

Comments of the American Forest and Paper Association, American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Council of Industrial Boiler Owners, Industrial Energy Consumers of America, Interstate Natural Gas Association of America, National Lime Association, National Mining Association, National Oilseed Processors Association, Portland Cement Association, Steel Manufacturers Association, the Air Permitting Forum, The Aluminum Association, the Auto Industry Forum, the Fertilizer Institute, the Corn Refiners Association, and the U.S. Chamber of Commerce

EPA, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting Proposed Rule

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I. INTRODUCTION

The American Forest and Paper Association, American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Council of Industrial Boiler Owners, Industrial Energy Consumers of America, Interstate Natural Gas Association of America, National Lime Association, National Mining Association, National Oilseed Processors Association, Portland Cement Association, Steel Manufacturers Association, the Air Permitting Forum, the Aluminum Association, the Auto Industry Forum, The Fertilizer Institute, the Corn Refiners Association, and the U.S. Chamber of Commerce (collectively, the Associations) offer these comments on the U.S. Environmental Protection Agency's (EPA or the Agency) proposed rule on *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting* published in the Federal Register on May 3, 2024.¹ The Associations' members own and operate facilities throughout the United States that are subject to Clean Air Act regulations, including the Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NNSR) (collectively, NSR) preconstruction review and permitting requirements under Title I of the Act. They also have extensive experience regarding the issues that arise when incorporating Title I permit terms into Title V operating permits.

When EPA issued the Project Emissions Accounting (PEA) rule in 2020,² it sought to formalize what had been a longstanding interpretation both before and after the 2002 NSR Reform Rules were adopted and to provide clarity to both regulated entities and permitting authorities. EPA made clear at the time that it viewed formalizing the PEA approach as encouraging environmentally beneficial projects. The Association commenters have found that such projects are more likely to be implemented and can be implemented more quickly as a result of EPA formally codifying PEA. Indeed, member companies utilize PEA often when evaluating process and/or product changes at complex facilities or when replacing equipment with new, lower-emitting, more-efficient equipment. Being able to account for project emissions decreases at Step 1 of the applicability analysis not only encourages facilities to make voluntary emissions reductions but also allows them to undertake projects to respond to changes in market conditions. If companies cannot respond to market shifts and demands in a timely manner (because of lengthy major NSR permitting timeframes), their competitiveness is harmed and projects simply may not occur. Companies also may utilize PEA when they need to address quality issues or where there are opportunities to improve energy and operational efficiency at a plant. Companies look to implement environmentally beneficial actions when they are otherwise developing projects that improve quality, increase efficiency or production, or provide other business benefits, in environmentally responsible ways and incorporating pollution prevention, in part to help these activities clear investment ROI hurdles present in responsible businesses. The proposed rule revisions would disincentivize such proactive actions and especially those with associated

¹ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting*, Proposed rule, 89 Fed. Reg. 36,870 (May 3, 2024) ("2024 Proposed PEA Rule Amendments").

² EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting*, Final rule, 85 Fed. Reg. 74,890 (November 24, 2020) ("2020 Final PEA Rule").

emissions reduction activities. In so doing, they would negate a key aspect of the NSR Reform rules adopted in 2002, “to allow sources more flexibility to respond to rapidly changing markets.”³

This proposal to amend the 2020 Project Emissions Accounting (PEA) Rule should not be adopted and the ability for major stationary sources to use PEA should be retained as is. We are concerned that the proposed actions combined with the various comment requests could lead to regulatory changes that undermine fundamental tenets that supported the NSR Reform rules adopted in 2002. We caution EPA against taking such steps. The NSR Reform rules were designed to allow permitting applicability to be determined using projections of activity and emissions instead of enforceable limits, based on the scope of a project as defined by the facility, and, since their inception, have successfully provided sources with greater flexibility in responding to rapidly changing markets and in planning for future investments, while also ensuring that projects that actually result in emissions increases above significance levels are subject to major NSR permitting.⁴ This comprehensive regulatory action was overwhelmingly upheld by the U.S. Court of Appeals for the D.C. Circuit.⁵ At the core of that action were two fundamental premises:

1. NSR applicability needs to be based on actual emissions increases, using baselines that reflect the operation of the emissions units and do not confiscate capacity (*e.g.*, by requiring companies to accept emissions limits as a result of one change and thereby precluding use of capacity that otherwise was available for the source, which undermines investment expectations).
2. Consistent with the goal of not confiscating capacity, NSR applicability does not require future emissions levels to be enforceable unless Step 2 netting, considering facility-wide contemporaneous projects, is involved or the projected actual emissions need to be limited for the projected increase to stay below the relevant significance levels.

One source of our concern with the proposed action is that it would affect several inter-related elements of the NSR Reform rules – from how the emissions effects of a project are counted to how they are memorialized/tracked in the future – in a way that is difficult to reconcile with the above tenets. In addition, the proposed action seems to overlay a new notion, specifically that EPA is the arbiter of what constitutes a “project” at a regulated entity’s facility. This overlay ignores a regulated entity’s determination that is inherently within a business’s domain to make and presumes that there is one “correct” definition of a project. This approach also departs from EPA’s traditional deference to the regulated entity’s definition of its project *unless there is evidence of that the regulated entity was artificially defining the project for the purpose of circumventing the NSR Rules* (*i.e.*, artificially dividing a single project into multiple projects, each of which is below the significance level).

Fundamentally, the record includes no meaningful evidence, either in the preamble or documents in the docket, that there is anything wrong with the NSR regulations as they currently

³ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, Final rule, 67 Fed. Reg. 80,185 (Dec. 31, 2002) (“2002 NSR Reform Rules”).

⁴ *Id.*

⁵ *New York v. EPA*, 413 F.3d 3, 35 (D.C. Cir. 2005).

exist, and, in turn, this proposed action creates several unnecessary implementation concerns in a program that has finally found stability after years of changes that required states to repeatedly revise state implementation plans.⁶ The CAA distinguishes between the state implementation planning process, which is the primary driver for requiring emission reductions across an airshed that is classified as nonattainment, and the NSR program, which is triggered based on a facility-specific analysis that is predicated on actions that a given facility is taking. Unlike the SIP planning process, the permitting process is focused on individualized facilities contemplating projects that could add emissions to an airshed. Rather than achieving emission reductions from existing operations based on the status quo, the NSR program focuses on ensuring that sources undertaking significant projects that add emissions take that opportunity to design controls into the project and to manage impacts on ambient air quality as a result of those increases. Consequently, each major NSR permitting action is already resource-intensive and time-consuming for states and regulated entities to administer, and this proposed action will require even more resources to manage the program. Given this, it is important to question decisions (like this proposed action) that would drive even more resources into the program, as this proposal would have states and regulated entities do.

We urge EPA to review its proposed action and assess each proposed rule revision against the fundamental purpose of NSR, which is to allow for controls to be designed into the project at the outset when large investments that cause significant emissions increases to occur.

II. THE 2020 PEA RULE IS CONSISTENT WITH THE CAA AND THE 2002 NSR REFORMS, AND IT SHOULD BE RETAINED.

In 1990, the U.S. Court of Appeals in the *WEPCo* case determined that EPA had violated its own major NSR applicability regulations in attempting to subject an existing emissions unit to permitting.⁷ Specifically, EPA claimed that an emissions unit that had operated for decades had not “begun normal operation,” with the consequence being that an “actual-to-potential” emissions test would apply. EPA claimed that WEPCo must project future emissions after a change using potential emissions. WEPCo contended that it should be able to rely on its longstanding operating history for that unit in making the future emissions projection. The Court agreed with WEPCo. Following that decision, EPA promulgated the predecessor regulations to the current major NSR rules, which provided that companies would assess baseline emissions using a representative period prior to the change and an estimate of future emissions based on the maximum *projected* operations.⁸

⁶ Stability in NSR regulations is important. Changing the NSR regulations creates obligations for states to change their implementation plans, which, in turn, must be approved by EPA. This creates transition issues as once state regulations are changed, the prior regulations remain in effect as a matter of federal law until EPA approves the changes to the rules as a federal matter. Changes in the regulations also require regulated entities to adopt new procedures.

⁷ *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (“*WEPCo*”); see also *Alabama Power Co. v. Costle*, 636 F.2d 323, 403 (D.C. Cir. 1980) (holding that when there is no net increase from contemporaneous changes within a source, PSD permitting requirements, procedural or substantive, cannot apply).

⁸ EPA, *Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources*, Final rule, 57 Fed. Reg. 32,314 (July 21, 1992).

EPA claimed during that rulemaking to limit the applicability of the actual-to-actual test demanded by the *WEPCo* court to electric utility steam generating units (EGUs) because those were the units at issue in the *WEPCo* case. EPA properly recognized in the 1990s that the court decision was in fact broader and that reform of NSR was needed. The Clinton Administration worked to propose NSR Reform rules, which were the subject of extensive comment, and following the change in Administration, the NSR Reform rules were promulgated (largely in the same form as the proposed Clinton Administration action).⁹

EPA explained its action at that time as follows:

Acting on the broad-based, bipartisan call for improving the New Source Review (NSR) program, ... EPA ... announced steps to increase energy efficiency and encourage emissions reductions. ... EPA reviewed the potential impact of the NSR program on investment in new utility and refinery capacity, energy efficiency and environmental protection. ***EPA's review found that the NSR program has impeded or resulted in the cancellation of projects that would maintain or improve reliability, efficiency[,] or safety of existing power plants and refineries.*** Reforms to NSR will ***remove barriers to pollution prevention projects, energy efficiency improvements, and investments in new technologies and modernization of facilities***....The actions being taken today will not take away the strong public health protection provided by the Clean Air Act through the National Ambient Air Quality Standards and the programs that ensure their compliance. ...When Congress established the New Source Review Program, it did so with a goal of providing for economic growth while maintaining or improving air quality. Today's announced reforms improve the program to ensure that it is meeting these goals. These reforms will:

- Provide greater certainty about which activities are covered by the NSR program;
- Remove barriers to environmentally beneficial projects;
- Provide incentives for industries to improve environmental performance at the same time they make changes to their facilities; and
- Maintain provisions of NSR and other Clean Air Act programs that protect air quality.¹⁰

The 2002 NSR Reform rules were vigorously litigated and, in 2005, the actual-to-projected-actual test promulgated in those rules was upheld.¹¹ The court remanded, however, for further explanation what has become known as the “reasonable possibility” requirement tied to recordkeeping and reporting requirements when this test is used to determine applicability.¹²

⁹ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, Final rule, 67 Fed. Reg. 80,185 (Dec. 31, 2002) (“2002 NSR Reform Rules”).

¹⁰ EPA, *Fact Sheet – New Source Review (NSR) Report and Improvements* (June 13, 2002) (emphasis added).

¹¹ *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

¹² *Id.* at 35-36.

As codified in the NSR regulations, these permitting requirements apply to a physical change in or change in method of operation (or “project” as this term is currently defined)¹³ undertaken at an existing major stationary source based on a two-step process. Step 1 involves a determination of whether the project would result in a significant emissions increase. If that project will result in a significant increase, then the analysis proceeds to Step 2 which considers whether the project will result in a facility-wide significant *net* emissions increase, considering creditable emission increases and decreases from other projects within a contemporaneous time period (generally five years). If the analysis indicates both (1) a significant emissions increase associated only with the project and (2) a significant *net* emissions increase that is facility-wide, then NSR permitting is triggered. A key in the NSR applicability analysis is determining the scope of the project being proposed.

Since the 2002 rule was issued, EPA has made only limited changes to the NSR regulations. Specifically, EPA promulgated the reasonable possibility rule, which essentially provides that sources must keep certain records when projected emissions exceed 50% of the significance level.¹⁴ This rule too was upheld in the D.C. Circuit.¹⁵

EPA explained the preference for the use of actual emissions impacts in the November 2002 Technical Support Document (Technical Support Document) for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations. In response to comments, EPA noted the following:

Under the “actual-to-potential” test, there is an initial presumption that the source will operate at [its] full potential to emit following the change. When the source believes that actual emissions won’t significantly increase, it is free to project the actual emissions increase, but it must set this level out in an enforceable permit cap. This cap is often set forth in a minor NSR permit or other enforceable mechanism, and must be accomplished before construction may begin. **Moreover, the cap may restrict the ability of a source to increase its emissions in association with an increase in production or hours of operation, which when done alone are not normally considered as physical or operational changes.** As stated above, the “actual-to-projected-actual” test also relies on the premise that a projection of a project’s post-change emissions is needed. In contrast to the “actual-to-potential” test, however, we believe that under the “actual-to-projected-actual” test, a projection of post-change actual emissions accompanied by recordkeeping, and in some instances reporting, **is sufficient.**¹⁶

¹³ See, e.g., 40 C.F.R. § 52.21(b)(52): “**Project** means a physical change in, or change in the method of operation of, an existing major stationary source.”

¹⁴ EPA, *Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping*, Final rule, 72 Fed. Reg. 72,607 (Dec 21, 2007) (codified at 40 C.F.R. §§ 51.165(a)(6)(vi), 51.166(r)(6)(vi), 52.21(r)(6)(vi)(b), and Appendix S to Part 51). EPA considered adopting a range of other potential thresholds, including 25% and 75% but landed on 50%. See *id.* at 72,611. Note that in determining whether the projected increase is above 50% of the significant emission rate triggering NSR, sources deduct any increases resulting from demand growth.

¹⁵ *New Jersey v. EPA*, 989 F.3d 1038, 1051 (D.C. Cir. 2021).

¹⁶ Page I-4-7 (emphasis added).

Also, in response to some confusion as to the effect of certain language in the 2002 rule, EPA issued a clarification in 2018 as to when nominally separate projects are to be considered a single project. This action by EPA, which affirmed its 2009 Project Aggregation Reconsideration, resulted in no regulatory text, but made it clear that projects should be aggregated if they are “substantially related” and established a rebuttable presumption that projects separated by three years should not be aggregated and considered a single project.¹⁷ Just as the D.C. Circuit upheld the 10-year baseline lookback period for the actual-to-projected-actual test on the basis of normal business cycles,¹⁸ EPA determined that three years was a reasonable approximation of business cycle planning for projects, such that as a general rule, companies do not plan single projects to take place over greater than a three-year period.¹⁹ Throughout the Aggregation action, EPA recognized that it must guard against positions that would effectively relate all projects at a facility simply because they support the basic purpose of the business, and that, first and foremost, companies define their projects.²⁰ The goal of the Aggregation action was to prevent intentional circumvention of NSR applicability by a company *artificially separating* what was intended as a single project into multiple projects for the purpose of circumventing NSR.

Finally, EPA issued the 2020 PEA Rule. To understand the context of the PEA Rule’s clarifications of the 2002 NSR Reform rules, it is helpful to consider the original NSR regulations. As the Clean Air Act does not expressly prescribe the two-step applicability determination, it was developed in context of interpreting the NSR regulations that EPA issued at the start of the program. EPA promulgated its core NSR regulations in 1980, which built out explicitly only the *second* step of the applicability determination process: the *net* emissions increase calculation among contemporaneous projects (*i.e.*, those occurring over five years).²¹ The first step of the applicability analysis, focused just on the project at issue, was largely implemented through guidance documents, and it relied on the definition of “actual emissions” and other relevant NSR regulatory definitions. Importantly, no regulatory provision prohibited the practice of considering both a project’s emissions increases and decreases at Step 1.²² Indeed, EPA’s regulations

¹⁷ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting, Final action*, 74 Fed. Reg. 2376 (Jan. 15, 2009) (“2009 Aggregation and Project Netting Final Action”); EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, Final action; lifting of administrative stay and announcement of effective date*, 83 Fed. Reg. 57,324, 57,331 (Nov. 15, 2018).

¹⁸ See *New York v. EPA*, 413 F.3d at 27.

¹⁹ EPA justified its selection of three 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.” 2009 Aggregation and Project Netting Final Action, 74 Fed. Reg. at 2,380.

²⁰ EPA has plainly stated that “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.” See EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, Final action; lifting of administrative stay and announcement of effective date*, 83 Fed. Reg. 57,324, 57,331 (Nov. 15, 2018) (“2018 Aggregation Final Action”). EPA further explained that “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.” *Id.*

²¹ EPA, *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, Final rule, 45 Fed. Reg. 52,676 (Aug. 7, 1980).

²² We recognize that EPA’s 1990 Draft NSR Workshop Manual stated that only emissions increases are counted at the initial step, and the project’s total effect on emissions is not considered until the second stage of the analysis. EPA,

recognized the need to consider increases and decreases from a project because the statute defines “modification” as a project that “results in” an emissions increase.²³ EPA also recognized that the applicability analysis stops once it is demonstrated that a project will not result in a significant emissions increase of regulated NSR pollutants.²⁴ Numerous state permitting authorities, likewise, applied a similar framework, first considering whether a project will cause or result in a significant emissions increase and, if so, then undertaking the facility-wide netting analysis to account for contemporaneous projects.²⁵

When EPA ultimately codified the two-step analysis in the 2002 NSR Reform rules,²⁶ it made clear that NSR permitting was to be based on the “actual” emissions impacts²⁷ of a project. Prior to 2002, the NSR rule language referenced emission decreases only in the context of netting under Step 2. Yet, as discussed above, reductions had in fact been considered at Step 1 in the NSR applicability analysis.²⁸ In its March 13, 2018 memorandum interpreting the 2002 NSR Reform regulations, EPA, to end any potential for confusion and inconsistency that may have occurred in the past, confirmed that decreases may be considered in Step 1. The 2020 PEA Rule codified this approach to remove any doubt that both increases *and decreases* can be considered in a Step 1 “significant emissions increase” analysis to determine NSR applicability. The 2020 PEA Rule also determined that emission decreases in Step 1 are to be treated in the same manner as increases and provided accountability through existing monitoring, recordkeeping, and reporting requirements. EPA further clarified that the guidelines regarding project aggregation and “substantial relatedness” would apply while emphasizing that sources were to remain in control of the definition of a project—and that such definitions are inherently case-by-case determinations.

New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting, at A-35 (Draft – Oct. 1990). The Draft Workshop Manual was never finalized and in the experience of the Associations’ members, state permitting authorities did not uniformly follow it (on this aspect and on other aspects of the program), in part because it was guidance, and a *draft* guidance at that. EPA recognized this in its 2006 proposed rule, “[t]he EPA recognizes that in the past some sources and permitting authorities have counted decreases in emissions at the individual units involved in the project when determining overall project emissions increases” EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting*, Proposed rule, 71 Fed. Reg. 54,235, 54,248 (Sept. 14, 2006) (“2006 Proposed Aggregation and Project Netting Rule”).

²³ 42 U.S.C. § 7479(2)(c) (definition of “construction” includes “modification” as defined in 42 U.S.C. 7411(a)); 42 U.S.C. § 7411(a)(4). EPA, *Part 52—Approval and Promulgation of State Implementation Plans, 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, Final rule, 43 Fed. Reg. 26,388, 26,394 (June 19, 1978).

²⁴ EPA, *New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting*, at A-36 (Draft – Oct. 1990).

²⁵ Alliance of Automobile Manufacturers, Comments on EPA’s 2006 Proposal at 13 (Nov. 13, 2006), EPA-HQ-OAR-2003-0064-0060 (“The Alliance’s experience, however, is that states have generally looked at the overall effect of a project.”); see also EPA, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration*, EPA-456/R-03-005 at 111 (Oct. 30, 2003) (“Using qualitative information is appropriate when quantitative information is limited. Moreover, using experience and judgment to predict industry behavior is appropriate when there is limited actual case history.”).

²⁶ 2002 NSR Reform Rules, 67 Fed. Reg. at 80,194 n.18.

²⁷ *Id.* at 80,190.

²⁸ EPA proposed to clarify in 2006 that both hybrid projects and projects involving only existing emissions units would evaluate all of a project’s effects on emissions at the first step of the NSR applicability analysis. 2006 Proposed Aggregation and Project Netting Rule, 71 Fed. Reg. at 54,248-49.

All of this makes sense from a practical perspective. Considering the effects of a project on facility emissions, both upward and downward, is contemplated by the statute²⁹ itself, by the pre-2020 regulations, and by the 2020 PEA Rule. While the 2020 PEA Rule is entirely consistent with a common-sense understanding of the regulatory intent in 2002 and a proper reading of the text of the statute and prior regulations, memorializing the interpretation in regulatory language to eliminate any confusion was a good and appropriate administrative practice to provide certainty and clarity in regulatory requirements.

In addition to being consistent with the statute and regulatory history of the NSR applicability analysis, the 2020 PEA Rule also supports the tandem policies that are reflected in the NSR program and the Clean Air Act. Specifically, EPA's actions in implementing the Act to address air quality must be undertaken in a manner "to promote the public health and welfare and the productive capacity of [the] population."³⁰ Statutory purposes are properly read to inform regulatory actions taken pursuant to a statute.³¹ Thus, these Clean Air Act regulations must serve these dual goals.³² In the NSR context, the Supreme Court has expressly acknowledged EPA's obligation to balance these considerations in protecting and enhancing the nation's air resources.³³ The 2020 PEA Rule accomplished both objectives by incentivizing facilities to take steps that will reduce emissions, at the same time as fostering economic development through increased efficiency and job creation in connection with undertaking such projects.

Some entities joined in a petition for reconsideration of the 2020 PEA Rule, asserting that the rule fails to ensure that emission decreases, which are used to show that a "project" will not cause a significant emission increase in Step 1 of the NSR applicability analysis, actually "result" from the change (*i.e.*, the "project") being evaluated; that the rule will allow a source to avoid NSR by offsetting emissions increases resulting from a change/project with *non-contemporaneous* emission decreases; and that EPA has not ensured that project-related emission decreases will

²⁹ 42 U.S.C. § 7479(2)(c) (definition of "construction" includes "modification" as defined in 42 U.S.C. § 7411(a)); 42 U.S.C. § 7411(a)(4).

³⁰ 42 U.S.C. § 7401(b)(1).

³¹ See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13 (1980) (recognizing the value of considering statutory purposes sections in interpreting ambiguous operating provisions of the statute and upholding regulation by the Occupational Health and Safety Administration based on a finding that it comports with the "overriding purpose of the Act").

³² "[I]t is appropriate for the agency, as courts have so often done, to look for guidance to the statute as a whole and to consider the underlying goals and purposes of the legislature in enacting the statute . . . Only by this approach can legislative purposes and statutory instructions be given the greatest possible practical effect." *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979) (finding that EPA was required to effectuate an appropriate harmonization of conflicting sections 165 and 168 of the Clean Air Act by considering underlying statutory purposes of the Act); H.R. Rep. No. 101-490, at 163 (1990), *reprinted in* 2 LEGIS. HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 at 3187 ("Our goal, as originally stated in the 1970 Clean Air Act, 42 U.S.C. Section 7401(b)(1), has been to 'promote the public health and welfare and the productive capacity' of our Nation. We have given EPA both the regulatory tools to accomplish cleaner air and the flexibility to protect our industrial and productive capacity. We intend that both be exercised equally.").

³³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 851-52 (1984) ("Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."); see also *New York v. EPA*, 413 F.3d 3, 23-24 (D.C. Cir. 2005) (citing *Chevron*, 467 U.S. at 843) ("Different interpretations of the term 'increases' may have different environmental and economic consequences, and in administering the NSR program and filling in the gaps left by Congress, EPA has the authority to choose an interpretation that balances those consequences.").

actually occur and be maintained.³⁴ EPA denied the petition for reconsideration on the grounds that it did not make the showing required by Section 307(d)(7)(B) of the Clean Air Act³⁵ while noting that, notwithstanding its denial, EPA may reconsider the 2020 PEA Rule on its own.³⁶

The proposed approach and rule language would be inconsistent with the NSR applicability procedures by treating decreases in emissions differently from increases in terms of an enforceability requirement for determining the emissions resulting from a project at Step 1. This approach should not be adopted because it fails to recognize the basic approach embodied in the NSR regulations—that sources can reasonably project (and track) the emissions impacts caused by a project. The proposal continues to embrace the principle that sources are not, and should not be, required to obtain enforceable limits to restrict the amount of a Step 1 *increase* based on a reasonable projection of maximum projected actual emissions caused by the project but, without rational explanation, concludes that emissions *decreases* are somehow different. Without acknowledging that decreases are just as easily projected as increases (and often more easily projected), the proposal posits that sources cannot be relied upon to track decreases while they can track increases at less than potential to emit.

As explained in more detail below, implementation of the 2020 PEA Rule helped achieve the Clean Air Act’s twin goals of protecting public health and also the productive capacity of the population while the 2024 Proposed PEA Rule Amendments are counter to those goals. The examples included below demonstrate how environmentally beneficial projects involving innovative technologies to reduce emissions may be impeded as a result of the Proposed PEA Rule Amendments. Projects to replace older equipment with newer, more- efficient, less-energy-intensive equipment that would both reduce emissions and conserve economic resources by reducing energy costs may be discarded if the Proposed Amendments were to become final, preventing the potential for reinvestment of the monetary savings into operations and job creation.

A project to implement innovative technologies to reduce emissions, for instance, would benefit the environment and public health as a result of the 2020 PEA Rule. However, that same project may not move forward based on the 2024 Proposed PEA Rule Amendments that could require enforceable emissions reductions and result in reduced operational flexibility, restricted production capacity, and additional recordkeeping and reporting requirements. The 2020 PEA Rule serves the nation’s productive capacity by reducing the number of projects that would require enforceable emissions reductions or undergo complex Step 2 netting analyses.³⁷ This approach

³⁴ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,873.

³⁵ EPA, *Denial of Petition for Reconsideration and Administrative Stay: “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” Notification of action denying petition for reconsideration and administrative stay*, 86 Fed. Reg. 57,585 (Oct. 18, 2021).

³⁶ In EPA’s preamble statements supporting the 2024 Proposed PEA Rule Amendments, EPA confirms that it initiated this rulemaking action because it “agreed that the concerns raised in the petition warranted further consideration.” 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,873. Consolidated litigation over the 2020 Final PEA Rule is currently in abeyance in the U.S. Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund v. EPA*, Case No. 21-1259.

³⁷ The time-consuming and burdensome process of establishing enforceable limits to take advantage of any project-related decreases at a large complex plant would likely overtake planning cycles for such a project. Companies that submit detailed analyses to state agencies and EPA often end up in protracted discussions just because of the time required to review the historical projects, validate their impacts, and then establish new limits or other conditions to

has been saving costs and time, which, in turn, has allowed more-efficient and environmentally beneficial projects to be deployed more quickly. If the 2024 Proposed PEA Rule Amendments were to be finalized, these benefits would not be realized or would, at a minimum, be delayed at substantial and unnecessary cost.

III. DETAILED COMMENTS³⁸

The 2020 PEA Rule reflects the statutory requirement that major NSR is triggered only by projects that actually result in a significant emissions increase at an existing major stationary source.³⁹ “Project aggregation” has historically been intended to prevent companies from circumventing the major NSR program by intentionally separating a single project into multiple projects, such that each individual project’s emissions increase would be less than the significance level to trigger major NSR. The “reasonable possibility” (RP) rules, which have been wholly upheld by the D.C. Circuit, are intended to provide for tracking of emissions for projects that have a reasonable possibility of triggering major NSR, while ensuring that future emissions levels are not required to be enforceable in a manner that confiscates operating capacity of the source.⁴⁰ They are intended to balance the burden of recordkeeping and tracking with the likelihood that a project determined not to trigger major NSR may do so.⁴¹ We address each of EPA’s proposals in turn.

A. The proposed definition of “project” should not be adopted, and EPA should re-affirm that owners and operators define projects in the first instance.

Under the 2020 PEA Rule, and as explained above, EPA clarified that both emissions increases and decreases from projects may be considered in Step 1 of the NSR major modification applicability test.⁴² EPA is now proposing to revise the definition of the term “project,” which has been in use since the inception of the PSD program, to include more specificity on what activities owners and operators of facilities should include in Step 1 of the applicability analysis (*i.e.*, to inform a determination of what activities should be grouped together and called a project). The

confirm that expected reductions are realized. Moreover, as also discussed above, this process is likely to confiscate capacity, contrary to the intent of the 2002 Reform rules.

³⁸ The Associations are reviewing the recent decision from the United States Supreme Court in *Loper Bright Enterprises v. Raimondo*, No. 22–451, 603 U.S. ___ (June 28, 2024). Based on our initial review of the decision, we believe that it would be incorrect for EPA to interpret the statute to permit a determination that a project that would not increase emissions taking into account the full effects of the project triggers major NSR. This would be the case if EPA refuses to recognize decreases or requires that they be enforceable. We also discuss below both policy and legal reasons that EPA’s interpretation should not be adopted.

³⁹ See 42 U.S.C. §§ 7479(c), 7501(4) (adopting a definition of modification based on 42 U.S.C. § 7411(a)(4)—a physical or operational change “which increases the amount of any air pollutant or which results in the emission of any air pollutant not previously emitted”); see also 40 C.F.R. § 52.21(a)(2)(iv)(a) (a modification occurs if a project “causes” a significant emissions increase and a significant net emissions increase; a “project is not a major modification if it does not cause a significant emissions increase”), and 42 U.S.C. § 7501(c)(6) and (d)(2).

⁴⁰ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, Final rule, 67 Fed. Reg. 80,185 (Dec. 31, 2002) (“2002 NSR Reform Rules”).

⁴¹ *New Jersey v. EPA*, 989 F.3d 1038, 1051 (D.C. Cir. 2021). EPA made the decision in the final RP rule that struck an appropriate balance between administrative burdens and ensuring that absolutely every project that might exceed a significance level be captured in an analysis and the D.C. Circuit agreed.

⁴² 2020 Final PEA Rule, 85 Fed. Reg. at 74,890.

current definition of project is “a physical change in, or change in the method of operation of, an existing major stationary source.”⁴³ Although EPA admits in a 2018 guidance memorandum on project aggregation,⁴⁴ in the preamble to the 2020 PEA Rule, and in the preamble to the current 2024 Proposed PEA Rule Amendments that “determining what constitutes a ‘project’ is both site-specific and fact-driven” and that “there is no pre-determined list of activities that should be aggregated for a given industry or industries,”⁴⁵ EPA is proposing the following revisions to the definition of project:

Project means a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable. In an extreme ozone nonattainment area, a “project” means each discrete operation, emissions unit, or other pollutant-emitting activity.⁴⁶

As support for the revised definition, EPA states that it has determined that the prior definition “may not be sufficient to guard against the potential for sources to selectively aggregate or disaggregate multiple projects such that they are able to avoid major NSR in a manner that is contrary to the intent of the CAA.”⁴⁷ EPA further rationalizes the proposed definition as an effort to “enable a more consistent application of the aggregation criteria by both those considering the applicability of NSR to proposed modifications as well as for those conducting an after-the-fact inquiry regarding whether NSR was circumvented through the failure to aggregate dependent physical or operational changes at a source (or over-aggregation of unrelated activities).”⁴⁸

EPA expresses concern that sources could “over-aggregate” activities in order to circumvent NSR by repeating stakeholder concerns that “the 2020 PEA Rule would enable a source to avoid NSR by grouping multiple activities into a ‘project’ and only requiring NSR if the ‘project,’ taken together, will produce a significant emissions increase.”⁴⁹ The preamble and record provide no actual examples to substantiate these concerns and they do not explain how the concern is an important consideration in protecting air quality.⁵⁰ EPA also states concerns with the potential of “under-aggregation” of sources for NSR applicability determinations.

⁴³ 40 C.F.R. § 52.21(b)(52); *see also* CAA § 111(a)(4)(defining “modification” with the same language).

⁴⁴ Letter from E. Scott Pruitt, Adm’r, EPA to Reg’l Adm’rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program*, (Mar. 13, 2018) (“2018 Guidance Memorandum”). This memorandum constituted a final action.

⁴⁵ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. 36,875.

⁴⁶ *Id.* at 36,877.

⁴⁷ *Id.* at 36,878.

⁴⁸ *Id.* at 36,879.

⁴⁹ *Id.* at 36,876.

⁵⁰ This over-aggregation concern appears to misunderstand the congressional focus for major NSR which, as the *Alabama Power* Court explained, is whether emissions increase following a project. If a project includes compensatory emissions reductions in a project that also increases emissions, there is no increase. In fact, the *Alabama Power* Court did not refer to limiting creditable emissions reductions to activities related to a project, and it emphasized Congress’ intent to provide for “cost-efficient, flexible planning for industrial expansion and improvement.” 636 F.2d at 402.

We agree with EPA that the group of activities that constitute a project is virtually always site-specific.⁵¹ Because there are so many different types of facilities that are subject to the NSR program, it will be highly constraining for EPA to finalize the definition of “project” as proposed. Moreover, EPA has not explained what the proposed definition means in practice. For example, what is the intent of including the word “discrete” to describe a “change” or a “group of such changes”? This language illustrates the point that the definition of the project is best determined by the source and is a case-by-case determination. The addition of this language, while perhaps intended to add clarity, will only add confusion, at least in creating the impression that the language somehow informs what activities constitute a project. We further note that EPA has not sufficiently explained the proposal to allow for meaningful comment. To the extent EPA intends to proceed with changes, it needs to explain the basis for them and how the new language actually improves clarity. For example, the inclusion of the word “contemporaneous,” which implies a five-year period based on the current federal regulatory language, makes clarity illusory and EPA has not explained how that change would be implemented in practice.

EPA retains enforcement authority should it become concerned about a source that is circumventing the regulations through artificial segregation of projects. In no event, however, should EPA’s attempts to manage circumvention overtake the fundamental authority of facility owners and operators to define their operations and what changes they undertake. Owners and operators should always have the discretion to define the scope of a “project.” They are best positioned to know their operations, understand the changes that are most needed or advantageous, and assess the economics of which are viable at a given time. In fact, grouping or including emissions reduction activities with process-related or other activities that increase production or improve operations into one project may in itself make those emissions reduction activities viable. Recognizing that owners and operators themselves necessarily determine which activities they undertake in a particular project, while clarifying that emissions decreases can be accounted for at Step 1 of the NSR applicability analysis, incentivizes them to identify opportunities to reduce emissions in order to simplify the requisite pre-construction permitting process. Many owners and operators seek to implement innovative technologies or approaches that could be applied to increase efficiency and reduce emissions. At the same time, they are also subject to strict parameters for a return on investment in order to justify expenditure of capital, consistent with sound accounting practices. If the economics do not support pursuit of a particular investment, it will likely not move forward. As we explain in more detail below, permitting authorities are already involved in assessing whether a proposed project circumvents NSR, so there is no need for this proposed amendment to the definition of “project,” which we believe would ultimately only cause confusion and delay.⁵²

While it is not the government’s role to dictate the capital investment of a company directly (despite the fact that some emission standards and other requirements often indirectly require such investment), EPA *can* play an important role in allowing and even incentivizing companies to take actions that will generate lower emissions, *e.g.*, lower criteria pollutant or greenhouse gas emissions per unit of output. EPA can achieve this aim without redefining the term “project” and

⁵¹ *Id.* at 36,875 (“In the 2018 final action on project aggregation, the EPA explained that determining what constitutes a “project” under NSR is a case-by-case decision that is both site-specific and fact-driven.”).

⁵² The proposal does not explain its focus on the scope of the project, when, regardless of how the owner or operator defines a project, if emissions reductions offset some or all of the emissions increases the environment benefits.

by deferring to the sources to define the scope of their own projects, encouraging them to identify emissions-reducing actions to take in conjunction with other capital investments. Doing so ultimately promotes the Clean Air Act's fundamental goals of bettering the environment and bolstering economic capacity.⁵³ The following examples help illustrate the impacts that the Proposed Amendments could have and how achieving these goals could be thwarted.

Example 1, Manufacturing Facility Project with Multiple Activities:

A manufacturing facility has a project that includes changes to various process units that will increase emissions from those units and will also increase utilization of a combustion unit because the process will need additional steam as a result of the changes. To ensure that a significant emissions increase will not occur, the facility will install better emissions controls on the combustion unit as part of the "project." Although the combustion unit's emissions controls are not critical (from a technical or operational standpoint) to implementing the process changes, the permitting agency should not determine that they are not part of the project on that basis alone. As stated above, the current PEA can incentivize facilities to install controls they may not otherwise have installed. Implementing a constraining definition of project that requires all elements to be functionally and economically related will at best prolong the permitting process and at worst prevent emissions reductions from occurring.⁵⁴

Example 2, Proving Substantial Relationship Between Increases and Decreases at a Facility Making Multiple Products:

The proposed change to the definition of "project" might be misinterpreted to put a burden on the facility to prove that portions of a project are substantially related and may jeopardize projects that are good for the environment. An example includes a facility that plans to add storage capacity to meet increased market demands for one set of products, which would increase emissions from one portion of the facility, while at the same time reducing utilization of another process at the facility due to a decrease in market demands for a different set of products. The effect of this project is lower emissions in the future, which under the current rules would not trigger major NSR. The proposed change in definition of the "project" creates confusion as to whether the changes in market demand for different products may be "substantially related," are discrete, or are a "discrete group." If the proposed project definition is finalized, a company may choose not to proceed with a project like this due to the delays and uncertainty that would be associated with a Step 2 netting analysis. At a minimum, the proposal appears to contemplate extensive discussions to assess which of the descriptions in the new language applies. All of this is inconsistent with facilities' need to respond to changes in the market quickly, which the current PEA regulations support.

⁵³ As discussed throughout this comment letter, the 2020 PEA Rule accounts for increases and decreases at an emissions unit that is experiencing an increase in emissions. In the coating-booth example provided below, where multiple changes are being made to accommodate increased production, the effects of all of the physical changes in the line are taken into account, including emissions reducing changes from improved spray application equipment, without the need for any new emission limits or for those reductions to be enforceable.

⁵⁴ Triggering major NSR means that projects will be delayed and additional controls that could impact the economic viability of the project could be required.

B. EPA should not address “Project Aggregation” or establish a constraining interpretation of what emission decreases may be considered as part of a “project” under the PEA Rule.

EPA proposes that calculations of emission increases from a particular project should include emission decreases only if the decrease is substantially related to the particular project being evaluated. EPA was concerned that because “a decrease from an existing emissions unit is simply calculated as the difference between projected actual emissions and baseline actual emissions,” “a decrease resulting from an earlier project (one completed after the selected baseline actual emissions period) could be accounted for in a subsequent project being evaluated, even if that project had no causal relationship to the decrease.”⁵⁵ EPA’s stated reason for revising the definition of “project” is a concern that facilities could “*over-aggregate*” activities or selectively pair emissions offsets with other changes so that there is not a significant emissions increase in Step 1 of the applicability analysis—regardless of the impact on actual emissions being insignificant.⁵⁶

The language in the proposed revision to the “project” definition is taken from EPA’s 2018 Federal Register notice when it lifted the stay on the 2009 Aggregation Action in which it was setting guidelines to prevent “*under-aggregation*” of projects (such as through artificial segregation) so that there would not be a significant emissions increase.⁵⁷ In that 2018 notice and in the 2009 Aggregation Action, EPA discussed a “substantially related” test meant to prevent facilities from permitting activities that were interconnected yet described in separate applications to circumvent major NSR. However, EPA finalized no changes to the regulatory language and instead continued to rely on its inherent enforcement authority. In the preamble to this current 2024 Proposed PEA rulemaking, EPA presents examples of situations where it has taken enforcement action because facilities *under-aggregated* activities to circumvent PSD review yet presents no examples of situations where facilities have used PEA to *over-aggregate* activities to avoid a significant emissions increase at Step 1. Instead, EPA is asking commenters to provide those examples.⁵⁸ EPA does not need to adopt a constraining definition of “project” for agencies to determine whether facilities are under- or over-aggregating activities to avoid a significant emissions increase; the agencies should continue to be allowed to evaluate each project on its own merits, just as they have been doing since the NSR program began.

As further support for the proposed amendments, EPA asserts that it has a concern with “double-counting.” Specifically, EPA believes that any “double counting” of emissions decreases “will be addressed by the requirement ... that any decreases be made enforceable in order to be eligible for consideration in the Step 1 applicability calculation.”⁵⁹ Again, EPA provides no examples of when such double-counting might have occurred or why its authority to enforce circumvention would be insufficient to address such situations.

⁵⁵ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,879-880.

⁵⁶ *Id.* at 36,877.

⁵⁷ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration, Final action; lifting of administrative stay and announcement of effective date*, 83 Fed. Reg. 57,324 (Nov. 15, 2018).

⁵⁸ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,878.

⁵⁹ *Id.* at 36,880.

Hypothetical concerns associated with project *aggregation* discussed in the preamble to the current 2024 rulemaking are inapplicable to project *emissions accounting*.⁶⁰ Project emissions accounting and project aggregation are simply not mirror images of one another. Project aggregation addresses the situation where a company intentionally separates activities that it would otherwise characterize as a single project into multiple projects to prevent them from exceeding the significance level. The mere fact that a company could be forced to put together two activities into a single project under the aggregation interpretation does not mean that a company is prohibited from treating such activities as a single project (and in fact tends to support such a grouping). Indeed, companies include multiple activities in a single permit application/project for which a permit is sought. Thus, EPA reasonably determined in the 2020 Final PEA Rule that grouping together nominally separate activities that decrease or at least do not significantly increase emissions under project *emissions accounting* does not raise concerns that are presented in the project *aggregation* context (and more specifically, regarding under-aggregation, not over-aggregation).

Three-year rebuttable presumption. While EPA states that the “proposed revision would add detail to this definition in a manner consistent with the 2018 final action on project aggregation,”⁶¹ EPA ignores its elimination of the rebuttable presumption that activities undertaken more than three years apart should not be considered in the aggregation analysis. In fact, the current proposal includes no specific timeframe to define “occurring contemporaneously,” which could be (but is not necessarily) interpreted to mean over a five-year period. EPA attempts to justify its elimination of this important provision by stating that it “has obtained information that suggests a three-year timeframe may not adequately represent the wide variety of projects performed across all source categories” without providing any examples of when this might have occurred.⁶²

In the 2009 rulemaking when EPA established a rebuttable presumption,⁶³ EPA acknowledged that determining what constitutes a project must be “based on the relevant case-specific facts and circumstances” and that “as such, sources and permitting authorities should be careful to not over apply the examples in this final notice to cases with slightly different sets of facts and circumstances.”⁶⁴ When EPA lifted an administrative stay of the 2009 final action in 2018, EPA retained this interpretation and the three-year rebuttable presumption.⁶⁵

As part of this 2024 rulemaking, EPA is now requesting comments on eliminating the three-year rebuttable presumption and is not proposing to include any specific timeframe to define the phrase “occurring contemporaneously.” EPA has not provided examples to support doing away with the three-year rebuttable presumption, however, and its analysis ignores the fact that the three-year rebuttable presumption is, in fact, “rebuttable” for any unique situation. EPA states in the

⁶⁰ 2019 Proposed PEA Rule, 84 Fed. Reg. at 39,251.

⁶¹ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,877.

⁶² *Id.* at 36,879.

⁶³ See EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting, Final action*, 74 Fed. Reg. 2376 (Jan 1, 2009).

⁶⁴ *Id.* at 2377.

⁶⁵ See EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration, Final action; lifting of administrative stay and announcement of effective date*; 83 Fed. Reg. 57,324 (Nov. 15, 2018).

preamble that “a three-year timeframe may not adequately represent the wide variety of projects performed across all categories,” including “multi-year expansion projects that span more than three years.”⁶⁶ Consequently, if the definition of project is finalized as proposed, companies may need to spend more time justifying what activities are or are not aggregated with a particular project and could be subject to numerous aggregation challenges. For example, separate projects at a manufacturing facility, even though independently developed, approved, and undertaken several years apart, may be challenged as having been substantially related only because they are planned to be integrated into an existing facility. The following scenarios reflect similar concerns.

Example 3, Pulp and Paper Mill Optimization Project that Included Multiple Years of Aggregated Activities:

A pulp and paper mill sought to optimize facility operations and developed a list of actions it planned to perform in different areas of the mill to achieve a certain production goal and improve efficiency over multiple years. The project elements included installation of a better control device on a biomass boiler, changes to that boiler to improve efficiency (*e.g.*, replacement of superheater and economizer), changes to the newest paper machine to improve performance, reduced utilization of an older paper machine, installing a backup control device for certain pulp mill gases, a new cooling tower to eliminate non-contact cooling water discharge, and replacement of various tanks. The project’s energy balance and projections for future operations showed preferential use of the upgraded boiler over the older boiler, resulting in emissions decreases from the older boiler in the PSD applicability calculations. Although the facility projected an actual throughput increase for some equipment that resulted in projected emissions increases, emissions were reduced from other equipment due to either a shutdown, a reduction in utilization, or an improved control device. The use of PEA allowed all of these activities to be considered together as a single project and resulted in projected emissions increases that were below the significant emissions rates at Step 1.

The project was permitted under a minor NSR permit and the facility performed projected actual emissions tracking to show the project did not result in a significant emissions increase. The definition of project that EPA proposes would not have supported this permitting strategy because it could have been argued that the elements of the project were not all contingent on each other for technical or economic viability,. In this situation, the facility defined the project and the permitting agency had visibility into the components of the project via a pre-application meeting, a detailed permit application with well-laid-out emissions calculations, and post-project emissions tracking. In addition, the agency only had to review one permit application and one set of emissions calculations with the same overall result – a project that improved operations at the facility and did not result in a significant emissions increase.

⁶⁶ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,879.

C. Project Emissions Accounting should not require enforceable emission limits to be established for Step 1 decreases.

EPA is requesting comments and proposing regulatory changes with respect to treatment of decreases both in general and in the context of PEA.

For more than twenty-five years, EPA has recognized the negative consequences of setting permanent enforceable limits in the context of the actual-to-future-actual emissions change methodology. In 1998, EPA proposed an alternative approach whereby a **temporary** enforceable cap would be imposed on emission units impacted by a project.⁶⁷ In 2002, without finalizing the 1998 proposal, EPA rejected enforceability entirely in setting projected actual emissions in Step 1.⁶⁸ Specifically, EPA wrote:

You will not be required to make the projected actual emissions projection through a permitting action. After considering the comments received, we are concerned that such a requirement may place an unmanageable resource burden on reviewing authorities. We also believe that it is not necessary to make your future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if your physical or operational change results in a significant net emissions increase at your major stationary source.⁶⁹

EPA should continue to consider decreases in Step 1. EPA requests comment on eliminating the 2020 PEA Rule provisions altogether, such that only emission increases can be considered at Step 1 (not decreases). The Associations strongly urge EPA to maintain the 2020 PEA Rule provisions that allow decreases to be considered under Step 1 for the many reasons provided earlier. Taking decreases into account under Step 1 is consistent with the statute, the pre-2002 rules, the 2002 NSR Reform rules, and EPA's 2018 Guidance Memorandum, while also meeting the dual goals of the NSR program, which are to protect human health and the environment and also our economy.

Obtaining a PSD permit typically takes a minimum of eighteen months. Sources often carefully consider the emissions ramifications of a proposed project, especially for industries that face competition internationally or that need to respond quickly to market demand and fluctuations. Often, this delay will mean that a project is not economically viable and will not proceed if Step 1 decreases cannot be considered.

In response to EPA's solicitation of comment, double-counting of emissions decreases should not be a concern. The proposal states a potential concern with double-counting but EPA provides no examples of circumvention as a result of such double-counting in the past, which is consistent with the Associations' experience. Specifically, Section IV of the preamble asks about the

⁶⁷ EPA, *Notice of Availability; Alternatives for New Source Review (NSR) Applicability for Major Modifications; Solicitation of Comment*, Notice of availability, 63 Fed. Reg. 39,857 (July 24, 1998).

⁶⁸ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, Final rule, 67 Fed. Reg. 80,186, 80,197 (Dec. 31, 2002).

⁶⁹ *Id.* at 80,204.

potential for source owners and operators to “double count” emissions decreases across multiple projects and whether regulatory language should be added to prevent this from occurring.⁷⁰ This stated concern appears disconnected from project emissions accounting principles as the relevant analysis is of the effects of the project being evaluated. If a decrease will result from the project, it should be counted, but if it is attributable to a different project, it would be taken into account (to the extent it qualifies) only in Step 2.

As EPA considers its approach in any final action, we encourage the agency to consider the incentives created for facilities that work to promote pollution prevention and overall emissions reductions. In short, facilities should be encouraged to undertake and not be penalized for actions that reduce emissions. As the statute itself emphasizes, 42 U.S.C. § 7401(c), emissions reductions come from numerous actions, such as raw material, fuel, or product mix adjustments that do not require permit revisions and are not otherwise changes in the method of operation. A facility that has experienced emissions reductions over time should not be penalized for doing so. If emissions reductions have occurred and the projected actual emissions following a proposed project indicate that a significant emissions increase compared to baseline actual emissions will not occur, then the NSR program is operating as intended. See examples below.

Requiring decreases to be made enforceable is unnecessary and confiscates capacity by disconnecting the consequence from the particular project. With respect to project decreases being counted in Step 1 under PEA, EPA is proposing that they be legally and practically enforceable. EPA states that this change is being proposed to ensure that the decreases actually occur and are maintained.⁷¹ But the NSR applicability analysis is tied to the project at Step 1 and not to the source overall. Thus, the question at Step 1 is what are the emissions impacts of the *project*. By requiring such decreases to be enforceable, EPA would be locking in the decreases regardless of the impacts for unrelated *future* projects. Such an action would serve to confiscate capacity of sources by locking in reductions from one project for all future projects that might affect that emissions unit. In the experience of the Associations’ member companies, some state permitting authorities have historically considered decreases at Step 1—without the need for those decreases to be enforceable. The concerns that EPA uses to justify the proposal did not exist then and have not since materialized.

As part of the 2002 NSR Reform rules, EPA did not require that projected actual emissions be enforceable—in fact, this was a core purpose of issuing the Reform rules. In the November 2002 Technical Support Document, EPA noted:

We believe that the “actual-to-potential” test continues to be the most appropriate test for new emissions units; however, for existing emissions units and units which replace existing units, we now believe that the “actual-to-projected-actual” test is appropriate because these units can more reliably predict their post-change emissions and thus do not need the safeguard (**and associated cost and delay**) of the “actual-to-potential” test. ... Under the “actual-to-potential” test, an applicant who believes that a modified emissions unit’s actual emissions increase following a physical or operational change will not increase significantly has the option of

⁷⁰ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,879.

⁷¹ *Id.* at 36,880.

establishing an enforceable cap based on the predicted post-change actual emissions increase so that if the emissions increase is not significant, it will not be regulated as a major modification. **However, as was noted by several commenters, the test could, in some cases, restrict the unit's ability to make normal production increases (that increase emissions) not considered to be physical or operational changes under the NSR regulations, places a substantial resource burden on permitting authorities and prevents you from making a non-major change before a permit is issued.**⁷²

In the 2018 Guidance Memorandum and in the 2020 PEA Rule, EPA did not require that decreases be enforceable or that limits be imposed for this very reason.

In the 2020 PEA Rule, EPA did not require emission decreases to be enforceable in Step 1, as described below:

EPA is not finalizing ... a requirement that emissions increases or decreases be enforceable in Step 1 unless required by the applicable regulations. ... EPA intends to treat projected actual emissions used in calculating emissions decreases from a project in the same manner as it does emissions increases since they are both part of the same project. Emission decreases should be considered simply part of the project emissions for the project, not some discrete change from the project subject to different or additional requirements.⁷³

The 2020 PEA Rule treated emission increases and decreases in a uniform manner. It would be unreasonable and inconsistent to now impose additional requirements in a permit for emission decreases, whether establishing new emission limits or some other memorialization, but not increases, and any such distinction would lack a basis in policy or law. Imposing a requirement that emissions decreases counted at Step 1 be enforceable through a limit or otherwise memorialized in a permit would unnecessarily confiscate the productive capacity of facilities. Independent factors may contribute to an increase in emissions at a facility, such as shifts in economic trends or the makeup of competition. In the event that some such scenario leads to increased production, and therefore increases emissions, that increase would be unrelated to the project that, on its own, may decrease emissions, and would be allowed for and reviewable under demand growth provisions of the current rule. By requiring that decreases be enforceable, EPA would effectively be preventing sources from implementing subsequent projects that themselves have less-than-significant increases without first going through an often lengthy analysis under 40 C.F.R. § 52.21(r)(4) (and corresponding provisions under 40 C.F.R. §§ 51.165 and 51.166), which could potentially include major NSR permitting.

The proposal cites as its basis the Petition for Reconsideration's claim that EPA lacked the oversight to ensure that projected emissions decreases actually occur even though, in the 2020 PEA rule, EPA explicitly rejected such concerns. At that time, EPA explained that its requirements for reporting are appropriate to provide a reasonable assurance of compliance with the NSR program in those situations where post-project emissions differ from projections and exceed the

⁷² Page II-3-4 (emphasis added).

⁷³ 2020 Final PEA Rule, 85 Fed. Reg. at 74,898.

significance level. And the D.C. Circuit agreed. The current proposal now suggests that “additional safeguards are appropriate” to ensure all **decreases** under Step 1 actually occur. Yet the proposal lacks any evidence that the current rules do not appropriately provide the assurances that are needed. EPA appears to be focused solely on assuring that it can guarantee no increase will ever occur in the future, rather than on considering the overall effects of the particular project, consistent with the statutory (and NSR program) goals of both protecting air quality *and* promoting the nation’s productive capacity.⁷⁴ The current regulatory structure supports both goals, while the proposal would ignore the importance of supporting productive capacity through reasonable regulations that also protect air quality.

When only emission increases are projected to show that a facility will be below the significance level, sources are considered competent to track those increases to demonstrate that they remain below the significance level. This means that if a future project occurs, the source would establish baseline emissions for that project and again project future actual emissions and compare the difference with the significance level. Yet, when emission increases and decreases are combined to determine whether an increase is significant, according to the proposal, the decreases must be enforceable.⁷⁵ EPA should not be concerned about making the expected level of decreases enforceable because EPA and permitting authorities always retain the ability to enforce compliance with NSR if the outcome of the project is a significant emissions increase.

The proposal does not include a rationale for treating decreases differently from increases. In other words, why would a *reduction* of emissions from an existing unit that continues to operate be treated differently from an *increase* in emissions from a unit that continues to operate? This is a similar question to that which was before the *WEPCo* court. The evaluation benchmark for each is the maximum projected emissions expected in the 5 years (or 10 years) following the project, and that determination should be agnostic as to whether it is an increase or a decrease. EPA makes a passing reference to SIPs’ regulation of modifications “as necessary to assure that [NAAQS] are achieved” but does not explain whether this proposed requirement is necessary to achieve the NAAQS.

From a policy perspective, counting decreases at Step 1 of the analysis provides significant incentives for emission reductions, and EPA made this finding in the prior, 2020 rulemaking. Thus, even if EPA ignores the statutory goal of the program of fostering the nation’s productive capacity, the PEA approach incentivizes sources to make reductions. Those who petitioned for reconsideration of the final rule argue that greater emission reductions will occur if these sources are forced to comply with major NSR, but that logic is flawed in that it assumes the projects will go forward even if major NSR is triggered (and that major NSR always results in greater emissions reductions). As shown in the examples provided here, if projects are forced to go through major NSR, often the projects will not be economically justifiable and will not be implemented. In the end, the proposal to require decreases to be enforceable could in fact end up increasing emissions because, rather than pursuing energy efficiency and other emissions-reducing projects, companies instead will be incentivized by EPA’s regulations to operate existing plants as is or to invest in such projects in other locations.

⁷⁴ 42 U.S.C. § 7401(b)(1).

⁷⁵ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,880.

The following are practical examples illustrating why the current approach to PEA is appropriate and/or how the proposed approach would be counterproductive. They show how changing PEA as EPA proposes or repealing it would discourage emission reduction projects and energy efficiency projects, which not only reduce criteria pollutant emissions, but also reduce greenhouse gases and air toxics.

Example 4, Facility with Emissions Decreases since the Baseline Period:

Over a period of 10 years (the typical lookback period to determine baseline actual emissions), a facility may manage its operations (with actions that do not require a permit) to reduce emissions. For example, the facility may be permitted to use multiple fuels and begin to favor lower-emitting fuels over fuels that result in the highest emissions. The facility may similarly find ways of becoming more efficient and lowering its emissions per unit of product made. The facility could improve its raw materials sourcing to lower production emissions. If the facility performs unrelated projects that use the same (higher) baseline actual emissions but lead to lower future emissions based on the facility's current (lower) emissions profile and the NSR applicability analysis results in project emissions increases that are less than the significant emissions rates *or even negative*, then there is no basis for the regulations to require that these emissions reductions be made enforceable for them to occur. On their face, the tracking of the emissions after a project is complete will capture these reductions and improvements in operations.

Example 5, Refinery Project that Includes Emissions Decreases:

An optimization effort with various physical changes within a refinery can potentially increase the firing demand on a heater. As part of the optimization efforts, the project includes installation of ultra-low NOx burners and/or selective catalytic reduction (SCR) to control NOx emissions so the project does not result in a significant emissions increase. Adding the decreases from the additional controls on the heater to the other project emission units' increases using the 2020 PEA Rule results in no significant emissions increase at Step 1. The emission reductions from the controls included in the project are anticipated to compensate for the increase in utilization of the heater as a result of the proposed changes. Rather than automatically making the decreases an enforceable permit requirement that would be difficult to relax, the decreases should not be required to be implemented if the project is canceled for some reason; the heater should be allowed to continue to operate with its original technology if the facility does not implement the other changes that would have resulted in the increased utilization of the heater.

Example 6, Chemical Plant Project that Includes Emissions Decreases:

A large chemical plant with integrated processes and parallel reactors performs an NSR applicability analysis for a project that involves changes to multiple units and includes both increases and decreases. Using PEA on a baseline-actual-to-projected-actual emissions basis, the resulting projected emissions increases are below the significant emissions rates for all NSR pollutants. Later, due to product shifts or changes in demand, the facility runs the reaction train at a higher capacity than originally projected, although the actual overall project emissions remain below the NSR significant emissions rates for all pollutants. Had the facility been required to make enforceable the decreases that were calculated at Step 1, it would not have been able to run the reaction train at higher capacity and respond to market demand. Indeed, adding emissions limits to individual pieces of equipment simply because decreases in emissions from that equipment were included in the original calculation of projected impacts of the project would serve

to unreasonably constrain a facility with integrated processes and/or units with multiple parallel process trains or redundant systems. This could prevent future projects that improve efficiency and environmental performance.

Example 7, Refinery Project with Low-Capacity Units:

A refinery process unit was designed with heaters sized for startup or “end of catalyst run” conditions that are infrequently utilized, but necessary. These heaters operate “turned down” (fired at less than 50% of capacity) most of the time. The facility is contemplating a project that involves multiple emissions units and the heaters. The project includes increases from some emissions units and also decreases in the form of controls and reduced operations. It will utilize PEA and an actual-to-projected-actual emissions comparison to demonstrate that the project will not result in a significant emissions increase. If the decreases are required to be made enforceable and limits imposed as a result of this analysis, the permit conditions will be overly restrictive to future operations and could constrain the facility’s ability to quickly perform the next project with no meaningful environmental benefit achieved. NSR applicability is tied to the project, not the emissions unit, and it is this inquiry that was Congress’s focus in establishing the program.

Example 8, Pulp and Paper Mill Project with Product Change that Includes Decreases:

A pulp and paper mill has multiple pulping and bleaching lines, boilers, and paper machines. To respond to a change in the market, the mill has planned a project where one of its paper machines would make an unbleached product. This type of project involves changing multiple emissions units and results in both emissions increases and decreases at various points in the process. Using PEA and accounting for emissions decreases at one of the bleach plants and from wastewater treatment, the emissions increases from the paper machine undergoing changes did not result in a significant emissions increase from the project. If the decreases had to be made federally enforceable, the facility would be hindered in reverting to full utilization of its bleaching processes and in processing bleached pulp on the paper machine as it did prior to the project (*e.g.*, if market demands change such that the original product mix has a higher demand) because the emissions limits on the bleach plant and wastewater treatment system would have to be relaxed (potentially triggering a Section 52.21(r)(4)-type of analyses). This situation must be avoided. If the facility reverts back to its pre-project state (assuming baseline actual emissions remain sufficiently high), there is no increase in emissions over baseline. If the facility would have been able to count only the emissions *increases* at Step 1, the project would have triggered PSD review based on the paper machine emissions increases alone. Given that there are no feasible add-on emissions controls for paper machines, PSD review would not have resulted in any further emissions reductions. Requiring a minor NSR permit establishing enforceable reductions in emissions, however, would have prolonged the permitting process, reduced the facility’s operational flexibility to revert to pre-project conditions, and, as a result, may have resulted in the project not moving forward.

Example 9, Flexibility in Production Inputs:

Some types of industrial facilities have flexibility on the types of production inputs that are used to make certain products. These options allow the facilities to remain competitive as commodity and energy prices change. For example, at a pulp and paper mill, the facility could have the option to buy secondary (recycled) fiber or purchase logs and/or chips to make its own fiber. The fiber would then be used to make various product grades. If a facility performed a project that included changes to various parts of the process to increase its ability to handle secondary materials, the

PEA calculations may show an emissions decrease in the part of its process that makes primary materials. However, if the market for secondary materials became such that the facility was more profitable making its own primary materials, a second permitting exercise to relax emissions limits would have to be performed instead of the facility being able to revert back to its original mode of operation. This is another example of where making PEA decreases enforceable and permanent will reduce operational flexibility without resulting in environmental benefit. Making decreases permanent and enforceable will essentially dictate, at least for certain industries, what products a facility can make and how they do so. To compete in international markets, facilities must respond to market changes quickly and cannot afford to wait for a lengthy permitting exercise to relax emissions limits that don't serve to protect the environment from a significant emissions increase from baseline conditions.

Example 10, Boiler Project:

A manufacturer would like to convert to primarily using natural gas as a lower-emitting fuel option in boilers on site to support steam and power needs. To do so, the company would install two gas-fired boilers to replace the function of an older oil-fired boiler currently handling the load. The company wants to retain the ability to use the oil-fired boiler as backup, such as when the gas-fired boilers require maintenance. The company would keep the oil-fired boiler onsite and subject to ongoing maintenance to keep it capable of operating, but it would otherwise largely eliminate its emissions, meaning the project would result in a decrease in emissions. If the emissions reductions could not be counted at Step 1, however, the company may not pursue the beneficial project if it is necessary to take an enforceable limitation on the older boiler's emissions because the oil-fired boiler may be needed if natural gas is curtailed, there is a gas supply interruption, if the price of natural gas increases significantly above that of fuel oil, or if there is a future (separate) project that requires more steam than the natural gas boilers can provide. While the company could easily demonstrate that the project did not result in a significant increase in emissions, it would not be willing to accept permanent limits on future use of the oil-fired boiler that are attributable to a different project.

Example 11, Enforceability of Project Decreases:

A chemical plant is contemplating a project that will allow for manufacturing a new product in order to meet projected market demands. The facility has two existing reactors that are part of two production lines; one line makes Product A and one line makes Product B. The project would shift production such that Line 1 would make a new product, Product C, and Line 2 would make Products A and B at a lower production rate than during the baseline. This shift to address an emerging market for Product C would result in both increases and decreases of actual emissions from existing equipment at the facility (production of Product C has lower emissions than production of Product A). If, in order to use PEA, the agency requires that the projected emission reductions for units affected by the project be enforceable by adding numerous operating limits, these limits could include multiple unit feed rates, intermediate product rates, product composition/concentration specifications, and specific monitoring requirements. This would result in very onerous and complex recordkeeping (some of which would require changes to existing operating methods and installation of monitoring equipment). These additional limits and monitors would not be required under the 2020 PEA Rule but appear to be consistent with what EPA has suggested for the 2024 proposed PEA amendments. In addition to these burdensome recordkeeping requirements, the various operating limits would result in significant restrictions

that would prevent the facility from reverting to full production of Product A on Line 1 based on market changes and from improving its operating methods to help lower emissions if it were to perform a separate project in the future to accommodate production of Product D. And, if Product C's market does not in fact develop, switching back to producing Product A in Reactor 1 would be precluded. These are the types of burdens and impacts that the 2002 Reform rules and 2020 PEA Rule were meant to reduce and overcome. Finalizing revisions to the PEA rules that present barriers to implementing projects where PEA is used will make it difficult for facilities to preserve the flexibility to easily and quickly respond to changes in the market.

Example 12, Enforceability of Project Decrease:

A mineral products facility is exploring two project options to allow for additional production of one product.

- Option 1: Install a new gas-fired kiln that will increase sitewide production of one product but displace production from an existing older, less-efficient kiln with higher emissions. The new gas-fired kiln would have the potential to emit (PTE) 50 tons per year (tpy) of nitrogen oxides (NO_x), while the existing unit has baseline actual emissions of 300 tpy NO_x, and projected actual emissions of 240 tpy NO_x. Therefore, the overall effect of the project would result in decreased emissions under Option 1.
- Option 2: Increase the number of days of operation of the existing kiln, which is allowed under the facility's permit, but which is less desirable to the company based on an economic analysis. Actual emissions would increase by 150 tpy (300 tpy NO_x baseline actual emissions to 450 tpy projected actual emissions), but there would be no "project" (*i.e.*, no change) to accomplish this option and the emissions increase analysis would not be applied.

Under the proposed changes to the PEA rules, the decreases from the existing kiln would have to be made enforceable prior to constructing the new kiln. The facility is unwilling to commit to permanently de-rating its existing kiln under Option 1 by accepting a limit—a concern that the 2002 NSR Reform rules were intended to address—and the state agency cannot process a PSD permit that includes only construction of the new kiln within the facility's desired timeframes. Therefore, Option 2 is likely to be chosen if the decreases must be enforceable.

Option 1 results in a 60 tpy decrease in NO_x on an actual-to-projected-actual basis, and a 50 tpy increase on an actual-to-potential basis, for an overall reduction of 10 tpy NO_x from the two parts of the project and a positive environmental benefit. Under Option 2, an actual increase of more than 150 tpy of NO_x would be predicted. There is no change because the existing unit's permit does not prohibit the increase in production rate that would occur under this scenario and increases in production rate are not changes under the rules. Therefore, no "project" would actually occur under Option 2. If EPA finalizes the PEA rule revisions as proposed, it will result in these types of decisions at facilities that want to modernize their facilities more quickly than the timeframes experienced under the PSD permit process. This illustrates one way in which the proposed PEA amendments fail to promote the dual goals of protecting air quality and the economy.

Example 13, Waste Gas Reroute Project:

Refinery A currently operates a fuel gas recovery system that receives hydrogen-rich waste gas from the reformers. Currently, the refinery is operating fuel gas long – meaning that it recovers more fuel gas in the fuel gas system than it can use at the refinery. Excess fuel gas production from the fuel gas system is sent to Flare 1.

The refinery proposes to permit an alternate operating scenario in which the refinery can redirect the waste gas from the reformers to Flare 2 to avoid sending some reformer waste gas to the fuel gas recovery system and decrease overproduction of fuel gas. This project will result in overall emissions decreases of VOC, CO, and SO₂ emissions, because, with the reformer waste gas containing up to 95% hydrogen, the emissions from combustion of the waste gas at Flare 2 will be lower than after waste gas is processed and mixed to create excess fuel gas and burned at Flare 1.

The project would result in a decrease in emissions at the fuel gas system/Flare 1, and while the reformers/Flare 2 emissions would increase, the project would result in an overall emission decrease at the refinery.

In all cases, no matter how much reformer waste gas is burned in Flare 1, emissions will always be lower than if the refinery sent the same amount of reformer waste gas to the fuel gas system. The refinery would have maximum production flexibility while operating in an environmentally beneficial manner by sending reformer waste gas to the fuel gas system only when additional fuel gas is needed at the refinery, and diverting the stream when it is not.

Under current regulations, the actual-to-projected-actual applicability test would not result in emissions limitations on either the fuel gas system/Flare 1 emissions unit or the reformer/Flare 2 emissions unit in order to take credit for an emissions decrease in Step 1 of the analysis. Under EPA's proposed rule, if only emissions increases can be counted in Step 1 without taking enforceable limitations, the refinery would be required to accept emissions limitations on the reformer/Flare 2 emissions unit, the fuel gas system/Flare 1 emissions unit, or both to assure that the change does not result in a significant emissions increase. If emissions limitations are accepted on the reformer/Flare 2 emissions unit, this would affect the amount of reformer waste gas that can be diverted from the fuel gas system and reduce the refinery's use of the alternative operating scenario with a corresponding decrease in environmental benefit. Depending on how some states permit flare emissions, this may also reduce the total amount of flaring for any purpose at Flare 2. If Flare 2's emissions become capped, the refinery may be forced to construct a new flare in the future to handle additional waste gases, which would result in an increase in standby emissions from a new flare.

Alternatively, if the refinery accepted emissions limitations on the fuel gas system, Flare 1 could confiscate capacity not used in the fuel gas system which could severely hamper future operation of the fuel gas system. If the amount of fuel gas Refinery A can produce in the fuel gas system is limited, then Refinery A will have to construct a new fuel gas system if it cannot meet the Refinery's fuel needs with the existing system, or it will release waste gas without converting/recovery to fuel gas and purchase fuel to meet the Refinery's needs. In either case, emissions at Refinery A will be higher because of the emissions limitation placed on the Waste Gas Reroute Project.

The potential consequences of having to accept federally enforceable emission limitations make it unlikely that the refinery would opt to proceed with the project. The proposed rule results in an environmental disbenefit in this case.

Timing of Enforceable Decreases. If EPA amends the 2020 PEA Rule to require that reductions be enforceable under Step 1, notwithstanding the above comments, at a minimum EPA should revise the proposed rule language to provide that enforceable decreases need not take effect until construction is complete—rather than when construction begins onsite. Under the proposed rule language, reductions in emissions from the project would be taken into account in Step 1 only if those reductions are enforceable *at the time the actual on-site construction begins* regardless of when any increases would occur. Requiring the reductions at the time of construction instead of when any emissions increase would occur is problematic, especially when the construction may take a long period of time and could lead to some projects not being undertaken. A better approach would be to require that the decrease be enforceable when construction on the portion of the project that would result in an increase concludes.

For example, assume a project involves a change that would result in a significant emissions increase if no concurrent decrease is taken into account, and this change will require 18 to 24 months from the time that onsite construction begins until it is completed. No emissions increase will occur during this time. The project also involves a change that would result in a decrease that means the project will not result in a significant emissions increase. This decrease-related part of the project can occur immediately, without any associated construction, but it may constrain operations if the decrease is implemented prior to the completion of construction of the change that involves an increase. If the emissions reductions must be enforceable before onsite construction begins—a full 18 to 24 months earlier than the reductions are truly needed to offset the expected increase—then the project may not proceed.

D. The current *Reasonable Possibility Rule* requirements are appropriate and should not be expanded.

The “reasonable possibility” (RP) rule imposes recordkeeping and reporting requirements if the owner/operator of an existing major stationary source determines that a project does not qualify as a major modification, but a “reasonable possibility” exists that the project may result in a significant emissions increase. EPA finalized the RP rule in December 2007⁷⁶ and, as part of this rulemaking, EPA defined the term “reasonable possibility.” The D.C. Circuit Court subsequently upheld this rule.⁷⁷

The reasonable possibility determination takes place in the actual-to-projected-actual applicability evaluation. The owner or operator must determine if the project would result in either (1) a projected actual emissions increase of at least 50 percent of the amount that is a “significant emissions increase” for the regulated NSR pollutant; or (2) a projected actual emissions increase that, added to the amount of emissions excluded, sums to at least 50 percent of the amount that is

⁷⁶ EPA, *Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping*, Final rule, 72 Fed. Reg. 72,607 (Dec. 21, 2007).

⁷⁷ *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021).

a “significant emissions increase” for the regulated NSR pollutant. If there is a reasonable possibility as so defined, then the source is subject to recordkeeping and reporting requirements. It must submit pre-project records to the reviewing authority, among other recordkeeping and reporting obligations.⁷⁸ EPA did not make any changes to the reasonable possibility rule when it issued the 2020 PEA Rule. The additional requirements under the RP rule continued to apply only when there is a “reasonable possibility” that a project could result in a significant emissions increase despite the initial analysis.⁷⁹ When promulgating the 2020 PEA Rule, EPA determined that for projects not triggering major NSR under Step 1, when both emission increases and decreases from the project are taken into account, there was no reason to impose any new or additional monitoring, recordkeeping, or reporting provisions beyond what was already required under the RP rule. In a challenge to the “reasonable possibility” provisions, the D.C. Circuit upheld the provisions relatively recently, in 2021, in the case of *New Jersey v. EPA*.⁸⁰

In the 2020 Petition for Reconsideration of the PEA Rule, however, petitioners raised the concern that facilities may be improperly accounting for an unrelated decrease in Step 1 and improperly finding that a permit is not required, such that the permitting authority may not be able to verify that activities were properly aggregated and decreases actually occur. Under the 2024 Proposed PEA Rule Amendments, EPA is now proposing to change how decreases are treated under PEA by requiring that all facilities that include a decrease in Step 1 be required to both maintain records and report information under the RP requirements⁸¹ regardless of whether there is an overall project emissions increase.⁸² The proposal states that this change is based, in part, on the concern that sources including decreases in Step 1 are not subject to the RP provisions and associated reporting requirements if actual emissions are greater than projections. The proposal states that because the RP requirements apply to emissions that are “affected” by a project, rather than “increased” by a project, the RP test can be used to track both increases and decreases from a project. The proposal goes on to state that the “express inclusion of decreases at Step 1 in the NSR applicability process warrants additional recordkeeping and reporting to ensure that *decreases* that a source accounts for are appropriately considered as part of the project being evaluated and to provide a means to determine whether such *decrease(s)* actually occur.”⁸³

In addition, the proposal intends clarify that RP reporting only applies when actual emissions exceed baseline actual emissions by a significant amount (not when they “differ”). The preamble states that these changes will enhance consistency of how the RP requirements are applied and the accountability of facilities relying on projected actual emissions.

The preamble suggests that a handful of state permitting authorities and some environmental groups have claimed that, in some cases, minor NSR permit records do not contain information on how the applicability analysis was conducted, impeding verification of a source’s determination that a major NSR permit is not required. EPA is therefore proposing revisions it says are intended to help address these concerns.⁸⁴ These changes primarily include clarifying that

⁷⁸ See 40 C.F.R. § 52.21(r)(6) and the parallel provisions in 40 C.F.R. §§ 51.165 and 51.166.

⁷⁹ 2020 Final PEA Rule, 85 Fed. Reg. at 74,903.

⁸⁰ 989 F.3d 1038 (D.C. Cir. 2021).

⁸¹ Such as those listed in, e.g., 40 C.F.R. § 52.21(r)(6).

⁸² 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,884.

⁸³ *Id.* at 36,883 (emphasis added).

⁸⁴ *Id.* at 36,885.

the emissions units to be included in the projected actual emissions calculations and the post-project monitoring and recordkeeping include any emissions units that could be affected by the project, not just new/modified units. These changes are not needed or justified, however. First, state permitting authorities have the ability to request the information needed to assess applicability and there is nothing in the record indicating that states have been unable to exercise such authority. Second, there is no example in the record of any such deficient permit application, so it is impossible for the Association commenters to respond to the claims.

Moreover, under EPA's debottlenecking policy, all emissions units affected by a physical or operation change—including emission units that are not being changed but could increase their utilization only after the change—must already be included in the “actual-to-projected-actual” assessment. This was made clear in EPA's 2006 proposal to address “debottlenecking.”⁸⁵ Those emissions are also included as part of the 50% reasonable possibility threshold assessments. The proposed PEA Rule changes in this action also include (inappropriately) a new requirement applying the reporting provisions of 52.21(r)(6)(ii) to all projects instead of only those that involve an electric utility steam generating unit. As a result, there is no need for additional clarification for which units are included as part of a project as part of the 2024 PEA Rule Amendments.

Applying RP to all decreases would create an unwarranted recordkeeping burden and would reject the balancing that EPA conducted in issuing the RP rule to arrive at the 50% threshold. Indeed, EPA is effectively lowering the RP threshold to 0%, which reflects no balancing at all of the burdens on sources and permitting agencies. EPA provides no evidence in the record to support this decision, nor does it explain why its prior selection of the 50% threshold was incorrect merely because an emissions decrease is included in the Step 1 analysis.

When a project would result in an increase that is below the 50% threshold, the risk of inadvertently triggering NSR is very (perhaps exceedingly) low. EPA's decision in the original RP rule explained this and made the cut point at 50% of the significance level. If sources are required to do recordkeeping and reporting, some permitting authorities will require permit revisions, which would delay emission reduction projects and potentially prevent modernization and energy efficiency projects from proceeding at all.

Finally, we do not think EPA intended this, but we want to ensure that EPA is not requiring sources that opt for the actual-to-potential test to be required to keep post project records and to report annually. As EPA has explained, using this test was intended to prevent subjecting sources to burdensome RP recordkeeping in situations where those burdens were not warranted.

The Step 1 analysis is not intended to prevent facilities from adapting to changing market conditions but, instead, is meant to assess the emissions impacts caused by a particular project. Moreover, as EPA recognized in the 2018 PEA Guidance Memorandum,⁸⁶ and as numerous commenters on the 2006 RP Proposal pointed out, the existing provisions requiring recordkeeping, tracking, documenting, and reporting emissions impacts⁸⁷ – both increases and decreases – provide

⁸⁵ 2006 Proposed Aggregation and Project Netting Rule, 71 Fed. Reg. at 54,238.

⁸⁶ Letter from E. Scott Pruitt, EPA Adm'r, to EPA Reg'l Adm'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program*, (Mar. 13, 2018) (“2018 Guidance Memorandum”).

⁸⁷ 40 C.F.R. § 52.21(r)(6).

sufficient mechanisms for EPA or state or local permitting authorities to receive ample information needed to enforce the NSR program.⁸⁸

In addition, as EPA noted in the November 2002 Technical Support Document, sources are also obligated to ensure that the necessary emissions information is available for examination upon request by the permitting authority. A source must also be prepared to make this information available to the general public upon the permitting authority's request pursuant to existing state procedures meeting the requirements of 40 CFR § 70.4(b)(3)(viii) of the Title V permit program, which requires that the permitting agency have the legal authority to “make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act.”

Under these provisions, sources track and report the extent to which annual emissions exceed relevant significance levels or vary from projected emissions. EPA and state and local permitting authorities thus have ready access to all of the information they need to determine whether major NSR requirements apply. As a result, adding a requirement that emissions decreases under project emissions accounting be enforceable in a permit is neither necessary nor appropriate.

As noted above, EPA further proposes to require all sources to submit to state regulators (or EPA where it is the permitting authority) pre-project baseline calculations and projections for all projects under the expanded reasonable possibility test. EPA does not justify this significant additional burden on state regulators and on sources, nor does it take into account the significant concerns that such a proposal creates for protection of confidential business information (CBI), particularly with the expanded “description” requirements discussed immediately below. EPA attempts to justify its lack of analysis regarding emission reductions and increased regulatory costs by stating that they cannot be easily calculated. This appears to be true in part because EPA provided no practical examples nor could any be found in the docket. The new requirements would clearly increase costs substantially—for little to no emission reductions and could, perhaps, result in an increase in emissions if certain projects do not move forward because of the requirement for reductions to be enforceable.

While it is true that emissions information is not subject to CBI protection, the maximum projected operations and project objectives plainly will include information that could contain trade secrets and other commercially and competitively-important information. And the proposal would create risk of improper disclosure of this information for projects that themselves are determined not to trigger major NSR permitting. The Associations are concerned that EPA fails to recognize the significant difference in the importance of protecting competitive information for industries that are not electric utility units. And there is no reasonable basis to conclude that permitting authorities will actually review these documents. The proposal provides no consideration to the burden on the states to manage and maintain all of these submissions. EPA

⁸⁸ 2018 Guidance Memorandum, at 9 n.19; *see also, e.g.*, Alliance of Automobile Manufacturers, Comments on EPA's 2006 Proposal at 14 (Nov. 13, 2006), EPA-HQ-OAR-2003-0064-0060; National Petrochemical and Refiners Association Comments on EPA's 2006 Proposal at 5-6 (Nov.13, 2006) Docket No. EPA-HQ-OAR-2003-0064-0044.

should take seriously the CBI risks and the financial burdens that the reporting requirements are creating for both facilities and permitting agencies and reconsider this aspect of the proposal.

The Associations also comment on the proposed expanded requirements for the project “description” under Section 52.21(r)(6)(i)(A), which EPA does not explain or justify. The revised description provision would read:

(A) A description of the project that includes: the name of the project, the project’s intended objective(s), each physical change and/or change in the method of operation associated with the project objective(s), and estimated timeline for the project, including an estimation of when the project would begin actual construction and begin regular operation.

We note that while some significant projects may have names, EPA’s inclusion of a requirement to “name” the project is odd. It is also unclear what EPA means by a change that is “associated with the project objectives” and how this differs from changes that are part of the project itself. Fundamentally, these additions seem unnecessary and are unclear.

IV. NONATTAINMENT AREA REQUIREMENTS FOR VOC EMISSION INCREASES

The 2024 PEA Rule Proposed Amendments include provisions addressing VOC emissions from sources in ozone nonattainment areas designated as serious, severe, and extreme. EPA describes the changes as follows:

1. No source-wide netting is allowed in serious, severe, and extreme ozone nonattainment areas.
2. When a new project is proposed that results in a net emissions increase, the source must aggregate all net emissions increases that occurred within the previous five years (and that were below the applicable significance level to trigger NSR) to determine if the total net increase would be more than 25 tons per year.⁸⁹
3. Project emissions accounting may not be used to determine whether an emissions increase occurs in Step 1 in extreme nonattainment areas.

While the proposal takes the position that the changes simply reflect requirements already established under the Clean Air Act and do not reflect any *new* requirements,⁹⁰ we do not agree and are concerned specifically with EPA’s explanation and the potential impacts of the proposed

⁸⁹ EPA established the 25-ton-per-year threshold in 2005, as proposed in 1996. EPA, *Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule To Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS*, Final rule, 70 Fed. Reg. 71,612, 71,698 (Nov. 29, 2005); EPA, *Prevention of Significant Deterioration and Nonattainment New Source Review*, Proposed rule, 61 Fed. Reg. 38,249 (July 23, 1996).

⁹⁰ 2024 Proposed PEA Rule Amendments, 89 Fed. Reg. at 36,887.

new requirements on facilities located in ozone nonattainment areas designated as serious, severe, or extreme.

Source-Wide Netting. EPA states in the preamble that it is clarifying, consistent with the Clean Air Act, that “source-wide netting” is not allowed in serious, severe, and extreme ozone nonattainment areas.⁹¹ The proposal does not further explain this position or offer proposed rule language to accomplish this, and EPA’s statement that the Clean Air Act does not allow source-wide netting in these areas is inconsistent with past agency practice. The preamble does not engage this inconsistency at all. Specifically, subsections (c)(7) and (8) of Clean Air Act Section 182, establishing SIP requirements for ozone nonattainment areas designated as serious, severe, and extreme, address and specifically allow source-wide netting. These subsections provide that a project may be treated as not triggering major NSR if the source ensures that there is no net emissions increase when taking into account reductions in emissions from “other operations, units, or activities within the source.” Similarly, subsection (e)(1) for extreme designations confirms that the netting provisions apply although it also establishes a different internal ratio of 1.3 to 1, rather than 1 to 1. Because it would be inconsistent with unambiguous language in the statute intended to be implemented, EPA should not move forward with any rule language that would prevent source-wide netting for purposes of NSR applicability in serious, severe, or extreme ozone nonattainment areas.

Aggregation of Prior Net Increases. When EPA revised its rules in 2005 to reflect the provisions of Section 182(c)(6), EPA included the 25-ton de minimis threshold for projects in ozone nonattainment areas classified as serious or severe. At that time, EPA specifically chose not to include the remaining text from Section 182(c)(6) in its rules that addressed aggregation of all net increases within five consecutive calendar years. Now, decades later, EPA is proposing that additional text from Section 182(c)(6) be added to its rules but does not engage how that aligns with its prior interpretation of the text and application of the rules.

(B) Notwithstanding the significant emissions rate for ozone in paragraph (a)(1)(x)(A) of this section, significant means, in reference to an emissions increase or a net emissions increase, **any increase** in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation of, a major stationary source locating in a serious or severe ozone nonattainment area that is subject to subpart 2, part D, title I of the Act, if such emissions increase of volatile organic compounds exceeds 25 tons per year when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

EPA was clear in its preamble statements in the current 2024 proposed rulemaking that, while it was adding new language to its rules related to the 25-ton de minimis threshold, it was not imposing any new requirements or additional burden to industry or permitting authorities. EPA

⁹¹ *Id.* (“The proposed revisions to the nonattainment provisions applicable to Serious, Severe and Extreme classified ozone nonattainment areas do not impose new costs on sources, reviewing authorities, or the public. Rather, they merely establish in regulations requirements that sources are already required to adhere to in the CAA. **This includes that for these areas, source-wide netting is not permissible**”).

went to great lengths in the 1996 preamble to explain how the statutory language, reflected in red above, should be interpreted. EPA has subsequently, for more than twenty-five years, interpreted this language from Section 182(c)(6) consistent with the 1996 preamble. Notwithstanding EPA's currently proposed incorporation of the statutory text in its rules, the Associations presume that EPA will continue to interpret this language consistent with the 1996 preamble because EPA has been doing so for more than two decades and at no point has EPA stated that it was changing its interpretation or what any new interpretation might be.

For example, EPA explained in 1996 that it would be appropriate to establish a project-specific "trivial" threshold below which aggregation with other projects undertaken over the last five years would not be required.⁹² EPA has an extensive history of authorizing such trivial thresholds for state implementation plans (e.g., for Texas, which has a five-ton project-specific threshold). As another example, EPA made it clear in the 1996 preamble that retroactive new source review would not be triggered when emissions increases associated with other projects undertaken within the prior five years caused the most recent project to trigger the 25-ton threshold.⁹³ Industry has always agreed that it would make no sense, under any scenario, for the last project in a series of unrelated projects undertaken over the last five years to trigger retroactive new source review simply because the aggregated emissions were eventually above 25 tons. EPA certainly has not suggested anything to the contrary in current rulemaking preamble statements or docket, and EPA would need to clearly identify its new interpretation and offer an explanation for this changed position to avoid an arbitrary and capricious claim.⁹⁴

PEA in Extreme Nonattainment Areas. EPA proposes that a sentence be added to its rules to prevent project emissions accounting from applying in extreme ozone nonattainment areas. The following text reflects the current version of 40 CFR § 51.165(a)(1)(x)(E) (adopted in 2005), with the proposed new sentence reflected in red font and underlined:

(E) Notwithstanding the significant emissions rates for ozone under paragraphs (a)(1)(x)(A) and (B) of this section, **any increase** in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme ozone nonattainment area that is subject to subpart 2, part D, title I of the Act shall be considered a significant net emissions increase. A reduction in emissions of volatile organic compounds from discrete operations, units, or activities within the source may not be used to determine if a modification will result in a major modification.

Section 182(d)(2) of the Clean Air Act, applicable to ozone nonattainment areas designated as extreme, provides that any project that "**results in any increase** in emissions" is considered a modification for purposes of nonattainment new source review. EPA's rules adopted in 2005⁹⁵ to

⁹² EPA, *Prevention of Significant Deterioration and Nonattainment New Source Review*, Proposed rule, 61 Fed. Reg. 38,249, 38,300 (July 23, 1996).

⁹³ *Id.* at 38,299.

⁹⁴ See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (agency changing a rule "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

⁹⁵ EPA, *Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule To Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant*

implement Section 182 (see example quoted above in non-underlined, black font) similarly provide that a project in an ozone nonattainment area designated as extreme that results in “any increase” in emissions of VOCs is considered a significant net emissions increase. Neither Section 182 of the Act nor EPA’s current rules prevent decreases from being taken into account in Step 1 to determine if a *project* results in an emissions increase, even in extreme ozone nonattainment areas. The Clean Air Act allows (or at least does not prohibit) project emissions accounting under Step 1, where increases and decreases are both considered to determine whether a project would “result in” an emissions increase. For the same reasons that EPA allows project emissions accounting in all other areas, it should allow project emissions accounting in extreme ozone nonattainment areas.⁹⁶ As another indication that Step 1 PEA is appropriate even in extreme ozone nonattainment areas, EPA has approved state rules to this effect as part of the Texas SIP.⁹⁷

Example 14, Refinery Project in a Serious Ozone Nonattainment Area:

A petroleum refinery located in a serious ozone nonattainment area seeks to initiate a project to reduce greenhouse gas (GHG) emissions. The potential project involves increasing the fuel gas hydrogen content to reduce GHG emissions from several boilers and process heater units that share the same fuel gas system. The potential project also includes installing additional NOx controls on a single combustion unit.

The current PEA provisions would allow the refinery to group the NOx emissions increases and decreases in Step 1 to show the impact would be below the applicable NOx significant emission rate to avoid a full netting analysis under Step 2. The applicability analysis, using the baseline-to-projected-actual emissions test, would document the project does not result in a significant emissions increase and post-project actual emissions tracking would be performed for continued confirmation. If a full netting analysis under Step 2 is required, PSD would be triggered due primarily to another recent project to produce sustainable aviation fuel (in support of Inflation Reduction Act initiatives for the transportation sector). The impact of continuing to allow the current approach to PEA is that the proposed project would be able to be implemented to achieve the GHG emissions reduction initiative earlier than under a regulatory outcome that would otherwise prohibit PEA.

EPA’s proposal eliminates Step 1 PEA for extreme ozone nonattainment areas, although there are also references to serious and severe ozone nonattainment areas as well. If a full netting analysis were to be required to look at all projects at the refinery during the contemporaneous period and analyze them, it would result in months of delay and expenditure of resources given the complexity and variety of operations across the refinery. The proposed GHG emissions mitigation project would be significantly delayed due to the complexity and resources required to facilitate a nonattainment New Source Review permit application and the timeline for permit issuance. There will also be significant challenges with securing NOx emission offsets (ranging from \$20,000 to

Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS, Final rule, 70 Fed. Reg. 71,612, 71,698 (Nov. 29, 2005) (codified at 40 C.F.R. § 51.165(a)(1)(x)(B)).

⁹⁶ To the extent EPA believes that the language in Section 182(d)(2) indicates project emissions accounting is not allowed in extreme nonattainment areas, such a conclusion would support the notion that project emissions accounting was contemplated by Congress for other nonattainment areas and for attainment areas.

⁹⁷ For additional detail regarding the Texas SIP provisions for nonattainment areas that have been approved by EPA, please refer to the comments submitted by the Texas Industry Project on this proposal.

\$100,000 per ton, if even available), and this expenditure may force the refinery to cancel the proposed GHG emissions mitigation project or result in further delays to secure additional capital.

Alternatively, to ensure that there is not a significant net emissions increase, the proposed GHG emissions mitigation project may be delayed to allow old projects to fall out of the 5-year contemporaneous window. The refinery may also reduce the scope of the proposed GHG emissions mitigation project so it would not trigger a net NO_x emissions increase under Step 2. The refinery may also consider further investments in the proposed GHG emissions mitigation project (*e.g.*, NO_x controls on additional units) so as not to create a Step 2 net emissions increase. For these alternatives, the conditions (time and additional resources) may make the facility unable to avoid a project cancellation.

V. CONCLUSION

For the foregoing reasons, we urge EPA not to adopt the proposed changes to the regulations.