

ATTACHMENT 2

Affirmation of EPA's Long-Standing Reactivation Policy

Introduction:

As discussed in Attachment 1, EPA is continuing to apply its long-standing policy on the applicability of the Clean Air Act's Prevention of Significant Deterioration (PSD) regulations to the reactivation of permanently shut down sources ("Reactivation Policy" or "Policy"). See, *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2 (June 11, 1999) (*Monroe*). The *Monroe* Order provides the most complete articulation of the Reactivation Policy that EPA has consistently applied over three decades. This policy is grounded on an interpretation that a major stationary source that has permanently shut down is subject to the PSD regulations at 40 C.F.R. 52.21 as a new major stationary source upon restart. See Discussion, Section 2, below. EPA developed the factors in the Reactivation Policy to provide a way to determine whether a source that has been in "an extended condition of inoperation"¹ was permanently shut down.

Discussion:

1. *The Reactivation Policy Is Still Applied by EPA and Remains Appropriate*

EPA is continuing to apply the Reactivation Policy, as described in the *Monroe* Order, because it remains an appropriate method for determining whether the reactivation of a stationary source qualifies as the construction of a new source under the PSD regulations. Although EPA recently questioned the merit of continuing to apply the Reactivation Policy, EPA did not make a final decision to stop following the Policy. In this document, EPA reaffirms its intention to continue applying the Reactivation Policy.

On December 2, 2020, EPA criticized the Reactivation Policy and stated that the Agency would not follow it in the context of an action to issue a final Plantwide Applicability Limit (PAL) permit to Limetree Bay Refinery, LLC and Limetree Bay Terminals, LLC (Limetree).² The associated response to comments (RTC) stated that "EPA no longer believes that the Reactivation Policy is an appropriate policy, and the Agency is not required to apply it to any source, including the Limetree Bay facility."³ However, this position was not maintained in any final EPA decision. On February 3, 2021, both Limetree and environmental organizations filed petitions for administrative review of EPA's final PAL permit with the EPA Environmental Appeals Board (EAB). In such circumstances, the EPA's regulations at 40 C.F.R. Part 124 provide that a permit decision does not become final and effective until the conclusion of administrative review proceedings under Part 124. On March 25, 2021, EPA withdrew "the [Limetree] PAL permit and its administrative record in its entirety, including the Agency's

¹ *Monroe* at 7.

² EPA Plantwide Applicability Limit Permit for Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC, PAL permit No. EPA-PAL-VI001/2019, Response to Comments, pp. 106-111 (Dec. 2, 2020).

³ *Id.* at 111.

response to comments.”⁴ As a result, the EAB dismissed the petitions for review and no final permit decision was issued by EPA. Thus, the 2020 EPA statements regarding the Reactivation Policy contained in the RTC document were not part of a final action by EPA.

Even if this December 2020 action had taken effect and rescinded the Reactivation Policy, that Policy reflects the EPA’s current views. The withdrawal of the PAL permit was based in part on EPA’s desire to reconsider the statements in the RTC regarding the Reactivation Policy, but it was not necessary for the Administrator to articulate this reason at the time. After further consideration, for the reasons discussed below, EPA intends to continue following the Reactivation Policy to identify sources that have permanently shut down and that the Agency will classify as a new stationary source if they seek to restart. The EPA has applied the factors in that Policy in this case to determine that reactivation of the refinery now owned by Port Hamilton Refining and Transportation LLLP⁵ constitutes construction of a new stationary source that requires a PSD permit.⁶

2. *Basis for the Reactivation Policy in the New Source Review Regulations*

The PSD regulations provide that “no new major stationary source or major modification ... shall begin actual construction” without a PSD permit. 40 C.F.R. 52.21(a)(2)(iii). Although the PSD regulations contain a lengthy definition of the term “major modification,”⁷ the regulations contain no definition of the terms “new major stationary source” or “new source,” which are used throughout 40 C.F.R. 52.21.⁸ Absent a detailed definition in the New Source Review (NSR) regulations, one should look to the plain meaning of the term. The first meaning of the term “new” in Webster’s online dictionary is “having recently come into existence.”⁹ Likewise, the first meaning in the New Oxford American Dictionary is “not existing before; made, introduced, or discovered recently or now for the first time.”¹⁰ But the word “new” is also used to convey the concept of a renewal, as reflected in Webster’s additional meanings of “beginning the resumption or repetition of a previous act or thing” or “made or become fresh.” Similarly, Oxford’s second and third meanings are “already existing, but seen, experienced, or acquired recently or now for the first time” and “just beginning or beginning anew and regarded as better than what went before.” In the RTC document for the Limetree PAL, EPA argued that Webster’s first meaning was the best reading in the context of the NSR provisions, but the RTC document did not demonstrate that other meanings are not permissible or appropriate in this context as well.

⁴ Administrator Michael S. Regan, *Withdrawal of Plantwide Applicability Limit Permit No. EPA-PAL-VIOO1/2019* (March 25, 2021), at https://www.epa.gov/sites/default/files/2021-04/documents/withdrawal_decision_applicability_limit_permit_signed.pdf.

⁵ This reference to Port Hamilton Refining and Transportation, LLLP (PHRT) should be understood to include both PHRT and West Indies Petroleum Limited (“WIPL”) as purchasers of the Refinery in the bankruptcy proceeding.

⁶ See Attachment 1.

⁷ 40 C.F.R. 52.21(b)(2).

⁸ EPA’s PSD regulations do define the term “construction” in section 52.21(b)(8) as “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.”

⁹ <<https://www.merriam-webster.com/dictionary/new>>.

¹⁰ New Oxford American Dictionary, Third Edition, p. 1180, Oxford University Press (2010).

The Reactivation Policy does not establish a definition of “new major stationary source” or “new source,” but is grounded on a long-standing interpretation of these phrases that incorporates elements of each of the meanings of “new” described above to include the restart of a major stationary source that previously ceased operations on a permanent basis. An existing source or unit that has permanently shut down has effectively ceased to exist for purposes of air quality management. If a source that was permanently shut down resumes operations, from the perspective of the airshed, this source has newly come into existence after its air pollutant emissions permanently stopped.¹¹ Similarly, if a source that was previously in existence is substantially rehabilitated by its owner, the source has been made or become fresh – it is like new. Even more so when a second or third owner acquires a dormant facility for the first time and refurbishes it. By contrast, when an existing source has only shut down temporarily, it has not ceased to exist and may be capable of resuming its activities without substantial time and effort. EPA thus does not interpret the term “new stationary source” to include any resumption or repetition of a previous act or thing,¹² but only such a resumption that follows a permanent shutdown.¹³

This interpretation of the NSR regulations is also grounded on the premise that a stationary source that has permanently ceased operating no longer has a baseline level of actual emissions, that such baseline emissions are zero. The absence of any baseline emissions is a key characteristic of a new source. From 1978 to 2002, this interpretation was supported by NSR regulations that generally defined baseline emissions to include emissions over the last two years but placed the burden on sources to show that another period should be used to determine baseline emissions. These provisions were amended in 2002 to enable most existing sources to use any 24-month period in the last 10 years to determine the baseline level of emissions for existing emissions units.¹⁴ However, consistent with agency’s understanding of “new source” described above, the existing sources subject to this provision were not intended to include sources that permanently shut down. Although the 2002 rulemaking did not add any definition of “existing major stationary source” that excluded permanently shut down sources, the 2002 rule carried forward the principle that a permanently shut down source has no baseline emissions and should thus be treated as a new one.

EPA reflected this principle in the text of a provision in the NSR regulations that enables major stationary sources to establish Plantwide Applicability Limits (PALs). A PAL provides an alternative applicability test of major NSR permitting requirements, on a pollutant-by-pollutant basis, such that a source can make changes without triggering major NSR requirements if the total source-wide emissions remain below the PAL level established by the permitting authority. In general, this level is determined by adding a significant emission rate in 40 C.F.R.

¹¹ While much of the equipment at the stationary source may not be distinct from that which existed before (as in a new edition), resuming the emissions that have ceased for a significant period time can impact air quality in a manner that is distinct from the conditions that existed while the source was in a prolonged shutdown. Air quality management decisions may have been based on the premise that the source was no longer in existence.

¹² Under this reading, a source that restarts after a routine turn-around for maintenance is not a “new” source by virtue of resuming a previous act.

¹³ Applying the factors discussed in section 7 below, this may include, for example, a circumstance where the resumption of the same activity requires a more substantial investment in time, staffing, and capital than a routine maintenance turn-around.

¹⁴ See 40 C.F.R. 52.21(b)(48)(ii).

52.21(b)(23) to the baseline actual emissions demonstrated in a specific 24-month-period for a given NSR pollutant. In this context, 40 C.F.R. 52.21(aa)(6)(i) of the PSD regulations says the following: “Emissions associated with units that were permanently shut down after this 24-month [baseline] period must be subtracted from the PAL level.” The PAL provisions use the same definition of baseline actual emissions that was created in 2002, so the 24-month period in 40 C.F.R. 52.21(aa)(6)(i) for setting the PAL level is the same 24-month period selected from within the 10-year lookback period for determining baseline actual emissions. Thus, if an emissions unit is permanently shut down after the 24-month period that is used for determining the baseline emissions that form part of the PAL, the emissions from the permanently shut down unit cannot be counted as part of the baseline emissions in this context. For example, if a source selected a 24-month period that was 9-10 years prior to the PAL permit application but permanently shut down a unit three or four years before the PAL permit application, the emissions from that unit would be subtracted from the baseline.¹⁵ This PAL regulatory provision thus codified the principle that an emissions unit that has been “permanently shut down” has no baseline emissions. By requiring that emissions from such a unit be subtracted from the PAL level, the regulation requires quantifying the emissions from a permanently shut down unit as zero.

While EPA’s 2002 rule did not add a definition of “new major stationary source” or use the term “permanent shutdown” in another provision that would provide meaning to a “new source,” the PAL provision codified the central premise of EPA’s pre-2002 interpretation that a permanently-shutdown source is tantamount to a new one. If a single emissions unit that is permanently shut down has no baseline emissions, then by extension, if all of the emissions units at a facility are permanently shut down, the baseline emissions from the entire facility are zero, matching a key characteristic of a new source.

3. *Reactivation Policy Supports the Goals of the NSR Program*

Declining to treat a source that has “permanently shut down” as an existing source furthers an important balance that Congress struck in enacting the NSR program. The act requires that new facilities be designed to incorporate the best available pollution control technology but does not require existing facilities to upgrade their pollution controls until it is cost-effective to do so in conjunction with other upgrades or changes to the facility. This balance has been discussed in U.S. Court of Appeals decisions that have examined the legislative history of the NSR provisions in the Clean Air Act (CAA). In one opinion, the District of Columbia Circuit stated that “the statutory scheme intends to ‘grandfather’ existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program.” *Ala. Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). The Seventh Circuit made the following observation: “[c]onsistent with its balanced approach, Congress chose not to subject existing plants to the requirements of NSPS and PSD. ... But Congress did not permanently exempt existing plants from these requirements.” *Wisconsin Electric Power Co. v. Reilly*, 893 F.3d 901, 909 (7th Cir. 1990)

¹⁵ Since the significant emission rates are fixed for all sources, as specified in 40 C.F.R. 52.21(b)(23), and the baseline is source-specific and therefore variable, a reduction in a PAL for a permanently shut down unit is essentially a reduction in the baseline.

(internal citations and quotations omitted) (WEPCO). As the WEPCO court observed, a motivation for subjecting a source to PSD when it was modified was because this was a cost-effective time to improve pollution controls. *Id.* Members of the House of Representatives recognized that “[b]uilding control technology into new plants at time of construction will plainly be less costly than [sic] requiring retrofit when pollution control ceilings are reached.” H.R. Rep. No. 294, 95th Cong., 1st Sess. 185, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1264. Further, Judge Boggs of the Sixth Circuit, in a dissenting opinion, cited legislative history to support the following observation: “The purpose of the ‘modification’ rule is to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction.” *See* 116 Cong. Rec. 32,918 (remarks of Sen. Cooper), *reprinted in* 1 Senate Committee on Public Works, *A Legislative History of the Clean Air Act Amendments of 1970* (1974), at 260.” *National-Southwire Aluminum Co. v. EPA*, 838 F.2d 835, 843 (6th Cir.) (Boggs, J., dissenting), *cert. denied*, 488 U.S. 955, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988). Citing this observation, the Seventh Circuit in the WEPCO case noted that Judge Boggs argued that the shutting down of voluntarily installed pollution control equipment, not required by regulation, at an existing plant should not be considered a modification because it would not afford the utility an opportunity for “effective placement of new control technology.” 893 F.2d at 809. In contrast, where a source is doing much more to resume operation of an entire facility, undertaking substantial capital investment to restart after a “permanent” shutdown, this is an opportune time to cost-effectively upgrade pollution control technology. The Seventh Circuit in WEPCO also made the following observation:

The legislative history suggests and courts have recognized that in passing the Clean Air Act Amendments, Congress intended to stimulate the advancement of pollution control technology. *See, e.g.*, S.Rep. No. 91-1196, 91st Cong., 2d Sess. 17 (1970) (“Standards of performance should provide an incentive for industries to work toward constant improvement in techniques for preventing and controlling emissions from stationary sources....”); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 475 (D.C. Cir.1983); *Alabama Power*, 636 F.2d at 372; *ASARCO*, 578 F.2d at 327; *United States v. SCM Corp.*, 667 F.Supp. 1110, 1126-27 (D.Md.1987). The development of emissions control systems is not furthered if operators could, without exposure to the standards of the 1977 Amendments, increase production (and pollution) through the extensive replacement of deteriorated generating systems.

893 F.3d at 909-10. Likewise, the development of emissions control systems would be frustrated if a permanently shut down source was allowed to restart after making substantial investments in rehabilitating the facility without also improving the air pollution controls.

4. *Origin and Purpose of the Reactivation Policy*

Recognizing these goals of the NSR program, EPA developed the Reactivation Policy to provide a framework for determining whether a dormant source that seeks to resume operating was permanently shut down and should be classified as new. EPA has applied this policy

consistently since the late 1970s,¹⁶ shortly after the NSR program was created in the 1977 amendments to the Clean Air Act. In the 1999 *Monroe* order that best sums up the policy, the Administrator explained that “reactivation of facilities that have been in an extended condition of inoperation may trigger PSD requirements as ‘construction’ of either a new major stationary source or a major modification of an existing one. *Monroe* at 7. At the time of this order, and continuing today, EPA’s PSD regulation defined the term “construction” as “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in [actual] emissions.”¹⁷ Because of the use of the conjunction “or” in this definition, it has long been the case that a change in the method of operation may by itself qualify as construction, regardless of whether there is also a physical change to the equipment at a source. So, a change at a facility from a condition of permanent inoperation to a state of operation is a change in the method of operation that qualifies as construction.¹⁸ As the Administrator stated in the *Monroe* order, “[w]here facilities are reactivated after having been permanently shutdown, operation of the facility will be treated as operation of a new source.” *Id.* (emphasis in original).

While labeled a policy, the Agency’s approach has been grounded on the legal interpretation described above that a restart of a permanently shut down facility qualifies as construction of a new source. EPA has applied this interpretation in guidance letters and memoranda, as well as formal adjudications. For example, the *Monroe* order was an adjudication by the EPA Administrator of a petition requesting that the Agency object to a Title V permit on the grounds that it lacked an applicable requirement based on NSR.

To determine whether a shutdown is permanent, a key criterion that has been a part of the Reactivation Policy from the beginning is the presumption that shutdown that lasting for more than two years is permanent. This two-year time period was supported by the text of the NSR regulations in effect when the Policy was first developed. EPA regulations have long-defined the term “actual emissions” as of a particular date to mean “in general ... the average rate in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation.” 40 C.F.R. 52.21(b)(21)(ii).¹⁹ Before 2002, this definition of actual emissions was used to determine

¹⁶ See <<https://www.epa.gov/nsr/reactivation-shutdown-source>>.

¹⁷ 40 C.F.R. 52.21(b)(8) (2021) (omitting the term “actual” before emissions); 40 C.F.R. 52.21(b)(8) (1998) (including the term “actual”). The term “actual” was removed in the 2002 revisions to the NSR regulations. 67 Fed. Reg. 80186, 80190, 80276 (Dec. 31, 2002).

¹⁸ When arguing that that the definition of “construction” undermined the Reactivation Policy, the Limetree PAL RTC document failed to consider that this definition of “construction” includes a “change in the method of operation.” See, RTC at 110. The RTC also discussed terms in this definition that suggest a distinction between a new creation of an emissions unit (“fabrication” and “erection”) and an emission unit that is already in existence. (“modification”). *Id.* However, this merely illustrates how the definition of construction applies to both the construction of a new source and modification of an existing one. The terms in the parenthesis in the definition of “construction” do not demonstrate that construction requires a physical change. The language in the definition before these terms in parenthesis plainly includes a change in the method of operation by itself.

¹⁹ This definition remains in the regulations for other purposes, but after 2002, the term “baseline actual emissions” was established for use in determining NSR applicability to existing sources.

the baseline emissions²⁰ before a change at an existing stationary source that must be evaluated to determine if it qualifies as a major modification. Based on this language in the regulation, the emissions of an existing source prior to a change was generally²¹ based on the average rate of emissions over the two-year period prior to the change. Thus, an existing source that had been shut down for more than two years would generally not have any baseline emissions, just like a new source. This reasoning supported the idea that restarting an existing source that has been shut down for more than two years is analogous to constructing a new source for PSD applicability purposes because both would have an emissions baseline of zero.

Finding this interpretation of the NSR regulations to be permissible and reasonable, one federal district court issued a preliminary injunction against the restart of a stationary source on the basis of the Reactivation Policy. *Communities for a Better Environment (CBE) v. CENCO Refining*, 179 F. Supp. 2d 1128, 1143-48 (C.D. Cal. 2001). In its opinion, the Central District of California wrote the following:

[Petitioner] CBE makes a strong showing that the Reactivation Policy is a reasonable interpretation of Clean Air Act regulations that does not conflict with any terms of the NSR program. NSR regulations indicate that for a long-dormant facility (at least those shutdown for two years or more), the emissions baseline for determining whether it has undergone an emissions increase subject to NSR will be zero. Therefore, such a facility is subject to NSR upon restart, assuming the requisite increase in emissions over the zero baseline.

Id. at 44. Based on this reasoning, the court followed the Reactivation Policy and issued a preliminary injunction against the restart of a refinery that hadn't operated for five years, stating that a cost of between \$28 and \$180 million to reactivate a refinery over a period of six to eighteen months "slightly favors finding a permanent shutdown." *Id.* at 1146.

Another key element of the Reactivation Policy since its inception in the late 1970s is that the presumed permanence of a shutdown lasting more than two years can be rebutted by an owner/operator with evidence that it did not intend to permanently shut down. This concept can also be tied to text in the regulatory definition of actual emissions. As previously stated, this definition says that "in general" the rate of actual emissions is the average over the 24-months preceding the change "which is representative of normal source operation." The next sentence in the definition says that "[t]he Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation." 40 C.F.R. 52.21(b)(21)(ii). Thus, under this definition, the use of the previous two years of emissions to determine the actual emissions as of a particular date is rebuttable. A source could show that another time period, earlier than the preceding two years, is more representative of normal source

²⁰ While there was no PSD regulatory definition of "baseline" associated with the definition of actual emissions before the 2002 rule, the baseline actual emissions concept was discussed in the preamble to the 1980 New Source Review regulations. *See, e.g.*, 45 Fed. Reg. 52676, 52680 (Aug. 7, 1980).

²¹ However, as discussed below, the owner or operator of a source had the opportunity to use emissions from a period before the last two years if it could demonstrate that the emissions during this time period were more representative of its normal operations.

operation. Likewise, under the Reactivation Policy, EPA has essentially considered whether a shutdown source can show that its emissions from a different period, (when it was still operating more than 2 years prior to its planned restart), are more “representative of normal source operation” and use those emissions to demonstrate that the source is an existing source, rather than a new source with a zero baseline.

The presumption in the Policy that a shutdown lasting two years is permanent was also grounded on the time period for emissions that EPA considered temporary, which is the converse of permanent. To implement a provision in the regulations that exempted temporary emissions, EPA’s general approach has been to consider emissions lasting for less than two years to be temporary and eligible for that exemption. Letter from William A. Spratlin, Jr., P.E., Chief, Air Support Branch, Air and Hazardous Materials Division, EPA, to Harvey D. Shell, Shell Engineering and Associates (Oct. 9, 1979) (“Spratlin letter”), at <https://www.epa.gov/sites/default/files/2015-07/documents/m90678.pdf>. This letter cited a provision then in section 52.21(k) of the PSD regulations, as of June 19, 1978, that exempted temporary emissions from the PSD air quality impact analysis.²² The Spratlin letter explained that EPA’s approach for applying this exemption was generally to consider emissions occurring for less than two years in one location to be temporary. *See*, 43 Fed. Reg. 26388, 26394 (June 19, 1978). Extending this idea, the absence of emissions from a shutdown facility for up to two years could also generally be considered temporary, while the absence of emissions for a longer period would be regarded as permanent.

5. *Revisions to PSD Regulations in the 2002 NSR Reform Rule and Codification of the Permanent Shutdown Criterion*

Although EPA completed a major revision of its NSR regulations in 2002 that changed the method for determining baseline emissions, this revision did not remove the basis for EPA’s interpretation that construction of a “new stationary source” includes the restart of a source that was permanently shut down.

The 2002 revisions to the PSD regulations, created a new definition of “baseline actual emissions” for use in determining NSR applicability for modification of an existing source, while retaining for other purposes the existing definition of “actual emissions” that had previously been used to determine baseline emissions. The definition of “baseline actual emissions” that applies today gives existing source owners or operators the discretion to select a period other than the last 24 months to determine the baseline emission rate, without having to show that the selected period is representative of normal source operations. The new definition gave owners and operators of most existing sources the discretion to choose any 24-month period within the preceding 10 years, which EPA determined to be the length of a normal business cycle for most types of sources based on a study. 67 Fed. Reg. 80186, 80191-92, 80199-200 (Dec. 31, 2002); *see also*, *New York v. EPA*, 443 F.3d 3, 25–26 (D.C. Cir. 2005).

Based on the new definition of “baseline actual emissions,” the Limetree PAL RTC argued that the Reactivation Policy no longer served the purpose that it did under the pre-NSR

²² This provision is now located in 40 C.F.R. 52.21(i)(3).

Reform regulations, when existing sources could seek to establish baseline emissions by demonstrating that emissions during a period before the last 24 months were more representative of normal operations. The RTC asserted that it was inconsistent with the baseline approach in the current regulations to presume that a facility that was idled for the last two years had permanently shut down and that “the idling of the refinery portions of the facility may be viewed to have occurred in the normal course of the 10-year business cycle upon which EPA based the baseline provision in the 2002 rule.” RTC at 110.

However, this change to the approach for determining the baseline emissions of an existing source does not alter the fundamental premise of the Reactivation Policy that a stationary source that has permanently shut down qualifies as a new source upon seeking to restart. The idea that construction of a new stationary source results from restarting a facility that was permanently shut down is grounded on the plain meaning of the word “new” and the definition of “construction,” as discussed above. The “permanent shutdown” of a stationary source eliminates its status as an existing source under the NSR regulations. If an existing source ceases operations temporarily, such a source would reasonably continue to be classified as an existing source. Resuming operations after a temporary shutdown may be part of a normal business cycle, but resuming operations after a permanent shutdown is not. Completely ceasing operations at a source for an extended period of time is an exceptional circumstance. It is not “business as usual” to permanently stop utilizing the product of a large capital investment. A central purpose of the 2002 rule was to recognize that “a source's operations over a business cycle cover a range of operating (and emissions) levels—not simply a single level of utilization. The new procedure recognizes that market fluctuations are a normal occurrence in most industries, and that a source's operating level (and emissions) does not remain constant throughout a source's business cycle.” 67 Fed. Reg. at 80199. A permanently shut down source has no variation in utilization level. Instead, it has a zero operating level and zero emissions, which goes beyond the range associated with normally occurring market fluctuations.

EPA did not say anything in the 2002 NSR reform rule that indicated the Agency intended to abandon the core premise of the Reactivation Policy that a permanent shutdown terminates the status of an existing source as such. To the contrary, in this same action, EPA added the words “permanently shut down” to its PSD regulations for the first time, and made clear that emissions from a unit that has permanently shut down must be subtracted from baseline emissions when establishing a PAL. As discussed above, although the addition of this language was in a context other than defining a “new major stationary source,” the principle has broader relevance. Section 52.21(aa)(6)(i) of the PSD regulations has said the following since 2002: “Emissions associated with units that were permanently shut down after this 24-month period must be subtracted from the PAL level.” In the PAL section of the preamble to the 2002 Reform Rule, EPA elaborated on the application of this provision as follows:

The key determination to be made is whether an emissions unit is “permanently shut down.” This issue is discussed in the Administrator’s response to a petition objecting to an operating permit for a facility in Monroe, Louisiana. See *Monroe Electric Generating Plant*, Petition No. 6–99–2 (Adm’r 1999).

67 Fed. Reg. 80186, 80208-09 n. 30 (Dec. 31, 2002). EPA went on to explain that whether or not a shutdown should be treated as permanent should be based on the principles from the Reactivation Policy. EPA wrote the following:

[W]e explained in our ‘reactivation policy’ that whether or not a shutdown should be treated as permanent depends on the intention of the owner or operator at the time of shutdown based on all facts and circumstances. Shutdowns of more than 2 years, or that have resulted in the removal of the source from the State’s emissions inventory, are presumed to be permanent. In such cases it is up to the facility owner or operator to rebut the presumption.

Id. Thus, rather than undermining the Reactivation Policy that EPA applied prior to 2002, the NSR Reform rule actually expanded application of the Policy from permanent shutdown of entire facilities, in the context of identifying a new source, to determining whether an individual unit has been permanently shut down and if so, to require that such unit’s emissions be subtracted from the PAL level. The language in the preamble to the 2002 rule in no way rejects or limits *Monroe*. In fact, the preamble cites to *Monroe* as the basis for applying the permanent shutdown concept to the new PAL regulatory architecture, and the 2002 rule codifies in the PAL regulations a principle that supports classifying a permanently shut down source as a new one when it is reactivated. As discussed above, if the emissions of a single emissions unit that has been permanently shut down are effectively counted as zero, then by extension, if all of the emissions units at a facility are permanently shut down, then the baseline emissions from the entire facility is zero, just like a new source.

In addition, the definition of “actual emissions” was not removed from the NSR regulations in 2002 and continues to apply in several contexts under the NSR program that relate to the Reactivation Policy. Paragraph (b)(21)(i) of 40 C.F.R. 52.21 states that the original definition of “actual emissions” in that subsection applies except when EPA is “calculating whether a significant emissions increase has occurred” or when “establishing a PAL,” and in those excepted circumstances the definitions in 40 C.F.R. 52.21(b)(41) (projected actual emissions) and 40 C.F.R. 52.21(b)(48) (baseline actual emissions) apply. The preamble to the 2002 rule explained further that the new definition of “baseline actual emissions,” including the methodology in 40 C.F.R. 52.21(b)(48) is to be used “for three specific purposes involving existing emissions units as follows:

- For modifications, to determine a modified unit's pre-change baseline actual emissions as part of the new actual-to-projected-actual applicability test
- For netting, to determine the pre-change actual emissions of an emissions unit that underwent a physical or operational change within the contemporaneous period. You may select separate baseline periods for each contemporaneous increase or decrease.
- For PALs, to establish the PAL level.”

67 Fed. Reg. 80185, 80196 (Dec. 31, 2002) (emphasis added).

Thus, 40 C.F.R. 52.21(b)(48) was added to calculate the baseline emissions for modifications to existing sources, not for determining NSR applicability for new sources. And even at existing sources, 40 C.F.R. 52.21(b)(48) does not apply in all contexts.

For purposes other than those described above, the pre-NSR Reform formulation of “actual emissions” and its presumption of using the 24-month period preceding the particular date applies. For example, the “baseline concentration” used to determine compliance with PSD increments continues to be based on the definition of actual emissions in section (b)(21), which is used to determine the emissions from sources in existence on the applicable minor source baseline date with noted exception. 40 C.F.R. 52.21(b)(13)(i)(a). The preamble to the 2002 reform rule further explains that, when determining the “existing source’s contribution to the amount of increment consumed,” the contribution should be “based on that source’s actual emissions rate from the 2 years immediately preceding the date of the change.” *Id.*

Furthermore, to support the different applicability tests for new and existing emissions units in section 52.21(a)(2)(iv), the definition of baseline actual emissions in paragraph (b)(48) specifies a different method for establishing the baseline emissions for existing and new emissions units. The discretion to select any consecutive 24-month period in the last 10 years applies only to existing emissions units.²³ Under the definition of “emissions unit,” a new emissions unit is one that “is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.” 40 C.F.R. 52.21(b)(7)(i).²⁴ For new emissions units, “the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit’s potential to emit.” 40 C.F.R. 52.21(b)(48)(iii). Consistent with the discussion above for a new stationary source, an emissions unit that is proposed to be restarted after a permanent shutdown qualifies as one that “will be newly constructed” and thus should be classified as a “new emissions unit” under these provisions.²⁵ Furthermore, the baseline actual emissions from such a new emissions unit would

²³ In creating the architecture for the 10-year lookback, the preamble to the 2002 rule presumed that an existing source must have some level of utilization representative of normal operations. 67 Fed. Reg. 80185, 80200 (Dec. 31, 2002) (“We believe that use of a fixed 10-year look back period provides the desired clarity and certainty to the process of selecting an appropriate utilization/emissions level that is representative of a source’s normal operation.”).

²⁴ This definition of new emissions unit was not created to identify a new stationary source. EPA gave a specific meaning to “new emissions unit” in paragraph (b)(7)(i) to apply the different applicability calculation approaches set forth in 40 C.F.R. 52.21(a)(2)(iv) for modification of existing sources. For this approach, a “new emissions unit” needed to be separately addressed in the definition of “baseline actual emissions” in paragraph (b)(48). An emissions unit is plainly “part of a stationary source.” 40 C.F.R. 52.21(b)(7). It is not an entire stationary source.

²⁵ The Limetree PAL RTC document cited the phrase “newly constructed” in the definition of “new emissions unit” and concluded without explanation that none of the units at the Limetree refinery were “newly constructed.” This neglected to consider that the definition of “construction” includes physical changes and changes in the method of operation. The RTC did not demonstrate that a “newly operated” unit that had permanently shut down could not qualify as a new emissions unit under this definition. Although these units at the Limetree refinery had “existed” in one sense for more than two years, they ceased to “exist” for purpose of the NSR regulation when the units permanently shut down. It is thus consistent with these definitions in the PSD regulations to classify a unit that permanently shut down as “new” or “newly constructed” when it restarts.

be zero, as applicable to determining the emissions increase that will result from initial construction and operation of such unit.

Considering the full contours of the 2002 rulemaking, it is apparent that the discretion to select any 24-month period in the past 10 years in the context of definition of “baseline actual emissions” adopted in 2002 has limited applicability in the NSR program. This provision was only intended to apply to an existing unit at an existing source, not a new unit added to an existing source or to an entire source that had permanently shut down and no longer qualified as existing. In 2002, the method for determining baseline emissions changed only for existing sources. The approach for determining PSD applicability for new sources was not altered, and EPA has continued to look to the still active definition of “actual emissions” in section (b)(21) to inform its consideration of whether a source is presumed to be permanently shut down.

EPA continued to apply the Reactivation Policy after these revisions to the regulations in 2002. In 2005, EPA Region 5 executed a Consent Agreement and Final Order in which the respondent agreed that its facility was permanently shut down “as defined by” the Reactivation Policy and that the facility “will be considered a new source if restarted by Respondent.” *In the Matter of: Lesaffre Yeast Corporation Milwaukee, Wisconsin, Respondent*, 2007 WL 9797862, at 3. In addition, in 2015, EPA Region 2’s Regional Administrator issued an objection to a New York State Department of Environmental Protection (NYSDEC) Title V permit, articulating EPA’s view that the facility had been permanently shut down and was a new major stationary source under EPA’s Reactivation Policy. Letter from Judith A. Enck, Regional Administrator, to Honorable Basil Seggos, NYSDEC, *EPA Review of Proposed Title V Operating Permit for Greenidge Station* (Dec. 7, 2015).

The Limetree PAL RTC document places undue significance on the assumption that no EPA headquarters office provided guidance on the application of the Reactivation Policy after the 2002 rule, until Limetree proposed restarting the HOVENSA refinery in the Virgin Islands. This is incorrect. For example, EPA headquarters provided considerable review and guidance to Region 2 in its drafting of the 2015 objection to NYSDEC’s Title V permit. Moreover, since it is generally the responsibility of Regional Offices to address case-specific matters of this nature in the appropriate states and territories, it was not necessary or expected for EPA headquarters to provide written guidance in every case. After the Reactivation Policy was clearly articulated in the 1999 *Monroe* order and referenced in the 2002 rule preamble, additional written guidance from headquarters was generally not needed. More significant is the absence from 2002 to 2020 of any request from EPA headquarters that the Regional Offices stop applying the Reactivation Policy, especially after the 2002 rule preamble referenced the *Monroe* order as a guide to determining whether a unit had permanently shut down.

6. Continued Textual Support for a Two-Year Presumption

The 2002 NSR Reform rule changes do not preclude EPA from continuing to presume that the shutdown of a stationary source is permanent if it has lasted for more than two years. This continues to be supported by the EPA’s approach for identifying temporary emissions and

the continued applicability of the definition of actual emissions for several purposes, including identifying the emissions to be included in air quality impact analyses under the PSD program.

As discussed above, EPA has previously supported the presumption that a shutdown lasting more than 2 years is permanent by referencing EPA's policy of presuming that "temporary" emissions are those that occur for less than 2 years at one location. The "temporary" emissions exemption referenced in the 1979 Spratlin letter remains in effect today, at 40 C.F.R. 52.21(i)(3). In addition, the PSD regulations exempt portable stationary sources from PSD permitting if a source previously received a PSD permit and the new location of the source would be "temporary." 40 C.F.R. 52.21(i)(1)(viii)(a). After the 1979 Spratlin letter described above, EPA finalized the proposed rulemaking that was referenced in that letter. In the preamble to that final rule, EPA continued to generally consider temporary emissions in the context of these exemptions to be less than two years. 45 Fed. Reg. 52676, 52728 (Aug. 7, 1980) (emphasis added). EPA continues today to generally consider as temporary, stationary source emissions lasting for less than 2 years at one location.²⁶ Nothing in the 2002 NSR reform rule altered this conception of emissions that are temporary. Thus, it is still rational to extend this idea to presume that a shutdown is "permanent" if emissions stop for more than the period of time that EPA generally considers temporary in the context of stationary source operation.

In addition, the emissions of sources over the most recent two-year period of time continues to be the foundation for addressing air quality-related NSR requirements after determining that a permit is required, including making the showing that construction of a new source or modification will not cause or contribute to a violation of the National Ambient Air Quality Standards or PSD increment. 40 C.F.R. 52.21(k). At the same time EPA adopted the definition of "baseline actual emissions," the Agency said the following in the preamble to the 2002 rule: "If you determine that the modification of your source is a major modification, you must revert to using the existing definition of 'actual emissions' to determine your source's actual emissions on a particular date to satisfy all other NSR permitting requirements, including any air quality analyses (for example, compliance with NAAQS, PSD increments, AQRVs) and the amount of emissions offsets required." 67 Fed. Reg. at 80196. EPA further stated that the new longer lookback for baseline actual emissions "does not affect the way in which a source's ambient air quality impacts are evaluated," including "actual operating factors averaged over the most recent 2 years of operation." 67 Fed. Reg. at 80202. EPA's most recent modeling guidance reiterates that the 2002 NSR Reform Rule intended the original definition of "actual emissions" at 40 C.F.R. 52.21(b)(21) and its two-year presumption to apply to emissions rates used for

²⁶ EPA has recently applied the two-year temporary emissions concept in the context of PSD permits for Outer Continental Shelf Sources under 40 C.F.R. Part 55. See, Vineyard Wind Fact Sheet and Statement of Basis, at <https://www.epa.gov/sites/default/files/2021-06/documents/vineyard-wind-1-llc-fs-sob.pdf>; South Fork Draft Permit Fact Sheet (2021), at <https://www.epa.gov/system/files/documents/2021-07/south-fork-draft-permit-fs.pdf>; Anadarko Petroleum Preliminary Determination and Statement of Basis (Nov. 2016), at https://www.epa.gov/sites/default/files/2016-11/documents/2016_11_14_preliminary_determination_bob_douglas.pdf; and Anadarko Preliminary Determination and Statement of Basis (March 23, 2011), at <https://www.epa.gov/sites/default/files/2015-08/documents/anadarko-pd-032311.pdf>.

source impact analyses.²⁷ Under other provisions that apply to PSD modeling, the most recent two-year period is the starting point for determining the emissions of nearby sources included in background. 40 C.F.R. Part 51, Appendix W (Table 8-2), as revised in 2017.²⁸ Further, as mentioned above, the baseline emissions for calculating increment consumption is based on the definition of “actual emissions.” 40 C.F.R. 52.21(b)(13)(i)(a).²⁹ Considering that the most recent two years of emissions is the starting point when modeling impacts on ambient air quality, it continues to be appropriate to presume that emissions that have ceased prior to that time frame have permanently stopped, while enabling sources to rebut this presumption and show that the shutdown was not permanent.

The two-year presumption is also a reasonable threshold to guide EPA in considering when a presumption should be applied and when it should not, which ensures consistent implementation of the Reactivation Policy. The Policy does not say that a shutdown lasting less than two years cannot be permanent, rather only that the presumption does not apply in that case. Two years is a long time for a source to be shut down, and for most sources that are shut down for two years or longer there is no question about the shutdown being permanent. In cases where there is a question, that is where it is appropriate to apply the criteria and determine whether the presumption has been rebutted.

7. *Reactivation Policy Factors*

Under the Reactivation Policy, EPA has looked to the intent of the owner or operator to determine whether a shutdown is permanent. *Monroe* at 8. Based on the considerations described above, EPA presumes that a shutdown of more than two years is permanent, but the owner or operator of a facility can rebut this presumption by demonstrating that it maintained a continuous intent to restart the facility based on relevant facts, including activities undertaken during the time of the shutdown. *Monroe* at 8-9. EPA has examined the following factors in prior Reactivation Policy decisions to assess the intent of the owner/operator of a stationary source:

- Length of time the facility has been shut down
- Time and capital needed to restart.
- Evidence of intent and concrete plans to restart
- Cause of the shutdown

²⁷ EPA Memorandum, Guidance for Ozone and Fine Particulate Matter Permit Modeling, at 18 n. 16 (July 29, 2022), at https://www.epa.gov/system/files/documents/2022-07/Guidance_for_O3_PM25_Permit_Modeling.pdf.

²⁸ 82 Fed. Reg. 5182, 5220 (Jan. 17 2017).

²⁹ This has not changed since EPA’s 1980 PSD regulations. The preamble to these regulations states that “increment calculations will generally be based on actual emissions as reflected by normal source operation for a period of two years....In EPA’s judgment, two years represents a reasonable period for assessing actual source operation....The two-year period of concern should generally be the two years preceding the date as of which increment consumption is being calculated, provided that the two-year period is representative of normal source operation. The reviewing authority has discretion to use another two-year period, if the authority determines that some other period of time is more typical of normal source operation than the two years immediately preceding the date of concern.” 45 Fed. Reg. 52676, 52718 (Aug. 7, 1980); *see also*, EPA Draft New Source Review Workshop Manual, at C.69 (Oct. 1990), available at <https://www.epa.gov/sites/default/files/2015-07/documents/1990wman.pdf>.

- Status of permits
- Maintenance and inspections during shutdown

No single factor in this list is conclusive and the final determination will often involve a judgment regarding the owner's intent. *Monroe* at 9.

The Limetree PAL RTC document criticized these aspects of the Policy. It argued that the focus on the intent of the owner or operator is not grounded in the NSR regulations and that the Policy can produce inconsistent results based on subjective judgments about how to weigh the various factors against each other. Upon further review, EPA does not find these to be persuasive grounds against continuing to follow the Reactivation Policy.

As illustrated above, the NSR regulations support the interpretation that construction of a new source or new emissions unit occurs upon restarting a source or emissions unit that was permanently shut down. While the regulations do not define the term "permanently shut down," the ordinary meaning of the term "permanent" includes consideration of intent. The New Oxford American Dictionary defines permanent as "lasting or intended to last or remain unchanged indefinitely."³⁰ Thus, it is rational to consider the intent³¹ of the owner or operator of a stationary source when assessing whether a stationary source shutdown is permanent. While this question of intent is an inherently subjective one, the factors listed above that EPA has used to determine that the source maintained a continuous intent are based on objective facts. The two-year presumption in the Reactivation Policy lends further objectivity to the determination. EPA recognizes that it is not ideal to base regulatory decisions on a subjective consideration such as intent, and that this can lead to differences of opinion as to how to weigh those factors. However, the risk of inconsistent outcomes is minimized when such a judgment is based on objective facts, as reflected in the list above. Further, a more objective bright line test based solely on duration or some other factor would limit the flexibility afforded by the existing framework that allows for consideration of several case-specific factors in reaching a reasoned conclusion.

In this regard, the Reactivation Policy has served its function effectively for decades and remains a rational approach for distinguishing between new sources and existing ones in circumstances involving the shutdown of a stationary source. EPA thus intends to continue applying the Reactivation Policy to serve this function under the NSR program.

Conclusion:

EPA is continuing to apply its NSR Reactivation Policy, as described in the *Monroe* Order, because it remains an appropriate method for determining whether the reactivation of a stationary source qualifies as the construction of a new source under the PSD regulations. The

³⁰ New Oxford American Dictionary, Third Edition, p. 1305, Oxford University Press (2010).

³¹ The primary definition of "permanent" in Webster's online dictionary is "continuing or enduring without fundamental or marked change." But Webster's also provides a "Kid's Definition" of permanent that reads as follows: "lasting or intended to last for a very long time; not temporary or changing." <<https://www.merriam-webster.com/dictionary/permanent>>.

Policy has been and continues to be consistent with the PSD regulations at 40 C.F.R. 52.21, including after revisions to these regulations in 2002. Notwithstanding the absence of a regulatory definition of “new stationary source,” this term is reasonably read to include restarting a stationary source that was “permanently shut down.” This interpretation furthers the goals of the Clean Air Act’s statutory scheme for the New Source Review program. EPA has consistently applied the Reactivation Policy for over three decades and has issued formal adjudications on the basis of the policy and the supporting interpretation of law. One federal District Court found the Reactivation Policy to be grounded on a permissible interpretation of the NSR regulations and based a preliminary injunction on it. The basis for this interpretation in the EPA NSR regulations was not altered by the 2002 revisions to these NSR regulations, which expanded the application of the policy to additional contexts and displayed no intent by EPA to change the policy.