

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2003-0064; FRL-XXXX-X]

RIN 2060-AP80

Prevention of Significant Deterioration (PSD) and Nonattainment  
New Source Review (NSR): Aggregation

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

**ACTION:** Delay of Effective Date.

**SUMMARY:** EPA is delaying the effective date of the final rule titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation" under the authority of the Administrative Procedure Act (APA) section 705 until the proceeding for judicial review of this rule is completed or EPA completes the reconsideration of the rule. This final rule for "aggregation," which EPA published in the Federal Register on January 15, 2009, is subject to a petition for review and has not become effective.

**DATES:** The effective date of FR Doc. E9-815, published in the Federal Register on January 15, 2009 (74 FR 2376), which was May 18, 2010, is delayed until such time as the proceeding for judicial review of this document is completed. The EPA will publish a document in the Federal Register announcing the effective date once the delay is no longer necessary.

**ADDRESSES:** Docket: The final rule, the petition for reconsideration, and all other documents in the record for the rulemaking are in Docket ID. No. EPA-HQ-OAR-2003-0064. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

**FOR FURTHER INFORMATION CONTACT:** Mr. David J. Svendsgaard, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541-2380, fax number (919) 541-5509, e-mail address: svendsgaard.dave@epa.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On January 15, 2009, the EPA ("we") issued a final rule

amending the PSD and nonattainment NSR regulations that implement the definition of "modification" in Clean Air Act section 111(a)(4). The amendments addressed when a source must combine ("aggregate") nominally-separate physical changes and changes in the method of operation for the purpose of determining whether they are a single change under NSR and result in a significant emissions increase. The amendments retained the existing rule language for aggregation but interpreted that rule text to mean that sources and permitting authorities should combine emissions when activities are "substantially related." It also adopted a rebuttable presumption that activities at a plant can be presumed not to be substantially related if they occur 3 or more years apart. Collectively, this rulemaking is known as the "NSR Aggregation Amendments." For further information on the NSR Aggregation Amendments, see 74 FR 2376 (January 15, 2009).

The NSR Aggregation Amendments have had their effectiveness delayed by two actions published in the Federal Register. See 74 FR 7284 (February 13, 2009) and 74 FR 22693 (May 14, 2009). The latter action established an effective date of May 18, 2010. On the same day as the first action delaying the effectiveness of the NSR Aggregation Amendments, the EPA convened a proceeding for reconsideration in response to a petition from the Natural

Resources Defense Council (NRDC).<sup>1</sup> See 74 FR 7193 (February 13, 2009). In addition to filing a petition for reconsideration with EPA, NRDC also filed a petition for review of the NSR Aggregation Amendments in Federal Court.<sup>2</sup>

On April 15, 2010, we published in the Federal Register a notice soliciting comments on the NRDC petition for reconsideration (75 FR 19567). In that notice, we solicited comment on revoking the NSR Aggregation Amendments and reverting to our policies on aggregation as they existed prior to the Amendments. We requested comment on whether the NSR Aggregation Amendments are inconsistent with the statute and key legal precedent, do not properly resolve the relevant policy issues, raise implementation concerns, and otherwise do not sufficiently clarify our aggregation policy to justify abandoning our prior policy. Additionally, we proposed to further delay the effective date for the NSR Aggregation Amendments beyond May 18, 2010.

Under section 705 of the APA, "an agency ... may postpone the effective date of [an] action taken by it pending judicial review." The provision requires that the agency find that justice requires postponing the action, that the action not have gone into effect, and that litigation be pending. As described above, the latter two requirements plainly are met. We find that justice requires postponing the effectiveness of the NSR

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<sup>1</sup>John Walke, Natural Resources Defense Council, EPA-HQ-OAR-2003-0064-0116.1.

Aggregation Amendments because allowing the rule to become effective when the Agency has expressed serious concerns about its viability and policy soundness would lead to confusion in the regulated community and the public as well as create difficulties for implementing agencies administering the program.

We also note that the comment period for the April 15, 2010 notice ends on May 17, 2010. We would not be able to review and respond to comments on that notice before the NSR Aggregation Amendments would become effective on May 18, 2010. The failure to complete the reconsideration or the proposed delay in the effective date would result in the confusion and difficulties noted above. Therefore, we find that justice requires postponing the effectiveness of the NSR Aggregation Amendments in order to allow for proper evaluation of the comments on the April 15, 2010 notice.

## **II. Issuance of a Stay and Delay of Effective Date**

Pursuant to section 705 of the APA, the EPA hereby postpones the effectiveness of the NSR Aggregation Amendments until resolution of the proceeding for judicial review of this rule or the completion of the reconsideration process. By this action, we are delaying the effective date of FR Doc. E9-815, published in the Federal Register on January 15, 2009 (74 FR 2376). This

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<sup>2</sup>NRDC v. EPA, No. 09-1103 (D.C. Cir.).

delay of effectiveness will remain in place until judicial review is no longer pending or EPA completes the reconsideration process.

**List of Subjects**

**40 CFR Part 51**

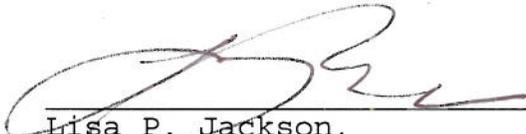
Environmental protection, Administrative practice and procedure, Air pollution control, Baseline emissions, Intergovernmental relations, Aggregation, Major modifications, Reporting and recordkeeping requirements.

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40 CFR Part 52

Environmental protection, Administrative practice and  
procedure, Air pollution control, Baseline emissions,  
Intergovernmental relations, Aggregation, Major modifications,  
Reporting and recordkeeping requirements.

May 6, 2010  
Dated:

  
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Lisa P. Jackson,  
Administrator.