6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2022-9249; FRL-9249-01-OAR]

RIN 2060-AV62

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting

AGENCY: The Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In this action, the Environmental Protection Agency (EPA) is proposing revisions to the preconstruction permitting regulations that apply to modifications at existing major stationary sources in the New Source Review (NSR) program under the Clean Air Act (CAA or Act). The proposed revisions include revising the definition of "project" in the NSR regulations, adding additional recordkeeping and reporting requirements applicable to minor modifications at existing major stationary sources, and proposing to require that decreases accounted for in the Step 1 significant emissions increase calculation be enforceable.

DATES: *Comments*: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Public hearing: If anyone contacts the EPA requesting a public hearing by **[INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the EPA will hold a virtual public hearing. *See* **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: *Comments*: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2022-9249, by any of the following methods:

Federal eRulemaking Portal: *https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.

• *Email:a-and-r-docket@epa.gov*. Include Docket ID No. EPA-HQ-OAR-2022-9249 in the subject line of the message.

• *Fax*: (202) 566–9744. Attention Docket ID No. EPA-HQ-OAR-2022-9249.

• *Mail*: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2022-9249, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

• *Hand/courier delivery*: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OAR-2022-9249 for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/*, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets*. In addition, the EPA has a website for NSR rulemakings at: *https://www.epa.gov/nsr*. The website includes the EPA's proposed and final NSR regulations, as well as guidance documents and technical information related to preconstruction permitting.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Keller, Air Quality Policy Division, Office of Air Quality Planning and Standards (C539-04), Environmental Protection Agency, Post Office Box 12055, Research Triangle Park, NC 27711; telephone number: (919) 541-2065; email address: *keller.peter@epa.gov*.

SUPPLEMENTARY INFORMATION:

Public hearing. To request a virtual public hearing, contact Ms. Pamela Long at (919) 541– 0641 or by email at *long.pam@epa.gov*. If requested, the virtual hearing will be held on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/nsr*.

Upon publication of this document in the *Federal Register*, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/nsr* or contact Ms. Pamela Long at (919) 541–0641 or by email at *long.pam@epa.gov*. The last day to pre-register to speak at the hearing will be **[INSERT DATE 13 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/nsr*.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 3 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *long.pam@epa.gov*. The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but generally will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/nsr*. While the EPA expects the hearing to go forward as set forth earlier, please monitor our website or contact Ms. Pamela Long at (919) 541–0641 or by email at *long.pam@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the *Federal Register* announcing updates. If you require the services of a translator or special accommodations such as audio description, please preregister for the hearing with Ms. Pamela Long and describe your needs by **[INSERT DATE 10 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The EPA may not be able to arrange special accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2022-9249. All documents in the docket are listed in the Regulations.gov index.

Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) 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. Publicly available docket materials are available either electronically in Regulations.gov or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

Instructions. Direct your comments to Docket ID No. EPA-HQ-OAR-2022-9249. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. This type of information should be submitted by mail as discussed later.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia

submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets*.

The *https://www.regulations.gov* website is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets*.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/*. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in Instructions. If you submit any digital storage media that does

not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office using the email address, oaqpscbi@epa.gov, and should include clear CBI markings as described later. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2023-0401. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

BACT	Best Available Control Technology
CAA	Clean Air Act
CBI	Confidential Business Information
CFR	Code of Federal Regulations

EPA	Environmental Protection Agency
EUSGU	Electric Utility Steam Generating Unit
FR	*Federal Register*
LAER	Lowest Achievable Emissions Rate
NSR	New Source Review
NNSR	Nonattainment New Source Review
PEA	Project Emissions Accounting
PSD	Prevention of Significant Deterioration
PTE	Potential to Emit
RP	Reasonable Possibility in Recordkeeping and Reporting
SER	Significant Emissions Rate
SIP	State Implementation Plan

Organization of this document. The information in this preamble is organized as follows:

I. General Information

A. Executive Summary

The EPA is proposing several revisions to its NSR preconstruction permitting regulations intended to improve implementation and strengthen enforceability of the NSR program provisions established in a 2020 rulemaking titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting rule"

("project emissions accounting" or "2020 PEA rule").[1] The revisions proposed in this document include (1) revisions to the definition of the term "project" to include criteria for determining the scope of a project that may be subject to the major NSR regulations; (2) revisions to the monitoring, recordkeeping and reporting provisions in the NSR regulations to improve compliance with, and enforcement of, the NSR applicability process; and (3) revisions to require that emissions decreases included in the significant emissions increase determination of the NSR applicability process be enforceable.

The NSR regulations establish a two-step process for determining when a modification to an existing major stationary source is subject to major NSR requirements. Under Step 1, prior to beginning construction, the source owner or operator first assesses whether a project would result in a significant emissions increase. Step 2 involves determining whether the project would also result in a significant net emissions increase from the major stationary source. Under these regulations, a project is a major modification that requires an NSR permit if a project results in both a significant emissions increase and a significant net emissions increase. The activities included in a "project" define the scope of the analysis under Step 1 of the NSR applicability process. In this action, the EPA is proposing to define the term "project" with greater specificity to ensure appropriate and consistent application of that term. The EPA is also proposing to improve accountability and compliance with this process by requiring that decreases in emissions associated with a project that are included in the significant emissions increase determination be enforceable.

[1] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 FR 74890 (November 24, 2020).

Also, to enhance owner/operator accountability and facilitate compliance with the NSR applicability requirements, the EPA is proposing revisions to the recordkeeping and reporting requirements in the NSR regulations' "reasonable possibility" provisions that apply to projects at major stationary sources that are evaluated using the actual-to-projected-actual applicability test. The "reasonable possibility" provisions apply in those circumstances where the owner/operator determines that the project does not qualify as a major modification but where there is a "reasonable possibility," as that term is defined in the regulations, that the project may nonetheless result in a significant emissions increase. The revisions to the reasonable possibility provisions in this proposal comport with the intent of the recordkeeping and reporting requirements as initially promulgated by the EPA in 2002 to improve compliance with the NSR applicability process by owners or operators that rely on the actual-to-projected-actual applicability test when determining, before beginning actual construction, that a project does not constitute a major modification.[2] The EPA is also proposing, in light of the 2020 codification of project emissions accounting, to expand the applicability of the reasonable possibility provisions to all source owners or operators that use project emissions accounting to take credit for a decrease in emissions under the significant emissions increase determination. The EPA is proposing to require that all owners or operators of major stationary sources subject to the

[2] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 FR 80185 (December 31, 2002) (establishing a new procedure for determining "baseline actual emissions" and supplementing the existing actual-to-potential applicability test with an actual-to-projected-actual applicability test for determining if a physical or operational change at an existing source will result in an emissions increase).

"reasonable possibility" recordkeeping and reporting requirements submit pre-project records to the reviewing authority and is proposing to specify the information these pre-project records must include.

B. Does this action apply to me?

Entities potentially affected directly by this action include air pollution emissions sources in all industry categories. Entities potentially affected by this action also include state, local and tribal air pollution control agencies responsible for issuing preconstruction permits pursuant to the major NSR programs.

C. What should I consider as I prepare my comments for the EPA?

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, *Federal Register* date and page number).
- Follow directions. The proposed rule may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used to support your comment.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns wherever possible and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this *Federal Register* document will be posted at *https://www.epa.gov/nsr*.

II. Background

The NSR program is a CAA program that requires certain stationary sources of air pollution to obtain permits prior to construction. The major NSR program applies to new construction and modifications of existing sources that emit "regulated NSR pollutants" over certain thresholds. New or modifying sources that emit regulated NSR pollutants in levels under those thresholds may be subject to minor NSR requirements or may be excluded from NSR altogether.

In November 2020, the EPA promulgated the "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting" (PEA) rule to clarify the accounting procedures that apply when determining whether a physical change or a change in the method of operation (*i.e.*, a project) at a major stationary source would result in a significant emissions increase under the major NSR preconstruction permitting programs.[3] The 2020 PEA rule clarified that both increases and decreases in emissions resulting from a proposed

[3] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 FR 74890 (November 24, 2020).

project shall be considered in Step 1 of the NSR major modification applicability test.[4] The EPA initiated this proposed rulemaking based on concerns raised by stakeholders on the implementation of the NSR program following promulgation of the 2020 PEA rule.

In developing this proposed rulemaking, the EPA has considered a petition for reconsideration it received on the 2020 PEA rule, the comments received on that rule's proposal, and the Agency's own experience in analyzing and enforcing the applicable regulatory provisions.[5] The petition for reconsideration described three primary concerns with the PEA rule.[6] These concerns are that (1) the final rule fails to ensure that offsetting emission decreases

[4] While the EPA determined that the revisions to the regulations at 40 CFR 52.21 adopted in the 2020 PEA rule apply to the EPA and reviewing authorities that have been delegated federal authority from the EPA to issue major NSR permits on behalf of the EPA, for state and local air agencies that implement the NSR program through EPA-approved SIPs, section 116 of the CAA allows these states and local air agencies to adopt more stringent SIP emission control requirements than required by the EPA's regulations. Therefore, reviewing authorities that do not allow for PEA have applicability requirements that are at least as stringent as those required by the Act or the EPA's implementing regulations and, therefore, are not required to submit SIP revisions or stringency determinations to the EPA incorporating PEA. 85 FR 74904.

[5] Letter from Sanjay Narayan et al., to Acting Administrator Jane Nishida, "Re: Petition for Reconsideration of 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,' 85 FR 74,890 (November 24, 2020), Docket ID No. EPA–HQ–OAR–2018–0048 and for Withdrawal of Guidance Memorandum titled 'Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program' (March 13, 2018) (OAQPS-2020-683 and OAQPS-2020-223)," January 22, 2021, ("Petition for Reconsideration"), available at *https://www.epa.gov/system/files/documents/2021-10/final-nsr-accounting-rule-reconsideration-petition-1_22_21.pdf*.

[6] The petition also discussed a 2018 Memorandum from the EPA Administrator E. Scott Pruitt, to Regional Administrators, titled, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," March 13, 2018 ("March 2018 Memorandum") available at: *https://www.epa.gov/sites/default/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 pre-2020

used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated; (2) the final rule allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous emission decreases; and (3) that the EPA has not ensured that project emission decreases will occur and will be maintained. The EPA denied the petition for reconsideration on the grounds that the petition did not make the showing required by CAA section 307(d)(7)(b).[7] However, the EPA agreed that the concerns raised in the petition warranted further consideration by the EPA, and the agency therefore initiated this rulemaking action. The EPA has considered these concerns as well as comments received on the proposed PEA rule in the development of this action.

A. New Source Review Permitting Program

The NSR permitting program applies to sources located in an area where the National Ambient Air Quality Standards (NAAQS) have been exceeded (nonattainment area), areas where the NAAQS have not been exceeded (attainment), and areas that are unclassifiable. However, the demonstration that must be made to obtain a permit and the conditions of such permits are different for nonattainment and attainment/unclassifiable areas. Thus, the pollutant(s) at issue and the air quality designation of the area where the facility is located or proposed to be built determine the specific permitting requirements.

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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.

[7] Denial of Petition for Reconsideration and Administrative Stay: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 86 FR 57585 (October 18, 2021).

Major sources locating, or located, in an area that is in attainment or unclassifiable for a particular regulated NSR pollutant must obtain a Prevention of Significant Deterioration (PSD) permit for that pollutant prior to constructing or undergoing a major modification at the source.[8] These PSD permits may also cover pollutants for which there are no NAAQS.[9] Major NSR permits for sources that are in an area designated nonattainment for a particular regulated NSR pollutant, and which emit that pollutant in excess of the specified nonattainment threshold for that pollutant, are referred to as nonattainment NSR (NNSR) permits. The CAA requires that sources subject to PSD meet emission limits based on Best Available Control Technology (BACT) as specified by CAA section 165(a)(4), and that sources subject to NNSR meet limits based on Lowest Achievable Emissions Rate (LAER) pursuant to CAA section 173(a)(2). Other requirements to obtain a major NSR permit vary depending on whether the permit is a PSD or NNSR permit.

A stationary source is subject to major NSR requirements if (1) a new stationary source is proposed with a potential to emit (PTE) a regulated NSR pollutant at levels that will meet or exceed statutory emissions thresholds,[10] such that it constitutes a "major stationary source," or

[8] In this action, the EPA refers to "source" as shorthand for "source owner/operator."
[9] "Regulated NSR pollutant" is defined at 40 CFR 52.21(b)(50). A "regulated NSR pollutant" includes any pollutant for which a NAAQS has been promulgated and other pollutants regulated under the CAA. These other pollutants include fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, and reduced sulfur compounds, including others. *See*, *e.g.*, 40 CFR 52.21(b)(23). For NNSR, regulated NSR pollutants include only the NAAQS, also known as criteria pollutants, and the precursors to those pollutants for which the area is designated nonattainment. *See* 40 CFR 51.165(a)(1)(xxxvii).
[10] For PSD, the statute uses the term "major emitting facility," which is defined as a stationary source that emits, or has a PTE of, at least 100 tons per year (tpy) if the source is in one of 28 listed source categories—or at least 250 tpy if the source is not—of "any air pollutant." CAA

(2) an existing major stationary source proposes a project that constitutes a "major modification," as discussed further in the following subsection.[11]

Projects that do not trigger major NSR requirements may still be reviewed under SIP-approved preconstruction permit programs, known as minor NSR programs, to ensure that the NAAQS are protected. Under CAA section 110, the CAA Parts C and D permitting programs, of which NSR is a component, are part of a broader requirement to regulate the construction and modification of stationary sources.[12] The minor NSR program, includes permitting requirements for modifications at stationary sources that are not major modifications (*e.g.*, minor modifications) and those requirements exist to ensure that changes at a stationary source that affect emissions, but are not subject to major source permitting, do not cause or contribute to NAAQS violations.[13]

B. Major Modifications Under the NSR Program

The EPA's regulations define "major modification" as any physical change or change in the method of operation of an existing major stationary source that would result in a significant

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section 169(1). For NNSR, the emissions threshold for a major stationary source is 100 tpy, although lower thresholds may apply depending on the degree of the nonattainment problem and the pollutant.

[11] A major stationary source includes any physical change that would occur at a stationary source not otherwise qualifying under 40 CFR 52.21(b)(1) as a major stationary source, if the change would constitute a major stationary source by itself. *See*, *e.g.*, 40 CFR 52.21(b)(1)(i)(*c*).

[12] Section 110(a)(2)(C) of the CAA requires that each SIP "include a program to provide for the…regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D." *See* 40 CFR 50.160-164.

[13] A minor source that undergoes a physical change that would itself be considered major is subject to major source requirements. 40 CFR 52.21(b)(1)(i)(c) ("Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section as a major stationary source, if the change would constitute a major stationary source by itself").

emissions increase of a regulated NSR pollutant and a significant net emissions increase of that pollutant from the major stationary source.[14] The NSR regulations define "project" as a physical change in, or change in the method of operation of, an existing major stationary source.[15] Following from these definitions, the EPA's current implementing regulations establish a two-step process for determining major NSR applicability: a project must result in both (1) a significant emissions increase (referred to as "Step 1"); and (2) a significant net emissions increase at the stationary source that takes into account emissions increases and emissions decreases attributable to other projects undertaken at the stationary source within a contemporaneous timeframe (referred to as "Step 2," or "contemporaneous netting"). An emissions increase of a regulated NSR pollutant is considered significant if the increase would be equal to or greater than any of the pollutant-specific Significant Emissions Rates (SERs) listed under the definition of "significant" in the applicable PSD or NNSR regulations.[16] For those regulated NSR pollutants not specifically listed, *any* increase in emissions is significant for purposes of the PSD program.[17] As codified in the 2002 NSR Reform

[14] 40 CFR 52.21(b)(2).
[15] 40 CFR 52.21(b)(52).
[16] 40 CFR 52.21(b)(23) defines when emissions of listed pollutants are considered significant under the federal PSD program. These pollutants include, but are not limited to, the following: pollutants for which a NAAQS has been promulgated, fluorides, and sulfuric acid mist. 40 CFR 51.165(a)(1)(x) defines when emissions of listed pollutants are considered significant under the federal NNSR program.
[17] 40 CFR 52.21(b)(23)(ii). Under NNSR, regulated NSR pollutants include only pollutants for which NAAQS have been established and precursors to those pollutants for which the area is designated nonattainment. *See* 40 CFR 51.165(a)(1)(xxxvii). The SERs for all these pollutants are enumerated under 40 CFR 51.165(a)(1)(x)(A) and part 51, appendix S.II.A.10; additionally, per 40 CFR 52.21(b)(23)(iii), *significant* also means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct

Rule,[18] Step 1 considers the effect of the project alone, and Step 2 considers the effect of the project and any *other* emissions changes at the major stationary source that are contemporaneous to the project (*e.g.*, generally within a 5-year period plus construction) and creditable.

The procedure for calculating whether a proposed project would result in a significant emissions increase in Step 1 depends upon the type of emissions unit(s) to be included in the proposed project, which can be new, existing, or a combination of new and existing units (*i.e.*, multiple types of emissions units).[19] A "new emissions unit" is defined as "any emissions unit that is (or will be) newly constructed and that has existed for less than two years from the date such emission unit first operated."[20] If a source undertakes a project that involves constructing only one or more new emissions units, it applies the actual-to-potential (ATP) test, under which it determines whether the sum of the difference between the PTE of a regulated NSR pollutant from each new emissions unit following completion of the project and the baseline actual emissions equals or exceeds the significant amount for that pollutant.[21]

If the source undertakes a project that involves only changes to one or more existing emissions units, the source may use the actual-to-projected-actual (ATPA) test or the ATP test to

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within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

[18] In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. The agency refers generally to this rule as the "NSR Reform Rule." As part of the NSR Reform Rule, the EPA revised the NSR applicability requirements for modifications to allow sources more flexibility to respond to rapidly changing markets and plan for future investments in pollution control and prevention technologies. 67 FR 80185 (December 31, 2002).

[19] 40 CFR 52.21(b)(7). There are two types of emissions units, new and existing. A "replacement unit" as defined in the NSR regulations is an existing emissions unit.

[20] 40 CFR 52.21(b)(7)(i).

[21] The "significant amount," also known as the "significant emissions rate" for regulated NSR pollutants, can be found at 40 CFR 52.21(b)(23).

determine the resulting emissions increase.[22] Under the ATPA test, a significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions and the baseline actual emissions for each existing emissions unit equals or exceeds the significant amount for that pollutant.[23] If a source undertakes a project that includes both new and existing emissions units, it must use the ATP test to determine the emissions change for each new emission unit while the source can choose to use either the ATPA test or the ATP test for each existing unit.

The "projected actual emissions" of a unit is the maximum annual rate, in tpy, the existing emissions unit is projected to emit a regulated NSR pollutant in the future.[24] PTE is defined as a unit's maximum capacity to emit a pollutant under its physical and operational design.[25] The baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of a new unit is zero; and thereafter, for all other purposes, equals the unit's PTE.[26] Baseline actual emissions for existing units are determined based on the rate of actual emissions (in tpy) a unit has emitted in the past.[27]

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[22] 40 CFR 52.21(b)(41)(ii)(*d*). A source can also opt to use the actual-to-potential test for existing units.
[23] 40 CFR 52.21(a)(2)(iv)(*c*) and 40 CFR 52.21(a)(2)(iv)(*f*).
[24] The "projected actual emissions" of a unit is "the maximum annual rate, in tons per year, at which an existing emission unit is projected to emit a regulated NSR pollutant in any one of the 5 years (12-month period) following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit of that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 CFR 52.21(b)(41)(i).
[25] 40 CFR 52.21(b)(4).
[26] 40 CFR 52.21(b)(48)(iii).
[27] 40 CFR 52.21(b)(48).

If a source determines that a significant emissions increase would occur in Step 1, then the source may elect to perform the Step 2 contemporaneous netting analysis to determine if a significant net emissions increase would not occur at the major source and thus conclude the project does not trigger major NSR permitting, or in the alternative, the source may elect to forgo Step 2 and assume PSD or NNSR is triggered.[28] Under Step 2, the source accounts for all other increases and decreases in actual emissions that are contemporaneous to the project and are creditable.[29] An increase or decrease in actual emissions is contemporaneous if it occurs between 5 years before construction on the particular change commences and the date that the increase from the particular change occurs.[30] To be creditable, an increase or decrease cannot have been previously relied upon in the issuance of any NSR permit by the reviewing authority;[31] and an increase in actual emissions is only creditable to the extent that the new level of actual emissions exceeds the old level.[32] Further, a decrease may be accounted for in Step 2 only to the extent that (1) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions; (2) it is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and (3) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from

[28] The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase. 40 CFR 52.21(a)(2)(iv)(*a*).
[29] 40 CFR 52.21(b)(3)(i)(*b*).
[30] 40 CFR 52.21(b)(3)(ii); Permitting authorities can select an alternate contemporaneous period if approved in their Part D SIP or PSD program. *See* 45 FR 53676, 52680 (August 7, 1980).
[31] 40 CFR 52.21(b)(3)(iii)(a).
[32] 40 CFR 52.21(b)(3)(v).

the particular change.[33] In addition, in nonattainment areas, emissions reductions are only creditable if they have not been relied upon for demonstrating attainment or reasonable further progress.[34]

A project that results in a significant emissions increase in Step 1 and a significant net emissions increase under Step 2 of the NSR major modification applicability test is considered a major modification and requires a major NSR permit.

C. Project Emissions Accounting

In November 2020, the EPA promulgated the PEA rule[35] in which the EPA finalized clarifications to the Step 1 provisions of the major modification applicability test (*e.g.*, 40 CFR 52.21(a)(2)(iv)).[36] The revised language clarified that both emissions increases and decreases from projects may be considered in Step 1 of the NSR major modification applicability test, regardless of the types of emissions units implicated in that project.

The PEA rulemaking was preceded by a March 2018 memorandum from the EPA Administrator titled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program."[37] In that memorandum, "the EPA interpreted the…NSR

[33] 40 CFR 52.21(b)(3)(i)(*b*); 40 CFR 52.21(b)(3)(iii); 40 CFR 52.21(b)(3)(vi).
[34] 40 CFR 51.165(a)(1)(vi)(A)(*2*); 40 CFR 51.165(a)(1)(vi)(C); 40 CFR 51.165(a)(1)(vi)(E).
[35] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 FR 74890 (November 24, 2020).
[36] The regulations at 40 CFR 52.21 apply to the federal PSD program. The EPA has other NSR regulations including 40 CFR 51.165, 51.166, and appendix S of part 51, that contain analogous provisions. We cite 40 CFR 52.21 in this document as illustrative, but we propose to revise analogous provisions as specified in the regulatory text below. To the extent that there are different provisions that apply to the other regulations, as in, for example, the nonattainment context, that distinction has been noted.
[37] March 2018 Memorandum.

regulations [pre-2020 PEA rule] 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."[38]

The 2020 PEA rule revised the NSR regulations to make the permissibility of this approach clearer by changing the term "sum of the emissions increase" to "sum of the difference" in the context of the hybrid test that applies to projects involving multiple types of emissions units. That rule also added a provision to specify that the term "sum of the difference," as used for all types of units (new, existing and the combination of new and existing units), shall include both increases and decreases in emissions as calculated in accordance with those subparagraphs.[39]

D. Project Aggregation

In the 2020 PEA rule, the EPA also concluded that it is appropriate to apply its "project aggregation" interpretation and policy set forth in a 2018 final action on project aggregation[40] in Step 1 of the NSR major modification applicability test for all types of projects, including those that involve both increases and decreases in emissions.[41] The 2020 PEA rule specified that application of the 2018 final action on project aggregation may assist sources and/or reviewing authorities when determining the scope of a project in order to avoid the over-aggregation or under-aggregation of activities that could subsequently be considered an effort to circumvent the

[38] *Id*. at 1.
[39] 40 CFR 52.21(a)(2)(iv)(*g*).
[40] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 83 FR 57324 (November 15, 2018) ("the 2018 final action on project aggregation" or "the 2018 Project Aggregation Final Action"). This action completed the EPA's process of reconsidering a 2009 action on the topic of "project aggregation."
[41] 85 FR 748895.

NSR program. The 2020 PEA rule did not, however, include any regulatory text to require application of that policy to determine the scope of a project.

In the 2018 final action on project aggregation, the EPA explained that determining what constitutes a "project" under NSR is a case-by-case decision that is both site-specific and fact-driven. Because there is no predetermined list of activities that should be aggregated for a given industry or industries, the EPA established criteria for determining when nominally separate activities are considered one project under NSR. These criteria included the "substantially related" standard and the three-year rebuttable presumption that were contained in the 2009 EPA action titled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting" ("2009 NSR Aggregation Action").[42]
In articulating what substantially related means, the 2018 final action on project aggregation reaffirmed the 2009 NSR Aggregation Action and stated that activities occuring in unrelated portions of a major stationary source (*e.g.*, a plant that makes two separate products and has no equipment shared among the two processing lines) will not be substantially related. The guidance further specified that the test of a substantial relationship is based on the interdependence of the activities, such that substantially related activities are likely to be jointly planned and occur close in time and at components that are functionally interconnected.[43]

[42] 74 FR 2376 (January 15, 2009); The EPA stayed the 2009 NSR Aggregation Action in response to a petition for reconsideration it received on the 2009 NSR Aggregation Action and, in 2010, as part of the reconsideration proceeding, sought comment on the 2009 NSR Aggregation Action.
[43] *Id*. At 2378.

The 2009 NSR Aggregation Action also added the following: "[t]o be 'substantially related,' there should be an apparent interconnection — either technically or economically — between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity."[44]

The 2009 NSR Aggregation Action also stated that timing could be a basis for not aggregating separate projects, and it established a rebuttable presumption against aggregating projects that occur three or more years apart. The EPA justified its selection of three years as the presumptive timeframe in part by reasoning that three years "is long enough to ensure a reasonable likelihood that the presumption of independence will be valid, but is short enough to maintain a useful separation between relevant construction cycles, consistent with industry practice."[45] However, the EPA did note that this presumptive timeframe may be rebutted in certain circumstances. For instance, the 2009 NSR Aggregation Action noted that where there is

[44] *Id*; The 2009 NSR Aggregation Action was preceded by a 2006 proposal in which the EPA proposed language that "projects occurring at the same major stationary source that are dependent on each other to be economically or technically viable [should be]…considered a single project." Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting, 71 FR 54235 (September 14, 2006) ("2006 proposal"). The 2006 proposal sought to clarify policy that had been discussed in EPA guidance documents. *See*, *e.g.*, "Applicability of New Source Review Circumvention Guidance to 3M-Maplewood, Minnesota" (June 17, 1993), *https://www.epa.gov/sites/default/files/2015-07/documents/maplwood.pdf*. The preamble language explained the proposed revisions to the regulatory language by stating that "if a source or reviewing authority determines that a project is dependent upon another project for its technical or economic viability, the source or reviewing authority must consider the projects to be a single project and must aggregate all of the emissions increases for the individual projects in Step 1 of the major NSR applicability analysis." 71 FR 54235, 54245 (September 14, 2006).

[45] *Id*.

"evidence that a company intends to undertake a phased capital improvement project" where the activities "have a substantial economic relationship," this would likely overcome the presumption that those activities should not be aggregated.[46]

The 2009 NSR Project Aggregation Final Action and subsequent 2018 final action on project aggregation were developed to ensure "that NSR is not circumvented through some artificial separation of activities at Step 1 of the NSR applicability analysis where it would be unreasonable for the source to consider them to be separate projects."[47] Given this aim, the 2018 final action on project aggregation affirmed the example provided in the 2009 NSR Aggregation Action that phased capital improvement projects comprised of activities that have a substantial economic relationship between one another may need to overcome the presumption towards aggregation.[48]

In 2018, a different consideration arose from the EPA's effort to make clear that sources can account for decreases at Step 1. Commenters and petitioners on the 2020 PEA rule expressed concern that sources could over-aggregate activities in order to circumvent NSR. In other words, sources may be able to "avoid NSR by grouping multiple activities into a 'project' and only requiring NSR if the 'project,' taken together, will produce a significant emissions increase."[49] This concern is manifest only when some of aggregated activities produce quantifiable emissions decreases that are used to offset emissions increases from other activities, thus increasing the likelihood that the net emissions from the collection of activities would be at levels below the

[46] *Id*.
[47] 83 FR 57326.
[48] *Id*. at 57327 (citing 74 FR 2380, 2380).
[49] Petition for Reconsideration at 5.

thresholds at which major NSR applies. The EPA proposes to address this concern with revisions to the language defining "project" within the NSR regulations, as explained in further detail in section III. of this action.

E. "Reasonable Possibility" Recordkeeping and Reporting Provisions

In 2002, the EPA adopted recordkeeping and reporting requirements to help permitting authorities and stakeholders oversee compliance with NSR requirements at sources that determine a modification does not trigger major NSR requirements. Under those requirements, sources that saw no reasonable possibility that post-change emissions would prove higher than past actual emissions were not required to keep records. In 2005, the D.C. Circuit Court remanded this "reasonable possibility" recordkeeping and reporting provision to the EPA, holding that the "EPA failed to explain how it can ensure NSR compliance without the relevant data" and directed the EPA "either to provide an acceptable explanation for its 'reasonable possibility' standard or to devise an appropriately supportive alternative." *New York v. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005). The EPA promulgated rules in 2007 to define "reasonable possibility," which the D.C. Circuit Court upheld in a 2020 decision. *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021).[50]

[50] In *New Jersey v. EPA*, the D.C. Circuit upheld the EPA's 2007 reasonable possibility rule, stating that the EPA "offered a rational basis for adopting the 50 percent trigger." 989 F.3d 1038, 1051 (D.C. Cir. 2021). The court recognized that in the preamble of the 2007 reasonable possibility rule, the EPA "strove for a balance between ease of enforcement and avoidance of requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community." *Id.* The court also recognized in its ruling that the EPA solicited comment on other percentage increase triggers and that the EPA's "final rule accounted for variability in projections due to demand growth emissions and thereby addressed the principal objection of commenters, including [the] petitioner[s], to the 50 percent trigger." *Id*.

In the 2020 PEA rule, the EPA concluded that the provisions at 40 CFR 52.21(r)(6) and other locations in the NSR rules (the "reasonable possibility" or "RP" provisions) are adequate to ensure sufficient monitoring, recordkeeping and reporting of emissions for projects determined not to trigger major NSR, after considering both emissions increases and decreases from the project in Step 1 of the NSR major modification applicability test.[51] The reasonable possibility provisions apply to projects involving existing emissions units at a major stationary source in circumstances where the owner or operator elects to use projected actual emissions in determining the emissions increase resulting from changes at such unit(s) and where there is a reasonable possibility (as defined in 40 CFR 52.21(r)(6)(vi)) that a project that is not considered a major modification may nevertheless actually result in a significant emissions increase. When the reasonable possibility criteria in 40 CFR 52.21 are triggered,[52] specific pre- and post-project recordkeeping, monitoring, and reporting requirements in paragraph 40 CFR 52.21(r)(6) must be met, depending on the circumstances.

As defined in the regulations, a reasonable possibility exists when the owner or operator calculates the project to result in either: (1) a projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase" for the regulated NSR pollutant; or (2) a projected actual emissions increase that, added to the amount of emissions excluded, sums to at least 50 percent of the amount that is a "significant emissions increase" for the regulated NSR pollutant. For a project for which a reasonable possibility exists only under

[51] 85 FR 74890, 74895 (November 24, 2020).
[52] As noted earlier, this proposal refences 40 CFR 52.21 as one such place where the applicable regulations may be found, but there are other NSR regulations that contain the same language.

criterion (2), and not also within the meaning of criterion (1), the RP provisions at (r)(6)(ii) through (v) do not apply to the project. Among other requirements, the RP provisions at (r)(6)(ii), (vi), and (v) require that the owner or operator of an electric utility steam generating unit (EUSGU) submit a copy of the information recorded under the RP provisions to the reviewing authority.

Additionally, under the monitoring provisions at 40 CFR 52.21(r)(6)(iii), as applicable, sources must calculate and maintain a record of annual emissions in tpy on a calendar year basis for a period of 5- or 10-years following resumption of regular operations after the change, depending on the type of change at the unit(s). Post-project annual reporting is required for projects involving EUSGUs, whereas for projects not involving EUSGUs, owners or operators need only maintain post-project records on-site and submit a report if certain criteria listed in the regulations are met.[53] In accordance with 40 CFR 52.21(r)(7), the information required to be documented and maintained pursuant to paragraph 40 CFR 52.21(r)(6) shall be available for review upon a request for inspection by the reviewing authority or the general public. The requirements of 40 CFR 52.21(r)(6) apply equally to units with projected increases and projected decreases in emissions, as long as there is a reasonable possibility that the project could result in significant emissions increase and those units are part of the project (*e.g.*, their emissions "could be affected" by the project). Projects that do not meet the reasonable possibility criteria are not subject to any specific recordkeeping requirements under the federal regulations.

[53] 40 CFR 52.21(r)(6)(iv).

For projects that trigger the reasonable possibility standard for one or more regulated NSR pollutants, the records that the owner or operator must maintain include (a) a description of the project; (b) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and (c) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded including an explanation for why such amount was excluded, and any netting calculations, if applicable.[54]

In this action, the EPA is proposing revisions to the reasonable possibility standard to further clarify how the recordkeeping and reporting provisions are intended to apply. The EPA is also proposing to strengthen the standard to improve accountability in those instances where the PEA rule is applied. These revisions are presented in section VI. of this action.

III. Proposed Definition of "Project"

In this action, the EPA is proposing to revise the existing definition of "project" in the major NSR regulations. The term "project" is currently defined as "a physical change in, or change in the method of operation of, an existing major stationary source."[55] The EPA's proposed revision would add detail to this definition in a manner consistent with the 2018 final

[54] Under 40 CFR 52.21(b)(41)(ii)(*c*) sources "shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions…and that are also unrelated to the particular project, including any increased utilization due to product demand growth."

[55] 40 CFR 51.165(a)(1)(xxxix); 40 CFR 51.166(b)(51); 40 CFR appendix S to part 51 II.A.33.; 40 CFR 52.21(b)(52).

action on project aggregation. The EPA is proposing to further define a project as "a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable."

In comments on the 2020 PEA rule and in the petition for reconsideration, some stakeholders expressed a concern that the 2020 PEA rule would enable a source to avoid NSR by grouping multiple activities into a "project" and only requiring NSR if the "project," taken together, will produce a significant emissions increase. The comments add that this would allow source owners/operators to consider only emissions offsets that they selectively pair with the change as a part of the "project" and would allow source owners/operators to disregard an actual source-wide emissions increase resulting from the change being permitted. [56]

In the final 2020 PEA rule, the EPA stated that "the application of the 'substantially related' test of the 2018 final action on project aggregation should be sufficient to prevent sources from arbitrarily grouping activities for the sole purpose of avoiding the NSR major modification requirements through project emissions accounting."[57] The EPA added in that rulemaking that "the 'substantially related' test…applies to prevent aggregating into a single project those activities that do not represent such project, so decreases from activities that do not meet this test

[56] Sierra Club, et al., Response to Request for Comments on Proposed Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 FR 39244 (August 9, 2019) at 5; see also Petition for Reconsideration at 4; comment from Steve Odendahl, Manager Air Law for All, Ltd. Re: Docket ID No. EPA-R04-OAR-2022-0397 (August 25, 2022) at page 4.
[57] 85 FR 74890, 74898 (November 24, 2020).

should not be considered in Step 1."[58] In the final rule, however, the EPA did not include regulatory text to require application of the provisions contained in the 2018 final action on project aggregation. The EPA is now proposing a definition of "project" that would codify a definition that is consistent with the 2018 final action on project aggregation.

The EPA is proposing changes to the definition of "project" to address concerns raised in the petition for reconsideration and in comments submitted on the PEA rule. Both the petition for reconsideration and comments on the 2020 PEA rule argued that a more-specific definition of a "project" would guard against circumvention of the NSR applicability process. Indeed, in their petition for reconsideration, petitioners argued that the EPA's 2020 PEA rule was flawed because it failed to ensure that emissions decreases taken in Step 1 to avoid NSR applicability result from the change being evaluated. Further petitioners noted that nothing in the final rule required states to use the "substantially related" test, and that EPA's statement that the "substantially related" would be appropriate for determining if decreases can be accounted for in Step 1 was insufficient.[59] By introducing a definition of "project" that codifies the 2018 project aggregation guidance, the EPA hopes to address these concerns.

The EPA agrees with commenters that a more specific regulatory definition of project would provide greater clarity regarding the activities included within the scope of a project for the purpose of determining whether the project constitutes a major modification under the NSR regulations.[60] The EPA has recognized that some line must be drawn between those activities

[58] *Id*. at 74899.
[59] Petition for Reconsideration at 6-10.
[60] States would generally be required to update their NSR regulations to incorporate the new definition of project and submit those regulations to the EPA for approval into the SIP.

that constitute a single "physical change…or change in the method of operation" and those changes at a source that are separate.[61] Historically, the EPA developed a policy on determining the scope of a "project," which evolved largely "from specific, case-by-case after-the-fact inquiries related to the possible circumvention of NSR in existing permits."[62] The subsequent issuance of final actions reflecting EPA interpretations and policy, while providing additional clarity, did not establish legal requirements and did not create consistency with respect to the application of Step 1 by reviewing authorities.[63] Several commenters on prior EPA actions regarding project aggregation noted that there is evidence in the rulemaking record that NSR applicability decisions based upon informal guidance and letters creates confusion.[64] The EPA is, therefore, proposing to adopt a controlling definition of "project" that is "a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable."

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[61] *See*, *e.g.*, 71 FR 54244, 54245 (describing the EPA's development of an aggregation policy "to ensure the proper permitting of modifications that involve multiple projects").
[62] *Id*.
[63] In the 2018 final action on project aggregation the EPA stated that "We acknowledge that, by not making any changes to the regulatory text, as had been proposed, it may have been somewhat unclear to some whether state and local air agencies have to adopt or implement the elements of the 2009 NSR Aggregation Action, and, if so, how they should do so."
[64] *See*, *e.g.*, "Comments of the Utility Air Regulatory Group on the Environmental Protection Agency's Proposed Rule Concerning Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration (April 15, 2010)," Docket EPA-HQ-OAR-2003-0064; "Comments of Toyota Motor Engineering & Manufacturing North America (Nov. 13, 2006)," Docket EPA-HQ-OAR-2003-0064; "Comments of Chevron Corporation (November 10, 2006)," Docket EPA-HQ-OAR-2003-0064.

Concerns of over- and under-aggregation illustrate the need for adding criteria to the NSR regulations for determining when nominally separate changes should be considered a single "project" for purposes of determining NSR applicability. The EPA has found that in some cases activities were not aggregated despite evidence that they were substantially related. In those instances, project disaggregation determinations were made without documentation for such a determination.[65] The EPA is seeking comments on examples of under- or over-aggregation of activities, *e.g.*, aggregation of activities without regard to technical and economic interrelatedness, and disaggregation of activities into multiple projects leading source to forgo major NSR requirements.

Based on these concerns, the EPA therefore finds it necessary to establish a controlling standard in its regulations to draw a line between those activities that are to be considered a single "physical change or change in the method of operation" (*i.e.*, project) and those that are separate. The EPA is proposing to adopt a revised definition of project to clarify the activities that must be considered when evaluating whether a project (*i.e.*, a physical change or change in

[65] *See*, *e.g.*, In the Matter of Suncor Energy (U.S.A.), Inc. Commerce City Refinery, Plant 2 (East), Order on Petition Nos. VIII-2022-13 & VIII-2022-14, pages 72-77 (July 31, 2023) (requiring that, in the absence of applying the EPA's 2018 Project Aggregation Final Action, the review authority "must ensure that its NNSR applicability determination…including the decision not to aggregate…changes with similar changes…is based on reasonable grounds and properly supported by the permit record."); *see also* In the Matter of Consolidated Environmental Management, Inc.– Nucor Steel Louisiana, Order on Petition Nos. VI-2010-02 & VI-2011-03 (March 23, 2012) (finding that the reviewing authority "did not analyze any regulatory definition of 'project,' such as the definition in 40 CFR 52.21(b)(52), before applying that term" and that "while [the reviewing authority] suggests that [the source] has not attempted to split the projects to avoid PSD permitting because both processes were subject to PSD review…this statement does not address whether [the reviewing authority's] PSD review adequately addressed the full scope of the source)."

the method of operation or a modification) is a major modification subject to NSR permitting requirements.[66]

Under the applicability analysis framework in the EPA's NSR regulations, it is important to accurately determine which activities should be considered part of a single project (*i.e.*, modification). There are consequences to either under- or over-aggregating activities; namely that sources undergoing modifications may inconsistently use the flexibility of imprecise regulatory provisions to systematically avoid major source NSR.

This potential pitfall of aggregation arises because the regulatory framework provides avenues to disaggregate "projects." The CAA definition of "modification" as "any physical change…or change in the method of operation" leaves ambiguity as to what activities are to be included in the source "modification" when the source may be undertaking contemporaneous activities that may all increase the source's emissions.[67] The EPA has previously only defined a "project" as "a physical change in, or change in the method of operation of, an existing major stationary source."[68] A "project" is a major modification for a regulated NSR pollutant if it causes a significant emissions increase (as defined at 40 CFR 52.21(b)(40)) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of 40 CFR 52.21).[69]

This definition may not be sufficient to guard against the potential for sources to selectively aggregate or disaggregate multiple projects such that they are able to avoid major NSR in a manner that is contrary to the intent of the CAA. The rule revisions proposed in this action aim

[66] CAA section 111(a)(4); CAA section 165(a)(3).
[67] CAA section 111(a)(4).
[68] 40 CFR 52.21(b)(52).
[69] 40 CFR 52.21(a)(2).

to bring additional clarity and consistency by providing a controlling standard that allows reviewing authorities to identify situations where activities should be grouped together or separated. By adopting a more specific definition of "project," this action, if finalized as proposed, would enhance the ability of reviewing authorities to enforce against avoidance of major NSR requirements due to the improper aggregation or disaggregation of activities.

In the 2020 PEA rule, the EPA referenced the 2018 Project Aggregation Final Action in recognition that "it is appropriate to limit the scope of emissions decreases that can be considered at Step 1 to only the project under review and to not allow sources to attempt to avoid NSR by expanding the scope of decreases to those that are not truly part of the project."[70] But the EPA did not require application of the 2018 Project Aggregation Final Action in the 2020 PEA rule. The EPA responded to comments stating "if PEA is to be allowed, the 'substantially related' standard must be applied to the activities that result in emissions increases and decreases," by stating that "applying the 'substantially related' criteria on project aggregation for those reviewing authorities that implement PEA should alleviate any concerns about potential NSR circumvention as part of Step 1 of the major modification applicability test."[71] Therefore, the EPA predicated finalization of the PEA rule on the basis that the 2018 Project Aggregation Final Action, or some analogous definition of project, would be applied by permitting authorities to prevent circumvention of the NSR program requirements with the application of PEA, yet did not establish such a requirement in that rule. The EPA is therefore proposing in this action to

[70] 85 FR 74898.

[71] Response to Comments Document on Proposed Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting" - 84 FR 39244, August 9, 2019 at 73-5 (October 2020).

codify a definition of a project consistent with the 2018 Project Aggregation Final Action to alleviate the potential for NSR circumvention that it highlighted in the 2020 PEA rule and Response to Comments document to that action.[72] The EPA is proposing this in light of evidence that the 2018 Project Aggregation Final Action or some similar definition of "project" is, in some instances, not being applied by reviewing authorities.[73]

The project definition criteria in the 2018 Project Aggregation Final Action are appropriate criteria for defining a project and comport within the purpose and language of the CAA.[74] More specifically, activities that occur at the same major stationary source that are dependent on each other to be economically or technically viable should be considered a single project. If finalized, the proposed definition of project will enable a more consistent application of the aggregation criteria by both those considering the applicability of NSR to proposed modifications as well as for those conducting an after-the-fact inquiry regarding whether NSR was circumvented through the failure to aggregate dependent physical or operational changes at a source (or over-aggregation of unrelated activities).

When considered with application of PEA, a more specific definition of project would help ensure that emissions decreases accounted for under Step 1 of the NSR applicability process are

[72] 85 FR 74890, 74900.
[73] Supra note 67.
[74] In the 2018 final action on projection aggregation, the EPA argued that the "substantially related" test would not result in the elimination of a type of physical change that Congress intended to cover (*i.e.*, the change that consists of the group of nominally-separate changes that comprise a project but do not qualify as 'substantially related'). In that final action, the EPA reasoned that a "common meaning" of a single "change" would not include multiple changes that are not substantially related, such as changes that are undertaken at a source at different times, or undertaken for different purposes, or are otherwise related to each other. 83 FR 57332.

substantially related to other activities comprising the physical change or change in the method of operation (*i.e.*, a project) at the source. Upon finalization of this element of this proposed action, any decrease in emissions accounted for under Step 1 of the NSR applicability test must be substantially related to the other activities involved in the project. Therefore, for the reasons discussed in the 2018 Project Aggregation Final Action, multiple changes that are "substantially related" would be considered one project for purposes of determining NSR applicability. Reviewing authorities that do not allow for project emissions accounting at Step 1 would still benefit from a codified definition of "project" as greater specificity can allow for identification of, and enforcement against, situations where a source may seek to avoid major NSR requirements by disaggregating activities that are "substantially related."

The EPA is not proposing that this definition of project include a specific timeframe that defines "occurring contemporaneously," such as the three-year rebuttable presumption from the 2018 Project Aggregation Final Action. Since promulgation of the 2018 Project Aggregation Final Action, the EPA has obtained information that suggests a three-year timeframe may not adequately represent the wide variety of projects performed across all source categories. For example, while the EPA has become aware of several multi-year expansion projects that span more than three years, the EPA does not have information on the percentage of projects that that involve activities occurring within any specific time period.[75] Accordingly, the EPA is taking comment on whether a specific temporal component of the project aggregation criteria, *i.e.*, the three-year rebuttable presumption contained in the 2018 final action on project aggregation

[75] Supra note 67.

should be retained. The EPA is requesting comment on this proposed definition of "project," including whether the proposed relationship-based aggregation criteria are appropriate and whether there would be any potential issues with implementing the definition for any particular type of project or source category.

In the event the EPA finalizes a temporal component to the definition of project, the EPA is soliciting comment on whether a rebuttable presumption should be retained. The EPA requests comments on the proposed codification of the "substantially related" test without the presumption, as well as any comments that may support, in the alternative, codifying a rebuttable time-based presumption of three years or some other period. The EPA requests that comments in support of a rebuttable time-based presumption provide evidence of why the presumption and associated time-period would be appropriate for purposes of NSR applicability across affected source types.

Irrespective of the finalization of this proposal, the EPA advises that permitting authorities scrutinize project determinations in those cases where a source concurrently submits a major and minor NSR permit application, when the source submits multiple minor NSR permit applications within a short period of time, or where there is otherwise evidence that some or all of the activities associated with those permit applications may be substantially (*i.e.*, technically and economically) related. The EPA would like information on the impacts the definition of "project" proposed in this action, if finalized, would have in safeguarding against potential over-aggregation or under-aggregation of projects with the intent to circumvent major NSR.

IV. Safeguard Against "Double Counting" of Emissions Decreases and Increases

The EPA is requesting comment on the potential, within a project emissions accounting framework, for source owners or operators to "double count" emissions decreases across multiple projects, and whether the NSR regulations should include language to prevent this.[76] The definition of projected actual emissions provides that the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[77] However, there is no corresponding provision that limits eligible emissions decreases to only those that result from the project being evaluated (*i.e.*, a decrease from an existing emissions unit is simply calculated as the difference between projected actual emissions and baseline actual emissions). Therefore, it seems possible that a decrease resulting from an earlier project (one completed after the selected baseline actual emissions period) could be accounted for in a subsequent project being evaluated, even if that project had no causal relationship to the decrease. The EPA acknowledges that this situation can occur when multiple projects during the baseline actual emissions determination timeframe involve the same existing emissions unit, but the Agency believes that "double counting" of emissions decreases will be addressed by the requirement (discussed below) that any decreases be made enforceable in order to be eligible for

[76] *See* Virginia Department of Environmental Quality (VDEQ) comments on the Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting (84 FR 39244) at page 3 (noting that the ability of "existing major sources to engage in a nearly continuous series of projects to increase efficiency, reduce cost and improve product quality for decreases" lends itself to a potential "double counting" issue).
[77] 40 CFR 52.21(b)(41)(ii)(*c*).

consideration in the Step 1 applicability calculation.[78] The EPA is nonetheless requesting comment on adding a provision in the NSR regulations to require that the baseline actual emissions of a unit with a projected decrease in emissions be adjusted to account for any portion of that decrease in emissions that would not result from (*i.e.*, is unrelated to) the project being evaluated, but would also like commenters to suggest alternatives to this language.

The EPA is aware that the potential also exists for "double counting" emissions increases under the existing regulations, such that major NSR may be triggered when a project itself would not result in a significant emission increase. For example, when projecting emissions from an affected existing emissions unit for Project A (the current project) a source must also consider whether any future separate project(s) during the required projection period (*i.e.*, 5 or 10 years after resuming regular operation) may affect the projected actual emissions from the unit, and if that affect is an increase that the unit could not have accommodated during the selected baseline period, that increase must be accounted for as part of the project applicability analysis for Project A. This may result in a situation where emissions increases are "double counted" in the NSR applicability process.

Thus, the possibility for "double counting," or imperfect allocation of emissions increases and decreases to a project, exists in limited circumstances, but revising the regulations to completely address any such possible situations would add significant complexity and it is unclear whether any such revisions are necessary or warranted. The EPA is requesting comment

[78] Under the existing NSR regulations, baseline actual emissions must be adjusted downward to exclude any emissions that would have exceeded a n emission limitation with which the source must currently comply, which would include any limits imposed to qualify decreases as part of prior step 1 applicability analyses involving a common unit or units.

on the prevalence of either of these forms of "double counting," specific examples, if applicable, of each, and whether the EPA should revise the NSR regulations to address one or both of these possible issues and, if so, how it should revise the regulations to rectify this potential issue.

V. Enforceability of Emissions Decreases

The EPA is proposing, in a distinct and severable portion of this proposal, to require that decreases associated with a project under the Step 1 significant emissions increase determination be legally and practicably enforceable (*i.e.*, enforceable as a practical matter). The EPA is proposing to revise the regulations accordingly by adding "a decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 CFR 52.21(b)(3)(vi)(*b*)" to the "significant emissions increase" definition at 40 CFR 52.21(a)(2)(iv)(*g*).[79]

The EPA is proposing this change as a safeguard to ensure that emissions decreases that are accounted for in the NSR applicability process will occur and be maintained. This is consistent with the requirement under CAA section 110 that "each implementation plan submitted by a State include enforceable emission limitations" and "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter."[80] The EPA is proposing this change to address concerns raised in the petition for reconsideration. Petitioners argued that under the 2020 PEA rule the

[79] The EPA is also proposing analogous regulatory language for 40 CFR 51.165, 40 CFR 51.166, and appendix S to 40 CFR part 51.
[80] CAA section 110(a)(2)(B) and (C).

EPA lacked oversight such that it cannot ensure that projected emission decreases will occur, or that they will be maintained over time.[81] A similar concern was expressed by commenters to the 2020 PEA rule, who argued the rule "would make NSR requirements unenforceable[,]" and that finalization of the 2020 PEA rule was unlawful because "EPA fails to require that…decreases [accounted for in Step 1] be…enforceable as a practical matter."[82] These commenters argued that enforceability is a regulatory safeguard that is required to ensure that any emission decreases relied upon to offset an otherwise emissions-increasing change are real and will remain in effect.[83] In proposing enforceability of decreases accounted for in Step 1, the EPA hopes to provide sufficient oversight that will address petitioners and commenters concerns.

Under the existing NSR regulations, projected actual emissions are not required to be made enforceable, regardless of whether the result of the calculation is an emission increase or decrease. In some cases, a projection may be enforceable, at least in part, if it is based on separate CAA legal authority (*e.g.*, NSPS, NESHAP, SIP), but there is no independent requirement in the NSR applicability procedures for such enforceability. In the 2002 NSR Reform Rule, the EPA elected not to require that projected actual emissions be made enforceable because establishing such a requirement may have "place[d] an unmanageable resource burden on reviewing authorities" and because the EPA did not believe at that time that it was necessary to make future projections enforceable in order to adequately enforce the major NSR

[81] Petition for Reconsideration at 11-12.
[82] Sierra Club, et al., Response to Request for Comments on Proposed Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 FR 39244 (August 9, 2019) at 13-24.
[83] *Id*.

requirements.[84] However, with the more explicit recognition that decreases in emissions may be considered in the Step 1 significant emissions increase determination, there may be reason to require that such decreases be enforceable. Because of the predominant impact that one or more claimed decreases in emissions involved in a project could have on the determination of whether the project constitutes a major modification, additional safeguards are appropriate to ensure that such decreases actually occur and that they are maintained. The existing framework under the reasonable possibility provisions and the revisions to that framework proposed in this action may be insufficient to provide that assurance. While the revisions proposed to the "reasonable possibility" provisions in section VI. of this action will allow reviewing authorities to verify that decreases accounted for at Step 1 by source owner or operators actually occur, they may not provide adequate recourse to reviewing authorities if the decreases do not occur as projected. While source owners or operators are required to submit a report to the reviewing authority when emissions differ from preconstruction projections, this requirement only applies when actual emissions exceed baseline actual emissions "by a significant amount" for the regulated NSR pollutant.[85] Consequently, source owner or operators may overestimate emissions decreases at Step 1 with no recourse provided actual emissions are not significant.

The EPA is thus proposing to revise the existing definition of "significant emissions increase" in the major NSR regulations to add that a decrease can only be accounted for at Step 1 if it meets the creditability requirements for decreases in the existing "significant net emissions increase" definition. The EPA is taking comment on this proposed requirement. Specifically, the

[84] 67 FR at 80204.
[85] 40 CFR 52.21(r)(6)(v).

EPA is requesting input from commenters on the types of projects that would be impacted by a requirement that emission decreases accounted for under Step 1 of the NSR applicability process be enforceable prior to beginning actual construction and the effect that such a requirement would have on project decision-making and project outcomes. The EPA is also requesting comment on the following questions related to this proposal:

- How would a requirement that emissions decreases under Step 1 meet the criteria currently applicable to decreases accounted for under Step 2 impact accountability and enforceability of emissions limitations?
- How can the EPA justify a distinction with respect to enforceability requirements by differentiating projections resulting in an increase versus those projections that result in a decrease in emissions given that inaccuracies in projections, in either case, may result in improper applicability conclusions?
- Is there a more effective regulatory revision to require that decreases at Step 1 are enforceable than what is being proposed in this action? Why would your proposed alternative be preferable to the revisions proposed by the EPA to the "significant emissions increase" definition?
- Is this proposed requirement necessary for added assurance that decreases accounted for by a source under the project emissions accounting process actually occur and are maintained, or are the "reasonable possibility" requirements in the recordkeeping and reporting provisions, including the revisions to these provisions described in section VI., a sufficient means of assurance?

- Finally, the EPA is taking comment on revising the regulations to expressly disallow project emissions accounting such that only emissions increases can be considered under the Step 1 significant emissions increase determination.

VI. "Reasonable Possibility" Recordkeeping and Reporting Regulations

In this rulemaking, the EPA is proposing both clarifications to the existing "Reasonable Possibility" recordkeeping and reporting requirements and a strengthening of the regulations by requiring that all sources crediting a decrease at Step 1 maintain records and report information under 40 CFR 52.21(r)(6). As with the 2007 Reasonable Possibility ("RP") rule, the EPA is again "analyz[ing] the trade-off between compliance improvement and the burdens of data collection and reporting" in this proposal.[86]

A. Clarification of Existing "Reasonable Possibility" Requirements

The EPA is proposing regulatory language to clarify certain existing RP requirements to ensure appropriate and consistent application of those requirements by affected sources and reviewing authorities. This includes clarifying (1) the emissions units that should be included in the project actual emissions calculation; (2) the calculation to be included in the description of the applicability test used to determine that the project is not a major modification; (3) the emissions units to be included in the monitoring requirement at 40 CFR 52.21(r)(6)(iii); (4) the provisions that apply to projects that involve an electric utility steam generating; and (5) the emissions units that should be included in the "projected actual emissions increase" used to determine whether there is a "reasonable possibility" under 40 CFR 52.21(r)(6)(vi).

[86] *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021) (citing *New York*, 413 F.3d at 44 (Williams J., concurring)).

The provisions of 40 CFR 52.21(r)(6) apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units in circumstances where the owner or operator elects to use the method specified in 40 CFR 52.21(b)(41)(ii)(a) through (c) for calculating projected actual emissions from any existing emissions unit and there is a reasonable possibility that a project not classified as a major modification based on those projections may actually result in a significant emissions increase of such pollutant. The existing regulations define a project as "a physical change in, or change in the method of operation of, an existing major stationary source." This leaves ambiguity with respect to the emissions units that should be included in the projected actual emissions calculation. To make this clear, consistent with the EPA's original intent, the Agency is proposing revisions to 40 CFR 52.21(r)(6) and corresponding sections of the regulations to replace the terms "at existing emissions units" with "that involve one or more existing emissions units" and adding at the end of that paragraph, the phrase "from any existing emission unit."

The EPA is also proposing that the requirement under 40 CFR 52.21(r)(6)(i)(*c*) that the pre-project record include "a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant" also include the PTE of an emissions unit, as applicable. It is important that the pre-project NSR applicability record include all emissions units that could be affected by the project, including those units for which the actual-to-potential (ATP) test applies, *i.e.*, any new emissions unit(s) and any existing emissions unit(s) for which the owner or operator elects to use PTE in lieu of projected actual emissions as provided by 40 CFR 52.21(b)(41)(ii)(*d*). To make this clear under 40 CFR 52.21(r)(6)(i)(*c*), the

EPA is proposing to add "or the potential to emit, as applicable" after "the projected actual emissions" in that subparagraph.

The EPA is proposing to clarify that the monitoring provisions in 40 CFR 52.21(r)(6)(iii) apply to all the emissions units identified in 40 CFR 52.21(r)(6)(i)(*b*) if the project increases the design capacity or potential to emit of any of those emissions units. The EPA is proposing to revise the language at the end of this paragraph from "if the project increases the design capacity or potential to emit that regulated NSR pollutant at such emissions unit" to "if the project increases the design capacity or potential to emit that regulated NSR pollutant at any emissions unit identified in 40 CFR 52.21(r)(6)(i)(*b*)."

The EPA is proposing to clarify that the provisions of 40 CFR 52.21(r)(6)(iv) apply to projects that involve an electric utility steam generating unit, and that the provisions of 40 CFR 52.21(r)(6)(v) apply to projects that do not involve an electric utility steam generating unit. The EPA believes this clarification is appropriate to address the reporting requirements for projects that involve one or more electric utility steam generating units as well as other emissions units and to appropriately focus the requirements on the nature of the project rather than the emissions unit. To make this clarification under 40 CFR 52.21(r)(6)(iv), the EPA is proposing to revise "if the emissions unit is an electric utility steam generating unit" to read "if the project involves an electric utility steam generating unit." To make this clarification under 40 CFR 52.21(r)(6)(v), the EPA is proposing to revise "if the unit is a unit other than an electric utility steam generating unit" to read "if the project does not involve an electric utility steam generating unit." The EPA would like to make clear that the contents of the report required under 40 CFR 52.21(r)(6)(iv) for projects that involve an existing electric utility steam generating unit shall include the annual

emissions from all units involved in the project as calculated pursuant to 40 CFR 52.21(r)(6)(iii). The EPA believes this clarification is appropriate to ensure that, for projects that involve one or more electric utility steam generating units as well as other emissions units, the required reports include the annual emissions from all emissions units involved in the project consistent with the requirement under 40 CFR 52.21(r)(6)(v) for projects that do not involve an electric utility steam generating unit. To make this clarification under 40 CFR 52.21(r)(6)(iv), the EPA is proposing to revise "setting out the unit's annual emissions" to read "setting out the annual emissions for each emissions unit being monitored pursuant to paragraph (r)(6)(iii)."

The "projected actual emissions increase" used to determine whether there is a "reasonable possibility" under 40 CFR 52.21(r)(6)(vi) means the sum of the emissions changes of a regulated NSR pollutant for each emissions unit that could be affected by the project calculated using the appropriate procedure identified at 40 CFR 52.21(a)(2)(iv) (*i.e.*, the ATP test for any new emissions unit(s) and the ATPA applicability test for any existing emissions unit(s)). This includes all the emissions units identified in accordance with 40 CFR 52.21(r)(6)(i)(*b*) and is not limited to existing emissions units, or to those existing emissions units for which the owner or operator elects to use projected actual emissions. A full accounting of the project emissions increase is needed to determine whether and how the RP requirements apply.

The EPA believes these clarifications to the RP recordkeeping and reporting requirements would help ensure that sources consistently determine the applicability of the reasonable possibility requirements in 40 CFR 52.21(r)(6) and perform the recordkeeping, monitoring, and reporting needed to verify that projects determined not to constitute a major modification do not, after operation, result in a significant emissions increase. The proposed

clarifications would thereby enhance accountability of sources relying on projected actual emission in their NSR applicability determinations and enforcement of the NSR provisions.

In their petition for reconsideration, petitioners took issue with the EPA's "self-reporting and self-monitoring provisions" under 40 CFR 52.21(r)(6) because the revisions to the "reasonable possibility" provisions the EPA took to address the D.C. Circuit's decision in *New York v. EPA* apply only to emissions increases. Petitioners stated that as a result of this, sources that account for an unenforceable emissions decrease at Step 1 such that they avoid a Step 2 netting analysis would not be subject to the "reasonable possibility" provisions. Petitioners add that that the lack of recordkeeping and reporting requirements in these instances prevent effective oversight and enforcement by the reviewing authority. [87]

In the response letter to the petition for reconsideration, the EPA noted that it responded to similar comments in the 2020 PEA final rule. The EPA stated in that rule that 40 CFR 52.21(r)(6)(i)(*b*) requires a source to identify emissions units "whose emissions of a regulated NSR pollutant could be affected by the project." The EPA stated that the use of "affected" as opposed to "increased" supports the EPA's view that the "reasonable possibility" test can be used to track both the increases and decreases from a project. The EPA added that the information required for collection under 40 CFR 52.21(r)(6)(i)(*c*) similarly can apply to both increases and decreases from the project. As a result, in that action, the EPA disagreed that the "reasonable possibility" provisions were inadequate to account for projects that included emissions decreases.[88]

[87] Petition for Reconsideration at 22 (citing 84 FR 39251).
[88] 85 FR at 74897.

Although EPA continues to support this reading of the existing regulations, to better address the concern expressed by petitioners that the existing RP provisions "do not provide an effective mechanism to ensure that unenforceable emission decreases … will … be qualitatively equivalent to the increases they purportedly offset," the EPA is proposing to revise the text of the NSR applicability regulations at 40 CFR 52.21(a)(2)(iv)(*b*) to more clearly state that the major modification applicability calculations must include all of the emissions units that could be affected by the project, consistent with 40 CFR 52.21(r)(6)(i)(*b*). Affected emissions units may include new, modified, and non-modified affected emissions units involved in the project. Non-modified affected emissions units are existing emissions units that will not undergo a physical change or change in the method of operation but that could realize a change in utilization as a result of the project, including increases resulting from removal of a process bottleneck (what we often call "de-bottlenecking"). The existing language under 40 CFR 52.21(a)(2)(iv)(*b*) states that "[t]he procedure for calculating … whether a significant emissions increase … will occur depends upon the type of emissions units being modified," which is unclear with respect to the need to also include non-modified existing emissions units that could be affected by the project. The proposed clarification to the regulations will provide consistency between the applicability and RP regulations and help ensure that all emissions units that could be affected by a project and all corresponding emissions increases and decreases are included in the applicability calculations and post-project monitoring, recordkeeping, and reporting.

Finally, the EPA proposes to clarify the meaning of the term "differ," as used in the reporting requirements for projects that do not involve an electric utility steam generating unit under 40 CFR 52.21(r)(6)(v). This provision provides that a reporting obligation is triggered, in part, when

the annual emissions, in tpy, from a project "differ from the preconstruction projection as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section." First, the EPA does not intend for a difference between post-project emissions and pre-project projection by itself to trigger reporting. Rather, the EPA intends for reporting to be triggered under 40 CFR 52.21(r)(6)(v) when post-project emissions differ from the preconstruction project in a way that indicates that the project did in fact result in a significant emissions increase. Second, the term "differ" is not synonymous with "exceed," and that distinction is important in determining when reporting is required under 40 CFR 52.21(r)(6)(v). The EPA intends to require reporting when emissions exceed the baseline actual emissions by a significant amount and exceed the preconstruction projection, and when actual emissions monitored and recorded after a project in accordance 40 CFR 52.21(r)(6)(iii) that do not exceed the preconstruction projection may nevertheless differ in a way that materially impacts the validity of the pre-project NSR applicability conclusion. For example, post-project actual emissions data may indicate that the portion of emissions excluded pursuant to 40 CFR 52.21(b)(41)(ii)(*c*) was overestimated for one or more existing emissions units. Thus, while the post-project emissions calculated for the project may not have exceeded the pre-project projection, there may be evidence that the emissions increase from the project would have been significant had certain emissions not been erroneously excluded. If such evidence exists, and if the emissions from all project-affected emissions units exceed the baseline actual emissions by a significant amount, a report must be submitted in accordance with 40 CFR 52.21(r)(6)(v). The EPA requests comment on whether we should add the word "materially" in front of the word "differ" or amend this provision in another way to achieve the result described above.

B. Proposed New "Reasonable Possibility" Requirements

In addition to the clarifications described in the preceding section, the EPA is also proposing additional requirements to the "reasonable possibility" recordkeeping and reporting provisions. These include (1) proposing to add a new criteria to the RP provisions such that a source is subject to the RP requirements whenever a decrease is accounted for in the Step 1 significant emissions increase determination; (2) removing the distinction between EUSGUs and all other sources with respect to the submission of pre-project records; and (3) adding records that must be submitted to the reviewing authority when the source is subject to RP for a particular project.

The EPA is proposing to revise the RP regulations to require that any source accounting for a decrease at Step 1 is also subject to the reasonable possibility recordkeeping provisions. This proposed revision to the RP regulations is intended to balance compliance assurance with recordkeeping and reporting burdens. The express inclusion of decreases at Step 1 in the NSR applicability process in project emission accounting warrants additional recordkeeping and reporting to ensure that decreases that a source accounts for are appropriately considered as part of the project being evaluated and to provide a means to determine whether such decrease(s) actually occur. Stakeholders have raised concern that sources can use project emissions accounting to evade permitting requirements that they would otherwise be subject to and that there would be no way for permitting authorities to identify that the source should have been subject to NSR permitting. For example, the petition for reconsideration expressed concern that under project emissions accounting, sources may improperly account for an unrelated decrease at

Step 1 and thereby improperly find that a permit is not required.[89] If, in aggregate, the emissions increase determined by the source is less than the RP threshold, it may be the case that the source is not subject to any recordkeeping and reporting requirements under the existing regulatory requirements. This means that the reviewing authority may not be able to verify that activities were properly aggregated and that decreases accounted for in the NSR applicability process actually occur.

Therefore, in this action, the EPA is proposing to require that projects that involve a calculated emissions decrease of a regulated NSR pollutant from one or more affected emissions units are subject to the RP provisions, including 40 CFR 52.21(r)(6)(i) through (v), as applicable, for that pollutant regardless of the overall estimated project emissions increase. The EPA is proposing this revision because the express inclusion of decreases under project emissions accounting warrants further accountability to ensure that those decreases are appropriately considered part of the project (*i.e.*, physical change or change in the method of operation at a source) and to provide a means to determine whether the decreases being accounted for actually occur. To implement this new requirement, the EPA is proposing to revise the RP regulations to include another category of projects that would have a "reasonable possibility" of resulting in a significant emissions increase, namely any project that that includes an emissions decrease in PEA at Step 1. The EPA is proposing to do so by adding the following as a trigger to the

[89] Petition for Reconsideration at 9-10 (noting that "in their comments on the proposal, Petitioners argued that the proposed project emissions accounting approach contravened the Clean Air Act's requirement that NSR apply to any change that 'increases the amount of any pollutant emitted' by a source because, inter alia, it would allow a source to avoid NSR based on offsetting emission decreases that are not contemporaneous with the change under consideration").

reasonable possibility in recordkeeping and reporting requirements: "The owner or operator accounts for a decrease in emissions from one or more emissions unit(s) in determining that the project is not a major modification for a regulated NSR pollutant regardless of the projected actual emissions increase."

Under the existing RP regulations, sources that trigger the "reasonable possibility" criteria under 40 CFR 52.21(r)(6)(vi)(*a*) for projects that involve EUSGUs are required to submit pre-project records and post-project monitoring reports while sources that trigger the same criteria for projects that do not involve EUSGUs are not required to submit pre-project records and are only required to submit post-project reports when certain criteria are met.[90] The EPA believes that restricting the pre-project reporting requirements to EUSGUs may not be warranted. There is currently no requirement in the federal regulations that source owners or operators of projects involving non-EUSGU sources subject to RP notify reviewing authorities that they are maintain records on-site as required by RP. The EPA is revising the pre-project requirements to align the requirements for all project types. This revision is intended to provide more transparency for projects that may not have otherwise been reviewed under the current regulations.

To address these concerns, the EPA is proposing language to remove the distinction between EUSGUs and non-EUSGUs in the submission of pre-project records required under 40 CFR 52.21(r)(6)(i). The EPA is proposing to do so by specifying that all sources that trigger the RP criterion under 40 CFR 52.21(r)(6)(vi)(*a*) submit to the reviewing authority the records required to be generated in accordance with 40 CFR 52.21(r)(6)(i). To remove the differential treatment

[90] 40 CFR 52.21(r)(6)(ii), (iv), and (v).

of EUSGUs and all other sources with respect to pre-project reporting requirements under the RP regulations, the EPA is proposing to remove the language "if the emissions unit is an existing electric utility steam generating unit" where that language is used in the reasonable possibility provisions for submission of pre-project records.[91]

The EPA is proposing this revision to provide increased transparency and opportunity for review of pre-project applicability analyses for projects that do not involve EUSGUs, and to ensure that required minor NSR permit applications contain the requisite detail necessary to confirm compliance with the definition of project outlined in section III. of this action. The EPA does not expect this requirement to add significant regulatory burden. Since non-EUSGUs subject to the "reasonable possibility" recordkeeping and reporting provisions under existing regulations are required to maintain pre-project records, the only additional requirement for non-EUSGUs subject to RP would be submitting these records to the reviewing authority. In many cases, this submission of pre-project records would generally occur anyway as part of a minor NSR permitting process. Under circumstances that require a minor NSR permit application or other transaction with the reviewing authority, the pre-project records required by the RP provision are normally included in the submittal. The proposed rule is intended to avoid any gaps where such information is not otherwise submitted to the reviewing authority.

When considered with the proposed expansion of "reasonable possibility" to include instances where a source considers one or more emissions decreases at Step 1 of the NSR applicability process, the proposed additional pre-project reporting requirement for non-EUSGU

[91] 40 CFR 52.21(r)(6)(ii).

projects would create more transparency and accountability when such emissions decreases are considered in the project emissions accounting process. If these requirements are finalized as proposed, they would enable reviewing authorities to identify potentially improperly accounting for emissions decreases to avoid triggering the "reasonable possibility" criteria that a source would otherwise have been subject to.

Additionally, the EPA proposes that sources be required to submit pre-project records to the reviewing authority for all projects that trigger the RP criteria, including projects that do not involve EUSGUs. Under the existing RP regulations, sources are only required to maintain the required pre-project records on site and are not required to notify the reviewing authority that these records are being maintained because RP has been triggered. If the revisions proposed in this action are finalized, this gap in reporting will be filled. This is because sources that consider a decrease at Step 1 would trigger RP and would be required to submit records specifying the decreases to the reviewing authority.

In the alternative of requiring that all records be submitted to the permitting authority, the EPA is taking comment on requiring that, for projects that do not involve EUSGU(s), owner or operators need only inform the permitting authority that they are maintaining records on site as required by the "reasonable possibility" provisions.

The EPA is also proposing to specify that the description of a project in these records include "the name of the project, the project's intended objective(s), each physical change and/or change in the method of operation associated with the project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin normal operation." When combined with the proposed definition of project, these proposed

revisions to the RP regulations will foster greater accountability for applicability conclusions, including whether the source owner/operator is required to maintain "reasonable possibility" records.

The EPA is seeking information on the potential implications of these proposed revisions to the RP regulations, including benefits to the enforceability of major NSR permitting requirements and burden on sources and/or the reviewing authorities that may result from the proposed revisions. The EPA is requesting substantiation of any facility expansion projects (or other projects affecting emissions) that did not go forward solely because the source did not want to maintain or submit RP records. The EPA is aware that expanding the “reasonable possibility” recordkeeping and reporting requirement to all projects that include a decrease in their Step 1 applicability calculations may expand the number of sources subject to recordkeeping, monitoring, and reporting provisions. The EPA believes that in many cases these sources and the emissions units involved in a project subject to RP requirements will also be subject to other CAA recordkeeping, monitoring, and reporting requirements, including those associated with NSR or title V permits, other SIP provisions, and applicable standards such as new source performance standards (NSPS). Thus, much of the information required to meet the expanded RP requirements should already be available. The EPA would like information on the number and types of sources and projects that will be subject to the additional recordkeeping and reporting requirements if this proposed revision is finalized and to what extent existing requirements and available information can be used to meet these new requirements with little extra burden. Finally, the EPA would also like information on potential administrative costs and/or benefits of

these proposed revisions to the recordkeeping and reporting requirements to reviewing authorities.

C. Additional Considerations for Proposed Reasonable Possibility Revisions

The proposed revisions to the RP regulations discussed previously comport with the court's decision in *New Jersey v. EPA* in that they balance "ease of enforcement with avoidance of requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community."[92] However, the EPA is proposing regulations today that shift that balancing based on developments since the promulgation of the RP regulations considered in that case.

In that decision, the court did not respond to petitioner's concerns about the sufficiency of RP in light of the project emissions accounting rule, stating that "enforcement problems stemming from EPA's actions following the Rule's promulgation are beyond the current record for judicial review."[93] The EPA is now proposing, revisions to RP to account for potential increased risk of improper avoidance of NSR requirements due to the express inclusion of decreases in Step 1 under the 2020 PEA rule.

In *New Jersey v. EPA*, the petitioner also challenged "EPA's explanation that enforcement authorities may rely on other records — such as Title V records, minor NSR records, state and national emissions inventory records, and business records — to evaluate preconstruction NSR compliance when the Rule's recordkeeping and reporting requirements are not triggered." The petitioner argued "that such records lack the type of project-specific, preconstruction information

[92] *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021) (citing 72 FR at 72609-11).
[93] *Id*. at 1050.

needed to evaluate NSR compliance" and "that EPA failed to explain how enforcement authorities may draw on these records collectively to trace emissions increases to specific modifications."[94] The D.C. Circuit did not find these arguments persuasive on the grounds the petitioners "cite[] no authority to support the[ir] proposition."

However, it has been several years since the EPA completed the rulemaking that was challenged in the *New Jersey* case, and the record for that rulemaking is now several years old. The EPA has since received feedback regarding the sparsity of information in minor NSR permit applications. For example, the EPA has received comments from state permitting authorities and environmental groups that oftentimes minor NSR permit records do not contain information on how the applicability analysis was conducted, thereby impeding verification of a source's determination that a major NSR permit is not required under a given circumstance. [95] The EPA is thus proposing revisions to address these concerns.

VI. Revisions to Clarify Statutory Limitations on Netting in Nonattainment NSR

The EPA is proposing revisions to the NSR nonattainment provisions to make the regulations consistent with CAA requirements, which limit netting in certain ozone non-attainment areas. The proposed revisions are applicable to Serious, Severe and Extreme classified ozone nonattainment areas and establish that for these areas, emissions increases over any period of 5

[94] *Id*. at 1051.

[95] *See*, *e.g.*, Sierra Club, et al., Response to Request for Comments on Proposed Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 FR 39244 (August 9, 2019) at 21 (commenting that PEA "would allow sources to avoid any obligation to 'retain the data underlying their projections, let alone send that information to permitting authorities,' so long as the source believes that its unenforceable (and potentially unidentified and undocumented) emission reductions will not trigger an increase in emissions.").

consecutive years should be aggregated when determining whether there is a significant net emissions increase, and in Extreme ozone nonattainment areas, project emissions accounting is not permissible under the CAA.[96] This includes revisions to the language in 40 CFR 51.165 and appendix S to part 51 to reflect that sources locating in an ozone nonattainment area that is classified as Serious or Severe for ozone, must aggregate all net emissions increases that have occurred within the previous 5 consecutive calendar year period. The proposed revisions will also establish that netting is not available for sources emitting ozone precursors and locating in ozone nonattainment areas that are classified as Extreme.

The EPA noted in the 2020 PEA rule that project emissions accounting would not apply to "certain modification provisions under Title I, Subpart D of the CAA and the EPA nonattainment NSR regulations that apply to certain nonattainment area classifications. For example, CAA section 182(e)(2) and 40 CFR part 51, appendix S 11.A.5.(v)." The EPA did not in that action, however, elaborate and clarify that project emissions accounting would not be available in certain nonattainment areas. This section addresses the application of netting and PEA in those situations.

The provisions of section 182(c)(6) of the CAA apply to ozone nonattainment areas classified Serious or higher. The provisions state that any emission increases of ozone precursor emissions (VOC and NOx)[97] resulting from a modification shall not be considered *de minimis* for the purposes of determining NNSR applicability "unless the increases in net emissions…from

[96] CAA section 182(c)(6); CAA section 182(e)(2).
[97] While CAA section 182(c)(6) refers only to VOC emissions, CAA section 182(f) extends to NOx emissions all requirements related to VOC emissions.

such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred." Thus, sources locating in an area classified Serious or Severe for ozone cannot consider an emission increase to be *de minimis* (*i.e.*, not significant) if it exceeds a 25 ton per year threshold of an ozone precursor when emissions from the project are aggregated with other projects that result in emissions increases over a period of 5 consecutive calendar years.[98] For sources locating in areas that are classified as Extreme for ozone, section 182(e)(2) of the CAA specifies that any change at a major stationary source which results in *any* increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source must be considered a major modification for NSR applicability purposes. In addition, in an Extreme area, the source has the option of providing offsets from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1, rather than the required 1.5 to 1 offset ratio.[99] The EPA is proposing language in the regulations to implement this CAA language applicable to sources that emit ozone precursors that are locating in an area that is classified as Serious, Severe or Extreme for ozone.

VII. Implementation of These Proposed Revisions for Delegated and SIP-Approved Programs

The PSD program requirements in 40 CFR 52.21 are implemented by the EPA or reviewing authorities that have been delegated federal authority from the EPA to issue PSD permits on behalf of the EPA (via a delegation agreement with an EPA Regional office). Thus, if these

[98] CAA section 182(c)(6).
[99] CAA section 182(e)(2).

proposed regulatory changes are finalized, any revisions to this federal PSD regulation will automatically apply to the EPA and all permitting authorities that implement a PSD program pursuant to a delegation agreement that does not reference § 52.21 as of a specific date.[100]

For state and local agencies that implement the NSR program through EPA-approved SIPs, the EPA's regulations for SIP-approved programs in 40 CFR 51.165 and 51.166 include applicability procedures that are analogous to the applicability procedures at 40 CFR 52.21(a)(2)(iv) that have been cited in this preamble.

If finalized, these regulations would modify the content of the minimum program elements of NSR. Consequently, if the EPA were to finalize the revisions being proposed in this rulemaking, reviewing authorities would need to revise their regulations and submit SIP revisions to adopt those revisions. Upon the effective date of any final revisions, EPA's implementing regulations at 40 CFR 51.166(a)(6) provide permitting authorities with up to 3 years to submit state implementation plan revisions reflecting any final EPA revisions to permit program regulations. If a reviewing authority's SIP-approved regulations already require that sources submit information consistent with the information required in the revisions to the reasonable possibility recordkeeping and reporting requirements described in section VI. of this action, those requirements may be considered by the EPA to be as stringent as that required by any final EPA regulatory revisions. Reviewing authorities whose SIP-approved regulations already require

[100] Where the EPA has only delegated authority to implement a date-specific version of section CAA 52.21, the delegation agreement would need to be updated to incorporate the revisions in this rule.

submission of regulations consistent with the proposed revisions in this action may submit a demonstration that their requirements are as stringent as those in the final action.

IX. Costs, Benefits, and Other Impacts of the Proposed Rule

The EPA is proposing to codify a definition of project and is proposing revisions to the monitoring, recordkeeping and reporting provisions under the major NSR program regulations to improve compliance with, and enforcement of, the major NSR applicability regulations. The benefits and costs associated with the proposed revisions to the NSR regulations are likely to vary greatly depending on the source category, number and location of facilities, and the pollutants and potential controls involved in any future contemplated projects. The EPA expects that the overall impacts of the proposed changes to the major NSR program applicability regulations will provide clarity to the NSR regulations applying to modifying projects and will also improve practical enforceability and public transparency of the NSR program. However, there are numerous challenges to quantifying potential cost and emissions impacts of the proposal. The EPA lacks data on the NSR permitting process since the NSR program is largely implemented by state and local reviewing authorities. Because NSR is a pre-construction program, the EPA also faces the absence of information on projects that would have been subject to NSR permitting requirements if the revisions proposed in this action are finalized as proposed. This is to say that the EPA does not have information, with the exception of anecdotal evidence, on what projects would have been undertaken but for the codification of a definition of project, the requirements that decreases be made enforceable at Step 1 of the two-step NSR applicability requirements, or additional recordkeeping and reporting requirements. Because the EPA has no information on what forthcoming projects are planned and what impact the proposed revisions to

the NSR regulations would have on these projects, the EPA also does not have specific information on what emissions impacts these projects would have had.

For example, major source permit applications are not submitted to the EPA, but to state and local reviewing authorities. There is currently no centralized database for NSR permit applications due primarily to potential federalism concerns. Minor source permitting is performed at the state and local levels (with the exception of Indian country), and there is significant variation in how state and local authorities design and implement minor source permit programs. Additionally, there are currently instances where a source may trigger the reasonable possibility recordkeeping and reporting requirements but not any NSR permitting requirements. If the source is not an EUSGU, then that source (under the EPA's federal regulations) does not need to notify the reviewing authority or the public that these requirements were triggered.

In a separate effort, the EPA has been scoping the development of an economic model appropriate to evaluate NSR applicability. Assuming the availability of appropriate permitting data as described earlier, the model could potentially be used to evaluate how proposed changes to the NSR regulations might impact permitting costs to industry and agencies, economic activities, and emissions.

In absence of a quantitative analysis for this action, the following discussion presents a qualitative assessment of the potential benefits and costs of the major clarifications and revisions included in this proposal.

A. Proposed Definition of "Project"

The EPA expects the proposed revisions to the regulatory definition of "project" will not impose additional direct regulatory costs on reviewing authorities and regulated entities, but will

benefit permitting authorities and the public by systemizing application of the NSR applicability process to focus on a "project" under a consistently interpreted definition. Since this would codify pre-existing EPA guidance — the 2018 Project Aggregation Final Action that affirmed a prior 2009 interpretation — the EPA expects it will not impose additional direct regulatory costs. In the 2020 PEA rulemaking, the EPA stated that "it is appropriate to apply its 'project aggregation' interpretation and policy, set forth in the 2018 final action that completed reconsideration of a 2009 action on this topic to Step 1 of the NSR major modification applicability test for projects that involve both increases and decreases in emissions."[101] This was reiterated in the Response to Comments document on the PEA rule, which stated that "the EPA is affirming that the criteria in the November 2018 final action on project aggregation apply universally to defining a project for purposes of major NSR, i.e., both in the context of under- and over-aggregation of activities into a project and the associated potential circumvention of NSR."[102] While the EPA repeatedly pointed to the 2018 Project Aggregation Final Action as the interpretation sources and permitting authorities should be implementing, it did not codify this interpretation. Therefore, the proposed codification of a definition for project is consistent with how the EPA presumed "project" would be defined in the 2020 PEA rule and should impose no additional obligations on regulated entities and permitting authorities.

Consistent with the EPA's statements in the 2018 Project Aggregation Final Action, we anticipate the EPA's efforts to clarify "project" through this rulemaking "will streamline NSR

[101] 85 FR at 74895.
[102] Response to Comments Document on Proposed Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting" - 84 FR 39244, August 9, 2019, at 58 (October 2020).

permitting by reducing the time needed to assess whether nominally-separate physical and operational changes should be aggregated for NSR applicability purposes."[103] As explained in section III. of this preamble, this definition will provide guardrails that will ensure that decreases that a source accounts for are actually part of the project being considered in the NSR applicability process.

B. Enforceability of Emissions Decreases

In this action, the EPA is proposing to require that decreases accounted for in Step 1 of the NSR applicability process be made enforceable. In this action the EPA is requesting information on the costs to reviewing authorities and to sources associated with proposing that decreases be made enforceable. As explained in section V. of this action, the EPA is proposing to make decreases enforceable due to concerns that PEA will allow sources to include decreases in the project-related NSR applicability analysis without any assurance that those decreases will actually occur.

C. Clarifications and Revisions to the "Reasonable Possibility" (RP) in Recordkeeping and Reporting Provisions

The EPA is proposing to clarify certain existing RP requirements as follows to ensure appropriate and consistent application of those requirements by affected sources and reviewing authorities. The EPA is proposing to clarify that the provisions of 40 CFR 52.21(r)(6) apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units in circumstances where there is a reasonable possibility that a project that is not a

[103] 83 FR 57324 (November 15, 2018).

part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the ATPA method for calculating projected actual emissions from any existing emissions unit. As with the codification of a definition of project, this clarification will allow for more consistent application of the reasonable possibility and recordkeeping provisions across the nation as those regulations were intended to apply.

Additionally, the EPA is expanding the applicability of the RP regulations due to PEA. The EPA believes that the inclusion of decreases at Step 1 in the NSR applicability process (*i.e.*, project emission accounting) may warrant additional recordkeeping and reporting to ensure that decreases that a source accounts for are appropriately considered as part of the project being evaluated and that such decrease(s) actually occur following the project. In order to determine whether they are subject to permitting requirements, all sources are required to undertake the calculation that is part of the NSR applicability process. Under the current regulations, sources that conduct the applicability analysis are not required to submit any information indicating that they are not subject to the NSR permitting requirements nor are they required to notify the reviewing authority that they are subject to the RP recordkeeping and reporting requirements.[104] This proposal would not result in a substantial increase in costs because it would only require that sources submit records they are already required to produce and, in some cases, maintain on-site.

[104] For projects that involve one or more EUSGUs, owners or operators are required to submit records under the RP regulations, but for all other projects, owners or operators must only maintain records on-site and are not currently required to notify the reviewing authority that they are maintaining RP records on-site.

Following promulgation of the PEA rule, sources accounting for a decrease associated with a project in Step 1 in the NSR applicability process may evade all recordkeeping requirements if the sum of that decrease and any increase from the same project is under 50 percent of the SER.[105] Therefore, if a source impermissibly undertakes a project that requires a permit and where that source claims a decrease in emissions associated with the project such that the emissions projected for the project is under 50 percent of the SER, there is no means of verifying whether that project was appropriately defined. There is, in fact, no means for the reviewing authority or the public to know that such project that would otherwise have required a permit but for emissions decrease purportedly associated with the project, is occurring. There is therefore no way under the currently regulatory scheme which allows for PEA, for the public or for permitting authorities to ensure that decreases that were used by a source to forgo permitting requirements are actually occurring. The EPA believes these shields are an impediment to practical enforceability of the applicability process and that it may be warranted to require greater accountability for projects that account for project-related decreases in their "significant emissions increase" calculation. The EPA is therefore proposing to require that these sources submit any required pre-project records to the reviewing authority as required by the NSR regulations.

D. Revisions to Nonattainment Applicability Provisions

The proposed revisions to the nonattainment provisions applicable to Serious, Severe and Extreme classified ozone nonattainment areas do not impose new costs on sources, reviewing

[105] 40 CFR 52.21(r)(6)(vi).

authorities, or the public. Rather, they merely establish in regulations requirements that sources are already required to adhere to in the CAA. This includes that for these areas, source-wide netting is not permissible, and in extreme ozone nonattainment areas project emissions accounting is not permissible under the CAA. Accordingly, in this action, the EPA is not proposing new requirements but is only proposing revisions to the regulations in 40 CFR 51.165 and appendix S to part 51 to reflect that sources locating in an area that is classified as Serious or Severe for ozone, must aggregate all net emissions increases that have occurred within the previous 5 consecutive calendar year period. These revisions mirror CAA language and do not reflect new requirements imposed upon sources or reviewing authorities. Consequently, these revisions will not change any pre-existing requirements for sources locating in ozone nonattainment areas or reviewing authorities.

X. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders ("EO") can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders*.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14904: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was, therefore, not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060-0003 for the PSD and NNSR permit programs. The burden associated with obtaining an NSR permit for a major stationary source undergoing a major modification is already accounted for under the approved information collection requests.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This proposed rule will strengthen the reasonable possibility in current recordkeeping and reporting provisions by requiring that any source wishing to account for a decrease in the significant emissions increase determination in the NSR applicability process be subject to those recordkeeping and reporting provisions. This proposed rule, if finalized, may therefore increase the recordkeeping and reporting burdens of sources that may have otherwise not been subject to these requirements. The EPA is soliciting feedback on the number of sources that may be subject to recordkeeping and reporting requirements because of this proposed revision and is also soliciting information on the cost of compliance to these sources. The EPA does not anticipate, however, that the economic impact of this revision will be significant since most sources that undertake an emissions-decreasing activity would likely have been subject to recordkeeping and reporting requirements in the absence of the proposed revision. Consequently, a substantial number of small entities are unlikely to be impacted should this proposed revision be finalized.

Furthermore, with respect to proposed revisions to reporting requirements, the EPA does not anticipate that this would result in a significant economic impact on a substantial number of small entities because under existing regulations, all sources are required to maintain records. The EPA does not believe that the additional requirement of submitting these records, which are already required to be produced, will result in a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act (UMRA)

This proposed action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Nonetheless, if this rule is finalized as proposed, it is possible that some state and local air agencies will need to submit a one-time revision to their SIP.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175 in that this action would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. The EPA is currently the reviewing authority for PSD and NNSR permits issued in tribal lands and, as such, the revisions being proposed will not

impose direct burdens on tribal authorities. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This proposed rule will impact the NSR applicability process, and the recordkeeping and reporting provisions associated with that process. As such, it is not likely to significantly impact the number of sources subject to permitting requirements but will only facilitate transparency and accountability for those sources that would otherwise have been subject to permitting requirements.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. This is due to the lack of permitting data necessary for the EPA to evaluate the number of sources likely to be impacted by this action. Additionally, the impacts of the proposal on the benefits and costs of the NSR program are likely to vary greatly depending on the source category, number and location of facilities, and the pollutants and potential controls addressed. The NSR program is largely implemented by state and local permitting authorities. These programs vary with respect to whether they implement PEA,[106] whether their applicability process allows for source-wide netting, and what information they require from sources applying for a permit.[107]

However, there are numerous challenges to quantifying potential cost and emissions impacts of the proposal. The EPA lacks systematic data on the permitting process because the NSR program is largely implemented by state and local permitting authorities. The EPA also faces the absence of information on projects that do not engage with NSR under requirements in the baseline but might under the proposed provisions.

[106] In an informal survey, the EPA identified 34 out of 79 permit authorities that allow the use of PEA in their PSD programs. Of these, 8 are delegated authorities and in three, EPA is the reviewing authority. Additionally, seven incorporate the federal rules by reference, three have a rulemaking underway to adopt the federal rule, 16 interpret their pre-2020 PEA rule regulations to allow for PEA by adopting the interpretation in the 2018 Memo or another equivalent interpretation, and two have revised their regulations to implement PEA and submitted a SIP to the EPA for approval. For 13 of these authorities, it is unclear whether they interpret their regulations to allow for PEA.

[107] *E.g.*, Washington has adopted regulations consistent with those proposed in this action in WAC 173-400-720(4)(b)(iii)(D); N.J. Stat. section 26:2C-9.2(i) provides that "the department may require the reporting and evaluation of emissions information for any air contaminant."

For example, major source permits are not submitted to the EPA, but to state and local permitting authorities. There is currently no centralized database where this permitting information is maintained. Minor source permitting is generally performed at the state and local levels, and there is a high degree of variation with respect to how state and local authorities permit non-major sources. Additionally, there are currently instances where a source may trigger the reasonable possibility recordkeeping and reporting requirements but not any other permitting requirements. If the source does not include an electric utility steam generating unit, then that source (under our current federal regulations) does not need to notify anyone that these requirements were triggered. In these cases, under the current regulations, the reviewing authority and the public are not provided notification that records are being maintained as required by the reasonable possibility in recordkeeping provisions.

The EPA is proposing this rulemaking to fill some of these gaps identified in permitting information that is collected. For example, if finalized, this rule would require that sources inform the reviewing authority that records were maintained in compliance with the reasonable possibility requirements. The reviewing authority is then required to inform the public that these records are available for public review, if such review is requested. The EPA is additionally exploring the potential development of a database to collect permitting information and other recordkeeping and reporting information.

Despite the difficulties associated with quantitatively estimating the impacts of this proposal, the EPA believes that this action does not have disproportionate and adverse human health or environmental effects on communities with environmental justice concerns. Rather, the EPA expects that the overall impacts of the implementation of the proposed changes to the NSR

program will improve the implementation, enforcement, and public transparency of the NSR program that may result in benefits to all communities including those with environmental justice concerns.

The proposed revisions to the recordkeeping and reporting requirements are likely to improve public transparency of permit terms and conditions. In this way, there may be benefits to populations with environmental justice concerns that are more likely to be impacted by the emissions of sources subject to the "reasonable possibility" in recordkeeping and reporting provisions. Additionally, the requirement that decreases accounted for in the NSR applicability process be made enforceable would improve the enforceability of emissions estimates used in the NSR applicability process. This improved enforcement, will ensure that decreases accounted for in the project emissions accounting process occur as projected. The revisions proposed in this action to both the recordkeeping and reporting provisions as well as the enforceability of calculations used in the NSR applicability process will reduce the barriers to public participation in the permitting process by providing the public and permitting authorities more information on the project and the emissions associated with that project.

The EPA conducted outreach during the development of this proposed rulemaking to environmental nonprofit groups that petitioned the EPA on the project emissions accounting rule, as well as to state permitting authority associations, industry groups, and Tribal groups. Additionally, as part of other ongoing policy reviews of minor NSR programs, the EPA has conducted outreach that, among other topics, considered public notification requirements for minor modifications at major sources. Those outreach sessions were provided to the same environmental nonprofit groups the EPA met with for this action as well as with industry, state

permitting authorities, and other environmental justice groups. The feedback obtained from those sessions informed aspects of this action as pertains to the revisions to the reasonable possibility in recordkeeping and reporting provisions and will inform public notice requirements that will be proposed as part of a subsequent action.

XI. Statutory Authority

The statutory authority for this action is provided by 42 U.S.C. 7401, *et seq*.

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Air pollution control.

_____

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401-7671 q.

Subpart I—Review of New Sources and Modifications

2. In § 51.165:

a. Revise paragraph (a)(1)(v)(F);

b. Revise paragraphs (a)(1)(x)(B) and (E);

c. Revise paragraph (a)(1)(xxxix);

d. Revise paragraph (a)(2)(ii)(B);

e. Revise paragraph (a)(2)(ii)(G);

f. Revise paragraph (a)(6);

g. Revise paragraphs (a)(6)(i)(A) and (C);

h. Revise paragraph (a)(6)(ii);

i. Revise paragraph (a)(6)(iv);

j. Revise paragraph (a)(6)(v);

k. Revise paragraph (a)(6)(vi)(B); and

l. Add paragraph (a)(6)(vi)(C).

The addition and revisions read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(v) * * *

(F) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area. A reduction in emissions of volatile organic compounds may not be used to determine if a modification will result in a major modification.

* * * * *

(x)

(B) Notwithstanding the significant emissions rate for ozone in paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area, if such emissions increase of volatile organic compounds exceeds 25 tons per year when aggregated with all other net emissions increases from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

* * * * *

(E) Notwithstanding the significant emissions rates for ozone under paragraphs (a)(1)(x)(A) and (B) of this section, any net increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area shall be considered a significant net emissions increase. A reduction in emissions of volatile organic compounds from discrete operations, units, or activities within the source may not be used to determine if a modification will result in a major modification.

* * * * *

(xxxix) *Project* means a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable. In an extreme ozone nonattainment area, a "project" means each discrete operation, emissions unit, or other pollutant-emitting activity.

* * * * *

(2) * * *

(ii) * * *

* * * * * (B) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type(s) of emissions units that could be affected by the project, according to paragraphs (a)(2)(ii)(C) through (F) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.,* the second step of the process) is contained in the definition in paragraph (a)(1)(vi)

of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(G) The "sum of the difference" as used in paragraphs (C), (D) and (F) of this section shall include both increases and decreases in emissions calculated in accordance with those paragraphs. A decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 CFR 51.165(a)(1)(vi)(E)(*2*).

* * * * *

(6) Each plan shall provide that, except as otherwise provided in paragraph (a)(6)(vi) of this section, the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (a)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (a)(1)(xxviii)(B)(*1*) through (*3*) of this section for calculating projected actual emissions from any existing emissions unit. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(6)(i) through (vi) of this section.

(i) * * *

(A) A description of the project that includes: the name of the project, the project's intended objective(s), each physical change and/or change in the method of operation associated with the

project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin regular operation;

* * * * *

(C) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (a)(1)(xxviii)(B)(*3*) of this section and an explanation for why such amount was excluded, and the potential to emit, as applicable, and any netting calculations, if applicable.

(ii) Before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (a)(6)(i) of this section to the reviewing authority. Nothing in this paragraph (a)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the reviewing authority before beginning actual construction.

* * * * *

(iv) If the project involves an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (a)(6)(iii) of this section setting out the unit's annual emissions during the year that preceded submission of the report.

(v) If the project does not involve an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority if the annual emissions, in tons per year, from the project identified in paragraph (a)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (a)(6)(i)(C) of this section, by a significant amount (as defined in paragraph (a)(1)(x) of this

section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (a)(6)(i)(C) of this section. Such report shall be submitted to the reviewing authority within 60 days after the end of such year. The report shall contain the following:

(A) The name, address and telephone number of the major stationary source;

(B) The annual emissions as calculated pursuant to paragraph (a)(6)(iii) of this section; and

(C) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(vi) * * *

(B) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (a)(1)(xxviii)(B)(*3*), sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (a)(1)(xxvii) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (a)(6)(vi)(B) of this section, and not also within the meaning of paragraph (a)(6)(vi)(A) of this section, then provisions (a)(6)(ii) through (v) do not apply to the project; or

(C) The owner or operator accounts for a decrease in emissions from one or more emissions unit(s) in determining that the project is not a major modification for a regulated NSR pollutant regardless of the projected actual emissions increase.

* * * * *

3. In § 51.166:

a. Revise paragraph (a)(7)(iv)(*b*);

b. Revise paragraph (a)(7)(iv)(*g*);

c. Revise paragraph (b)(51);

d. Revise paragraph (r)(6);

e. Revise paragraph (r)(6)(i)(*a*);

f. Revise paragraph (r)(6)(i)(*c*);

g. Revise paragraph (r)(6)(ii);

h. Revise paragraph (r)(6)(iv);

i. Revise paragraph (r)(6)(v);

j. Revise paragraph (r)(6)(vi)(*b*); and

k. Add paragraph (r)(6)(vi)(*c*).

The addition and revisions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(a) * * *

(7) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type(s) of emissions units that could be affected by a project, according to paragraphs (a)(7)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any

such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(*g*) The "sum of the difference" as used in paragraphs (*c*), (*d*) and (*f*) of this section shall include both increases and decreases in emissions calculated in accordance with those paragraphs. A decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 CFR 51.166(b)(3)(vi)(*b*).

* * * * *

(b) * * *(51) ***Project*** means a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable.

* * * * *

(r) * * *

(6) Each plan shall provide that, except as otherwise provided in paragraph (r)(6)(vi) of this section, the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(40)(ii)(*a*) through (*c*)

of this section for calculating projected actual emissions from any existing emissions unit. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (r)(6)(i) through (vi) of this section.

* * * * *

(i) * * *

(*a*) A description of the project that includes: the name of the project, the project's intended objective(s), each physical change and/or change in the method of operation associated with the project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin regular operation;

* * * * *

(*c*) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(40)(ii)(*c*) of this section and an explanation for why such amount was excluded, and the potential to emit, as applicable, and any netting calculations, if applicable.

(ii) Before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i) of this section to the reviewing authority. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the reviewing authority before beginning actual construction.

* * * * *

(iv) If the project involves an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during the calendar year that preceded submission of the report.

(v) If the project does not involve an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority if the annual emissions, in tons per year, from the project identified in paragraph (r)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (r)(6)(i)(*c*) of this section) by a significant amount (as defined in paragraph (b)(23) of this section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (r)(6)(i)(*c*) of this section. Such report shall be submitted to the reviewing authority within 60 days after the end of such year. The report shall contain the following:

(*a*) The name, address and telephone number of the major stationary source;

(*b*) The annual emissions as calculated pursuant to paragraph (r)(6)(iii) of this section; and

(*c*) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(vi) * * *

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(40)(ii)(*c*) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(39) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR

pollutant. For a project for which a reasonable possibility occurs only within the meaning of this paragraph (r)(6)(vi)(*b*), and not also within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then the provisions under paragraphs (r)(6)(ii) through (v) of this section do not apply to the project; or

(*c*) The owner or operator accounts for a decrease in emissions from one or more emissions unit(s) in determining that the project is not a major modification for a regulated NSR pollutant regardless of the projected actual emissions increase.

* * * * *

Appendix S to Part 51—Emission Offset Interpretative Ruling

4. In appendix S to part 51:

a. Revise paragraph II.A.5.(v);

b. Revise paragraph II.A.10.(ii);

c. Revise paragraph II.A.10.(v);

d. Revise paragraph II.A.33.;

e. Revise paragraph IV.I.1.(ii);

f. Revise paragraph IV.I.1.(vi);

g. Revise paragraph IV.J.;

h. Revise paragraph IV.J.1.(i);

i. Revise paragraph IV.J.1.(iii);

j. Revise paragraph IV.J.2.;

k. Revise paragraph IV.J.4.;

l. Revise paragraph IV.J.5.;

m. Revise paragraph IV.J.6.(ii); and

n. Add paragraph IV.J.6.(iii).

The addition and revisions read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

II. Initial Screening Analyses and Determination of Applicable Requirements

A. * * *

5. * * *

(v) Any physical change in, or change in the method of operation of, a major stationary source of volatile organic compounds that results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone, if the major stationary source is located in an extreme ozone nonattainment area. A reduction in emissions of volatile organic compounds may not be used to determine if a modification will result in a major modification.

* * * * *

10. * * *

(ii) Notwithstanding the significant emissions rate for ozone in paragraph II.A.10(i) of this Ruling, significant means, in reference to an emissions increase or a net emissions increase, any increase in actual emissions of volatile organic compounds that would result from any physical

change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area, if such emissions increase of volatile organic compounds exceeds 25 tons per year when aggregated with all other net emissions increases from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

* * * * *

(v) Notwithstanding the significant emissions rates for ozone under paragraphs II.A.10(i) and (ii) of this Ruling, any net increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area shall be considered a significant net emissions increase. A reduction in emissions of volatile organic compounds from discrete operations, units, or activities within the source may not be used to determine if a modification will result in a major modification.

* * * * *

33. ***Project*** means a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable. In an extreme ozone nonattainment area, a "project" means each discrete operation, emissions unit, or other pollutant-emitting activity.

* * * * *

IV. Sources That Would Locate in a Designated Nonattainment Area

* * * * *

I. * * *

1. * * *

(ii) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.,* the first step of the process) will occur depends upon the type(s) of emissions units that could be affected by the project, according to paragraphs IV.I.1(iii) through (v) of this Ruling. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.,* the second step of the process) is contained in the definition in paragraph II.A.6 of this Ruling. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(vi) The "sum of the difference" as used in paragraphs (iii), (iv) and (v) of this section shall include both increases and decreases in emissions calculated in accordance with those paragraphs. A decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 CFR appendix S to part 51 II.A.6.(v)(*b*).

* * * * *

J. ***Provisions for projected actual emissions.*** Except as otherwise provided in paragraph IV.J.6(ii) of this Ruling, the provisions of this paragraph IV.J apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units at a major

stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph IV.J.6 of this Ruling, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs II.A.24(ii)(a) through (c) of this Ruling for calculating projected actual emissions from any existing emissions unit.

1. * * *

(i) A description of the project that includes: the name of the project, the project's intended objective(s), each physical change and/or change in the method of operation associated with the project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin regular operation;

* * * * *

(iii) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph II.A.24(ii)(*c*) of this Ruling and an explanation for why such amount was excluded, and the potential to emit, as applicable, and any netting calculations, if applicable.

2. Before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph IV.J.1 of this Ruling to the reviewing authority. Nothing in this paragraph IV.J.2 shall be construed to require the owner or operator of such a unit to obtain any determination from the reviewing authority before beginning actual construction.

* * * * *

4. If the project does not involve an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year, during which records must be generated under paragraph IV.J.3 of this Ruling setting out the unit's annual emissions during the year that preceded submission of the report.

5. If the project does not involve an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority if the annual emissions, in tons per year, from the project identified in paragraph IV.J.1 of this Ruling, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph IV.J.1(iii) of this Ruling) by a significant amount (as defined in paragraph II.A.10 of this Ruling) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph IV.J.1(iii) of this Ruling. Such report shall be submitted to the reviewing authority within 60 days after the end of such year. The report shall contain the following:

(i) The name, address and telephone number of the major stationary source;

(ii) The annual emissions as calculated pursuant to paragraph IV.J.3 of this Ruling; and

(iii) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

6. * * *

(ii) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph II.A.24(ii)(*c*) of this Ruling, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph II.A.23 of this Ruling (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph IV.J.6(ii) of this Ruling, and not also within the meaning of paragraph IV.J.6(i) of this Ruling, then provisions in paragraphs IV.J.2 through IV.J.5 of this Ruling do not apply to the project; or

(iii) The owner or operator accounts for a decrease in emissions from one or more emissions unit(s) in determining that the project is not a major modification for a regulated NSR pollutant regardless of the projected actual emissions increase.

* * * * *

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

5. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq*.

Subpart A—General Provisions

6. In § 52.21:

a. Revise paragraph (a)(2)(iv)(*b*);

b. Revise paragraph (a)(2)(iv)(*g*);

c. Revise paragraph (b)(52);

d. Revise paragraph (r)(6);

e. Revise paragraph (r)(6)(i)(*a*);

f. Revise paragraph (r)(6)(i)(*c*);

g. Revise paragraph (r)(6)(ii);

h. Revise paragraph (r)(6)(iv);

i. Revise paragraph (r)(6)(v);

j. Revise paragraph (r)(6)(vi)(*b*); and

k. Add paragraph (r)(6)(vi)(*c*).

The addition and revisions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(a) * * *

(2) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type(s) of emissions units that could be affected by the project, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(*g*) The "sum of the difference" as used in paragraphs (*c*), (*d*) and (*f*) of this section shall include both increases and decreases in emissions calculated in accordance with those paragraphs. A decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 CFR 51.21(b)(3)(vi)(*b*).

* * * * *

(b) * * *

(52) ***Project*** means a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable.

* * * * *

(r) * * *

(6) Except as otherwise provided in paragraph (r)(6)(vi)(*b*) of this section, the provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant emitted from projects that involve one or more existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)(*a*) through (*c*) of this section for calculating projected actual emissions from any existing emissions unit.

* * * * *

(i) * * *

(*a*) A description of the project that includes: the name of the project, the project's intended objective(s), each physical change and/or change in the method of operation associated with the project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin regular operation;

* * * * *

(*c*) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(40)(ii)(*c*) of this section and an explanation for why such amount was excluded, the potential to emit, as applicable, and any netting calculations, if applicable.

(ii) Before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i) of this section to the reviewing authority. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the reviewing authority before beginning actual construction.

* * * * *

(iv) If the project involves an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the annual emissions from each affected emission unit during the calendar year that preceded submission of the report.

(v) If the project does not involve an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the Administrator if the annual emissions, in tons per year, from the project identified in paragraph (r)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section), by a significant amount (as defined in paragraph (b)(23) of this section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section. Such report shall be submitted to the Administrator within 60 days after the end of such year. The report shall contain the following:

(a) The name, address and telephone number of the major stationary source;

(b) The annual emissions as calculated pursuant to paragraph (r)(6)(iii) of this section; and

(c) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(vi) * * *

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(*b*) of this section, and not also within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project; or

(*c*) The owner or operator accounts for a decrease in emissions from one or more emissions unit(s) in determining that the project is not a major modification for a regulated NSR pollutant regardless of the projected actual emissions increase.

* * * * *