Electronic Filing: Received, Clerk's Office 5/06/2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE	)	
PART 203: MAJOR STATIONARY	)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND	)	
MODIFICATION, 35 ILL. ADM. CODE	)	
PART 204: PREVENTION OF	)	
SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

NOTICE OF FILING

To: Persons on Service List
(Via Electronic Filing)

PLEASE TAKEN NOTICE that I have filed today with Clerk of the Illinois Pollution Control Board by electronic filing the following The Illinois Attorney General Office's Motion to Stay, a true and correct copy of which is attached hereto and hereby served upon you.

KWAME RAOUL
Attorney General
State of Illinois

/s/ Jason E. James
Jason E. James, AAG

Dated: May 6, 2022

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CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, certify that on the 6th day of May, 2022, I caused to be served the foregoing Illinois Attorney General Office's Motion to Stay and Notice of Filing thereof on the parties named on the attached Service List, by email or electronic filing, as indicated on the attached Service List.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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THE ILLINOIS ATTORNEY GENERAL OFFICE'S MOTION TO STAY

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), respectfully requests that the Illinois Pollution Control Board ("Board") grant a stay of this rulemaking, R22-17, pursuant to 35 Ill. Adm. Code 101.514. The proposal before the Board in this rulemaking is directly related to a federal regulation currently undergoing review by both the United States Environmental Protection Agency ("USEPA") and the United States Court of Appeals for the D.C. Circuit ("D.C. Circuit").

As discussed more fully below, the D.C. Circuit has ordered USEPA to file a motion by February 28, 2023 detailing whether further proceedings before the court will be necessary. *New Jersey v. U.S. Envt'l Prot. Agency*, Mar. 3, 2022, No. 21-1033 (D.C. Cir.) (court order granting abeyance). USEPA's motion will provide the Board with critical details about the nature and expected timing of USEPA's active federal rulemaking.[1]

Accordingly, in the interest of conserving State resources, including the resources of the Board and Illinois Environmental Protection Agency ("Illinois EPA"), and ensuring that Illinois' air pollution regulations remain in accord with, and at least as stringent as, the corresponding

[1] USEPA must also file status reports with the D.C. Circuit every 90 days.

federal regulations, the People request that this rulemaking proceeding be stayed until February 28, 2023.[2]

I. **Background**

A. *USEPA's Project Emissions Accounting Rule*

On November 24, 2020, USEPA amended its Prevention of Significant Deterioration and Nonattainment New Source Review regulations. 85 Fed. Reg. 74,890 (Nov. 24, 2020). These amendments are known as the "Project Emissions Accounting Rule." In general, the Project Emissions Accounting Rule addresses whether a proposed modification of a source of air emissions must undergo the New Source Review permitting process. The Rule provides a means to account for both emissions increases and decreases that may result from the modification. *See* USEPA, "Project Emissions Accounting: rule text and fact sheet", *available at* https://www.epa.gov/nsr/project-emissions-accounting-2; R22-17, Illinois EPA's Initial Comments at 4-6 (Jan. 18, 2022).

Before USEPA promulgated the Project Emissions Accounting Rule, a coalition of Attorneys General representing seven states (not including Illinois) and the District of Columbia (the "Coalition") argued that the federal regulation "is designed to enable sources to avoid triggering [New Source Review] 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." Comment of the New Jersey Attorney General, *et al*. at 2, Docket No. EPA-HQ-OAR-2018-0048 (Oct. 8, 2019), a true and correct of which is attached hereto as Exhibit A.

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[2] If granted, the People will provide the Board with regular status reports on the federal litigation and rulemaking during the pendency of the stay.

For these reasons, the Coalition asserted that the Project Emissions Accounting Rule: 1) would result in increased air pollution, 2) is contrary to the text of the Clean Air Act (the "CAA"), and 3) is arbitrary and capricious. *Id*. at 3. However, USEPA nevertheless finalized the rule. In response, the Coalition and several environmental advocacy organizations filed petitions for review with the D.C. Circuit. *New Jersey v. U.S. Envt'l Prot. Agency*, No. 21-1033, Jan. 19, 2021 (D.C. Cir.).

B. *President Biden's Policy and Corresponding USEPA Action*

Almost immediately upon taking office, President Biden directed USEPA to review and address actions taken by the prior administration that conflict with the new administration's policy to reduce air pollution. *See* "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," Executive Order 13990 (Jan. 20, 2021), a true and correct copy of which is attached hereto as Exhibit B. In accordance with this executive order, federal agencies have reversed numerous environmental regulations adopted under the prior administration, and are in the process of reversing many more.[3] For instance, USEPA recently re-instituted California's authority to implement its own greenhouse gas emission standards for vehicles, an authority that the prior administration attempted to rescind. *See* 87 Fed. Reg. 14,332 (Mar. 14, 2022), *available at* https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05227.pdf.

USEPA recognized that the Project Emissions Accounting Rule—promulgated under the prior administration—could conflict with President Biden's policy to reduce air pollution. On February 16, 2021, before the D.C. Circuit began evaluating the merits of the Coalition's case,

[3] According to analysis compiled by the Washington Post, President Biden has overturned 24 actions on air pollution and greenhouse gases taken by the prior administration and has targeted 31 other actions for reversal. "Tracking Biden's Environmental Actions," *The Washington Post*, https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/, last updated April 21, 2022.

USEPA filed a motion for abeyance of the litigation. USEPA argued that the abeyance would allow the agency time to determine whether Executive Order 13990 necessitates further action, which could "obviate the need for judicial resolution of some or all the disputed issues." *New Jersey*, No. 21-1033, Feb. 16, 2021 (USEPA's unopposed motion for abeyance).

By February 2022, USEPA had completed its review of the Project Emissions Accounting Rule and decided that a new rulemaking was indeed necessary to consider revisions to comply with Executive Order 13990. *New Jersey*, No. 21-1033, Feb. 10, 2022 (USEPA's unopposed motion for abeyance), a true and correct copy of which is attached as Exhibit C. In initiating the new rulemaking process, USEPA stated that the outcome could address some or all of the Coalition's claims—indicating an intention to consider major revisions to the Project Emissions Accounting Rule. *Id*.

The D.C. Circuit granted the motion and put the case into abeyance until February 28, 2023, agreeing with USEPA's argument that briefing the underlying case while the agency simultaneously conducts a new rulemaking on the same subject would be a waste of resources. *New Jersey*, No. 21-1033, Mar. 3, 2022 (court order granting abeyance). Notably, the Coalition and environmental organization petitioners did not oppose USEPA's motion, indicating that they also acknowledge that a new rulemaking would be the most efficient and effective way to address their claims that the Project Emissions Accounting Rule violates the CAA. *See* Exh. C (USEPA's motion for abeyance).

C. *Rulemaking Proposal Before the Board*

On August 16, 2021, the Illinois Environmental Regulatory Group ("IERG") proposed to amend the Board's air pollution regulations at 35 Ill. Adm. Code Parts 203, 204, and 232. IERG argued its proposal is intended to (a) "amend the Board's Nonattainment New Source Review

("NA NSR") regulations to be up-to-date and consistent with the" CAA and implementing federal regulations; and (b) be "consistent with the revisions to the Project Emissions Accounting Rule recently adopted by USEPA." R22-17, IERG's Statement of Reasons at 2, 36 (Aug. 16, 2021); *see also* IERG's Statement of Reasons at 41; Illinois EPA Public Comment #6 at 26-27, 43-44 (Mar. 21, 2022).

II. Argument

The People request that the Board stay this proceeding until February 28, 2023, by which time USEPA will have further developed its new rulemaking to change the Project Emissions Accounting Rule. IERG argues that its proposal is intended to make Illinois air regulations "up-to-date and consistent with the [CAA] and implementing federal regulations." IERG's Statement of Reasons at 2. However, the best way to actually ensure that Illinois air regulations comply with federal law is to allow additional time for the currently-pending rulemaking to revise the Project Emissions Accounting Rule to take shape. If the Board does not pause its rulemaking to allow the federal rulemaking to proceed, Illinois' air pollution regulations could in fact become *in conflict* with federal regulations rather than aligned with them.

A. *Illinois' Air Pollution Regulations Must Be as Stringent as Federal Regulations*

As Illinois EPA has indicated, existing Illinois air pollution regulations are more stringent than the corresponding federal regulations—including the Project Emissions Accounting Rule. Illinois EPA stated that "any revision to [Illinois air pollution regulations] to memorialize . . . [the] Project Emissions Accounting [Rule] would potentially decrease the number of construction projects at existing major sources that meet the definition of major modification and thereby trigger the applicable requirements of NaNSR [Non-Attainment New Source Review]." R22-17, IEPA's Initial Comments at 4-5 (Jan. 18, 2022). Therefore, if the Board adopts IERG's proposal, and

USEPA soon thereafter revises federal regulations to be *more* stringent than the existing Project Emissions Accounting Rule, Illinois air pollution regulations would in that circumstance be less stringent than the corresponding federal regulations.

B. *Granting a Stay Is Consistent with Prior Board Practice*

In the past, the Board has taken a prudent wait-and-see approach on rulemaking proposals where it anticipates the underlying legal basis may soon change. For example, in a Coal Combustion Waste rulemaking, Illinois EPA sought a stay of the rulemaking proceeding in light of federal litigation attacking a related federal coal combustion waste rule and legislative proposals concerning coal combustion waste pending in Congress. In that rulemaking, Illinois EPA asked the Board to re-evaluate its proposal after the litigation and legislative proposals were resolved. *In the Matter of Coal Combustion Waste*, R14-10, Board Order (Nov. 5, 2015). For those purposes, the Board granted a 120-day stay which was renewed several times thereafter. *Id.*; *see also*, *e.g.*, R14-10, Board Orders on Mar. 17, 2016, May 19, 2016.

The case supporting a stay is even stronger in this instance because Illinois air pollution regulations are required under the CAA to be at least as stringent as federal regulations. 42 U.S.C. § 7416. The question of whether the Project Emissions Accounting Rule is legal is of fundamental importance to this rulemaking. Furthermore, USEPA has already commenced a new rulemaking process *on its own volition* to consider changes to comport with President Biden’s mandate to protect public health and the environment in Executive Order 13990. By contrast, in R14-10, future legislation was merely being considered by Congress. Yet, the Board granted the requested stay in that proceeding.

C. *IERG's Arguments Favoring Immediate Action Are Unconvincing*

IERG has not offered convincing reasons why the Board should immediately move ahead with this rulemaking. First, it states that because the "[Project Emissions Accounting Rule is] currently in effect, and, therefore . . . it is appropriate to proceed with the proposed revisions . . ." R22-17, IERG's Pre-Filed Answers to Board's Pre-Filed Questions at 3 (Feb. 15, 2022). This ignores the broader context of USEPA's aims under President Biden to restore strong federal environmental regulations that preserve clean air and reduce pollution. As describe above, USEPA has already taken many steps under Executive Order 13990 to rebuild federal environmental regulations, undoing many of the "rollback" rules adopted during the prior administration. *See* Executive Order 13990, Exh. B; *Washington Post* article at fn. 3.

IERG emphasizes that USEPA has merely begun to *consider* revisions to the Project Emissions Accounting Rule, and so the Board should proceed to adopt its proposal regardless of what rules USEPA may adopt in future rulemakings. R22-17, IERG's Second Post-Hearing Comment at 17 (Apr. 4, 2022). However, USEPA has detailed its reasons for opening a new rulemaking. Showing that USEPA recognizes serious flaws in the Project Emissions Accounting Rule, the agency stated that:

> The EPA agrees, however, that the [environmental advocates'] petition for reconsideration identifies potential concerns that warrant future consideration by the EPA. Therefore, the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's New Source Review regulations that would address the issues raised in the submitted petition and comments on the Project Emissions Accounting Rule.

USEPA Response to Mot. For Reconsideration, Docket No. EPA-HQ-OAR-2018-0048, (Oct. 12, 2021), a true and correct copy is attached as Exhibit D. *See also* 86 Fed. Reg. 57,585 (Oct. 18, 2021). In this statement, USEPA demonstrates its agreement that the environmental advocates have identified areas of potential concern—*i.e.,* that the Project Emissions Accounting Rule is

contrary to the CAA and will increase air pollution—and that the new rulemaking's purpose is to address these concerns.

Pausing the Board rulemaking to allow USEPA to consider such concerns is consistent with the purpose of the Illinois Environmental Protection Act, which is "to establish a unified, statewide program to restore, protect, and enhance the quality of the environment in Illinois." *People ex rel. Madigan v. Lincoln, Ltd.,* 2016 IL App (1st) 143487, ¶ 22 (citing 415 ILCS 5/2(b)); *see also* 415 ILCS 5/8 (2020) (purpose of Title II of the Act is "to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution").

IERG states that the Project Emissions Accounting Rule's provisions are only part of its proposal. IERG's Second Post-Hearing Comment at 16. However, Illinois EPA disagrees with IERG on which provisions in the proposal are actually related to the Project Emissions Accounting Rule. *See* R22-17, Illinois EPA's Comment at 42-44 (Mar. 21, 2022); IERG's Second Post-Hearing Comment at 25. This disagreement over how extensively the Project Emissions Accounting Rule informs the specific provisions in IERG's proposal demonstrates the need for the Board to approach this matter deliberately and grant this motion to stay. In the following months, USEPA will publish details about its rulemaking, which will allow the Board to more effectively discern which regulations are being considered for revision and thus be able to tailor any proposal it ultimately adopts to be fully compliant with new federal regulations.[4]

[4] At minimum, if the Board does not stay this entire rulemaking, the Board should stay proceedings on those provisions of the proposal that it deems related to the Project Emissions Accounting Rule.

D. *Granting a Stay Will Conserve Valuable State Resources*

Finally, in this proposed rulemaking, IERG requests that the Board adopt the federal "rollbacks" of the previous administration. That is, it asks the Board to ignore USEPA's active Project Emissions Accounting Rule rulemaking that aims to (a) address infirmities of the Project Emissions Accounting Rule alleged in litigation, and (b) harmonize them with Executive Order 13990's directive to protect public health and the environment. *See* USEPA Response to Mot. For Reconsideration, Exh. D.

If the Board allows this rulemaking to proceed, it will be diverting valuable State resources, because the Illinois EPA will be required to comment on IERG's proposed rules, and the Board will be required to evaluate the record and issue an order. Then, in the likely event that USEPA's active rulemaking leads to rule revisions that comport with Executive Order 13990 and resolves the litigation efforts of Coalition and environmental groups, it will be Illinois EPA—not IERG—who will be before the Board proposing new regulations. These new regulations will likely be needed to comport with USEPA's efforts and to ensure that the new Board regulations are at least as stringent as federal law, so that Illinois' State Implementation Plan is approvable by USEPA. Similar to the CCW Rulemaking in R14-10, the Board is not required by statute to promulgate IERG's proposal. Therefore, the Board should exercise its considerable discretion and stay this rulemaking proceeding.

III. Conclusion

USEPA is currently evaluating the legality of the Project Emissions Accounting Rule within its own federal rulemaking and has repeatedly asked the D.C. Circuit to wait before passing judgment on a rule that will likely change in the future. Rather than adopting a rulemaking proposal that relates to a federal rule in a tenuous position, the Board should stay this rulemaking until the

federal rulemaking process has further proceeded. At that point, the Board will have additional information to consider how to manage this rulemaking.

As noted above, the D.C. Circuit has granted USEPA until February 28, 2023 to advance its rulemaking and to detail whether further proceedings before the court will be necessary. Accordingly, the People request that the Board stay the above-captioned rulemaking until that date and require the filing of a status report at the close of the stay, or at such intervals that the Board deems appropriate. Doing so will ensure that Illinois' air pollution regulations do not run afoul of their federal counterpart and will preserve valuable State resources.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,
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By: /s/ Jason E. James

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Status Report Required by 35 Ill. Adm. Code 101.514

The People provide the following status report for this rulemaking, as required by 35 Ill. Adm. Code 101.514 to accompany a motion for stay.

The Board has held two public hearings to discuss IERG's proposal: one on February 17, 2022 and another on April 7, 2022. On January 18, 2022 and March 31, 2022, the Illinois EPA filed comments and recommendations relating to IERG's proposal; on January 4, 2022 and March 16, 2022, the Illinois Attorney General's Office filed a pre-hearing and post-hearing comment, respectively; and on February 24, 2022 and April 4, 2022, IERG filed a post-hearing comment and second post-hearing comment, respectively. The deadline for filing post-hearing comments on IERG's proposal is currently set for May 16, 2022.

<u>Attachments:</u>

Exhibit A: Comment of the Attorneys General of New Jersey, *et al*. at 2, Docket No. EPA-HQ-OAR-2018-0048 (Oct. 8, 2019).

Exhibit B: "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," Executive Order 13990 (Jan. 20, 2021).

Exhibit C: *New Jersey, et al. v. U.S. Envt'l Prot. Agency*, Feb. 10, 2022, No. 21-1033 (USEPA's unopposed motion for abeyance).

Exhibit D: USEPA Response to Mot. For Reconsideration, Docket No. EPA-HQ-OAR-2018-0048 (Oct. 12, 2021).

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THE ILLINOIS ATTORNEY GENERAL OFFICE'S MOTION TO STAY

EXHIBIT A

Electronic Filing: Received, Clerk's Office 5/06/2022

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)

Docket No. EPA-HQ-OAR-2018-0048

October 8, 2019

By Electronic Submission to www.regulations.gov

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 Generals 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 (PM_{10} 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 pollutants[1], 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 project[2], 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 requirements[4] 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

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[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 NOx emissions at unit X. Another unit is also modified resulting in a decrease of 30 TPY of NOx emissions at unit Y. Contemporaneous increases in NOx emissions from unrelated modifications at other units at the source are 35 TPY. The significance threshold for NOx 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 Hannesschlager, 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.

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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 though 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 letter[8]) 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

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[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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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE	)	
PART 203: MAJOR STATIONARY	)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND	)	
MODIFICATION, 35 ILL. ADM. CODE	)	
PART 204: PREVENTION OF	)	
SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

THE ILLINOIS ATTORNEY GENERAL OFFICE'S MOTION TO STAY

EXHIBIT B

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Presidential Documents

Executive Order 13990 of January 20, 2021

Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments, places that secure our national memory. Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice. In carrying out this charge, the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making. It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

To that end, this order directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.

Sec. 2. *Immediate Review of Agency Actions Taken Between January 20, 2017, and January 20, 2021.* (a) The heads of all agencies shall immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order. For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions. In addition, for the agency actions in the 4 categories set forth in subsections (i) through (iv) of this section, the head of the relevant agency, as appropriate and consistent with applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action within the time frame specified.

(i) Reducing Methane Emissions in the Oil and Gas Sector: ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration,'' 85 FR 57398 (September 15, 2020), by September 2021.

(ii) Establishing Ambitious, Job-Creating Fuel Economy Standards: ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,'' 84 FR 51310 (September 27, 2019), by April 2021; and ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,'' 85 FR 24174 (April 30,

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2020), by July 2021. In considering whether to propose suspending, revising, or rescinding the latter rule, the agency should consider the views of representatives from labor unions, States, and industry.

(iii) Job-Creating Appliance- and Building-Efficiency Standards: ''Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment,'' 85 FR 8626 (February 14, 2020), with major revisions proposed by March 2021 and any remaining revisions proposed by June 2021; ''Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards,'' 85 FR 50937 (August 19, 2020), with major revisions proposed by March 2021 and any remaining revisions proposed by June 2021; ''Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC),'' 84 FR 67435 (December 10, 2019), by May 2021; ''Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1–2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings,'' 83 FR 8463 (February 27, 2018), by May 2021.

(iv) Protecting Our Air from Harmful Pollution: ''National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review,'' 85 FR 31286 (May 22, 2020), by August 2021; ''Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,'' 85 FR 84130 (December 23, 2020), as soon as possible; ''Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information,'' 86 FR 469 (January 6, 2021), as soon as possible.

(b) Within 30 days of the date of this order, heads of agencies shall submit to the Director of the Office of Management and Budget (OMB) a preliminary list of any actions being considered pursuant to section (2)(a) of this order that would be completed by December 31, 2021, and that would be subject to OMB review. Within 90 days of the date of this order, heads of agencies shall submit to the Director of OMB an updated list of any actions being considered pursuant to section (2)(a) of this order that would be completed by December 31, 2025, and that would be subject to OMB review. At the time of submission to the Director of OMB, heads of agencies shall also send each list to the National Climate Advisor. In addition, and at the same time, heads of agencies shall send to the National Climate Advisor a list of additional actions being considered pursuant to section (2)(a) of this order that would not be subject to OMB review.

(c) Heads of agencies shall, as appropriate and consistent with applicable law, consider whether to take any additional agency actions to fully enforce the policy set forth in section 1 of this order. With respect to the Administrator of the Environmental Protection Agency, the following specific actions should be considered:

(i) proposing new regulations to establish comprehensive standards of performance and emission guidelines for methane and volatile organic compound emissions from existing operations in the oil and gas sector, including the exploration and production, transmission, processing, and storage segments, by September 2021; and

(ii) proposing a Federal Implementation Plan in accordance with the Environmental Protection Agency's ''Findings of Failure To Submit State Implementation Plan Revisions in Response to the 2016 Oil and Natural Gas Industry Control Techniques Guidelines for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) and for States in the Ozone Transport Region,'' 85 FR 72963 (November 16, 2020), for California, Connecticut, New York, Pennsylvania, and Texas by January 2022.

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(d) The Attorney General may, as appropriate and consistent with applicable law, provide notice of this order and any actions taken pursuant to section 2(a) of this order to any court with jurisdiction over pending litigation related to those agency actions identified pursuant to section (2)(a) of this order, and may, in his discretion, request that the court stay or otherwise dispose of litigation, or seek other appropriate relief consistent with this order, until the completion of the processes described in this order.

(e) In carrying out the actions directed in this section, heads of agencies shall seek input from the public and stakeholders, including State local, Tribal, and territorial officials, scientists, labor unions, environmental advocates, and environmental justice organizations.

Sec. 3. *Restoring National Monuments.* (a) The Secretary of the Interior, as appropriate and consistent with applicable law, including the Antiquities Act, 54 U.S.C. 320301 *et seq.,* shall, in consultation with the Attorney General, the Secretaries of Agriculture and Commerce, the Chair of the Council on Environmental Quality, and Tribal governments, conduct a review of the monument boundaries and conditions that were established by Proclamation 9681 of December 4, 2017 (Modifying the Bears Ears National Monument); Proclamation 9682 of December 4, 2017 (Modifying the Grand Staircase-Escalante National Monument); and Proclamation 10049 of June 5, 2020 (Modifying the Northeast Canyons and Seamounts Marine National Monument), to determine whether restoration of the monument boundaries and conditions that existed as of January 20, 2017, would be appropriate.

(b) Within 60 days of the date of this order, the Secretary of the Interior shall submit a report to the President summarizing the findings of the review conducted pursuant to subsection (a), which shall include recommendations for such Presidential actions or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order.

(c) The Attorney General may, as appropriate and consistent with applicable law, provide notice of this order to any court with jurisdiction over pending litigation related to the Grand Staircase-Escalante, Bears Ears, and Northeast Canyons and Seamounts Marine National Monuments, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the actions described in subsection (a) of this section.

Sec. 4. *Arctic Refuge.* (a) In light of the alleged legal deficiencies underlying the program, including the inadequacy of the environmental review required by the National Environmental Policy Act, the Secretary of the Interior shall, as appropriate and consistent with applicable law, place a temporary moratorium on all activities of the Federal Government relating to the implementation of the Coastal Plain Oil and Gas Leasing Program, as established by the Record of Decision signed August 17, 2020, in the Arctic National Wildlife Refuge. The Secretary shall review the program and, as appropriate and consistent with applicable law, conduct a new, comprehensive analysis of the potential environmental impacts of the oil and gas program.

(b) In Executive Order 13754 of December 9, 2016 (Northern Bering Sea Climate Resilience), and in the Presidential Memorandum of December 20, 2016 (Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf From Mineral Leasing), President Obama withdrew areas in Arctic waters and the Bering Sea from oil and gas drilling and established the Northern Bering Sea Climate Resilience Area. Subsequently, the order was revoked and the memorandum was amended in Executive Order 13795 of April 28, 2017 (Implementing an America-First Offshore Energy Strategy). Pursuant to section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), Executive Order 13754 and the Presidential Memorandum of December 20, 2016, are hereby reinstated in their original form, thereby restoring the original withdrawal of certain offshore areas in Arctic waters and the Bering Sea from oil and gas drilling.

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(c) The Attorney General may, as appropriate and consistent with applicable law, provide notice of this order to any court with jurisdiction over pending litigation related to the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge and other related programs, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the actions described in subsection (a) of this section.

Sec. 5. *Accounting for the Benefits of Reducing Climate Pollution.* (a) It is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues. The ''social cost of carbon'' (SCC), ''social cost of nitrous oxide'' (SCN), and ''social cost of methane'' (SCM) are estimates of the monetized damages associated with incremental increases in greenhouse gas emissions. They are intended to include changes in net agricultural productivity, human health, property damage from increased flood risk, and the value of ecosystem services. An accurate social cost is essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions.

(b) There is hereby established an Interagency Working Group on the Social Cost of Greenhouse Gases (the ''Working Group''). The Chair of the Council of Economic Advisers, Director of OMB, and Director of the Office of Science and Technology Policy shall serve as Co-Chairs of the Working Group.

(i) Membership. The Working Group shall also include the following other officers, or their designees: the Secretary of the Treasury; the Secretary of the Interior; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Health and Human Services; the Secretary of Transportation; the Secretary of Energy; the Chair of the Council on Environmental Quality; the Administrator of the Environmental Protection Agency; the Assistant to the President and National Climate Advisor; and the Assistant to the President for Economic Policy and Director of the National Economic Council.

(ii) Mission and Work. The Working Group shall, as appropriate and consistent with applicable law:

(A) publish an interim SCC, SCN, and SCM within 30 days of the date of this order, which agencies shall use when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published;

(B) publish a final SCC, SCN, and SCM by no later than January 2022;

(C) provide recommendations to the President, by no later than September 1, 2021, regarding areas of decision-making, budgeting, and procurement by the Federal Government where the SCC, SCN, and SCM should be applied;

(D) provide recommendations, by no later than June 1, 2022, regarding a process for reviewing, and, as appropriate, updating, the SCC, SCN, and SCM to ensure that these costs are based on the best available economics and science; and

(E) provide recommendations, to be published with the final SCC, SCN, and SCM under subparagraph (A) if feasible, and in any event by no later than June 1, 2022, to revise methodologies for calculating the SCC, SCN, and SCM, to the extent that current methodologies do not adequately take account of climate risk, environmental justice, and intergenerational equity.

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(iii) Methodology. In carrying out its activities, the Working Group shall consider the recommendations of the National Academies of Science, Engineering, and Medicine as reported in Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide (2017) and other pertinent scientific literature; solicit public comment; engage with the public and stakeholders; seek the advice of ethics experts; and ensure that the SCC, SCN, and SCM reflect the interests of future generations in avoiding threats posed by climate change.

Sec. 6. *Revoking the March 2019 Permit for the Keystone XL Pipeline.* (a) On March 29, 2019, the President granted to TransCanada Keystone Pipeline, L.P. a Presidential permit (the ''Permit'') to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada (the ''Keystone XL pipeline''), subject to express conditions and potential revocation in the President's sole discretion. The Permit is hereby revoked in accordance with Article 1(1) of the Permit.

(b) In 2015, following an exhaustive review, the Department of State and the President determined that approving the proposed Keystone XL pipeline would not serve the U.S. national interest. That analysis, in addition to concluding that the significance of the proposed pipeline for our energy security and economy is limited, stressed that the United States must prioritize the development of a clean energy economy, which will in turn create good jobs. The analysis further concluded that approval of the proposed pipeline would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take ambitious climate action.

(c) Climate change has had a growing effect on the U.S. economy, with climate-related costs increasing over the last 4 years. Extreme weather events and other climate-related effects have harmed the health, safety, and security of the American people and have increased the urgency for combatting climate change and accelerating the transition toward a clean energy economy. The world must be put on a sustainable climate pathway to protect Americans and the domestic economy from harmful climate impacts, and to create well-paying union jobs as part of the climate solution.

(d) The Keystone XL pipeline disserves the U.S. national interest. The United States and the world face a climate crisis. That crisis must be met with action on a scale and at a speed commensurate with the need to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory. At home, we will combat the crisis with an ambitious plan to build back better, designed to both reduce harmful emissions and create good clean-energy jobs. Our domestic efforts must go hand in hand with U.S. diplomatic engagement. Because most greenhouse gas emissions originate beyond our borders, such engagement is more necessary and urgent than ever. The United States must be in a position to exercise vigorous climate leadership in order to achieve a significant increase in global climate action and put the world on a sustainable climate pathway. Leaving the Keystone XL pipeline permit in place would not be consistent with my Administration's economic and climate imperatives.

Sec. 7. *Other Revocations.* (a) Executive Order 13766 of January 24, 2017 (Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects), Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ''Waters of the United States'' Rule), Executive Order 13783 of March 28, 2017 (Promoting Energy Independence and Economic Growth), Executive Order 13792 of April 26, 2017 (Review of Designations Under the Antiquities Act), Executive Order 13795 of April 28, 2017 (Implementing an America-First Offshore Energy Strategy), Executive Order 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth), and Executive Order 13927 of June 4, 2020 (Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities), are hereby revoked. Executive Order 13834 of May 17, 2018

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(Efficient Federal Operations), is hereby revoked except for sections 6, 7, and 11.

(b) Executive Order 13807 of August 15, 2017 (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects), is hereby revoked. The Director of OMB and the Chair of the Council on Environmental Quality shall jointly consider whether to recommend that a replacement order be issued.

(c) Executive Order 13920 of May 1, 2020 (Securing the United States Bulk-Power System), is hereby suspended for 90 days. The Secretary of Energy and the Director of OMB shall jointly consider whether to recommend that a replacement order be issued.

(d) The Presidential Memorandum of April 12, 2018 (Promoting Domestic Manufacturing and Job Creation Policies and Procedures Relating to Implementation of Air Quality Standards), the Presidential Memorandum of October 19, 2018 (Promoting the Reliable Supply and Delivery of Water in the West), and the Presidential Memorandum of February 19, 2020 (Developing and Delivering More Water Supplies in California), are hereby revoked.

(e) The Council on Environmental Quality shall rescind its draft guidance entitled, ''Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions,'' 84 FR 30097 (June 26, 2019). The Council, as appropriate and consistent with applicable law, shall review, revise, and update its final guidance entitled, ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,'' 81 FR 51866 (August 5, 2016).

(f) The Director of OMB and the heads of agencies shall promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, including, if necessary, by proposing such rescissions through notice-and-comment rulemaking, implementing or enforcing the Executive Orders, Presidential Memoranda, and draft guidance identified in this section, as appropriate and consistent with applicable law.

Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

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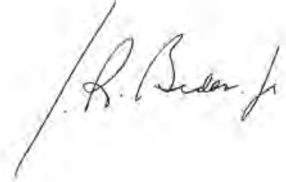
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 20, 2021.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE	)	
PART 203: MAJOR STATIONARY	)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND	)	
MODIFICATION, 35 ILL. ADM. CODE	)	
PART 204: PREVENTION OF	)	
SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

THE ILLINOIS ATTORNEY GENERAL OFFICE'S MOTION TO STAY

EXHIBIT C

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ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of New Jersey, State of Maryland, Commonwealth of Massachusetts, State of Minnesota, State of Oregon, Commonwealth of Pennsylvania, State of Washington, and the District of Columbia,

Petitioners,

v.

U.S. Environmental Protection Agency and Michael S. Regan, in his capacity as Administrator, U.S. Environmental Protection Agency,

Respondents.

No. 21-1033 (consolidated with Nos. 21-1039 and 21-1259)

EPA's Unopposed Motion to Govern

EPA moves to keep these consolidated cases in abeyance until February 28, 2023, to allow the agency to consider revisions to the challenged rule. EPA also moves to consolidate Case No. 18-1149 with these cases. Petitioners do not oppose the relief sought.

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Petitioners seek review of EPA's rule "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting." 85 Fed. Reg. 74,890 (Nov. 24, 2020). In February 2021, this Court agreed to put this matter in abeyance so that EPA could review the challenged action in light of policies set forth in an Executive Order signed by President Biden. Order (Feb. 17, 2021) (also requiring 90-day status reports and motion to govern by August 17); *see* Order (Aug. 30, 2021) (granting EPA's motion to keep case in abeyance for 30 days); Order (Sept. 17, 2021) (granting EPA's motion to keep case in abeyance for a month); Order (Nov. 15, 2021) (granting EPA's motion to keep case in abeyance for 90 days and ordering motion to govern by today).

Last January EPA received an administrative petition for reconsideration from some petitioners of the challenged action under 42 U.S.C. § 7607(d)(7)(B). In October EPA denied that petition because it does not meet the criteria for mandatory reconsideration under Section 7607(d)(7)(B). But EPA agreed that the reconsideration petition "identifies potential concerns that warrant further consideration…." EPA thus "plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's New Source Review regulations that would address the issues raised in the…petition and comments on the Project Emission Accounting rule."

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EPA has since initiated its rulemaking process. Because the outcome of that process could obviate some or all the disputed issues here, EPA asks that the Court leave this case in abeyance until February 28, 2023, with 90-day status reports, as well as a motion to govern due at the end of that period.[1]

Separately, several environmental petitioners here—Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club—petitioned for review, in Case No. 18-1149, of an EPA memorandum entitled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program." *See* 83 Fed. Reg. 13,745 (Mar. 30, 2018). That case is in abeyance, with 90-day status reports, pending EPA's review of the memorandum in light of the executive order. The content of that memorandum is related to the rule challenge here, and review of the memorandum could be affected by EPA's rulemaking here.

For efficiency purposes, EPA asks that Case No. 18-1149 be consolidated with Case Nos. 21-1033, 21-1039, and 21-1259, and that it be allowed to file a single status report every 90 days for all these cases.

Submitted on February 10, 2022.

/s/ Sue Chen

Sue Chen
U.S. Department of Justice
Environment & Natural Resources Division

[1] EPA anticipates that it will request extending the abeyance at that point so that it can complete the rulemaking process.

Environmental Defense Section
P.O. Box 7611
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Certificates of Service and Compliance

I certify that this motion complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this motion complies with Fed. R. App. P. 27(d)(2)(A), because by Microsoft Word's count, it has 465 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on February 10, 2022, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

/s/ Sue Chen
Sue Chen

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE	)	
PART 203: MAJOR STATIONARY	)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND	)	
MODIFICATION, 35 ILL. ADM. CODE	)	
PART 204: PREVENTION OF	)	
SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

THE ILLINOIS ATTORNEY GENERAL OFFICE'S MOTION TO STAY

EXHIBIT D

Electronic Filing: Received, Clerk's Office 5/06/2022

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OCT 1 2 2021

THE ADMINISTRATOR

Mr. Sanjay Narayan
Acting Director, Environmental Law Program
Sierra Club
2101 Webster Street, Suite 1300
Oakland, California 94612

Dear Mr. Narayan:

I am responding to the January 22, 2021, Petition for Reconsideration you submitted on behalf of the Environmental Defense Fund, the Natural Resources Defense Council, the Environmental Integrity Project, the Sierra Club, and the Adirondack Council (collectively, "petitioners") regarding the U.S. Environmental Protection Agency's final rule "Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting" (85 FR 74890, November 24, 2020) ("Project Emissions Accounting rule" or "PEA rule"). The petition also requests withdrawal of the guidance memorandum "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (March 13, 2018) ("March 2018 Memorandum").[1]

The EPA is denying the petition for reconsideration of the rule on the grounds that the petition does not meet the criteria for mandatory reconsideration under section 307(d)(7)(B) of the Clean Air Act. The EPA is also denying the request that the Project Emissions Accounting rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. The EPA agrees, however, that the petition for reconsideration identifies potential concerns that warrant further consideration by the EPA. Therefore, the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's New Source Review regulations that would address the issues raised in the submitted petition and comments on the Project Emissions Accounting rule. The agency also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.[2]

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[1] Letter from E. Scott Pruitt, to Regional Administrators, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," March 13, 2018, available at: https://www.epa.gov/sites/default/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

[2] Convening such a rulemaking process is also consistent with the priorities outlined in Executive Order 13990, entitled Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis, which states that it is the Biden Administration's policy "to improve public health and protect our environment; to ensure access to clean air and water; . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." 86 FR at 7,037 (January 20, 2021). Executive Order 13990 directs federal agencies "to immediately review and, as appropriate and consistent with applicable law, take action to

Overview of Project Emissions Accounting

The final Project Emissions Accounting rule revised the NSR regulations to make clear that both emissions increases and decreases from a project (a physical change or change in the method of operation) can be considered during Step 1 of the two-step NSR applicability test in what is referred to as project emissions accounting. The Project Emissions Accounting rule was preceded by the March 2018 Memorandum. In that guidance memorandum, the Administrator explained that the agency interpreted the post-2002 NSR regulations to allow emissions decreases as well as increases to be considered under Step 1.[3] The guidance clarified that the phrase "sum of the emissions increases" used for projects that involve a combination of new and existing units (i.e., the hybrid test) should be interpreted in the same manner as the term "sum of the difference," which applied to projects involving only new or only existing units.[4] The Project Emissions Accounting rule revised the term "sum of the emissions increases" to "sum of the difference" to alleviate any uncertainty that still may have remained following issuance of the March 2018 Memorandum.[5]

Objections Raised in Petition for Reconsideration

The submitted petition contained three primary objections to the Project Emissions Accounting rule and the March 2018 Memorandum:

1. The final rule fails to ensure that offsetting emission decreases used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated;
2. The final rule unlawfully allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous[6] emission decreases; and,
3. The EPA has not ensured that project emission decreases will occur and will be maintained.

The petition alleges that each objection either arose after the period for public comment on the Project Emissions Accounting rule or that each objection was impracticable to raise during that comment period. The petition also alleges that these objections are of central relevance to the outcome of the rule. It claims that the EPA must grant reconsideration pursuant to section 307(d)(7)(B) of the Clean Air Act and stay the Project Emissions Accounting rule. The petition additionally requests that the EPA immediately withdraw the March 2018 Memorandum and that such withdrawal can occur without notice and comment through direct final action.

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address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives . . . ." *Id.* For actions inconsistent with these policies, "the heads of agencies shall . . . consider suspending, revising, or rescinding the agency actions." *Id.*

[3] Letter from E. Scott Pruitt, to Regional Administrators, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," March 13, 2018, available at: https://www.epa.gov/sites/default/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

[4] *Id.* at 8.

[5] 85 FR 74890 (November 24, 2020).

[6] For an explanation on contemporaneous emissions, *see* footnote 25 in 85 FR 74893 (November 24, 2020).

After careful review of the objections raised in the petition for reconsideration, the EPA is denying the petition for reconsideration of the rule under section 307(d)(7)(B) of the CAA and the request that the Project Emissions Accounting rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. The petition has failed to establish that the objections to the Project Emissions Accounting rule meet the criteria for mandatory reconsideration under section 307(d)(7)(B) of the CAA. Section 307(d)(7)(B) of the CAA requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule "can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." [7]

After review of the petition, the EPA has determined that it was not impracticable for commenters to raise these particular concerns as the agency specifically sought comment on the application of the "project aggregation" interpretation and policy in its proposal of the Project Emissions Accounting rule.[8] The EPA received comments on whether or not the EPA should apply the project aggregation interpretation and policy.[9] Commenters had the opportunity to raise whether applying such an interpretation and policy would still be insufficient as the agency specifically asked for comments on this issue. The failure to make such comments means that the petitioners have not met the bar for mandatory reconsideration under CAA section 307(d)(7)(B).

However, as noted above, the EPA agrees that the petition for reconsideration identifies potential concerns that warrant further consideration by the EPA. Therefore, the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's NSR regulations that would address the issues raised in the submitted petition and comments on the Project Emissions Accounting rule. The agency also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.

Basis for Denial of Petition for Reconsideration

The requirement to convene a proceeding to reconsider a rule is based on a petitioner demonstrating to the EPA **both**: (1) that it was impracticable to raise the objection during the comment period, or that grounds for such objection arose after the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the *Federal Register*, *see* CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule.[10]

As discussed in this letter it was not impracticable for the petitioners to raise the objections that they now raise in their petition for reconsideration of the final rule as evidenced by the fact that

[7] 42 U.S.C. 7607(d)(7)(B).

[8] 84 FR 39244, 39251 (August 9, 2019) ("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.")

[9] As described in the 2018 project aggregation interpretation and policy, "'project aggregation,' … ensures that nominally-separate projects occurring at a source are treated as a single project for NSR applicability purposes where it is unreasonable not to consider them a single project." 83 FR 5734, 57326 (November 11, 2018).

[10] 42 U.S.C. 7607(d)(7)(B).

the EPA requested comment on the potential for the application of the project aggregation interpretation and policy in the proposed rule.[11] The petitioners' primary concerns in the petition for reconsideration are similar to those addressed in the Response to Comments under the following heading: "Comments on Implementation of Project Emissions Accounting under Step 1."[12] Two of the sections within this heading are titled "Comments on Defining the Scope of a Project," (which includes a discussion of contemporaneous emissions) and "Comments on Monitoring, Recordkeeping, and Reporting of Emissions Decreases in Step 1 of the NSR Major Modification Applicability Test."[13]

The discussion below addresses each of the objections raised in the petition.

1. Alleged inability to raise an objection that the final rule fails to ensure that offsetting emission decreases used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated.

The petitioners claim that the EPA's final rule is unlawful and arbitrary because it omits safeguards that might ensure that the emission decreases counted in Step 1 result from the planned modification, rather than from unrelated activities that should only be considered in Step 2 in combination with other contemporaneous emission increases and decreases. While they recognize the EPA declared that it would be appropriate for sources to apply the "substantially related" test set forth in the agency's 2018 project aggregation interpretation and policy to ensure emission decreases counted at Step 1 are substantially related to the change in question, petitioners allege that nothing in the final rule requires that states use this test when engaging in project emissions accounting. The petitioners state that simply identifying a test that sources could utilize to demonstrate that an emission decrease results from the change under consideration does not remedy the unlawfulness of the EPA's final rule. According to petitioners, this is because it does not guarantee that sources will apply the test despite "EPA's admission that use of the 'substantially related' test is needed to 'alleviate concerns about potential NSR circumvention in Step 1 of the NSR major modification applicability test.'"[14]

The petitioners contend that the grounds for this objection arose after the period for public comment. They allege that, while the EPA solicited 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 activities (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," the proposed regulatory text did not include such a requirement on the grounds that it was unnecessary. Petitioners argue that nothing in the proposal suggested that the EPA might agree that a "substantially related" test is needed to

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[11] 84 FR 39244, 39251 (August 9, 2019).
[12] Response to Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 61 ("Response to Comments").
[13] *Id.* at 61-98.
[14] Petition for Reconsideration on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) (Petition for Reconsideration) at 8 (citing 85 FR at 74900).

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prevent NSR circumvention but nonetheless fail to make the use of such test a mandatory feature in the final rule.

The EPA finds that this claim does not satisfy the requirements to grant mandatory reconsideration under CAA section 307(d)(7)(B). The petitioners have failed to demonstrate that it was impracticable to raise the objection during the comment period. This precise issue was presented at proposal, raised during the public comment period, and addressed by the EPA in the preamble to the final Project Emissions Accounting rule and Response to Comments.

In the proposed Project Emissions Accounting rule, the EPA requested comment on the application of the "substantially related" test. To this point, as petitioners noted, the EPA took 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."[15] The EPA also stated its view on circumvention of NSR requirements when it stated that "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."[16] The EPA specifically took comment on this statement and added that "we ask for comment on our position in this regard."[17]

In response to this request, the EPA received multiple comments on the potential application of the "substantially related" test in the context of project emissions accounting, including on whether to allow for a rebuttable presumption as well as potential issues with circumvention of NSR that may arise if the scope of a project is not adequately defined. It was these comments that informed the EPA's ultimate decision in the final rule to recommend that permitting authorities apply the "substantially related" criteria. For example, one comment stated the following:

> "The 'substantially related' test, based on a technical relationship, is appropriate …also… it is preferable to revise the rule to reflect the 'substantially related' requirement. Finally, we believe EPA should revise its rules to adopt a time-based (3 year) presumption against aggregation. These proposals would provide further clarification to the regulated public and the regulatory agencies."[18]

Several state attorneys general and the South Coast Air Quality Management District (South Coast AQMD) provided examples on how a facility could circumvent NSR under the EPA's

[15] 84 FR at 39251.
[16] *Id.*
[17] *Id.*
[18] Florida Sugar Industry Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 7, *https://www.regulations.gov/document/EPA-HQ-OAR-2018-0048-0017*.

proposed rules.[19] More specifically, the attorneys general recognized that "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."[20] Several commenters also included in their comments a response to the EPA's preliminary consideration that over-aggregation may not be as prevalent as under-aggregation.[21] While petitioners are correct that "EPA's proposed regulatory text did not include such a requirement,"[22] this fact is not sufficient grounds for concluding that it was impracticable for petitioners to raise the objection during the comment period.[23] In *Clean Air Council v. Pruitt,* the D.C. Circuit determined that it was not impracticable for petitioners to provide meaningful comments during the comment period when the EPA specifically requested comment on the topic regardless of whether the EPA proposed regulatory text for a potential exclusion it solicited comment on.[24] The application of the "substantially related" test that the EPA solicited comment on to determine the scope of a project for purposes of addressing over-aggregation was, at the time of the proposed rule, not reflected in the text of a regulations and thus not a mandatory feature of the EPA's NSR regulations in any context. The EPA's notice of proposed rulemaking solicited comment on applying that 2018 project aggregation approach to PEA and did not indicate that the only option was to make the "substantially related" test into a mandatory element of the NSR regulations when applied in the context of addressing over-aggregation. The EPA solicited comment on exactly what it recommended in the preamble of the final Project Emissions Accounting rule -- the application of the then-extant "substantially related" criteria from the 2018 project aggregation interpretation and policy to determine the scope of a project to cover both under- and over-aggregation. The petitioners had the opportunity to raise an objection regarding the non-mandatory nature of the "substantially related" test at the time that the EPA requested comment on whether to extend the applicability of that existing approach to over-aggregation. Commenters therefore could have raised whether applying such a non-mandatory interpretation or policy would or would not be sufficient, as the agency specifically inquired.

The EPA responded to comments it received on the application of the "substantially related" test in the Response to Comments as well as in the preamble of the final rule. The preamble of the final rule included a section titled "Defining the Scope of a Project," in which the EPA responded to commenter concerns by stating that "The application of the 'substantially related' test of the 2018 project aggregation interpretation and policy should be sufficient to prevent sources from arbitrarily grouping activities for the sole purpose of avoiding the NSR major

[19] Attorneys General of New Jersey, California, Maryland, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Washington, and the District of Columbia Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 16; South Coast Air Quality Management District Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) ("If EPA Finalizes the Proposal it Must Require Activities Identified as One Project to be 'Substantially Related.'").
[20] *Id.*
[21] For an explanation of under and over-aggregation, *see* 85 FR 74899-74900 (November 24, 2020).
[22] Petition for Reconsideration at 9.
[23] *See Clean Air Council v. Pruitt*, 862 F.3d 1,12-13 (D.C. Cir. 2017).
[24] *Id.* at 11 ("Although it is true that the NPRM for the final methane rule proposed to *exclude* low-production well sites, EPA and Industry Intervenors ignore the fact that the notice went on to solicit comment on whether such an exclusion would be warranted.").

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modification requirements through project emissions accounting."[25] The EPA, therefore, took comment on the issue of the scope of a project, received comments similar to those petitioners now raise in their petition for reconsideration, and responded to these comments in the Response to Comments and in the preamble of the final rule.

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

2. Alleged inability to raise objection that the final rule unlawfully allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous emission decreases.

The petitioners argue that neither the text of the final rule nor the preamble indicate that states and sources must utilize the "substantially related" test when applying project emissions accounting. The petitioners argue that the EPA's conclusion that use of the "substantially related" test would be "appropriate" for deciding whether an emissions decrease can be counted in Step 1 is insufficient to prevent sources from unlawfully circumventing NSR based on the inclusion of non-contemporaneous emission decreases. The petitioners additionally argue in the alternative that even if the final rule did require use of the "substantially related" test, allowing for a rebuttable presumption that activities occurring outside of a 3-year period cannot be included in the Step 1 analysis does not equate to requiring that offsetting emission decreases be contemporaneous.

The petitioners contend that the grounds for this objection arose after the public comment period because the EPA stated in the proposal that it did not believe it was necessary to require sources to determine that emission decreases counted in Step 1 are "substantially related" to the change under review. Th petitioners also argue that, in the proposal, the EPA made no mention of any requirement that Step 1 decreases be contemporaneous with the emission increases resulting from the change in question.

The EPA, however, does not agree that petitioners' claims arose after the comment period. As the EPA explained in the Response to Comments, and as petitioners note in their petition for reconsideration, this issue arises out of the application of the "substantially related" interpretation and policy to project emissions accounting and, as explained in the preceding section, the EPA took comment on the application of this test to address potential over-aggregation in this context.

The petitioners commented during the public comment period of the Project Emissions Accounting rule that "by deferring to the unfettered discretion of sources as to which activities may be included at Step 1, the EPA fails to ensure that sources do not circumvent NSR by including wholly unrelated and non-contemporaneous pollution-decreasing activities within the scope of an otherwise pollution-increasing project at Step 1."[26] The EPA was aware of comments

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[25] 85 FR 74890, 74898 (November 24, 2020).

[26] The Sierra Club, et al., Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 11.

similar to those concerns raised by petitioners in their petition for reconsideration and responded to these comments in the final rule preamble as well as in the final rule's Response to Comments. In the preamble to the final rule, the EPA noted that "commenters also argued that the EPA had unlawfully not required that emissions decreases be contemporaneous or enforceable in Step 1 of the NSR major modification applicability test."[27]
The Response to Comments accompanying the final rule provides further detail on the comments received regarding the contemporaneity of emissions decreases and responded in the following manner:

> Upon consideration of this comment and other comments received, the EPA has decided that it would be appropriate to apply the same criteria to determine whether physical and operational changes are part of the same project as it does when considering both under- and over-aggregation. Therefore, as noted above and in the preamble for the PEA final action, the final PEA rule does impose a temporal requirement in defining the scope of a project to include emissions increases and decreases that are 'substantially related.' 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.' The EPA interprets the requirement 'that activities 'occur close in time' to adopt a rebuttable presumption that activities at a plant can be presumed not to be 'substantially related' if they occur three or more years apart.' This is fully consistent with the direction to 'look at any change proposed for a plant, and decide whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant,' at the source as a whole. It is only once the full impact of a particular project at Step 1 has been considered that a source could look to contemporaneous emissions decreases to offset the increases from the project at Step 2."[28]

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

3. Alleged inability to raise objection that EPA has not ensured that project emission decreases will occur and be maintained.

The petitioners argue that the monitoring and recordkeeping provisions of 40 CFR § 52.21(r)(6) are insufficient to assure that sources comply with the "substantially related" test. Pre-project recordkeeping requirements under 40 CFR § 52.21(r)(6) include a description of the project, and identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project, and a description of the applicability test used to determine that the project is not a major modification. The petitioners claim these provisions permit no meaningful oversight of the "technical or economical interconnection" between the various activities

[27] 85 FR at 74898.
[28] Response to Comments at 42.

grouped into a project (nor whether there are equally interconnected activities that the source has chosen to exclude from the "project"), that they are insufficient to confirm that the timing of the activities grouped into a single project conform with the timing-related requirements of the "substantially related" test, and that they provide no capacity to enforce the EPA's "substantially related" test, even where that test applies.

The petitioners also contend that project emissions accounting prevents one from evaluating whether a source circumvents NSR because emissions may increase at a source without triggering NSR if the source "has gerrymandered its emissions accounting so as to divide the increase between two 'projects,' each of which individually falls below the significance threshold."[29] The petitioners state that while this would constitute a circumvention of the NSR requirements, the EPA's regulations do not allow one to confirm that sources' actual activities conform with that policy, or with their pre-project claims as to the relationship between various changes grouped into a single "project." The petitioners also argue that this is exacerbated by the fact that sources may avoid even these minimal requirements if the results of their applicability calculations fall below the "reasonable possibility" requirements of 40 CFR § 52.21(r)(6)(vi).

The petitioners claim that this objection arose after the public comment period because the final rule, for the first time, states that the "substantially related" interpretation and policy will apply and ensure that the Project Emissions Accounting final rule meets the requirements of the CAA.

As with the preceding two claims discussed, petitioners had an opportunity to comment on this issue and the EPA received comments on the proposed rule similar to the concerns raised by petitioners in their petition for reconsideration. The proposed rule preamble had a section on "Monitoring, Recordkeeping and Reporting of Emissions Decreases During Step 1 of the Applicability Regulations" in which the EPA took 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."[30]

The EPA received comments similar to those raised in the Petition for Reconsideration including from the petitioners themselves. The petitioners commented on the proposed rule as follows:

> EPA's current Proposal also fails to mention that the D.C. Circuit invalidated the agency's 2002 Reform Rule, in part, because the EPA's self-reporting and self-monitoring provisions failed to ensure compliance with the Clean Air Act's NSR provisions, and failed to provide a mechanism to ensure that a source's projected increases in emissions would be enforceable. *New York v. U.S. E.P.A.*, 413 F.3d 3 (D.C. Cir. 2005) . . . . The EPA's proposed reliance on self-monitoring and self-reporting to substantiate emission decreases suffers from the same flaws. Indeed, the rule would allow sources to avoid any obligation to 'retain the data underlying their projections, let alone send that information to permitting authorities,' so long as the source believes that its unenforceable (and potentially unidentified and undocumented) emission reductions will not trigger an increase in

[29] Petition for Reconsideration at 12.
[30] 84 FR at 39252.

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> emissions….The 'rule allows sources that take advantage of the "reasonable possibility" standard to avoid recordkeeping altogether, thus thwarting the EPA's ability to enforce the NSR provisions.[31]

The EPA responded to this comment by stating that "[t]he EPA also disagrees that the regulations and what information they require to be recorded, collected and reported can only be read to speak to that part of the project that results in an increase in emissions. In fact, the text of the regulation supports the fact that it can be read to require the collection of information about both increases and decreases in emissions . . . . Furthermore, the EPA explained that it disagrees that the 'reasonable possibility' provisions do not require monitoring of decreases that are part of the project just because they occur at a different emission unit. That emission unit would be part of the project and would therefore be considered an 'affected' emission unit for purposes of 40 CFR § 52.21(r)(6)(i)(b)."[32] The EPA also noted at the time that commenters' (and petitioners') concerns regarding the "reasonable possibility" provisions were a challenge to the revised "reasonable possibility" rule.[33] At the time of publication of the Response to Comments, this rule was subject to litigation in *State of New Jersey v. EPA*, No. 08-1065 (D.C. Cir. 2021). The D.C. Circuit has since decided this case in the EPA's favor, affirming that the EPA had adequately justified the "reasonable possibility" standard.

Additionally, the Response to Comments for the Project Emissions Accounting rule identified that commenters raised the concern that the "rule allows sources that take advantage of the 'reasonable possibility' standard to avoid recordkeeping altogether, thus thwarting the EPA's ability to enforce the NSR provisions."[34] In the preamble of the final rule, the EPA summarized its response, stating that "the 'reasonable possibility' provisions would provide the records necessary for reviewing authorities to ensure that the emissions reductions are not temporary and provide for enforcement of the major NSR program requirements, as necessary."[35]

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

Conclusion

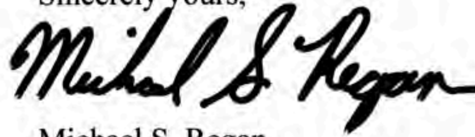
After careful review of the objections raised in the submitted petition for reconsideration, the EPA is denying the petition for reconsideration of the rule under section 307(d)(7)(B) of the CAA and the request that the Project Emissions Accounting Rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. However, while the EPA is not required by CAA section 307(d)(7)(B) to grant this petition for reconsideration, the EPA agrees that the petition raises concerns that warrant further consideration by the EPA in a separate rulemaking effort. The EPA, therefore, plans to initiate, at its own discretion, a rulemaking process to consider revisions to the NSR regulations

[31] The Sierra Club Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 20.
[32] Response to Comments at 53, 54.
[33] 72 FR 72607 (December 21, 2007).
[34] Response to Comments at 50.
[35] 85 FR at 74900.

to address the concerns raised by the petition for reconsideration. The EPA also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.

I appreciate your comments and interest in this matter.

Sincerely yours,



Michael S. Regan