6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

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

2060-AP80

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to a proceeding for reconsideration, the EPA requests comment on a Clean Air Act (CAA) rule, the New Source Review (NSR) Aggregation Amendments, which was promulgated on January 15, 2009. The NSR Aggregation Amendments established a new interpretation of the existing NSR rules governing the modification of major sources by requiring sources and permitting authorities to combine emissions from nominally-separate activities at a major stationary source only when the activities are "substantially related." This proposed reconsideration is in response to a petition from the Natural Resources Defense Council (NRDC) received on January 30, 2009. EPA requests public comment on all issues included in NRDC's petition. In light of the legal and policy issues raised in the petition and in our own review of the rule, EPA's

preferred option is to revoke the NSR Aggregation Amendments. EPA is also proposing to extend the effective date of the stay by an additional 6 months, and soliciting comment on a longer extension of the stay.

DATES: Comments. Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Public Hearing. If anyone contacts EPA requesting the opportunity to speak at a public hearing concerning the proposed regulation by **[INSERT DATE 10 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, EPA will hold a public hearing on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If a hearing is held, the record for the hearing will remain open until **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2003-0064, by one of the following methods:

- http://www.regulations.gov. Follow the online instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov.
- Mail: Air and Radiation Docket, Environmental Protection Agency, Mail code 6102T, 1200 Pennsylvania

Avenue, NW, Washington, DC 20460. Please include a total of two copies.

- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to the applicable docket. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at http://www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part

of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: 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., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC, 20460. 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)

566-1742, and the telephone number for the Air Docket is (202) 566-1744.

Public Hearing. If a public hearing is held, it will be held in Washington, DC.

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

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-5509; e-mail address: long.pam@epa.gov.

SUPPLEMENTARY INFORMATION:

The preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. How is this preamble organized?
II. Overview
A. What is “Aggregation”?
B. What events have led to this action?
III. This Action
A. What is the standard for reconsideration?
B. What issues are being reconsidered?
C. Key Issues Under Reconsideration
1. Lack of Adequate Opportunity for Notice and Comment on the Adopted Rule

2. Rule may be Inconsistent with a Court of Appeals Decision for Previous NSR Rule
a. Background for Our Historic Approach
b. Our Explanation of Our Authority in the NSR Aggregation Amendments
c. The CAA Requires Aggregation of Nominally-Separate Changes When They Collectively can be Seen as One Change
3. Questioning the Need for a Policy Change
4. State Plan Adoption
5. Proposal to Revoke Rule
6. Proposal to Extend Effective Date
IV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions to Address
K. Determination Under Section 307(d)
V. Statutory Authority

II. Overview

A. What is “Aggregation”?

When undergoing a physical or operational change, a source determines major NSR applicability through a two-step analysis that first considers whether the increased emissions from a particular proposed change alone are significant, followed by a calculation of the change’s net emissions increase considering all contemporaneous increases and decreases at the source (i.e., source-wide netting calculation) to determine if a major modification

has occurred. See, for example, 40 CFR 52.21(b)(2)(i). The term "aggregation" comes into play in the first step (Step 1), and describes the process of grouping together multiple, nominally-separate but related physical changes or changes in the method of operation ("nominally-separate changes") into one physical or operational change, or "project." The emission increases of the nominally-separate but related changes must be combined in Step 1 for purposes of determining whether a significant emissions increase has occurred from the project. See, for example, 40 CFR 52.21(b)(40). When undertaking multiple nominally-separate changes, the source must consider whether NSR applicability should be determined collectively (i.e., "aggregated") or whether the emissions from each of these changes should separately undergo a Step 1 analysis.[1]

Neither the CAA nor current EPA rules specifically address the basis upon which to aggregate nominally-separate changes for the purpose of making NSR applicability determinations. Instead, our[2] aggregation policy developed over time through statutory and regulatory

[1] Even if activities are determined to be separate and subject to an individual Step 1 analysis, the emission increases and decreases may still be included together in the source-wide netting calculation if the projects occur within a contemporaneous period.

[2] In this notice, the terms "we," "us," and "our" refer to the EPA.

interpretation and applicability determinations in response to a need to deter sources from attempting to expedite construction by permitting several changes separately as minor modifications. When related changes are evaluated separately, the source may circumvent the purpose of the NSR program by showing a less than significant emission increase for Step 1 of the applicability analysis, that could result in avoiding major NSR permitting requirements.[3] This, in turn, could result in increases of emissions of air pollutants from the facility that would be higher than the increases would be had the changes been subject to NSR control requirements. The associated emissions increases could endanger the air quality health standard and adversely affect public health.

Under our longstanding aggregation policy, we evaluate all relevant and objective criteria specific to a case in determining if multiple changes at a source should be aggregated as a single project for NSR purposes. See section III.C.2.a of this notice. Our policy aims to ensure the proper permitting of modifications that involve multiple physical and/or operational changes.

[3] Of course, if a source has a significant increase in emissions from a change (or aggregated changes), it is not necessarily subject to NSR; rather, not until the source also has a "significant net emission increase" would it be subject to NSR permitting requirements.

B. What events have led to this action?

On January 15, 2009, we issued a final rule that changed our interpretation of the PSD and nonattainment NSR regulations relating to the definition of "modification" in the CAA 111(a)(4). The new rule addressed when a source must aggregate emissions from nominally-separate changes for the purpose of determining whether they are a single project resulting in a significant emission increase. The final rule retained the prior rule language relevant to aggregation, but interpreted that rule text to mean that sources and permitting authorities should combine emissions only when nominally-separate changes are "substantially related." We described in the final rule preamble the factors that may be considered when evaluating whether changes are substantially related, and we specifically stated that two nominally-separate changes are not substantially related if they are only related to the extent that they both support the plant's overall basic purpose. At the same time, we adopted a rebuttable presumption that nominally-separate changes at a source that occur three or more years apart are presumed to not be substantially related. 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).

On January 30, 2009, NRDC submitted a petition for reconsideration of the NSR Aggregation Amendments as provided for in CAA section 307(d)(7)(B).[4] Under that CAA provision, the Administrator may convene a reconsideration proceeding if the petitioner raises an objection to a rule that was impracticable to raise during the comment period or if the grounds for the objection arose after the comment period. In either case, the objection must be of central relevance to the outcome of the rule.

On February 13, 2009, we announced the convening of a reconsideration proceeding in response to the NRDC petition. See 74 FR 7193. In order to allow for completion of the reconsideration prior to the NSR Aggregation Amendments becoming effective, we also announced a 90 day administrative stay of the rule. See 74 FR 7284 (Feb. 13, 2009). We subsequently completed a rulemaking further delaying the effective date until May 18, 2010. See 74 FR 22693 (May 14, 2009). The extensions enable us to take comment on issues that are in question

[4] John Walke, Natural Resources Defense Council, EPA-HQ-OAR-2003-0064-0116.1.

and complete any revisions of the rule that become necessary as a result of the reconsideration process.

III. This Action

A. What is the standard for reconsideration?

As noted above, pursuant to CAA 307(d)(7)(B) of the CAA, an individual can petition an agency to reconsider a final rule issued under CAA 307(d)(1) if the individual can show that:

- It was impracticable to raise the objection during the public comment period on the proposed rule, or the grounds for the objection arose after the public comment period; and
- The objection is centrally relevant to the outcome of the rule.

As to the first procedural criterion for reconsideration, a petitioner must show why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). Thus, CAA 307(d)(7)(B) does not provide a forum to request EPA to reconsider issues that actually were raised, or could have been raised, prior to promulgation of the final rule.

An agency can deny the reconsideration of issues when they fail to meet the procedural test for reconsideration under CAA 307(d)(7)(B). If, however, there are adequate grounds for the objections raised in this petition, the EPA Administrator must "... convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." CAA 307(d)(7)(B). In this case, the final rule adopted interpretations that were not described in the proposal and on which the public did not have an opportunity to offer comment, as described more specifically below.

B. What issues are being reconsidered?

The basis for this reconsideration proceeding is NRDC's petition of January 30, 2009, in which NRDC requested reconsideration of many aspects of the January 15, 2009, final rule. The reader is directed to the petition for an exact explanation of each objection raised by NRDC. See Docket EPA-HQ-OAR-2003-0064-0116.1. In summary, NRDC's main points of concern include:

- The NSR Aggregation Amendments are inconsistent with the D.C. Circuit Court ruling on the NSR "Equipment Replacement Provision," by creating an illegal

exclusion to the broad “any physical change” provision in the CAA.

- The EPA failed to identify any actual problems or inconsistencies with longstanding policy.
- The 2006 proposal sought to clarify aggregation rules through proposing new rule text, but the 2009 final rule reinterpreted the existing rule text and was described as a change in policy.
- The term “substantially related” is vague and undefined, did not appear in the proposal, retreats from the factors used in previous aggregation determinations by EPA (e.g., adopting the 3-year timing presumption against aggregation), and eliminates consideration of EPA’s policy on circumvention by failure to consider a company’s intent.
- The final rule is silent, and therefore confusing, on whether States must implement the new rule in their own programs.
- The EPA violated relevant executive orders through failure to adequately consult with states during the development of the rule.

Through this notice, we are taking comment on a broad range of legal and policy issues related to the NSR Aggregation Amendments. We also acknowledge an interdependence among several objections raised in NRDC's petition, such that granting reconsideration on one issue that meets the standard for reconsideration may warrant taking comment on a second issue that may, on its own, not meet the standard for reconsideration. However, the basis for the second issue is at stake depending on what comments are received on the first issue.

For example, under CAA 307(d)(3)(C), EPA is required to present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." We acknowledge through this reconsideration proceeding that portions of the legal basis for the NSR Aggregation Amendments did not undergo comment solicitation, and it is necessary to allow the public an opportunity to comment fully on the basic authority for the rule. However, as is the case with many rules, the statutory basis of this rule provides the underpinning for most every aspect of the rule, and could call into question the legitimacy of other aspects of the rule. Therefore, in addition to granting reconsideration on the legal basis for the rule, we are also taking comment on other aspects of

the final rule that are dependent upon a sound legal basis. For instance, although we requested comment on a 3-year presumption against aggregation through our 2006 proposal, in light of the broad legal issue that is currently under reconsideration, we believe it is justified to open for additional comment the issue of having a presumption against aggregation because such a presumption would be necessarily dependent on, and an outgrowth of, the legal basis of our rule.

Moreover, a few of the issues raised in the NRDC petition demonstrate that there are fundamental components of the final rule that elicit confusion, such as whether states with approved implementation plans must adopt the new rule and whether their State Implementation Plans (SIPs) must be amended. Since the aim of the rule was to reduce, not promote, confusion with regard to project aggregation, we are particularly concerned with this comment from the petitioner, and it is one of the primary reasons for delaying the effective date of the rule while we reconsider issues raised in the petition.

For these reasons, we invite comment on all issues raised by the petitioner. In the sections below, we specifically describe several key issues on which we seek comment.

C. Key Issues Under Reconsideration

1. Lack of Adequate Opportunity for Notice and Comment on the Adopted Rule

As noted above, NRDC identifies as grounds for reconsideration several issues related to the adoption and implementation of the "substantially related" test for aggregating nominally-separate changes. The proposed rule did not mention the "substantially related" test adopted in the final rule.[5] Additionally, the proposed rule offered new regulatory text to clarify the criteria for aggregation, while the final rule retains the existing text. Our proposed rule did not discuss the possibility of changing the interpretation of the existing text.

A commenter would not have been on notice of the possibility that we would adopt the "substantially related" test without amending the rule text, nor would a commenter have been on notice of the need to comment on whether the existing text was susceptible to this interpretation. The issue of adopting this rule in the form and manner we did

[5] Furthermore, subsumed within the "substantially related test" is another feature of the final rule that was not introduced as a possible change in policy at proposal – i.e., to not aggregate projects when their sole common ground is that they each support the plant's overall basic purpose.

is an issue that arose after the comment period and is of central relevance to the rulemaking proceeding.

In soliciting comment on the option of creating time-based presumptions regarding aggregation, we did not raise the issue of whether the existing regulatory text could support the creation of this presumption. We "acknowledge[d] that the establishment of a presumption ... would go beyond the codification of the status quo." See 71 FR 54248. Therefore, we did not characterize a time-based presumption as a clarification. We recognized it could only apply prospectively. Nevertheless, the final rule announced the three-year presumption against aggregation as an interpretation of the regulatory text despite the regulation's silence on this issue.

In context, commenters could not have been aware that we were suggesting the presumption was an interpretation of the existing regulatory text rather than a proposal to add a presumption to the text. Therefore, commenters did not have an adequate opportunity to comment on whether the existing regulatory text could be interpreted to have a time-based presumption.

We solicit comment on the change in approach from the pre-rule policy on aggregation to the "substantially related" test set forth in the preamble to the January 15,

2009, final rule. We specifically request comment on any rule changes that may be needed to implement the new test. For example, if we were to retain the “substantially related” test, then must we amend the regulatory text for the definition of “project” to say that nominally-separate changes must be aggregated into a project if they are substantially related? Must we also add new regulatory text in order to establish a time-based presumption for or against aggregation? We also solicit comment on whether we would need new or revised rule language to adopt a time-based presumption against aggregation.

Furthermore, we specifically request comment on whether “substantially related” is the proper measurement to apply when determining whether to aggregate projects. Or does it, as the petitioner has expressed, add confusion for sources and permitting authorities trying to apply the test? Is there another benchmark that would be more sensible to use to determine when the emissions of nominally-separate changes at a source should be aggregated for evaluating NSR applicability? If we decide to retain the substantially related test or revert to our former test, is the 3-year presumption against aggregation appropriate?

2. Rule may be Inconsistent with a Court of Appeals Decision for Previous NSR Rule

The NRDC petition identifies our interpretation of the controlling statutory term, “modification,” and a key case discussing that definition as issues that were impractical to raise during the comment period and of central relevance to the rule. While NRDC and other commenters identified these matters as being at issue in their comments, we did not include an explanation in the proposed rule of how the EPA aggregation interpretation was consistent with the statute and the court decision. In a sense, the rulemaking process required by CAA 307(d) was inverted: rather than the EPA providing a “statement of basis [summarizing] the major legal interpretations ... underlying the proposed rule,” as required by CAA 307(d)(3)(C), the commenters provided their views of the law, and we then provided a legal basis in the final rule and in the response-to-comment document. Moreover, the rulemaking did not simply adopt a theory that was a logical outgrowth of the theory or theories suggested in the proposal. The portion of the proposal discussing aggregation was completely silent on how we interpreted CAA section 111(a)(4) to authorize aggregation and provided no analysis of the relevant case law.

Below we set out our understanding of the statute and case law. We invite comment on our understanding and what we believe would be the result from that understanding – i.e., the revocation of the NSR Aggregation Amendments and the reversion to our pre-existing policy on project aggregation.

a. Background for our Historic Approach

Under both the nonattainment NSR provisions of the CAA as well as the PSD provisions, a modification of a major stationary source is treated as construction of a new source subject to permitting. Modification is a defined term under the statute: "The term 'modification' means 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" (CAA section 111(a)(4)). This definition requires analyzing whether a physical or operational change will take (or, post hoc, has taken) place, and whether it results in an emission increase. As noted above, in situations involving multiple nominally-separate changes at a source, EPA's "aggregation" policy interprets what is the physical or operational change that must be assessed for an emission increase.

We calculate the emissions increase associated with a physical or operational change at a major stationary source by reference to de minimis thresholds (also known as "significance levels"). From the earliest days of the NSR program, we recognized that a party seeking to avoid major source NSR might attempt to break up a single physical or operational change into nominally-separate changes in order to make the emission increase associated with each change appear to be less than significant. See 45 FR 52702 (Aug. 7, 1980). As subsequent case law confirmed, even a small physical or operational change may satisfy the first portion of the definition of modification. State of New York v. EPA, 443 F.3d 880, 890 (D.C. Cir. 2006), cert. den. 127 S. Ct. 2127 (2007) (New York II); Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 908 (7th Cir. 1990). We recognized that an owner or operator might apply for multiple minor permits for nominally-separate, small changes that by themselves result in de minimis emission increases, instead of obtaining a permit for the collection of changes that, when examined as a single project, resulted (or would result) in a significant emission increase.

We issued several letters since the early 1980s explaining that we may enforce the major source permitting

requirements in such cases when a source "circumvents" major source NSR by dividing one change and its emission increase into nominally-separate physical or operational changes.[6] Some of these letters discussed intent to evade NSR, but focused more on objective factors such as the closeness in the timing of nominally-separate changes and the integrated planning of these changes.[7] In 1993, we issued a letter analyzing a series of minor permit applications for 3M Company's research and development facility in Maplewood, Minnesota.[8] This letter has been widely cited for its discussion of objective factors that could support a conclusion that nominally-separate changes

---

6 Memorandum from John Calcagni, Director, Air Quality Management Division, to William B. Hathaway, Director, Air, Pesticides, and Toxics Division, EPA Region 6, entitled "Request for Clarification of Policy Regarding the 'Net Emissions Increase'" (Sept. 18, 1989).

7 See, e.g., Letter from James Wilburn, Chief, Air Management Branch, EPA Region 4, to Harold Hodges, Director, Division of Air Pollution Control, Tennessee Department of Public Health (Aug. 15, 1983); Memorandum from Darryl Tyler, Director, Control Programs Development Division, EPA Office of Air Quality Planning and Standards (OAQPS), to David Kee, Director, Air Management Division, EPA Region 5, entitled "Applicability of PSD to Portions of Plan Constructed in Phases Without Permits" (Oct. 21, 1986); Letter from Don Clay, Acting Assistant Administrator, EPA Office of Air and Radiation, to John Boston, Vice President, Wisconsin Electric Power Company (Feb. 15, 1989).

8 Memorandum from John Rasnic, Director, Stationary Source Compliance Division, OAQPS, to George Czerniak, Chief, Air Enforcement Branch, EPA Region 5, entitled "Applicability of New Source Review Circumvention Guidance to 3M-Maplewood, Minnesota" (June 17, 1993).

should be treated as one project. These factors include the filing of multiple minor source or minor modification permits for a single source within a short period of time, funding information indicating one project, other reporting on consumer demand and project levels, other statements from the business indicating one project, EPA's assessment of the economic realities of the project, as well as the relationship of the changes to the overall basic purpose of the plant. Subsequently, we have issued additional letters discussing aggregation at particular plants in certain circumstances.[9] Collectively, these letters outline an approach where we would look at case-specific facts and the relationship between nominally-separate changes to determine whether they were a single project to be assessed for an emission increase under Step 1 of the NSR applicability test.

b. Our Explanation of Our Authority in the NSR Aggregation Amendments

[9] See, e.g., Letter from Doug Cole, Acting Manager, Federal & Delegated Air Programs Unit, EPA Region 10, to Grant Cooper et al., Frederickson Power L.P. (Oct. 12, 2001); Letter from Gregg Worley, Chief, Air Permits Section, EPA Region 4, to Heather Abrams, Georgia Environmental Protection Division (July 5, 2005); Letter from David Campbell, Chief, Permits & Technical Assessment Branch, EPA Region 3, to Matthew Williams, Pennsylvania Department of Environmental Protection (Feb. 21, 2007).

The statute itself defines modification in the singular: “any physical change in, or change in the method of operation of, a stationary source” that increases emissions. Some have argued that we cannot aggregate or accumulate nominally-separate changes to determine NSR applicability because they can be viewed as multiple changes.

In response to this argument in comments on the NSR Aggregation Amendment proposed rule, we cited the recent decision in New York II, which held that the definition of modification requires “EPA [to] apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of ‘physical change.’” 443 F.3d at 885. Because “[s]ubstantially related, nominally-separate changes can be seen as one change when viewed as a whole,” we viewed “[a]ggregation of nominally separate changes that are substantially related as ‘fit[ting] within one of the ordinary meanings of physical change.’”[10] Therefore, we viewed aggregation as allowed under the statute and the “substantially related” test for aggregation as a permissible interpretation of the modification definition.

[10] “Response to Comments Document for the Final Action: PSD and Nonattainment New Source Review (NSR): Aggregation and Project Netting”, EPA-HQ-OAR-2003-0064-0111, pg. 8.

Having seen EPA's analysis of New York II for the first time in the response-to-comment document supporting the NSR Aggregation Amendments, NRDC expressed the view that the foregoing analysis of that case "utterly misses the point." NRDC's petition acknowledges that aggregation of nominally-separate changes that are substantially related is one of the ordinary meanings of physical change. However, NRDC notes that "aggregation of nominally separate changes that are *not* substantially related" also may be within an ordinary meaning of physical change, especially when substantially related is defined in terms of technical or economic interrelationship and dependence. In NRDC's view, because the statute covers "any physical change," and the NSR Aggregation Amendments would omit some of these physical changes from NSR permitting by not aggregating them, the NSR Aggregation Amendments impermissibly narrowed the expansive reading of the statute's "any physical change" required by New York II. See NRDC petition at 5–6.

c. The CAA Requires Aggregation of Nominally-Separate Changes When They Collectively can be Seen as One Change

The issue NRDC raises goes to the crux of the NSR Aggregation Amendments. What must be treated as one physical or operational change under the definition of

“modification” in the act is the legal underpinning for our aggregation policy.

The New York II Court held that we have limited authority to exempt from NSR those activities that can be considered a single physical change. Accordingly, “any physical change” should encompass any change that reasonably can be considered an ordinary meaning of the phrase. As the Court noted, “[W]hen Congress places the word “any” before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them.” 443 F.3d at 888. The logic of New York II applies not only to physical changes but also to changes in the method of operation of a source.

Much of the emphasis of New York II and other cases has been on whether we could exclude small changes from being considered potential modifications as defined in the Act. However, the New York II Court’s reasoning also applies to a rule that would split apart one change into separate changes in order to limit the applicability of NSR. The Court concludes, “[a]lthough the phrase "physical change" is susceptible to multiple meanings, the word "any" makes clear that activities within each of the common meanings of the phrase are subject to NSR when the activity

results in an emission increase." 443 F.3d at 890. The statute prohibits EPA from picking and choosing among meanings of the phrase "any physical change... or change in the method of operation" if it would result in omitting a common meaning that would subject an emission increase to review.

Historically, EPA has analyzed the question of whether nominally-separate changes are one change by using a case-by-case review of all relevant and objective factors that looks for "indicia," or indicators, of these changes being one common aggregate change. As noted above, one much-cited example of our analysis of grouping together nominally-separate changes is appropriate is the "3M-Maplewood" memorandum discussed above and in the notices for the proposed and final rules. One concern about the 3M-Maplewood analysis has been that one portion of the analysis suggests that any set of nominally-separate changes that are consistent with "the plant's overall basic purpose" can be aggregated.[11]

The opinion in New York II further clarifies this portion of the 3M-Maplewood analysis, which remains EPA's most complete statement of the principles regarding

[11] We do not believe the 3M-Maplewood letter relies solely on this portion of its analysis.

grouping nominally-separate changes. As the Court observed, “[t]he modifier ‘any’ cannot bring an activity that is never considered a ‘physical change’ within the ambit of NSR.” 443 F.3d at 887-888. Therefore, an important limiting factor in analyzing indicia of whether nominally-separate changes should be grouped into an aggregated, single change is whether the grouping would be under one of the ordinary meanings of physical change or change in the method of operation of a source.

If "substantially related" would omit an ordinary, common meaning of physical change that would bring an emission-increasing project under review, then the definition would eliminate a type of physical change that Congress intended to cover (i.e., the change that consists of the group of nominally-separate changes that comprise a project but do not qualify as “substantially related”). In effect, the interpretation in the NSR Aggregation Amendments is unreasonable because it would create a carve-out from the scope of the statutory definition of modification.

It is our view that New York II requires EPA to aggregate any group of small changes that are sufficiently related to “fit[] within one of the ordinary meanings of ‘physical change.’” We agree with the contention that, to

the extent that our “substantially related” interpretation would exclude meanings that fit within a reasonable understanding of the ordinary meaning of “any physical change,” the interpretation in the NSR Aggregation Amendments would impermissibly narrow the scope of CAA section 111(a)(4). We seek comment on our analysis.

We specifically invite comment on the following questions. Do we have the authority to aggregate nominally-separate changes that “fit within one of the ordinary meanings” of a single physical or operational change when they are viewed in the context of the source? Is New York II relevant to the question of whether we aggregate? Are there "ordinary meanings” of physical or operational change that do not fit within "substantially related" as we describe it in the NSR Aggregation Amendments? Do we have the authority to exclude these meanings in light of the New York II language?

In one respect, the aggregation of nominally-separate changes that are “substantially related” appears to be distinguishable from the legal error underlying the rule at issue in New York II, the “Equipment Replacement Provision” or “ERP”. In the ERP, we claimed that the excluded activities (e.g., replacements that were functionally equivalent and less than 20 percent of the replacement

cost) were not physical changes as meant by the statute. In the NSR Aggregation Amendments, we recognize that a nominally-separate physical or operational change is a change by itself and declare it not to be part of a 'larger change'[12] that also meets a common understanding of a single "change." To the extent that one event could be a part of either a change that is smaller or a change that is larger, one may argue that it is ambiguous as to which meaning of change should apply.

We are not persuaded that the same event possibly being part of more than one change is an ambiguity that would allow us to exclude the event from CAA section 111(a)(4). The New York II decision requires that, when choosing among meanings of "change" in various contexts, we must choose a meaning that brings the emission-increasing change into the potential scope of the modification definition. Therefore, we do not consider the potential for a nominally-separate change to be either a change by itself or a change that is part of a larger change to be an ambiguity that would allow us to select the less inclusive meaning. Nevertheless, were a reviewing court to find that there is some ambiguity in the statute as it applies to the

[12] i.e., a subset of another physical change or change in the method of operation.

coverage of nominally-separate changes, we believe there may be policy concerns that would warrant revocation of the NSR Aggregation Amendments.

3. Questioning the Need for a Policy Change

An objection raised in NRDC's petition is that the EPA's 2006 proposal on Aggregation failed to identify any actual problems or inconsistencies with longstanding aggregation policy as applied and explained in the 3M Maplewood letter. While the issue of whether the historic policy on project aggregation had problems was raised by our proposed rule, we did not request comment on the various factors we historically applied. Given that we now view the state of the record differently, we are taking this opportunity to request comment on the need for a change in policy.

The impetus for developing the NSR Aggregation Amendments emerged from a study conducted by EPA in 2001 on the impact of NSR regulations on investment in new utility and refinery generation. This EPA study took input from a range of stakeholders and resulted in a report to the President in 2002 that included a suite of recommendations for how to change the NSR rules to improve the effectiveness of the program. One of the recommendations

was for EPA to make clarifying changes to the approach used for aggregating projects.

However, in reviewing the record for the NSR Aggregation Amendments, we find that the only factual support for the contention that our historic approach caused confusion was anecdotal. The parties supporting a change in policy failed to provide us with any characterization of the overall level of uncertainty or other problems resulting from the existing policy on aggregation. Furthermore, through our Aggregation proposal in 2006, we received countervailing testimony from permitting agencies and other stakeholders that contended that there was little confusion in the application of our aggregation policy. For example, the State of New Mexico wrote that "... the current common sense approach of looking at the timing, scope, and interrelationship(s) of projects in determining the occurrence of aggregation is more straightforward than to narrowly evaluate the validity of independent economic justification ... or technical dependence of various projects."[13] We also heard from a local reviewing authority in Ohio, who recommended that "... EPA propose a test that more accurately represents

[13] Richard Goodyear, State of New Mexico Environment Department, EPA-HQ-OAR-2003-0064-0055.1.

current permitting authority practice with regard to evaluating major NSR applicability and aggregation." [14] Finally, the National Association of Clean Air Agencies stated that the proposal left "... greater uncertainty than the previous, reasonably well-developed policy." [15] We note that these comments were made in the context of a proposed rule based on technical and economic dependence, not "substantially related," but nevertheless illustrate a basic comfort level with the current practice.

We request comment on whether there was a bona fide need for added clarity over and above what the old aggregation policy provided. If clarity was lacking, we further solicit comment on whether the NSR Aggregation Amendments achieved added clarity.

We also note that it has been our experience that the few applicability determinations we have issued where aggregation was the central issue have not been contested on appeal. The absence of contested applicability determinations tends to support a belief that there was not significant confusion or controversy with our historic policy. Through this reconsideration, we specifically

---

[14] John A. Paul, Regional Air Pollution Control Agency, EPA-HQ-OAR-2003-0064-0089.1.

[15] Bill O'Sullivan and John A. Paul, National Association of Clean Air Agencies, EPA-HQ-OAR-2003-0064-0102.1.

request comment from reviewing authorities on the frequency of disputes with other parties over their aggregation decisions, such as appeals of applicability determinations where this has been an issue, adverse comments in permitting proceedings, or having to brief the issue in litigation.

4. State Plan Adoption

As noted above, the NSR Aggregation Amendments did not include amendatory text for the Code of Federal Registers (CFR). We agree with NRDC's assertion that the state and local implementation requirements of the NSR Aggregation Amendments are unclear. The question of whether a SIP amendment is required when the CFR remains unchanged is likely to cause confusion for reviewing authorities and other stakeholders. We view these difficulties as clear support for the need to have the rule not be effective until the completion of our reconsideration proceeding. We also view it as added support for our preferred position in this notice, which is to revoke the NSR Aggregation Amendments, as discussed in greater detail in the next section of this notice.

In section III.3.a of this notice, we ask for comment on whether the existing NSR regulatory text can support the new interpretation provided by the NSR Aggregation

Amendments if the rule remains in effect after this reconsideration proceeding. Apart from this important question, we are also taking comment on when and how reviewing authorities with EPA-approved plans in 40 CFR part 51.166 can implement the new policy interpretation given that there are no CFR changes to use as a basis for drafting amendments to their state plans.

In a broader sense, when EPA issues an interpretive rule, have reviewing authorities with EPA-approved implementation programs adopted the new interpretation in their implementation plans? Or have these agencies not required a plan amendment and immediately applied the new interpretation? If a plan revision was required, what was the proper mechanism for State adoption for an interpretive rule where there is no change to the CFR? We solicit comment on all of these questions.

5. Proposal to Revoke Rule

As part of NRDC's petition requesting reconsideration of the Aggregation Amendments, NRDC further asked EPA to "withdraw and abandon the final rule." While rare, the Administrator has in the past withdrawn, or revoked, a promulgated rule prior to its effective date. The reasons for such action by the Administrator are varied, but typically it is done when a final rule is determined to be

either error prone, confusing, overly burdensome, or unnecessary, such that leaving the rule in place would not improve the program.[16]

An overarching concern of EPA is that our original policy goal for developing the Aggregation Amendments – i.e., to provide improved clarity in making aggregation determinations – does not appear to have been achieved. This concern is reflected in the petition for reconsideration, and we believe it has sufficient merit that we must consider whether retaining the NSR Aggregation Amendments is justified. While the rule may, in some respects, appear clearer than our past policy, we are not convinced that it achieved enough additional clarity to improve the process of making aggregation assessments by sources and reviewing authorities. As noted above, our reexamination of the record also leads us to believe that the apparent need for additional clarity with the aggregation policy may have been overstated. Furthermore, as discussed above, the rule introduces new ambiguities,

[16] See, e.g., "Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation" proposed Dec. 27, 2002 (67 FR 79020) and finalized Mar. 19, 2003 (68 FR 13608).

particularly with respect to implementation, that may further reduce its effectiveness.

Balancing this against the additional issues raised with respect to the legal and implementation aspects of the final rule, as well as our concern of possible under-inclusiveness of the final rule (i.e., the chance that certain projects that should be aggregated would avoid aggregation under the approach from the NSR Aggregation Amendments), we believe that the prior agency policy may, on balance, provide a more reasonable interpretation than the policy interpretation contained in the final rule. We are therefore proposing as our preferred option to revoke the final rule. If we ultimately decide through reconsideration to revoke the NSR Aggregation Amendments, we believe we should restore the past policy for making case-by-case aggregation determinations.

We specifically solicit comment on the legal concerns and possible under-inclusiveness with the final rule. As noted above, comments received on our proposal from various reviewing authorities show some support for retaining the pre-existing aggregation factors. Thus, we also request comment on whether the old policy framework for aggregating nominally-separate changes is adequate if the NSR Aggregation Amendments is revoked. Has the decision in New

York II helped to improve the understanding of the past policy direction in 3M-Maplewood and other relevant memoranda?

6. Proposal to Extend Effective Date

As noted, the effective date of the NSR Aggregation Amendments is May 18, 2010. This scheduled date was shifted from the original effective date to allow time for the Agency to conduct a full reconsideration of the final rule.

We are concerned now, however, that our reconsideration rulemaking schedule will not meet the revised effective date. Furthermore, we still have concerns, as noted above, with the final rule becoming effective prior to completion of our reconsideration proceeding. Recognizing this, we are proposing additional time that would enable us to fully evaluate comments on issues that are in question and to complete any revisions of the rule that become necessary as a result of the reconsideration process, without the concern of the rule prematurely becoming effective.

Therefore, we propose to delay the effective date of the NSR Aggregation Amendments, published in the Federal Register on January 15, 2009 (74 FR 2376), until November 18, 2010. This delay would be for an additional 6 months,

which we believe would provide a reasonable period of time to complete action on the reconsideration. We solicit comment on a 6-month delay of the effectiveness of the final rule, and we also solicit comment on a longer delay (e.g., 9 or 12 months).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not proposing any new paperwork requirements (e.g., monitoring, reporting, recordkeeping) as part of this proposed action. This action simply solicits comment on a number of legal and policy issues raised in a petition for reconsideration on the NSR Aggregation Amendments, and proposes an additional extension of the stay of the rule.

However, the OMB has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and has been assigned OMB control number 2060-0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposal on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small

organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any new requirements on small entities. We have determined that small businesses will not incur any adverse impacts because no costs were associated with the NSR Aggregation Amendments, and this proposed reconsideration of that rule simply requests comment on a variety of issues, none of which would create any new requirements or burdens. Therefore, no costs are associated with this proposed amendment.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 ("URMA"), 2 U.S.C. 1531-1538 for state, local, and tribal governments or the private sector. This action simply solicits comment on a number of issues raised in a

petition for reconsideration on the NSR Aggregation Amendments, and proposes to revoke the rule. Therefore, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action simply solicits comment on issues raised in NRDC's petition for reconsideration on the NSR Aggregation Amendments, and proposes to revoke the rule. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000.) This action will not impose any new obligations or enforceable duties on tribal governments.

EPA specifically solicits additional comment on this proposed action from tribal officials.

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

This action is not subject to EO 13045 (62 FR 19885), April 23, 1997) because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We do not believe this action creates any environmental health or safety risks.

The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure

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

This action is not a “significant energy action” as defined under Executive Order 13211, “Actions Concerning

Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have significant adverse effect on the supply, distribution, or use of energy. This action will not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because any impacts that it will have will be global in nature and will not affect local communities or populations in a manner that adversely affects the level of protection provided to human health or the environment.

K. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section

307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

V. Statutory Authority

The statutory authority for this action is provided by section 301(a) of the CAA as amended (42 U.S.C. 7601(a)). This notice is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Part 52

Administrative practices and procedures, Air pollution control, Environmental protection, Intergovernmental relations, Aggregation.

Dated:

Lisa P. Jackson,
Administrator.