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To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA), formerly STAPPA and ALAPCO, is pleased to submit comments on EPA's proposed rule, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reasonable Possibility in Recordkeeping (hereafter, "the proposed Reasonable Possibility rule"), as proposed by the agency on March 8, 2007 (45 Federal Register 10445). NACAA is the national association of air pollution control agencies in 54 states and territories and over 165 major metropolitan areas throughout the United States.

Congress has vested with state and local air pollution control agencies the primary responsibility for assuring air quality and implementing the Clean Air Act (CAA §107(a), 42 U.S.C. §7407(a)). For more than three decades, states and localities across the country have relied upon the NSR program as an essential tool in reducing air pollution. Accordingly, NACAA believes it is important that modifications of existing process equipment that result in increased utilization and increased emissions must be carefully monitored so that facilities obtain NSR permits, install pollution control equipment, and analyze the impacts of their emissions as required by the Clean Air Act. The proposed Reasonable Possibility rule falls far short of our needs and we recommend that it be revised in accord with our suggestions below.

The D.C. Circuit Court of Appeals Required EPA to Propose a Supportable Alternative to the Reasonable Possibility Rule in *New York v. EPA* ("New York I")

The D.C. Circuit Court of Appeals ("D.C. Circuit") remanded the "Reasonable Possibility" standard contained in the 2002 NSR Reform Rule to EPA "[b]ecause EPA has failed to explain how it can ensure NSR compliance without the relevant data...." The Court charged the agency to

“devise an appropriately supported alternative” to the Reasonable Possibility rule. EPA’s proposed rule again fails to provide for reporting of the relevant data and, like the remanded rule, does nothing to ensure NSR compliance.

The proposed rule states, “[a]s our preferred option, we propose what we refer to as the ‘percentage increase trigger’ option for applying the ‘reasonable possibility’ standard...under which you would conclude that there is a reasonable possibility that your change will result in a significant emissions increase if the change’s projected actual emissions increase equals or exceeds [50 percent] of the significance level for the regulated NSR pollutant as the trigger...” (45 *Federal Register* at p. 10449). This proposal, however, is as flawed as that originally proposed. It relies completely on the discretion of the source in deciding which changes will equal or exceed 50 per cent of the significance level, without review or approval by the permitting authority.

The D.C. Circuit recognized that EPA’s NSR Reform rules significantly increased the complexity of NSR applicability decisions by adding provisions for excluding emissions from the applicability calculation for “demand growth,”¹ and from startup, shutdown, malfunction events.² The Court stated in *New York I* that each major NSR applicability determination requires sources to “...predict uncertain future events. By understating projections for emissions associated with malfunctions, for example, or overstating the demand growth exclusion, sources could conclude that a significant emissions increase was not reasonably possible. Without paper trails, however, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed ‘reasonable.’” NACAA agrees with the D.C. Circuit that it is essential that enforcement and permitting authorities know whether sources have reasonably and accurately exercised their judgment.

Unfortunately, the proposed percentage increase trigger will, if promulgated, continue to keep our air pollution control agencies in the dark. Like the Reasonable Possibility rule contained in the 2002 NSR reforms, the proposed rule relies on applicability calculations and emissions predictions made by sources without the oversight of permitting authorities, and without adequate requirements to record and maintain those calculations. Therefore, preservation of those calculations and reporting of actual emissions occurs only when sources themselves decide to keep the calculations and undertake such reporting—without review of such determinations by state and local air agencies. Such a lack of transparency and accountability is likely to result in diminished NSR compliance.

¹ Under the “demand growth exclusion,” a source deducts increases that the source predicts could be accommodated without change if there are production increases.

² In addition, EPA has recently promulgated a rule that excludes fugitive emissions from some applicability calculations (72 *Federal Register* 24,060).

NACAA Recommendations for Revising the Proposed Reasonable Possibility Rule

NACAA believes that applicability and reporting rules should be certain, verifiable, transparent, and enforceable. The proposed Reasonable Certainty rule, is, on the contrary, fraught with uncertainty and subjectivity, as demonstrated by the *Preamble* to the proposal, which states “[t]he ‘reasonable possibility’ requirements apply only in the case of a change that the source considers small, in that the source believes it increases projected emissions by only a small amount....[Reporting would be required] only if the source believed that emissions increase from the project would be no more than 50 percent of the significance levels.” (Emphasis added) (*Id* at pp. 10449, 10450). However, applicability determinations and reporting requirements should be based on calculations (not beliefs) that can be verifiable by permitting authorities. NSR applicability must be objectively determined and confirmed.

NACAA recommends that the final rule be revised to clearly establish two kinds of reporting requirements. First, for any change, the source’s preconstruction analysis of the baseline and projected actual emissions should be available to the permitting authority and should be retained and kept on file by the source. The permitting authority should have the authority to require the source to report such analyses and/or make such information available upon request. Second, when any modification triggers NSR significance levels using the actual to potential test, post-change emissions impacts of the project should be reported annually to the appropriate state or local permitting authorities. If the total change in emissions could be significant without excluding emissions as a result of demand growth, then monitoring and recordkeeping should be required. The trigger for recordkeeping should be an actual to potential test because this emissions increase can be readily verified by state and local agencies.

Such reporting will create a paper trail that will allow the permitting authority to compare the project’s actual emissions with the emissions projected by the source. We recommend that actual annual emissions should be reported to the permitting authority for a period of ten years for new units and five years for projects that involve modifications of existing units.

NACAA also encourages EPA to require sources to include in Title V Operating Permits demonstrations of continuing NSR compliance with recordkeeping requirements. For example, routine Title V recordkeeping requirements and emissions statements should be unit-specific and sufficient to provide a screening trigger for a more detailed investigation of emissions, if necessary. Moreover, in its annual Compliance Certification, a facility that has modified within the last five years (or constructed a new unit within the last ten years) should certify that actual emissions have not increased beyond the significance level using the actual to potential test.

If, at any time, actual emissions increase at or beyond significance levels, such a change should be considered to be a violation of the requirement to obtain a major PSD or nonattainment NSR preconstruction permit and the state or local agency should have

the authority to take enforcement action and require the source to reduce emissions below the significance level or require the source to apply for the appropriate PSD or nonattainment NSR permit, undertake air quality analysis, and meet Best Available Control Technology or Lowest Achievable Emissions Rate requirements.

Adoption of NACAA's Recommendations Will Address Concerns about the Reasonable Possibility Standard That Were Voiced by GAO and NAPA

Adoption of NACAA's recommended revisions to the proposed rule would alleviate concerns expressed by the National Academy of Public Administration (NAPA) and the Government Accountability Office (GAO). NAPA reviewed the Reasonable Possibility standard contained in the 2002 NSR Reform Rules, and concluded that "self-policing could lead to implementation problems and inadequate reporting of information..."³ In a GAO report titled "New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data," the GAO cited NAPA's recommendation that EPA carefully oversee the calculation of emissions increases resulting from facility changes and not be allowed to self-police."⁴ EPA's addition of a 50 percent of significance level cut-point in the proposed rule does not change the fact that the proposed rule, like the original, continues to allow facilities to self-police.

Moreover, during a September 3, 2002 hearing before the Subcommittee on Public Health, Senate Committee on Health Education, Labor and Pensions, former EPA Administrator Carol Browner testified that she was concerned that the NSR revisions would "eliminate the very features of the current law that provide transparency to the public—monitoring, record keeping, and reporting."⁵ As discussed, the proposed rule continues to eliminate these features. If, however, the Reasonable Possibility rule were revised to include NACAA's recommendations, sources would report preconstruction applicability determinations to permitting authorities and keep them on file. Moreover, permitting authorities would be able to monitor the annual emissions' records of projects that have triggered significant levels of emissions using the actual to potential test and would be able to insure NSR compliance by these sources.

Inclusion of the Percentage Trigger Test for Reporting Emissions in the Final Appendix S Rule Ignores Our Views on Recordkeeping

On the same day that EPA proposed its Reasonable Possibility rule, March 8, 2007, the agency also finalized a related NSR rule titled "Nonattainment New Source Review." This rule consists of "revisions that conform the nonattainment permitting rules that apply during the SIP development period following nonattainment designations

³ "A Breath of Fresh Air: Reviving the New Source Review Program," a report by a panel of NAPA for the U.S. Congress and EPA, April 2003.

⁴ GAO Report, "New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data," p. 25 October 2003 citing "A Breath of Fresh Air: Reviving the New Source Review Program, *supra*.

⁵ *Id.* at p. 14.

before SIP approval to the Federal permitting rules applicable to SIP-approved programs.” (72 *Federal Register* 10367). In particular, the rule incorporates into Appendix S the NSR changes proposed by the agency in 1996 and finalized December 31, 2002 concerning baseline emission determinations, actual to projected actual methodology and PALs.


With regard to recordkeeping requirements, EPA states in the final rule, “[i]n a separate *Federal Register* notice published on this date, we are proposing clarification of the “reasonable possibility” standard to address under which circumstances records must be kept for projects that do not trigger NSR.” Specifically, EPA states, “[i]n the interim, until EPA completes the rulemaking, EPA announces that it interprets the standard so that a source may conclude there is no “reasonable possibility” that the change will result in a significant increase in emissions only if the change’s projected actual emissions increase is below 50 percent of the applicable NSR significance level for any pollutant.... The EPA believes that this interpretation addresses the issues identified by the Court in the *New York* case.” (*Id* at 10370).

NACAA is disappointed that EPA has included its preferred choice of allowing sources to estimate 50 per cent of significance levels—with no permitting authority oversight—in its final Nonattainment NSR rule. For the reasons that we have discussed, state and local agencies who administer NSR do not support the percentage increase approach. Embodying it in this final rule appears to undermine our opportunity to influence this significant EPA decision on recordkeeping requirements in Appendix S.

In addition, EPA’s failure to provide a comment period on Reasonable Possibility recordkeeping before promulgating it in a final rule arguably violates the Administrative Procedures Act (APA). EPA’s characterization of the chosen recordkeeping provision as an “interim interpretation” (45 *Federal Register* 10367) does not negate the impression that EPA has, in effect, already made up its mind and would not be open to other views.

NACAA appreciates the opportunity to provide these comments on EPA’s proposed rule, “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reasonable Possibility in Recordkeeping.” If you have any questions about these comments, or desire further information, please do not hesitate to contact one of us or Mary Stewart Douglas of NACAA.

Sincerely,



Bill O’Sullivan
Co-Chair
NSR Committee



John Paul
Co-Chair
NSR Committee