6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0064; FRL–]

RIN 2060–AP80

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: In this action, the Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting." The 2009 action – hereafter referred to as "2009 NSR Aggregation Action" – clarified implementation of the New Source Review (NSR) permitting program under the Clean Air Act (CAA or Act) with respect to treating related physical or operational changes as a single "modification" for the purpose of determining NSR applicability at a stationary source. On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments received on that proposal, the EPA has now decided to not revoke the 2009 NSR Aggregation Action. The EPA is, therefore, retaining the interpretation set forth in the 2009 NSR Aggregation Action, while not adopting any changes to the relevant rule text. At the same time, the EPA is using this present action to clarify the implications of the 2009 NSR Aggregation Action for EPA-approved permitting

programs. This action also lifts the stay of the 2009 NSR Aggregation Action that the EPA issued in May 2010 pursuant to the Administrative Procedure Act (APA).

DATES: This action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action, identified by Docket ID No. EPA-HQ-OAR-2003-0064. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, *e.g.*, Confidential Business Information 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. Publicly available docket materials are available electronically in *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For further general information on this action, contact Mr. Dave Svendsgaard, Office of Air Quality Planning and Standards (OAQPS), Air Quality Policy Division, U.S. EPA, Mail Code 504-03, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711; by telephone at (919) 541-2380; or by email at *svendsgaard.dave@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this action include sources in all industry categories. Entities potentially affected by this action also include state, local and tribal air

pollution control agencies (air agencies) responsible for permitting sources pursuant to the NSR program.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at *https://www.epa.gov/nsr.*

C. How is this notice organized?

The information presented in this document is organized as follows:

II. Background

A. What is New Source Review?

The NSR program is a preconstruction permitting program that requires certain stationary sources of air pollution to obtain permits prior to beginning construction. The NSR permitting program applies both to new construction and to modifications of existing sources, regardless of

whether the source is in an area where the national ambient air quality standards (NAAQS) have been exceeded (nonattainment area) or if the source is in an area where the NAAQS have not been exceeded (attainment or unclassifiable area). New construction and modifications that emit "regulated NSR pollutants"[1] over certain thresholds are subject to major NSR requirements, while smaller emitting sources and modifications may be subject to minor NSR requirements or be excluded from NSR altogether.

Major NSR permits for sources that are located in attainment or unclassifiable areas are referred to as Prevention of Significant Deterioration (PSD) permits. These permits can also cover pollutants for which there are no NAAQS. Major NSR permits for sources located in nonattainment areas and that emit pollutants above the specified thresholds for which the area is in nonattainment are referred to as nonattainment NSR (NNSR) permits. The pollutant(s) at issue and the air quality designation of the area where the facility is located or proposed to be built determine the specific permitting requirements. The CAA requires sources subject to PSD to meet emission limits based on Best Available Control Technology (BACT) as specified by CAA section 165(a)(4), and sources subject to NNSR to meet Lowest Achievable Emissions Rate (LAER) pursuant to CAA section 173(a)(2). Other requirements to obtain a major NSR permit vary depending on whether it is a PSD or NNSR permit.

A new stationary source is subject to major NSR requirements if its potential to emit (PTE) a regulated NSR pollutant exceeds statutory emission thresholds.[2] If it exceeds the

[1] 40 CFR 51.165(a)(1)(xxxvii), 40 CFR 51.166(b)(49), 40 CFR 52.21(b)(50).
[2] For PSD, the statute uses the term "major emitting facility" which is defined as a stationary source that emits, or has a PTE, at least 100 tons per year (TPY) if the source is in one of 28 listed source categories – or at least 250 TPY if the source is not – of "any air pollutant." CAA

applicable threshold, the NSR regulations define it as a "major stationary source."[3] An existing major stationary source triggers major NSR permitting requirements when it undergoes a "major modification," which occurs when a source undertakes a physical change or change in method of operation (*i.e.,* a "project") that would result in (1) a significant emissions increase from the project, and (2) a significant net emissions increase from the source (*i.e.*, a source-wide "netting" analysis that considers creditable emission increases and decreases occurring at the source as a result of other projects over a 5-year contemporaneous period). *See*, *e.g.*, 40 CFR 52.21(b)(2)(i) and 40 CFR 52.21(b)(52). For this two-step process, the NSR regulations define what emissions rate constitutes "significant" for each NSR pollutant. *See* 40 CFR 51.165(a)(1)(x), 40 CFR 51.166(b)(23), and 40 CFR 52.21(b)(23).

In many cases, these requirements of the major NSR program (or equivalent requirements) are formally adopted by a state or local air agency, and the agency submits a revised state implementation plan (SIP) to the EPA for approval. The EPA's regulations provide for the minimum requirements of these programs. Upon EPA approving the SIP, the air agency becomes the "permitting authority" for major NSR permits for sources within its boundaries. When a state or local air agency is not the permitting authority, either the EPA issues the major NSR permits or a state or local air agency issues the major NSR permits on behalf of the EPA by way of a delegation agreement. For sources located in Indian country, the EPA is currently the

169(1). For NNSR, the emissions threshold for a major stationary source is 100 TPY, although lower thresholds may apply depending on the degree of the nonattainment problem and the pollutant. 40 CFR 51.165(a)(iv)(A).

[3] 40 CFR 51.165(a)(1)(iv), 40 CFR 51.166(b)(1)(i), 40 CFR 52.21(b)(1)(i).

only permitting authority for major NSR. Currently, state and local air agencies issue the vast majority of major NSR permits each year.

New sources and modifications that do not require a major NSR permit may instead require a minor NSR permit prior to construction. Minor NSR permits are almost exclusively issued by state and local air agencies, although the EPA issues minor NSR permits in some areas of Indian country. Minor NSR requirements are approved into a SIP in order to achieve and maintain the NAAQS. *See* CAA section 110(a)(2)(C). The CAA and EPA's regulations are less prescriptive regarding minimum requirements for minor NSR, so air agencies generally have more flexibility in designing their minor NSR programs.

B. What is project aggregation?

As described in the preceding section, the EPA's implementing regulations for NSR establish a two-step process for determining major NSR applicability for projects at stationary sources. To be subject to major NSR requirements, the project must result in both (1) a significant emissions increase from the project (the determination of which is called "Step 1" of the NSR applicability analysis, or "project emissions accounting"); and (2) a significant *net* emissions increase at the stationary source, taking account of emission increases and emission decreases attributable to other projects undertaken at the stationary source within a specific time frame (called "Step 2" of the NSR applicability analysis, or "contemporaneous netting"). This approach to applicability makes it necessary to accurately define what constitutes the "project" under review to ensure that the proper emissions increase resulting from the project is used when comparing it with the applicable NSR significance threshold at Step 1 of the NSR applicability

analysis.[4] Otherwise, a source could conceivably carve up a higher-emitting project into two or more lower-emitting "projects" and avoid triggering major NSR requirements.[5] "Project aggregation," therefore, 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.[6]

As with certain other aspects of the NSR program, determining what constitutes the "project" is a case-by-case decision that is both site-specific and fact-driven. There is no pre-determined list of activities that should be aggregated for a given industry or industries. It is, therefore, necessary to establish criteria for determining when nominally-separate activities are considered one project under NSR. The EPA has specifically sought to develop principles for aggregating changes such that a project is appropriately defined by the source, so that the emission increases attributable to the project are accurately quantified for purposes of analyzing NSR applicability. Over the years, the EPA articulated its policy on project aggregation through

[4] In this notice, we use the terms "project," "changes," and "activities" interchangeably in referring to physical or operational changes that occur at a facility. In some cases, particularly in using the term "activities," we are actually referring to "sub-projects" that are nominally separate in scope but are nevertheless related to other sub-projects such that they all are part of a larger single project when determining NSR applicability. It is important to note that our use of the term "activities" in this notice is not intended to imply that every "activity" at a plant is a physical or operational change. The EPA recognizes that there are numerous activities undertaken at a facility, of which only a subset will constitute "changes" under the NSR regulations.

[5] Emission changes from separate projects (not included under Step 1 as falling within the project under review) are considered at Step 2 if they are "contemporaneous" and "otherwise creditable" under the NSR regulations. *See* 40 CFR 52.21(b)(3).

[6] It is not permissible to seek to circumvent NSR by securing several minor NSR permits for individual projects with the effect of avoiding major NSR requirements for what is actually a single project.

a series of statutory and regulatory interpretations contained in EPA letters and memoranda, the most commonly cited being a 1993 EPA memorandum regarding NSR applicability for activities that had occurred at a 3M facility in Minnesota.[7]

To date, the EPA's focus in formulating criteria for project aggregation has been to ensure that NSR is not circumvented through some artificial separation of activities at Step 1 of the NSR applicability analysis where it would be unreasonable for the source to consider them to be separate projects. However, in a March 13, 2018, memorandum[8] on the topic of "project emissions accounting," the EPA broached the question of whether it might also somehow be possible for a source to circumvent NSR through some wholly artificial grouping of activities to include decreases in emissions as part of Step 1 of the NSR applicability analysis – *i.e.*, assessing whether a project by itself results in a significant emissions increase before reaching Step 2, where one then determines whether there will be a significant net emissions increase by taking into account all contemporaneous increases and decreases across the source. While we[9] have been mindful of this question in deciding to employ the project aggregation criteria described in this action, we intend to address more fully this scenario in the context of a subsequent rulemaking action on the topic of project emissions accounting.

C. Regulatory History

[7] Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, OAQPS, to George T. Czerniak, Chief, Air Enforcement Branch, EPA Region 5, titled, "Applicability of New Source Review Circumvention Guidance to 3M – Maplewood, Minnesota" (June 17, 1993) (hereinafter "3M Memorandum").
[8] Memorandum from E. Scott Pruitt, Administrator, to Regional Administrators, titled, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (March 13, 2018) (hereinafter "Project Emissions Accounting Memorandum").
[9] In this preamble, the terms "we", "our" and "us" refer to the EPA.

1. The 2009 NSR Aggregation Action

On January 15, 2009, the EPA published a final action – which we are calling the "2009 NSR Aggregation Action" – that described the principles of project aggregation that we would apply when determining whether a source had unreasonably segregated a single project into multiple projects, thereby circumventing the NSR permitting requirements.[10] We had initially proposed in 2006 to establish principles for project aggregation through an amendment to the NSR regulations.[11] However, because of the difficulty of creating a bright line to determine when activities should be aggregated, we ultimately decided not to adopt the proposed changes to the regulations and elected instead to pursue a less prescriptive approach by describing, in the 2009 action, the EPA's interpretation of the existing regulations and a policy for applying that interpretation going forward.

The 2009 NSR Aggregation Action called for sources and reviewing authorities to aggregate emissions from nominally-separate activities when they are "substantially related" for the purpose of determining whether they are a single modification resulting in a significant emissions increase under NSR at Step 1.[12] This "substantially related" criterion is based on an interpretation of the term "project" contained in the major NSR regulations.[13] The action also

[10] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting (74 FR 2376; January 15, 2009).
[11] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting (71 FR 54235; September 14, 2006).
[12] *See* 74 FR 2378 ("When there is no technical or economic relationship between activities *or where the relationship is not substantial*, their emissions need not be aggregated for NSR purposes." (emphasis added)). That is, mere relatedness is not sufficient to upend the source's definition of its project, but sources cannot circumvent NSR by artificially separating a series of emissions-increasing projects into separate projects that fall below the significance thresholds.
[13] *See*, *e.g.*, 40 CFR 52.21(b)(52).

included a statement that the EPA would, as a matter of policy, establish a rebuttable presumption that activities that occurred more than three years apart are not "substantially related" and therefore, generally, should not be aggregated for purposes of determining whether they are a single modification at Step 1.

The 2009 NSR Aggregation Action retained the existing rule text defining the term "project" – *i.e.*, "a physical change in, or change in method of operation of, an existing major stationary source" – and interpreted this rule text to mean that sources and permitting authorities should combine emissions only when nominally-separate changes are "substantially related." While acknowledging the case-specific nature of a project aggregation determination, the 2009 NSR Aggregation Action described the factors that should be considered when evaluating whether changes are substantially related, including technical or economic dependence. It also offered examples of what it means to be substantially related, and it referenced examples provided in EPA's 2006 proposed rule on project aggregation to further amplify EPA's meaning of the term. Thus, in many respects, the "substantially related" interpretation in the 2009 NSR Aggregation Action was intended to encompass principles for aggregating projects that were similar to those that the EPA had proposed in 2006, but ultimately concluded should not be prescriptively defined in a regulation because of the difficulty of developing a bright line for determining when activities should be aggregated.

The 2009 NSR Aggregation Action specifically addressed the timing element of project aggregation decisions in multiple ways. It affirmed that timing alone should not be a basis for aggregating projects because the appropriate basis for aggregation is whether there is a substantial technical or economic relationship. It further explained that activities that occur

simultaneously should not be presumed to be substantially related, although it is reasonable to presume that activities closer in time are more likely to be substantially related than activities separated by larger time frames. Thus, it affirmed that the timing between activities remains important from a standpoint of framing the analysis of whether a substantial technical or economic relationship exists.

The 2009 NSR Aggregation Action also expressed that the farther apart projects are timed, the less likely they are to be substantially related, since the activities would likely be part of distinct planning and capital-funding cycles. It stated "the passage of time provides a fairly objective indicator of nonrelatedness between physical or operational changes. Specifically, the greater the time period between activities, the less likely that a deliberate decision was made by the source to split an otherwise 'significant' activity into two or more smaller, non-major activities." 74 FR 2380.

To this end, the 2009 NSR Aggregation Action affirmed that timing could be a basis to not aggregate separate projects, and it established a policy of applying a rebuttable presumption against aggregating projects that occur 3 or more years apart. The EPA justified its selection of 3 years as the presumptive timeframe in part by reasoning that it "is long enough to ensure a reasonable likelihood that the presumption of independence will be valid, but is short enough to maintain a useful separation between relevant construction cycles, consistent with industry practice. For example, in the case of electric utilities, a commenter explained that companies plan and schedule major turbine outages every four to five years." *Id*. However, the EPA did note that this presumptive timeframe may be rebutted in certain circumstances. For instance, the 2009 NSR Aggregation Action noted that where there is "evidence that a company intends to

undertake a phased capital improvement project" where the activities "have a substantial economic relationship," this would likely overcome the presumption that those activities should not be aggregated. *Id.*

With regard to implementing the 3-year presumption, the EPA stated "the time period separating physical or operational changes should be calculated based on time of approval (*i.e.*, minor NSR permit issuance). If a permit has not been, or will not be, issued for the physical or operational changes, the time period should be based on when construction commences on the changes." 74 FR 2381.

The EPA also explained that a statement within the 3M Memorandum was potentially vulnerable to misapplication and did not properly reflect the "substantially related" criterion. The 3M Memorandum stated the following:

> Some minimum level of research activity and commensurate emissions, source-wide, perhaps could be expected from year to year, as would be expected to keep the 3M plant productive or operable. These emissions and thereby modifications cannot be presumed to be independent given the plant's *overall basic purpose* to support a variety of research and development activities. Therefore, even though each research project may have been individually conceived and separately funded, it is appropriate to look at the overall expected research activity in assessing NSR applicability and enforcement.
> 3M Memorandum at 5 (emphasis added).

In the 2009 NSR Aggregation Action, the EPA expressed concern with this statement from the 3M Memorandum, saying "it could be interpreted to imply that almost any activity is related to any other activity at that source simply because they are both capital investments and support the company's goal to make a profit." 74 FR 2376, 2379. The suggestion that all changes consistent with the "overall basic purpose" of the plant can and should be aggregated is inconsistent with the interpretation of "project" to include only those changes that have a substantial relationship. While the EPA did not, in the 2009 NSR Aggregation Action, find such

a broad approach to project aggregation was often applied after the 3M determination, we nevertheless had concerns that it did not represent an appropriate criterion for aggregating projects for NSR purposes and could be misapplied. Thus, in the 2009 NSR Aggregation Action, we maintained that two nominally separate projects are not substantially related if they are only related to the extent that they both support the source's "overall basic purpose."

In summarizing what it means for projects to be substantially related, the 2009 NSR Aggregation Action provided that "in most cases, activities occurring in unrelated portions of a major stationary source (*e.g.*, a plant that makes two separate products and has no equipment shared among the two processing lines) will not be substantially related. The test of a substantial relationship centers around the interrelationship and interdependence of the activities, 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." 74 FR 2378. The 2009 NSR Aggregation Action added, "[t]o 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. We note that these factors are not necessarily determinative of a substantial relationship, but are merely indicators that may suggest that two or more activities are likely to be substantially related and, therefore, candidates for aggregation." *Id.*

2. Reconsideration and Stay

On January 30, 2009, the Natural Resources Defense Council (NRDC) submitted a petition for reconsideration of the 2009 NSR Aggregation Action (the "NRDC Petition"). In response to the NRDC Petition, on February 13, 2009, the EPA convened a proceeding for reconsideration as provided for under the CAA section 307(d)(7)(B), finding that the petitioner had raised objections to the action that arose after the comment period and that were of central relevance to the action.

To allow time to complete the reconsideration prior to the 2009 NSR Aggregation Action becoming effective, the EPA announced a 90-day administrative stay of the action. *See* 74 FR 7284 (February 13, 2009). The EPA subsequently completed an action to further delay the effective date until May 18, 2010. *See* 74 FR 22693 (May 14, 2009). On May 18, 2010, the EPA invoked APA section 705 to stay the action indefinitely pending the proceedings for judicial review or the completion of reconsideration. These stays were intended to allow the EPA the time to take comment on issues that were in question and complete any revisions of the action that became necessary as a result of the reconsideration process.

As part of the reconsideration proceeding, on April 15, 2010, the EPA published a notice seeking comment on the 2009 NSR Aggregation Action (the "2010 Reconsideration Proposal").[14] 75 FR 19567. At the time, the EPA considered whether some of the points raised by the NRDC petition might demonstrate potential flaws in the process and with fundamental aspects of the 2009 NSR Aggregation Action, including the legal basis, state adoption and

[14] In the 2010 Reconsideration Proposal, the EPA described the 2009 action as the "NSR Aggregation Amendments." However, since this action did not "amend" the NSR regulations, but rather laid out an interpretation of our current regulations and described a policy on timing for aggregation, the 2009 action is more appropriately described, as it is described herein, as the 2009 NSR Aggregation Action.

implementation, and the clarity of the "substantially related" criterion. In the 2010 Reconsideration Proposal, we expressed agreement with the petitioner on a number of fronts, invited comment on all issues raised in the NRDC petition, and proposed a preferred option to revoke the 2009 NSR Aggregation Action. The 2010 Reconsideration Proposal also referenced a number of the past determinations on project aggregation. *See* 75 FR 19570-1.

The EPA received a total of 27 comments on our 2010 Reconsideration Proposal. Of those commenters, 20 represented industry parties, three represented state and local air agencies, one represented a tribal government agency, one represented a federal agency, one represented an environmental advocacy group, and one was a private citizen.

3. Characterizing the 2009 NSR Aggregation Action

In the history of actions that the EPA has taken regarding its project aggregation policy since 2006, the EPA has variously described the 2009 NSR Aggregation Action as a "rule," "interpretation," and "policy." However, we are now mindful that these terms may be used to refer to three distinct types of agency action that have varying degrees of legal effect and can be changed through different types of procedures. *National Mining Association v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014). As is explained below, the distinction between the proper procedures for changing rules, interpretations, and policies were not as clear to the agency in 2009 and 2010 as they are today. Recent court decisions have provided more clarity regarding the distinction between these types of actions and the means through which an agency can change them. In order to clarify how state and local permitting authorities may apply the principles for project aggregation that the EPA articulated in 2009, in this final action we seek to address any confusion regarding the nature of that 2009 action.

We begin by defining what we understand each of these terms to mean when they are used in the discussion that follows. We use the term "rule" to describe a "legislative rule," which is "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties — and that would be the basis for an enforcement action for violations of those obligations or requirements." *National Mining*, 758 F.3d at 251-52. We use the term "interpretation" to describe "an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *Id.* Following the language in the APA, courts have used the term "interpretive rule" to describe this type of action. *Id.* Here, however, we use the term "interpretation" to more clearly distinguish such an action from a *legislative* rule. Finally, a "policy" or "statement of policy" is "an agency action that merely explains how the agency will enforce a statute or regulation — in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule." *Id.*

In 2006, we proposed a rule (meaning a *legislative* rule) that would have changed the text in the Code of Federal Regulations. We included in the preamble an explanation of what we intended that proposed regulatory text to mean. 71 FR 54235 (September 14, 2006). In that **Federal Register** notice, we referred to the action as a "proposed rule." *Id.*; *see also* 71 FR at 54245 ("We are proposing to add our aggregation policy to our NSR regulations . . .").

In 2009, we took "final action" in the matter. That is, we completed the action begun in 2006, while not changing the regulatory text itself. 74 FR 2376. In retaining the existing regulatory text defining the term "project," we said that the action we were taking "interprets that rule text." *Id.* The interpretation offered in the 2009 NSR Aggregation Action was that a

"project," which the regulatory text defines to mean "*a* physical change in, or change in the method of operation of, an existing major stationary source," 40 CFR 52.21(b)(53) (emphasis added), includes those activities that are "substantially related." 74 FR 2377. This portion of the 2009 NSR Aggregation Action was an interpretation.[15] Although we had proposed to adopt a legislative rule in 2006 and to reflect that in amended regulatory text, we made a final decision in 2009 not to adopt any legislative rule or to amend the text of the NSR regulations. Instead, we chose to announce an interpretation of the *existing* regulations that drew from EPA's prior experience on the topic of project aggregation, but which to some degree altered the aggregation policy that the EPA had previously articulated in past guidance memoranda and letters.

In 2009, we also discussed our intention to apply a rebuttable presumption that activities separated by more than 3 years would not be considered substantially related. This section of the action is best understood as a statement of policy, as we were describing how we intended to exercise our discretion under the NSR regulations, as we interpreted them. We justified the 3-year presumption as a commonsense approach, in that we believed that in practice once 3 years had passed, "it is difficult to argue that th[e activities] are *substantially* related and constitute a single project." 74 FR 2380. But recognizing that there may be situations that would warrant an exception to this approach, we indicated that the 3-year presumption would be rebuttable. We indicated our view that it would be allowable and appropriate for other permitting authorities to "also adopt this presumptive timeframe as guidance for their sources." 74 FR 2381.

[15] As explained above, courts follow the APA in referring to this type of action as an "interpretive rule," but we refer to it herein simply as an "interpretation" to more clearly distinguish such an action from a *legislative* rule.

The 2009 action, thus, contained both an interpretation of the existing regulations and a statement of policy on how we intended to implement that interpretation. It is for this reason that we refer to it as the 2009 NSR Aggregation Action. However, when reconsidering that 2009 action, we were not sufficiently clear in the 2010 Reconsideration Proposal regarding the nature of the action we were reconsidering. At times, we described the 2009 action as a "final rule," and called it the "NSR Aggregation Amendments," which could be read to suggest that we considered the 2009 NSR Aggregation Action, despite the lack of regulatory text changes, to somehow be a *legislative* rule, or something that "amended" the existing regulations.

Much of the confusion stemmed from the fact that at the time we took these actions, judicial precedent in the United States Court of Appeals for District of Columbia Circuit (D.C. Circuit) provided that, where an agency had given a definitive interpretation to one of its own legislative rules, the agency could not thereafter change that interpretation without providing notice and an opportunity to comment. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). In part because of this precedent, we were persuaded in 2010 that we should provide an opportunity for the public to comment on the 2009 interpretation, which could have been viewed as a change from the interpretation that the EPA had articulated in 2006 and earlier. In addition, since we understood the *Paralyzed Veterans* opinion to require a notice-and-comment rulemaking process when an agency wished to change a regulatory interpretation (which, under the APA, would constitute the issuance of an "interpretive rule," or, as we refer to it herein, an "interpretation"), and because the 2009 NSR Aggregation Action had completed a notice-and-comment rulemaking process that had originally proposed to amend rule text, we

chose in the 2010 Reconsideration Proposal to apply the procedures for reconsidering a "legislative rule."

The United States Supreme Court has since abrogated the *Paralyzed Veterans* doctrine, ruling that it was inconsistent with the APA, which by its plain terms does not require agencies to go through a notice-and-comment process in issuing an interpretive rule. *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015). Because the 2009 NSR Aggregation Action did not impose legally binding obligations or prohibitions on regulated entities or state permitting authorities, it was not a legislative rule. Since the 2009 NSR Aggregation Action was a combination of interpretation and policy statement, it could have been issued by the EPA without following notice-and-comment rulemaking procedures. 5 U.S.C. 553(b); 42 U.S.C. 7607(d)(1). Further, to the extent the interpretation reflected therein is a change from a prior interpretation, after the Supreme Court decision in *Mortgage Bankers*, it is now clear that an agency may also change such an interpretation of its regulations without the need to publish notice in the **Federal Register** and solicit public comment. However, because the EPA has been using notice-and-comment rulemaking procedures up to this point, the EPA believes it is prudent, but not required, in order to retain the interpretation of the NSR regulations with regard to project aggregation that we published in 2009, that we publish this notice in the **Federal Register**. This procedure also allows us to complete the reconsideration proceeding begun in 2010 and lift the indefinite stay. We also believe that it is prudent to respond to those comments we received during the reconsideration process.

III. This Action

A. Overview

In this action, we are taking final action on reconsideration of the issues for which we asked for comment in the 2010 Reconsideration Proposal. The proposal invited comment on all issues alleged in the petition for reconsideration, including the following: lack of adequate opportunity for notice and comment on the final action; legal inconsistency with a prior court decision; lack of demonstrated need for a policy change; and lack of clarity over state plan adoption of the action.

This action addresses all of the petitioner's issues. Moreover, to the extent that commenters lacked an adequate notice-and-comment opportunity in the development of the 2009 NSR Aggregation Action, the reconsideration process has addressed this deficiency by inviting comment in 2010 on the issues raised by the petitioner. This action (1) takes final action on the 2010 Reconsideration Proposal and retains the 2009 NSR Aggregation Action without adopting any changes to the rule text or the interpretation and statement of policy contained therein; (2) completes the CAA section 307 reconsideration proceeding on the 2009 NSR Aggregation Action to address any potential notice-and-comment deficiency; and (3) lifts the APA section 705 stay of the 2009 NSR Aggregation Action. The conclusions reached and expressed in this final action are based on careful review of the public comments on the 2010 Reconsideration Proposal.[16]

This final decision on reconsideration of the 2009 NSR Aggregation Action does not finalize the 2010 Reconsideration Proposal's preferred option to revoke the 2009 NSR

[16] In the docket for this action, we are making available a document, "Response to Public Comments for Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration", in which the EPA responds to the public comments received on the 2010 Reconsideration Proposal.

Aggregation Action's interpretation and policy. Upon reviewing public comments, after further deliberation, and taking account of the Administration's priorities and policy goals, the EPA has concluded that the interpretation and policy in the 2009 NSR Aggregation Action should be retained.[17] We believe the 2009 NSR Aggregation Action articulates a reasonable standard for aggregating related projects and is consistent with the CAA and our regulations.

With regard to the petitioner's concern about how the 2009 NSR Aggregation Action applies to EPA-approved permitting programs, we affirm our decision in 2009 not to revise the current rule text, and instead to conclude that the terms "project" and "a physical change in, or change in method of operation of" in the existing NSR regulations can be reasonably interpreted as already incorporating the "substantially related" test set forth in the 2009 preamble. Because the 2009 NSR Aggregation Action did not amend the rule text, state and local air agencies with approved state implementation plans (SIPs) are not required to amend those plans to adopt this interpretation that projects should be aggregated when "substantially related." If state and local agencies want to adopt this interpretation, we believe that in most cases this interpretation can be applied without formal adoption into their rules. We encourage state and local air agencies to follow this interpretation to ensure greater national consistency in making NSR applicability determinations, though state and local air agencies with approved SIPs can continue to apply their own interpretation of the scope of a "project."

Consistent with comments received on the EPA's 2006 proposed rule, commenters on the 2010 Reconsideration Proposal raised concerns with the clarity of our prior policy on project

[17] *See* Presidential Memorandum on Streamlining Permitting and Reducing Regulatory burdens for Domestic Manufacturing (82 FR 8667; January 24, 2017); Executive Order 13777 on Enforcing the Regulatory Reform Agenda (82 FR 12285, March 1, 2017).

aggregation, which was developed over time through a number of *post hoc* site-specific applicability determinations. We anticipate the 2009 NSR Aggregation Action will reduce any confusion over our past policy and provide sources and regulators with increased clarity when determining whether projects should be aggregated for NSR purposes. The EPA believes the principles outlined in the 2009 NSR Aggregation Action will not only help to achieve greater national consistency in project aggregation determinations but will also streamline NSR permitting by reducing the time needed to assess whether nominally-separate physical and operational changes should be aggregated for NSR applicability purposes.

As this action officially completes our reconsideration proceeding, we are also lifting the APA section 705 stay of the 2009 NSR Aggregation Action that we invoked in May 2010.

B. Retaining the 2009 NSR Aggregation Action

1. An Interpretation Is Needed

As explained earlier in this notice, the EPA's past position on project aggregation – prior to the 2009 NSR Aggregation Action – was not established through a rule or through a single, comprehensive policy statement. Rather, the policy had been articulated by the EPA through a number of site-specific determinations, many of which were issued after the activities subject to the determination had already occurred. Navigating this collection of EPA statements, capturing their salient points, and determining whether and how to apply their rationale to new determinations with different fact patterns was arguably a challenge for sources and permitting authorities over the years. Such an approach lacked clarity for sources and permitting authorities, making it sometimes difficult to understand the overall policy so they could effectively apply it prospectively.

There is a substantive distinction between making case-by-case determinations after-the-fact and making case-by-case determinations prospectively – *i.e.*, as part of a permitting applicability review– for NSR purposes. Many *post hoc* determinations are made with an eye to determining whether the requirements of NSR were circumvented, whereas prospective determinations are made with the purpose of giving sources an opportunity to evaluate modifications during the planning or preconstruction phase in order to determine whether a planned or proposed modification requires a PSD or NNSR permit, so as *not* to circumvent the NSR process. While the underlying criteria for assessing whether to group multiple activities as a single project should be the same regardless of whether the determination is prospective or *post hoc*, a *post hoc* determination is often very specific to the industry and the individual fact pattern under consideration, and therefore applying the determination's rationale prospectively, while potentially informative, could be misapplied to situations involving different industries or having different fact patterns. The 2009 NSR Aggregation Action also recognized the limitations of having a policy that is based on the specific fact patterns of past determinations: "the decision to aggregate or disaggregate activities is highly case-dependent, such that letters and memoranda that opine on whether to aggregate a particular set of activities at one facility are not necessarily transferable to a decision to aggregate a similar set of activities but with a slightly different set of circumstances at a different plant." 74 FR 2377.

Previous agency statements can be taken out of context or misunderstood when reviewing projects having a different set of facts. For example, while the 3M Memorandum was considered by some as the EPA's guiding policy on project aggregation, parties could certainly misconstrue portions of that statement to suggest that all projects occurring within the same timeframe should

be aggregated, or that all projects occurring at a facility should be aggregated as long as they contribute to the source's "overall basic purpose." Such an approach – *i.e.*, to aggregate projects simply because they may occur close in time or may support the same overall purpose of the facility – fails to take proper account of the actual interrelationship of activities. Meanwhile, in other parts of the 3M Memorandum, the EPA's statements clearly indicate that, in order to justify aggregating activities for purposes of major NSR, the reasonable approach is to determine whether those activities are related in some meaningful way: *e.g.*, "[a]uthorities should scrutinize [permit] applications *that relate to the same process or units* …"; "two or more *related* minor changes over a short time period should be studied for possible circumvention." 3M Memorandum at 3 (emphasis added). We consequently do not believe that a broader approach to aggregating activities – *i.e.*, based on their contribution to a plant's overall purpose – is an accurate characterization of the EPA's view at the time of the 3M determination. Furthermore, we do not believe it reflects EPA's view in any other statement made by the agency over the years.

We noted in the 2010 Reconsideration Proposal that "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," and that 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." 75 FR 19572. However, after further consideration, the EPA finds this to be an insufficient basis for changing or revoking the 2009 NSR Aggregation Action. So-called "anecdotal" evidence is nevertheless still evidence of which the agency can properly take account if, in its judgment, it finds it to be meaningful.

Indeed, the criticism of relying on "anecdotes" suggests that examples of problems offered in public comments should be ignored. The EPA is required to take into account the comments submitted. Furthermore, merely because the overall level of uncertainty demonstrated by public comments cannot be characterized – a given entity would not necessarily know whether others were as uncertain as they were – does not serve to demonstrate that the 2009 NSR Aggregation Action was unwarranted. We believe that the evidence before the EPA in 2009 and the agency's own extensive permitting experience, coupled with statements from public commenters in this reconsideration proceeding, clearly indicates that the EPA's prior policy on project aggregation lacked clarity and promoted confusion. The 2009 NSR Aggregation Action provides a more concise formulation for how to interpret the scope of a project and provides clarity for permitting authorities, regulated entities, and the public.

Finally, the 2010 Reconsideration Proposal states that "[w]hile the [2009 NSR Aggregation Action] may, in some respects, appear clearer than our previous policy, we are not convinced that it achieved enough additional clarity to improve the process of making aggregation assessments by sources and reviewing authorities. . . ." 75 FR 19573. After further consideration, we now believe that providing clarity in a single document is a better approach than continuing the previous policy that was based on a host of EPA letters and memoranda, which collectively provided less clarity. We recognize there will continue to be "gray areas" that sources and permitting authorities will ultimately have to work through in deciding whether or not to aggregate a set of changes at a facility. But this is attributable to the inherent nature of such decisions, not to some deficiency in the 2009 NSR Aggregation Action. That does not mean that the EPA should abandon the clarity it attempted to provide in that action.

2. "Substantially Related" Is an Appropriate Standard

As noted above, the EPA continues to believe that there is a need for *some* criteria for determining when nominally-separate changes should be considered a single "project" for purposes of determining NSR applicability. It remains necessary to draw a line between those activities that are to be considered a single "physical or operational change" and those that are not. In this action, we are affirming that the 2009 NSR Aggregation Action's "substantially related" test is an appropriate standard for project aggregation.

As explained elsewhere in this notice, the nature of the project aggregation determination is case-specific, which means it is inherently difficult to establish a bright line standard: such a standard may be reasonable when conducting an evaluation of project scope in one situation, but could prove to be unreasonable or unworkable when applied in other situations. This case-by-case aspect necessitates that the EPA establish a reasonable general principle to apply, and we believe the "substantially related" criterion is an appropriate principle for concluding that claimed separate projects are a single project for NSR applicability purposes. We believe the substantially related criterion is sound from a policy and implementation perspective.

The 2009 NSR Aggregation Action effectively addresses certain past EPA statements in relation to implementing the "substantially related" test for future project aggregation determinations. The 2009 NSR Aggregation Action outlined the role of timing – specifically, that timing alone is not determinative of whether activities are substantially related and that, as a policy matter, activities separated in time by three or more years may be presumed to be not substantially related. The 2009 NSR Aggregation Action also rejected the use of an "overall basic purpose" criterion for aggregating physical or operational changes, since it could have been

read to constitute an open-ended standard, resulting in the unreasonable or improper aggregation of unrelated activities.

Importantly, we do not believe the 2009 NSR Aggregation Action reflects a major shift in policy from EPA's prior policy on project aggregation. To the contrary, we believe that in many ways the 2009 NSR Aggregation Action clarifies and supplements previous statements of policy. For example, in the case of timing, the 3M Memorandum suggested that when minor NSR permit applications occur "over a short time period (*e.g.*, 1 year or 18 months), the modifications *may* require major new source review." 3M Memorandum at 4 (emphasis added). Thus, the 3M Memorandum never said timing was the sole criterion or otherwise conclusive. Rather, timing was a reason to look more closely at the relevant activities' "intrinsic relationship with each other (physical proximity, stages of production process, etc.) and their impact on economic viability of the plant (scheduling down time in light of production targets, economies of scale, etc.)." *Id*. Similarly, the 2009 NSR Aggregation Action said that "whether a physical or operational change is dependent on another for its viability is still a relevant factor in assessing whether the changes should be aggregated," and "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." 74 FR 2378.

In addition, the "substantially related" criterion is not materially different from the factors the agency has considered in previous project aggregation decisions. Over time, the EPA has used various terms and phrases – *e.g.*, "intrinsic relationship" as was used in the 3M Memorandum – to describe the basis for why multiple nominally-separate changes at a source should be treated as a single project for NSR applicability purposes. The term "substantially

related" is, therefore, little more than a functional synonym for other terms that the EPA has historically used to characterize its project aggregation policy. While sources and permitting authorities making project aggregation determinations may continue to use the EPA's previous terms, and may rely on other terms or phrases going forward, we believe that the terminology used should ultimately express a standard for determining whether the activities are or are not substantially related. Thus, we believe "substantially related" works effectively as an umbrella term to include these previous descriptors for analyzing the relationship between projects that warrant aggregation.

Finally, the matter of defining the scope of a project was raised, in a different context, in the Project Emissions Accounting Memorandum issued on March 13, 2018. There, we observed that, as general matter, the source itself is responsible for defining the scope of its own project, subject to the limitation that the source cannot seek to circumvent NSR by characterizing the proposed project in a way that would separate a single project into multiple projects. We further pointed out that, "[s]ubject to the equivalent understanding that it might be possible [for a source] to circumvent NSR through some wholly artificial *grouping* of activities, the EPA does not interpret its NSR regulations as directing the agency to preclude a source from reasonably defining its proposed project broadly, to reflect multiple activities."[18]

In the Project Emissions Accounting Memorandum, we noted that EPA was then evaluating whether to undertake a future notice-and-comment rulemaking to implement, through changes to the regulatory text itself, the interpretation of the NSR applicability provisions set forth in the memorandum. At such time as we proceed with that rulemaking, we will look to

[18] Project Emissions Accounting Memorandum at 9 (emphasis added).

provide further guidance with respect to properly accounting for the scope of a project in which a source is seeking to take account of emission decreases at Step 1 of the NSR applicability analysis. Meanwhile, in advance of that rulemaking, we take the opportunity here to clarify that, as a general matter, it is neither necessary nor appropriate to take into consideration such matters as whether emission decreases attributable to a particular activity are "integral" to the overall project, as had once been proposed by a petroleum refinery to the EPA.[19] Our current view is that the concerns regarding the real possibility that NSR might be circumvented through some artificial separation of activities where it would be unreasonable to consider them separate projects – *i.e.*, the concerns which the 2009 NSR Aggregation Action is intended to address – are not so obviously presented by the situation where a source itself is choosing to group together, as a single project, activities to which a projected emissions decrease is attributable.[20] In a future rulemaking to clarify, through regulatory text changes, the interpretation set forth in the Project Emissions Accounting Memorandum, the EPA will be taking comment on whether our current view of this issue is reasonable, whether the "substantially related" criterion described here may speak to this issue, and other related matters.

3. Legal Basis Is Sound

[19] Letter from Steven C. Riva, U.S. EPA Region 2, to Kathleen Antoine, HOVENSA, LLC, "Re: Emission Decreases Integral to Projects" (June 7, 2010) ("EPA, by this letter, is not opining on the merits of HOVENSA's analysis regarding the underlying basis for 'integral to the project' approach.").

[20] Indeed, the EPA views this latter situation as one where sources could potentially be incentivized to seek out emission reductions that might otherwise be foregone entirely – *e.g.*, because of perceived complexity with contemporaneous netting under Step 2 of the NSR applicability analysis.

We believe the 2009 NSR Aggregation Action is legally supportable and makes sense for sometimes difficult case-by-case determinations required for assessing whether to aggregate nominally-separate projects. Contrary to the petitioner's argument, the use of the term "substantially related" would not create a carve-out from the scope of the statutory definition of "modification."

Drawing on arguments made by NRDC in its petition, in 2010 we had postulated, while "[m]uch of the emphasis" of *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (*New York II*) and other cases had been on whether the EPA "could exclude small changes from being considered potential modifications as defined in the Act," the court's reasoning in *New York II* also applies to a rule that would split apart one change into separate changes in order to limit the applicability of NSR." 75 FR 19571. The D.C. Circuit's *New York II* decision had focused on whether the EPA's amendment to the "routine maintenance, repair and replacement" provision of the NSR regulations which provided that a specifically defined category of "equipment replacement" projects did not constitute a "physical change or change in the method of operation," was lawful. The court in *New York II* held that it was *not* lawful, opining that the EPA "must apply NSR whenever a source conducts an emissions-increasing activity that fits within one of the ordinary meanings of physical change." 443 F.3d at 885.

In the 2010 Reconsideration Proposal, we said we then read the D.C. Circuit's opinion as "requir[ing] EPA to aggregate any group of small changes" that were "sufficiently related to 'fit[] within one of the ordinary meanings of 'physical change.'" 75 FR 19571. In this regard, we said that we "agree[d] with [NRDC's] contention that, to the extent that our 'substantially related' interpretation," as set forth in the 2009 NSR Aggregation Action, would "exclude

meanings that fit within a reasonable understanding of the ordinary meaning of 'any physical change,'" that interpretation would "impermissibly narrow the scope of CAA section 111(a)(4)." *Id.* We sought comment on this analysis of the statute and *New York II*.

Upon further consideration and after reviewing the public comments on this reconsideration proposal, the agency does not read *New York II* as supportive of the notion that the "substantially related" interpretation set forth in the 2009 NSR Aggregation Action is somehow contrary to the language of CAA section 111(a)(4). While we had previously suggested that there might be some weight to NRDC's argument that the "'aggregation of nominally separate changes that are *not* substantially related' also may be within an ordinary meaning of physical change," 75 FR 19571, *citing* NRDC Petition at 5-6 (emphasis in original), we do not now perceive any merit in NRDC's assertion.

With NRDC's arguments in mind, the agency at one point read *New York II* as suggesting that the CAA "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." 75 FR 19571. Based on this, we were concerned that, "[i]f 'substantially related' would omit an ordinary, common meaning of physical change that would bring an emissions-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')." *Id.* Thus, we reasoned at the time "that, to the extent that [the] 'substantially related' interpretation would exclude meanings that fit within a reasonable understanding of the ordinary meaning of 'any

physical change,'" then the 2009 NSR Aggregation Action "would impermissibly narrow the scope of CAA § 111(a)(4)." *Id.*

We now believe that such concerns were unwarranted. Upon further consideration, we do not view *New York II*, properly understood, as providing support for the proposition that a "common meaning" of a single "change" would include multiple changes, much less multiple, separate changes that are not substantially related, such as changes which are undertaken at a source at different times, or undertaken for different purposes, or which are otherwise unrelated to each other. That is, the EPA's current view is that nothing in *New York II* supports, much less compels, a reading of the CAA under which all "nominally-separate changes" are deemed to "comprise" a single "project," where those changes are not substantially related. Nevertheless, under the interpretation reflected in the 2009 NSR Aggregation Action, multiple changes that are "substantially related" are to be considered to be one project for purposes of determining NSR applicability.

Finally, to the extent that NRDC argues that the aggregation of activities that are not substantially related into one activity that fits within the ordinary meaning of a physical change – and not aggregating those changes to compare to the significance level would violate *New York II* – it has provided no examples where that may be the case and have not followed the reasoning of their argument to its logical conclusion. This argument would require the EPA to prove a negative: that whatever interpretation or policy on aggregation we adopted would not exclude any level of aggregated activities that fit within the ordinary

meaning of a physical change. This impossible task would mean that even the EPA aggregation policy prior to the 2009 NSR Aggregation Action was in violation of *New York II* because it allowed a facility to sometimes disaggregate activities when, if aggregated, they would fall within the ordinary meaning of physical change. A better approach to defining the scope of the ordinary meaning of physical change is to provide, as we did in the 2009 NSR Aggregation Action, a principle for source owners or operators to follow, here the "substantially related" principle, when defining the scope of "a physical change in, or change in method of operation of," pursuant to 40 CFR 52.21(b)(52), in a particular case.

4. Adoption Is Not Mandatory

We acknowledge that, by not making any changes to the regulatory text, as had been proposed, it may have been somewhat unclear to some whether state and local air agencies have to adopt or implement the elements of the 2009 NSR Aggregation Action, and, if so, how they should do so. In the 2010 Reconsideration Proposal, we expressed our agreement with "NRDC's assertion that the state and local implementation requirements of the NSR Aggregation Amendments are unclear," and that 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." 72 FR 19572. Taking account of this confusion, the agency considered that it "added support for our preferred position in this notice, which is to revoke" the 2009 NSR Aggregation Action. *Id*.

We now find such concerns over potential "confusion" to have been overstated. In the Response to Comments document for the 2009 NSR Aggregation Action (2009 RTC), the agency had specifically noted that "[s]ince we are not promulgating the proposed rule regulatory

changes, we are not adding NSR minimum program elements that would require states to modify their SIP." 2009 RTC at 56. The agency continued that it would "begin applying the interpretations laid out in the final action to activities that postdate actions after the effective date of the final rulemaking notice." *Id.* "At that time," the EPA explained, states "may also begin applying EPA's interpretations to the extent they do not conflict with their approved SIPs." *Id.* We now believe it is likely that state and local permitting authorities would have understood this straightforward explanation.

Further, as previously discussed, determining whether a source has sought to circumvent NSR by failing to treat nominally-separate activities as a single project is inherently case-specific and fact-dependent. Given this, it is not reasonable to imagine that perfect clarity could ever be achieved. To the extent, however, that the 2009 NSR Aggregation Action, in setting forth both the "substantially related" interpretation and the EPA's policy for applying that interpretation, provides some meaningful guidance to sources and to state and local permitting authorities, we fail to understand how revoking the 2009 NSR Aggregation Action would serve to promote clarity.

Indeed, in this regard, we believe in most cases that sources and state and local air agencies already implement a standard that is similar to the substantially related standard. To the extent that a state or local air agency desires to formally adopt the 2009 NSR Aggregation Action, the EPA will provide support to those agencies to process SIP submittals and issue approvals, as warranted. In most cases, however, we do not think changes in state plans would be needed to implement this interpretation.

C. Completing the Reconsideration Proceeding

We believe that this final action addresses the concerns raised by the petitioner with respect to the 2009 NSR Aggregation Action – *e.g.*, adequate notice and logical outgrowth, the legal underpinnings of the action, state adoption, and our need to change or clarify our aggregation policy. Accordingly, this action concludes the reconsideration proceeding of the 2009 NSR Aggregation Action.

D. Lifting the Stay

On May 18, 2010, after a series of temporary administrative stays of the 2009 NSR Aggregation Action, the EPA exercised the provisions of the APA section 705 to postpone the effectiveness of the action "until judicial review is no longer pending or the EPA completes the reconsideration process." 75 FR 27644. Since this action concludes the reconsideration proceeding, and we have affirmed the legal consistency and policy appropriateness of the 2009 NSR Aggregation Action, we are hereby lifting the indefinite stay of the action. The effective date of the 2009 NSR Aggregation Action begins again on [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

IV. Environmental Justice Considerations

We believe that this action does not have any effect on environmental justice communities. Through this action, the EPA is affirming its interpretation that its current NSR regulations allow for the 2009 NSR Aggregation Action and, as such, no increased burden is expected for source owners, permitting authorities, or environmental justice communities.

V. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in

part, that petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator" or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This action completes the reconsideration proceeding and makes effective the 2009 NSR Aggregation Action. The 2009 NSR Aggregation Action is an interpretation of NSR rule language that applies in every state and territory in the United States where EPA is the permitting authority. Therefore, to the extent that this action is a "final action," it is "nationally applicable" within the meaning of CAA section 307(b)(1).

Under section 307(b)(1) of the Act, to the extent that this action is judicially reviewable, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

VI. 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)).

_____
Dated:

_____
Andrew R. Wheeler,
Acting Administrator.