

Comments of the U.S. Chamber of Commerce, National Association of Manufacturers, American Chemistry Council, American Forest and Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Wood Council, Council of Industrial Boiler Owners, National Oilseed Processors Association, Portland Cement Association, the Air Permitting Forum, and the Auto Industry Forum

EPA, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting

Proposed Rule

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

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The U.S. Chamber of Commerce, National Association of Manufacturers, American Chemistry Council, American Forest and Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Wood Council, Council of Industrial Boiler Owners, National Oilseed Processors Association, Portland Cement Association, the Air Permitting Forum, and the Auto Industry Forum (collectively the “Associations”) are pleased to submit 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): Project Emissions Accounting*, 84 Fed. Reg. 39,244 (Aug. 9, 2019) (“Proposed Rule”). 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. Although the Associations believe that the existing regulatory language is most reasonably interpreted to ensure that the complete impacts of a project are taken into account in determining applicability of preconstruction permitting requirements, EPA’s proposal to make that result absolutely clear is an appropriate exercise of the Agency’s authority and is also the best way to ensure that states and regulated entities have the certainty needed to plan investment and promote the productive capacity of the population. Moreover, the interpretation of the existing regulations that EPA offered in its March 13, 2018 guidance memorandum and that is proposed to be codified/clarified in this action (“the PEA interpretation”) will result in significant emissions reductions that otherwise could be foregone.

The Proposed Rule would amend the NSR regulations to clarify that emissions increases and decreases are to be considered in determining whether a project would result in a significant increase in emissions of a regulated NSR pollutant, previously explained in EPA’s March 13, 2018 guidance memorandum on “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.”¹ This action is both consistent with statutory language and supported by sound policy. The Associations urge EPA to move expeditiously to adopt a final rule with the regulatory change to ensure that there is no confusion that the full effects of a project are to be considered at Step 1 of the NSR applicability analysis. We further recommend clarifications of some statements in the preamble to provide for smooth implementation and clear compliance procedures, consistent with the overall statutory requirement that NSR only be triggered if a project “causes” an emissions increase.

¹ 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”).

I. INTRODUCTION AND EXECUTIVE SUMMARY

EPA’s interpretation that determining NSR applicability should at the outset account for a project’s true impacts on emissions is consistent with the Clean Air Act’s structure and purpose. This is why EPA’s regulations have long established both a causation requirement and the need for a significant emissions increase to impose the burdensome requirements attendant to major NSR permitting. The proposal to memorialize more clearly in the regulatory text considerations of project emissions accounting is therefore plainly within EPA’s statutory authority, and it would provide useful clarity to both companies undertaking preconstruction review analyses and the state agency partners that are on the front lines administering these programs.

The Associations have consistently supported efforts to provide regulatory clarity under the NSR program, while ensuring that its intended benefits are preserved, and for good reason: the complexity that has evolved around every aspect of implementing this program has served to mire the simplest of decisions with potential enforcement risk—even for projects that clearly have emissions reduction benefits. The consequences of this perceived risk have resulted in a reluctance to invest in projects that actually reduce emissions. The project emissions accounting or “PEA” regulatory history is a prime illustration.² In the years preceding the 2009 transition of administration, EPA worked diligently to clarify this aspect (and certain others) of the NSR program through rulemaking, but with the presidential transition, those efforts were halted, meaning that the requirements remained unclear and the application of the regulations in various states continued to be uneven. That the numerous subtleties in the NSR program have at times been blurred or even misinterpreted by states or EPA regional offices has had a detrimental effect on economic progress and the environment, with investment decisions having been impacted by uncertainty.

As these comments explain, EPA’s Proposed Rule to codify the PEA interpretation is reasonable, consistent with the Clean Air Act and sound policy, and important to provide regulatory certainty to enable and even incentivize projects to reduce emissions and drive productive capacity. The following key considerations support these conclusions:

² The Proposed Rule would adopt more appropriate nomenclature, “project emissions accounting,” to refer to the Step 1 analysis of considering a project’s emissions effects, including both increases and decreases. EPA previously used the confusing name of “project netting,” including in a 2006 proposed rule that was not finalized. See EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting; Proposed Rule*, 71 Fed. Reg. 54,235 (Sept. 14, 2006) (“2006 Proposal”). But this process is not netting, and it benefits from a name that clearly distinguishes it from the “netting” process at Step 2 that looks at emissions increases and decreases from other projects. The term “project emissions accounting” is a much more appropriate moniker and accurately describes the required evaluation of a project’s direct emissions effects.

- Key to determining whether NSR permitting requirements apply is the Clean Air Act’s definition of “modification,” which encompasses only projects that increase emissions, as opposed to those that reduce or have no impact on emissions. EPA’s proposal to clarify that emissions increases and decreases are taken into account when assessing if a project will cause an increase and thus potentially qualify as a “modification” is entirely consistent with Congress’s intent and EPA’s regulatory structure.
- Accounting for emissions increases and decreases of a project at the first step of EPA’s two-step applicability procedure incentivizes emissions-reducing and technology-advancing projects because it provides a straightforward, transparent analysis that avoids the complexities and delays associated with formal Step 2 netting. In practice, the burden and delay of Step 2 analyses has postponed and even prevented implementation of environmentally beneficial projects.
- Clarifying that emissions increases and decreases are properly considered at Step 1 also serves to provide regulatory certainty and nationally consistent application of policy that enables regulated entities to make investment decisions.

This Proposed Rule is an important part of the effort to clarify the NSR applicability regulations in order to remove barriers not countenanced by the Clean Air Act. These barriers have hindered growth and thwarted efforts to modernize the nation’s industrial sector in ways that would ultimately benefit both the environment and the economy, as reflected in Clean Air Act Section 101(b)(1)’s statement of the statutory purpose of “protect[ing] and enhanc[ing] the quality of the nation’s air resources so as to promote [1] the public health and welfare and [2] the productive capacity of the population.”³

II. THE PEA INTERPRETATION HAS THE PRACTICAL EFFECT OF PROMOTING EMISSIONS REDUCTIONS AND EFFICIENCY IMPROVEMENTS.

Codifying the PEA interpretation, as EPA proposes, will reduce confusion by clarifying the text of the PSD and NNSR regulations. It will also have the effect of eliminating the impediments to companies pursuing environmentally beneficial projects and incentivizing them to undertake projects that will increase efficiency, reduce emissions, and foster economic growth and job creation. The Associations appreciate and support EPA’s previous decision to clarify through guidance the PEA interpretation, as many states are following that approach in implementing the NSR regulations. Indeed, examples from facilities across the wide range of industries represented by the Associations illustrate the positive impact of the PEA interpretation. Indeed, as EPA

³ 42 U.S.C. § 7401(b)(1).

explains in the Proposed Rule preamble, the Step 2 contemporaneous netting analysis is cumbersome and “can limit operational flexibility and increase permitting burden” because all other contemporaneous and creditable project increases and decreases in actual emissions must be analyzed and enforceable.⁴

By clarifying that facilities properly account for emissions reductions associated with the project at hand at Step 1 of the analysis from (a) reduced utilization or shutdown of higher-emitting equipment, (b) replacing outdated technologies, or (c) supplementing with more efficient (or updated) equipment, project emissions accounting not only fosters efficiency and cost-saving measures, but also incentivizes companies to reduce emissions. Often these emission-reducing activities, especially considering uncertainty and regulatory costs, would not be able to meet company return on investment hurdles (which are standard accounting principles that apply throughout industries). By considering such activities at Step 1, environmental benefits can be realized faster than would otherwise be possible. While the regulations already contemplate consideration of emissions reductions, the proposed clarifying amendments would ensure that all EPA offices consistently account for these emissions impacts of a project. When regulatory uncertainty is present, companies become reluctant to invest because they are concerned about potential enforcement, even where a project (as defined to include increases and decreases) will result in a reduction in emissions. The examples provided below are illustrative and represent only a sample of activities that companies may develop to reduce emissions with the simplified approach outlined in the proposal.

Example 1: A pulp and paper mill sought to replace an existing 25 megawatt (“MW”) gas-fired combustion turbine with a more efficient and reliable 49 MW turbine. Doing so would reduce the amount of purchased electricity the mill relies on and eliminate an older on-site turbine being used to satisfy some of the mill’s electricity needs. Generating more electricity onsite would also reduce overall operating costs. The new turbine would be significantly more energy efficient than the one it would replace, nearly 40% better, and it would generate lower emissions than the existing turbine being retired. Replacing the turbine with the newer technology would reduce the amount of greenhouse gas emissions resulting from the facility’s electricity usage even further, since the increased capacity and efficiency would reduce the amount of electricity the mill purchased from coal-fired off-site generation. If the emissions reductions associated with the turbine being replaced could not be counted at Step 1, the environmental benefits would be significantly delayed due to the complex Step 2 netting analysis and permitting approval process. They may not be realized at all if the mill determined not to pursue the project due to the complexities of analysis and delay attendant to the Step 2 netting process. Here, the state agreed to count the reductions at Step 1, so the project is proceeding.

⁴ Proposed Rule, 84 Fed. Reg. at 39,246 n.9.

Accounting for both emissions reductions and increases at Step 1 through project emissions accounting also allows projects that will yield increased efficiencies for regulated facilities to move forward faster than if complex and time consuming analyses must be undertaken before emissions reductions of a project can be considered.

Example 2: A refinery seeks to upgrade one of its boilers while simultaneously shutting down two older, less efficient boilers. The project would allow the facility to continue meeting operational steam demand and would also reduce overall energy use onsite. The project would result in no increase in emissions when considering the reduction that will occur from the shutdown of the older boilers. A straightforward analysis, taking into account the increase from the new boiler and the reductions from the boilers being replaced would allow the project to move forward quickly. If a full netting analysis were to be required to look at all projects at the refinery during the contemporaneous period (generally, five years) and analyze them, it would result in months of delay and expenditure of resources given the complexity and variety of operations across the facility. The facility would thus be incentivized to simply continue operation of the older boilers rather than engage this time-consuming and uncertain process.

Example 3: A paper mill wanted to replace three paper machines with a new, more efficient paper machine using current technology. The replacement machine would reduce emissions of greenhouse gases and of criteria pollutants per unit of production. Using project emissions accounting, the analysis is simple: the reductions in emissions from shutting down the old, less efficient machines would be credited in Step 1 just as the emissions from the new machine are considered. Under a rule that does not allow both increases and reductions of emissions from the project to be considered at the first step of determining NSR applicability, the project would be significantly delayed while substantial effort is expended to undertake complex analyses of prior projects.

The significant administrative burden, delays, and costs associated with complex netting analyses that would be required for projects despite the fact that they do not cause an increase in emissions can deter companies from undertaking projects to increase efficiency and productivity and to introduce new products. Two projects at a paper manufacturing plant in the northern United States—one prior to the PEA interpretation and once since—illustrate the severity of this delay. The earlier project was done before EPA’s interpretation acknowledging that emissions decreases of a project are properly counted at Step 1 and the state agency in that case required a Step 2 analysis that took roughly two years to complete. By contrast, a more recent project undertaken following EPA’s PEA interpretation completed its Step 1 analysis within three months. The same emissions result would have occurred under either analysis. While this facility was able to accommodate the two-year delay, typically the capital return and budgeting timeframes would result in the netting process not being able to be completed and the project being moved to another

facility or being abandoned altogether. And, during such a delay, the environment would miss out on the improved efficiency and other reductions that could be achieved. Another added burden of Step 2 netting is that it can create a moving target for facilities conducting the analysis, as emissions reductions that were within the contemporaneous period preceding the start of construction when the project is first conceived may no longer count when the process extends for many months (even years) due to the complex review and communications with permitting authorities.

As noted above, Step 2 contemporaneous netting analyses are cumbersome and limit operational flexibility.⁵ Indeed, if EPA were to interpret its regulations to force sources to count emissions decreases of a project only at Step 2, it would also act to remove a key intended benefit of the 2002 NSR Reform Rule,⁶ which was to prevent confiscation of production capacity of facilities by adopting the actual-to-projected-actual emissions test (and explicitly rejecting an actual-to-potential test for existing units).⁷ If EPA were to interpret the regulations to require emissions reductions of a project to be counted only at Step 2 and thus force facilities to obtain enforceable restrictions to count those reductions in the applicability analysis, it would result in a similar confiscation of capacity. For example, economic factors such as increased demand may drive an increase in production unrelated to the implementation of a project affecting a particular emissions unit. Similarly, consider a situation in which a competitor declares bankruptcy and shuts down. This would affect the competitive landscape such that a supply gap would lead the facility to increase its production to accommodate newly available market share, thereby increasing emissions for reasons separate and apart from a particular change made at the unit. Codifying the project emissions accounting language in the regulations makes absolutely clear to regulators and regulated entities alike how the 2002 regulations will be interpreted. This will allow them, among other things, critical certainty to move forward with environmentally beneficial projects by reducing those barriers to innovation and progress.

⁵ Proposed Rule, 84 Fed. Reg. at 39,246 n.9.

⁶ 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 (Dec. 31, 2002) (“2002 NSR Reform Rule”).

⁷ EPA interpretations of the NSR rules prior to 2002 led to sources often being required to assume that an emissions unit had not “begun normal operations,” even if those units had existed for many years, and required them to take enforceable limits to restrict potential emissions even if actual emissions would not increase as a result of a change. The 2002 NSR Reform Rule addressed this concern that companies were required to give up their capacity through these enforceable limits by clearly articulating the actual-to-projected-actual test. EPA, *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations*, at I-4-7 and II-3-9 (Nov. 2002). Note that the “actual-to-potential” test had only applied in situations where an emissions unit had not begun normal operations. EPA, *1977 Clean Air Act; Prevention of Significant Air Quality Deterioration; Final Rule*, 43 Fed. Reg. 26,388, 26,394 (June 19, 1978).

Example 4: An automobile manufacturing plant operates two coating lines. The plant wants to implement a project that will increase the processing rate of one line to increase the number of vehicles the plant is currently producing and also to replace the robot paint applicators to improve paint transfer efficiency on both lines. The technology advancement has productivity, cost, and emissions benefits. Specifically, as a result of the project, less paint would be required to coat the same amount of surface area at both lines, *i.e.*, reducing paint and emissions per square foot of application. In addition, the project would reduce waste from the coating operation. The increase in processing speed would increase emissions but the improved technology for paint application would provide offsetting emission reductions.

Without project emissions accounting, only the reduction in emissions from the project at the coating line where the increased processing speed would occur would be considered in Step 1; with project emissions accounting, however, the reductions from the improved applicators would be taken into account at both lines in Step 1. If the emissions reductions associated with the applicators being used at the second coating line could not be considered until Step 2, the company might not implement *either* the coating line expansion or the improved applicator technology if the project does not justify the expenditure of the facility's resources to undertake the complex netting analysis.⁸ By implementing the project emissions accounting approach, EPA would treat the emissions increases and decreases for both coating lines in the same manner. Without project emissions accounting, the reduction at the second line would be treated differently than the reduction at the first coating line. The Proposed Rule would provide the facility the certainty to move forward with the project.

Example 5: A manufacturer would like to convert primarily to using natural gas as a cleaner fuel option in boilers on site to support 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 would want 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 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 due to the complexities of conducting netting across the entire facility, which would involve numerous other emissions units at the site.

Example 6: A chemical producer seeks to shut down and replace a portion of an older cogeneration plant (gas turbine and heat recovery steam generator) with one

⁸ Netting requires review of all physical changes or changes in the method of operation during the "contemporaneous period," which is generally five years preceding the project. Often, permit limits are required to memorialize reductions.

new gas-fired boiler. The project will result in significant decreases in actual emissions of NO_x. With project emissions accounting, the source would treat the project effects as a decrease from the shutdown of the cogeneration plant units and an increase from the installation of the new gas-fired boiler, the impact of which would be below the applicable NO_x significance level. If project emissions accounting did not apply, however, the project would require a full netting analysis, which could result in PSD being triggered. This would be so even if the source permanently removes the old equipment from the site after a transition period to start up the new units. The impact of allowing project emissions accounting is that the project would be able to be implemented to achieve these reductions approximately a year earlier than through the permitting process that would otherwise apply.

These examples illustrate that finalizing the Proposed Rule to codify the PEA interpretation will provide certainty to companies that yield numerous and varied positive results. Companies will be incentivized to pursue environmentally beneficial actions to reduce emissions. At the same time, they will benefit from reduced administrative burdens, avoiding unnecessary costly and time-consuming analyses.

III. THE PEA PROPOSAL IS CONSISTENT WITH THE TEXT AND STRUCTURE OF THE CLEAN AIR ACT, REGULATORY HISTORY, AND SOUND POLICY.

The PEA interpretation and the Proposed Rule language to clarify its applicability fall firmly within EPA's authority and should be finalized. Accounting for both increases and decreases in emissions from a project at Step 1 respects the text of the Clean Air Act, reflects and clarifies EPA's longstanding regulatory history of implementing the NSR program, and furthers the policy goals Congress sought to promote under Title I.

A. The text and structure of the Clean Air Act support the PEA interpretation.

Preconstruction permitting requirements under the Clean Air Act NSR provisions apply to construction of new major stationary sources or major modifications to existing major stationary sources. Neither the PSD nor the NNSR provisions in the Clean Air Act define "major modification," instead relying on the definition of "modification" in Section 111.⁹ A fundamental element of determining whether NSR (and its rigorous permitting requirements) applies thus stems from the Clean Air Act's definition of "modification," which means "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air

⁹ The PSD program incorporates this definition at Section 169(2)(C), 42 U.S.C. § 7479(2)(C), and the NNSR program incorporates it at Section 171(4), 42 U.S.C. § 7501(4).

pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”¹⁰ This language indicates that only a change that increases emissions, as opposed to one that either reduces emissions or does not cause an increase, can be considered a “modification” under EPA’s regulations. To determine whether a project is in fact a “modification,” its effect on emissions must be assessed, and doing so without considering both increases and decreases would fail to provide a rational assessment.

The Section 111(a)(4) definition of “modification” also requires a causal nexus between a particular physical change or change in the method of operation (*i.e.*, project) and any increase in emissions. Because the statutory text asks whether *any change* will cause an increase in emissions, this analysis of evaluating a project’s emissions effects (both increases and decreases) to determine its net impact applies, in the first instance, to the project. In other words, having created the two-step process for NSR applicability analysis, it would be unreasonable for EPA to apply an interpretation that entirely precludes consideration of decreases at Step 1, given that the impact of the project is determined at that stage.¹¹ The PEA interpretation and the Proposed Rule avoid that problem and align with the Clean Air Act’s plain meaning.

The PEA interpretation and EPA’s proposal are entirely consistent with this statutory text.¹² Congress’s intent was clearly to apply NSR permitting requirements only to projects that increase emissions; otherwise it would have defined “modification” to mean any project “which *increases or decreases* the amount of any air pollutant emitted” or “which *changes* the amount of any air pollutant emitted.” Congress’s choice of words in legislation is meaningful, particularly in a statute like the Clean Air Act, which reflected such hard-fought compromises.¹³

¹⁰ 42 U.S.C. § 7411(a)(4).

¹¹ We do not speak here directly to whether EPA could justify an interpretation that is based solely on a plantwide definition because EPA has not adopted such an approach.

¹² The PEA interpretation is also validated by Section 182(c)(6) of the Act, which provides that a project shall not trigger nonattainment NSR in a serious or above ozone nonattainment area if “the increase in *net emissions* of [VOC] ... does not exceed 25 tons when aggregated with all other *net increases* in emissions from the source over any” five consecutive year period, including the calendar year of the increase. 42 U.S.C. § 7511a(c)(6) (emphases added). This language makes clear that the increase from the project at hand is a “net” increase—indicating that both increases and decreases are to be considered from the current project. At a minimum, this statutory language means EPA has the discretion to adopt the PEA interpretation.

¹³ *Bd. Of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (“[T]he final language of ... legislation may reflect hard-fought compromises.”); *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 847 (1984) (acknowledging the many compromises between economic and environmental values in the Clean Air Act).

B. The PEA interpretation aligns with the NSR program’s regulatory history.

Considering the effects of a project on facility emissions, both upward and downward, is not only contemplated by the statute, as discussed above, but also by the current regulations. EPA’s regulatory two-step analysis, first looks at the impact of the particular project and then, if that project will result in a significant increase, nets across space (sitewide) and time (over the contemporaneous period). The Clean Air Act does not expressly prescribe the two-step applicability determination; rather, that came about through development of the NSR regulatory program. EPA promulgated the NSR regulations in 1980, which detailed only the second step of the applicability determination: the net emissions increase calculation among contemporaneous projects.¹⁴ The applicability analysis focused just on the project at issue, on the other hand, was largely implemented through guidance documents, and it relied on the actual emissions and other important definitions in the regulations. Although some confusion occurred in the 1980s and 1990s, no regulatory provision prohibited the practice of considering a project’s emissions increases and decreases at Step 1.¹⁵ Indeed, EPA’s regulations recognized the need to consider increases and decreases from a project, by requiring that a project “result” in an emissions increase.¹⁶ EPA also recognized that the applicability analysis stops once it is determined that a project will not cause a significant emissions increase of regulated NSR pollutants.¹⁷ Numerous state permitting authorities, likewise, applied a similar framework, first considering whether the effect of a project’s actual emissions as a whole will result in a significant emissions increase and, if so, then undertaking the netting analysis to account for contemporaneous projects.¹⁸ In the experience of the members of the Associations, many state permitting authorities have historically considered decreases at Step 1. Indeed, consider a project that involves replacement of one type of product at a facility, such as in *Example 4* above, where a facility would replace paint

¹⁴ 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).

¹⁵ 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, *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.

¹⁶ 43 Fed. Reg. at 26,394.

¹⁷ EPA, *New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting*, at A-36 (Draft – Oct. 1990).

¹⁸ 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.”).

applicators at two coating lines. Although project emissions accounting would allow emissions reductions from the improved technologies at *both* of the lines to be considered at Step 1, the reductions at the first coating line (the one being modified to increase speed) due to the new paint applicators, would be considered under *any* interpretation of Step 1. This is because regardless of whether project emissions accounting is allowed, the source need not assume emissions based on applicators that would no longer exist.¹⁹

When EPA issued the NSR Reform Regulations in 2002, it explicitly codified the two-step analysis of determining whether a project is a major modification.²⁰ The Agency inadvertently created more confusion, however, by utilizing slightly different language to describe how Step 1 accounting works for projects involving both existing units and new units as compared with how the accounting works for projects involving only new units or only existing units. The original intent “to allow sources more flexibility to respond to rapidly changing markets and to plan for future investments in pollution control and prevention technologies,”²¹ and to reflect the “actual” emissions impacts²² of a project which underlay the 2002 regulations was overlooked in certain instances. Moreover, some states and EPA regions were inconsistent in their application of the regulations. In 2006, EPA proposed a rule to clarify that a project’s complete effects on emissions must be accounted for at the first step of determining NSR applicability.²³ Following a change in administration, these amendments were never finalized, but neither were they withdrawn.²⁴

EPA’s Proposed Rule would offer an end to the confusion and inconsistency. Although the Proposed Rule is entirely consistent with a common sense understanding of the regulatory intent in 2002 and a proper reading of the text of the prior regulations, memorializing the interpretation in regulatory language to eliminate any confusion is consistent with good administrative practice to provide certainty and clarity in regulatory requirements.

¹⁹ The regulations require projected actual emissions to be the “maximum” projected emissions from the unit as configured after the change. Nothing in the regulations suggests that the source would assume that paint applicators that are no longer operating are actually being used.

²⁰ 2002 NSR Reform Rule, 67 Fed. Reg. at 80,194 n.18.

²¹ *Id.* at 80,186.

²² *Id.* at 80,190.

²³ 2006 Proposal, 71 Fed. Reg. at 54,248-49.

²⁴ To the extent the prior administration clearly articulated an interpretation of the 2002 regulations contrary to the PEA interpretation, EPA is not bound to such an interpretation and is free to change it where permissible under the statute and where EPA believes there are good reasons for it such that the Agency believes it to be a better policy. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1207-09 (2015).

C. Codifying EPA’s PEA interpretation reflects sound policy and the goals of the Clean Air Act by incentivizing reduced emissions and increased efficiency, and it will ensure clear and consistent application of the policy throughout the country.

In addition to being consistent with the statute and regulatory history, the Proposed Rule to clarify the project emissions accounting process also supports the tandem policies that are reflected in the NSR program and the Clean Air Act generally, such that 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.”²⁵ Statutory purposes are properly read to inform regulatory actions taken pursuant to a statute.²⁶ Thus, all Clean Air Act regulations serve these dual goals.²⁷ 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.²⁸ The Proposed Rule will accomplish both 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. The numerous examples of the practical effects of project emissions accounting provided above illustrate how the Proposed Rule will help achieve the Clean Air Act’s twin aims. The coatings operation that would implement innovative technologies to reduce emissions, for instance, would benefit the environment and public health as a result of the PEA interpretation. Likewise, the paper mill hoping to replace its aging combustion turbine and increase its on-site generating capacity with a more efficient, newer turbine would both reduce emissions and reap the economic benefit of

²⁵ 42 U.S.C. § 7401(b)(1).

²⁶ 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”).

²⁷ “[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.”).

²⁸ *Chevron*, 467 U.S. at 851-52 (“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.”).

needing to purchase less energy from external sources and be able to reinvest those savings into its operations and job creation.²⁹ Finally, the PEA interpretation serves the nation’s productive capacity by limiting the resources consumed by the expansive administrative state by reducing the number of projects that would need to undergo complex Step 2 netting analyses, thus saving the costs and time required to undertake them. This in turn would allow more efficient and environmentally beneficial projects to be deployed more quickly.

IV. CERTAIN ELEMENTS OF THE PROPOSED RULE PREAMBLE PROVIDE USEFUL CLARITY, WHILE OTHERS REQUIRE CLARIFICATION IN ORDER TO PREVENT CONFUSION.

The proposal to amend the PSD and NNSR regulations to require project emissions accounting at Step 1 of the NSR applicability determination will provide useful clarity to companies that are subject to the regulations and state agencies that implement them through approved programs. Certain aspects of the Proposed Rule preamble will further support a streamlined and appropriate Step 1 analysis, others could create confusion or significant obstacles to implementation and compliance, however, and the Associations urge EPA to clarify them in the final rule as detailed below.

A. The Proposed Rule would clarify confusing discrepancies in the existing regulatory text with respect to hybrid projects, involving both existing and new units.

As the regulations contemplate, a single project can affect different combinations of unit types—existing emission units, new emission units, or what is often the case in practice, a combination of both existing and new emission units, which EPA refers to as “hybrid projects.”³⁰ To add clarity, EPA explained in regulatory text the method of calculating emissions changes for these three types of project combinations. For existing unit only projects, the calculation examines “the sum of the difference between the projected actual emissions ... and the baseline actual emissions;”³¹ for exclusively new unit projects, the calculation looks at “the sum of the difference between the potential to emit ... from each new emissions unit following completion of the project and the baseline actual emissions.”³² As noted, the existing regulatory language regarding these

²⁹ As discussed above, while the netting process could eventually lead to the same result, the time-consuming process of netting at a complex plant would likely overtake planning cycles for such a project. Companies that submit detailed netting 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 record in enforceable netting documents. Moreover, as also discussed above, the netting process would confiscate capacity, contrary to the intent of the 2002 rules.

³⁰ 40 C.F.R. § 51.165(a)(2)(ii).

³¹ 40 C.F.R. § 51.165(a)(2)(ii)(C).

³² 40 C.F.R. § 51.165(a)(2)(ii)(D).

calculations is slightly different, however, for hybrid projects. The provision omits the “sum of the difference” language, and instead speaks explicitly to “the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(ii)(C) through (D) of this section as applicable with respect to each emissions unit, for each type of emissions unit”³³ This discrepancy is easily understood in that the hybrid project language *incorporates by reference* the calculation methods for both new and existing unit projects individually. Thus, the most reasonable reading of the regulations is that the Agency intended to use the results of both of those calculations and combine those two values to determine the effect on emissions of the hybrid project. There is no rational basis for treating projects that involve both new and existing units differently than projects that involve only new units or only existing units. EPA’s prior reasoning that such an analysis drives the conclusion that none of these provisions should therefore allow for counting of decreases does not follow when the “sum of the difference” language clearly contemplates that a source can count the decreases. EPA’s decision to codify this understanding by amending existing regulations to avoid any confusion created by the inconsistent language is therefore entirely appropriate.

B. EPA’s recognition that the source defines the project appropriately acknowledges that the source is uniquely positioned to determine the scope of its project.

In the Proposed Rule preamble, EPA takes the same reasonable position articulated in the 2018 Guidance Memorandum, that the owner or operator of a source retains the discretion to define the scope of a project.³⁴ Source owners and operators 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. Recognizing that source 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 companies to seek out opportunities to reduce emissions. Many companies seek to implement innovative technologies or approaches that could be applied to increase efficiency and reduce emissions. At the same time, these companies are also subject to strict parameters for 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.

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

³³ 40 C.F.R. § 51.165(a)(2)(ii)(F).

³⁴ Proposed Rule, 84 Fed. Reg. at 39,250-51.

actions that will generate lower emissions, *e.g.*, lower criteria pollutant or greenhouse gas emissions per unit of output. EPA can achieve this aim by clarifying that sources may account for emissions increases *and decreases* at Step 1 of the NSR applicability determination. This would allow sources to avoid months of added work and significant expense to undertake a five-year source-wide project netting analysis that can undermine the economic justification for taking an efficiency-boosting action in the first place. This netting process may delay other needed actions that could otherwise be part of the same project to allow time for the analysis or simply require too great an investment of resources to complete the Step 2 analysis that it undermines justification of the project by canceling out potential economic efficiencies. EPA can also foster such environmentally beneficial measures by deferring to the sources to define the scope of their own projects, encouraging them to seek out 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.³⁵

Hypothetical concerns associated with project aggregation discussed in the Proposed Rule preamble are inapplicable to project emissions accounting.³⁶ 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 not 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. Indeed, in numerous instances companies have included multiple activities in a single project for which it sought a PSD permit or a synthetic minor permit.

Thus, EPA reasonably determines in the Proposed 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 aggregation context.

³⁵ As discussed in *Example 4* above, the NSR regulations account for increases and decreases at a unit that is experiencing an increase in emissions. In the coating booth example, 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. PEA simply ensures that increases and decreases involved in a project, regardless of whether they occur at an emissions source that is also experiencing an increase, are considered in determining the Step 1 impact of the project. If project emissions accounting were not allowed, decreases would be treated differently simply based on where they occur.

³⁶ Proposed Rule, 84 Fed. Reg. at 39,251.

C. The existing monitoring, recordkeeping, and reporting requirements applicable to projects at Step 1 are sufficient and imposing further requirements, such as requiring a permit limit, would be unreasonable and create needless administrative burden.

EPA appropriately declines to propose additional requirements on emissions decreases accounted for applying project emissions accounting. It would be unreasonable and inconsistent to impose additional requirements like memorialization in a permit on emissions decreases 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 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. The Step 1 analysis is not intended to prevent facilities from adapting to the changing conditions of the real world but, instead, is meant to assess the emissions impacts caused by a particular physical change or change in the method of operation. Moreover, as EPA recognized in the 2018 Guidance Memorandum and as numerous commenters on the 2006 Proposal pointed out, the existing provisions requiring recordkeeping, tracking, documenting, and reporting emissions impacts³⁷ – both increases and decreases – provide sufficient mechanisms for EPA or state or local permitting authorities to receive ample information to enforce the NSR program.³⁸ Under these provisions, sources track and report the extent to which annual emissions exceed relevant significance levels or vary from projected emissions effects. 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.

D. Project emissions accounting is a minimum program element.

The Proposed Rule would amend the PSD and NNSR regulations to more clearly reflect project emissions accounting consistent with what the existing regulations already provide. As EPA recognizes in the preamble, many, if not most, state and local permitting authorities with approved NSR programs need not revise their regulations to accommodate project emissions accounting. Indeed, many states already implement the project emissions accounting approach under their current regulations.

³⁷ 40 C.F.R. § 52.21(r)(6).

³⁸ 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.

To the extent that state and local permitting authorities have approved State Implementation Plans (“SIPs”) but their regulations nonetheless preclude (or have been read to preclude) project emissions accounting, however, EPA should require revision of those regulations as this is a minimum program element that promotes emissions reductions that might otherwise not occur. Just as EPA determined that the regulatory changes in the 2002 NSR Reform Rule were minimum program elements,³⁹ EPA should similarly determine that the proposed regulatory revisions here are minimum program elements to ensure that state and local agencies will adopt them and revise SIPs if necessary to reflect the changes. The applicability determination process is a core element of the NSR program, and states should apply it consistently.

V. CONCLUSION

The Associations appreciate the clarity that EPA provides in the proposal regarding (1) project emissions accounting under the current regulations and (2) an owner’s or operator’s inherent ability to define the scope of its project provided it does not artificially separate what is plainly a single project into multiple activities. We recommend that EPA finalize the Proposed Rule expeditiously consistent with the comments above.

³⁹ 2002 NSR Reform Rule, 67 Fed. Reg. at 80,240-41.