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U.S. Environmental Protection Agency
EPA Docket Center
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Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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): Project Emissions Accounting," which was published in the *Federal Register* on August 9, 2019 (84 Fed. Reg. 39,244). NACAA is the national, non-partisan, non-profit association of air pollution control agencies in 41 states, including 114 local air agencies, the District of Columbia and four U.S. 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.

The proposed Project Emissions Accounting rule would revise the New Source Review (NSR) permitting regulations to provide that both emissions increases and emissions *decreases* projected to result from a proposed project at an existing major source are to be considered during "Step 1" of the two-step "major modification" applicability test.¹ Projects that are "major modifications" are subject to NSR permitting requirements, including the installation of Best Available Control Technology (BACT) under the PSD program or implementation of Lowest Achievable Emission Rate (LAER) controls under the NNSR program. This proposal follows a March 2018 Memorandum from the EPA Administrator² announcing that EPA interprets the existing NSR regulations to allow for project emissions accounting; the proposed regulatory changes are "intended to eliminate uncertainty regarding this issue."³

¹ Step 1 is used to determine whether a proposed project, by itself, will result in a "significant emissions increase" of a regulated NSR pollutant. If so, the analysis moves to Step 2, which is used to determine whether the project along with any other contemporaneous emissions changes at the source as a whole would result in a "significant net emissions increase" of the regulated NSR pollutant. If a project is determined to cause both a significant emissions increase at Step 1 and a significant net emissions increase at Step 2, it is considered a "major modification."

² Letter from E. Scott Pruitt to Regional Administrators, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (Mar. 13, 2018) (hereafter, "March 2018 Memorandum").

³ 84 Fed. Reg. 39,244, 39,248 (Aug. 9, 2019).

This proposed rule raises a number of serious concerns. First and foremost, state and local agencies that do not support project emissions accounting should not be required to modify their State Implementation Plans (SIPs) to accommodate it, because the Clean Air Act gives states and localities the right to adopt rules that are more stringent than the federal requirements. Second, the proposal's failure to provide any criteria for determining when activities may be grouped into one project presents a serious risk of NSR circumvention. EPA should correct that omission by requiring that activities be "substantially related" in order to qualify as a single project, and by providing detailed guidance to assist in that evaluation. Finally, EPA's monitoring, recordkeeping and reporting requirements should be improved so that states are better able to audit and enforce a source's emissions projections.

A. EPA Lacks Authority to Require the Modification of State Implementation Plans to Accommodate Project Emissions Accounting

Some states and localities allow for the use of project emissions accounting under their approved SIPs. But others have SIP-approved NSR programs that expressly *preclude* project emissions accounting. Recognizing this fact, EPA requests comment on whether the revised regulatory language included in the proposal to implement project emissions accounting should be made "minimum program elements" in order for state and local agencies to have approvable SIPs for implementation of the PSD and NNSR programs.⁴ The Clean Air Act precludes EPA from infringing on state and local clean air programs in this manner.

Section 116 of the Clean Air Act unequivocally authorizes state and local governments to adopt their own clean air standards or requirements so long as they are not "less stringent" than the Clean Air Act requires.⁵ As the U.S. Supreme Court affirmed in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), Section 116 "provides that the States may adopt emission standards stricter than the national standards."⁶ The Court went on to hold, "the States may submit implementation plans more stringent than federal law requires ... and the Administrator must approve such plans if they meet the minimum requirements of § 110(a)(2)" of the Clean Air Act.⁷ EPA has also long-recognized this fundamental principle of state and local authority to set their own, more stringent clean air standards. For example, a December 2017 memorandum from Administrator Pruitt included the following statement: "To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion."⁸

⁴ *Id.* at 39,252.

⁵ 42 U.S.C. § 7416.

⁶ 427 U.S. at 263-64.

⁷ *Id.* at 265; *see also* 40 C.F.R. § 51.166(a)(7)(iv) (calling for EPA approval of deviant PSD SIPs that are "more stringent than or at least as stringent in all respects" as the corresponding EPA provision).

⁸ Letter from E. Scott Pruitt to Regional Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" (Dec. 7, 2017).

Allowing for emissions decreases from a project to be considered at Step 1 is clearly less stringent than prohibiting that approach, because it results in fewer sources triggering NSR, thereby avoiding air quality analysis and emissions control requirements that would otherwise have applied. EPA acknowledges as much in recounting its reasoning for promulgating the proposed rule, where it explains that it is responding to presidential directives and comments from stakeholders seeking to reduce regulatory burdens.⁹ For example, the agency cites a commenter who explained that “PSD review would not have been triggered” by a client’s project, had “project netting” (a previous incarnation of “project emissions accounting”) been permitted at Step 1.¹⁰ And there is certainly no reasonable argument that disallowing project emissions accounting is *less* stringent than the approach advocated in the proposed rule (nor does EPA make such an argument).

EPA should not force states to revise their SIPs in a way that may make it more difficult for them to attain and maintain the National Ambient Air Quality Standards. Furthermore, states and localities that do not explicitly prohibit project emissions accounting in their SIPs, including those that track the existing regulatory language in §§ 51.165 and 51.166 and interpret that language to prohibit project emissions accounting, should not be required to adopt the less stringent interpretation advocated in the March 2018 Memorandum and the proposed rule.

In summary, if this rule is finalized, states that support project emissions accounting would continue to be able to implement it, but states that do not should not be compelled to do so. This is consistent with EPA’s commitment to “cooperative federalism,” the goal of which is to encourage state and local governments to implement laws that protect human health and the environment without “dictating one-size-fits-all mandates from Washington.”¹¹

B. The Proposal Raises NSR Circumvention Concerns

EPA states that it believes that taking account of emissions decreases at Step 1 “does not present any reasonable concerns regarding NSR circumvention.”¹² In fact, the proposal poses a *significant* risk of NSR circumvention because it allows sources to arbitrarily group together unrelated activities for the purposes of avoiding major NSR review. This falls squarely within the meaning of the term “circumvention,” notwithstanding EPA’s assertion that such “over-aggregation” does not fall under its “circumvention policy.”¹³ As discussed in more detail below, the proposal should be modified to help allay this concern.

The proposal attempts to draw a distinction between the problem of “under-aggregation” – that is, when a source artificially separates related emissions-increasing activities into separate “projects” to avoid triggering NSR – with the “over-aggregation” issue implicated by the project emissions accounting proposal – *i.e.*, the unreasonable grouping together of separate activities

⁹ 84 Fed. Reg. at 39,248.

¹⁰ *Id.*

¹¹ “Cooperative Federalism at EPA,” available at <https://www.epa.gov/home/cooperative-federalism-epa>.

¹² 84 Fed. Reg. at 39,251.

¹³ *Id.*

that, when considered together, either decrease emissions or result in an increase that is not significant. The proposal incorrectly implies that the former situation presents a legitimate NSR circumvention concern, while the latter does not. Accordingly, EPA has addressed the problem of “under-aggregation” in rulemaking, requiring sources and reviewing authorities to aggregate emissions from nominally separate activities when they are “substantially related.”¹⁴ But EPA proposes to require no similar criteria or scrutiny with respect to projects where source owners or operators choose to group together activities into a single project.

The distinction EPA is attempting to draw between “under-aggregation” and “over-aggregation” is not persuasive. Both situations pose the same fundamental issue: the concern that a source might arbitrarily and unreasonably manipulate the way it defines a “project” to avoid triggering NSR. A regulatory agency should use the same reasoning and apply the same scrutiny to what constitutes the “project” regardless of whether the determination is in the context of potential “under-aggregation” or “over-aggregation.”

EPA provides insufficient explanation as to why NSR circumvention resulting from the improper grouping of unrelated activities should not be of concern. It merely cites a March 2018 Memorandum in which it speculated that if sources are allowed to group emissions-increasing and emissions-decreasing activities at Step 1, they “could potentially be incentivized to seek out emission reductions that might otherwise be foregone entirely.”¹⁵ But it is equally likely that a source might group an emissions-reducing activity with an unrelated emissions-increasing activity in order to group them together as one project simply to avoid triggering NSR.

Although not included in EPA’s proposed regulatory language, the agency requests comment on “whether, 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.”¹⁶ Should EPA elect to finalize this rule, it should absolutely require sources to make this demonstration to the satisfaction of the permitting authority (and the final rule should make clear that the final determination rests with the permitting authority).

In all events, EPA should prepare detailed guidance that lays out requisite criteria for determining whether activities may be grouped together for project emissions accounting purposes. Without any criteria for determining whether separate activities may be reasonably grouped into one project, permitting authorities will not have a consistent means of testing whether a source’s proposed grouping is reasonable.

¹⁴ This issue is addressed in EPA’s November 2019 “project aggregation final action”: Prevention of Significant Deterioration and Nonattainment New Source Review: Aggregation; Reconsideration, 83 Fed. Reg. 57,324 (Nov. 15, 2018).

¹⁵ 84 Fed. Reg. at 39,250.

¹⁶ *Id.* at 39,251.

C. Monitoring, Recordkeeping and Reporting Requirements

EPA requests comment on whether its provisions under 40 C.F.R. § 52.21(r)(6) provide appropriate monitoring, recordkeeping and reporting requirements for both emissions increases and decreases under Step 1. If emissions decreases are considered under Step 1, the existing requirements will not be adequate for permitting authorities to verify that a project did not trigger major NSR. The problem may be compounded if projected emissions decreases counted at Step 1 are not “enforceable as a practical matter.”

Under the existing “reasonable possibility” monitoring, recordkeeping and reporting rules, sources are not required to monitor and record emissions of regulated NSR pollutants resulting from a project if the projected emissions increase of the pollutant at Step 1 is less than 50% of the amount defined by the regulations as a “significant emissions increase” of that pollutant.¹⁷ If emissions decreases are counted at Step 1, fewer proposed projects will meet the 50% threshold, and thus fewer records will be kept. This in turn would make it difficult for the permitting authority to audit the evaluation. Enforcement of source-obligation monitoring, recordkeeping and reporting requirements is already challenging for state and local agencies; including emission decreases in Step 1 will further complicate enforcement. One potential way to address this problem is to amend the rules to provide that projected decreases associated with a project do not count toward the 50% threshold that triggers monitoring, recordkeeping, and reporting requirements. EPA could also require projected emissions reductions to be enforceable as a practical matter.

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Thank you for your consideration of these comments. If you have any questions, please contact either of us or Karen Mongoven of NACAA at kmongoven@4cleanair.org.

Sincerely,



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¹⁷ See 40 C.F.R. § 52.21(r)(6)(vi)(b).