source at any time, so long as the source takes an enforceable limit on the potential to emit and brings the emissions down below the threshold. Such a source would then not be subject to the Maximum Achievable Control Technology (MACT) Standards applicable to major sources under the National Emission Standards for Hazardous Air Pollutants (NESHAP).

Area sources are subject to fewer requirements than major sources. Following this policy shift, sources may seek reclassification from a “major source” designation to an “area source.” However, it is likely that EPA, and potentially individual sources, could face litigation over the policy shift or related reclassifications.

## Key Takeaways

### Enhanced Flexibility

Under the current EPA administration, facilities will now have greater flexibility in assessing whether a pre-construction permit is required for major projects, thanks to EPA’s policy shift on key issues impacting how emissions increases are calculated.

### Relief from MACT Standards

Facilities are no longer saddled with a permanent “major source” designation – and corresponding requirements – under Section 112 of the Clean Air Act. At the same time, facilities evaluating the need for a permit, or permit revisions to reflect an area source designation under Section 112, should act with caution to ensure that their emissions calculations are correct, well-documented, and defensible in a lawsuit brought by an NGO or future EPA administration.

### Permitting Considerations Going Forward

Options to consider when utilizing EPA’s new policy determinations may include: establishing enforceable emissions limitations in operating permits, ensuring ongoing documentation of emissions decreases, and obtaining buy-in from local permitting authorities. These are just some of the measures that facilities can take to ensure defensible permitting decisions. Because individual situations will vary, and because EPA’s policies may shift between administrations or differ from state-level policies, it also is important to review permitting decisions with in-house or outside counsel to ensure compliance with all applicable requirements.

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