

# How Is EPA's New Source Review Guidance Helpful?

By Richard Alonso, Sam Boxerman and Byron Taylor April 13, 2018, 4:42 PM EDT

On March 13, 2018, [U.S. Environmental Protection Agency Administrator Scott Pruitt](#) issued a memorandum reinterpreting EPA regulations that determine when a project could trigger new source review, or NSR. This new interpretation of the NSR regulations allows permittees to consider the overall emission impact from a proposed project from a macro-level perspective considering a wide range of impacts a project may have throughout an existing facility. If the proposed project does not cause a significant emissions increase based on this holistic analysis, there is no need to conduct the detailed netting analysis currently in the regulations, which examines all increases and decreases throughout a facility in the previous five years. This new interpretation implements a high-priority NSR reform from the last Republican administration that was not completed before the Obama administration took office, and makes it easier for permittees to proceed with plant improvements without the delays inherent in the NSR review process.

Specifically, the administrator's directive allows permittees to avoid burdensome NSR permitting if the proposed project, as a whole, will not increase emissions above the significance threshold. In the past, the EPA used the term "project netting" to describe situations where a source had evaluated all the emission increases and decreases throughout a facility resulting from a particular project to determine if the project triggered NSR permitting. The EPA and state/local permitting authorities did not allow this type of analysis, as the EPA asserted the NSR rules did not permit that approach. In this new policy directive, the EPA has renamed this analysis "Project Emissions Accounting" and is now reinterpreting its existing NSR regulations to allow sources to use this type of project analysis to assess whether an NSR permit is required.

## Past EPA Interpretation

To understand the impact of Project Emissions Accounting, it is helpful first to understand how the EPA previously interpreted its regulations. In order to trigger NSR at an existing major source, there must be (A) a physical change or change in the method of operation, and (B) a significant increase in emissions. In part B of the applicability analysis, the EPA has historically followed a two-step process to determine if there is a significant increase in

the emissions: In step one, the permittee identifies the emission increases from the project by comparing the baseline actual emissions to the projected actual emissions (or the potential to emit) after the project is completed. (Note that emission decreases from the project are not yet considered). In step two, the permittee determines whether there would be significant “net emissions increase” by examining “contemporaneous” (within five years) emission increases and decreases throughout the facility — and only considered decreases that were “federally enforceable” under a permit or other legally binding measure.

### **EPA’s New Interpretation — and its Significance**

Whereas in the past, in step one, the EPA only allowed sources to evaluate emission increases, the administrator’s new interpretation allows permitting authorities to consider both increases and decreases in step one. The impact of allowing emission decreases to be considered in step one is significant.

First, by allowing permittees to consider emission decreases at step one, permittees can consider emission reductions from various changes at emission units within the scope of the proposed project or that are impacted by the proposed project. This, more practical review, encourages efficiency and pollution prevention efforts up front without the burden of going through the step two netting process, which can be quite complicated.

Second, the new policy specifically allows permittees to consider the addition of pollution controls as part of the overall project in step one. By considering pollution controls in step one, permittees can reduce projected emission increases based on the expected performance of such controls. Crucially, unlike in step two, the emission reductions considered in step one do not need to be federally enforceable, but only need to be projected to occur after the project is completed and operational. This approach provides significant flexibility by allowing industrial facilities to account for the expected operation of pollution controls. Permittees also have flexibility in defining the scope and impact of a proposed project, although the memorandum cautions that permittees cannot define a project in a manner that would circumvent NSR.

### **A Practical Illustration of Project Emission Accounting**

The EPA’s previous implementation of a step-one analysis was outlined in a series of applicability determinations from EPA Region 2 to [Hovenssa](#), a St. Croix-based petroleum

refinery, in 2010.[1] In the first of two letters, Hovensa proposed a project at its U.S. Virgin Islands refinery that included (1) retrofitting and refurbishing five gas turbines, (2) modifying an additional gas turbine to allow it to fire refinery fuel gas, and (3) retiring three existing gas turbines. Hovensa proposed to the EPA that the proposed project not be subject to NSR permitting because the “sum of the difference” of all three parts of the project would show that there would not be a significant emission increase. The EPA disagreed with Hovensa and found that it was proposing project netting, which was not allowed under the then current NSR regulations. The EPA clarified that at step one, NSR regulations required that emission increases, not decreases, be summed. The decreases from the project could only be considered in during step two of the analysis.

In Hovensa’s second request, it proposed to construct a new coker or increase the rate of its existing coker and route any increased gas from the coker to pollution controls. The project was also proposed for Hovensa’s refinery in the U.S. Virgin Islands. Because the project included routing any increase in gas to pollution controls, Hovensa believed that there would be no significant increase in emissions that would trigger NSR permitting. Once again, the EPA disagreed. The EPA found that routing the increased gas to the pollution controls was not an integral part of the project and the emission decreases from the pollution controls could not be considered when defining a project. The EPA’s solution was to force Hovensa to conduct a detailed source-wide contemporaneous netting analysis which only considers enforceable emission reductions, and is known as step two.

Under today’s new interpretation of the NSR rules allowing Project Emissions Accounting, the EPA would have approved both projects as requested by Hovensa without further analysis. This is a practical result given that neither project would have had an adverse emission impact to the environment. The EPA specifically states in its March 13, 2018, memorandum that it no longer subscribed to the reading of the NSR regulations reflected in these letters. The letters to Hovensa can still be found on the EPA’s website, but they come with a disclaimer that they no longer reflect EPA policy.

## **Conclusion**

The EPA’s new interpretation allowing Project Emission Accounting makes sense and it is practical. This new approach removes some of the uncertainty that plagues the NSR program and streamlines NSR applicability decisions by companies and by permitting authorities. This new guidance is applicable today in states that operate delegated NSR

programs. However, there may be a delay in the implementation of Project Emission Accounting in states where the NSR program is in a federally approved state implementation plan, or SIP. These states may need to issue a corresponding interpretation of state law that mirrors the EPA's new interpretation, and there may be SIP-approved states that may not want to adopt the EPA's interpretation. While this new guidance may result in fewer NSR permits being issued, states will continue to permit projects and ensure proper operation of pollution controls through their minor source permitting programs.

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[1] See <https://www.epa.gov/sites/production/files/2015-07/documents/stp1net.pdf>