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EPA's Attack on New Source Review and Other Air Quality Protection Tools

November 1, 2019

Introduction

The purpose of the Clean Air Act (CAA) is to ensure that the quality of the air people in the US breathe does not threaten their health. Since its passage in 1970, emissions of air pollution have decreased, air quality has improved, and the national economy has moved forward, as illustrated in Figure 1.

Instead of celebrating and building on this success, EPA in the Trump administration has taken a series of actions to weaken a number of EPA programs instrumental to achieving air quality results. The CAA uses a variety of tools to achieve its purpose, ranging from broad multi-state "good neighbor" programs to reduce pollution that travels over long distances and harms air quality in downwind states, to permitting programs like New Source Review (NSR) that play a critical role in improving air quality.

EPA's "good neighbor" rules have produced large-scale reductions in pollution, improving air quality and critically assisting state and municipal efforts to achieve National Ambient Air Quality Standards (NAAQS). NSR permitting is the indispensable, community-level cornerstone of the CAA's strategy for preventing excessive air pollution and protecting public health and the environment as businesses and the economy change and expand.

First, the NSR program, which has borne the brunt of the EPA's weakening actions under the Trump administration, is designed to ensure that each new or expanding facility uses up-to-date air pollution control technologies and practices, meets all federal requirements, and does not emit pollution that would contribute to unhealthy air quality. This reflects a fundamental principle of the CAA: new construction should be cleaner than existing operations. By requiring more effective pollution control strategies, NSR often yields overall reductions in pollution even as facilities expand production.

Second, NSR is an important tool in helping communities meet the NAAQS and maintaining healthy air everywhere. Without proper implementation of NSR, new construction projects that increase emissions could increase NAAQS violations, endangering public health.

Third, the source-by-source permitting process is a public one, often one of the only ways residents, including people living in environmental justice communities, and businesses can be involved in developments affecting their air quality. Because NSR covers many types of facilities, the program is critical to the air quality of countless communities across the country.

Facility updating and expansion – that is, modifications – represent much of the capital investment that businesses make. Modifications can have significant impacts on local air quality while providing high-leverage opportunities for increasing pollution controls.

The changes the Trump EPA is making, however,

are largely about offering facilities early, easy off-ramps from NSR's coverage of modifications – and the pollution reduction obligations that come with them. Individually and in combination, these changes threaten to make NSR less effective in ensuring the protection of local air quality in several ways.

Most of these actions have been issued with little fanfare, often without analysis of their potential effects and without acknowledging or revealing clearly to the public that many of the actions have a cumulative or compounding effect on each other and thus on the effectiveness of NSR. In many cases, the agency has not used the formal rulemaking process, which would have allowed the public an opportunity to comment and the federal courts the jurisdiction to review EPA's action. Even so, many of these actions have drawn lawsuits, some of which we note below.

NSR's history has been marked by tension among businesses' legal obligation to limit pollution, EPA's obligation to enforce the law, and business imperatives to minimize costs and act quickly. Over time many industries have expressed concerns about aspects of the NSR permitting process and requested a variety of changes to it.[1] Concerns include the time, expense, and uncertainty of the permitting process, the cost of having to install state-of-the-art pollution control equipment, and the lack of timely or clear guidance from EPA.

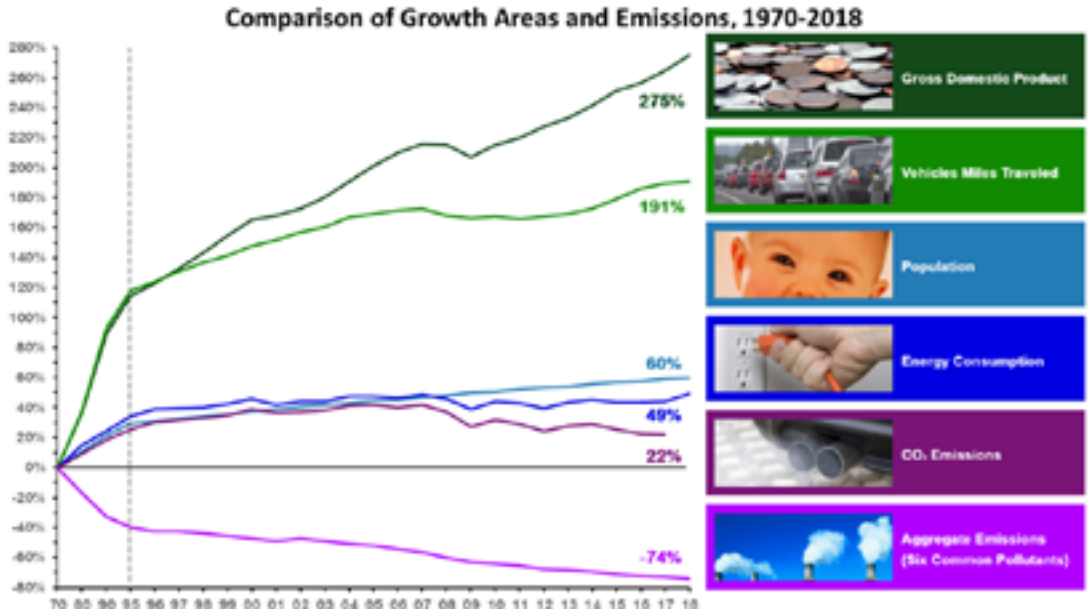

Figure 1, *Source: Air Quality – National Summary*, EPA, https://www.epa.gov/air-trends/air-quality-national-summary.

Other requests for change relate to the interplay between NSR and changes to NAAQS and perceived stringency or inflexibility of aspects of the program,

1 *E.g.* Art Fraas, John D. Graham, & Jeff Holmstead, *EPA's New Source Review Program: Time for Reform?*, 47 Envt'l L. Rep. 10,026, 10,023–34 (Jan. 2017).

such as modeling and emission offsets.[2] Sources have argued that companies' desire to avoid the NSR process has created incentives to continue operating older equipment and not make upgrades that would lead to greater efficiency and reductions in air pollution. Many of the specific changes requested by individual companies or industry groups would result in fewer projects being considered subject to the NSR requirements and thus in greater risk to communities facing potential increases in pollution.

The NSR changes that the Trump EPA is making reflect the complete credence it gives to industry's position and put all the weight on economic priorities, framing NSR as a regulatory burden to avoid regardless of impacts on air quality and public health. The NSR changes treat these competing imperatives as irreconcilable, privileging cost avoidance over air quality and public health (and the agency's statutory duty).

EPA's changes reduce NSR's coverage and effectiveness. The list of changes is lengthy, and some affect permitting in ways that are not strictly changes to NSR, but together they remove projects that had been subject to NSR. There are four ways in which this happens:

1) *Narrowing what counts as a source*

- Redefining "adjacency" so facilities that operate as one unit may still count as two sources if they are not physically contiguous
- Treating multiple modification projects at one facility as separate even when they are done at the same time
- Raising the bar for when sources are considered so related as to be under common control

2) *Limiting what pollution is counted*

- Changing the rules for power plants, and perhaps other sources, to avoid NSR if their hourly emissions decrease even if their annual emissions increase
- Changing the process for comparing emissions increases and decreases in a way that tilts the scales against finding increases
- Narrowing the definition of "ambient air" affected by a facility such that air pollution can exceed health limits in areas to which the public reasonably may have access
- Easing limits on when emissions from one state affect air quality in another state

3) *Undermining consistent and diligent application*

- Stepping back from scrutinizing permits carefully to ensure they are accurate
- Loosening monitoring requirements for certain large sources

4) *Weakening substantive requirements*

- Removing stringent limits on toxic air pollution in certain circumstances

2 In several recent NAAQS rulemakings, EPA provided a grandfathering provision so that businesses with NSR permit applications pending would not need to restart the process in light of the revised air quality standard. *E.g.,* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,431 (Oct. 26, 2015); National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3252 (Jan. 15, 2013). The D.C. Circuit invalidated that approach in *Murray Energy Corp. v. EPA*, No. 15-1385, slip op. at 44 (D.C. Cir. Aug. 23, 2019), finding no ambiguity in the Clean Air Act that once a standard is revised, all new NSR permits must measure compliance against the current standard, and illustrating the importance Congress placed on the instrumental role NSR plays in attaining NAAQS.

Background

New Source Review – Purpose and Importance

The New Source Review program is a long-established set of Clean Air Act rules that safeguards communities from increases in pollution when a new facility is built or an existing facility is modified. The program achieves this through the issuance of permits that require facilities to install pollution control technology or operate their plants in ways that minimize air emissions. In most instances, state environmental agencies issue permits under programs that EPA has determined satisfy federal requirements, providing a model of "cooperative federalism" that allows local governments priority but retains a federal backstop to ensure that the Clean Air Act's requirements are being met. Historically, EPA has used a combination of rulemakings, guidance documents, and interpretative letters to help guide states on how to implement their programs. Through the steps it is taking to weaken NSR, however, the Trump administration EPA is both reducing protections afforded when EPA is the permitting authority and undermining states' ability to implement effective and protective programs.

Because NSR covers a variety of facilities, from paper mills and plastics production to power plants and automobile manufacturing, the program is critical to the air quality of communities across the country. When properly implemented, NSR ensures that new sources or sources that undertake major renovations will install pollution control equipment or take other steps to avoid increasing local pollution significantly. In some cases, by requiring more effective pollution control strategies, NSR can yield reductions in pollution even as facilities expand production. This is a fundamental principle of the Clean Air Act as Congress first established it in 1970 and then ratified in 1990: it is expected that new construction will be cleaner than existing operations, and integrating modern pollution controls is cheaper when companies are building new facilities or investing substantially in expanding or modifying existing ones.

Without proper implementation of NSR, businesses would be able to undertake construction projects that increase emissions without installing and operating emissions control technology. This could cause an increase in harmful pollutants in the air around the facilities, meaning dirtier air in nearby communities, with negative effects on people's health and the environment. Moreover, the permitting process is a public one, and may be one of the only ways community members can find out in advance what developments are proposed locally that could impact air quality, and to weigh in on those developments. Permits are the community-level cornerstone of the Clean Air Act's strategy for preventing excessive air pollution and protecting public health and the environment as businesses and the economy change and expand.

How NSR Works

NSR permitting is carried out in a series of steps that occur prior to construction, and begin with determining what type of permit a facility needs and whether pollution control measures are required. There are three types of NSR permits: 1) Prevention of Significant Deterioration (PSD) permits for new major sources or major modifications to sources[3] in areas where the air quality meets the NAAQS for the most common air pollutants; 2) Nonattainment NSR permits for new major sources or major modifications to sources in areas that do not meet those standards; and 3) Minor NSR permits for sources or modifications that have a pollution effect but do not emit pollution in a volume that rises to the "major" level. Sources may agree to conditions that legally and enforceably restrict the amount they can emit to a minor source permit amount in order to avoid having to obtain a major source permit with its more demanding requirements.

In order to determine whether NSR applies to a new construction project, the source and the permitting authority evaluate whether the facility will emit air pollution in excess of certain thresholds, since small increases don't require a permit.[4] While making this determination for new construction can be complicated, determining whether NSR applies when an existing facility is undergoing a modification can be especially difficult. A preliminary assessment is conducted to determine whether the change is considered a modification for NSR permitting purposes. Both physical changes to facilities and changes in how they operate are considered. Some changes are exempted from NSR if they are within the scope of Routine Maintenance, Repair, and Replacement[5] – itself a difficult term to define that has spawned rulemakings, policy documents, and litigation.

If the change is a modification, then two steps are used for determining whether the modification is considered "major":[6]

Step 1: Does the modification *by itself* result in a significant emissions increase?

Step 2: Will the modification result in a significant *net* emissions increase, given other, concurrent increases and decreases at the facility?

- "Netting" describes the comparison of emissions increases and decreases to determine whether increases are offset by pollution decreases achieved as part of the project or as a result of other changes at the facility.
- Netting encourages facility operators to make upgrades to reduce emissions.

If the answer to one or both of these questions is "no", the facility does not need a PSD or Nonattainment NSR permit for the modification. If the answer to both questions is yes, then the facility must obtain a permit. How EPA interprets the way these two steps should be applied can result in fewer

3 See below for discussion of what makes a source or modification major.

4 40 C.F.R. §§ 51.165–51.166.

5 40 C.F.R. §§ 51.165(a)(1)(v)(C)(1), 51.166(b)(2)(iii)(a).

6 40 C.F.R. §§ 51.165(a)(1)(vi)(A), 51.166(b)(2)(i).

sources being reviewed to determine their pollution control obligations, if any.

To obtain a permit, a source must provide the permitting authority, usually the state government, a detailed description of construction plans, with estimates of post-construction emissions, and commitments to limiting post-construction emissions. Depending on the type of permit, pollution control requirements vary. For PSD permits sources must limit emissions to levels achievable via Best Available Control Technology (BACT).[7] BACT is determined on a source-specific, case-by-case basis that accounts for the feasibility and cost of pollution control technology. BACT considers what other similar sources have achieved and what is reasonable for that specific source to implement.

If a permitted facility is in an area that has not attained the air quality standards, NSR requirements are more stringent in light of the area's need to make progress toward healthy air. In these areas, sources must meet the Lowest Achievable Emissions Rate (LAER), which is the lowest emissions level achieved by any similar source regardless of cost.[8] Regulators expect that new and expanding sources will apply the "best" approaches used elsewhere by similar sources to limit their emissions.

Nonattainment NSR also requires sources to offset their emissions increases by reducing their own emissions in other ways or by purchasing (or trading for) reductions created by other sources.[9] If the area's air quality problem is severe, the source may be required to offset their emissions at a greater than one-to-one ratio.

The result of this process is a permit that specifies all of the source's air quality obligations, including required pollution control technology and practices and offsets, so that the source will not emit pollutants that will cause or contribute to exceedances of air quality health standards and will be in compliance with all other applicable state and federal requirements.

Resistance and Enforcement

The NSR program is ambitious, requiring pollution reduction from facilities both as a physical matter and as a means to ensure that sources invest in air quality protection. Since this is an added expense to projects, source owners have incentive to estimate lower emissions from projects than what might actually happen. NSR must be rigorously implemented to counter that incentive.

The incentive to avoid NSR permitting is compelling, and EPA has brought several major actions to enforce NSR compliance. For example, in 1999, the Department of Justice initiated lawsuits against multiple utility companies, alleging that the utilities unlawfully undertook construction projects without obtaining NSR pre-construction permits. In 2007, American Electric Power (AEP) agreed to a record settlement that included $4.6 billion to upgrade pollution controls at 16 power plants,[10] $15 million

7 Clean Air Act § 165(a)(4), 42 U.S.C. 7475(a)(4).

8 Clean Air Act § 173(a)(2), 42 U.S.C. 7503(a)(2).

9 Clean Air Act § 173(a)(1)(A), 42 U.S.C. 7503(a)(1)(A).

10 *See American Electric Power Service Corporation*, EPA (Oct. 9, 2007), https://www.epa.gov/enforcement/american-electric-power-service-corporation.

in civil penalties, and $60 million to mitigate the environmental damage that resulted from the unlawful pollution (although AEP did not admit liability as part of the settlement). EPA estimated that the benefits from operating the pollution control equipment would include $32 billion annual avoided health-related costs. The AEP litigation and settlement were among a great many enforcement actions brought and settlements reached in the sweeping and high-profile 1999 NSR enforcement initiative. Even so, businesses' incentives to avoid NSR remain strong and EPA has brought additional actions in the years since.[11, 12]

To ensure that the NSR program protects the public from rising pollution levels over time, EPA must continually work to make sure that NSR rules make sense and keep up with advances in technology and analytical methods. To ensure a level playing field, given that permits are generally issued by the states, EPA must provide clear guidance and consistent scrutiny and oversight of state programs.

Instead, the Trump EPA is systematically undermining the program, as we describe in the following sections.

11 *See, e.g.*, United States v. DTE Energy Co., 845 F.3d 735 (6th Cir. 2017).

12 Further discussion will be available in a forthcoming work, expected to be published in 2020, which details how more than two thirds of the largest coal-fired power plants in the United States have been subject to enforcement actions that have collectively reduced over two million tons of air pollution per year. For those curious about this work prior to publication, please contact the authors to inquire about access.

The Trump Administration: Quietly Undercutting NSR

Under the Trump administration and the guise of "modernization," EPA is responding, one by one, to industry's complaints and is weakening the NSR program. The Trump EPA has said these "reforms" are designed to promote manufacturing, and makes no reference to protecting air quality and public health.[13] Promoting manufacturing is not the purpose of the NSR program; the Clean Air Act established the NSR program to ensure that investment in manufacturing included investment in pollution control. Instead, the Trump EPA is treating the competing incentives of profit vs. air quality as irreconcilable and is privileging businesses' preferences for avoiding costs.

EPA is pursuing these changes in ways that obscure their overall effect. The agency is masking the potential harms and circumventing the customary rulemaking process, which would keep the public informed and able to participate. EPA does this by taking many of these steps in ways that are not framed as rulemakings.

Many of the NSR dismantling actions are non-binding guidance documents, exchanges of letters with outside parties, or other means of changing policy that fall outside the rulemaking process.

13 News Release, EPA, EPA Celebrates One Year of New Source Review Modernization (Dec. 10, 2018), https://www.epa.gov/newsreleases/epa-celebrates-one-year-new-source-review-modernization.

Making these changes via individual discrete actions taken over time clouds the fact that the various components of NSR implementation function in concert. This makes it harder for the public to get a clear understanding of their overall impact. This approach creates several additional ill effects.

By avoiding public input, the Trump EPA can ignore dissent, and narrow the diversity of perspective and experience from which public rulemaking benefits. This feeds suspicion that EPA decided on a preferred outcome before doing analysis or seeking feedback and frees the agency from having to analyze the environmental consequences of its actions. The impacts of some actions may be analyzed individually, but not all, and there has not been a comprehensive review of what effects the entire suite of changes will have.

Finally, EPA's approach complicates the task of citizens who want to bring legal challenges and obtain judicial review to determine whether the actions comply with the substantive requirements of the Clean Air Act. By making policy changes while bypassing the rulemaking process, EPA is dampening the right of the public to seek relief from the courts from changes that defeat EPA's obligations under the law – meaning that EPA may be taking steps that are illegal but will not be held accountable for doing so in a timely way.[14]

14 Eventually, members of the public might have an opportunity to challenge these actions, but that opportunity will not arise until EPA or a state issues a permit pursuant to these policy changes.

The Steps EPA is Taking to Dismantle NSR

Category	Link	Date	Mechanism
(1) Not applying NSR consistently & diligently			
(A) Enforcement	Memorandum	12/7/2017	Policy
(B) Compliance monitoring	FR Notice	9/13/2018	Proposal
(2) Narrowing what counts as a source			
(A) Adjacency	Draft Guidance	9/5/2018	Draft Guidance
(B) Project aggregation	FR Notice	11/15/2018	Reconsideration
(C) Common control	Letter	4/30/2018	Letter
(3) Limiting what pollution is considered			
(A) Hourly emissions	FR Notice	8/31/2018	Proposal
(B) Project accounting	FR Notice	8/9/2019	Proposal
(C) Ambient air exclusions	Draft Guidance	12/14/2018	Draft guidance
(D) "Good neighbor" significance	Memorandum	8/31/2018	Policy
(4) Lowering substantive requirements			
(A) Once-In-Always-In	FR Notice	7/26/2019	Proposal

1) NOT APPLYING NSR CONSISTENTLY AND DILIGENTLY

The NSR program must be applied consistently and diligently to be successful. That means providing rules, policies, and decisions that apply equally to all parties, and monitoring compliance to prevent cheating. Sources speak of wanting a level playing field for all sources and a predictable system, but some of the NSR actions EPA has taken work against that.

A) Enforcement: informing industry that EPA will no longer scrutinize emissions estimates for accuracy

For years, EPA embraced its obligation to ensure that polluters estimated potential future emissions increases accurately, since those estimates are the cornerstone of the NSR program. In a 2017 memorandum,[15] it took a step away from that obligation.

15 Memorandum from E. Scott Pruitt, Administrator, EPA, to Regional Administrators (Dec. 7, 2017), https://www.epa.gov/sites/production/files/2017-12/documents/policy_memo.12.7.17.pdf.

The NSR process begins when a facility estimates its future air pollution emissions levels, and the permitting agency (state or EPA) reviews those estimates to ensure they are accurate. This task is essential to ensuring that the air quality protection objectives of the program are achieved. Recently, the US Court of Appeals for the Sixth Circuit vindicated that process. EPA had brought an NSR enforcement action against a power plant owned by DTE Energy in Michigan, and the company defended itself by saying that EPA had no right to review the substance of its emissions estimates to determine if they were accurate. The Sixth Circuit rejected that argument.

One of the first changes EPA made to the NSR program was to issue a memorandum embracing DTE's position and stating that the agency would no longer scrutinize a company's estimates of its own pollution. Going forward, facilities will enjoy the license DTE tried – unsuccessfully – to claim for itself: the ability to avoid both accountability for emissions estimates that prove to be inaccurate and responsibility for controlling pollution increases. All it takes, the memo implies, is filing the paperwork.

In a similar, unrelated action, EPA responded to a Title V permit petition by narrowing the scope of what those petitions might cover.[16] Since the inception of the Title V program, EPA had addressed shortcomings in the permits, including on issues where the Title V permit incorporated emissions limitations from an NSR permit. Under its new reading, EPA will no longer check that NSR permit limitations incorporated into a Title V permit are correct – just whether they were accurately copied-and-pasted from the NSR permit itself.[17]

The changes EPA has made subsequent to these are in keeping with this hands-off stance. The agency's approach signals deference to project operators in implementing the changes EPA has made, all of which put greater discretion in the hands of source operators.

B) *Compliance monitoring: a troubling precedent in the NOx SIP Call*

Monitoring is key in any pollution control program. It is how a source knows what it is emitting, and how regulators keep track of compliance. The Trump EPA is lowering the standards for monitoring in one of two attacks on the "good neighbor" provision.

The "good neighbor" provision is one of the Clean Air Act's protections against air pollution.[18] It requires that a state, as part of its plan to implement air quality standards, must ensure that its air pollution does not "contribute significantly" to unhealthy air quality in another state. The provision includes a mandate: when EPA determines that a state has not met its "good neighbor" obligations, the agency

16 Title V of the Clean Air Act provides for an operating (as opposed to construction) permit that sources must obtain. 42 U.S.C. § 7661a. A Title V operating permit does not itself impose new substantive limitations, as NSR construction permitting can, but rather includes various limitations from other sections of the act, including NSR, and mechanisms to ensure compliance. 42 U.S.C. §§ 7661a(a), 7661c(a). Title V also includes a provision allowing any person to petition EPA to object to the permit. 42 U.S.C. § 766ld(b)(2).

17 Pacificorp Energy, Order on Petition No. VIII-2016-4 (EPA Oct. 16, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf.

18 CAA § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D).

must issue a federal plan to achieve the needed "good neighbor" reductions. EPA has issued three multi-state federal "good neighbor" plans since, each of which achieved significant and cost-effective reductions. The Supreme Court upheld one plan and the D.C. Circuit upheld the other two.

"EPA does not explain why facilities that currently use the best form of monitoring should be allowed to use other, less reliable methods, and there are no guidelines given to states to ensure that the replacement monitoring would be effective."

One of these plans was the NOx SIP Call, promulgated by EPA in 1998 to require some states to control emissions of oxides of nitrogen (NOx) that contributed to ozone formation in downwind states. While subsequent regulations have tightened controls, the NOx SIP Call was the first to establish what is in effect a cap-and-trade program giving sources flexibility in meeting their compliance obligations, and it is still in effect. One of its provisions requires that sources participating in trading use the best monitoring technology available, Continuous Emissions Monitoring Systems (CEMS). CEMS, as the name suggests, refers to technology, typically in-stack emissions monitors, that measures emissions continuously rather than merely relying on periodic tests or assumptions based on inputs like fuel. CEMS are highly accurate and considered best practices technology for determining actual emissions. In a system like the one under the NOx SIP Call, where companies buy, sell, and trade credits, it is essential that they know those credits in fact represent an increment of pollution reduction.

As part of a rulemaking proposal issued in September 2018, EPA is proposing to allow states to lower monitoring standards for some sources. Most of the sources subject to the NOx SIP Call are power plants, and are also required to use CEMS by other regulatory schemes,[19] but some of them are boilers and turbines used in industrial facilities. That means they are power plants for a single customer, with the same physical construction as a power plant, but the electricity or a steam heat they generate is used in a factory rather than delivered to the grid.

EPA's proposal would allow states to amend or revise permits so that those facilities could use an approach other than CEMS to monitor their NOx emissions, reasoning that the NOx emissions are much smaller than from power plants and thus not a big concern. EPA does not explain why facilities that currently use the best form of monitoring should be allowed to use other, less reliable methods, and there are no guidelines given to states to ensure that the replacement monitoring would be effective.

While this proposal covers a relatively small amount of NOx emissions, it sets a troubling precedent, and offers no guidelines for what will replace CEMS.

19 In fact, a substantial majority of the sources covered by the NOx SIP Call and its successor rules are separately required to install and operate CEMS and report their emissions results to EPA by the Acid Rain Program under Title IV of the Clean Air Act.

2) NARROWING WHAT COUNTS AS A SOURCE: MAKING IT EASIER FOR A SOURCE TO AVOID TRIGGERING NSR

Precisely categorizing a source and defining the scope of projects that affect that source's emissions are a big challenge under NSR. Industrial facilities often have many components spread across a large area, so defining what counts as a single source may determine whether that source is a major source, which in turn determines which permitting program and pollution control requirements to apply. Facilities may be subject to a range of construction activities at one time, so determining which activities are related to each other can define whether a project is a major modification triggering NSR. In three ways, the Trump EPA is making it easier for facilities to avoid being treated as a major source.

A) *Adjacency: constricting the definition*

The first of these is a policy change regarding the definition of the word "adjacent." The NSR implementing regulations require that pollutant-emitting activities be "located on one or more contiguous or adjacent properties."[20] "Contiguous" clearly means parcels of land that touch each other, but the meaning of "adjacent" has been debated. Since EPA began implementing NSR in 1980, physical proximity has been a factor in determining adjacency, so that two parcels of land that are near but not quite touching could be considered adjacent if, say, a public street or a waterway passed between them. In addition, since at least 1981 EPA has also considered "functional interrelatedness," as in the example from that year of two General Motors operations connected by a dedicated railway link and a shared production line.

In a draft memorandum issued for public comment on September 4, 2018, the Trump EPA suggested dropping the functional interrelatedness test and focusing solely on physical proximity.[21] The reason given for this change is that the analysis required is "burdensome" and "fine-grained" and that the test does not always result in clear answers. The proposed new interpretation would only be applied in future determinations, and not used to revisit previously made decisions. There is no bright line rule for what counts as physical proximity, however, so determinations will still be made on a case-by-case basis.

The effect of this proposed change will be to allow new facilities to avoid being considered as one source – and thus, potentially, avoid being treated as a major source – if they are not in close physical proximity, even if they are designed to operate as one. They might be connected by a dedicated rail line, as the in General Motors example, or a pipeline, or they might have business models that rely on each other exclusively, but EPA will now allow them to call themselves separate and try to stay under the major source threshold, thus avoiding NSR permitting.

20 40 C.F.R. § 51.165(a)(1)(ii)(A).

21 Memorandum from William L. Wehrum, Assistant Administrator, EPA, to Regional Air Division Directors, Region 1-10, https://www.epa.gov/sites/production/files/2018-09/documents/draft_adjacent_policy_memo_9_04_2018.pdf (On Oct. 9, 2019, EPA sent the adjacency guidance to the Office of Information and Regulatory Affairs for review, a required step prior to finalizing and publishing the guidance. As of the time of publication, EPA has not published the final guidance.).

B) *Project aggregation: viewing actions in a vacuum*

Similarly, EPA is proposing through rulemaking to relax the definition of when a modification to a facility triggers NSR. Because it can be difficult to determine where one construction project ends and another begins, or what parts of a project are normal maintenance as opposed to upgrades, EPA has rules regarding "project aggregation," or when discrete activities at a facility would be "aggregated" into one "project" for purposes of evaluating whether a modification triggers NSR.

In November 2018, EPA issued a Federal Register notice determining to retain a definition of project aggregation issued in the last few days of the Bush Administration. This narrow definition requires projects to have a substantial technical or economic relationship, where EPA had previously presumed that activities that occurred at the same time and that supported a source's overall purpose were related.

The result of requiring a substantial technical or economic relationship could be to allow a source to, in EPA's own words, "carve up a higher-emitting project into two or more lower-emitting 'projects' and avoid triggering major NSR requirements."[22] That is, a source could claim two construction projects that together would yield a significant increase in air pollution serve different ends and are unrelated, thus avoiding NSR permitting. Coupled with EPA's expressed intention to defer to the company's determinations of applicability, described separately in the section below, this is yet another guide to industry about how to avoid permitting requirements.

One example of this in practice comes in a letter regarding a refinery in the US Virgin Islands.[23] As part of restarting an idled refinery, the source solicited EPA's views on several NSR issues, including whether two contemporaneous projects should be combined for permitting purposes. In this instance, the source is intending to do two things: first, to restart certain refinery equipment to produce marine fuel that meets sulfur requirements due to take effect in 2020; and, second, to repurpose other parts of the refinery to produce renewable diesel fuel to satisfy federal and state renewable fuel requirements.

"[A] source could claim two construction projects that together would yield a significant increase in air pollution serve different ends and are unrelated, thus avoiding NSR permitting."

While these projects are happening at the same time at a single facility, the source asserts that they are intended to produce different products with different business cases and are not interdependent.

22 Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 40 Fed. Reg. 57,324, 57,326 (Nov. 15, 2018).

23 Letter from William Wehrum, Assistant Administrator, EPA, to LeAnn Johnson Koch, Perkins Coie (Apr. 5, 2018), https://www.epa.gov/sites/production/files/2018-04/documents/limetree_2018.pdf.

Under the old test, looking at whether the projects are occurring at the same time and supporting the source's overall purpose, they likely would have been considered one project; they are unquestionably at the same time, and the overall purpose of a refinery is to produce fuel, even if it produces multiple varieties. But under the new test, EPA found that these actions lack the technical or economic relationship necessary to qualify as one project, because they are using different equipment and serving different markets. While the letter does not specify the emissions levels, this could allow the projects to avoid major source permitting they would otherwise have triggered.[24] This facility is adjacent to residential neighborhoods and about a mile from an elementary school, a reminder about the real effects these policy changes can have.

C) *Common Control: treating sources as unrelated*

Another way EPA has made it easier for sources to avoid triggering NSR is by narrowing the scope of one of the factors that makes up the definition of a source: common control, or being "under the control of the same person (or persons under common control)."[25] This ensures that facilities that are managed together are treated together for air pollution purposes, and facilities that are adjacent but independent are not.

Historically, EPA has considered common control to be a case-by-case determination because it is so fact-specific, and that has not changed. What has changed is that EPA has replaced its longstanding multi-factor test that weighed a number of relevant considerations for a narrower test. Instead of considering questions like shared workforces and management, shared equipment or materials, or interdependency, EPA will now look only at one question: whether either facility has the ability to direct the other facility's actions in a way that necessarily affects its air pollution permit compliance.

Rather than make a public announcement or seek public feedback, this policy change is accomplished by an attachment to a letter regarding two facilities in Pennsylvania asking for EPA's opinion on whether they were under common control.[26] This example covers a landfill and a gas-processing facility that will convert captured landfill gas into natural gas for transportation fuel. As trash decomposes, it produces significant amounts of natural gas that can be emitted as air pollution or captured and controlled in some way – including being repurposed as fuel. The captured gas will be transported by a pipeline

24 The letter addressed two other NSR issues, at the source's request. First, it applied the "reactivation policy" that governs when an idled source is considered a new source for NSR permitting. The policy applies a rebuttable presumption that a source idled for more than two years should be treated as a new source; in this instance, EPA affirmed the source's request to rebut the presumption by showing that it had continuous intent to restart the source over its seven plus years of idling. Second, the letter affirmed the source's request to treat an extension of its dock system for loading petroleum products as a modification of an existing emissions unit (the loading system) rather than a new one. This extension will allow deep-water loading and unloading of petroleum products, using a flexible hose system and underwater pipeline, meaning that the extension will conduct submerged loading rather than the above-water loading at the existing terminals.

25 40 C.F.R. § 51.165(a)(1)(ii)(A).

26 Letter from William Wehrum, EPA Assistant Administrator, to Hon. Patrick McDonnell, Secretary of the Pa. Dep't. of Envtl. Protection, (Apr. 30, 2018), https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf.

from the landfill to the new processing facility, which has the contractual right to purchase all of the gas from the landfill.

Under the new interpretation of common control, these facilities are not considered together for permitting purposes. EPA's new interpretation holds that neither facility can dictate whether the other complies with its air pollution permit. The processing facility has the power to stop taking deliveries of the gas from the landfill, which then is required under its permit to dispose of its gas by flaring it (essentially, burning it). While this would change the amount of air pollution from the landfill, the landfill would still be in compliance with its permit and thus EPA does not think it sufficient control to consider the emissions from the two facilities together. The amount of gas that the landfill will deliver to the processing facility will definitely affect the latter's air pollution, but EPA does not find common control because the landfill lacks the legal authority to tell the processing facility what to do with the gas.

More insight on the agency's efforts to limit common control came in a letter regarding two similar facilities in Wisconsin.[27] In this instance, a landfill and landfill gas facility understood the Pennsylvania letter's new interpretation as placing them under common control, because one facility controls a process aspect that is the legal responsibility of the other under the relevant regulations. Instead, EPA inverted the typical meaning of common control, saying essentially that if the facilities have any activities that are separate, they should be treated separately.

This new test is much narrower and legalistic than the old one. Under the old test, EPA would have considered the practical consequences of how the facilities are designed and operated. Given that they are designed to operate together to dispose of air pollution from one, even if they have retained the theoretical legal right to stop cooperating, EPA likely would have concluded that their operations are so interdependent and mutually influencing as to consider them under common control.

3) LIMITING WHAT POLLUTION IS CONSIDERED

Even after the source has been defined, EPA is taking several actions that would limit what pollution is considered when determining whether NSR applies. These actions each provide an off-ramp for removing a new or modified source from NSR permitting;

A) *Hourly emissions: the ACE proposal*

In its Affordable Clean Energy proposal, EPA introduced a new definition for an emissions increase at the step of determining whether a change triggers NSR.[28] Even if a change would result in a source's polluting more annually, the source would avoid NSR if its emissions do not increase on an hourly basis. This is a potentially significant loophole. In the power sector and elsewhere, new investment in facilities of precisely the type ACE intends to promote

27 Letter from Anna Marie Wood, Director, EPA Air Quality Policy Division, to Gail Good, Director, Bureau of Air Mgmt., Wisconsin Dep't. of Natural Resources (Oct. 16, 2018), https://www.epa.gov/sites/production/files/2018-10/documents/ameresco_jcl_letter.pdf.

28 Under the proposal, this would apply only to electricity generating units (EGUs, better known as power plants). 83 Fed. Reg, 44,746, 44,781 (Aug. 31, 2018).

mean increased operations and increases in annual emissions. While EPA has finalized the main provisions of the ACE proposal, it did not finalize the NSR-related changes, stating that it will issue those changes in final form in a separate rulemaking.[29] If EPA finalizes the NSR changes it proposed, facilities destined to increase annual emissions in ways that would trigger NSR pollution control requirements under current law will be able to bypass NSR and operate more frequently, resulting in higher emissions, in turn leaving communities exposed to pollution increases but with little recourse.

To justify the proposal, EPA shifts its view of NSR and the purpose of its changes: to relieve sources of a "burden," not to enhance air quality or public health protection. The proposal repeats claims by power plant operators that they have refrained from investing in environmentally beneficial operational upgrades in order to avoid triggering NSR. The proposal offers no analysis to support these claims. However, operators have not foregone upgrades, but accomplished them in piecemeal fashion to evade NSR. A series of NSR enforcement actions brought by EPA against power plant operators over the past 20 years has targeted that behavior and, in some cases, resulted in settlements requiring significant investment in new pollution control measures.

The proposal does include data showing that approximately 80 percent of coal-fired power plants currently emit oxides of nitrogen and sulfur dioxide at levels greater than would be permitted under today's NSR, but the proposal does not include data to show that the plants have foregone upgrades. Instead, it suggests NSR would be a burden on those plants if they adopted the heat-rate improvement measures included in ACE. Yet, they beg the question if this is so, why is EPA not introducing provisions that would address those elevated emissions levels, which are likely to rise under the proposal? Using EPA's data, independent analysis shows that pollution would increase in 20 states as power plants responded to ACE with investments that would result in their emitting more.[30] Under current law, NSR would function to address the increases; under the proposal, NSR would no longer do so.

"If EPA finalizes the NSR changes it proposed, facilities destined to increase annual emissions in ways that would trigger NSR pollution control requirements under current law will be able to bypass NSR and operate more frequently, resulting in higher emissions."

Finally, the proposal justifies this change as relieving power plants of the burdens of NSR when they adopt

29 ACE Final Rule, 84 Fed. Reg. 32,520, 32,537 (Jul. 8, 2019) ("The EPA intends to take final action on the proposed NSR reforms in a separate final action at a later date.").

30 Amelia T. Keyes, et al., *The Affordable Clean Energy rule and the impact of emissions rebound on carbon dioxide and criteria air pollutant emissions*, 14 Envtl. Research Letters (2019), https://iopscience.iop.org/article/10.1088/1748-9326/aafe25.

the heat rate improvements identified in ACE. As drafted, however, the proposal would extend the change to all power plants including those making upgrades for other reasons. The proposal simply invites comment on whether the NSR change should be limited to power plants making ACE-specified changes. At no point here or elsewhere does the proposal argue or demonstrate that the change would yield lower levels of pollution.

B) Project Accounting: changing the process for comparing emissions increases and decreases

One of the most complicated questions in NSR is determining which changes to a facility qualify as major modifications – because it is a "major modification" that triggers the NSR permit process. Over the years, EPA has put much thought into the process of determining what changes constitute major modifications. This can be particularly complicated when a facility (for example an oil refinery) has several components that each emit air pollutants (for example storage tanks, pumps and pipes, boilers, or crackers). The current regulations require the facility to undergo the two-step "netting" process (described above) to determine if NSR applies.

Here's how it works now: under the first step, the source reviews the proposed project to determine whether it would increase emissions from the particular unit. If that project would not increase emissions, then the project does not trigger the NSR review process. If it does, then the source proceeds to step two. In step two, the source looks at emissions increases **and** decreases across the whole facility. Decreases only count if they are enforceable and occur, or occurred, within a particular window of time.

Here's how that might work in practice. In the oil refinery example, imagine that the facility was considering replacing one of its oil storage tanks; the liquid in these tanks can evaporate leading to emissions of methane, volatile organic compounds, and toxic substances like benzene. Under step 1, for example the new tank will be 25% better at controlling evaporation but will be twice as large. If so, emissions from the tank itself will go up (because 75% of 2x is greater than 100% of 1x). So, the refinery proceeds to step 2. Under step 2, perhaps the refinery is also going to replace several pumps and valves that are leaking, and that they are willing to commit to ensuring that the emissions decrease from those leaks offset the increase from the tank – and that no other projects are going to increase emissions at the refinery. In that case, the refinery can avoid triggering NSR. If not, the facility would trigger it, potentially requiring it to buy an even more efficient but also more expensive tank.

On March 13, 2018, Administrator Pruitt issued new guidance, without the opportunity for public comment, that changed how EPA will administer the NSR two-step process.[31] On August 9, 2019, EPA published a Notice of Proposed Rulemaking, entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting.[32] The purpose of the

31 Memorandum from E. Scott Pruitt, EPA Administrator, to Regional Administrators (Mar. 13, 2018), https://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

32 PSD and Nonattainment New Source Review: Project Emissions Accounting, 84 Fed. Reg. 39,244 (Aug. 9, 2019).

rulemaking is to "make it clear that both emissions increases and emissions decreases that result from a given proposed project are to be considered at Step 1 of the NSR major modification applicability test." The proposal argues that the more appropriate interpretation of the *existing* rule language would allow consideration of decreases that "occur within the scope of the project" to be considered in Step 1 along with increases, but this rulemaking would make the language more clear. Now, projects would only move to Step 2—considering all contemporaneous increases and decreases—if the project's increases and decreases net out as a major modification.

"The purpose of the NSR program is to address emissions before construction, not to come back after the fact with a complex enforcement action – and the decreases relied on here will not be required to be enforceable anyway."

This proposal will weaken NSR. Aspects of this proposal that are concerning include the lack of clear guidance on what would be considered the "scope of the project," the fact that EPA says it will defer to companies' own determinations of project netting,[33] and the fact that decreases considered in Step 1 do not require enforceability (in contrast to how decreases have always been considered in Step 2). Given the financial incentive for businesses to avoid major source permitting and the complexity of the calculations and projections that are required to make these assessments, these changes will allow sources to define projects in expansive ways in order to claim decreases that keep the projects out of NSR. That would allow a company to define a project as including the real purpose of the project, plus any emissions decreases it can claim around the facility, without considering any contemporaneous *increases* – even when those decreases are only tangentially related to the project and are not actually enforceable. Given EPA's intention of deferring to companies' own judgments, this could very well be a loophole allowing the construction of air emitting facilities that turn out to be major. The purpose of the NSR program is to address emissions before construction, not to come back after the fact with a complex enforcement action – and the decreases relied on here will not be required to be enforceable anyway.

C) *Ambient air exclusions: removing some areas from protection*

When EPA analyzes air sources' emissions, it looks at what effect pollution will have on the ambient air. It excludes areas that Clean Air Act permitting does not cover, such as the air inside buildings or outdoor areas not open to the public. Ambient air is defined in Code of Federal Regulations as "that portion of the atmosphere, external to buildings, to which the

33 *Id.* at 39,250.

general public has access."[34] This has historically been interpreted to exclude the air over land that the source owns or controls and to which public access is precluded by a fence or other physical barriers. As part of its NSR "modernization" effort, however, EPA issued a draft guidance document for public comment expanding what may be excluded from ambient air.[35]

Instead of requiring a physical barrier to preclude access, EPA now proposes to consider other options. Fences still count – but so might surveillance cameras and no trespassing signs, without a fence. This change could reduce the expense of creating restricted access areas and allow sources to exclude larger areas for less money, but at a cost to public safety.

The Clean Air Act directs EPA to focus on the public's risk of exposure to pollution from ambient air, as opposed to air quality events that occur on, and remain confined to, private property. NSR permitting is one of the ways EPA does this – so if more areas can be excluded from NSR requirements then more air pollution may be allowed. Imagine standing downwind from a factory: emissions will be more concentrated, and more likely to be dangerous, closer to the factory. If the factory builds a fence over land it owns to prevent public access, it will help keep people from breathing the air. But if that measure is just a no trespassing sign, then people may be able to get closer to the pollution and be in more danger.

As part of permitting, sources are expected to model what air pollution consequences they will create. It is frequently the case that at or close to the "fenceline" of a source is where the air pollution is the highest, and so that area dictates what pollution reduction measures are necessary. In many instances, this policy will not change anything; sometimes there is a community or a business or a school or a farm right up against the fence. In other instances, this policy change will allow a source to claim that unhealthy pollution levels are acceptable in a larger area even if the public might in fact be able to access it.

D) *"Good neighbor" significance: easing limits on when emissions from one state contribute to air pollution in another state*

Implementing the "good neighbor" provision, introduced in the discussion of the NOx SIP Call in Section 1(B) above, requires determining what constitutes a state's "significant contribution" to a downwind community's air quality problems. This is a measure of what concentration of air pollution must end up in one downwind state for the upwind state to be expected to control it. The Supreme Court backed the agency's approach to making this determination, and the agency relied on this Court-backed approach in a subsequent "good neighbor" federal plan.[36]

34 40 CFR § 50.1(e).

35 EPA, Revised Policy on Exclusions from "Ambient Air" (Draft Nov. 2018), https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf (On September 26, 2019, EPA sent the ambient air guidance to the Office of Information and Regulatory Affairs for review, a required step prior to finalizing and publishing the guidance. As of the time of publication, EPA has not published the final guidance.).

36 *See EPA v. EME Homer City Generation*, L.P., 572 U.S. 479, 524 (2014); *see also Wisconsin v. EPA*, Docket No. 16-1406, slip op. at 5 (D.C. Cir. Sept. 13, 2019) (Reviewing the 2016 federal plan and leaving undisturbed EPA's four-step process for implementing the "good

The Trump EPA, however, has moved to alter this approach by raising the threshold for what emissions are considered to "significantly contribute" to downwind air quality problems.

EPA uses a four-step process for implementing the "good neighbor" provisions. First, EPA and states identify downwind areas that are projected to have unhealthy air quality; second, they identify upwind states whose air pollution significantly contributes to that downwind air quality problem; third, they identify what emission reductions would eliminate that contribution; and fourth, they adopt rules that would require those emissions reductions. Since at least 2008, EPA has considered a state's contribution to be "significant" if it was responsible for at least 1% of the standard at issue (e.g., 0.7 ppb of a 70 ppb ozone standard).

In August 2018, EPA broke with its own well-established (and successfully litigated) approach when it issued a memorandum providing guidance to states regarding the 2015 NAAQS for ground level ozone. For the two prior ozone standards, issued in 2008 and 1997, EPA had set the significance threshold at 1% of the standard itself. Because those standards were 75 ppb and 85 ppb respectively, the contribution thresholds were 0.75 ppb and 0.85 ppb. For the 2015 NAAQS (which was set at 70 ppb by the Obama Administration, pursuant to court-ordered deadline), the Trump EPA set the threshold at 1 ppb.

In the memo setting this higher level, EPA noted that it used the same historical approach of 1% of NAAQS, or 0.70 ppb, and found that it was "generally comparable" to its 1 ppb approach. Its analysis showed that 1 ppb would cover 70 percent of all the air pollution at targeted downwind areas, rather than the 77 percent that would be captured by using the historical approach. They acknowledge that this means less pollution reduction but claim the relaxed threshold "still generally captures a substantial amount" of transported pollution. Despite this claim and the seeming modesty of the 7% increment of pollutant concentration excluded from any "significant contribution" determination, this change will have consequences. By raising this threshold, EPA is taking away cost-effective reductions from the "good neighbor" program that would fall within the scope of a "significant contribution" determination had EPA maintained the approach used in the 3 previous rules.

4) LOWERING SUBSTANTIVE REQUIREMENTS

In addition to its actions to keep sources out of NSR, limit what pollution NSR covers, and undermine the consistency and integrity of the NSR program, the Trump EPA is also changing some of the substantive requirements that will go into NSR permit conditions.

A) *Once-In-Always-In: removing the most stringent limits on toxic air pollution*

As part of the Clean Air Act (CAA), EPA regulates hazardous air pollutants (HAPs). HAPs include benzene, metals like mercury, and other pollutants that are known to cause cancer and other serious health effects. A facility is considered a major source if it has the potential to emit 10 tons per year of any one HAP or 25 tons per year of any combination of HAPs. All other facilities are considered area sources. Major sources, such as

neighbor" provision).

power plants and petroleum refineries, are subject to Maximum Available Control Technology (MACT) standards for regulated pollutants. MACT standards are stringent pollution control requirements based on the technology used in the best-controlled sources in the industry.

MACT controls and operational practices reduce emissions of HAPS so much that the source's emissions drop below the 10/25 tons per year threshold to be considered a major source. Under current law, a major source remains a major source even after the application of MACT and the resulting achievement of emissions reductions. That means the source must continue to operate under the more stringent requirements that are applied to major sources and maintain MACT-level low emissions. This policy, dating to 1995, is known as "Once-In-Always-In."

> "Reclassification from a major source to an area source means it is subject to less stringent emissions control and compliance requirements."

In early 2018 EPA issued a memorandum to rescind the Once-In-Always-In policy.[37] While the rescission was effective as soon as the memorandum was issued, it quickly drew legal challenges in part because it was announced without public comment.[38] Subsequently, in June 2019, EPA proposed a rule that would codify the memorandum's policy change.[39] The replacement weakens the pollution control technology requirements for major sources of HAPs, if those sources commit to limiting their emissions to the less constraining threshold levels of 10 tons per year for any single HAP and 25 tons per year for any combination of HAPs. By amending its operating permit to incorporate those threshold HAP emissions levels, a major source can be reclassified as an area source. Reclassification from a major source to an area source means it is subject to less stringent emissions control and compliance requirements.

The new approach – allowing the source to be treated as an area source after it reduces its emissions below the threshold – has the effect of replacing the source's initial MACT requirements, and the greater level of emissions reductions achieved, with a limit of 10 and 25 tons per year. That means, for all practical purposes, the newly re-classified area source would be constrained by the *thresholds*, not by the more stringent MACT requirements.

The result could be a large increase in pollution. For

37 Memorandum from William L. Wehrum, EPA Assistant Administrator to Regional Air Division Directors (Jan. 25, 2018), https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf.

38 After the proposal was issued, the D.C. Circuit ruled the memorandum was not a final agency action ripe for judicial review and dismissed the suit for lack of subject matter jurisdiction. *California Communities Against Toxics v. EPA*, No. 18-1085, slip op. (D.C. Cir. Aug. 20, 2019).

39 Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 84 Fed. Reg. 36,304 (Jul. 26, 2019).

example, after first applying the MACT, the source could switch to less effective pollution controls, or operate its controls less frequently or at lower removal efficiencies, and release more HAPs *up to the major source threshold amounts*. This increase could have significant health effects on local communities, especially those that are located near multiple major stationary sources of toxic air pollutants.

Allowing a major source to stop operating these stringent controls would be counter to the primary goal of the CAA and, especially its MACT provisions, of protecting public health and the environment by minimizing emissions consistent with standards such as MACT-based ones.

In a Declaration attached to California's brief as part of litigation over this change, an official from the California Air Resources Board identified 42 sources of air pollution that are emitting below the 10 ton or 25 ton limits and would be eligible to reclassify and increase their pollution.[40] According to California, this could mean up to 935 tons per year of additional toxic air pollution in California communities – this in the state that many consider as having the most stringent state standards. In states where federal regulations are not supplemented or backstopped by separate state regulations, the proportional increases could be even higher. In fact, the proposal was accompanied by a Technical Support Memorandum listing more than thirty sources that have already changed their permits in reliance on this policy.[41] In its Regulatory Impact Analysis accompanying the June 2019 proposal, EPA identified $169 million that sources could save in reduced monitoring, recordkeeping, and reporting.[42] That same analysis determined that, while the rule could allow as much as 1,140 tons more HAPs from one source category alone, that analysis was not certain enough to quantify *any* health effects.[43]

Conclusion

The NSR program plays a crucial role in state and community efforts to achieve and maintain healthful air quality by requiring that new construction be cleaner than existing facilities. Rather than fulfill its statutory duty to ensure that companies invest in pollution control when they undertake new

40 Brief for Petitioner, Decl. of Brian Clerico ¶ 23, Cal. Communities Against Toxics v. EPA, No. 18-1085 (D.C. Cir. Oct. 10, 2018) (Citing Union of Concerned Scientists, EPA Decision Increases Hazardous Air Pollution Risk, https://www.ucsusa.org/resources/epa-decision-increases-air-pollution-risk).

41 Technical Support Memorandum from Elineth Torres, No. EPA–HQ–OAR–2019–0282, (Draft Report May 2019), https://www.epa.gov/sites/production/files/2019-06/documents/mm2a_proposal_technical_support_memo_emissions_analysis_final.pdf.

42 Office of Air Quality Planning and Standards, EPA, Regulatory Impact Analysis for the Proposed Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act, 3-4 tbl. 3-1, 1-6 tbl.1-1 (May 2019), https://www.epa.gov/sites/production/files/2019-06/documents/mm2a_proposal_ria_final.pdf.

43 *Id.* at 4-7 tbl.4-1, 5-1.

projects, the Trump EPA is eroding the NSR program. Through a series of actions, EPA is curtailing the program's reach and effectiveness in four ways: narrowing what counts as a source of air pollution; limiting what pollution is counted; undermining the consistent application of the program; and weakening substantive requirements. By creating easy avenues for projects to avoid NSR or undercut its requirements, EPA is increasing the chances that projects that should include additional pollution control will be constructed without it. The piecemeal process EPA has followed in making these changes has masked their potential effect, leaving the public in the dark about the potential air quality effects of these changes and less able to hold the agency accountable for its actions.

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