

The EPA Administrator, Michael S. Regan, signed the following notice on 10/12/2021, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2018-0048. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

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ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2018-0048; FRL- 8992-01-OAR]

Notice of Action Denying Petition for Reconsideration and Administrative Stay: “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting” (85 FR 74890, November 24, 2020)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of action denying petition for reconsideration and administrative stay.

SUMMARY: The Environmental Protection Agency (EPA) is providing notice that it has responded to a petition for reconsideration and administrative stay of a final action under the Clean Air Act (CAA) published in the **Federal Register** on November 24, 2020, titled, “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” (“Project Emissions Accounting rule”). On January 22, 2021, the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), the Environmental Integrity Project (EIP), the Sierra Club, and the Adirondack Council (“petitioners”) submitted a petition requesting that the EPA reconsider and stay the effective date of the Project Emissions Accounting rule. The EPA has denied this petition in a letter to the petitioners for the reasons that the EPA explains in that letter. The EPA is not taking action at this time on the petitioners’ additional request to withdraw the memorandum titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program” (March 13, 2018) (“March 2018 Memorandum”).

This document is a prepublication version, signed by EPA Administrator, Michael S. Regan on 10/12/2021. We have taken steps to ensure the accuracy of this version, but it is not the official version.

FOR FURTHER INFORMATION CONTACT: Ms. Tanya Abrahamian, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, 109 T.W. Alexander Drive, Mail Code C539-04, Research Triangle Park, N.C. 27711; phone number: (919) 541-5690; email address: *abrahamian.tanya@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Where Can I Get Copies of This Document and Other Related Information?

This **Federal Register** notice, the petition for reconsideration and administrative stay, and the response letter to the petitioners are available in the docket that the EPA established for the Project Emissions Accounting rulemaking, under Docket ID NO. EPA-HQ-OAR-2018-0048.

All documents in the docket are listed in the index at *<http://www.regulations.gov>*.

Although listed in the index, some information may not be publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *<https://www.epa.gov/dockets>*.

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

In addition, the EPA has established a website for the New Source Review permitting program, including New Source Review rulemakings, at: <https://www.epa.gov/nsr>. This **Federal Register** notice, the petition for reconsideration and administrative stay, and the response letter denying the petition are also available on this website along with other information.

II. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” Judicial challenges to the EPA’s denials of petitions for reconsideration of CAA actions belong in the same venue as any challenge to the action that such petitions request the agency to reconsider.¹

On January 19, 2021, the States of New Jersey, Maryland, Minnesota, Oregon, and Washington, and the Commonwealth of Massachusetts, the Commonwealth of Pennsylvania, and the District of Columbia filed a petition for review of the Project Emissions Accounting rule in the D.C. Circuit. On January 22, 2021, EDF, NRDC, EIP, the Sierra Club, and the Adirondack

¹ Cf. *Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988) (the clause in CAA section 307(b) governing “nationally applicable regulations” provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration).

Council filed a petition for review on the same action in the D.C. Circuit. Those cases have been consolidated and are temporarily being held in abeyance.

The D.C. Circuit is the appropriate venue for challenges to the final action titled, “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting” 85 FR 74890 (November 24, 2020) because it is nationally applicable. *See* 85 FR at 74908. Therefore, challenges to the action denying the administrative petition on the Project Emissions Accounting rule must also be filed in the D.C. Circuit.

Under CAA section 307(b), any petition for review of this action denying the petitions for reconsideration and/or stay must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this notice is published in the **Federal Register**.

III. Description of Action

On November 24, 2020, the EPA finalized the Project Emissions Accounting rule, which codified in the New Source Review (NSR) regulations the EPA’s interpretation of the NSR applicability test contained in the March 2018 Memorandum.² That memorandum and the subsequent Project Emissions Accounting rule clarified that both increases and decreases in

² Memorandum from E. Scott Pruitt, to Regional Administrators, “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program,” March 13, 2018 available at: https://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf. The March 2018 Memorandum explained that “the EPA interpreted the current NSR regulations as providing that emissions decreases as well as increases are to be considered in Step 1 of the NSR applicability process, where those decreases and increases are part of a single project.” More specifically, in the March 2018 Memorandum the EPA interpreted the major NSR regulations to mean that emissions increases and decreases could be considered in Step 1 for projects that involve multiple types of emissions units in the same manner as they are considered for projects that only involve new or only involve existing emissions units.

emissions resulting from a proposed project can be considered in Step 1 of the NSR major modification applicability test.³

On January 22, 2021, following promulgation of the final rule, the EPA Administrator received a petition for reconsideration of the final rule pursuant to CAA section 307(d)(7)(B). The petition for reconsideration was filed by EDF, NRDC, EIP, the Sierra Club, and the Adirondack Council. The petition for reconsideration requests that the EPA (1) stay the effectiveness of the rule during reconsideration for 90 days; (2) conduct reconsideration proceedings and withdraw the Project Emissions Accounting rule within the 90-day stay period; and, (3) immediately withdraw the March 2018 Memorandum. CAA section 307(d)(7)(B) requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule “can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such

³ An existing major stationary source triggers major NSR permitting requirements when it undergoes a “major modification.” The EPA’s implementing regulations for NSR establish a two-step process for determining major NSR applicability for projects at stationary sources. To be subject to major NSR requirements, the project must result in both (1) a significant emissions increase from the project (the determination of which is called “Step 1” of the NSR applicability analysis); and (2) a significant net emissions increase at the stationary source, taking account of emissions increases and emissions decreases attributable to other projects undertaken at the stationary source within a specific time frame (called “Step 2” of the NSR applicability analysis, or “contemporaneous netting”). For this two-step process, the NSR regulations define what emissions rate constitutes “significant” for each NSR regulated pollutant. *See* 40 CFR 52.21(a)(2)(iv)(a); 40 CFR 51.165(a)(v); 40 CFR 51.166(b)(2)(i); 40 CFR Appendix S to Part 51 II.A.5.(i).

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objection is of central relevance to the outcome of the rule.” The EPA has carefully reviewed the petition for reconsideration and evaluated all issues raised. The EPA has determined that they do not meet the CAA section 307(d)(7)(B) criteria for mandatory reconsideration, and has sent a letter to the petitioner denying the petition for reconsideration and request for administrative stay of the Project Emissions Accounting rule. The letter articulates the rationale for the EPA’s final response and is available in the docket for this action.

Michael S. Regan,
Administrator.