STEEL MANUFACTURERS ASSOCIATION

July 2, 2024

Via Regulations.gov

Michael S. Regan, Administrator
Environmental Protection Agency
Docket ID No. EPA-HQ-OAR-2022-0381
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments of the Steel Manufacturers Association on the Environmental Protection Agency's Proposed Rule *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting*; Docket ID No. EPA–HQ–OAR–2022–0381

Dear Environmental Protection Agency:

This letter provides comments from the Steel Manufacturers Association ("SMA") on the Environmental Protection Agency's ("EPA's" or "the Agency's") proposal to revise the Agency's Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") Regulations Related to Project Emissions Accounting ("PEA Proposal").[1] EPA's PEA Proposal includes three proposed revisions to the Agency's PSD/NNSR regulations that are of particular concern to SMA and its members: (1) the Agency's proposed redefinition of "project" for the purpose of NSR preconstruction permitting; (2) the proposed requirement that emissions decreases projected in Step 1 of the NSR applicability determination be legally and practically enforceable; and (3) the proposed imposition of substantial new and seemingly unjustified monitoring, recordkeeping, and reporting requirements.[2]

This rulemaking is an outgrowth of a petition for reconsideration[3] of the 2020 Project Emissions Accounting Rule ("2020 PEA Rule") that EPA denied based on the petitioners' failure to demonstrate that it was impracticable to raise their concerns in comments as required by Section

[1] 89 Fed. Reg. 36,870 (May 3, 2024)/EPA-HQ-OAR-2022-0381.
[2] 89 Fed. Reg. at 36,872.
[3] Letter from Sanjay Narayan *et al.*, to Acting Administrator Jane Nishida, "Re: Petition for Reconsideration of 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,' 85 FR 74,890 (November 24, 2020), Docket ID No. EPA–HQ–OAR–2018–0048 and for Withdrawal of Guidance Memorandum titled 'Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program' (March 13, 2018) (OAQPS–2020–683 and OAQPS–2020–223)," January 22, 2021, ("Petition for Reconsideration"), available at https://www.epa.gov/system/files/documents/2021-10/final-nsr-accounting-rulereconsideration-petition-1_22_21.pdf.

307(d)(7)(B) of the Clean Air Act ("CAA" or "the Act").[4] In his October 12, 2021 response letter to the petitioners, Administrator Regan acknowledged that EPA had already considered and fully responded to the petitioners' comments during the rulemaking process for the 2020 PEA Rule, but that the Agency nonetheless planned "to initiate, at its own discretion, a rulemaking process… that would address issues raised in the submitted petition and comments on the Project Emissions Accounting rule."[5] As such, SMA is concerned with EPA's inability to articulate a record-based justification for the present PEA Proposal or its anticipated adverse impacts on preconstruction permitting.

For instance, neither EPA's record for this rulemaking nor the petitions for reconsideration of the 2020 PEA Rule identify any instance in which a failure to properly define a "project" altered the applicability determination and/or led to circumvention of NSR preconstruction permitting requirements. Similarly, the docket for this rule and the petitioners' request for reconsideration of the 2020 PEA Rule both fail to provide any evidence that the 2020 PEA final rule unlawfully allowed sources to avoid NSR permitting by offsetting project emissions with non-contemporaneous emission decreases, or that the current regulations' extensive emissions monitoring, reporting, and recordkeeping requirements have failed to ensure that projected emission decreases will occur and be maintained.

Thus, although SMA recognizes that different administrations will inevitably attempt to orient their regulations toward different policy outcomes, it is critical that each administration ensure that their proposed and final regulatory revisions are factually supported and reasonably justified. For the reasons set forth below, SMA does not believe the Agency's present rulemaking satisfies this important standard. As such, we respectfully urge EPA to refrain from finalizing the PEA Proposal.

I. SMA's INTERESTS

SMA is the largest steel trade association in North America in terms of membership, and the primary trade association of electric arc furnace ("EAF") steel producers, often referred to as "minimills," that make various steel products, including carbon, alloy, and stainless steels. Steel that is sustainably produced in EAFs from scrap metal reduces the mining of virgin ores and avoids the need to utilize higher-emitting and more energy intensive processes required to make steel from ores. The SMA member companies producing steel in this manner collectively account for approximately 70% of the steel producing capacity of the United States today, and virtually all of the steel produced for domestic construction projects. The SMA member companies that produce steel in this manner directly and indirectly generate two million jobs throughout North America.

Because of EAF steel facilities' ability to produce new steel products almost exclusively from scrap steel feedstocks, the EAF steelmaking industry annually recycles 650 million tons of scrap

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[4] *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting*, 85 Fed. Reg. 74,890 (Nov. 24, 2020).

[5] Letter from Administrator Michael Regan, Oct. 12, 2021, available at https://www.epa.gov/system/files/documents/2021-10/oar-21-000-6429-narayan_0.pdf.

metal. Absent SMA members' capacity to beneficially reuse millions of tons of scrap metal every year, much of that material would be discarded and/or diverted to landfills. End-of-life products and other materials that are presently collected and diverted into the recycling system based on the value of their metal content would increasingly be abandoned thereby saddling overburdened communities with another source of blight.

Importantly, domestic EAF steelmaking facilities produce twice as much carbon steel as integrated facilities that produce steel from iron ore, but with 75 percent less greenhouse gas emissions.[6] EAF steel producers emit substantially lower levels of other pollutants as well, including as relevant here, 7.7 times less PM than integrated steel facilities.[7]

SMA represents an industry that is not only environmentally beneficial, but highly regulated as well. EAF steel manufacturers in the United States are subject to some of the most stringent environmental standards in the world, employ the most advanced pollution control technology, and protect their workforces and neighboring communities better than any their overseas competitors. As such, in the present rulemaking as well as many other rulemaking contexts, it is important that EPA fully consider how its proposed actions can help ensure that the green infrastructure future that Congress envisions in enacting the Bipartisan Infrastructure Law and the Infrastructure Investment and Jobs Act will be sustainably built with domestically produced steel.

II. DETAILED COMMENTS

a. EPA's PEA Proposal Would Needlessly Negate the Benefits of the 2002 NSR Reform Rule

Through the 2002 NSR Reform Rule,[8] EPA undertook a substantial revision of the NSR program to better align the Agency's regulations with Congress's intent that the CAA be implemented in a way that balances economic and industrial growth be balanced with the need to improve and maintain air quality.[9] EPA's 2002 NSR Reform Rule was grounded on the Agency's recognition that multiple prior NSR rules needlessly constrained and complicated preconstruction permitting programs because they ignored variability in business cycles and excessively relied on unrealistic and overly conservative assumptions about operating scenarios. Thus, EPA intended its 2002 NSR Reform Rule to "remove disincentives that discourage sources from making the types of changes that improve operating efficiency, implement pollution prevention projects, and result in other environmentally beneficial changes."[10]

In promulgating the 2002 NSR Reform Rule, EPA also noted that its various revisions would help allow state and local authorities to better focus on projects that "could cause real and

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[6] https://steelnet.org/sustainability/.

[7] Mukhtar, U. A., El-jummah, A. M., & Mohammad, M. D. (2017). NOx Emission in Iron and Steel Production: A Review of Control Measures for Safe and Eco-Friendly Environment. *Arid Zone Journal of Engineering, Technology and Environment*, 13 (6), 848.

[8] 67 Fed. Reg. 80,186 (Dec. 31, 2002).

[9] 42 U.S.C. § 7470(3) [Section 160 of the Clean Air Act], "to insure that economic growth will occur in a manner consistent with the preservation of clean air resources."

[10] 67 Fed. Reg. at 80,192.

significant increases in pollution."[11] Unfortunately, if finalized, the current PEA Proposal would largely nullify many of these same benefits, and do so without any meaningful consideration of the costs to industry, the economy, or the environment. Therefore, SMA urges EPA to reassess its current rulemaking effort in light of the Agency's twenty-plus years of experience implementing the 2002 NSR Reform Rule and more recent experience implementing the 2020 PEA Rule, rather than limit its review to the handful of narrow issues raised in a petition for reconsideration that EPA already denied. We believe that careful consideration of the circumstances leading up to and following the 2002 NSR Reform Rule and 2020 PEA Rule will show that the Agency's current PEA Proposal is not beneficial, necessary, or remotely justified relative to the significant costs it would impose on permittees and permitting authorities alike.

For instance, the 2002 NSR Reform Rule removed the requirement that all "major modifications" be treated as operating at their maximum "potential to emit" ("PTE") upon startup until two years of actual emissions were obtained. This change eliminated the consistent, often gross, overestimation of future emissions from "projects" without the requirement that the estimate be made "enforceable." EPA appropriately recognized that: (1) estimates of actual future emissions are inherently somewhat uncertain; and (2) monitored actual post-modification emissions will bear out whether the change was "significant." In contravention with EPA's current assertion that the PEA Proposal is necessary to make pre-construction emissions estimates enforceable, even a cursory examination of permitting authorities' implementation of the 2002 NSR Reform Rule demonstrates that sources remain unwilling to bear the risk of any material underestimation even without the new enforceability provisions set forth in the PEA Proposal.

Moreover, following the 2005 U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit) decision in *New York v. EPA*,[12] permitting authorities' ability to assess and ensure the accuracy of pre-construction emissions estimates was significantly bolstered through additional "reasonable possibility" recordkeeping requirements applicable to projects for which emissions estimates exceeded half of the significance threshold. Combined with sources' requirements to monitor and record actual emissions, "reasonable possibility" recordkeeping requirements created a powerful incentive for sources to ensure that post-modification emissions do not increase over baseline actual emissions by a "significant amount."

Notwithstanding that this existing approach to pre-construction emissions estimates allowed for effective oversight and did not lead to permit circumvention, EPA's PEA Proposal would negate much of the benefits of 2002 NSR Reform Rule by reimposing the "enforceable" reduction requirement on any emissions reductions. Under the approach EPA sets out in the PEA Proposal, if a source projects that a modified or replacement unit will emit less than a current unit or method of operation, that reduction cannot be accounted for in pre-construction permitting unless an enforceable limit is accepted. This proposed approach is not only irrational, it has already been rejected by U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") in *Wisconsin Elec. Power v. Reilly* ("*WEPCO*"), which held that courts "cannot defer to agency

[11] 67 Fed. Reg. at 80,192.
[12] 413 F.3d 3 (D.C. Cir. 2005).

interpretations that, as applied here, appear to assume what they seek to prove."[13] If a projection is good enough to form the basis for permitting, it should be used consistently.

Furthermore, if EPA is concerned that a particular source may have erroneously estimated emissions, the Agency already has ample authority to require that source to test or submit proof that its emissions have not increased above relevant thresholds.[14] Requesting such information is appropriate when a source is suspected of underestimating emissions for the purpose of permit circumvention; however, requiring all sources by rule to systematically overestimate emissions so that there is a greater likelihood of triggering NSR permitting is not. This proposed approach represents a reversion to the conduct ruled illegal in *WEPCO*.

Due to the complexity of any major NSR action, including the expensive and time-consuming preparation of air quality permit applications, many sources will likely forgo implementation of useful innovations that may reduce pollution or energy use (and corresponding greenhouse gas emissions) rather than face the risk of undertaking a second protracted permitting effort to remove a limitation for a project that did not work as intended. Collectively, the disincentive to implementing these types potential environmentally beneficial project components is potentially far more detrimental than the purely speculative harms and surmised abuses upon which EPA attempts to rationalize its PEA Proposal. It is indeed telling that the preamble to the Agency's PEA Proposal lacks any examples of the alleged abuses that this proposal is supposedly intended to address.

b. EPA's Proposed Redefinition of "Project" is Unworkable and Unlawful

EPA is proposing to revise the definition of "project," which is currently defined as "a physical change in, or change in the method of operation of, an existing major stationary source"[15] to the following definition:

> [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.[16]

The Agency claims that this revision is necessary to protect 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,"[17] but here again, EPA's PEA Proposal provides no evidence indicating that any sources have employed these means to circumvent permitting obligations.

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[13] 893 F.2d 901, 917 (7th Cir. 1990).

[14] 42 U.S.C. § 7414(a)(1)(c)-(e) (authorizing administrator to require any person to "install, use, and maintain such monitoring equipment" or "sample such emissions… in such manner as the Administrator may describe" and "establish and maintain" records).

[15] 40 C.F.R. § 51.165(a)(1)(xxxix); 40 C.F.R. § 51.166(b)(51); 40 C.F.R. Part 51, Appendix S II.A.33.; 40 C.F.R. § 52.21(b)(52).

[16] 87 Fed. Reg. at 36,878.

[17] 87 Fed. Reg. at 36,878.

Moreover, existing regulatory procedures already sufficiently address the hypothetical circumvention concerns that EPA believes this definitional change will prevent. Any project that avoids major NSR will almost certainly require a minor NSR permit, and a minor NSR permit application that relies on Step 1 emissions reductions to circumvent major NSR permitting will be required to include substantiation of these decreases. Therefore, permitting authorities will be able to readily determine whether the emissions increases and decreases are appropriately considered part of the same project.

Sources make physical and operational changes for a variety of reasons including long-term planning, market forces, and opportunistic reasons. In a manufacturing process, equipment at various points on the process may require replacement or upgrade. While this scenario would appear to link individual process units, the equipment may operate completely independent of each other. For example, construction of a new production line may be necessary to replace an older product with diminishing demand, while another product line replacement may be required to preserve existing capacity and structural integrity. It is unreasonable to expect state permit authorities, subject to many demands on their time and necessarily generalists, to untangle this complexity.

Thus, in addition to being unnecessary, incorporating the project aggregation "substantially related" test into the definition of "project" is also unworkable. Given the need to assess a project's business purpose and planning considerations, only permit applicants are truly capable of determining whether projects are "substantially related." Neither EPA nor any permitting authority is positioned to completely understand the interrelatedness of individual projects necessary to sustain business and product development. As a result, applying the "substantially related" test to the definition of "project" would burden permitting authorities with the obligation to assess the economic and technical viability of source's physical and operational changes. Many permitting authorities lack the expertise and insight to reasonably conduct such analyses, and requiring these authorities to do so will merely burden permit reviews with speculative project scope determinations that will inevitably delay the permitting process.

EPA's proposed new definition of "project" will also increase potential challenges to permitting actions, which will compound the burden on sources and permitting authorities alike. In particular, the proposed new requirement to assess economic and technical viability will surely invite EPA, permitting authorities, commenters, and other third parties to second-guess sources' operational and business decisions. Plainly, while the "substantially related test" may be appropriate in the enforcement context, its use within the definition of "project" will only needlessly invite speculation and delay.

EPA has historically refused to allow redefinition of the scope of the source (*e.g.*, the proponent's "project") within the permit review process.[18] And for good reason - As the Seventh Circuit observed in *Sierra Club,* EPA must avoid scope creep because "[t]hat approach would invite a litigation strategy that would make seeking a permit for a new plant a Sisyphean labor, for there would always be one more option to consider."[19] Nonetheless, EPA's proposed new definition of

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[18] *See EPA, NSR Manual*, at B.13 (Draft 1990); *In Rock Energy Co.*, 14 E.A.D. 484, 526 (EAB 2009); *Helping Hand Tools v. EPA*, 848 F.3d 1185 (9th Cir. 2016).

[19] 499 F.3d 653 (7th Cir. 2007).

"project" risks facilitating precisely this type of endless loop of second guessing and redefining the scope of the project. Every "discrete physical change" or "discrete change in the method of operation" would be prone to challenge as various stakeholders endlessly debate whether each proposed change is "substantially related" to the overall project purpose. In fact, should EPA proceed with finalizing this proposed redefinition of "project," the new definition will likely generate so much confusion and uncertainty that sources, permitting authorities, and others will no longer have any conception of what is, or is not, contemplated by EPA's revised NSR regulations.

EPA can address each of these issues and concerns by simply following the approach Congress intended when it enacted and amended the CAA. Congress intended that the scope of construction activities that constitute a modification of a major source would be determined by the owners or operators of that source. There is no basis to believe that Congress intended to allow the EPA or a permitting authority to substitute their own judgement to define what constitutes the "major stationary source" in contravention with an application submitted by the source. Congress expected EPA to require controls on the source to meet the objectives of the PSD program, not for EPA or a permitting authority to second guess the source's business planning.

Indeed, in CAA Section 173, Congress specifically authorized EPA and permitting authorities to issue a permit if "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification."[20] Congress conferred no similar authority to consider "alternative… sizes, production processes, and environmental control techniques" under the PSD program.[21] As the Supreme Court ultimately declared in *West Virginia v EPA*, Congress knows how to grant the authority that the EPA seeks and it did not do so in Sections 165, 169 or Section 111 of the Clean Air Act. Thus, EPA cannot exercise authority Congress did not grant.

c. Additional Safeguards Against "Double Counting" of Emissions are Unnecessary and Unwarranted

EPA's PEA Proposal requests comments "on the potential, within a project emissions accounting framework, for source owners or operators to 'double count' emissions decreases across multiple projects, and whether the NSR regulations should include language to prevent this."[22] SMA appreciates the opportunity to comment on this issue and respectfully urges the Agency to refrain from promulgating additional regulatory changes to address a hypothetical potential permit circumvention scenario that permitting agencies are already capable of identifying and preventing.

The hypothetical risk of double-counting of emissions decreases or increases is not unique to sources' ability to consider decreases under Step 1 of the NSR applicability process. Rather, these concerns are related to the baseline actual emissions and projected actual emissions

[20] 42 U.S.C. § 7503(a)(5).
[21] Compare 42 U.S.C. § 7475 with 42 U.S.C. § 7503.
[22] 89 Fed. Reg. at 36,879.

provisions established as part of the 2002 NSR Reform Rule. The baseline actual emissions provisions include an eligible "lookback" period of 10 years (5 years for electric utility steam generating units) for determining the baseline actual emissions for a particular unit/pollutant, and, the projected actual emissions provisions do not require that projected emissions be made enforceable. Thus, inherent to the 2002 NSR Reform Rule's regulatory approach is the possibility that some changes in emissions that occurred or occur subsequent to the selected baseline period may not be perfectly allocated to individual projects. And as with other aspects of this proposed rulemaking, there is no evidence that the 2002 NSR Reform Rule created, or that the 2020 PEA Rule exacerbated, the double-counting of emissions.

Attempting to address sources' potential to double-count emissions increases and decreases across multiple projects would seemingly result in sources having to maintain multiple books – one for each "project" that occurred for the five- or ten-year period. The prospect of maintaining multiple emissions profiles would result in undue complexity and confusion, ultimately distracting from the reasoned analyses of actual environmental impact that Congress envisioned. As noted by the D.C. Circuit in *New York* ruled, it is "actual increases" that are regulated, not artificial ones that EPA creates by creative accounting rules.[23]

To the extent there are limited circumstances where a series of projects at an existing major stationary source double counted emissions decreases in order to avoid triggering major NSR applicability, the CAA already provides ample authority to enforce the major NSR requirements against a source that misrepresents the emissions decreases available for the applicable project. Given the lack of any evidence that sources double count emissions decreases across multiple projects and the existence of adequate authority to address hypothetical circumvention of this type, EPA should avoid further undermining regulatory clarity and certainty by increasing the complexity of EPA's NSR regulations.

d. Enforceability of Emissions Decreases

In "a distinct and severable portion of" the Agency's PEA Proposal, EPA proposes that emissions decreases associated with a project under Step 1 be legally and practicably enforceable, which EPA considers to mean "enforceable as a practical matter."[24] EPA proposes to do this by subjecting any decrease in Step 1 of the NSR analysis to the same "creditability" requirements as apply in Step 2 of the analysis. Thus, the Agency proposes to revise its current regulations in order to specify that "a decrease may only be accounted for in the significant emissions increase determination if it meets the requirements under 40 C.F.R. § 52.21(b)(3)(vi)(b)" to the "significant emissions increase" definition at 40 C.F.R. § 52.21(a)(2)(iv)(g).[25] The Agency's PEA proposal also includes analogous regulatory language for 40 C.F.R. § 51.165, 40 C.F.R. § 51.166, and Appendix S to 40 C.F.R. Part 51.[26]

According to the Agency's PEA Proposal, EPA asserts that these changes are: (1) necessary to ensure that emissions decreases included in the NSR applicability determination will occur and

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[23] *New York v. EPA*, 413 F.3d 3, 10 (D.C. Cir. 2005) ("Congress directed the agency to measure emissions increases in terms of changes in actual emissions.").

[24] 89 Fed. Reg. at 36,880.

[25] 89 Fed. Reg. at 36,880.

[26] 89 Fed. Reg. at 36,880, note 79.

be maintained; and (2) consistent with the CAA Section 110 requirements that "each implementation plan submitted by a State include enforceable emission limitations" and "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter." [27] Both of these rationale lack merit.

1. EPA's Concern About Ensuring that Step 1 Emissions Decreases Occur and are Maintained is Unsupported and Inconsistent with the NSR Program

The Agency's PEA Proposal recognizes that, in its 2002 NSR Reform Rule, EPA opted against requiring that projected actual emissions be made enforceable,[28] but again fails to acknowledge that, even though these regulatory revisions were promulgated over two decades ago, EPA cannot identify any example of the type of abuses that the Agency's proposed revision is seeking to prevent. EPA simply offers that there "may" be a reason to require that decreases be made enforceable.[29]

Nor does Agency's PEA Proposal meaningfully contend with EPA's reasoning for declining to adopt a requirement in the 2002 NSR Reform Rule under which a source's projected actual emissions would have become an enforceable emission limitation. EPA reasonably declined such an approach in 2002 because: (1) the Agency was "concerned that such a requirement may place an unmanageable resource burden on reviewing authorities," and (2) because the Agency "believe[d] that it is not necessary to make... future projections enforceable in order to adequately enforce the major NSR requirements."[30] EPA's topline conclusion in 2002 remains true today: "[t]he Act provides ample authority to enforce the major NSR requirements if... [a] physical or operational change results in a significant net emissions increase at... [a] major stationary source."[31]

What matters for the purposes of NSR is whether there is an increase in emissions from the source as a whole, not whether the source is able to estimate the exact emissions impact of each individual piece of the project for five or ten years into the ultimately unknowable future. Thus, EPA's existing regulations provide that "[r]egardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase."[32]

Compliance with this provision is assessed and made practically enforceable by requirements that sources track their post-project emissions and compare them to their estimates does what is needed to fulfill the purpose of the preconstruction program – it ensures that emissions do not increase more than allowed by the permit or by more than a significant amount. If such an increase does not occur, then there is no basis to bring an enforcement action over minor

[27] 89 Fed. Reg. at 36,880.
[28] 89 Fed. Reg. at 36,880.
[29] 89 Fed. Reg. at 36,880.
[30] 67 Fed. Reg. 80,204.
[31] 67 Fed. Reg. 80,204.
[32] 40 CFR § 52.21(a)(2)(iv)(b).

deviations from preconstruction projections that have no impact on permitting determinations. And, as previously noted, if a source does violate its permit and/or its projections and reports it, permitting authorities have ample authority to investigate and take corrective action, including civil and criminal enforcement.

This aspect of EPA's PEA Proposal therefore has no impact on permitting authorities' ability to enforce preconstruction permitting conditions. And perhaps more importantly, the aspect of EPA's proposal does nothing to enhance environmental quality. It does not provide any enforcement benefit that matters because state permitting authorities are already notified if an estimate is exceeded.

2. EPA's Concern that CAA Section 110 Requires Permit Conditions to be Enforceable is Misplaced and Inconsistent with Case Law

As noted above, the Proposed PEA also claims that it is necessary to make Step 1 emissions decreases enforceable in order to remain consistent with the CAA Section 110 requirement that permits issued under state implementation plans ("SIPs") "include enforceable emission limitations" "necessary to assure that national ambient air quality standards [("NAAQS")] are achieved…" This rationale makes little sense.

To begin, EPA's longstanding interpretation and implementation of the CAA Section 110 requirement that SIPs contain enforceable permit limits necessary for NAAQS compliance demonstrates that this provision in no way compels EPA to make Step 1 emissions decreases enforceable. More specifically, EPA has never required that projected actual emissions used in calculating emissions *increases* from a project be enforceable even though a lower projected emissions increase at an existing emissions unit can have the same result on the Step 1 applicability calculation as a projected emissions *decrease* at another unit.

In addition to being inconsistent with longstanding Agency practice, EPA's rationale is also inconsistent with the recent D.C. Circuit decision in *Environmental Comm. of Fl. Elec. Power Coord. Grp. v. EPA*, where the court held that EPA cannot "call a SIP solely on the ground that the SIP's 'other control measures' fail to satisfy the statutory definition of an 'emission limitation.'"[33] If a SIP, or a permit, can contain such "other controls," then EPA must find that any additional requirement is *necessary and appropriate* to support its action, which it likely cannot do in a blanket rulemaking on something as individualized as the extent of reductions, particularly given its inability to point to any specific problem that has arisen.

It is noteworthy that EPA deemed this aspect of the Proposed PEA "severable" from the remainder of the proposal. This suggests that the Agency is aware its proposed enforceability provisions are legally suspect. If so, SMA respectfully urges that the proper course is for EPA to refrain from promulgating a legally dubious regulation rather than take steps to ensure that the impermissible provision cannot undermine other aspects of the rule.

3. EPA's Proposed Enforceability Provisions are Particularly Arbitrary and Capricious as Applied to Replacement Units

[33] 94 F.4th 77, 100-01 (D.C. Cir. 2024).

In addition to the concerns set forth above, SMA is compelled to point out that EPA's proposed enforceability provisions are particularly arbitrary as applied to units that are being replaced by another substantially identical unit. These are known as "replacement units."[34] Under EPA's regulations, replacement units must share the same "basic design parameters" as the original unit,[35] and the original unit being replaced must be "permanently removed," "permanently disabled," or "permanently barred from operation."[36] Under these circumstances, the "reduction" from the original units removal or permanent disablement is assured and there is no need for additional enforceable measures.

Even beyond the "replacement unit" context, if the original unit is, in fact, replaced by the new or modified unit, there is generally not much doubt that the emissions reductions from the replaced unit will occur. If the EPA has examples of how a unit that has been removed did not achieve actual emissions reductions consistent with its prior actual emissions, SMA urges the Agency to provide those examples for public review and comment. Otherwise, we believe that EPA should view the "replacement unit" scenario as further evidence that its proposal to require enforceable Step 1 emissions reductions is misplaced and unnecessary.

4. SMA's Responses to Specific Requests for Comment

In addition to our overarching comments on EPA's proposed enforceability provisions above, SMA provides brief responses to EPA's specific requests for comment in the subsections below.

- *What types of projects would be impacted by a requirement that emissions decreases accounted for under Step 1 of the NSR applicability process be enforceable prior to beginning actual construction and the effect that such a requirement would have on project decision-making and project outcomes.*

The proposed requirement would adversely affect any project where the return on the investment is uncertain. Consider, for example, a source that is considering adopting a new technology that is inherently less polluting but not certain to continuously achieve customers' expected levels of quality when operated at scale. Under such a scenario, the source may be reluctant to accept enforceable limits on other units to enable the new technology because if the new technology fails to operate as planned, EPA's proposed enforceability provisions would prevent the source from reverting back to its previous higher-emitting but more reliable technology.

- *How would a requirement that emissions decreases under Step 1 meet the criteria currently applicable to decreases accounted for under Step 2 impact accountability and enforceability of emissions limitations?*

We do not fully understand the premise of this question. EPA's proposed change would impose enforceable emissions limits on all Step 1 emissions decreases and thus necessarily increases enforceability. The Agency's proposed change would not, however, increase source accountability because accountability is already assured based on existing emissions inventory requirements to track emissions. EPA's proposal could conceivably increase accountability over

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[34] 40 C.F.R. § 52.21(b)(33).
[35] 40 C.F.R. § 52.21(b)(33)(iii).
[36] 40 C.F.R. § 52.21(b)(33(iv).

emissions from a discrete piece of equipment change, but it doing so, would undermine the "bubble concept" under PSD, which focuses less on the significance of emissions projected from an individual piece of equipment and more on the overall source impact. EPA's proposal fails to provide any reason why a small deviation at an individual piece of equipment should be viewed as significantly impacting air quality if the source as a whole emits lower emissions or even emissions consistent with its forecast.

- *How can the EPA justify a distinction with respect to enforceability requirements by differentiating projections resulting in an increase versus those projections that result in a decrease in emissions given that inaccuracies in projections, in either case, may result in improper applicability conclusions?*

For the reasons set forth through this section, SMA does not believe that EPA can reasonably justify this distinction. On the contrary, we believe this distinction represents another indicator of arbitrary and capricious rulemaking.

- *Is there a more effective regulatory revision to require that decreases at Step 1 are enforceable than what is being proposed in this action? Why would your proposed alternative be preferable to the revisions proposed by the EPA to the "significant emissions increase" definition?*

For the reasons set forth throughout these comments, SMA believes that the current regulatory regime is preferable to the revised approach that EPA has proposed. As evinced by EPA's inability to cite any instances of abuses that its proposed approach would remedy, the current regulatory requirements and guidance provide adequate assurance that overall post-project emissions remain consistent with projections. On the contrary, expanded and continuous scrutiny of emissions estimates will needlessly invite immaterial parsing of emissions projections without resulting in more accuracy or precision.

- *Is this proposed requirement necessary for added assurance that decreases accounted for by a source under the project emissions accounting process actually occur and are maintained, or are the "reasonable possibility" requirements in the recordkeeping and reporting provisions, including the revisions to these provisions described in section VI., a sufficient means of assurance?*

As we explained throughout these comments, SMA believes that EPA's ability to cite specific instances of permit circumvention related to Step 1 emissions decreases reflects that EPA's existing regulations are adequate to address the abuses hypothesized by the Agency. As we discussed in detail in this section and Section II.e. that follows, SMA believes that EPA's existing regulations regarding enforceability and "reasonable possibility" requirements are adequate, and that the proposed revisions to these regulations will add undue complexity with no concordant environmental benefit.

- *Finally, the EPA is taking comment on revising the regulations to expressly disallow project emissions accounting such that only emissions increases can be considered under the Step 1 significant emissions increase determination.*

EPA cannot adopt this approach because doing so violates both *WEPCO* and *New York*, which hold that EPA may not assume what it is required to prove and that it only has regulatory

jurisdiction over an increase in emissions. EPA cannot, by regulation, turn an emissions "decrease" into an "increase."

e. EPA's Proposed Revisions to its "Reasonable Possibility" Recordkeeping and Reporting Regulations are Unnecessarily Burdensome and Unworkable

In its PEA Proposal, EPA proposes to expand the "reasonable possibility" recordkeeping and reporting requirements in the Agency's NSR regulations, which apply to projects at major stationary sources and are evaluated using the actual-to-projected-actual applicability test. The reasonable possibility provisions apply when an owner/operator determines that the project does not qualify as a major modification but where there is a "reasonable possibility" that the project may nonetheless result in a significant emissions increase.

For the reasons set forth in more detail in the subsections below, SMA urges EPA to refrain from finalizing these proposed new recordkeeping and reporting provisions. These proposed revisions are unnecessary, burdensome, and unworkable.

1. EPA's Proposed New Recordkeeping and Reporting Requirements are Unnecessarily Burdensome

EPA's proposed revisions to its "reasonable possibility" recordkeeping and reporting provisions are needlessly burdensome because there is already robust recordkeeping and reporting for all Step 1 and Step 2 emissions decreases through emissions inventory reporting requirements. All major sources under the NSR program are also subject to Title V permitting, and are therefore required to annually report emissions from emissions units. These annual emission reports include any emissions units and its resulting emissions decreases that a source relied upon in a Step 1 assessment. As such, EPA, permitting authorities, and others can already track emissions decreases using these annual reports to ensure that emissions decreases calculated in Step 1 occur and are maintained.

Additionally, projects that are not deemed major based on a Step 1 analysis are generally subject to minor NSR review, which requires the applicant to obtain a pre-construction permit or other similar approval. In many cases, irrespective whether there is a "reasonable possibility" that a project could emit above the significant emission rate, permitting authorities are allowed to require, and often do require, enhanced monitoring.

Moreover, EPA's existing "reasonable possibility" provisions already provide ample recordkeeping requirements for sources that could otherwise trigger major NSR. Under these highly conservative existing provisions, a source is required to maintain records to demonstrate that "the project is not a major modification" if projected emissions are as low as fifty percent of the significant emission rate.[37] If emissions decreases contribute to a project not classified as a major modification under Step 1, these existing "reasonable possibility" recordkeeping requirements will already require sources to maintain information on those Step 1 decreases.

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[37] 40 C.F.R. § 52.21(r)(6)(i)(c).

SMA believes that all of these existing reasonable possibility requirements, minor NSR permitting recordkeeping requirements, and annual emission reporting requirements collectively assure that Step 1 emission decreases are accounted for and maintained. We also believe that the adequacy of these existing recordkeeping and reporting provisions are reflected in the absence of evidence in EPA's record for this rulemaking that existing regulations preclude EPA or any other permitting authority from determining that emissions decreases calculated in Step 1 occur and are maintained.

Even though the Agency's existing recordkeeping and reporting requirements plainly already allow permitting agencies to reasonably assess compliance with Step 1 emissions reductions, EPA's PEA Proposal would require all sources to submit to permitting authorities all records developed pursuant to proposed 40 C.F.R. § 52.21(r)(6)(i). EPA never sufficiently explains the value it associates with this burdensome new reporting proposal, and in fact undercuts the Agency's own justification for this proposal by specifically stating that EPA and other permitting authorities will never be required to review this information.[38]

A rule that imposes costs without any corresponding benefit is the paragon of arbitrary and capricious rulemaking. The purported enforcement benefits that EPA associates with this proposed change are speculative at best, and as noted throughout these comments, unsupported by any data.

Moreover, as applied to "replacement units," the potential benefit of these burdensome new recordkeeping and reporting proposals is unquestionably nonexistent. Replacement units replace the existing emissions units and therefore the emissions reductions associated with the removal of existing units are effectively assured. Applying onerous new recordkeeping and reporting requirements to these "permanently disabled" units is plainly arbitrary and unnecessary.

2. EPA's Proposed New Reporting Requirements are Vague and Unworkable

EPA's proposed requirement that sources "document and maintain a record of... each physical change and/or change in the method of operation associated with the project objectives..."[39] is drafted in such a vague and imprecise manner that it could conceivably be applied to innumerable different process units that may undergo a "physical change and/or change in the method of operation" associated with a project. For example, as written, this proposed provision could apply to plumbing and conduit fittings a company may need to realign or replace, a pencil sharpener added to an office wall, or a higher resolution projector that is added to a meeting room. None of these actions are relevant to determining a source's preconstruction permitting compliance. As such, at minimum, EPA must revise this provision to restrict it to modified or newly constructed emissions units only. Affected non-modified units, if addressed at all, should be addressed generally (*e.g.*, "as a result of the project, throughput through the XZ circuit will increase by 2.3% with corresponding changes in throughput-based emissions").

Additionally, nowhere in the preamble to the PEA Proposal does EPA address how sources are expected to deal with the changes that inevitably happen during the course of a project, such as

[38] 89 Fed. Reg. at 36,884.
[39] Proposed 40 C.F.R. § 52.21(r)(6)(i) & (i)(a).

when the unit a source planned to install becomes unavailable thereby requiring the source to substitute a different, functionally similar unit. EPA's proposal implies that this type of change could result in an enforcement action even if the substitution has no impacts on emissions or the source's projections.

SMA urges EPA to recognize, that, in practice, no construction project ever proceeds exactly as planned. Changes, revisions, and substitutions are inevitable and should be accounted for in EPA's regulations. Construction projects that modestly deviate from plans without impacting emissions should not be the subject of enforcement actions. What is important is that actual emissions after project completion are consistent with projections and remain below applicable significant emission rates.

III. CONCLUSION

SMA appreciates the opportunity to provide these comments. If you have any questions or would like to discuss these comments, please feel free to contact me using the information below, Wayne D'Angelo at WDAngelo@KelleyDrye.com or (202) 342-8525, or Zachary Lee at ZLee@KelleyDrye.com or (202) 342-8859.

Respectfully,

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