



What's at Stake in the Trump EPA's New Approach to New Source Review?

The authors describe some of the changes to the New Source Review program and demonstrate how they weaken public health protections.

The purpose of the U.S. Clean Air Act (CAA) is to ensure that the quality of the air people 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. Given this record of success, the U.S. Environmental Protection Agency's (EPA) moves under the Trump Administration to weaken New Source Review (NSR)—an essential source-by-source permitting program—are disconcerting.

NSR permitting is the community-level lynchpin 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 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 in many cases has yielded overall reductions in pollution even as facilities expanded production.

Second, NSR is a critical tool helping communities meet the U.S. National Ambient Air Quality Standards (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 or businesses can find out about and weigh in on developments affecting their air quality. The public process requirements are especially meaningful to environmental justice communities. Because NSR covers many types of facilities, the program is critical to the air quality of countless communities across the country.

NSR's history has been marked by tension between business' legal obligation to limit pollution and its imperatives to minimize costs and act quickly. EPA, working with states, must implement the law, ensuring that as investment in manufacturing moves forward it includes investment in pollution control. That way both businesses' economic imperatives and the imperative to protect and improve air quality are fulfilled.

The Trump EPA is making NSR changes that put greater weight on economic imperatives, framing NSR as a regulatory burden to be avoided at every turn without consideration 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, thus, the agency's statutory duty). Individually and in combination these changes threaten to make NSR less effective in ensuring the achievement and maintenance of healthy local air quality.

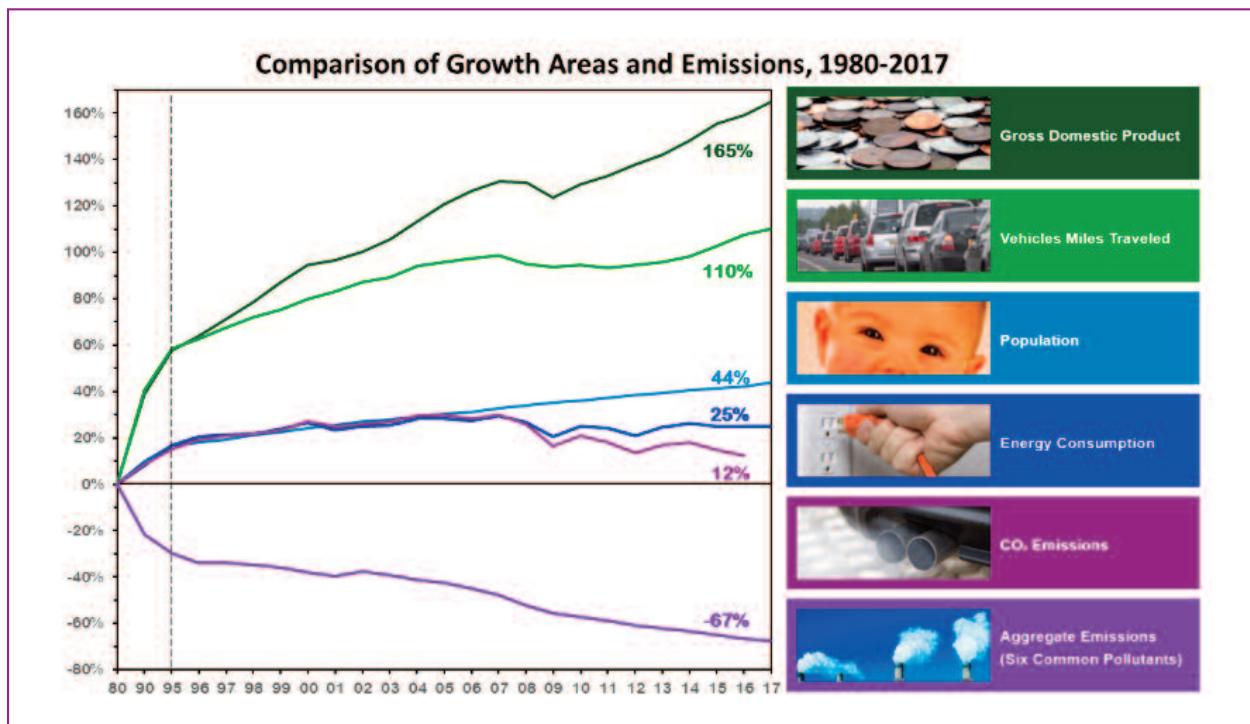


Figure 1. A Comparison of Growth Areas and Emissions, 1980–2017.

Source: U.S. Environmental Protection Agency (EPA).

NSR is carried out in a series of steps beginning with a determination as to whether NSR applies to a facility's construction at all and, if so, what the facility's pollution control obligations are, if any. The changes EPA has made or is proposing to make affect virtually every one of these steps, often in multiple ways, and consistently in ways that retract NSR's reach, weaken its requirements, or limit its consistent enforcement. These changes seem designed to add or expand "off-ramps" that allow facilities to avoid NSR's pollution control obligations.

Although EPA has acknowledged and even celebrated¹ that it is making changes intended to affect the entire program, the agency has rolled them out one-by-one and has offered no analysis of the overall impact of the changes. In many cases, even the impacts of individual changes are not presented. Additionally, many of the changes have not been subject to advance public notice or input from the public. The public has been doubly deprived, both of the right to comment on EPA's actions and of any analysis of the impact of those actions. Similarly, the agency has been deprived of the benefit of public input and has itself seemingly been operating without analyzing and considering the full consequences of its disparate actions.

The specific changes generally narrow NSR's coverage and effectiveness in one of two ways: first, narrowing what counts as a source of air pollution so that fewer facilities have to consider their air pollution; and, second, limiting what pollution is counted so that NSR applies to fewer sources. This list of changes is lengthy, and some affect permitting in ways that are not strictly changes to NSR. Overall, however, these changes add up to numerous ways projects that historically would be subject to NSR no longer will be.

They include:

1. Narrowing what counts as a source.

- Redefining "adjacency" so that 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; and

- 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; and
- Narrowing the definition of "ambient air" affected by a facility such that air pollution can exceed health limits in some areas to which the public reasonably may have access.

3. Weakening permitting generally.

- Stepping back from scrutinizing permits carefully to ensure they are accurate.

While it is beyond the scope of this article to detail each of the changes listed above, we describe a few of them below to give a flavor of how they weaken public health protections.

The Hourly Rate Off-Ramp

In its Affordable Clean Energy (ACE) proposal, EPA introduced a new notion of what constitutes an emissions increase at the step of determining whether a change triggers NSR.² Even if a change would result in a source's polluting more annually, the source could avoid NSR altogether if its emissions do not increase on an hourly basis. This is a potentially significant loophole, as the proposal cites a study that found that approximately 80 percent of coal-fired power plants are currently emitting oxides of nitrogen and sulfur dioxide at levels greater than they would be permitted to emit were they to undergo NSR permitting.³ In the power sector and elsewhere, new investment in facilities of precisely the type ACE intends to promote portend increased operations and increases in annual emissions. If EPA finalizes this proposal, facilities could increase annual emissions but bypass NSR,⁴ leaving communities exposed to pollution increases but with little recourse.



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Two Ways to 'Carve Up a Higher-Emitting Project'

Separately, EPA has suggested two more ways sources can avoid NSR. Until now, EPA defined a new source as "major" for purposes of assessing its total emissions impact even in cases where physically and operationally related components were not immediately contiguous. This reflects commonsense understanding of modern industrial operations and their actual impact on local air quality. Now, EPA has invited public comment on Draft Guidance (<https://www.epa.gov/nsr/draft-guidance-interpreting-adjacent-new-source-review-and-title-v-source-determinations-all>) that would allow multi-component facilities, even those designed to operate as one, to sidestep NSR. They can identify their non-contiguous components as separate lower emitting facilities so that each one can remain below the triggering emissions threshold.

EPA has also proposed to narrow the circumstances in which multiple changes to a facility count as a modification for NSR purposes by relaxing rules regarding project aggregation. Now, even where several alterations are made at the same time to support a source's overall purpose, the source may claim that projects do not have a substantial technical or economic relationship. This could result in exactly what EPA says it is trying to avoid: allowing a source to "carve up a higher-emitting project into two or more lower-emitting 'projects' and avoid triggering major NSR requirements."⁵ The proposal could be read by a source, motivated to avoid pollution control costs, as a how-to manual for avoiding NSR even as it makes changes that will yield pollution increases.

Stepping Back from Enforcement

The changes just described, as well as the others EPA is putting forward, are even more meaningful in light of recent statements by EPA that it intends to defer to industry's own determinations of whether particular projects are subject to NSR. 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. Now, it has expressed its intent to step away from that obligation.

In one of the first changes EPA made to the NSR program, the agency issued a memorandum (https://www.epa.gov/sites/production/files/2017-12/documents/policy_memo_12.7.17.pdf) stating that the agency would no longer scrutinize a company's estimates of its own pollution. This essentially adopts a position that a power company had taken in litigation—and lost.⁶ Going forward, polluters will enjoy the license that losing litigant 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.

Conclusion

So much of the CAA is built on what is both principle and expectation: newer should be cleaner. By offering a variety of ways that sources can avoid NSR, EPA subverts that logic and casts NSR as a burden that EPA is obliged to relieve. In treating NSR as nothing more than a burden on industry, EPA ignores the fundamental purpose of the law—protection of public health—and undermines its own mission. **em**

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References

1. See, e.g., "EPA Celebrates One Year of New Source Review Modernization," Dec. 10, 2018, available at <https://www.epa.gov/newsreleases/epa-celebrates-one-year-new-source-review-modernization>.
2. Under the proposal, this would apply only to electricity generating units (EGUs, better known as power plants). 83 *Fed. Regist.* 44,746, 44,781 (Aug. 31, 2018).
3. 83 *Fed. Regist.* 44,746, 44,775-76 (Aug. 31, 2018), citing Sarah K. Adair, David C. Hoppock, Jonas J. Monast, New Source Review and coal plant efficiency gains: How new and forthcoming air regulations affect outcomes; *Energy Policy* 2014, 70, 183-92.
4. In fact, independent analysis of the proposal shows that pollution would increase in 20 states as power plants responded to ACE with investments that would result in their emitting more. See, e.g., <https://iopscience.iop.org/article/10.1088/1748-9326/aafe25>.
5. 40 *Fed. Regist.* 57324, 57326 (Nov. 15, 2018).
6. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017); *United States v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013).