UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 12 2021

THE ADMINISTRATOR

Mr. Sanjay Narayan
Acting Director, Environmental Law Program
Sierra Club
2101 Webster Street, Suite 1300
Oakland, California 94612

Dear Mr. Narayan:

I am responding to the January 22, 2021, Petition for Reconsideration you submitted on behalf of the Environmental Defense Fund, the Natural Resources Defense Council, the Environmental Integrity Project, the Sierra Club, and the Adirondack Council (collectively, "petitioners") regarding the U.S. Environmental Protection Agency's final rule "Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting" (85 FR 74890, November 24, 2020) ("Project Emissions Accounting rule" or "PEA rule"). The petition also requests withdrawal of the guidance memorandum "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (March 13, 2018) ("March 2018 Memorandum").[1]

The EPA is denying the petition for reconsideration of the rule on the grounds that the petition does not meet the criteria for mandatory reconsideration under section 307(d)(7)(B) of the Clean Air Act. The EPA is also denying the request that the Project Emissions Accounting rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. The EPA agrees, however, that the petition for reconsideration identifies potential concerns that warrant further consideration by the EPA. Therefore, the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's New Source Review regulations that would address the issues raised in the submitted petition and comments on the Project Emissions Accounting rule. The agency also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.[2]

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[1] Letter from E. Scott Pruitt, to Regional Administrators, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," March 13, 2018, available at: https://www.epa.gov/sites/default/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

[2] Convening such a rulemaking process is also consistent with the priorities outlined in Executive Order 13990, entitled Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis, which states that it is the Biden Administration's policy "to improve public health and protect our environment; to ensure access to clean air and water; . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." 86 FR at 7,037 (January 20, 2021). Executive Order 13990 directs federal agencies "to immediately review and, as appropriate and consistent with applicable law, take action to

Overview of Project Emissions Accounting

The final Project Emissions Accounting rule revised the NSR regulations to make clear that both emissions increases and decreases from a project (a physical change or change in the method of operation) can be considered during Step 1 of the two-step NSR applicability test in what is referred to as project emissions accounting. The Project Emissions Accounting rule was preceded by the March 2018 Memorandum. In that guidance memorandum, the Administrator explained that the agency interpreted the post-2002 NSR regulations to allow emissions decreases as well as increases to be considered under Step 1.[3] The guidance clarified that the phrase "sum of the emissions increases" used for projects that involve a combination of new and existing units (i.e., the hybrid test) should be interpreted in the same manner as the term "sum of the difference," which applied to projects involving only new or only existing units.[4] The Project Emissions Accounting rule revised the term "sum of the emissions increases" to "sum of the difference" to alleviate any uncertainty that still may have remained following issuance of the March 2018 Memorandum.[5]

Objections Raised in Petition for Reconsideration

The submitted petition contained three primary objections to the Project Emissions Accounting rule and the March 2018 Memorandum:

1. The final rule fails to ensure that offsetting emission decreases used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated;
2. The final rule unlawfully allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous[6] emission decreases; and,
3. The EPA has not ensured that project emission decreases will occur and will be maintained.

The petition alleges that each objection either arose after the period for public comment on the Project Emissions Accounting rule or that each objection was impracticable to raise during that comment period. The petition also alleges that these objections are of central relevance to the outcome of the rule. It claims that the EPA must grant reconsideration pursuant to section 307(d)(7)(B) of the Clean Air Act and stay the Project Emissions Accounting rule. The petition additionally requests that the EPA immediately withdraw the March 2018 Memorandum and that such withdrawal can occur without notice and comment through direct final action.

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address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives . . . ." *Id.* For actions inconsistent with these policies, "the heads of agencies shall . . . consider suspending, revising, or rescinding the agency actions." *Id.*

[3] Letter from E. Scott Pruitt, to Regional Administrators, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," March 13, 2018, available at: https://www.epa.gov/sites/default/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

[4] *Id.* at 8.

[5] 85 FR 74890 (November 24, 2020).

[6] For an explanation on contemporaneous emissions, *see* footnote 25 in 85 FR 74893 (November 24, 2020).

After careful review of the objections raised in the petition for reconsideration, the EPA is denying the petition for reconsideration of the rule under section 307(d)(7)(B) of the CAA and the request that the Project Emissions Accounting rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. The petition has failed to establish that the objections to the Project Emissions Accounting rule meet the criteria for mandatory reconsideration under section 307(d)(7)(B) of the CAA. Section 307(d)(7)(B) of the CAA requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule "can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." [7]

After review of the petition, the EPA has determined that it was not impracticable for commenters to raise these particular concerns as the agency specifically sought comment on the application of the "project aggregation" interpretation and policy in its proposal of the Project Emissions Accounting rule.[8] The EPA received comments on whether or not the EPA should apply the project aggregation interpretation and policy.[9] Commenters had the opportunity to raise whether applying such an interpretation and policy would still be insufficient as the agency specifically asked for comments on this issue. The failure to make such comments means that the petitioners have not met the bar for mandatory reconsideration under CAA section 307(d)(7)(B).

However, as noted above, the EPA agrees that the petition for reconsideration identifies potential concerns that warrant further consideration by the EPA. Therefore, the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's NSR regulations that would address the issues raised in the submitted petition and comments on the Project Emissions Accounting rule. The agency also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.

Basis for Denial of Petition for Reconsideration

The requirement to convene a proceeding to reconsider a rule is based on a petitioner demonstrating to the EPA **both**: (1) that it was impracticable to raise the objection during the comment period, or that grounds for such objection arose after the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the *Federal Register*, *see* CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule.[10]

As discussed in this letter it was not impracticable for the petitioners to raise the objections that they now raise in their petition for reconsideration of the final rule as evidenced by the fact that

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[7] 42 U.S.C. 7607(d)(7)(B).

[8] 84 FR 39244, 39251 (August 9, 2019) ("we seek comment on whether, if, 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.")

[9] As described in the 2018 project aggregation interpretation and policy, "'project aggregation,' ... ensures that nominally-separate projects occurring at a source are treated as a single project for NSR applicability purposes where it is unreasonable not to consider them a single project." 83 FR 5734, 57326 (November 11, 2018).

[10] 42 U.S.C. 7607(d)(7)(B).

the EPA requested comment on the potential for the application of the project aggregation interpretation and policy in the proposed rule.[11] The petitioners' primary concerns in the petition for reconsideration are similar to those addressed in the Response to Comments under the following heading: "Comments on Implementation of Project Emissions Accounting under Step 1."[12] Two of the sections within this heading are titled "Comments on Defining the Scope of a Project," (which includes a discussion of contemporaneous emissions) and "Comments on Monitoring, Recordkeeping, and Reporting of Emissions Decreases in Step 1 of the NSR Major Modification Applicability Test."[13]

The discussion below addresses each of the objections raised in the petition.

1. Alleged inability to raise an objection that the final rule fails to ensure that offsetting emission decreases used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis result from the change being evaluated.

The petitioners claim that the EPA's final rule is unlawful and arbitrary because it omits safeguards that might ensure that the emission decreases counted in Step 1 result from the planned modification, rather than from unrelated activities that should only be considered in Step 2 in combination with other contemporaneous emission increases and decreases. While they recognize the EPA declared that it would be appropriate for sources to apply the "substantially related" test set forth in the agency's 2018 project aggregation interpretation and policy to ensure emission decreases counted at Step 1 are substantially related to the change in question, petitioners allege that nothing in the final rule requires that states use this test when engaging in project emissions accounting. The petitioners state that simply identifying a test that sources could utilize to demonstrate that an emission decrease results from the change under consideration does not remedy the unlawfulness of the EPA's final rule. According to petitioners, this is because it does not guarantee that sources will apply the test despite "EPA's admission that use of the 'substantially related' test is needed to 'alleviate concerns about potential NSR circumvention in Step 1 of the NSR major modification applicability test.'"[14]

The petitioners contend that the grounds for this objection arose after the period for public comment. They allege that, while the EPA solicited comment on "whether, if, 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 activities (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," the proposed regulatory text did not include such a requirement on the grounds that it was unnecessary. Petitioners argue that nothing in the proposal suggested that the EPA might agree that a "substantially related" test is needed to

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[11] 84 FR 39244, 39251 (August 9, 2019).
[12] Response to Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 61 ("Response to Comments").
[13] *Id.* at 61-98.
[14] Petition for Reconsideration on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) (Petition for Reconsideration) at 8 (citing 85 FR at 74900).

prevent NSR circumvention but nonetheless fail to make the use of such test a mandatory feature in the final rule.

The EPA finds that this claim does not satisfy the requirements to grant mandatory reconsideration under CAA section 307(d)(7)(B). The petitioners have failed to demonstrate that it was impracticable to raise the objection during the comment period. This precise issue was presented at proposal, raised during the public comment period, and addressed by the EPA in the preamble to the final Project Emissions Accounting rule and Response to Comments.

In the proposed Project Emissions Accounting rule, the EPA requested comment on the application of the "substantially related" test. To this point, as petitioners noted, the EPA took comment on "whether, if, 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."[15] The EPA also stated its view on circumvention of NSR requirements when it stated that "the circumvention policy speaks to the situation where a source carves up what is plainly a single project into multiple projects, where each of those separate projects may result in emissions increases below the significance threshold but which, if considered collectively as one project, would result in an emissions increase above the threshold. Separate activities that, when considered together, either decrease emissions or result in an increase that is not significant are not in view in the EPA's circumvention policy."[16] The EPA specifically took comment on this statement and added that "we ask for comment on our position in this regard."[17]

In response to this request, the EPA received multiple comments on the potential application of the "substantially related" test in the context of project emissions accounting, including on whether to allow for a rebuttable presumption as well as potential issues with circumvention of NSR that may arise if the scope of a project is not adequately defined. It was these comments that informed the EPA's ultimate decision in the final rule to recommend that permitting authorities apply the "substantially related" criteria. For example, one comment stated the following:

> "The 'substantially related' test, based on a technical relationship, is appropriate …also… it is preferable to revise the rule to reflect the 'substantially related' requirement. Finally, we believe EPA should revise its rules to adopt a time-based (3 year) presumption against aggregation. These proposals would provide further clarification to the regulated public and the regulatory agencies."[18]

Several state attorneys general and the South Coast Air Quality Management District (South Coast AQMD) provided examples on how a facility could circumvent NSR under the EPA's

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[15] 84 FR at 39251.
[16] *Id.*
[17] *Id.*
[18] Florida Sugar Industry Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 7, *https://www.regulations.gov/document/EPA-HQ-OAR-2018-0048-0017.*

proposed rules.[19] More specifically, the attorneys general recognized that "while EPA does not view NSR circumvention as 'a reasonable concern' under its permissive approach, it implicitly acknowledges there could be manipulation issues and seeks comment on whether the activity (or activities) for which a source 'projects' an emission decrease to occur should be required to be 'substantially related' to the activity (or activities) for which the source 'projects' an emission increase to occur."[20] Several commenters also included in their comments a response to the EPA's preliminary consideration that over-aggregation may not be as prevalent as under-aggregation.[21] While petitioners are correct that "EPA's proposed regulatory text did not include such a requirement,"[22] this fact is not sufficient grounds for concluding that it was impracticable for petitioners to raise the objection during the comment period.[23] In *Clean Air Council v. Pruitt,* the D.C. Circuit determined that it was not impracticable for petitioners to provide meaningful comments during the comment period when the EPA specifically requested comment on the topic regardless of whether the EPA proposed regulatory text for a potential exclusion it solicited comment on.[24] The application of the "substantially related" test that the EPA solicited comment on to determine the scope of a project for purposes of addressing over-aggregation was, at the time of the proposed rule, not reflected in the text of a regulations and thus not a mandatory feature of the EPA's NSR regulations in any context. The EPA's notice of proposed rulemaking solicited comment on applying that 2018 project aggregation approach to PEA and did not indicate that the only option was to make the "substantially related" test into a mandatory element of the NSR regulations when applied in the context of addressing over-aggregation. The EPA solicited comment on exactly what it recommended in the preamble of the final Project Emissions Accounting rule -- the application of the then-extant "substantially related" criteria from the 2018 project aggregation interpretation and policy to determine the scope of a project to cover both under- and over-aggregation. The petitioners had the opportunity to raise an objection regarding the non-mandatory nature of the "substantially related" test at the time that the EPA requested comment on whether to extend the applicability of that existing approach to over-aggregation. Commenters therefore could have raised whether applying such a non-mandatory interpretation or policy would or would not be sufficient, as the agency specifically inquired.

The EPA responded to comments it received on the application of the "substantially related" test in the Response to Comments as well as in the preamble of the final rule. The preamble of the final rule included a section titled "Defining the Scope of a Project," in which the EPA responded to commenter concerns by stating that "The application of the 'substantially related' test of the 2018 project aggregation interpretation and policy should be sufficient to prevent sources from arbitrarily grouping activities for the sole purpose of avoiding the NSR major

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[19] Attorneys General of New Jersey, California, Maryland, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Washington, and the District of Columbia Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 16; South Coast Air Quality Management District Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) ("If EPA Finalizes the Proposal it Must Require Activities Identified as One Project to be 'Substantially Related.'").

[20] *Id.*

[21] For an explanation of under and over-aggregation, *see* 85 FR 74899-74900 (November 24, 2020).

[22] Petition for Reconsideration at 9.

[23] *See Clean Air Council v. Pruitt*, 862 F.3d 1,12-13 (D.C. Cir. 2017).

[24] *Id.* at 11 ("Although it is true that the NPRM for the final methane rule proposed to *exclude* low-production well sites, EPA and Industry Intervenors ignore the fact that the notice went on to solicit comment on whether such an exclusion would be warranted.").

modification requirements through project emissions accounting."[25] The EPA, therefore, took comment on the issue of the scope of a project, received comments similar to those petitioners now raise in their petition for reconsideration, and responded to these comments in the Response to Comments and in the preamble of the final rule.

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

2. Alleged inability to raise objection that the final rule unlawfully allows a source to avoid NSR by offsetting emission increases resulting from a change with non-contemporaneous emission decreases.

The petitioners argue that neither the text of the final rule nor the preamble indicate that states and sources must utilize the "substantially related" test when applying project emissions accounting. The petitioners argue that the EPA's conclusion that use of the "substantially related" test would be "appropriate" for deciding whether an emissions decrease can be counted in Step 1 is insufficient to prevent sources from unlawfully circumventing NSR based on the inclusion of non-contemporaneous emission decreases. The petitioners additionally argue in the alternative that even if the final rule did require use of the "substantially related" test, allowing for a rebuttable presumption that activities occurring outside of a 3-year period cannot be included in the Step 1 analysis does not equate to requiring that offsetting emission decreases be contemporaneous.

The petitioners contend that the grounds for this objection arose after the public comment period because the EPA stated in the proposal that it did not believe it was necessary to require sources to determine that emission decreases counted in Step 1 are "substantially related" to the change under review. Th petitioners also argue that, in the proposal, the EPA made no mention of any requirement that Step 1 decreases be contemporaneous with the emission increases resulting from the change in question.

The EPA, however, does not agree that petitioners' claims arose after the comment period. As the EPA explained in the Response to Comments, and as petitioners note in their petition for reconsideration, this issue arises out of the application of the "substantially related" interpretation and policy to project emissions accounting and, as explained in the preceding section, the EPA took comment on the application of this test to address potential over-aggregation in this context.

The petitioners commented during the public comment period of the Project Emissions Accounting rule that "by deferring to the unfettered discretion of sources as to which activities may be included at Step 1, the EPA fails to ensure that sources do not circumvent NSR by including wholly unrelated and non-contemporaneous pollution-decreasing activities within the scope of an otherwise pollution-increasing project at Step 1."[26] The EPA was aware of comments

[25] 85 FR 74890, 74898 (November 24, 2020).
[26] The Sierra Club, et al., Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 11.

similar to those concerns raised by petitioners in their petition for reconsideration and responded to these comments in the final rule preamble as well as in the final rule's Response to Comments. In the preamble to the final rule, the EPA noted that "commenters also argued that the EPA had unlawfully not required that emissions decreases be contemporaneous or enforceable in Step 1 of the NSR major modification applicability test."[27]
The Response to Comments accompanying the final rule provides further detail on the comments received regarding the contemporaneity of emissions decreases and responded in the following manner:

> Upon consideration of this comment and other comments received, the EPA has decided that it would be appropriate to apply the same criteria to determine whether physical and operational changes are part of the same project as it does when considering both under- and over-aggregation. Therefore, as noted above and in the preamble for the PEA final action, the final PEA rule does impose a temporal requirement in defining the scope of a project to include emissions increases and decreases that are 'substantially related.' For a project to be 'substantially related', the 'interrelationship and interdependence of the activities [is expected], such that 'substantially related' activities are likely to be jointly planned (i.e., part of the same capital improvement project or engineering study), and occur close in time and at components that are functionally interconnected.' The EPA interprets the requirement 'that activities 'occur close in time' to adopt a rebuttable presumption that activities at a plant can be presumed not to be 'substantially related' if they occur three or more years apart.' This is fully consistent with the direction to 'look at any change proposed for a plant, and decide whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant,' at the source as a whole. It is only once the full impact of a particular project at Step 1 has been considered that a source could look to contemporaneous emissions decreases to offset the increases from the project at Step 2."[28]

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

3. Alleged inability to raise objection that EPA has not ensured that project emission decreases will occur and be maintained.

The petitioners argue that the monitoring and recordkeeping provisions of 40 CFR § 52.21(r)(6) are insufficient to assure that sources comply with the "substantially related" test. Pre-project recordkeeping requirements under 40 CFR § 52.21(r)(6) include a description of the project, and identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project, and a description of the applicability test used to determine that the project is not a major modification. The petitioners claim these provisions permit no meaningful oversight of the "technical or economical interconnection" between the various activities

[27] 85 FR at 74898.
[28] Response to Comments at 42.

grouped into a project (nor whether there are equally interconnected activities that the source has chosen to exclude from the "project"), that they are insufficient to confirm that the timing of the activities grouped into a single project conform with the timing-related requirements of the "substantially related" test, and that they provide no capacity to enforce the EPA's "substantially related" test, even where that test applies.

The petitioners also contend that project emissions accounting prevents one from evaluating whether a source circumvents NSR because emissions may increase at a source without triggering NSR if the source "has gerrymandered its emissions accounting so as to divide the increase between two 'projects,' each of which individually falls below the significance threshold."[29] The petitioners state that while this would constitute a circumvention of the NSR requirements, the EPA's regulations do not allow one to confirm that sources' actual activities conform with that policy, or with their pre-project claims as to the relationship between various changes grouped into a single "project." The petitioners also argue that this is exacerbated by the fact that sources may avoid even these minimal requirements if the results of their applicability calculations fall below the "reasonable possibility" requirements of 40 CFR § 52.21(r)(6)(vi).

The petitioners claim that this objection arose after the public comment period because the final rule, for the first time, states that the "substantially related" interpretation and policy will apply and ensure that the Project Emissions Accounting final rule meets the requirements of the CAA.

As with the preceding two claims discussed, petitioners had an opportunity to comment on this issue and the EPA received comments on the proposed rule similar to the concerns raised by petitioners in their petition for reconsideration. The proposed rule preamble had a section on "Monitoring, Recordkeeping and Reporting of Emissions Decreases During Step 1 of the Applicability Regulations" in which the EPA took comment on "whether the 40 CFR 52.21(r)(6) provisions provide appropriate monitoring, recordkeeping and reporting requirements for both emissions decreases and increases, as relevant, in the context of Step 1 of the major modification applicability test."[30]

The EPA received comments similar to those raised in the Petition for Reconsideration including from the petitioners themselves. The petitioners commented on the proposed rule as follows:

> EPA's current Proposal also fails to mention that the D.C. Circuit invalidated the agency's 2002 Reform Rule, in part, because the EPA's self-reporting and self-monitoring provisions failed to ensure compliance with the Clean Air Act's NSR provisions, and failed to provide a mechanism to ensure that a source's projected increases in emissions would be enforceable. *New York v. U.S. E.P.A.*, 413 F.3d 3 (D.C. Cir. 2005) . . . . The EPA's proposed reliance on self-monitoring and self-reporting to substantiate emission decreases suffers from the same flaws. Indeed, the rule would allow sources to avoid any obligation to 'retain the data underlying their projections, let alone send that information to permitting authorities,' so long as the source believes that its unenforceable (and potentially unidentified and undocumented) emission reductions will not trigger an increase in

[29] Petition for Reconsideration at 12.
[30] 84 FR at 39252.

> emissions....The 'rule allows sources that take advantage of the "reasonable possibility" standard to avoid recordkeeping altogether, thus thwarting the EPA's ability to enforce the NSR provisions.[31]

The EPA responded to this comment by stating that "[t]he EPA also disagrees that the regulations and what information they require to be recorded, collected and reported can only be read to speak to that part of the project that results in an increase in emissions. In fact, the text of the regulation supports the fact that it can be read to require the collection of information about both increases and decreases in emissions . . . . Furthermore, the EPA explained that it disagrees that the 'reasonable possibility' provisions do not require monitoring of decreases that are part of the project just because they occur at a different emission unit. That emission unit would be part of the project and would therefore be considered an 'affected' emission unit for purposes of 40 CFR § 52.21(r)(6)(i)(b)."[32] The EPA also noted at the time that commenters' (and petitioners') concerns regarding the "reasonable possibility" provisions were a challenge to the revised "reasonable possibility" rule.[33] At the time of publication of the Response to Comments, this rule was subject to litigation in *State of New Jersey v. EPA*, No. 08-1065 (D.C. Cir. 2021). The D.C. Circuit has since decided this case in the EPA's favor, affirming that the EPA had adequately justified the "reasonable possibility" standard.

Additionally, the Response to Comments for the Project Emissions Accounting rule identified that commenters raised the concern that the "rule allows sources that take advantage of the 'reasonable possibility' standard to avoid recordkeeping altogether, thus thwarting the EPA's ability to enforce the NSR provisions."[34] In the preamble of the final rule, the EPA summarized its response, stating that "the 'reasonable possibility' provisions would provide the records necessary for reviewing authorities to ensure that the emissions reductions are not temporary and provide for enforcement of the major NSR program requirements, as necessary."[35]

The requirements of mandatory reconsideration under CAA section 307(d)(7)(B) are not satisfied by this objection because petitioners have failed to demonstrate that it was impracticable to raise this objection during the comment period.

Conclusion

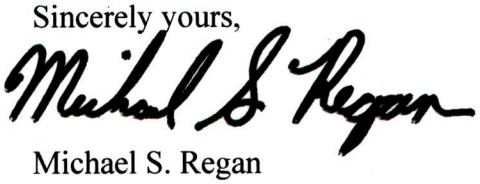
After careful review of the objections raised in the submitted petition for reconsideration, the EPA is denying the petition for reconsideration of the rule under section 307(d)(7)(B) of the CAA and the request that the Project Emissions Accounting Rule be stayed. The EPA is not taking action at this time on petitioners' request for the EPA to withdraw the March 2018 Memorandum. However, while the EPA is not required by CAA section 307(d)(7)(B) to grant this petition for reconsideration, the EPA agrees that the petition raises concerns that warrant further consideration by the EPA in a separate rulemaking effort. The EPA, therefore, plans to initiate, at its own discretion, a rulemaking process to consider revisions to the NSR regulations

[31] The Sierra Club Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 85 FR 74890 (November 24, 2020) at 20.
[32] Response to Comments at 53, 54.
[33] 72 FR 72607 (December 21, 2007).
[34] Response to Comments at 50.
[35] 85 FR at 74900.

to address the concerns raised by the petition for reconsideration. The EPA also plans to consider if withdrawal or revision of the March 2018 Memorandum is necessary.

I appreciate your comments and interest in this matter.

Sincerely yours,



Michael S. Regan