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# New Source Review/Clean Air Act: December 7th U.S. Environmental Protection Agency Memorandum Addressing Actual-to-Projected-Actual Applicability Test

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The United States Environmental Protection Agency (“EPA”) Administrator E. Scott Pruitt issued a December 7th guidance memorandum titled:

*New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability (“Memorandum”)*

The *Memorandum* states it is being issued pursuant to the Administration’s mandate to “streamline” regulatory permitting requirements for manufacturing and other types of facilities.”

The focus of the *Memorandum* are the New Source Review (“NSR”) provisions of the Clean Air Act.

The NSR regulations require new major stationary sources and major modifications at existing major stationary sources to obtain a permit prior to beginning construction. The NSR process is quite complex and can involve significant expense. As a result, a key issue is under what circumstances NSR is triggered.

The *Memorandum* cites appellate decisions involving DTE Energy as having created:

...uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements.

The *Memorandum* states that it represents EPA’s future intent in applying and enforcing aspects of the applicability provisions of the NSR regulations that were addressed in the appellate decisions. Specifically, it addresses scenarios in which sources have used or intended to use “projected actual emissions” in determining NSR applicability and the associated pre- and post-project source obligations. As a result, this *Memorandum* should be of particular interest to anyone that is potentially subject to the NSR review process.

Please note three caveats.

First, this *Memorandum* is a guidance document as opposed to a rule. It contains the usual stipulation that it does not “substitute for any law, regulation or other legally binding requirement and is not legally enforceable,” (i.e., is a “clarification”).

Second, EPA's application of the *Memorandum* is likely to be challenged by any number of environmental groups or other organizations.

Third, delegated states (such as Arkansas) presumably have some discretion in whether they adopt this approach.

[A copy of the \*Memorandum\* can be downloaded here.](#)