January 22, 2021

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Re: Petition for Reconsideration of "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 85 Fed. Reg. 74,890 (Nov. 24, 2020), Docket ID No. EPA–HQ–OAR–2018–0048 and for Withdrawal of Guidance Memorandum titled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (March 13, 2018) (OAQPS-2020-683 and OAQPS 2020-223).

BY E-MAIL AND CERTIFIED MAIL

Dear Acting Administrator Nishida:

EPA has issued a final rule titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions

Accounting," 85 Fed. Reg. 74,890 (Nov. 24, 2020) (the "Project Accounting Rule"). Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, Adirondack Council, and Environmental Integrity Project ("Petitioners") petition for reconsideration of that rule pursuant to 42 U.S.C. § 7607(d)(7)(B). Due to the significance of the concerns set forth herein, Petitioners request that EPA stay the effectiveness of the rule during reconsideration for 90 days, as provided in 42 U.S.C. § 7607(d)(7)(B). Petitioners further request that EPA conduct reconsideration proceedings and withdraw the Project Accounting Rule within the 90-day-stay period, as contemplated by 42 U.S.C. § 7607(d)(7)(B). Finally, Petitioners request that EPA immediately withdraw the memorandum issued by former Administrator Scott Pruitt on March 13, 2018 titled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" ("Pruitt Memo").[1] Because the Project Accounting Memo was issued without notice or comment opportunity, it can be withdrawn without notice and comment through direct final action.

I. BACKGROUND

The Clean Air Act's New Source Review ("NSR") requirements are triggered by, *inter alia,* "modification" of a major source of air pollutants.[2] The Act defines a modification as: "any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[3]

EPA's regulations interpret the statutory definition of "modification" to require NSR for a physical or operational change that increases a source's emissions above the applicable significance threshold both when the change is considered alone, and when the change is considered in combination with the emission impacts of all other "contemporaneous" changes at the source.[4] Throughout the NSR program's history, EPA has instructed sources and regulators to make that emissions increase determination using a two-step process, which it memorialized in its NSR regulations in 2002.[5]

Under the two-step process, a source must first determine "[t]he increase in emissions from a particular change or change in the method of operation at a

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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/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf [Docket I.D. EPA-HQ-OAR-2018-0048-0008].

[2] 42 U.S.C. §§ 7475(a), 7479(2) (PSD requirements, applicable in areas attaining national ambient air quality standards, and referring to definition of "modification" provided in 42 U.S.C. § 7411(a)); 42 U.S.C. §§ 7501(4), 7502(c)(5) (Non-Attainment NSR, applicable in areas not attaining air quality standards, and also referring to definition of "modification" provided in 42 U.S.C. § 7411(a)).

[3] 42 U.S.C. § 7411(a)(4).

[4] 40 C.F.R. § 52.21(b)(3)(i).

[5] 67 Fed. Reg. 80,186, 80190 (Dec. 31, 2002).

stationary source."[6] (Step 1). If the increase determined under Step 1 would be "significant,"[7] the regulations instruct the source to determine whether the change would result in a "significant net emissions increase" at the source (Step 2).[8] "Net emissions increase" is defined to mean the sum of the emissions increase from the change (calculated under Step 1) and "[a]ny other increases or decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable" (Step 2).[9] To be "creditable," a contemporaneous emission decreases must be, among other things, "enforceable as a practical matter at and after the time that actual construction on the particular change begins."[10]

EPA has long interpreted its regulations as requiring that under the two-step analysis, an emission *decrease* can be considered only at Step 2, regardless of whether the decrease results from the physical or operational change under consideration. This position is memorialized in EPA's 1990 New Source Review Workshop Manual, [11] which declares: "Emission decreases associated with a proposed project (such as a boiler replacement) are contemporaneous and may be considered along with other contemporaneous emissions changes at the source. However, they are not considered at [Step 1] in the analysis."[12] The NSR Manual further emphasizes that "[i]t is important to note that when *any* emissions decrease is claimed (including those associated with the proposed modification), *all* source-wide creditable and contemporaneous emissions increases and decreases of the pollutant subject to netting must be included" in the NSR applicability determination.[13] EPA reaffirmed that its current regulations do not permit consideration of decreases at Step 1 in a lengthy analysis provided in response to a PSD permit application from HOVENSA.[14] EPA confirmed, therein, that the

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[6] 40 C.F.R. 52.21(b)(3)(i)(a).
[7] 40 C.F.R. § 52.21(a)(2)(iv)(a) (increase needs to be "significant"); 40 C.F.R. § 52.21(b)(40) (defining "significant").
[8] 40 C.F.R. § 52.21(a)(2)(iv)(a).
[9] 40 C.F.R. § 52.21(b)(3)(i)(b). *See also* 45 Fed. Reg. 52,676, 52,698 (Aug. 7, 1980).
[10] 40 C.F.R. § 52.21(b)(3)(vi).
[11] EPA, New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting (Draft, Oct. 1990) ("NSR Manual"), https://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf. In its response to comments accompanying the final rule, EPA contends that the NSR manual is no longer relevant because it pre-dated the 2002 revisions to the federal NSR regulations. U.S. EPA, Response to Comments Document on Proposed Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting" – 84 FR 39244, August 9, 2019 (Oct. 2020) ("Response to Comments"), at 10 [Docket I.D. EPA-HQ-OAR-2018-0048-0099]. To the contrary, in promulgating the 2002 rule changes, EPA was clear that the new language incorporating the "two-step process" for determining NSR applicability simply "clarif[ied] what was always [EPA's] policy. 67 Fed. Reg. at 80,190.
[12] NSR Manual at A.46.
[13] *Id.* at A.36 (emphasis in original).
[14] Letter from Barbara A. Finazzo to Kathleen Antoine dated March 30, 2010 [Docket I.D. EPA-HQ-OAR-2018-0048-0016].

amendments made in its 2002 NSR Reform Rule did not alter "the historic two step NSR applicability test."[15]

Under the project emissions accounting approach first announced by EPA in the 2018 Pruitt Memo and formally adopted in the Project Accounting Rule, instead of calculating only increases resulting from a planned change at Step 1 of the NSR applicability analysis and then considering any offsetting contemporaneous decreases in Step 2, a source may cobble together a group of activities into a "project," and consider the project's increases *and decreases* at Step 1.[16] If the Step 1 calculation does not reveal a significant emission increase, the analysis concludes, and the project can proceed without undergoing NSR.

A fundamental problem with EPA's new approach to determining NSR applicability is that it enables a physical or operational change to escape NSR at Step 1—which is intended to account for emission increases that result "from" a planned change[17]—based on emission decreases that do not result from the change but are instead the result of a separate change packaged into the same "project." If consideration of those unrelated emission decreases cancels out the significant emissions increase resulting from the change, the change is not subject to NSR, and the source does not need to perform Step 2, even if consideration of all contemporaneous increases and decreases under Step 2 would show that the change will in fact result in a significant source-wide net emissions increase. Thus, under the final rule, a source can make an emissions-increasing change without complying with NSR requirements, including use of up-to-date pollution control technology and the requirement to obtain emission offsets in nonattainment areas. Such an outcome plainly contravenes the Clean Air Act's directive that a source comply with NSR before undertaking "any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[18]

Even if the final rule included adequate safeguards to ensure that only emission decreases that will result from the change under consideration are considered in Step 1—which it does not—the final rule would still be unlawful and arbitrary due to its failure to require emission decreases counted in Step 1 to be contemporaneous and enforceable. Throughout the NSR program's history, these key regulatory safeguards have ensured that any emission decreases relied upon to

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[15] *Id.* at 3.

[16] EPA's final action implements this new approach by interpreting certain existing regulations in 40 C.F.R.§§ 51.165, 51.166, and Appendix S as already allowing a project's emission decreases to be included in Step 1, and by revising the language of Appendix S at IV(I)(1)(v)-(vi) and of the regulations at 40 C.F.R.§§ 51.165(a)(2)(ii)(F)-(G), 51.166(a)(7)(iv)(f)-(g), and 52.21(a)(2)(iv)(f)-(g) to clarify that its new approach is allowed under those provisions as well.

[17] *See, e.g.,* 40 C.F.R. § 52.21(b)(3)(i)(a).

[18] 42 U.S.C. § 7411(a)(4).

offset an otherwise emissions-increasing change "is real and [will] remain in effect," and reflect actual source emissions at the time the change is made.[19]

Petitioners and others raised the concerns described above, as well as many others, during the public comment period.[20] The final rulemaking raises additional concerns of central relevance that, as shown below, were either impracticable to raise during the public comment period or that arose after the public comment period. Accordingly, Petitioners request that the EPA conduct reconsideration proceedings on this rulemaking.

II. STANDARD OF REVIEW

CAA section 307(d)(7)(B) provides, in relevant part:

> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time 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, the Administrator *shall convene* a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.[21]

Accordingly, the CAA *requires* that EPA convene a proceeding for reconsideration when it was impracticable to have raised an issue during the comment period and the issue is of central relevance to the outcome of the rule.

The D.C. Circuit has held that it is impracticable to object to an approach EPA takes in the final rule if the final rule is not a "logical outgrowth" of the proposed rule.[22] Even if EPA's conclusion could be considered a logical outgrowth of the proposal, previously undisclosed findings underlying the conclusion may be the proper subject of mandatory reconsideration.[23] A contrary rule would "place the unreasonable burden on commenters not only to identify errors in a proposed rule

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[19] 45 Fed. Reg. 52,676 (Aug. 7, 1980).
[20] *See* Sierra Club, *et al.*, Comments on "Proposed Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 84 Fed. Reg. 39,244 (Aug. 9, 2019) [Docket I.D. EPA-HQ-OAR-2018-0048-0079] ("Comments").
[21] 42 U.S.C. § 7607(d)(7)(B) (emphasis added).
[22] *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 319 (D.C. Cir. 2020).
[23] *See id*. at 320.

but also to contemplate why every theoretical course of correction the agency might pursue would be inappropriate or incorrect."[24]

The key inquiry in the central relevance determination is "whether the objections provide substantial support for the argument that the regulation should be revised."[25] An objection that "go[es] to the very legality" of the final rule passes this test.[26] EPA may, furthermore, reconsider its actions even where the standards for mandatory reconsideration are not met.

Applying these principles to the final rule it is clear that EPA must, and in any event should, grant reconsideration.

III. REASONS FOR RECONSIDERATION

A. The Final Rule Fails to Ensure That Offsetting Emission Decreases Used to Show That a "Project" Will Not Cause a Significant Emissions Increase in Step 1 of the NSR Applicability Analysis Result from the Change Being Evaluated.

Objection: EPA's final rule is fundamentally flawed because it fails to ensure that the emission decreases used to avoid NSR applicability at Step 1 result from the change being evaluated. As explained below, though EPA indicates in the preamble to the final rule that sources should use the "substantially related" test set forth in EPA's 2018 action on "project aggregation"[27] to determine whether it is appropriate to consider a particular emission decrease at Step 1, this test is not included in the final regulation and the preamble discussion indicates that its use by states and sources is optional.

Discussion: The Clean Air Act requires a source to undergo NSR prior to making "any" physical or operational "change" that "increases the amount of any pollutant emitted" by the source.[28] Under the project emissions accounting approach announced in the final rule, a source can avoid NSR for a planned "project"—a term that EPA explains is "synonymous" with "change"[29]— if it determines that the sum of the emission increases and decreases projected to result from the project will be insignificant. If the source makes that determination, it need not proceed to Step 2, which requires consideration of all other contemporaneous emission increases and decreases source-wide. Among other deficiencies, the final rule omits safeguards that might ensure that the emission decreases counted in Step 1 result from the

[24] *Id*.
[25] *Id*. at 322.
[26] *Id*.
[27] 83 Fed. Reg. 57,324 (Nov. 15, 2018).
[28] 42 U.S.C. § 7411(a)(4).
[29] Response to Comments at 19.

planned change, rather than from unrelated activities that should only be considered in Step 2 in combination with other contemporaneous emission increases and decreases. Thus, the final rule unlawfully and arbitrarily enables a source to evade NSR for an emissions-increasing change by grouping it into a "project" with unrelated activities such that the project's emission increase will be found insignificant at Step 1.

After reviewing comments on the proposed rule by Petitioners and others, EPA conceded that, as proposed, the project emissions accounting approach could "allow sources to avoid NSR even though the project under consideration—the physical change or change of method of operation for purposes of 111(a)(4), see 40 CFR § 52.21(b)(8)—would itself result in a significant emission increase by including unrelated decreases."[30] EPA purported to remedy that problem in its final action by declaring that it would be "appropriate" for sources to apply the "substantially related" test set forth in its 2018 project aggregation policy to ensure emission decreases counted at Step 1 are related to the change in question.[31] According to EPA, application of this test "should be sufficient to prevent sources from arbitrarily grouping activities for the sole purpose of avoiding the NSR major modification requirements through project emissions accounting."[32] However, nothing in the final rule requires that states require use of the "substantially related" test when sources engage in "project emissions accounting." The final regulations themselves say nothing whatsoever regarding a requirement to ensure that decreases counted in Step 1 are "substantially related" to the change under consideration.[33] Furthermore, EPA admits that under its 2018 project aggregation policy, "state and local air agencies with approved SIPs are and were not required to amend their plans to adopt the interpretation that projects should be aggregated when "substantially related."[34] Finally, throughout the preamble to the final rule, EPA refers to the "substantially related" test as an "appropriate" approach that states and sources "may" use, *e.g.,* EPA asserts that "[a]pplication of this policy *may* assist sources that are responsible for determining the scope of a project to make

[30] Response to Comments at 36.
[31] 85 Fed. Reg. at 74,895.
[32] 85 Fed. Reg. at 74,898.
[33] *See generally,* 85 Fed. Reg. at 74,908-74,909 (final regulatory revisions).
[34] 85 Fed. Reg. at 74,895 n.57. *See also* 83 Fed. Reg. 57,324, 57,328-29 (Nov. 15, 2018) ("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.'")

that determination and avoid over aggregation or under aggregation of activities that could subsequently be considered an effort to circumvent the NSR program."[35]

Simply by identifying a test that sources and states *could* utilize to demonstrate that emission decreases result from the change under consideration does not remedy the unlawfulness of EPA's final rule. By failing to require that emission decreases considered in Step 1 be "substantially related" (or to establish any other mandatory criteria designed to show that such decreases will result from the change under consideration), EPA has failed to fulfill its statutory duty to implement and enforce the Clean Air Act's NSR requirements.[36] Though EPA contends that the final rule fills a statutory gap regarding how to determine "whether a physical change or change in the method of operation 'increases' emissions,"[37] EPA is nonetheless obligated to address all "important aspect[s] of the problem" in filling that gap.[38] Given 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," [39] ensuring that Step 1 decreases actually are substantially related to the change in question plainly constitutes and important factor that must be addressed before allowing sources to utilize project emissions accounting. Accordingly, EPA's failure to mandate use of the substantially related test (or a similar safeguard) renders its final rule unlawful and arbitrary.

Basis for Reconsideration: The grounds for Petitioners' objection to EPA's failure to require that states and sources ensure that any decrease included in Step 1 of the NSR applicability analysis is substantially related to the change in question arose after the period for public comment. In the proposal, 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 activity (or activities) to which the emissions decrease is projected to occur is 'substantially related' to another activity (or activities) to which an emissions

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[35] 85 Fed. Reg. at 74,895 (emphasis added). *See also, id.* ("it is appropriate to apply" the project aggregation policy); *id.* at 74,900 (stating that the aggregation policy's "substantially related" test "provides the appropriate basis for sources to determining the scope of a project in Step 1 of the NSR applicability analysis").

[36] *See, e.g.,* 42 U.S.C. § 7410(a)(2)(A) (requiring state implementation plans to "include enforceable emission limitations and other control measures, means, or techniques … as necessary and appropriate to meet the applicable requirements of this chapter")(emphasis added); § 7410(a)(2)(C) (plan must "provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source … as required in parts C and D of this subchapter); § 7477 ("The Administrator shall … take such measures … as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part").

[37] 85 Fed. Reg. at 74,894.

[38] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

[39] 85 Fed. Reg. at 74,900.

increase is projected to occur."[40] However, EPA's proposed regulatory text did not include such a requirement because, at the time, EPA "believe[d] that taking account of emission decreases at Step 1 does not present any reasonable concerns regarding NSR circumvention."[41] Specifically, EPA contended that it was unnecessary "to adopt the same criteria that apply for separation of activities (i.e., under aggregation) to the grouping of activities, by considering such grouping to potentially constitute 'over aggregation' that, in turn, may constitute NSR circumvention."[42] In the final rule, EPA acknowledged that a requirement that emission decreases counted in Step 1 be "substantially related" to the physical or operational change under consideration is in fact necessary to "alleviate[] concerns about potential NSR circumvention in Step 1 of the NSR major modification applicability test."[43] In particular, EPA now concedes that the "substantially related" test is necessary "to prevent sources from arbitrarily grouping activities for the sole purpose of avoiding the NSR major modification requirements through project emissions accounting."[44] Yet, despite EPA's solicitation of comments on whether it would be reasonable "to require" use of the "substantially related" test,[45] the text of the final rule fails to require that emission decreases counted at Step 1 be substantially related to the change in question, and EPA's statements in the preamble to the final rule indicate that use of the "substantially related" test is optional. Nothing in the proposal suggested that EPA might agree that a "substantially related" test is needed to prevent NSR circumvention but nonetheless fail to make the use of such test a mandatory feature of its final project emissions accounting rule.

Petitioners' objection is of central relevance to the outcome of the rule because, as EPA admits, requiring emission decreases counted at Step 1 to be substantially related to the change under consideration is needed to prevent NSR circumvention.

B. The Final Rule Unlawfully Allows a Source to Avoid NSR by Offsetting Emission Increases Resulting from a Change with Non-Contemporaneous Emission Decreases.

Objection: In their comments on the proposal, Petitioners argued that the proposed project emissions accounting approach contravened the Clean Air Act's requirement that NSR apply to any change that "increases the amount of any pollutant emitted" by a source because, *inter alia*, it would allow a source to avoid NSR based on offsetting emission decreases that are not contemporaneous with the

[40] 84 Fed. Reg. at 39,251 (emphasis added).
[41] *Id.*
[42] *Id.*
[43] 85 Fed. Reg. at 74,900.
[44] 85 Fed. Reg. at 74,898.
[45] 84 Fed. Reg. at 39,251.

change under consideration.[46] In the final rulemaking, EPA contends that application of the "substantially related" test from its 2018 project aggregation policy will ensure that any emissions increases considered in Step 1 are contemporaneous "because, the 'substantially related' test has a temporal component and . . . the decreases must be part of the same project."[47] Specifically, EPA contends that the project aggregation policy "appl[ies] a rebuttable presumption that project activities that occur outside a 3-year period are not related and should not be grouped into one project."[48] As explained above, however, neither the text of the final regulations nor the preamble indicates that states and sources must utilize the substantially-related test when applying the project emissions accounting approach authorized by the final rule.[49] 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 non-contemporaneous emission decreases. Furthermore, even if the final rule did require use of the substantially related test, a "rebuttable presumption" that activities occurring outside a 3-year period cannot be included in the Step 1 analysis does not equate to requiring that offsetting emission decreases be contemporaneous.

Basis for Reconsideration: The grounds for Petitioners' objection to EPA's reliance on application of the "substantially related" test to ensure that emission decreases counted in Step 1 are contemporaneous arose after the public comment period. As explained above, 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. Furthermore, EPA's proposal made no mention of any requirement that Step 1 decreases be contemporaneous with the emission increases resulting from the change in question. It was only in the final action that EPA announced its conclusion that the "substantially related" test is appropriate for use in deciding which decreases to consider in Step 1, and that use of this test will ensure that offsetting emission decreases are contemporaneous with emission increases projected to result from the change under review.[50] Petitioners' objection is of central relevance to the rulemaking because allowing a source to avoid NSR based on offsetting emission decreases that are not contemporaneous with the change under review contravenes the Clean Air Act's command that NSR apply to any change that "increases the amount of any pollutant emitted" by a source.[51]

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[46] Comments at 14-16.
[47] 85 Fed. Reg. at 74,898.
[48] 85 Fed. Reg. at 74,900. *See also, id.* (quoting 74 Fed. Reg. 2,376, 2,380 (January 15, 2009), which states: "'When activities are undertaken three or more years apart, there is less of a basis that they have a substantial technical or economic relationship because the activities are typically part of entirely different planning and capital funding cycles.").
[49] *Supra* at 7-8.
[50] *See, e.g.,* 85 Fed. Reg. at 74,898.
[51] Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4) (defining "modification").

C. EPA Has Not Ensured that Projected Emission Decreases Will Occur and Will Be Maintained.

As noted above, EPA's rule would permit a source-owner to offset a physical or operational change that will increase a source's emissions together with other physical or operational changes that will decrease emissions, and thereby avoid NSR. EPA concedes that the final rule does not require that these offsetting decreases be enforceable.[52] It states, instead, that such decreases are subject only to EPA's requirements for "projecting [an] actual emissions change at a facility."[53] It claims that its reversal regarding the "substantially related" test will prevent "aggregating into a single project those activities that do not represent such project."[54] And it claims that its regulations are "adequate to ensure sufficient monitoring, recordkeeping and reporting of emissions" so as to provide the necessary assurance that any decrease in emissions claimed by a source to avoid NSR actually occurs and is maintained.[55]

Objection: EPA has conceded that, to be lawful, its rule must ensure that only activities meeting its "substantially related" test be grouped together as a single project. But the monitoring and recordkeeping provisions of 40 C.F.R. § 52.21(r)(6) are insufficient to assure that sources comply with the "substantially related" test. EPA's pre-project requirements include only 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, together with the owner's projection of baseline and projected emissions."[56] Those provisions permit no meaningful oversight of the "technical or economical interconnection" between the various activities grouped into a project (nor whether there are equally interconnected activities that the source has chosen to exclude from the "project."[57] Nor are they sufficient to confirm that the timing of the activities grouped into a single project conform with the timing-related requirements of the substantially related test. *See id.* (noting rebuttable presumption that activities that occur outside a 3-year period are not related). They consequently provide no capacity to enforce EPA's substantially related test, even where that test applies.

Following their pre-project record-keeping, EPA's regulations require only that sources track emissions.[58] Yet under EPA's new rule, a source's emissions no longer allow one to determine whether a source has violated NSR. Emissions may

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[52] 85 Fed. Reg. at 74,898.
[53] *Id.*
[54] *Id.* at 74,899.
[55] *Id.* at 74,895, 74,900. *See* 71 Fed. Reg. 54,235 (Sept. 14, 2006) (acknowledging the EPA must ensure that emissions decreases relied upon to avoid NSR actually occur and are maintained).
[56] *Id.*
[57] *See* 85 Fed. Reg. at 74,895.
[58] 40 C.F.R. 52.21(r)(6)(iii).

increase as a result of modifications undertaken at the plant *without* triggering NSR—because the owner has gerrymandered its emissions accounting so as to divide the increase between two "projects," each of which individually falls below the significance threshold.[59] In EPA's newly announced view, whether such an emissions increase violates NSR depends upon the details of that gerrymandering—in particular whether it conforms with EPA's "substantially related" policy. But EPA's regulations do not permit state and federal authorities (or anyone else) 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." Making matters worse, sources may avoid even these minimal requirements if their projection meets the "reasonable possibility" requirements of 40 C.F.R. § 52.21(4)(6)(vi).[60]

Basis for Reconsideration: EPA's final rule asserts, for the first time, that the Agency's "substantially related" policy will apply and ensure that its Rule meets the requirements of the Act. Petitioners had no opportunity to raise objections to that assertion during the comment period, nor to assess the sufficiency of the above-described requirements in assuring compliance with that policy. That EPA's regulations provide no insight into sources' compliance with the Act's NSR requirements, as EPA has now interpreted them, renders its Rule unlawful.[61] This objection is consequently of central relevance, and consequently requires mandatory reconsideration.

Objection: We pointed out, in our prior comments, that EPA's actual-to-projected-actual methodology could not be reconciled with the Agency's claim that decreases may be assessed through that methodology.[62] EPA's final rule confirms as much. EPA states that its projected-actual methodology makes it impossible to ensure that decreases, claimed by sources to avoid NSR, are enforceable and so actually occur.[63] EPA notes that its projected-actual methodology permits sources to exclude some unrelated emissions increases.[64] But the regulations contain no provision by which to distinguish: those permissible unrelated *increases*, on the one hand; from a source's failure to maintain *decreases* that it relied upon to evade NSR at Step 1 of the regulatory calculation, on the other.[65] For that reason, EPA observes, its regulations make it impossible to prohibit the latter (failing to complete Step 1 decreases) without also prohibiting the former (unrelated increases). From this EPA concludes that it has no choice but to allow sources to evade NSR based on unenforceable projected decreases.[66]

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[59] *See* Comments at 7.
[60] *See* Comments at 21.
[61] *New York,* 413 F.3d at 45.
[62] Comments at 23-24, 29.
[63] 85 Fed. Reg. at 74,899.
[64] 40 C.F.R. § 52.21(b)(41)(ii)(c).
[65] 85 Fed. Reg. at 74,899 & nn. 82-83.
[66] *Id.*

That gets it backwards. EPA's regulations render the Agency's interpretation unworkable. That is a reason to discard its interpretation—not to discard accepted statutory requirements.[67] EPA's projected-actual methodology does not permit the Agency to ensure that Step 1 decreases actually occur; that demonstrates that this methodology was not designed to permit consideration of offsetting emissions decreases. The necessary consequence is that EPA's regulations cannot be read to permit sources to consider decreases at Step 1.

Basis for Reconsideration: During the comment period, petitioners objected that EPA's regulations—including its projected-actual methodology—was flatly incompatible with inclusion of offsetting decreases at Step 1 of the netting analysis.[68] EPA's final rule underscores that objection. We urge EPA to voluntarily reconsider its action on these grounds.

IV. CONCLUSION

For the above reasons, Petitioners request that EPA stay the effectiveness of the rule during reconsideration for 90 days, conduct reconsideration proceedings and withdraw the Project Accounting Rule within the 90-day stay period, and immediately withdraw the Pruitt Memo.

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[67] *See* Comments 16-19 (describing enforceability requirement); *see Utility Air Regulatory Grp. v. EPA,* 573 U.S. 302, 328 (2014) (where EPA's interpretation conflicts with other portions of regulatory regime, EPA has "taken a wrong interpretive turn").

[68] This objection may, as a result, be raised during immediate judicial review of EPA's Rule.

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