



THE ADMINISTRATOR

WASHINGTON, D.C. 20460

September 15, 2025

MEMORANDUM

SUBJECT: EPA Policy on Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability in New Source Review Preconstruction Permitting: Reinstatement of 2017 Memorandum

FROM: Lee M. Zeldin 

TO: Regional Administrators
Deputy Regional Administrators

In the context of implementing the New Source Review program under the Clean Air Act, I am reinstating the policies described in the December 7, 2017, memorandum titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" ("2017 Memorandum")¹.

The 2017 Memorandum communicated how the U.S. Environmental Protection Agency intended to apply and enforce certain aspects of EPA's NSR regulations addressing the applicability of this permitting program to modifications of existing major stationary sources of air emissions. It primarily addressed the use of "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. On December 9, 2022, EPA issued a memorandum to regional administrators titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability: Rescission of 2017 Memorandum" ("2022 Memorandum").² The 2022 Memorandum purported to rescind the 2017 Memorandum in its entirety.

EPA issued the 2017 Memorandum to address uncertainty caused by appellate court decisions in then-pending enforcement proceedings³ and to provide greater clarity for sources and permitting authorities with respect to implementing the NSR program major modification applicability requirements. While EPA indicated at the time that the policies communicated in the 2017 Memorandum were interim pending further review of the underlying issues by the courts and the agency's own broader review of the NSR program, there have been no subsequent court opinions that

¹ See https://www.epa.gov/sites/default/files/2017-12/documents/policy_memo.12.7.17.pdf

² See <https://www.epa.gov/system/files/documents/2022-12/OAR-23-000-0399.pdf>

³ *United States v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013); *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

have clarified any of the issues addressed in the 2017 Memorandum. Further, the EPA review of the NSR program that concluded in 2020 did not identify a need to revise any of those policies. The 2022 Memorandum provided no explanation or basis to support the rescission of the policies reflected in the 2017 Memorandum.

Since there has been no material change in the circumstances creating the uncertainty EPA addressed in the 2017 Memorandum, there continues to be a need for EPA to provide greater clarity. The 2022 Memorandum did not identify a deficiency in the 2017 policy or adopt an alternative policy to clarify the use of projected actual emissions in determining NSR applicability and the associated pre- and post-project source obligations, thereby leaving the need for guidance unaddressed. The 2017 policy is preferable because it provides more clarity regarding the application of the NSR major modification applicability provisions than the 2022 Memorandum. Furthermore, the policies communicated in the 2017 memorandum are consistent with the CAA and EPA NSR regulations, for the reasons discussed in the 2017 Memorandum. The agency does not have information suggesting that regulated parties have substantially relied on the 2022 memorandum given its lack of an alternative policy approach.

EPA will thus resume applying the policies reflected in the 2017 Memorandum immediately, and will, if necessary and as appropriate, further review these issues in the future in the interest of providing clear and transparent guidance to regulators and regulated parties.