

**Comments of the Attorneys General of New Jersey, California, Maryland,
Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Washington,
and the District of Columbia**

on

**Proposed Rule re: Prevention of Significant Deterioration (PSD) and
Nonattainment New Source Review (NNSR): Project Emissions Accounting**

84 Fed. Reg. 39,244 (Aug. 9, 2019)

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The Attorneys General of New Jersey, California, Maryland, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Washington, and the District of Columbia hereby submit these comments on EPA’s proposed rule titled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” published at 84 Fed. Reg. 39,244 (Aug. 9, 2019) (the “Proposed Rule”).

I. INTRODUCTION

The Proposed Rule is one of several proposals or actions taken by EPA in the last two years that would weaken the New Source Review (“NSR”) program of the Clean Air Act (“CAA” or “the Act”). Pursuant to the Clean Air Act, existing pollution sources that undertake a “major modification” must, like new pollution sources, comply with NSR permitting and pollution control provisions, including the obligation to install and operate modern pollution control equipment. Congress defined “modification” broadly as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §§ 7479(2)(c) and 7501(4) (incorporating the definition set forth in 42 U.S.C. § 7411(a)(4)).

The Proposed Rule is designed to enable sources to avoid triggering NSR by allowing them to decide – with little or no regulatory scrutiny -- what emissions are counted in determining whether a physical or operational change would cause a “significant net” emissions increase from the source. The Proposed Rule effectively allows sources to “net out” of NSR in Step 1 of the traditional two-step regulatory analysis by including emissions decreases from a modification that the source deems to be within the scope of the “project” involving a modification that increases emissions. Under this expanded Step 1 scope, sources are unlikely to ever get to Step 2, where they consider other “contemporaneous” emission increases and decreases from other units at the

source. While this may reduce emission control requirements for industry sources, *see* 84 Fed. Reg. at 39,248/1, these are not goals of the NSR program: The NSR program is designed to help attain and maintain national ambient air quality standards and prevent significant degradation of air quality by requiring owners of larger new and modified sources of air pollutants to apply appropriate emission control technology at the time of construction. *See* 42 U.S.C. §§ 7470, 7503.

More specifically, the Attorneys General have identified the following problems in the Proposed Rule: First, it would allow an owner or operator (“owner/operator”) of a polluting facility to determine the scope of a modification for NSR purposes, and based on our experience this could lead to the improper inclusion of emission reductions in NSR calculations and thereby to avoidance of NSR requirements; conversely, it would also allow an owner/operator to improperly exclude certain emission increases from NSR calculations with the same result. Second, it would enable an owner/operator to forego monitoring and recordkeeping necessary to ensure that forecast emission reductions actually occur. Third, and of great concern to the Attorneys General as regards to the sovereign powers of their state governments, the Proposed Rule would compel state environmental agencies that currently prohibit “project emissions accounting” to use EPA’s improper new approach and weaken their state air quality regulations when the Clean Air Act expressly preserves the states’ rights to impose standards that are more stringent than federal requirements. Because the Proposed Rule will result in increased air pollution, is contrary to the Clean Air Act, and is arbitrary and capricious, EPA must abandon it.

II. BACKGROUND: NSR PERMITTING AND “PROJECT NETTING,” ALSO REFERRED TO AS “PROJECT EMISSIONS ACCOUNTING”

A. General Overview of the NSR Program

The NSR permitting program is key to the Clean Air Act’s goal to prevent excessive air pollution and protect public health and the environment as businesses change and expand. First, the NSR program is designed to ensure that each new or expanding facility uses up-to-date air pollution control technologies and practices, meets all federal requirements, and does not emit pollution that would contribute to unhealthy air quality. Second, NSR is a critical tool to help States and local communities meet the U.S. National Ambient Air Quality Standards (NAAQS) and then maintain them. Without proper implementation of NSR, new construction projects that increase emissions could increase NAAQS violations, endangering public health. Third, the NSR process is a public one, often the only one where residents or businesses can learn about and have input on major projects that affect the air quality in their community.

The proposed NSR changes are inconsistent with all of these purposes, and threaten to make NSR much less effective in ensuring the achievement and maintenance of the NAAQS. And because NSR covers a variety of facilities, from paper mills to power plants, any change to weaken the program will likely have widespread impacts across the country. This weakening of NSR undermines Congressional intent that when sources undertake construction projects that significantly increase emissions—a “major modification” under Clean Air Act terminology--they must install and operate modern emissions control technology.

The limited nature of any exceptions to the requirement to install and operate pollution control technology when undertaking a major modification was underscored by the D.C. Circuit

in its seminal decision in *Alabama Power v. Costle*, 636 F.2d 323 (1979). In reviewing EPA’s first PSD regulations following the 1977 Clean Air Act Amendments, the court held that EPA’s exemption for projects that increased emissions by less than 100 or 250 tons per year was contrary to the Act’s “clear language,” explaining that:

Implementation of the statute’s definition of “modification” will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to “grandfather” existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

Id. at 400; *New York v EPA*, 413 F.3d 3, 27 (D.C. Cir. 2005) (citing *Alabama Power*); *see also Wisconsin Elec. Power Co. v. EPA*, 893 F. 2d 901, 909-10 (7th Cir. 1990) (“*WEPCo*”) (rejecting interpretation of modification definition that would “open up vistas of indefinite immunity” from NSR requirements.); *In re Tennessee Valley Authority*, 2000 EPA App. LEXIS 25, *79 (EPA Env. App. Bd. 2000) (“[T]he structure of the Act reflects that this grandfathering was envisioned as a temporary rather than permanent status, in that existing plants were required to modernize air pollution controls whenever they were modified in a way that increased emissions.”), *cf. ASARCO*, 578 F.2d 319, 327-28 (D.C. Cir. 1978) (“The bubble concept in the challenged regulations would undercut Section 111 [New Source Performance Standards] by allowing operators to avoid installing the best pollution control technology on an altered facility as long as the emissions from the entire plant do not increase.”).

B. The NAAQS and NSR Nonattainment and Attainment Programs

The Clean Air Act requires all areas of the country to meet and maintain National Ambient Air Quality Standards for six “criteria” pollutants: ozone, particulate matter (PM₁₀ and PM_{2.5}),

sulfur dioxide, nitrogen dioxide, lead, and carbon monoxide. As noted, the NSR preconstruction review and permitting process is one of the key programs to achieve and maintain clean air and compliance with the NAAQS. NSR imposes strict requirements on new and modified major stationary sources of criteria pollutants¹, with two separate programs for areas in “nonattainment” (out of compliance with the NAAQS) and “attainment” (in compliance with NAAQS). The two programs are referred to collectively as “New Source Review.” One of the programs is known as nonattainment NSR (NNSR), and it applies to new or modified major stationary sources in nonattainment areas. The other program is known as Prevention of Significant Deterioration (PSD), and it applies in attainment areas. In these comments we will generally use the term “NSR” to refer to both programs collectively, unless otherwise noted.

Sources subject to the nonattainment NSR program must comply with strict emission control standards: they must receive a permit requiring pollution control consistent with the lowest achievable emission rate (LAER) and must offset emission increases associated with the newly constructed or modified source by creating or acquiring emission offsets from other sources. 42 U.S.C. § 7503(a)(1)-(2). These stringent requirements are intended to ensure, in an area where air quality does not meet the NAAQS for a particular pollutant, that any increase in emissions from new or modified major sources is as small as possible and is accompanied by even greater emission reductions from other sources so as to improve air quality in the area and help bring the area into compliance with the NAAQS.

Sources subject to the attainment PSD program also must comply with strict emissions-related requirements: They must monitor existing air quality and analyze through modeling

¹ For purposes of the NSR program, “regulated NSR pollutant” includes any pollutant for which a NAAQS has been promulgated (and any precursors to the NAAQS), as well as all other pollutants regulated under the Act except for hazardous air pollutants. 40 CFR § 52.21(b)(50).

projected impacts from the source; demonstrate that emissions from the facility will not cause, or contribute to, air pollution in excess of any NAAQS or PSD “increment”; and obtain a permit requiring application of the best available control technology (BACT). *See generally* 40 CFR § 52.21. These PSD requirements ensure that emissions from new or modified major sources do not cause significant deterioration of air quality in areas that meet the NAAQS for a particular pollutant.

Also important to the ability of States to attain and maintain the NAAQS are the anti-backsliding provisions of the Clean Air Act. Section 193 of the Act is a general savings clause that prohibits EPA from adopting control measures weaker than those in place as of 1990 to prevent backsliding on incremental improvements of air quality over time. 42 U.S.C. § 7515. Section 110(l) forbids changes to State Implementation Plans that weaken existing controls that states are relying on to attain the NAAQS. 42 U.S.C. § 7410(l). NSR is a “control” for purposes of Section 110(l)’s backsliding analysis. *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (2006), *decision clarified on denial of reh’g*, 489 F.3d 1245 (D.C. Cir. 2007).

C. Determining What Pollution is Counted: EPA’s Existing Netting Rule

The Clean Air Act’s NSR program requires facilities to obtain a permit before constructing a new major stationary source or undertaking a “major modification” to an existing major source. EPA’s long-standing NSR regulations, promulgated in 2002, set out a two-step process to determine if a modification—defined as a physical change or change in the method of operation—is “major.” A source must first determine whether “there will be a significant emissions increase from the modification itself” (Step 1), and if so, the source must then assess whether there will be a significant “net” emissions increase based on a netting analysis for actual emissions increases

and decreases from other modifications at the source during the “contemporaneous” time period (Step 2). *See, for example*, 40 CFR §§ 52.21(b)(2) & (3). The two-step formula may be illustrated as follows:

- Step 1: Does the modification *by itself*, as well any other existing emissions units at the source that experience an increase in emissions related to the project², result in a significant emissions increase from the source?
- Step 2: Will the modification result in a significant *net* emissions increase, given other contemporaneous increases and decreases at the source? In making this determination, EPA/permitting authorities look at any *other* emission increases or decreases resulting from other modifications that have occurred at all units at the source during the period that is “contemporaneous” with the modification in Step 1. Permitting authorities then sum these other emission increases and decreases with the increase from the modification(s) at issue to determine whether there is a “significant net” emissions increase at the source.

A project is a major modification if it would result in both a significant emission increase of an NSR pollutant (Step 1) and a significant net emissions increase of the NSR pollutant (Step 2). See 40 CFR § 52.21(b)(2), 40 CFR § 51.165(a)(1)(v).

An increase or decrease in actual emissions is “contemporaneous” with the increase from the proposed modification if it occurs between “[t]he date five years before construction on the particular change commences” and “[t]he date that the increase from the particular change occurs.” 40 CFR § 52.21(b)(3)(ii). In addition, the regulations require that any decrease used in the netting

² When a constraining unit or piece of equipment is changed to increase its capacity, another unit may increase its operations (depending on whether some or all of the constraint was removed) to provide input to the changed unit or use output from it. EPA has historically referred to this phenomenon as “debottlenecking.”

calculation be “creditable,” meaning (i) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions; (ii) it is enforceable as a practical matter; and (iii) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. 40 CFR § 52.21(b)(3)(iii); 40 CFR § 51.165(a)(2)(ii)(F).

In making the Step 1 determination, a project is deemed to cause a significant emissions increase if the “sum of the difference” between the baseline (historical) actual emissions and the post-project emissions (the “projected actual” emissions for existing units or “potential to emit” for new units) equals or exceeds the relevant threshold (e.g. 40 tons per year for sulfur dioxide and ozone for PSD purposes, *see* 40 CFR § 51.21(b)(23)). 40 CFR § 52.21(a)(2)(iv)(b)-(f).. In promulgating the 2002 rule, EPA affirmed its position that emission reductions unrelated to the proposed modification could not be included in Step 1, but could only be considered when looking at emissions from other units as part of the Step 2 netting analysis. *See* 67 Fed. Reg. 80186, 80215-216 (Dec. 31, 2002). The focus is on the emission unit(s) undergoing the change resulting in an emissions increase as well as any “debottlenecked” units, and determining whether there will be a significant emissions increase at *such* units. If so, then the inquiry proceeds to look at other units at the source, and at that time the permitting authority considers contemporaneous increases *and* decreases at other units across the facility to determine whether there will be a significant net emissions increase for the source as a whole, during the contemporaneous period. *Id.*

D. 2006 Proposed Netting Rule

In 2006, to address how to make the Step 1 determination under the 2002 regulations, EPA proposed a rule titled “Prevention of Significant Deterioration and Nonattainment New Source

Review: Debottlenecking, Aggregation and Project Netting.” 71 Fed. Reg. 54,249 (Sept. 14, 2006).

EPA observed that the 2002 regulations provide different procedures for calculating a significant emissions increase in Step 1 depending on whether the project (a) involved changes at two or more existing units or two or more new units, in which case the calculation was based on “the sum of the difference” between projected actual and baseline emissions, or (b) involved changes at multiple types of units (existing and new), in which case the calculation used a hybrid test based on the “sum of the emissions increase” for each unit.

EPA observed the latter hybrid test “challenges” the concept that an emissions increase at an individual emissions unit “could be a negative number,” and, indeed, EPA concluded the existing rule would not allow a source to include emissions reductions in Step 1 if projects include both existing and new units. 71 Fed. Reg. at 54,249/1. EPA thus proposed to change the rule to allow all emissions changes (both increases and decreases) that occur within the scope of a “project” to be counted in Step 1. *Id.* In line with existing regulations, EPA also proposed that any decrease must be enforceable as a practical matter, or there must be some procedure to ensure the decrease actually occurs and is maintained, and is subject to all of the requirements at 40 CFR § 52.21(b)(3), including that the decrease be “creditable.” *Id.* at 54,249/2.

EPA never took final action on the 2006 proposed rule, and withdraws it in the Proposed Rule. 84 Fed. Reg. 39,252/2. EPA now asserts that its prior statement that a source could not count emissions reductions from hybrid units until Step 2 “was unwarranted.” *Id.*

E. Overview of the Proposed Rule

EPA proposes to change the way in which an owner/operator of a major stationary source calculates whether it can “net out” of NSR requirements for regulated NSR pollutants. If finalized, the proposal would allow an owner/operator to take into account—at Step 1-- both emission increases and *decreases* associated with a modification “project” -- as defined by the owner/operator -- when determining whether the project will cause a significant emissions increase. EPA refers to this as “project emissions accounting” under Step 1. Emission decreases used to offset emission increases can occur at any other unit (existing or new) at the source undergoing a modification, and they do not have to be credible or enforceable. Consequently, even if the decreases turn out to be temporary or less than what was projected by the source, they still count at the Step 1 phase under EPA’s proposal.

EPA states that its proposal is consistent with the new interpretation set forth in a March 2018 Memorandum issued by former EPA Administrator Pruitt titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.” *See* Memorandum from E. Scott Pruitt to Regional Administrators (Mar. 13, 2018), *available at* https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf. There, EPA stated that it interprets existing regulations as providing for consideration of emission decreases at Step 1 where the decreases, plus the increases associated with the proposed modification, are part of a “single project.” 84 Fed. Reg. at 39,248/2.

Under the proposed revisions, EPA and permitting authorities would now consider the following in determining whether a modification will result in a significant *net* emissions increase:

- Step 1: Does the modification at an emissions unit (Unit X) result in an emissions increase at that unit? Do modifications at one or more other emissions units (e.g., Units A and Y) at the source result in an emissions decrease at that unit? Are the modifications part of a single project as defined by the owner/operator? If the answer to these three questions is yes, the aggregate emissions decrease from Units A and Y is subtracted from the emissions increase from Unit X. If there is no significant emissions increase for the “project,” the inquiry ends here.
- Step 2 (if applicable): Add to the significant emissions increase from the project any “other” increases and decreases at the source (all units) that are contemporaneous with the modification to Unit X and are otherwise creditable.

EPA states that it changed its long-standing interpretation because the phrase “sum of the difference” could be either a positive or negative number; therefore, the summation of any “difference” can be taken into consideration for Step 1 purposes. 84 Fed. Reg. at 39,249/1-2. Although EPA contends that its new interpretation is based on the wording of existing NSR regulations, the regulation governing multiple types of emission units specifies calculating the “sum of the emissions *increases*” for each emissions unit, which in turn is calculated using the applicability tests for existing and new emission units. *See* 40 CFR 52.21(a)(2)(f). A much more logical reading of this regulation—which refers only to the sum of emission *increases*--is that the “sum of the difference” must be a positive number. Indeed, this interpretation of Step 1 calculations to allow inclusion of emission reductions does not reflect state agencies’ understanding of EPA’s regulations, and is contrary to those agencies’ understanding of EPA’s interpretation of those regulations prior to former Administrator Pruitt’s March 2018 memorandum discussed above.

Although EPA claims its new interpretation accords with language in existing regulations, it nonetheless proposes revised regulatory language in subparagraph (f) substituting “the sum of the emissions increases” with “the sum of the difference” for each emissions unit, and adding a new definition for the “sum of the difference,” which is defined to include both increases and decreases. *See* 40 CFR § 52.21(a)(2)(f). EPA states that these changes are “to end any confusion and clarify that project emissions accounting is allowed for all project categories, including projects that involve multiple types of emission units.” 84 Fed. Reg. at 39,249/1.

As for what emission decreases, at what emissions units, may be considered part of the “project” involving the emissions unit undergoing the modification that will result in an emissions increase, EPA proposes that “the scope of a project that a source owner or operator is proposing to undertake” rests within the “reasonable discretion of the source owner or operator.” 84 Fed. Reg. at 39,250/2. In other words, sources are allowed to determine what activities, at what emission units, to group together as a single “project” for purposes of then calculating—at Step 1—the project’s overall emissions taking into consideration emission increases and decreases. EPA contends that its new Step 1 methodology does not present any “reasonable concerns” that sources will circumvent NSR requirements through the netting process, *id.* at 39,251/1, but EPA nonetheless seeks comment on this issue. EPA also requests comment on whether all parts of the project for Step 1 purposes should be “substantially related.” *Id.*

EPA states that it believes existing monitoring, recordkeeping, and reporting requirements for the “projected actual emissions” test are sufficient to ensure no circumvention, but it seeks comment on this issue as well. In light of existing recordkeeping requirements, EPA asserts that projected emission decreases in Step 1 need not become an enforceable emission limitation since a reviewing authority “can receive” the information necessary to enforce NSR requirements. EPA

also notes that the NSR regulations make enforceability of emission decreases a requirement of Step 2, not Step 1, and it seeks comment on whether “reasonable possibility” recordkeeping requirements for both emission increases and decreases are adequate in the context of the Step 1 applicability test. *See* 84 Fed. Reg. at 39,251/3.

As for State and local implementation of the NSR program, EPA states that programs that specifically forbid “project netting” might need to revise their regulations. 84 Fed. Reg. at 39,252/1. EPA requests comment on whether the proposed rule should be considered a “minimum program element” that must be included in a State Implementation Plan (SIP) for it to be approvable. *Id.*

In addition, in light of EPA’s new interpretation that existing NSR regulations allow “project emissions accounting,” EPA states its “belief” that state and local reviewing authorities with approved NSR programs “do not need to wait until finalization of this proposal” to implement project emissions accounting if their local rules and SIPs contain the same language as the EPA regulations. *Id.* EPA also states that reviewing authorities may not need to revise their state regulations and submit SIP revisions to adopt the proposed revisions if the current applicability procedures in those regulations “can be interpreted” to allow for project emissions accounting or these state and local programs incorporate the federal NSR regulations by reference without a date restriction. *Id.*

III. THE PROPOSAL ENABLES CIRCUMVENTION OF NSR AND IS THUS CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, AND EXCEEDS EPA’S AUTHORITY

Because EPA has failed to demonstrate that its proposal will not result in additional air pollution as compared to current netting rules, and because it conflicts with the Clean Air Act and is otherwise arbitrary and capricious, EPA should withdraw the proposal.

Agencies may not adopt or implement regulations that conflict with the statutes under which they are promulgated, and an agency's construction of a statutory scheme it is entrusted to administer must always at least be reasonable. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Accordingly, an agency's regulations cannot be "arbitrary, capricious, or manifestly contrary to the statute," *id.*, or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706. Further, agencies may not rely on general statutory grants of rulemaking authority to promulgate regulations that are otherwise inconsistent with more specific statutory directives. *Global Van Lines, Inc. v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1293-97 (5th Cir. 1983).

As set forth below, the Proposed Rule conflicts with the Clean Air Act, exceeds EPA's statutory authority, and is arbitrary and capricious. It accordingly must be withdrawn.

A. The Scope of "Project" is Unbounded, Enabling NSR Circumvention

One major problem is that EPA allows pollution sources to decide which modifications to look at when evaluating emissions at Step 1. Under the Proposed Rule, sources can—at their "reasonable discretion"—group together different activities, including activities that involve multiple types of emission units (new or existing), into a single "project" in order to show an emissions decrease, and hence avoid in-depth review of overall emissions. *See* 84 Fed. Reg. at 39,250/3-39,251/1. The Proposed Rule gives no timeframe in which the various activities considered must occur, but leaves that to the source to determine. This stands in marked contrast to EPA's 2009 project aggregation "interpretation," for which EPA denied reconsideration in 2018. That interpretation sets out the "substantially related" standard that EPA says applies to NSR project aggregation. *See* 83 Fed. Reg. 57,324 (Nov. 15, 2018); 74 Fed. Reg. 2,376 (Jan. 15,

2009). Under the substantially related standard, projects that occur more than three years apart are presumptively not substantially related. *See* 83 Fed. Reg. at 57,328/3, 57,331.

The Proposed Rule also draws a false distinction between the circumvention problem of “under-aggregation,” where a source artificially separates related emissions-increasing activities into separate “projects” to avoid triggering NSR, with the “over-aggregation” problem implicated by the Proposed Rule, where a source artificially groups together separate activities that, when considered together, either decrease emissions or result in an increase that is not significant. EPA incorrectly asserts that while the former situation presents a legitimate NSR circumvention concern, the latter does not. EPA accordingly proposes not to require any similar criteria or scrutiny with respect to “projects” involving different activities that the owner/operator chooses to group together into a single project for “project emissions accounting” purposes. But both “under-aggregation” and “over-aggregation” involve the same fundamental problem: a source can arbitrarily and unreasonably group together activities as part of a “project” to avoid triggering NSR.

While EPA does not view NSR circumvention as “a reasonable concern” under its permissive approach, it implicitly acknowledges there could be manipulation issues and seeks comment on whether the activity (or activities) for which a source “projects” an emission decrease to occur should be required to be “substantially related” to the activity (or activities) for which the source “projects” an emission increase to occur. Seeking cover for its “no circumvention” position, EPA invites industry commenters to propose examples of activities that would purportedly reduce emissions but which industry would not undertake under a “substantially related” requirement. 84 Fed. Reg. at 39,251/1.

The truth is, however, that significant NSR circumvention issues exist with the proposal. First, sources get to calculate their own projected emissions estimates, and EPA has stated it will defer to industry’s own emission projection determinations.³ Second, sources are only subject to “I believe” recordkeeping requirements⁴ regarding future emission levels triggered by the subjective views of the owner/operator in place of enforceable limits on any emission decreases utilized in Step 1 to net out of NSR (*see* discussion below at Section III.C).

Third, in designating the project scope, the Proposed Rule allows sources to arbitrarily group together (aggregate) any number of unrelated activities, without requiring a substantive or temporal nexus, to avoid triggering NSR review. EPA’s only justification for allowing sources this latitude is the agency’s wholly unsupported “belief” that sources “could *potentially* be incentivized to seek out emission reductions that might otherwise be foregone entirely.” 84 Fed. Reg. 39,250/3 (emphasis added). Providing nothing to substantiate its “belief,” EPA’s solicitation of examples speaks to the inadequacy of EPA’s analysis to justify this overtly permissive approach that will likely result in increased emissions and harm to public health. Such a result undercuts

³ On December 7, 2017, EPA issued an NSR “guidance” memo, stating it is now EPA’s policy that EPA will not substantively review industry NSR applicability determinations that comply with procedural requirements. *See* <https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index>. The memo essentially adopts a position that a power company had taken in litigation—and lost. *See United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017); *United States v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013).

⁴ As discussed further herein, under EPA’s recordkeeping rule sources are required to monitor and maintain records of modifications only if they determine—based on their own emissions projections which EPA will not second-guess -- there is a “reasonable possibility” the modification will result in an emissions increase that is 50% or greater of the amount that is a “significant emissions increase” as defined for a particular pollutant. We thus refer to this as the “I believe” recordkeeping requirement.

the primary purpose of the NSR program: to ensure that over time, modified sources install modern pollution controls to improve air quality.

Industry, however, has a lot to gain by avoiding NSR review: the NSR permitting process is complicated and can be lengthy, and any required pollution controls and other operational strictures necessary to satisfy BACT or LAER requirements can be costly. But for that very reason, polluting sources should not be allowed to make the call on what projects, over what timeframe, to include in Step 1, since they have every incentive to use that project aggregation to conceal significant emissions increases from the entire facility. The following example illustrates how EPA's proposal would allow sources to group projects in such a way that results in circumvention of NSR.

Hypothetical Example: An existing major stationary source has many emission units, including two emission units (X and Y). An activity occurring at the facility results in an increase of 60 tons per year (TPY) of NO_x emissions at unit X. Another unit is also modified resulting in a decrease of 30 TPY of NO_x emissions at unit Y. Contemporaneous increases in NO_x emissions from unrelated modifications at other units at the source are 35 TPY. The significance threshold for NO_x increases is 40 TPY.

Analysis under existing regulations:

Step 1: Emission increases at X = 60 TPY. Because this amount exceeds the significance threshold of 40 TPY, Step 2 analysis of the whole facility is required.

Step 2:

Net emission increase:

+ 60 TPY from unit X

- 30 TPY decrease from unit Y

+ 35 TPY increases in contemporaneous emissions from other units at the source ⁵=65 TPY.

⁵ NSR does not apply to this contemporaneous increase if each activity or change results in emissions less than 40 TPY. This increase only enters NSR applicability determination, as part of the contemporaneous netting determination, if a subsequent change exceeds 40 TPY, as is the case with activity X here.

Since 65 TPY exceeds the 40 TPY threshold, NSR applies.

Analysis under the Proposed Rule:

If one moves the consideration of decreases associated with the project from Step 2 to Step 1, this affords an opportunity to “cherry pick” emission decreases at unit Y and try to justify those decreases as being part of the same project the activity at Unit X. The company is also free to claim that the 35 TPY emission increases from other units are not part of the Unit X and Unit Y “project,” and there would not be any Step 2 netting analysis that includes the emission increases from the other units.

Step 1:

Emission increases:

+ 60 TPY (increases from unit X)

-30 TPY (decreases from Unit Y if the company claims modification Y is part of the project encompassing the activity at Unit X) = 30 TPY increase, leading to the conclusion that the project is not subject to NSR.

Step 2: Is Not Applicable -- The Project Has Netted Out Under Step 1

Conclusion: Unit X would have gone through NSR under EPA’s existing rule, but does not go through NSR under EPA’s Proposed Rule. Neither air quality monitoring nor installation/implementation of BACT/LAER would be required. In short, and contrary to EPA’s suggestions in its proposal, this approach will allow for NSR circumvention by polluting sources.

The example set forth above demonstrates that EPA’s proposed approach not only encourages, but authorizes, gamesmanship at the Step 1 stage, and incentivizes companies to include minimal control initiatives in “projects” just to the level to ensure the project “nets out” under Step 1. Indeed, given sources’ ability to define the scope and timing of the “project,” which can now include at Step 1 non-creditable decreases (see below) that result from any physical change or operational change, chances are good that many facilities will never get to a source-wide Step 2 netting analysis. Those facilities can then avoid having to look at the impacts of other “contemporaneous” source activities, notwithstanding that at least one modification they are

undertaking will result in a significant emissions increase. And significantly, facilities could proffer at Step 1 an emissions decrease that results from a “change in the method of operation” such as an unenforceable reduction in production rate that turns out to be nothing but a temporary reduction, thus avoiding the need to even modify equipment or install a pollution control device. EPA does not address this possibility, which amounts to a license to avoid NSR.

As noted above, EPA’s new interpretation of Step 1 calculations to allow inclusion of emission reductions does not reflect the understanding of EPA’s regulations held by the environmental agencies of the states whose Attorney Generals have signed these comments, and is contrary to those agencies’ understanding of EPA’s interpretation of those regulations prior to former Administrator Pruitt’s March 2018 memorandum discussed above.

B. The Proposed Rule Does Not Require That the Emissions Decrease Be Creditable or Enforceable

Because emission decreases within the undefined scope of a “project” are accounted for in Step 1 under EPA’s proposal, EPA states that the change that causes an emissions decrease need not be “creditable” or enforceable. This is perhaps the most egregious aspect of EPA’s new interpretation.

Existing regulations, as noted, require that any decrease used in the netting calculation be “creditable,” meaning (i) the pre-modification level of actual emissions or the pre-modification level of allowable emissions, whichever is lower, exceeds the post-modification level of actual emissions; (ii) the decrease in emissions is enforceable as a practical matter; and (iii) the decrease in emissions has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the modification at issue. 40 CFR § 52.21(b)(3)(iii); 40 CFR § 51.165(a)(1)(vi)(E). There is a good reason for this requirement: it prevents sources from

netting out of NSR by counting emission decreases that later turn out to be less than projected, which do not materialize at all, or which are not maintained beyond a short period of time. In allowing consideration of non-creditable decreases at Step 1, the Proposed Rule provides yet another mechanism for sources to avoid NSR in a manner that undermines the health-protective purpose of the Act.

In addition, with regard to Step 2 netting calculations, the preamble to the Proposed Rule makes an error by expanding the circumstances in which emission reductions can be netted in Step 2. EPA states that an emission reduction from another unit is creditable, and thus can be used in Step 2 netting, “only if the EPA Administrator or other reviewing authority has not relied on it in issuing a PSD or [nonattainment NSR] permit for the source and the permit is still in effect at the time of the major modification. 84 Fed. Reg. at 39,247/1-2. But EPA has previously stated that an emission reduction is “surplus” and thus available for netting only if it has not been used to meet “any other regulatory requirement.” 51 Fed. Reg. 43,814, 43,832/1 (Dec. 4, 1986) (emphasis added); *see also* Memorandum from John Seitz, Director of Air Quality Planning and Standards, to Bob Hanneschlager, Acting Director Multimedia Planning and Permitting Division, Region VI, at 3 (emission reductions required to comply with “reasonably available control technology” or other regulatory purposes may not be used for NSR netting), *available at* <https://www.epa.gov/sites/production/files/2015-07/documents/netnoff.pdf>. Thus, contrary to EPA’s suggestion in the preamble to this Proposed Rule, emissions reductions that have not been relied on in issuing an NSR permit may only be used in Step 2 netting if in addition they have not been used to meet *any* other regulatory requirement.

C. The Proposed Rule is Arbitrary and Capricious Because It Fails to Include Enforceable Recordkeeping Requirements for Validating Industry’s “Project Emissions Accounting” Calculations

EPA contends that any concerns with NSR circumvention are alleviated by existing monitoring, recordkeeping and reporting requirements set forth at 40 CFR § 52.21(r)(6), hanging its hat on the proposition that this will mitigate any concerns with polluting sources defining the scope of “projects” and relying on emission decreases counted at Step 1 that are not creditable and enforceable. EPA’s reliance is misplaced.

Sources can avoid the triggers for tracking, documenting, and usually reporting post-project emissions simply by “projecting” that an emissions increase will be less than 50% of the significant emission increase level. *See* 40 CFR § 52.21(r)(6). In “projecting” estimated future emissions, owner/operators are allowed to decide what part of the increase is due to demand growth, and hence does not count for NSR purposes.⁶ So, under EPA’s netting proposal, companies can pair an unenforceable emission decrease (change A) with an otherwise significant emission increase (change B) to avoid NSR, and can then avoid tracking the actual emission increase as a result of the changes by “projecting” that the Step 1 net emissions change (B – A) would be less than 50% of the significant emission increase level. And the Administrator’s directive to EPA enforcement to not question a source’s NSR calculations (except in cases of “clear

⁶ An increase in hours or production rate are not considered physical changes, 40 CFR § 52.21(b)(2)(iii)(f). Emissions increases that would have occurred regardless of the project, “in response to independent factors, such as system-wide demand growth ... do not result from the change and shall be excluded from the projection of future actual emissions.” 57 Fed. Reg. 32,314, 32,326 (July 21, 1992). Without source records, it is extremely difficult, if not impossible, for regulatory authorities to evaluate what part of an emissions increase is in fact due to demand growth.

error”)⁷ means there is little chance that facilities’ calculations will be audited and even less chance that EPA will be able to check the actual emission increases resulting from changes A (decrease) and B (increase).

A brief history of the current monitoring, recordkeeping, and reporting rule demonstrates why it is wholly inadequate to ensure that sources do not circumvent NSR requirements through faulty netting analyses. Under EPA’s 2002 NSR rule, if a facility concluded that there is a “reasonable possibility” that the project might result in a significant emissions increase, the facility was required to maintain records of actual emissions for five years following the change (10 years if the project increases the capacity or potential to emit of an NSR-regulated pollutant). The “reasonable possibility” standard applied to projects that facilities had determined do not result in a significant emissions increase (and hence are not a major modification). 40 CFR § 52.21(r)(6). While such projects are exempt from NSR permitting requirements (including LAER or BACT requirements), EPA required facilities to document their determinations and track future emissions if there was a “reasonable possibility” that a significant emissions increase could occur.

Various states (including several signatories to this letter⁸) and environmental groups challenged the 2002 rule in court. In *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), the court upheld certain elements of the 2002 rule while rejecting others. As relevant here, the court rejected the provision requiring sources to keep records only if there is a “reasonable possibility” that a project may result in a significant emissions increase. The court agreed with petitioners that this

⁷ See December 7, 2017 NSR “guidance” memo, stating it is now EPA’s policy that EPA will defer to industry NSR applicability determinations that comply with procedural requirements. <https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index>

⁸ New York, New Jersey, California, Massachusetts, Pennsylvania, and the District of Columbia (among others) challenged the 2002 rule.

provision rendered the post-modification emissions calculation methodology unenforceable and remanded the issue back to EPA to provide an acceptable explanation of the “reasonable possibility” standard or devise an appropriately supported alternative. Notable is the court’s determination that “the rule allows sources that take advantage of the ‘reasonable possibility’ standard to avoid recordkeeping altogether, thus thwarting EPA’s ability to enforce the NSR provisions.” *New York*, 413 F.3d at 35 (noting also that EPA’s enforcement authority “depends on evidence”).

In response to the D.C. Circuit’s decision, on December 21, 2007, EPA issued a final rule to clarify its “reasonable possibility” recordkeeping standard. 72 Fed. Reg. 72,607 (Dec. 21, 2007); *see* 40 C.F.R. § 52.21(r)(6) and 40 C.F.R. § 51.165(a)(6). EPA sought to clarify that a “reasonable possibility” of a significant emissions increase exists—and therefore recordkeeping and reporting requirements apply—if the projected increase in emissions equals or exceeds 50% of the applicable NSR significance level for a relevant pollutant. If a facility crosses the “reasonable possibility” threshold, the facility must document and retain pre-modification records that describe the project, the emissions units affected, and the applicability calculations made, and in some cases must submit reports to the permitting authority. 40 CFR § 52.21(r)(6)(i). Post-construction, if the facility crosses the “reasonable possibility” threshold it must maintain records and monitor emissions for five years, or ten years if the project increases the design capacity or potential to emit of the regulated NSR pollutant. *Id.* § 52.21(r)(6)(iii).

Under the final 2007 rule, sources must consider and track both project-related emissions and emissions attributable to demand growth. However, if a project exceeds the percentage increase trigger only because of increased emissions which are due to independent factors such as demand growth (as determined by the owner/operator), a source need only maintain pre-

modification records of its determination; it is not required to maintain the pre-modification data or other records used to generate that determination, nor do post-change recordkeeping or reporting requirements apply. Sources are only required to monitor, calculate and maintain a record of annual emissions of any regulated NSR pollutant, but such records do not indicate what portion of those emissions may be attributable to a modification and what portion may be attributable to independent factors. Significant questions have arisen concerning how the demand growth exclusion should be interpreted, *see U.S. v. Cinergy Corp.*, 2005 WL 3018688 (S.D. Ind. 2005), and industry historically has argued that demand growth—not the project at issue—resulted in any increased emissions. The final recordkeeping rule does not fix these shortcomings because it continues to impose subjective recordkeeping and reporting standards.⁹ In short, the recordkeeping rule “allows sources that take advantage of the ‘reasonable possibility’ standard to avoid recordkeeping altogether, thus thwarting EPA’s ability to enforce the NSR provisions. *New York*, 413 F.3d at 35. This remains true under the Proposed Rule.

Under the existing recordkeeping rule, states and EPA still are unable to determine whether a source’s estimated future emissions and future demand growth were reasonable, or whether the source was instead avoiding NSR by attributing an artificially high amount of future emissions to demand growth instead of to the project in question. Including emission decreases in Step 1 will only compound the validation problem, as sources would not be required to maintain any records of their calculations of projected emission increases and decreases if they “net out” of NSR in Step

⁹ Given these defects and lack of accountability under the 2007 recordkeeping rule, New Jersey challenged the rule in the D.C. Circuit (Docket No. 08-1065) and also filed a petition for reconsideration with EPA, both of which are still pending. At EPA’s request, New Jersey’s petition for review in the D.C. Circuit has been held in abeyance pending EPA’s reconsideration of the rule. EPA did not stay the rule, and reconsideration remains pending.

1: EPA states that emission decreases calculated under Step 1 are subject to the same emissions tracking, documenting and, under certain circumstances, reporting as any other emissions calculation using the “projected actual emissions” test. 84 Fed. Reg. at 39,251/2-3. Thus, these requirements are limited to projects where the owner/operator “believes” that the emissions increase would be greater than 50% of the significant threshold level. If an owner/operator can now include emission reductions at other units in the Step 1 calculation, it becomes even less likely that tracking, documenting and reporting will occur.

For all of these reasons, existing monitoring, recordkeeping and reporting requirements are wholly inadequate to verify companies’ emissions projections or to act as a backstop to NSR circumvention. EPA’s reliance on existing recordkeeping requirements to eliminate the requirement that emission decreases be creditable and enforceable in order to “count” in the netting analysis, and to justify its policy to not substantively review a sources’ emissions projections, is arbitrary and capricious and contrary to the Clean Air Act’s requirement that when a facility is modified in such a way that its overall emissions increase, it is subject to NSR.

D. EPA Has No Authority to Require States to Modify Their SIPs to Accommodate Project Emissions Accounting

EPA’s proposal also seeks comment on whether the proposed regulatory changes should be deemed minimum program elements, and accordingly require states and localities whose SIP-approved regulations expressly preclude project emissions accounting to revise their SIPs to make them consistent with the Proposed Rule. 84 Fed. Reg. at 39,252/1. EPA, however, has made no determination that its proposed changes are more stringent than what states or local agencies are presently implementing under their NSR rules; indeed, EPA states that it is “unable” to estimate any emissions decreases associated with project emissions accounting. 84 Fed. Reg. at 39,251/ 1-2. Because EPA has not demonstrated that its project emissions accounting proposal is more

stringent than what states or local agencies are presently implementing under their NSR rules, EPA lacks authority to require states to modify their SIPs to include the proposal.

The Clean Air Act specifically allows state and local agencies to adopt and enforce their own pollution control programs provided they are at least as stringent as those required under the Act itself. 42 U.S.C. § 7416. As recognized by the Supreme Court, states may submit implementation plans more stringent than federal law requires, and EPA “must approve such plans if they meet the minimum requirements of § 110(a)(2) [42 U.S.C. § 7410(a)(2)].” *Union Electric Co. v. EPA*, 427 U.S. 246, 265 (1976).

As set forth above, allowing for emission decreases to be considered in Step 1 while at the same time allowing sources to “project” future emissions without any substantive review by EPA, without robust recordkeeping and tracking, and without any requirement that emission decreases be creditable or enforceable, clearly is less stringent than existing EPA regulations or the netting analysis employed by many jurisdictions that does not allow or require such “project netting.” Under EPA’s new interpretation, more sources will be able to avoid triggering NSR, thereby avoiding air quality analysis and pollution reductions that otherwise would have applied.

Because the Clean Air Act authorizes state and local agencies to implement more stringent emissions requirements, EPA has no power to adopt a rule preventing a state from doing so. “The Act gives the Agency no authority to question the wisdom of a State’s choices of emissions limitations” if they are part of a plan which satisfies the standards of § 110(a)(2) [42 U.S.C. § 7410(a)(2)]. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). Any attempt by EPA to circumscribe the States’ authority would be in excess of EPA’s statutory authority and thus subject to reversal under CAA Section 307, 42 U.S.C. § 7607. Likewise, because EPA has no authority to infringe on State and local agencies’ ability to implement more stringent NSR

“netting” regulations, it has no authority to require States and local agencies whose current applicability procedures can be interpreted to allow for “project emissions accounting” to adopt EPA’s new interpretation. *See* 84 Fed. Reg. at 39,252/1 (stating that States/local authorities whose regulations can be interpreted to match EPA’s new interpretation “may not need” to revise their state regulations and submit SIP revisions).

E. EPA Attempts to Make its March 2018 Memorandum a Final Agency Action, Without Notice and Comment Rulemaking

EPA’s Proposed Rule states the following:

In light of the agency’s interpretation that the existing NSR regulations allow project emissions accounting, and as discussed in the March 2018 Memorandum, the EPA believes that state and local reviewing authorities with approved NSR programs do not need to wait until finalization of this proposal to allow for project emissions accounting.

84 Fed. Reg. at 39,151/1. EPA’s “belief” that reviewing authorities can immediately begin implementing EPA’s new interpretation of NSR netting rules amounts to an attempt to make EPA’s change in interpretation legally effective without notice and comment rulemaking. This is illegal--reviewing authorities are not free to implement EPA’s new interpretation until EPA complies with formal rulemaking procedures as required by the Administrative Procedure Act. 5 U.S.C. § 553.

F. The Proposed Rule Conflicts with the Anti-Backsliding Provisions in the CAA

EPA’s new interpretation of NSR netting rules and proposed revisions likely will result in significantly more air pollution from modified sources and consequently, if implemented, the Proposed Rule is likely to cause states to violate the anti-backsliding requirements of Sections 110(l) and 193 of the Clean Air Act. As noted, Section 193 is a general savings clause that prohibits EPA from adopting control measures weaker than those in place as of 1990 to prevent

backsliding on incremental improvements of air quality made over time. 42 U.S.C. § 7515. Section 110(l) forbids changes to State Implementation Plans that weaken existing controls – including NSR-- that states are relying on to attain the NAAQS. 42 U.S.C. § 7410(l).

An important goal of NSR is to avoid emissions backsliding. For non-attainment areas, this becomes even more significant since those areas must strive to improve deteriorated air quality by finding ways to reduce emissions in the air quality control area. To avoid emissions backsliding, EPA should withdraw the Proposed Rule.

IV. CONCLUSION

The proposed rule is contrary to EPA’s statutory obligation to protect human health and the environment. It exceeds EPA’s statutory authority, conflicts with the Clean Air Act, and is arbitrary and capricious. We urge EPA to abandon this ill-advised Proposed Rule that will very likely result in increased air pollution emissions, worsen air quality, and harm public health.

Respectfully Submitted,

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