

airplanes with GE90 engines without a forward insulation blanket and without the fitting assembly at the aft insulation blanket location.”

(4) Boeing Service Bulletin 777-78A0066, Revision 3, dated April 28, 2011, defines Group 2 Configuration 2 as “all 777-200 airplanes with GE90 engines through line number 413 without a forward insulation blanket and with the fitting assembly at the aft insulation blanket location;” however for paragraph (h) of this AD, Group 2 Configuration 2 is defined as “all 777-200 airplanes with GE90 engines without a forward insulation blanket and with the fitting assembly at the aft insulation blanket location.”

#### (j) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (j)(1), (j)(2), or (j)(3) of this AD.

(1) Boeing Alert Service Bulletin 777-78A0066, dated June 5, 2008.

(2) Boeing Service Bulletin 777-78A0066, Revision 1, dated March 12, 2009.

(3) Boeing Alert Service Bulletin 777-78A0066, Revision 2, dated April 8, 2010.

#### (k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: [9-ANM-Seattle-ACO-AMOC-Requests@faa.gov](mailto:9-ANM-Seattle-ACO-AMOC-Requests@faa.gov).

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously for AD 2010-26-01 are approved as AMOCs for the corresponding provisions of paragraph (g) of this AD.

#### (l) Related Information

(1) For more information about this AD, contact James Laubaugh, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206-231-3622; email: [james.laubaugh@faa.gov](mailto:james.laubaugh@faa.gov).

(2) For service information identified in this AD, contact Boeing Commercial

Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717. You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

Issued in Des Moines, Washington, on July 30, 2019.

**Dionne Palermo,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### 36 CFR Part 220

**RIN 0596-AD31**

#### National Environmental Policy Act (NEPA) Compliance

**AGENCY:** Forest Service, USDA.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** On June 13, 2019, the U.S. Department of Agriculture, Forest Service (Agency) published a proposed rule to revise its National Environmental Policy Act (NEPA) regulations. The Agency is extending the comment period on the proposed rule, which was scheduled to close on August 12, 2019, for 14 days until August 26, 2019.

**DATES:** The comment period for the proposed rule published June 13, 2019, at 84 FR 27544, is extended. Comments must be received in writing by August 26, 2019.

**ADDRESSES:** Please submit comments via one of the following methods:

1. *Public participation portal (preferred):* <https://www.regulations.gov/>.

2. *Mail:* NEPA Services Group, c/o Amy Barker; USDA Forest Service, 125 South State Street, Suite 1705, Salt Lake City, UT 84138.

3. *Email:* [nepa-procedures-revision@fs.fed.us](mailto:nepa-procedures-revision@fs.fed.us).

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received online via the public reading room at <https://www.regulations.gov/>.

The proposed rule and supporting information is available at <https://www.fs.fed.us/emc/nepa/revisions/index.shtml>.

#### FOR FURTHER INFORMATION CONTACT:

Christine Dawe; Director, Ecosystem Management Coordination; 406-370-8865. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

Dated: August 6, 2019.

**Christopher B. French,**

*Deputy Chief, National Forest System.*

[FR Doc. 2019-17071 Filed 8-8-19; 8:45 am]

**BILLING CODE 3411-15-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51 and 52

**[EPA-HQ-OAR-2018-0048; FRL-9997-95-OAR]**

**RIN 2060-AT89**

#### Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Project Emissions Accounting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to revise certain New Source Review (NSR) applicability regulations to clarify the requirements that apply to sources proposing to undertake a physical or operational change (*i.e.*, a project) under the NSR preconstruction permitting program. Under this program, an existing major source proposing to undertake a project must determine whether that project will constitute a major modification following a two-step applicability test and thus be subject to the NSR preconstruction permitting requirements. The first step is to determine if the proposed project will cause a “significant emissions increase” of a regulated NSR pollutant (Step 1). If the proposed project is projected to cause such an increase, the second step is to determine if there is a “significant net emissions increase” of that pollutant (Step 2). In this action, we are proposing to revise our NSR applicability regulations to make it clear that both emissions increases and emissions decreases that result from a given proposed project are to be considered at Step 1 of the NSR major modification applicability test. In addition, this proposal replaces and withdraws the agency’s 2006 Project Netting Proposal.

**DATES:**

*Comments:* Comments must be received on or before October 8, 2019.

*Public Hearing:* If anyone contacts us requesting to speak at a public hearing by August 30, 2019, the EPA will hold a public hearing. Additional information about the hearing will be published in a subsequent **Federal Register** document.

**ADDRESSES:** *Comments:* Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2018-0048, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. 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 <http://www2.epa.gov/dockets/comments.html>.

**FOR FURTHER INFORMATION CONTACT:** Jessica Montañez, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-3407; email address: [montanez.jessica@epa.gov](mailto:montanez.jessica@epa.gov).

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-4028; email address: [long.pam@epa.gov](mailto:long.pam@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### *A. Does this action apply to me?*

Entities potentially affected directly by this action include sources in all industry categories. Entities potentially

affected by this action also include state, local and tribal air pollution control agencies (air agencies) responsible for permitting sources pursuant to the NSR program.

#### *B. What should I consider as I prepare my comments for the EPA?*

When submitting comments, remember to:

- Identify the rulemaking docket 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.

#### *C. 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>.

#### *D. How is this proposed rule organized?*

The information presented in this document is organized as follows:

- I. General Information
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- II. Background
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  - B. Revising the Step 1 Applicability Regulations for Projects That Involve Multiple Types of Emissions Units To Provide Clarity on These Applicability Procedures

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- IV. Withdrawing the 2006 Project Netting Proposal
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  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
  - C. Paperwork Reduction Act (PRA)
  - D. Regulatory Flexibility Act (RFA)
  - E. Unfunded Mandates Reform Act (UMRA)
  - F. Executive Order 13132: Federalism
  - G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
  - H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  - I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - J. National Technology Transfer and Advancement Act (NTTA)
  - K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- VII. Statutory Authority

## **II. Background**

### *A. New Source Review Program*

The major NSR provisions of the Clean Air Act (CAA) are a combination of air quality planning and air pollution control technology provisions that require stationary sources of air pollution to obtain a preconstruction permit prior to beginning the construction of a new major stationary source or a major modification of an existing major stationary source. Part C of title I of the CAA contains the requirements for the preconstruction review and permitting of new and modified major stationary sources of air pollution (specifically, regulated NSR pollutants) locating in areas meeting the National Ambient Air Quality Standards (NAAQS) (“attainment” areas) and, areas for which there is insufficient information to classify an area as either attainment or nonattainment (“unclassifiable” areas).<sup>1</sup> This program is known as the Prevention of Significant Deterioration (PSD) program.

<sup>1</sup> 40 CFR 52.21(b)(50) defines the term “regulated NSR pollutant” for purposes of the Prevention of Significant Deterioration program. The term generally includes pollutants for which a NAAQS has been promulgated and other pollutants subject to regulation under the CAA. This “regulated NSR pollutant” definition, however, excludes the Hazardous Air Pollutants regulated under section 112 of the CAA.

Part D of title I of the CAA contains the requirements for the preconstruction review and permitting of new and modified major stationary sources of air pollution locating in areas not meeting the NAAQS (“nonattainment” areas). This program is known as the Nonattainment New Source Review (NNSR) program.<sup>2</sup>

The permit program for non-major sources and minor modifications to major sources is known as the minor NSR program. CAA section 110(a)(2)(C) requires states to develop a program, which includes a permitting program to regulate the construction and modification of any stationary source “as necessary to assure that [NAAQS] are achieved.”

To comply with the requirements of the CAA and the major NSR implementing regulations at 40 CFR 51.166 and 51.165 respectively, most states have EPA-approved State Implementation Plans (SIPs) in place to implement the PSD and NNSR preconstruction permit programs. For states and tribes that lack an EPA-approved SIP or Tribal Implementation Plan (TIP) to implement the PSD permit program, the federal PSD program at 40 CFR 52.21 applies. For states that do not have an approved NNSR SIP for a particular nonattainment pollutant, Appendix S to 40 CFR part 51 contains an interim NNSR program. This interim program enables implementation of NNSR permitting in such areas during the time between the date of the relevant nonattainment designation and the date on which the EPA approves into the SIP a NNSR program or additional components of an NNSR program for a particular pollutant. The EPA also has a federal NNSR program at 40 CFR 49.165 that only applies to tribal areas that do not have an EPA-approved TIP in place to implement the NNSR program.<sup>3</sup> For stationary sources whose emissions are lower than the PSD and NNSR applicability thresholds, minor NSR permitting requirements might apply. Sources should consult with the applicable state or local permitting agency, or for most tribal areas the applicable EPA Regional office,<sup>4</sup> to determine if any minor NSR

requirements may apply to your stationary source.

The applicability of the PSD, NNSR, or minor NSR programs to a stationary source must be determined in advance of construction and is a pollutant-specific determination. Thus, a stationary source may be subject to the PSD program for certain pollutants, NNSR for some pollutants and minor NSR for others.

#### B. Major Modifications Under the NSR Program

Our NSR regulations define a major modification<sup>5</sup> as any physical change in or change in the method of operation of an existing major stationary source that would result in a significant emissions increase of a regulated NSR pollutant (known as Step 1) and a significant net emissions increase of that pollutant (known as Step 2) from the major stationary source. This two-step test, which has been an element of the NSR program since the 1980’s, was codified by the 2002 NSR Reform Rule<sup>6</sup> to explicitly include the prior EPA practice of looking first at whether any emissions increase that may result from the project<sup>7</sup> by itself would be significant before evaluating whether there would be a significant “net emission increase”<sup>8</sup> from the major stationary source as a whole. In other words, 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 (*i.e.*, generally within a 5-year period) and creditable. We currently refer to

Step 1 applicability procedures as “project emissions accounting” (previously known as “project netting”) and Step 2 as “contemporaneous netting.”<sup>9</sup>

An emissions increase of a regulated NSR pollutant is considered significant at Step 1 or 2 if the emissions increase would be equal to or greater than any of the pollutant-specific significant emissions rates listed under the definition of “significant” in the applicable PSD or NNSR regulations.<sup>10</sup> For those regulated NSR pollutants not specifically listed, any increase in emissions is significant. In addition, the procedure for calculating whether a proposed project would result in a significant emissions increase depends upon the type of emissions unit(s)<sup>11</sup> that would be included in the proposed project. The emissions units involved in a project can be new, existing, or a combination of new and existing units.<sup>12</sup> For new units,<sup>13</sup> the NSR regulations require the difference in pre- and post-project emissions to be calculated based on the difference between baseline actual emissions (as applicable to new emissions units)<sup>14</sup> and potential to emit (PTE)<sup>15</sup> after the project. For existing units,<sup>16</sup> the NSR regulations allow the difference in pre- and post-project emissions to be calculated based on the difference between baseline actual emissions (as

<sup>9</sup> Contemporaneous netting is voluntary and can add significant complexity to the NSR applicability process in that it requires the additional accounting of all other increases and decreases in actual emissions that are contemporaneous and creditable to the project. Additionally, to be creditable, emissions decreases accounted for under Step 2 must, among other things, be enforceable as a practical matter at and after the time actual construction on the project being evaluated under Step 1 begins. This requirement can limit operational flexibility and increase permitting burden.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 40 CFR 52.21(a)(2)(iv).

<sup>13</sup> 40 CFR 52.21(b)(7)(i).

<sup>14</sup> The NSR regulations define a “new emissions unit” 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.” 40 CFR 52.21(b)(7)(i). The “baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit’s potential to emit.” 40 CFR 52.21(b)(48)(iii).

<sup>15</sup> 40 CFR 52.21(b)(4).

<sup>16</sup> 40 CFR 52.21(b)(7)(ii).

<sup>5</sup> 40 CFR 52.21(b)(2). The regulations at 40 CFR 52.21 apply to the federal PSD program, however, the EPA has other NSR regulations, including 40 CFR 51.165, 51.166, and Appendix S of part 51, that contain analogous provisions. This proposal also applies to those analogous provisions. However, there are certain modification provisions under the Title I, Subpart D of the CAA and the EPA nonattainment NSR regulations that apply to certain nonattainment area classifications (*See, e.g.*, CAA section 182(e)(2); 40 CFR part 51, Appendix S 11.A.5.(v)). This proposal does not cover those provisions.

<sup>6</sup> In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. The agency refers generally to these rule provisions as the “NSR Reform Rule.” As part of this 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 80186 (December 31, 2002).

<sup>7</sup> 40 CFR 52.21(b)(52). In general, we use the term “project” to mean the physical change or change in method of operation under review, though this can encompass one or more activities at an existing major source. A subsequent section of this rule’s preamble discusses how multiple activities should be evaluated to determine whether these activities constitute one project.

<sup>8</sup> 40 CFR 52.21(b)(3).

<sup>2</sup> For purposes of NNSR, “regulated NSR pollutant” is defined at 40 CFR 51.165(a)(1)(xxxvii).

<sup>3</sup> To date, no tribe has submitted a TIP to administer the NNSR program for any lands under their jurisdiction. Thus, the EPA is currently the NNSR reviewing authority in Indian Country.

<sup>4</sup> To date, most tribes have not submitted a TIP to administer the minor NSR program for any lands under their jurisdiction. Thus, the EPA is currently the minor NSR reviewing authority in Indian country for most tribal areas.

applicable to existing emissions units)<sup>17</sup> and projected actual emissions.<sup>18</sup> Baseline actual emissions are generally based on the rate of actual emissions a unit has emitted in the past. Projected actual emissions are based on the maximum rate of actual emissions a unit is projected to emit in the future. Potential to emit represents a unit's maximum capacity to emit a pollutant under its physical and operational design.

Step 2, or contemporaneous netting, is described in 40 CFR 52.21(a)(2)(iv)(a). Once a source owner or operator determines that a significant emissions increase would occur at Step 1, then the source owner or operator may perform the Step 2 or contemporaneous netting analysis to determine if there would be a significant net emissions increase. A "net emissions increase" is specifically defined at 40 CFR 52.21 (b)(3)<sup>19</sup> and "means, with respect to any regulated NSR pollutant emitted at a major stationary source, the amount of which the sum of the following exceeds zero: (a) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to [40 CFR 52.21] (a)(2)(iv), and (b) any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable." Thus, the Step 2 contemporaneous netting analysis is conducted by adding the resulting emissions changes from the project at Step 1 to all *other* emissions increases and decreases in actual emissions at the major stationary source that are contemporaneous with the Step 1 project and otherwise creditable. If there is a significant net emissions increase after the Step 2 contemporaneous netting analysis, then the project is a major modification.

Emissions increases and decreases are contemporaneous if they occur between "the date five years before construction of a particular project commences and the date that the increase from a particular change occurs."<sup>20</sup> An emissions increase or decrease in actual emissions under Step 2 is creditable only if the EPA Administrator or other reviewing authority has not relied on it in issuing a PSD or NNSR permit for the source and the permit is still in effect at

the time of the major modification.<sup>21</sup> Furthermore, emissions increases under Step 2 are only creditable if the new level of actual emissions exceeds the old level of actual emissions.<sup>22</sup> Emissions decreases under Step 2, on the other hand, are creditable only to the extent that the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions and the decrease in actual emissions is enforceable as a practical matter at and after the time that actual construction of the particular change begins.<sup>23</sup>

Thus, for a project that results in a significant emissions increase under Step 1 of the major modification applicability test and a significant net emissions increase as determined under Step 2, the modification is a major modification.

### C. Regulatory History

In 2002, as part of the NSR Reform Rule, the EPA revised the applicability procedures in its NSR regulations, including procedures for determining whether a project at an existing major stationary source constitutes a major modification. This 2002 rule codified the EPA's prior interpretation that one must first determine whether "there will be a significant emissions increase from the modification itself,"<sup>24</sup> and only then move on to assess whether there will be a significant net emissions increase (based on the contemporaneous netting analysis).

In 2006, the EPA issued a proposed rule titled, "Prevention of Significant Deterioration and Nonattainment New Source Review: Debottlenecking, Aggregation and Project Netting" (2006 Project Netting Proposal)<sup>25</sup> to address, among other topics, the accounting of emissions under Step 1 of the major modification applicability test. Prior to the 2006 Project Netting Proposal, the agency had come to perceive that there was some uncertainty both within the regulated community and among reviewing authorities with respect to how to account for emissions at Step 1 of the NSR applicability regulations, insofar as some sources and reviewing authorities were counting both emissions decreases and emissions increases from a project at Step 1 of the major modification applicability test,

while others were only considering emissions increases from a project at Step 1.<sup>26</sup> In addition, the EPA made applicability determinations before and after this proposal in which it suggested that the NSR applicability regulations could be read as precluding the consideration of emissions decreases at Step 1 of the major modification applicability test.<sup>27</sup> The agency indicated in the 2006 Project Netting Proposal that the current regulatory text for projects that involve multiple types of emissions units,<sup>28</sup> which uses the term "sum of the emissions increases for each emissions unit," "would not allow a source to include reductions from units that are part of the project until Step 2 of the calculation," while the current regulatory text that applies to projects that involve only new or existing units, which uses the term "sum of the difference," would allow for the consideration of both emissions increases and decreases at Step 1 because that "difference may either be a positive number (representing a projected increase) or a negative number (representing a projected decrease)."<sup>29</sup>

In the 2006 Project Netting Proposal, we solicited public comment on revising the relevant regulatory text to expressly provide that both emissions increases and decreases that occur within the scope of a project be counted in Step 1 of the major modification applicability test for all project categories. The EPA explained that this was appropriate in order to "represent the true environmental impact of a project on all involved emissions units."<sup>30</sup> In January 2009, however, the EPA announced in a **Federal Register** notice<sup>31</sup> that it was taking no action on the "project netting" portion of the 2006 proposal since the agency was still

<sup>26</sup> 71 FR 54248 (September 14, 2006) ("The EPA recognizes that in the past some sources and permitting authorities have counted decreases in emissions at the individual units involved in the project when determining an overall project emissions increase (*i.e.*, Step 1 of the NSR test), while some have not.")

<sup>27</sup> For example, in the 2006 Project Netting Proposal the EPA mentioned that "In past [permitting applicability] determinations, the EPA has stated that only the increases resulting from the project are considered in determining whether a significant emissions increase has occurred in Step 1." 71 FR 54248 (September 14, 2006). In addition, a 2010 letter from Barbara A. Finazzo, U.S. EPA Region 2 to Kathleen Antoine, HOVENSA, LLC, "Re: HOVENSA Gas Turbine Nitrogen Oxides (GT NO<sub>x</sub>) Prevention of Significant Deterioration (PSD) Permit Application-Emission Calculation Clarification," March 30, 2010, stated a similar conclusion.

<sup>28</sup> 40 CFR 52.21 (a)(2)(iv)(f).

<sup>29</sup> 71 FR 54249 (September 14, 2006).

<sup>30</sup> *Id.*

<sup>31</sup> 74 FR 2376 (January 15, 2009).

<sup>17</sup> 40 CFR 52.21(b)(48)(i) and (ii).

<sup>18</sup> 40 CFR 52.21(b)(41). Alternatively, a source may elect to use potential to emit in lieu of projected actual emissions as described in 40 CFR 52.21(b)(41)(ii)(d).

<sup>19</sup> 40 CFR 51.166(b)(3) contains the same definition.

<sup>20</sup> 40 CFR 52.21(b)(3)(ii).

<sup>21</sup> 40 CFR 52.21(b)(3)(iii)(a).

<sup>22</sup> 40 CFR 52.21(b)(3)(v).

<sup>23</sup> 40 CFR 52.21(b)(3)(vi).

<sup>24</sup> Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement to Charles Whitmore Chief, Technical Analysis Section, Region VII; "Re: PSD Applicability," January 22, 1981.

<sup>25</sup> 71 FR 54235 (September 14, 2006).

considering whether and how to proceed with that proposal.

In early 2017, the new Administration issued a Presidential Memorandum and several Executive Orders initiating a review of regulatory requirements. One of those actions was the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing.<sup>32</sup> The Presidential Memorandum directed the Secretary of Commerce to conduct outreach to stakeholders concerning the impact of federal regulations on domestic manufacturing and solicit comments from the public concerning federal actions to streamline permitting and reduce regulatory burdens for domestic manufacturers.<sup>33</sup> A number of the comments the Department of Commerce subsequently received were related to “project netting.”<sup>34</sup> In those comments, the commenters asked the EPA to allow for “project netting” in Step 1 of the NSR applicability test because, in general, most of these stakeholders believed that “project netting” streamlines permitting. In addition, some of these commenters asked the agency to finalize the 2006 Project Netting Proposal. During the public comment period for another action, Executive Order 13777 on Enforcing the Regulatory Reform Agenda,<sup>35</sup> the agency received over 20 comments specifically on “project netting.”<sup>36</sup> As with the commenters on the Presidential Memorandum on Streamlining Permitting, all of these commenters argued that the agency should allow for “project netting.” For example, one commenter stated that they had “recently supported a client in obtaining a PSD permit in which Step 1 of the PSD applicability analysis exceeded the PSD [Significant Emission Rate] (SER) for several pollutants due to the fact that emissions reductions at certain emissions units could not be counted in Step 1.”<sup>37</sup> This commenter represented that “if “project netting” had been allowed in Step 1, then PSD review would not have been triggered” and the client would have saved “four additional months and an additional \$80,000 in obtaining a PSD permit.”

After consideration of the “project netting” regulatory history, past interpretations, and the recent public comments on this topic, in March 2018, the EPA Administrator issued a

memorandum titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program” (the “March 2018 Memorandum”).<sup>38</sup> The March 2018 Memorandum communicated the EPA’s current interpretation regarding the consideration of emissions decreases as part of Step 1 of the major modification applicability test. In the memorandum, the agency explained that it interprets the current NSR regulations as providing that emissions decreases as well as increases are to be considered at Step 1 of the NSR applicability process, where those decreases and increases are part of a single project.<sup>39</sup> Unlike in 2006, EPA determined in the March 2018 Memorandum that decreases could be considered at Step 1 for all project categories (*i.e.*, new, existing or projects that involve multiple types of emissions units). Although the existing language in the NSR regulations supports this interpretation, this rulemaking proposal is intended to eliminate uncertainty regarding this issue. As discussed in more detail below, we propose to revise the NSR applicability procedures for projects that involve multiple types of emissions units to make clear that project emissions accounting should be conducted under Step 1 of the major modification applicability procedures for all project categories, consistent with the interpretation set forth in the March 2018 Memorandum. The EPA is not proposing any changes to the procedures or requirements for Step 2 of the major modification applicability regulations.

### III. This Action

#### A. Overview

In this action, we are proposing revisions to the applicability provisions in the NSR regulations to fully clarify that the regulatory language of 40 CFR 52.21(a)(2)(iv)(f) allows the approach set forth in the March 2018 Memorandum. More specifically, we are proposing to revise the regulatory language for

projects that involve multiple types of emissions units<sup>40</sup> to more directly state that both emissions increases and decreases are to be considered as part of Step 1 of the major modification applicability test in the same manner as they are for projects that involve only existing emissions units and projects that involve only new emissions units. Furthermore, the EPA is seeking comment on other aspects of the implementation of the concept of project emissions accounting, including how sources should keep records of their emissions increases and decreases. In addition, the EPA is seeking comment on whether states would need to modify their SIPs to accommodate this rule’s clarifications if the rule revisions become final. Lastly, this proposal supersedes the agency’s 2006 Project Netting Proposal and, as such, this action withdraws the 2006 Project Netting Proposal.

#### B. Revising the Step 1 Applicability Regulations for Projects That Involve Multiple Types of Emissions Units To Provide Clarity on These Applicability Procedures

As stated previously, the emissions units involved in a project can be new, existing or a combination of new and existing units.<sup>41</sup> For projects that involve only existing emissions units, the applicability procedures at 40 CFR 52.21(a)(2)(iv)(c) state that “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 emission unit, equals or exceeds the significant amount for that pollutant.” For projects that only involve new emissions units, the applicability procedures at 40 CFR 52.21(a)(2)(iv)(d) state that “a significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit from each new emissions unit following completion of the project and the baseline actual emissions of these units before the project equals or exceeds the significant amount for that pollutant.” Finally, for projects that involve multiple types of emissions units (*i.e.*, a combination of new and existing units), the applicability procedures at 40 CFR 52.21(a)(2)(iv)(f) state that “a significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method

<sup>38</sup> Letter from E. Scott Pruitt, to Regional Administrators, “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program,” March 13, 2018 (“March 2018 Memorandum”).

<sup>39</sup> Furthermore, the memorandum clarified that while this Step 1 had previously been referred to as “project netting,” this terminology had caused confusion since the term “netting” more properly describes the consideration of other projects that may have been or will be undertaken during the contemporaneous period, which occurs under Step 2 of the major modification applicability test. As such, the memorandum said that since “netting” refers to consideration of other projects, its use in Step 1 was misplaced and that the term “project emissions accounting” more accurately reflects the purpose of Step 1 which is to account for the emissions impacts from the project itself.

<sup>40</sup> 40 CFR 52.21(a)(2)(iv)(f).

<sup>41</sup> 40 CFR 52.21(a)(2)(iv).

<sup>32</sup> 82 FR 8667 (January 30, 2017).

<sup>33</sup> 82 FR 12786 (March 7, 2017).

<sup>34</sup> <https://www.regulations.gov/docket?D=DOC-2017-0001>.

<sup>35</sup> 82 FR 17793 (April 13, 2017).

<sup>36</sup> <https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190>.

<sup>37</sup> EPA-HQ-OA-2017-0190-53674.

specified in [40 CFR 52.21] (a)(2)(iv)(c) through (d) as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant.”

In the 2006 Project Netting Proposal, the agency said, consistent with its prior understanding, that the omission of the phrase “sum of the difference” and the use of the term “sum of the emissions increases” in the regulations for the test for projects involving multiple types of emissions units (*i.e.*, hybrid test) suggested that the current NSR regulations “would not allow a source to include reductions from units that are part of the project until Step 2 of the calculation.”<sup>42</sup> However, as reflected in the Administrator’s March 2018 Memorandum, the agency has reexamined the existing regulations and their context and has concluded after a more thorough review that, for projects that involve multiple types of emissions units, “emissions decreases are also to be accounted for.”<sup>43</sup> The applicability procedures for projects involving multiple types of emissions units state that for each type of unit involved in the modification, the “method specified in [40 CFR 52.21] (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emission unit” shall be used and then the sum of the emissions increases for each type of emissions unit is calculated to determine if there is a significant emissions increase for that pollutant. Therefore, since “the method specified in [40 CFR 52.21] (a)(2)(iv)(c) through (d) with respect to each emission unit” applies, the EPA has concluded that “the “current NSR regulations provide that emissions decreases as well as increases are to be considered at Step 1 of the NSR applicability process . . .”<sup>44</sup>

The EPA is proposing to revise a portion of the regulations to end any confusion and clarify that project emissions accounting is allowed for all project categories, including projects that involve multiple types of emissions units. Specifically, the EPA is proposing to revise the text “sum of the emissions increase” in 40 CFR 52.21(a)(2)(iv)(f) to “sum of the difference” as in subparagraphs 40 CFR 52.21(a)(2)(iv)(c) and (d) to make clear that accounting of emissions increases and decreases under Step 1 of the major modification applicability test is allowed for projects that involve multiple types of emissions units. Furthermore, the EPA is proposing to add a subparagraph (g) to 40 CFR 52.21(a)(2)(iv) to further clarify

that the term “sum of the difference,” as used in 40 CFR 52.21(a)(2)(iv)(c) and (d) and proposed for 40 CFR

52.21(a)(2)(iv)(f), shall include both increases and decreases in emissions calculated in accordance with the procedures specified in those paragraphs. These proposed changes will make clear that projects that involve multiple types of emissions units should treat the calculation of the change in emissions from the project in the same way that projects that only involve new units or only involve existing units. As explained in the March 2018 Memorandum, the history of this provision in the regulations indicates that the EPA originally intended that project emissions accounting be allowed at Step 1 for projects involving different types of units.<sup>45</sup>

The EPA is seeking comment on these clarifying revisions to the regulatory text and whether other clarifications might be more appropriate to convey that consideration of emissions decreases and increases is allowed as part of Step 1 of the major modification applicability test for projects that involve both new and existing emissions units.

### C. Legal Analysis and Policy Rationale

The EPA said in its March 2018 Memorandum that we believe that our current NSR applicability regulations, promulgated in 2002 can be reasonably interpreted to allow for project emissions accounting at Step 1.<sup>46</sup> However, the agency made statements in 2006 and earlier that suggested that, at least insofar as the so-called “hybrid” applicability test for proposed projects involving both new and existing units is concerned, emissions decreases may not be taken into account at Step 1. Thus, in light of this history, the EPA is proposing to make regulatory revisions that fully clarify that both increases and decreases in emissions from all categories of projects are to be

<sup>45</sup> March 2018 Memorandum at 8.

<sup>46</sup> For example, and as stated in the March 2018 memorandum at 6, “This interpretation is grounded in the principle that the ‘plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions.’ *State of New York v. EPA*, 413 F.3d at 40 (emphasis added). Central to the CAA’s definition of ‘modification’ is that there must be a causal link between the physical or operational change at issue—*i.e.*, the ‘project’—and any change in emissions that may ensue. In other words, it is necessary to account for the full and direct effect of the proposed change itself. Accordingly, at the very outset of the process for determining whether NSR may be triggered, the EPA should give attention to not only whether emissions may increase from those units that are part of the project but also whether emissions may at the same time decrease at other units that are also part of the project.”

considered at Step 1 of the major NSR applicability regulations.

Fundamentally, the major NSR applicability regulations discussed previously are an interpretation of the statutory phrase “increases the amount of any air pollutant emitted” contained in the definition of “modification.”<sup>47</sup> This definition is cross referenced in both Part C (PSD) and Part D (NNSR) of the CAA.<sup>48</sup> The United States Court of Appeals for the District of Columbia Circuit has recognized that the CAA “is silent on how to calculate such ‘increases’ in emissions.”<sup>49</sup> Thus, the question of how to determine whether a physical change or change in method of operation “increases” emissions is ambiguous.<sup>50</sup> Accordingly, because the statutory text does not itself dictate how to determine whether a physical change or change in the method of operation “increases” emissions, under the principles of *Chevron*,<sup>51</sup> the “EPA has the authority to choose an interpretation” of the term “increases” in “administering the NSR program and filling in the gaps left by Congress.”<sup>52</sup>

The EPA believes that allowing for consideration of both increases and decreases from a project is consistent with congressional intent for these preconstruction programs to cover existing sources only when they undertook projects which resulted in a non-*de minimis* increase in emissions.<sup>53</sup> If the full scope of emissions changes from a project were *not* considered at Step 1, the regulations could subject a project to preconstruction review when the actual effect of that project would be to reduce emissions, which would be contrary to congressional intent for this program.<sup>54</sup> The EPA sees little policy

<sup>47</sup> 42 U.S.C. 7411(a)(4).

<sup>48</sup> 42 U.S.C. 7479(2)(C); 42 U.S.C. 7501(4).

<sup>49</sup> *New York v. EPA*, 413 F.3d 3, 22 (D.C. Cir. 2005) (*New York I*).

<sup>50</sup> *New York v. EPA*, 443 F.3d 880, 888–89 (D.C. Cir. 2006) (*New York II*) (“Congress’s use of the word ‘increases’ necessitated further definition regarding rate and measurement for the term to have any contextual meaning.”).

<sup>51</sup> *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (Where the “statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”)

<sup>52</sup> *New York I*, 413 F.3d at 23, 24.

<sup>53</sup> *Alabama Power v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979) (“Congress wished to apply the permit process, then, only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase.”).

<sup>54</sup> Emissions decreases may also be accounted for under Step 2; however, the language in the NSR regulations makes clear that such decreases are ones “other” than those associated with the project being evaluated under Step 1. *See, e.g.*, 40 CFR

<sup>42</sup> 71 FR 54249 (September 14, 2006).

<sup>43</sup> March 2018 Memorandum at 8.

<sup>44</sup> March 2018 Memorandum at 1.

support for such an outcome, while allowing the consideration of both increases and decreases at Step 1 would allow sources to undertake projects that are overall environmentally beneficial that they might forgo if decreases could not be considered at Step 1. Therefore, the EPA believes a two-step process—first determining all of the emissions changes, both increases and decreases, from the project under consideration and second, considering any *other* contemporaneous increases or decreases that are otherwise creditable—is a reasonable and allowable interpretation of the phrase “increases the amount of any air pollutant emitted” within the definition of “modification.”

Furthermore, this approach represents sound policy to the extent it encourages emissions decreases that might not otherwise occur or would be delayed. In discussions with stakeholders, the EPA has come to understand that, given the complexities that Step 2 contemporaneous netting can entail, and given past EPA statements that emissions decreases could not be accounted for at Step 1, there are occasions where sources have experienced significant delays or declined altogether to undertake projects that could have resulted in overall emissions decreases.<sup>55</sup> The agency requests additional information on adverse project impacts that may have occurred and specifically any examples of environmentally beneficial projects that were proposed or under consideration but did not move forward as a result of the apparent unavailability of project emissions accounting.

#### D. Implementation of Project Emissions Accounting Under Step 1 of the NSR Applicability Regulations

##### 1. Defining the Scope of a Project

In the March 2018 Memorandum, the agency explained that, for purposes of ascertaining whether a proposed project would constitute a major modification at a major stationary source, defining the scope of a project that a source

owner or operator is proposing to undertake is a determination that rests within the reasonable discretion of the source owner or operator.<sup>56</sup> Further, while the EPA acknowledged the longstanding principle that, in defining the scope of the project, an owner or operator cannot seek to circumvent NSR permitting by *separating* multiple activities into smaller projects, the EPA did not “interpret its NSR regulations as directing the agency to preclude a source from reasonably defining its proposed project broadly, to reflect multiple activities.”<sup>57</sup> The agency concluded by indicating that it would speak more about this concept of grouping multiple activities in a then-planned future action regarding “project aggregation.”<sup>58</sup>

Subsequently, the EPA took a final action in November 2018 addressing the subject of “project aggregation” in the action titled “Prevention of Significant Deterioration and Nonattainment New Source Review: Aggregation; Reconsideration.”<sup>59</sup> In that final action, the agency concluded the reconsideration of an earlier action that the EPA had published on January 15, 2009, titled “Prevention of Significant Deterioration and Nonattainment New Source Review: Aggregation and Project Netting.” That 2009 action had provided clarification with respect to when the EPA considered it appropriate to treat nominally separate activities as a single project for the purpose of determining NSR applicability at a stationary source. In the final “project aggregation” action, the EPA decided, among other things, not to revoke the 2009 NSR Aggregation Action but to retain both the interpretation and the policy set forth therein.

For purposes of determining the circumstances under which nominally separate activities should reasonably be considered to be a single project, “the 2009 NSR Aggregation Action called for sources and reviewing authorities to aggregate emissions from nominally-separate activities when they are “substantially related.”<sup>60</sup> For a project to be substantially related, the “interrelationship and interdependence of the activities [is expected], such that substantially related activities are likely to be jointly planned (*i.e.*, part of the same capital improvement project or

engineering study), and occur close in time and at components that are functionally interconnected.”<sup>61</sup> In addition, the November final 2018 project aggregation action adds that in general “[to] 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.”<sup>62</sup>

Thus, the main purpose of the November 2018 final project aggregation action was to address situations where a source owner or operator might attempt to circumvent NSR “through some artificial separation of activities where it would be unreasonable to consider them separate projects.”<sup>63</sup> This project emissions accounting proposed action, however, addresses the opposite scenario—*i.e.*, “where a source itself is choosing to group together, as a single project, activities to which a projected emissions decrease is attributable.”<sup>64</sup>

With respect to this latter scenario, the EPA observed in the March 2018 Memorandum that its “current view is that the concerns regarding the real possibility that NSR might be circumvented through some artificial separation of activities where it would be unreasonable to consider them separate projects,” were “not so obviously presented by the situation where a source itself is choosing to group together, as a single project, activities to which a projected emissions decrease is attributable.”<sup>65</sup> To the contrary, the EPA observed, the agency “views this latter situation as one where sources could potentially be incentivized to seek out emission reductions that might otherwise be foregone entirely—*e.g.*, because of perceived complexity with contemporaneous netting under Step 2 of the NSR applicability analysis.”<sup>66</sup> Nevertheless, we said that in a planned future rulemaking on project emissions accounting, the EPA would take

52.21(b)(3)(i)(b). Furthermore, as explained previously, additional requirements apply for creditability of emissions decreases under Step 2.

<sup>55</sup> For example, National Mining Association Response to Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 FR 17793, April 13, 2017, at 3–4, EPA–HQ–2017–0190–37770; Testimony of Paul Noe for American Forest & Paper Association (AF&PA) and American Wood Council (AWC), House Committee on Energy & Commerce, Subcommittee on Environment, and Climate Change, Oversight Hearing on “New Source Review Permitting Challenges for Manufacturing and Infrastructure,” at 2, 5, 7–8, February 14, 2018; AF&PA and AWC April 25, 2019, Executive Order 12866 meeting materials (EPA–HQ–OAR–2018–0048).

<sup>56</sup> March 2018 Memorandum at 9.

<sup>57</sup> *Id.* The EPA at that same time noted that this NSR “circumvention” principle could be seen as giving rise to some “equivalent understanding that it might be possible to circumvent NSR through some wholly artificial grouping of activities.” *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> 83 FR 57324 (November 15, 2018).

<sup>60</sup> 83 FR 57326 (November 15, 2018).

<sup>61</sup> 74 FR 2378 (January 15, 2009).

<sup>62</sup> 83 FR 57327 (November 15, 2018).

Furthermore, the final “project aggregation” action notes that “these factors are not necessarily determinative of a substantial relationship, but are merely indicators that may suggest that two or more activities are likely to be substantially related and, therefore, candidates for aggregation.” *Id.*

<sup>63</sup> 83 FR 57331 (November 15, 2018).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

comment on our current view of this issue.<sup>67</sup>

The EPA continues to believe that taking account of emissions decreases at Step 1 does not present any reasonable concerns regarding NSR circumvention. Therefore, having analyzed the applicability regulations and having considered the project aggregation final action, we are not proposing to impose additional requirements or find that scrutiny equivalent to that which the EPA's approach to project aggregation requires is warranted with respect to projects where source owners or operators choose to group together activities into a single project. We do not believe it is necessary to adopt the same criteria that apply for separation of activities (*i.e.*, under aggregation) to the grouping of activities, by considering such grouping to potentially constitute "over aggregation" that, in turn, may constitute NSR circumvention. The circumvention policy speaks to the situation where a source carves up what is plainly a single project into multiple projects, where each of those separate projects may result in emissions increases below the significance threshold but which, if considered collectively as one project, would result in an emissions increase above the threshold. Separate activities that, when considered together, either decrease emissions or result in an increase that is not significant are not in view in the EPA's circumvention policy. We ask for comment on our position in this regard. In addition, we seek comment on whether, if, in order for an emissions decrease to be accounted for at Step 1, it would be reasonable to require that a source owner or operator determine whether the activity (or activities) to which the emissions decrease is projected to occur is "substantially related" to another activity (or activities) to which an emissions increase is projected to occur. We are particularly interested in the impacts that this alternative approach might have on sources' decisions to undertake activities projected to result in emissions decreases (*e.g.*, whether such decisions might be delayed or otherwise foregone). The agency requests public input that would identify examples helpful to inform the agency's judgment on the emissions and cost impacts of this and other potential alternative approaches.

The EPA is currently unable to estimate any cost savings or emissions decreases associated with project emissions accounting because most NSR permits are issued by state and local

agencies and the EPA does not have estimates of those permitting statistics. Furthermore, neither the EPA nor state and local permitting agencies have access to any decision-making records made by company owners that would indicate whether a project was or was not undertaken due to the availability of project emissions accounting. NSR permitting is a case-by-case determination and source owners make permitting decisions based on many factors. We do not have access nor require reporting of any decision-making information for permitting projects that were or were not pursued. Thus, any examples on the emissions and cost impacts of project emissions accounting, including the particular cases described above, could be beneficial for the agency to potentially provide some level of qualitative analysis when finalizing this action.

## 2. Monitoring, Recordkeeping and Reporting of Emissions Decreases During Step 1 of the Applicability Regulations

In the 2006 Project Netting Proposal, the agency proposed a series of steps for implementing project emissions accounting under Step 1 of the major NSR applicability test, including that emissions "decreases must be enforceable as a practical matter, or there must be another procedure that will ensure the decrease actually occurs and is maintained, and are subject to all the requirements of 40 CFR 52.21(b)(3)."<sup>68</sup> The 2006 proposal, however, did not provide an explanation as to why the EPA considered this step necessary or warranted. As explained in the March 2018 Memorandum, "the agency now recognizes that other provisions in existing regulations serve to alleviate concerns that projected emissions decreases would escape the same tracking, documentation and reporting requirement applicable to projected emissions increases."<sup>69</sup> The March 2018 Memorandum recognized that the provisions at 40 CFR 52.21(r)(6) are adequate for recording, tracking, documenting, and reporting emissions decreases as well as increases for project emissions accounting. The provisions at 40 CFR 52.21(r)(6) were specifically designed for source owners or operators to document and maintain records when a project that is not a part of a major modification subject to major NSR permitting nonetheless presents a reasonable possibility that it may result in a significant emissions increase of

such pollutant after completion. The regulations provide for, among other things: The identification of the emissions units affected by the project; the identification of the applicability test used to determine that the project was not a major modification; and monitoring, recordkeeping, and reporting of emissions from the units involved in the project based on certain criteria.

The agency "expressly declined to adopt a requirement under which a source's post-project projected actual emissions would have become an enforceable emission limitation"<sup>70</sup> as part of the 2002 NSR Reform Rule,<sup>71</sup> and the EPA currently believes that "the same reasoning that underpinned the 2002 NSR Reform Rule's treatment of projected actual increases applies equally to projected emissions decreases at Step 1."<sup>72</sup> The EPA continues to believe that ". . . the combination of the recordkeeping requirements of this rule, along with a requirement to report to the reviewing authority any annual emissions that exceed your baseline actual emissions by a significant amount for the regulated NSR pollutant and differ from your preconstruction projection, is an equally effective way to ensure that a reviewing authority can receive the information necessary to enforce the major NSR requirements."<sup>73</sup> In addition, the NSR regulations make enforceability of emissions decreases a requirement of Step 2 and not Step 1.<sup>74</sup> As part of this proposal, we are seeking comment on whether the 40 CFR 52.21(r)(6) provisions provide appropriate monitoring, recordkeeping and reporting requirements for both emissions decreases and increases, as relevant, in the context of Step 1 of the major modification applicability test.

## 3. Implementation of Projects Emissions Accounting for Delegated and SIP-Approved Programs

The requirements of 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 this regulation is finalized, any revisions to this federal PSD regulation will automatically apply to the EPA and permitting authorities

<sup>70</sup> March 2018 Memorandum at 8.

<sup>71</sup> 67 FR 80193, 80197 (December 31, 2002).

<sup>72</sup> March 2018 Memorandum at 8. As also stated in the March 2018 Memorandum, if an emissions decrease is calculated using the potential to emit of a unit after the project, the requirements of 40 CFR 52.21(b)(4) apply.

<sup>73</sup> 67 FR 80193, 80204 (December 31, 2002).

<sup>74</sup> 40 CFR 52.21(a)(2)(iv) and 40 CFR 52.21(b)(3).

<sup>67</sup> 83 FR 57331 (November 15, 2018).

<sup>68</sup> 71 FR 54235 (September 14, 2006).

<sup>69</sup> March 2018 Memorandum at 9, footnote 19.

that implement a PSD program pursuant to a delegation agreement.

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. As noted previously, the EPA is also proposing to revise those regulations consistent with the proposed revisions to 40 CFR 52.21(a)(2)(iv).<sup>75</sup>

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 if their local rules and SIPs contain the same language as the EPA's regulations. In addition, if the EPA were to finalize the clarifications being proposed in this rulemaking, reviewing authorities may not need to revise their state regulations and submit SIP revisions to adopt those 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.

Nevertheless, the EPA is currently aware of a few states and locals where the applicable SIP-approved regulations expressly preclude project emissions accounting. With respect to this situation, we request comment on whether the EPA should determine that the revisions to 40 CFR 51.165(2)(ii)(F) and (G); to 40 CFR 51.166(a)(7)(iv)(f) and (g); to (IV)(I)(1)(v) and (vi) to Appendix S to part 51; and to 40 CFR 52.21(a)(2)(iv)(f) and (g) that we are proposing here constitute minimum program elements that must be included in order for state and local agency programs implementing part C or part D to be approvable under the SIP.<sup>76</sup>

<sup>75</sup> There are certain modification provisions under the title I, subpart D of the CAA and the EPA nonattainment NSR regulations that apply to certain nonattainment area classifications (e.g., CAA 182(e)(2); 40 CFR part 51, Appendix S I.L.A.5.(v)). This proposal, as with the March 2018 Memorandum, does not address those specific modification provisions in the CAA or the EPA regulations for nonattainment areas, and thus, does not communicate any EPA view regarding the interpretation of those provisions.

<sup>76</sup> Such a determination was made with respect to the NSR regulatory revisions the EPA made in 2002. 67 FR 80240 (December 31, 2002).

#### IV. Withdrawing the 2006 Project Netting Proposal

As mentioned in Section III.A of this notice, this proposal supersedes the 2006 Project Netting Proposal and, as such, this action withdraws the 2006 Project Netting Proposal. As the agency explained in the March 2018 Memorandum, the EPA recently performed a thorough reconsideration of the regulations pertaining to project emissions accounting and found that the statement included in the EPA's 2006 Project Netting Proposal that project emissions accounting was not allowed for projects with multiple types of emissions units<sup>77</sup> was unwarranted as "other language in clause (f) indicates that emissions decreases are also to be accounted for."<sup>78</sup> Therefore, in light of this proposal, we believe the 2006 Project Netting Proposal is no longer necessary and is withdrawn.

#### V. Environmental Justice Considerations

We do not believe that the proposed clarifying revisions to the NSR applicability regulations would have any effect on environmental justice communities. As indicated in the March 2018 Memorandum, the EPA's NSR regulations in place after the 2002 NSR Reform Rule was finalized allow project emissions accounting and, as such, no increased burden is expected for source owners or operators, permitting authorities or environmental justice communities after finalization of the clarifications included in this rule.

#### VI. Statutory and Executive Order Reviews

##### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review since it raises policy issues arising from the President's priorities. Any changes made in response to OMB recommendations have been documented in the docket.

##### B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This proposed rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule would not result in additional costs.

<sup>77</sup> 40 CFR 52.21(a)(2)(iv)(f).

<sup>78</sup> March 2018 Memorandum at 8.

##### C. 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.

##### D. 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. In general, major stationary sources undergoing major modifications are not small entities. In addition, the EPA interprets its current NSR regulations to allow for project emissions accounting and, as such, no increased burden is expected for source owners or operators or permit reviewing authorities after finalization of the clarifications included in this rule.

##### E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded federal mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

##### F. 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.

##### G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. The EPA's NSR applicability regulations in place after the 2002 NSR Reform Rule allow for the consideration of emissions increases and decreases as part of Step 1 of the major NSR applicability test for modifications and, as such, the clarifying revisions being proposed in this rule will not have exclusive tribal implications. Furthermore, the EPA is currently the reviewing authority for PSD and NNSR permits issued in tribal

lands and, as such, the clarifying revisions being proposed will not impose direct burdens on tribal permit reviewing authorities. Thus, Executive Order 13175 does not apply to this action.

*H. 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.

*I. 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. The EPA interprets its current NSR regulations to allow for project emissions accounting and, as such, no increased burden is expected for source owners or permit reviewing authorities after the finalization of the clarifications included in this rule.

*J. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The EPA interprets its current NSR regulations to allow for project emissions accounting and this action only proposes clarifying revisions to the NSR applicability regulations. Accordingly, no disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples are expected.

**VII. Statutory Authority**

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

**List of Subjects**

*40 CFR Part 51*

Environmental protection, Air pollution control.

*40 CFR Part 52*

Environmental protection, Air pollution control, Incorporation by reference.

Dated: August 1, 2019.

**Andrew R. Wheeler,**  
*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. 7401–7671q.

**Subpart I—Review of New Sources and Modifications**

**§ 51.165 [Amended]**

■ 2. Section 51.165 is amended by revising paragraph (a)(2)(ii)(F) and adding paragraph (G) to read as follows:

**§ 51.165 Permit requirements.**

- \* \* \* \* \*
- (a) \* \* \*
- (2) \* \* \*
- (ii) \* \* \*

(F) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference for all emissions units, using the method specified in paragraphs (a)(2)(ii)(C) through (D) of this section as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (a)(1)(x) of this section).

(G) The “sum of the difference” as used in subparagraphs (C), (D) and (F) of this section shall include both increases and decreases in emissions calculated in accordance with those subparagraphs.

\* \* \* \* \*

■ 3. Section 51.166 is amended by revising paragraph (a)(7)(iv)(f) and adding paragraph (g) to read as follows:

**§ 51.166 Prevention of significant deterioration of air quality.**

- \* \* \* \* \*
- (a) \* \* \*
- (7) \* \* \*

(iv) \* \* \*

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference for all emissions units, using the method specified in paragraphs (a)(7)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(g) The “sum of the difference” as used in subparagraphs (c), (d) and (f) shall include both increases and decreases in emissions calculated in accordance with those subparagraphs.

\* \* \* \* \*

■ 4. Appendix S to part 51 is amended by revising paragraph IV.I.1.(v) and adding paragraph (vi) to read as follows:

**Appendix S to Part 51—Emissions Offset Interpretative Ruling**

\* \* \* \* \*

IV. Sources that Would Locate in a Designated Nonattainment Area

\* \* \* \* \*

I. *Applicability procedures.*

1. \* \* \*

(v) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference for all emissions units, using the method specified in paragraphs IV.I.1(iii) through (iv) of this Ruling as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph II.A.10 of this Ruling).

(vi) The “sum of the difference” as used in subparagraphs (iii), (iv) and (v) shall include both increases and decreases in emissions calculated in accordance with those subparagraphs.

\* \* \* \* \*

**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. Section 52.21 is amended by revising paragraph (a)(2)(iv)(f) and adding paragraph (g) to read as follows:

**§ 52.21 Prevention of significant deterioration of air quality.**

\* \* \* \* \*

- (a) \* \* \*
- (2) \* \* \*
- (iv) \* \* \*

(f) Hybrid test for projects that involve multiple types of emissions units. A

significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference for all emissions units, using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(g) The “sum of the difference” as used in subparagraphs (c), (d) and (f) shall include both increases and decreases in emissions calculated in accordance with those subparagraphs.

\* \* \* \* \*

[FR Doc. 2019-17019 Filed 8-8-19; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 215 and 252

[Docket DARS-2019-0038]

RIN 0750-AJ78

#### Defense Federal Acquisition Regulation Supplement: Management of Should-Cost Review Process (DFARS Case 2018-D015)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018, which requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before October 8, 2019, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018-D015, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2018-D015”. Select “Submit a Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2018-D015” on any attached document.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2018-D015 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Heather Kitchens, telephone 571-372-6104.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

This rule proposes to amend the DFARS to implement section 837 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 837 requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system in a manner that is transparent, objective, and provides for the efficiency of the systems acquisition process in the Department of Defense. A weapon system is considered to be a “major weapon system,” as defined by DFARS 234.7001, when it is “a weapon system acquired pursuant to a major defense acquisition program.” At a minimum, DoD is required to address the following:

- A description of the features of the should-cost review process.
- Establishment of a process for communicating with the prime contractor on the program the elements of a proposed should-cost review.
- A method for ensuring that identified should-cost savings opportunities are based on accurate, complete, and current information and can be quantified and tracked.
- A description of the training, skills, and experience that Department of Defense and contractor officials carrying out a should-cost review should possess.
- A method for ensuring appropriate collaboration with the contractor throughout the review process.
- Establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule.

##### II. Discussion and Analysis

Federal Acquisition Regulation (FAR) 15.407-4(b) establishes when a program

should-cost review should be considered in the case of a major system acquisition. DoD is proposing to add a new paragraph (b) to DFARS 215.407-4 to address the six elements of a program should-cost review, as required by section 837. In addition, DoD is proposing to add a new contract clause at DFARS 252.215-701X, Program Should-Cost Review, for use in solicitations and contracts for the development or production of a major weapon system, as defined in DFARS 234.7001, to ensure objectivity and efficiency in the should-cost review process, if a program should-cost review is performed.

##### III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses for contracts at or below the simplified acquisition threshold or for contracts for the acquisition of commercial items, including commercially available off-the-shelf items. Contracts for the development and or production of a major weapon system do not include contracts valued at or below the simplified acquisition threshold and are unlikely to include contracts for commercial items.

##### IV. Executive Orders 12866 and 13563

Executive Order (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

##### V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

##### VI. Regulatory Flexibility Act

DoD does not expect this rulemaking to have a significant economic impact on a substantial number of small entities