THE ADMINISTRATOR
WASHINGTON, D.C. 20460

September 18, 2025

MEMORANDUM

SUBJECT: New Source Review Program "Reactivation Policy"

FROM: Lee M. Zeldin

TO: Regional Administrators
Deputy Regional Administrators

I. Introduction and Purpose

The U.S. Environmental Protection Agency has historically applied a policy under the Clean Air Act New Source Review program known as the "Reactivation Policy" for the purpose of determining whether an NSR permit was required to resume the operation of an idle stationary source. Under the Reactivation Policy, EPA presumed that a major stationary source that was idle for two or more years was permanently shut down and thus subject to NSR permitting requirements applicable to a newly constructed source prior to restarting operations. That presumption controlled unless the source could rebut the presumption by providing evidence that it intended to restart operations at the time the source went idle. On July 25, 2023, the U.S. Court of Appeals for the Third Circuit rejected an EPA determination that a specific stationary source would require an NSR permit to restart based on the principles in the Reactivation Policy. *See Port Hamilton Refining and Transportation, LLLP v. EPA*, 87 F.4th 188 (3d Cir. 2023) ("*Port Hamilton*").[1]

In response to the reading of the Clean Air Act reflected in the Third Circuit's decision, the agency will no longer apply any form of the Reactivation Policy in its NSR permitting determinations and enforcement proceedings, or in its oversight of state, local and tribal air permitting programs. EPA will continue to apply the modification provisions of the NSR program to shut down sources in accordance with the CAA and applicable EPA regulations. Thus, where an existing major stationary source that has been idle makes a change in order to enable it to resume operation, EPA will not require the source to obtain an NSR permit unless this change qualifies as a "major modification" under applicable regulations based on the nature of the change and the magnitude of any resulting increase in emissions.

[1] See https://www2.ca3.uscourts.gov/opinarch/231094ppan.pdf.

II. Background

The NSR provisions of the CAA and of EPA's implementing regulations require a permit before constructing a new major stationary source or a major modification at existing major stationary sources.[2] This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards are exceeded (nonattainment areas) or an area that is in attainment with the NAAQS or unclassifiable. In general, permits for sources in attainment and unclassifiable areas and for certain other pollutants regulated under the major source program are referred to as prevention of significant deterioration permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR permits. The entire preconstruction permitting program, which includes PSD and NNSR permits, is referred to as the NSR program.

Under the CAA and EPA regulations, the NSR program applies to any new major stationary source or major modification of an existing source. *See, e.g.*, 40 CFR § 52.21(a)(2)(iii). Whether NSR requirements apply to a newly constructed source turns on the source's potential to emit regulated NSR pollutants. Under the PSD program, a "major stationary source" is one that emits or has the potential to emit 100 or 250 tons per year of any regulated NSR pollutant, depending on whether the source is classified under a list of source categories identified in CAA section 169(1) (42 U.S.C. § 7479) and EPA regulations. Once a source is determined to be a major stationary source, PSD permitting requirements for individual regulated NSR pollutants are based on the source's potential to emit each pollutant and the corresponding significant emission rate defined in the PSD regulations. Under the NNSR program, a "major stationary source" is one that emits or has the potential to emit 100 tpy of the regulated NSR pollutant for which the area is designated nonattainment, although a lower threshold can apply depending on the pollutant and the severity of the nonattainment classification in the area. Whether NSR requirements apply to changes at an existing major stationary source is generally based on the increase in actual emissions that would result from the project (i.e., a physical change or change the method of operation) using calculation procedures defined in the NSR regulations and the applicable significant emission rate for each regulated NSR pollutant.[3]

Since the late 1970s, EPA has expressed a view that resuming operation of an idle facility that was determined to be permanently shut down qualifies as construction of a new stationary source and thus requires an NSR permit. This view, and the framework EPA used to determine if a source had permanently shut down, became known as the "Reactivation Policy." In 1999, in response to a petition for an objection to a state-issued operating permit under Title V of the CAA (42 U.S.C. § 7661 *et seq.*), the Administrator issued an Order that contains the most complete articulation of the Reactivation Policy. *In the Matter of Monroe Electric Generating Plant Entergy Louisiana Inc.*, Proposed Operating Permit, Petition No. 6-99-2 (June 11, 1999) ("*Monroe*").[4] In the *Monroe* Order, the Administrator stated the following:

> [R]eactivation 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 stationary source. Where facilities are reactivated

[2] 42 U.S.C. §§ 7475(a), 7502(c)(5), 7503(a); 40 C.F.R. §§ 51.165, 51.166, 52.21.
[3] See 40 C.F.R. §§ 51.165(a)(v), 51.166(b)(2), 52.21(b)(2).
[4] See www.epa.gov/sites/default/files/2015-07/documents/ccaw_ord.pdf.

> after having been permanently shut down, operation of the facility will be treated as operation of a new source. Alternatively, shutdown and subsequent reactivation of a long-dormant facility may trigger PSD review by qualifying as a major modification.

Monroe at 7 (emphasis in original). The *Monroe* Order explained that whether a shutdown should be treated as permanent depends on the intention of the owner or operator at the time of shutdown and that shutdowns of more than two years, or that have resulted in the removal of the source from the state's emissions inventory, are presumed to be permanent. *Id.* at 8-9. In such cases, it was up to the facility owner or operator to rebut the presumption. *Id.* To determine the intent of the owner or operator, EPA cited several factors to be examined, including the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits and ongoing maintenance and inspections that have been conducted during shutdown. *Id.*

On November 16, 2022, the Assistant Administrator for the Office of Air and Radiation issued a letter to the owners of a petroleum refinery on St. Croix, U.S. Virgin Islands,[5] communicating EPA's determination that a PSD permit would be required for restart of the refinery in accordance with the Reactivation Policy. On January 13, 2023, the owner of this refinery petitioned for review in the U.S. Court of Appeals for the Third Circuit. On July 25, 2023, the Third Circuit vacated EPA's determination that the owners of the refinery must obtain a PSD permit under the CAA prior to restarting the refinery. The Court held that:

> The Clean Air Act unambiguously limits the PSD program's application to newly constructed or modified facilities. The Refinery is not new and has not undergone a "modification" as the Act defines that term. The EPA therefore exceeded its authority by requiring Port Hamilton to obtain a PSD permit for the Refinery.

Port Hamilton, 87 F.4th at 194. The Court rested its decision on the text of CAA sections 165 and 169. The former provides that "[n]o major emitting facility on which construction is commenced after August 7, 1977, may be constructed" in an attainment area without a PSD permit. 42 U.S.C. § 7475. The latter defines "construction" as including only "modification." *Id.* § 7479(2)(C). The Court rejected EPA's argument that these provisions were ambiguous and provided room for EPA to construe "construction" to also apply to facilities that are shut down and later restarted. In support of its decision, the Court also relied on its earlier opinion in *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274 (3d Cir. 2013) ("*Homer City*"), which it described as already holding that "the CAA's PSD permitting provisions unambiguously extended the PSD program to construction and modification alone, and not 'operation.'" *Port Hamilton*, 87 F.4th at 194-95.

III. Analysis

EPA has reviewed the Third Circuit's decision in *Port Hamilton* and accepts the Court's reading that the CAA does not presumptively require an NSR permit to resume operation of an existing stationary source. In addition to vacating EPA's determination that the refinery in question required a permit prior to restarting, the Third Circuit also stated the following:

[5] Port Hamilton Refining and Transportation and an associated company, West Indies Petroleum Ltd.

> The CAA limits the PSD program's reach to only two circumstances: construction and modification. . . . The EPA's Reactivation Policy extends the PSD program beyond those limited circumstances.

Port Hamilton, 87 F.4th at 195. EPA agrees with this conclusion insofar as its prior Reactivation Policy calls for treating as "construction" the resumption of operations at an existing major stationary source that was considered to have been permanently shut down. While the Third Circuit did not vacate the Reactivation Policy itself, the court's reasoning leads to the inescapable conclusion that it is not permissible for EPA to apply that policy to require existing stationary sources to obtain a permit based solely on resuming operation of the source after a period of inactivity. Even prior to this decision, EPA leadership had expressed that the Reactivation Policy was not grounded in the NSR regulations and that the factors EPA employed to determine if a facility was permanently shut down were subjective and prone to inconsistent application. In 2018, the Assistant Administrator for the Office of Air and Radiation stated that the agency intended to reconsider the policy.[6] Administrator Wheeler subsequently decided to cease following the policy in a 2020 permitting decision.[7] However, that decision was reversed without explanation by Administrator Regan in 2021.[8] This action restored the prior approach, which EPA then applied to the Port Hamilton refinery. This lead to the Third Circuit decision that makes clear that some elements of the Reactivation Policy were not supported by applicable law.

Thus, consistent with *Port Hamilton* and the agency's analysis of its reasoning, EPA will no longer apply the Reactivation Policy to classify resuming operation of a stationary source as construction of a new source in EPA permitting and enforcement actions on a national basis. EPA is also clarifying that it will not consider the restarting of an emissions unit that was idled to by itself constitute a "change in the method of operation" that would potentially trigger NSR permitting requirements. EPA intends to follow this policy nationwide. The Third Circuit's reasoning is persuasive and illustrates that the Clean Air Act is best read not to require a permit to resume operation of an idle stationary source. Section 165(a) requires a permit for construction on a major stationary source, and section 169(2)(C) defines construction to include "modification" but not "operation" of such source. 42 U.S.C. § 7475(2)(C). No U.S. Court of Appeals has adopted a contrary reading of the statute, and the Third Circuit's earlier decision in *Homer City* aligns with the view of four other circuits that have expressly confirmed NSR requirements are triggered by construction or modification.[9] An additional reason to apply the Third Circuit's holding nationwide is a strong interest in equal treatment among sources and nationwide uniformity. Thus, the revised policy described in this memorandum is not limited to only those states

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[6] Letter from William L. Wehrum, EPA Assistant Administrator for Office of Air and Radiation, to LeeAnn Johnson Koch, Perkins Coie, Re: Limetree Bay Terminals, St. Croix, U.S. Virgin Islands – Permitting Questions, p. 2 n.2 (April 5, 2018), available at: https://www.epa.gov/sites/default/files/2018-04/documents/limetree_2018.pdf.

[7] EPA, Response to Comments on the Clean Air Act Plantwide Applicability Permit for the Limetree Bay Terminal and Limetree Bay Refining, St Croix, U.S. Virgin Islands, pp. 108-11 (November 2020), available at https://www.epa.gov/sites/default/files/2020-12/documents/response_to_comments-limetree_pal_permit.pdf.

[8] Michael S. Regan, EPA Administrator, Withdrawal of Plantwide Applicability Limit Permit No. EPA-PAL-VIOO1/2019 (March 25, 2021), available at: https://www.epa.gov/sites/default/files/2021-04/documents/withdrawal_decision_applicability.limit_.permit.signed.pdf.

[9] *See Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666 (10th Cir. 2016); *United States v. Midwest Generation LLC*, 720 F.3d 644 (7th Cir. 2013); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010); *Nat'l Parks & Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316 (11th Cir. 2007).

within the jurisdiction of the Third Circuit and should be applied by EPA regional offices in all states across the United States.

EPA will continue to implement and enforce the NSR applicability provisions for modification of existing facilities in accordance with the CAA and applicable EPA and state regulations. Thus, a restart of an idled facility involving a physical change (or a change in the method of operation at the source other than simply restarting) will still require a PSD permit if it qualifies as a "major modification" by virtue of the nature of the change and the degree to which it results in an increase in regulated NSR pollutant emissions.

State, local and tribal air agencies are encouraged to follow this policy as well, where doing so is consistent with applicable law in their jurisdictions. This memorandum does not preclude permitting authorities from continuing to implement their own requirements with respect to preconstruction permitting for the reactivation of idle sources where those policies are supported by applicable laws in their jurisdictions that are more stringent than the CAA. EPA will evaluate on a case-by-case basis the extent to which it is necessary to enforce or revisit its approval of State Implementation Plans that contain requirements that were based on EPA's prior policy and are not independently supported by state or local laws.