

July 2, 2024

U.S. Environmental Protection Agency  
Docket ID No. EPA-HQ-OAR-2022-0381

*Submitted electronically via the Federal eRulemaking Portal at <https://www.regulations.gov>*

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed rule, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting," 89 Fed. Reg. 36,870 (May 3, 2024) (hereafter, the proposed "PEA Revisions Rule"). NACAA is the national, nonpartisan, non-profit association of 156 air pollution control agencies in 40 states, including 117 local air agencies, the District of Columbia and five territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

EPA's November 2020 Project Emissions Accounting (PEA) Rule<sup>1</sup> revised the federal New Source Review (NSR) permitting regulations concerning how the emissions impacts of a proposed facility modification are calculated. Under the PEA Rule, both emissions increases and decreases resulting from a proposed project can be considered during "Step 1" of the two-step NSR applicability test, *i.e.*, the determination of whether a project would result in a "significant emissions increase." Only projects projected to result in a significant emissions increase are required to move to the Step 2 contemporaneous netting analysis, which takes into account emissions increases and decreases attributable to other projects undertaken at the source within a contemporaneous time period to determine whether a project would result in a "significant net emissions increase."

In our 2019 comments on the proposed PEA Rule,<sup>2</sup> NACAA expressed concern that EPA's project emissions accounting approach posed a "serious risk" of NSR circumvention, in that it contained insufficient safeguards to prevent the arbitrary grouping of unrelated activities for the purpose of avoiding major NSR review. We also opined that the related monitoring, recordkeeping and reporting requirements were insufficient to assure that projected emissions decreases counted at "Step 1" would actually occur. These concerns were echoed by other commenters, several of

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<sup>1</sup> Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 Fed. Reg. 74,890 (Nov. 24, 2020).

<sup>2</sup> Available at: [https://www.4cleanair.org/wp-content/uploads/Documents/FINAL\\_NACAA\\_PEA\\_Comments\\_100819.pdf](https://www.4cleanair.org/wp-content/uploads/Documents/FINAL_NACAA_PEA_Comments_100819.pdf)

which filed a petition for administrative reconsideration of the final rule. The proposed PEA Revisions Rule is intended in part to mitigate these concerns.

### **Proposed Revisions to the Definition of “Project”**

To guard against the potential for sources to selectively aggregate or disaggregate multiple projects in order to avoid major NSR review in a manner contrary to the intent of the Clean Air Act, EPA is proposing to expand the definition of “project” in the NSR regulations to add details consistent with its 2018 Final Action on Project Aggregation.<sup>3</sup> The current definition of “project” is “a physical change in, or change in the method of operation of, an existing major stationary source.”<sup>4</sup> The revised definition would read as follows:

A discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable.

In our comments on the PEA Rule, NACAA opined that EPA should require sources that wish to aggregate projects for NSR purposes to make a demonstration that the proposed activities are “substantially related” to the satisfaction of the permitting authority. However, the expanded definition of “project” that EPA is proposing is overly complicated, and some of its wording is likely to create confusion. We have two specific concerns in this regard.

First, past EPA guidance has discussed the technical and economic factors of aggregation in terms of “substantial relatedness” and not just “viability.” As EPA explained in its 2009 NSR Aggregation Action and affirmed in its 2018 Final Action, “to be ‘substantially related,’ there should be an apparent interconnection – either technically or economically – between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity.”<sup>5</sup> In other words, relatedness captured a broader array of considerations than viability. We recommend replacing the word “viability” in the proposed definition with the phrase “substantially related,” as this phrase is more consistent with EPA guidance on aggregation.

Assessing the importance of economic factors to a project aggregation determination can be challenging for permitting authorities, as these factors may include details of a company's finances, business operations and economic projections. Agencies often do not have staff with the requisite knowledge to explore these issues well. Therefore, we recommend that EPA consider

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<sup>3</sup> Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 83 Fed. Reg. 57,324 (Nov. 15, 2018).

<sup>4</sup> 40 C.F.R. §§ 51.165(a)(1)(xxxix) & 51.166(b)(51); 40 C.F.R. part 51, appendix S II.A.33.; 40 C.F.R. § 52.21(b)(52).

<sup>5</sup> Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting, 74 Fed. Reg. 2346, 2378 (Jan. 15, 2009); Final Action on Project Aggregation, *supra* note 3, at 57,327.

providing additional guidance on how to assess economic factors in the context of project aggregation.

Second, the word “contemporaneous” has an existing meaning within the NSR program: the five-year time period for conducting a “netting” analysis in Step 2 of the NSR test.<sup>6</sup> Yet, EPA states in the proposal’s preamble that it did not intend to include an express temporal component in the definition of “project.” NACAA recommends that EPA delete the term “contemporaneously” or replace it with a synonym.

Relatedly, EPA has requested comment on whether it should retain a temporal component in the project aggregation criteria, *i.e.*, the rebuttable presumption in the 2018 Final Action on Project Aggregation that changes separated by three or more years are not substantially related. NACAA agrees with EPA that a time-based presumption with respect to “substantially related” should *not* be specified in the regulation. While timing is one factor to be considered by permitting authorities in conducting this analysis, the primary factor in determining whether multiple activities are substantially related should be technical relatedness.

### **Enforceability of Emissions Decreases**

EPA proposes to require that emissions decreases associated with a project under the Step 1 significant emissions increase determination should be “legally and practicably enforceable,” as a safeguard to ensure that emissions decreases accounted for in the NSR applicability process will occur and be maintained. EPA proposes to accomplish this by adding to the “significant emissions increase” definition a reference to an existing provision in the PSD rules regarding netting. NACAA agrees that emissions decreases accounted for in Step 1 should be enforceable, in order to ensure that the reductions actually occur. We support this change to the regulations.

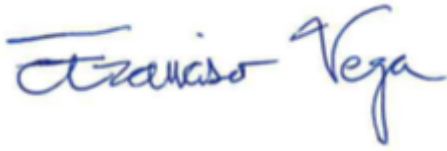
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Thank you for the opportunity to comment on the proposed rule. If you have any questions, please do not hesitate to contact either of us or Karen Mongoven of NACAA at [kmongoven@4cleanair.org](mailto:kmongoven@4cleanair.org).

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<sup>6</sup> See 40 C.F.R. § 52.21(b)(3)(ii), which provides a clarification to the definition of “net emissions increase”: “An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between: (a) The date five years before construction on the particular change commences; and (b) The date that the increase from the particular change occurs.”

Sincerely,



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