

Management and Budget grants an exception. Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing services under the enrolled actuaries program. The IRS has determined that the full cost of administering the enrollment and re-enrollment processes is \$250 per enrolled actuary per process.

The final user fees will be implemented under the authority of the IOAA of 1952 and the OMB Circular.

On October 31, 2007, a notice of proposed rulemaking (REG-134923-07) was published in the **Federal Register** [72 FR 61583]. No comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. The proposed regulations are adopted by this Treasury decision.

Special Analyses

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This certification is based on the information that follows. These final rules affect enrolled actuaries, of which there are currently 4,600 active. The economic impact of these regulations on any small entity would result from a small entity, including a sole proprietor, being required to pay a fee prescribed by these regulations in order to obtain a particular service. The appropriate NAICS codes for enrolled actuaries relate to Insurance Other (524298) and Administrative and General Management Consulting, Including Financial Consulting (541611). Entities identified under these codes are considered small under the SBA size standards (13 CFR 121.201) if their annual revenue is less than \$6.5 million. The IRS estimates that as many as 2,070 enrolled actuaries may be operating as or employed by small entities. Therefore, the IRS has determined that these final rules will affect a substantial number of small entities. The dollar amounts of the fees are not, however, substantial enough to have a significant economic impact on any entity subject to the fees. The amounts of the fees are commensurate with, if not less than, the amount charged by professional organizations. Persons who elect to apply for enrollment or renewal of enrollment also receive benefits from obtaining the enrolled actuary designation. Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM

preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact.

Drafting Information

The principal author of these regulations is Kimberly A. Mattonen of the Office of the Associate Chief Counsel (Procedure & Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR Part 300 is amended as follows:

PART 300—USER FEES

■ **Paragraph 1.** The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.0 is amended as follows:

■ 1. Paragraphs (b)(7) and (b)(8) are added.

■ 2. Paragraph (c) is revised.

■ The additions and revision read as follows:

§ 300.0 User fees, in general.

* * * * *

(b) * * *

(7) Enrolling an enrolled actuary.

(8) Renewing the enrollment of an enrolled actuary.

(c) *Effective/applicability date.* This part 300 is applicable March 16, 1995, except that the user fee for processing offers in compromise is applicable November 1, 2003; the user fee for the special enrollment examination, enrollment, and renewal of enrollment for enrolled agents is applicable November 6, 2006; the user fee for entering into installment agreements on or after January 1, 2007, is applicable January 1, 2007; the user fee for restructuring or reinstatement of an installment agreement on or after January 1, 2007, is applicable January 1, 2007; and the user fee for the enrollment and renewal of enrollment for enrolled actuaries is applicable January 22, 2008.

■ **Par. 3.** Section 300.7 is added to read as follows:

§ 300.7 Enrollment of enrolled actuary fee.

(a) *Applicability.* This section applies to the initial enrollment of enrolled actuaries with the Joint Board for the Enrollment of Actuaries pursuant to 20 CFR Part 901.

(b) *Fee.* The fee for initially enrolling as an enrolled actuary with the Joint

Board for the Enrollment of Actuaries is \$250.00.

(c) *Person liable for the fee.* The person liable for the enrollment fee is the applicant filing for enrollment as an enrolled actuary with the Joint Board for the Enrollment of Actuaries.

■ **Par. 5.** Section 300.8 is added to read as follows:

§ 300.8 Renewal of enrollment of enrolled actuary fee.

(a) *Applicability.* This section applies to the renewal of enrollment of enrolled actuaries with the Joint Board for the Enrollment of Actuaries pursuant to 20 CFR Part 901.

(b) *Fee.* The fee for renewal of enrollment as an enrolled actuary with the Joint Board for the Enrollment of Actuaries is \$250.00.

(c) *Person liable for the fee.* The person liable for the renewal of enrollment fee is the person renewing their enrollment as an enrolled actuary with the Joint Board for the Enrollment of Actuaries.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2001-0004; FRL-8508-4]

RIN-2060-AN88

Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule finalizes proposed revisions to the regulations governing the major new source review (NSR) programs mandated by parts C and D of title I of the Clean Air Act (CAA). These changes clarify the "reasonable possibility" recordkeeping and reporting standard of the 2002 NSR reform rules. The "reasonable possibility" standard identifies for sources and reviewing authorities the criteria under which an owner or operator of a major stationary source undergoing a physical change or change in the method of operation that does not

trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. As noted in the proposal, the U.S. Court of Appeals for the DC Circuit in *New York v. EPA*, 413 F.3d 3 (DC Cir. 2005) (*New York*) remanded for the EPA either to provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately supported alternative. To satisfy the Court’s remand, the EPA is clarifying what constitutes “reasonable possibility” and when the “reasonable possibility” recordkeeping requirements apply.

DATES: This final rule is effective on January 22, 2008.

ADDRESSES: *Docket.* The EPA has established a docket for this action under Docket ID No. [EPA–HQ–OAR–2001–0004]. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Air

and Radiation Docket and Information Center telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Public Reading Room is located in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The telephone number for the Public Reading Room is (202) 566–1744. Visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor materials will be processed through an X-ray machine as well. Visitors will be provided a badge that must be visible at all times.

FOR FURTHER INFORMATION CONTACT: Ms. Lisa Sutton, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711, *telephone number:* (919) 541–3450; *fax number:* (919) 541–5509, e-mail address: sutton.lisa@epa.gov.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

- I. General Information
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 - K. Congressional Review Act
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I. General Information

A. Does this action apply to me?

Entities affected by this final rule include major stationary sources in all industry groups.¹ The majority of sources potentially affected are expected to be in the following groups:

Industry group	SIC ^a	NAICS ^b
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122.
Petroleum Refining	291	324110.
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188.
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199.
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510.
Natural Gas Liquids	132	211112.
Natural Gas Transport	492	486210, 221210.
Pulp and Paper Mills	261	322110, 322121, 322122, 322130.
Paper Mills	262	322121, 322122.
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213.
Pharmaceuticals	283	325411, 325412, 325413, 325414.

^a Standard Industrial Classification.
^b North American Industry Classification System.

Entities affected by the rule also include States, local permitting authorities, and Indian country.

B. Where can I obtain additional information?

In addition to being available in the docket, an electronic copy of this preamble and final amendments will

also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this notice will be posted on the EPA’s NSR Web site,

¹ As noted in our proposal (72 FR 10449), the “reasonable possibility” standard does not apply to

existing minor sources or to “synthetic minor modifications.”

under Regulations & Standards, at <http://www.epa.gov/nsr>.

II. Background and History of the Reasonable Possibility Standard

We recognized that the long-standing major NSR applicability test based on “actual-to-potential” methodology was the subject of claims by industry representatives that the actual-to-potential methodology resulted in “confiscation” of unused plant capacity following a modification project. Accordingly, in a proposal in 1996, we proposed to allow non-utility units to use an actual-to-future-actual methodology, similar to what we had already extended to electric utility steam generating units (other than new units or the replacement of existing units) in the 1992 WEPCO rule. 61 FR at 38255. Some States commented that the accuracy of applicability determinations for major NSR was compromised by the potential for error in calculations of future actual projections. As a result, in 1998, we issued a supplemental proposal requesting comment on an actual-to-future-enforceable-actual methodology. To use this test, a source would be required to accept a permit limit equal to its future actual projection. 63 FR 39857. That proposal received many negative comments, particularly from States that were concerned about increases in resource burdens and in paperwork related to creating and enforcing the future actual emissions limit.

In the 2002 NSR reform rules (67 FR 80186, December 31, 2002), we promulgated an actual-to-projected-actual methodology for major NSR applicability determinations.² That rule further provides that if a source calculates its projected actual emissions for the project below major NSR significant levels, the source must comply with recordkeeping and, in some cases, reporting requirements, if there is a “reasonable possibility” that the project would result in a significant emissions increase. We included these requirements to respond to concerns that a source’s projection could erroneously understate emissions and that the project could result in an emissions increase greater than the significant levels. Our goal for developing the “reasonable possibility” standard was to strike a balance between, on the one hand, States’ concerns with possible calculation

errors in applicability determinations and, on the other hand, sources’ and States’ concerns about resource burdens.

Specifically, we promulgated the “reasonable possibility” standard to apply “* * * in circumstances where there is a reasonable possibility that a project that is not part of a major modification may result in a significant emissions increase * * *” (e.g., 40 CFR 52.21(r)(6)).³ We did not define the term “reasonable possibility” or identify the criteria under which a “reasonable possibility” would arise. Sources whose project resulted in a reasonable possibility of a significant emissions increase were required to keep pre-change and post-change records. Pre-change records include a description of the project, identification of units that could be affected, a description of the applicability test used, and netting calculations (if applicable). For purposes of pre-change recordkeeping, the description of the applicability test addresses baseline actual emissions, projected actual emissions, and emissions excluded (such as due to demand growth) with an explanation as to why they are excluded. (See, e.g., 40 CFR 52.21(r)(6)(i).) The post-change recordkeeping requirement—actually a recordkeeping and monitoring requirement—entailed monitoring emissions of those regulated NSR pollutants for which there was a reasonable possibility of a significant emissions increase and calculating and maintaining records of the annual emissions for 5 (or 10) years. (See, e.g., 40 CFR 52.21(r)(6)(iii).) Further, for certain cases, sources whose project resulted in a reasonable possibility of a significant emissions increase were required to submit pre-change and/or post-change reports to the reviewing authority. The reporting requirements applied depending on whether the unit was an electric utility steam generating unit and on whether the project’s annual emissions exceeded the baseline by a significant amount. (See, e.g., 40 CFR 52.21(r)(6)(ii), (iv), and (v).)

In the *New York* case, the Court held, “[b]ecause EPA has failed to explain how it can ensure NSR compliance without the relevant data, we will remand for it either to provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately supportive alternative.” 413 F.3d at 35–36. This final action addresses the Court’s remand by including regulatory changes

that clarify the reasonable possibility standard and specify the criteria under which records must be kept for a physical change or change in the method of operation that does not trigger major NSR permitting requirements. (For purposes of this action, we refer to the physical or operational change interchangeably as a change or a project.) Two options were proposed in the March 8, 2007 proposal (45 FR 10445, March 8, 2007). These options include the “percentage increase trigger” and the “potential emissions trigger.” Based on our⁴ evaluation and consideration of comments received on the two main options proposed for clarifying the “reasonable possibility” standard, we are finalizing the “percentage increase trigger” option with refinements to address concerns raised by commenters.

Other background information for this action is included in the notice of proposed rulemaking (72 FR 10445, March 8, 2007), and this notice assumes familiarity with that information.

III. Summary of the Final Rule

This rule finalizes the “percentage increase trigger” option, with a few changes from what we proposed as our preferred option. Under the proposed “percentage increase trigger” option, there was a reasonable possibility that your change would result in a significant emissions increase if the projected increase in emissions of a pollutant—determined by comparing baseline actual emissions to projected actual emissions—equaled or exceeded 50 percent of the applicable NSR significant level for that pollutant. The proposed rule imposed recordkeeping, emissions monitoring, and reporting requirements on any source projecting that a change could result in a reasonable possibility of a significant emissions increase.

By definition in our regulations, “projected actual emissions” excludes emissions attributable to an independent factor⁵ (such as demand growth); see, e.g., 40 CFR 52.21(b)(41). Likewise, in our proposal, we excluded emissions attributable to independent factors from the projected increase in emissions to which the “reasonable possibility” recordkeeping trigger applied. In this final action, based on the comments received, we are requiring

⁴ In this rulemaking, the terms “we,” “us,” and “our” refer to the EPA and the terms “you” and “your” refer to the owners or operators of major stationary sources of air pollution.

⁵ Use of the term “projected actual emissions” in this preamble has the same meaning for both major NSR applicability and the “reasonable possibility” recordkeeping and reporting requirements.

² Under the actual-to-projected-actual methodology, a source may opt to use potential to emit as its projected actual emissions. See, e.g., 40 CFR 52.21(b)(41)(ii)(d).

³ For example, we required that owners/operators record the netting calculations for a project if the owners/operators used emissions reductions elsewhere at the source to conclude that the project was not a major modification. 67 FR at 80197.

that emissions attributable to independent factors (such as demand growth) be considered for purposes of the “percentage increase” test. We are retaining the proposed approach, which requires sources to compare baseline actual emissions to projected actual emissions to determine whether this value equals or exceeds 50 percent of the applicable NSR significant level. The final rule requires these sources to comply with both the pre-change and the post-change recordkeeping and reporting requirements, as in the proposed rule. This final rule includes the additional requirement that sources whose projected actual emissions increase is less than 50 percent of the applicable NSR significant level must determine whether emissions attributable to demand growth that is unrelated to the change would cause the post-project emissions increase to exceed 50 percent of the applicable NSR significant level. If so, then under the final rule, these sources also have a reasonable possibility of causing a significant emissions increase, but under these circumstances, the final rule requires such sources to comply with only the pre-change recordkeeping requirements and not the pre-change reporting requirements or post-change recordkeeping and reporting requirements.

At the same time that we proposed the 50-percent “percentage increase trigger” option, we included that approach as an interim interpretation in appendix S of 40 CFR part 51. In this final rule, we are amending appendix S to include the additional requirement concerning independent factors (such as demand growth) described earlier in this section.

IV. Legal and Policy Rationale for Action

A. Purpose of the Reasonable Possibility Standard

From the standpoint of compliance, project-related records allow permitting authorities and enforcement officials to evaluate a source’s claim that any emissions increase from a project does not trigger NSR. If ease of enforcement were our only consideration, it would point us toward the most inclusive of recordkeeping and reporting requirements. Nonetheless, agencies do not invariably require the regulated community to keep records to prove the nonapplicability of a requirement. In imposing recordkeeping requirements in this case, we strove for a balance between ease of enforcement and avoidance of requirements that would be unnecessary or unduly burdensome

on reviewing authorities or the regulated community.

Initially, in promulgating the “reasonable possibility” standard, we intended to limit recordkeeping requirements to those projects for which variability in calculating emissions creates an interest in obtaining additional information in order to confirm that the appropriate applicability outcome is reached. Nonetheless, the Court expressed concerns with the lack of definition for the standard and with the uncertainty that accompanies particular elements of the calculations, including demand growth and fugitive emissions, as well as startups and malfunctions. The regulated community expressed concern that the lack of a bright-line test left them uncertain about their recordkeeping and reporting obligations. As a result, our proposal in response to the Court’s remand in *New York* included a bright-line, 50-percent test for the “reasonable possibility” standard. We stated that the closer the projected actual emissions are to the significant level, the greater the likelihood that the project could ultimately result in a significant emissions increase, and that the bright-line test will capture most if not all projects that have a higher probability of variability and/or error in projected actual emissions. Thus, we proposed the bright-line test to create certainty for the regulated community and reviewing authorities.

B. How Our Final Rule Differs From Proposal

We are finalizing the “percentage increase trigger” option with one difference from the proposed option. This final rule requires consideration of “demand growth” emissions and additionally requires pre-change recordkeeping (specified, *e.g.*, at 40 CFR 52.21(r)(6)(i)) of a project whose emissions increase would equal or exceed 50 percent of the applicable NSR significant level only if emissions due to independent factors (such as demand growth) are included. As proposed, under the “percentage increase” test, “reasonable possibility” recordkeeping and reporting requirements are triggered in the case of a 50 percent or greater increase in emissions, calculated as the difference of “baseline actual emissions” and “projected actual emissions.” Under our NSR regulations, the calculation of “projected actual emissions” excludes “that portion of the unit’s emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the

baseline actual emissions * * * and that are also unrelated to the particular project, including any increased utilization due to product demand growth.* * *” See, *e.g.*, 40 CFR 52.21(b)(41). This exclusion is commonly called the “demand growth exclusion.”

The Court, in its order on remand of the reasonable possibility provision to EPA, specifically cited as a problem the possibility that sources would overstate the demand growth exclusion:

[T]he intricacies of the actual-to-projected-actual methodology will aggravate the enforcement difficulties stemming from the absence of data. The methodology mandates that projections include fugitive emissions, malfunctions, and start-up costs, and *exclude demand growth unrelated to the change.** * * Each such determination requires sources to predict uncertain future events. By understating projections for emissions associated with malfunctions, for example, or *overstating the demand growth exclusion*, sources could conclude that a significant emissions increase was not reasonably possible. Without paper trails, however, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed “reasonable.”

413 F.3d at 35 (emphasis added).

Following our proposal to treat 50 percent of the applicable NSR significant level as the trigger for “reasonable possibility” recordkeeping and reporting requirements, we received numerous comments expressing continued concerns about “demand growth” emissions. These commenters argued that a source’s inaccurate or improper use of the demand growth exclusion could allow projects to go unreviewed under the proposed rule trigger.

We have decided to refine the “percentage increase” test by providing for recordkeeping to document projections of an emissions increase that would exceed the 50-percent threshold if emissions attributable to independent factors (such as demand growth) are counted. Thus, this final rule requires sources to include emissions from demand growth for purposes of applying the “percentage increase” test. Several commenters specifically recommended this approach. Some commenters suggested applying the trigger at 100 percent of the significant level where demand growth is concerned. However, we believe that such an approach would complicate the regulatory requirements by applying two different percentages depending on the circumstances. For ease of implementation, we are applying the same trigger—50 percent of the significant level—that applies to sources

not relying on excluding emissions caused by independent factors.

A project that triggers "reasonable possibility" recordkeeping and reporting requirements but does so only when counting emissions due to an independent factor (such as demand growth) will be subject to only pre-change recordkeeping requirements. The project will not be subject to pre-change reporting requirements or post-change recordkeeping or reporting requirements. According to the "reasonable possibility" standard of our existing rules, the source owner/operator must make a pre-change report prior to construction if the unit is an electric utility steam generating unit. (See, e.g., 40 CFR 52.21(r)(6)(ii).) Under this final rule, however, the pre-change reporting requirement does not apply to the utility project unless the projected actual emissions increase alone equals or exceeds 50 percent of the NSR significant levels.

We believe this pre-change recordkeeping requirement establishes an adequate paper trail to allow enforcement authorities to evaluate the source's claims concerning what amount of an emissions increase is related to the project and what amount is attributable to demand growth. In most cases, it is unlikely that "demand growth" emissions could ultimately be found to be related to changes made at a facility. Accordingly, NSR applicability is not affected by whether a source overestimates or underestimates demand growth emissions. Nonetheless, we recognize that for some limited types of projects, additional information may be required to determine whether a projected emissions increase is related to the change. The source must retain pre-change records that describe the project, identify the units that could be affected, describe the baseline actual emissions, the projected actual emissions, and the emissions excluded due to demand growth with an explanation as to why they were excluded. These records provide permitting authorities and enforcement officials sufficient information to determine whether the type of project undertaken could have a causal link to increases in emissions due to demand growth. With these records, enforcement authorities will have an adequate starting point to make further inquiries and to access other types of records, as discussed later in this preamble, to verify post-project demand growth and enforce NSR requirements.

In imposing a recordkeeping requirement on projects that attribute any emissions to demand growth, we

believe our "percentage increase test" further addresses the Court's concerns that a source might overstate the demand growth exclusion but not retain records to support its exclusion of emissions attributable to demand growth. The rule imposes pre-change recordkeeping requirements on projects that have a higher probability of variability and/or error in projected actual emissions. This approach balances ease of enforcement with avoidance of requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community. Because sources that rely on the demand growth exclusion already conduct the necessary calculations to determine whether the project would trigger major NSR requirements, requiring the source to retain this calculation adds little additional burden.

The following example illustrates the difference between the "percentage increase trigger" as proposed and as finalized with the refinement for demand growth. Consider an owner/operator who calculates a post-project emissions increase of 60 tpy for a pollutant with a 40-tpy significant level. The owner/operator attributes 10 tons of the increase to the project and the other 50 tons to demand growth. The owner/operator correctly concludes that the project is not a "major modification" that triggers major NSR requirements because the emissions increase of 10 tpy is below the significant level for the pollutant. Under our proposal, the project would not have triggered any recordkeeping or reporting requirements because the projected increase of 10 tpy is below 50 percent of the applicable significant level of 40 tpy (i.e., below the 20-tpy threshold level that triggers "reasonable possibility" recordkeeping and reporting requirements). In contrast, under this final rule, the source must take the additional step of determining whether the project has a reasonable possibility of a significant emissions increase before subtracting the 50 tpy of emissions attributed to demand growth. Because 60 tpy exceeds the 20-tpy threshold level (and even though the owner/operator attributes only 10 tons of the increase to the project), the project would trigger pre-change recordkeeping requirements as described earlier in this section. The project would not trigger pre-change reporting or post-change recordkeeping (which includes emissions monitoring) or reporting.

C. Why Recordkeeping Trigger Is at 50 Percent of NSR Significant Levels

Our final rule (like our proposal) uses 50 percent of the applicable NSR significant level as the trigger for "reasonable possibility" recordkeeping and reporting requirements, but we solicited comment on use of a different percentage, such as 25, 33, 66 or 75 percent. Commenters who supported the "percentage increase trigger" option expressed support for a trigger of not less than 50 percent. We are using 50 percent because it balances competing interests, as described by the Court. Specifically, the Court stated:

We recognize that less burdensome requirements may well be appropriate for sources with little likelihood of triggering NSR. * * *

413 F.3d at 34.

Agencies have authority under circumstances such as these to establish a bright-line test, as opposed to making case-by-case determinations. See, e.g., *Time Warner Entertainment Co. L.P. v. F.C.C.*, 240 F.3d 1126, 1141 (DC Cir. 2001). We believe a bright-line test at 50 percent will capture projects that have a higher probability of variability and/or error in projected emissions.

Projects with projected increases below the 50-percent threshold, especially when emissions from demand growth are included in projections, are, we believe, sufficiently small that any variability or error in calculations is less likely to be large enough for the change to have increased emissions to the significant level. This view seems to be consistent with comments submitted by the group of States that successfully challenged the "reasonable possibility" rule.⁶ Other commenters included general objections to the 50-percent threshold but did not give specific examples of projects for which sources would project emissions increases of less than 50 percent of the significant level but which would nevertheless be likely to cause emissions increases above the significant level. For projects with a projected increase of more than 50 percent of the significant level, the increase is large enough that we conclude there is a reasonable possibility of a significant emissions increase, due to variability in emissions and the possibility of error in the projection. As a result, for these projects, we do not believe the imposition of "reasonable possibility" recordkeeping and reporting

⁶ See comment letter from Hon. Andrew M. Cuomo, New York Attorney General, et al., at Docket Item EPA-HQ-OAR-2001-0004-0810.1, page 9, footnote 2.

requirements to be unnecessarily burdensome. The project-specific records and reports created pursuant to this rule (see, e.g., 40 CFR 52.21(r)(6)) will provide an adequate paper trail for reviewing authorities and will be supplemented with records that are kept for other purposes for use by a reviewing agency in determining whether enforcement action is warranted.

Some commenters expressed concern that a threshold at 50 percent of NSR significant levels would capture too many small projects, including routine maintenance projects. The “reasonable possibility” standard applies when a major source undergoes a physical change or change in the method of operation. We point out that in defining “major modification,” the major NSR regulations specify that a “physical change or change in the method of operation” excludes routine maintenance, repair, and replacement, certain uses of alternative fuel or raw material, certain increases in hours of operation or production rate, changes in ownership, and certain activities associated with clean coal technology. (See, e.g., 40 CFR 52.21(b)(2).) Thus, a project that is not a “physical change or change in the method of operation” is not subject to “reasonable possibility” recordkeeping and reporting requirements.

D. Fugitive Emissions and Emissions Due to Startup and Malfunction

Under the actual-to-projected-actual methodology of the major NSR applicability test, projected actual emissions include fugitive emissions as well as emissions anticipated to be caused by startups and malfunctions. One of the concerns expressed by the Court in remanding the “reasonable possibility” standard was that sources may underestimate future emissions by understating fugitive, startup, or malfunction emissions.

We do not believe projections of fugitive, startup, or malfunction emissions are likely to be significant causes of variability or error that would lead to underestimates of emissions increases from existing units.⁷ The types of emissions at issue are included in the project’s baseline actual emissions, and we have no reason to expect greater amounts of these types of emissions in the post-project projections. Thus, any variability or error in estimating these types of emissions is not likely to lead

to underestimates of emissions increases due to the project. Indeed, because the types of the projects at issue are often small improvements—that is, they are relatively small physical or operational changes, many of which would make nonroutine repairs or other types of improvements or make the source operations run more smoothly—such projects would, if anything, reduce these types of emissions from the amounts included in the baseline.

E. Additional Methods Supporting Compliance

We believe that the reasons described earlier are sufficient to support the 50-percent bright-line test, with the demand growth refinement. In addition, we believe that as a practical matter, existing records will aid in permitting and enforcement.

For projects that do not trigger recordkeeping and reporting requirements under the “reasonable possibility” standard, many source owners/operators will have various types of records that, collectively, provide information on the baseline actual emissions and projected actual emissions, as well as post-change emissions. These records will also be valuable for projects that trigger the “reasonable possibility” recordkeeping and reporting requirements but are not required to track post-change emissions. Such records include but are not limited to reports submitted to reviewing authorities pursuant to title V operating permit program requirements of 40 CFR parts 70 and 71, State minor NSR permit application data, business records, and emissions inventory data.

In the *New York* case, the Court questioned whether reporting requirements of the CAA’s title V program would provide the information enforcement authorities need, noting, “EPA fails to explain how emissions reported under title V can be traced to a particular physical or operational change.” 413 F.3d at 35. We recognize the Court’s concern that records kept in connection with monitoring and compliance under the title V operating permit program do not necessarily provide specific information on emissions increases from particular projects. Even so, many of these records will be useful in allowing enforcement authorities to identify an emissions increase from a particular piece of equipment, which can provide a starting point for inquiry as to whether a particular project was associated with such an increase. The enforcement authority could determine whether the source has kept records of changes that caused those emissions increases and, if

not, whether the source has an adequate explanation for the emissions increases.

Sources annually quantify and report emissions to reviewing authorities for purposes of computing annual permit program emission fees. Some sources calculate their reported emissions based on stack testing and emission factors. Other sources submit emissions data collected from continuous emissions monitoring (CEM). This information, in conjunction with title V permit applications, can allow enforcement authorities to determine whether emissions increases are associated with a particular piece of equipment.

In addition, major sources are subject to periodic monitoring and recordkeeping requirements for every individual applicable requirement in the source’s operating permit. See 71 FR 75422. These requirements frequently apply on an emissions-unit-by-emissions-unit basis. In many cases, physical changes or changes in the method of operation associated with a project occur at the emission unit level, so that these emissions records provide enforcement authorities a starting point for further inquiry as to whether a project at that unit is associated with such increase. Large emissions equipment is also subject to additional monitoring and recordkeeping under the “compliance assurance monitoring” (CAM) regulations at 40 CFR part 64. The CAM rule requires sources to establish monitoring or recordkeeping sufficient to assure compliance on a pollutant-specific basis at each emissions unit for which there is a limit, standard, or similar pollution control requirement. Monitoring assures proper operation of active pollution control devices in order to reduce the amount of downtime which would cause emissions increases. Typically, parameters are monitored that show proper operation of the control device, and if these parameters fall outside acceptable ranges or limits, then it is possible that there has been an emissions increase. In certain cases, CEMS (continuous emission monitoring systems), COMS (continuous opacity monitoring systems), PM CEMS (particulate matter continuous emission monitoring systems), or similar direct monitoring, is required to be used for CAM. In many such cases, these devices would be providing direct evidence of emissions increases. Monitoring compliance data includes logs of operations, visible emissions and instrumental opacity readings, stack test reports, analytically generated mass balances, and strip charts from continuous direct emissions and parametric monitors. These records can

⁷ We are not concerned about fugitive, startup, or malfunction emissions from new units at a project, because their emissions increases are based on potential to emit.

also allow enforcement authorities to identify an emissions increase at a particular piece of equipment, which provides a starting point for further inquiry about projects associated with that equipment.⁸

Regarding State minor source programs, the Court also expressed concern:

* * * [R]eliance on state programs to establish minimum recordkeeping and reporting standards means that states unwilling to impose stricter rules are free to retain the 2002 rule's approach. * * *

413 F.3d at 35.

While we recognize the Court's concern that States have latitude in structuring their minor source review programs, we recently collected information confirming that, as a practical matter, existing State minor NSR programs already provide data that assist reviewing authorities and enforcement authorities in identifying major modifications. Specifically, CAA 110(a)(2)(C) requires States to regulate construction and modification of stationary sources. Accordingly, States have adopted programs that require the owner/operator to provide notification or obtain a permit before construction or modification. These steps allow reviewing authorities to confirm the source's preconstruction projections and non-major NSR applicability determination. Minor NSR programs by definition apply to emissions increases less than the major NSR significant level, and only activities that a State qualifies as "insignificant activities" under the SIP-approved program may be excluded from review. Thus, reviewing authorities have an opportunity to review virtually all projects causing an emissions increase before construction begins. Moreover, our regulations (40 CFR 51.161) provide for public review of information submitted by owners/operators for purposes of minor NSR review. Thus, information provided for purposes of minor NSR programs is also of value in determining applicability of major NSR.

In October 2004, the EPA published an Information Collection Request (ICR) covering changes to the major NSR regulations. Our ICR analysis resulted in an estimate of 25,000 minor NSR permit applications per year processed by State and local agencies at major sources (specifically, 74,609 applications over a

3-year period).⁹ These permit applications include descriptions of the projects and other data that enforcement authorities can use in evaluating the applicability of NSR.

Business records include such routinely maintained operation-related records as production records, capital project development and appropriation requests, work orders, purchase records, and sales records. This information is readily available to reviewing authorities. In addition, publicly available information on production levels and growth in various industrial sectors can be used by authorities to determine if unexplained actual emissions increases are occurring at a source that might have constructed, installed, or modified equipment without NSR review.

Sources report the earlier-described title V data and State minor source permit data to the States, and, in turn, States must submit certain emissions data to the EPA. All information that the source submits to the State is available to assist EPA enforcement authorities, regardless of whether the information is included in the State's data submittal to EPA. States submit emissions inventory data directly to the EPA through the EPA's Central Data Exchange.¹⁰ Under the Consolidated Emissions Reporting Rule (CERR) (at 40 CFR part 51, subpart A), States must report criteria pollutant emissions from large point sources every year and must report emissions for all point sources, at the process level, at 3-year intervals.

States develop emissions inventories in support of their State Implementation Plans (SIPs) and submit the data to the EPA through the Governor or his/her designee. The EPA interprets CAA 110(a)(2)(F) as requiring SIPs to provide for the reporting of criteria air pollutant emissions from stationary sources for all areas under the general SIP requirements of section 110. In addition, EPA interprets section 172(c)(3) as providing the Administrator with discretionary authority to require other emissions data from stationary sources as deemed necessary for SIP development in nonattainment areas to attain the National Ambient Air Quality Standards (NAAQS).

Another source of data is the National Emissions Inventory (NEI). Produced by the EPA every 3 years, the NEI is an

inventory of criteria air pollutant and hazardous air pollutant emissions from stationary sources. The EPA uses data submitted by States under the CERR (as well as data from other sources) to develop the NEI. The NEI has several applications, including support for trends analyses and national rulemakings.

Enforcement authorities can use all of these earlier-described information sources to examine whether emissions from particular sources and, in some cases, particular pieces of equipment have increased. Such increases could give an enforcement authority a starting point for further inquiry. Upon inquiring, the enforcement authority could determine whether the source has kept records of changes that caused those emissions increases, and if not, whether the source has an adequate explanation for the emissions increases.

V. Effective Date of This Rule and Requirements for State Implementation Plans

These changes will take effect in the Federal PSD and Federal nonattainment NSR programs on January 22, 2008. This means we will apply these rules in any area without a SIP-approved PSD or SIP-approved nonattainment NSR program for which we are the reviewing authority or for which we have delegated our authority to issue permits to a State, local, or tribal reviewing authority.

We are establishing these requirements as minimum program elements of the PSD and nonattainment NSR programs. Notwithstanding these requirements, it may not be necessary for a State or local authority to revise its SIP program to begin to implement these changes.¹¹

Some State or local authorities may be able to adopt these changes through a change in interpretation of the term "reasonable possibility" without the need to revise the SIP. For any State or local authority that can implement the changes without revising its approved SIP, the changes will become effective when the reviewing authority publicly announces that it accepts these changes by interpretation. In the case of NSR SIP revisions that include the term "reasonable possibility" but that EPA has not yet approved, we will approve the SIP revision if the State or local authority commits to implementing the "reasonable possibility" standard in a manner consistent with our final rule.

⁸ Major stationary sources are also subject to State reporting requirements. In addition to data collected from sources for purposes of title V permit program emission fees, as noted earlier, States may also collect emissions data from sources for local ambient air quality planning purposes.

⁹ See Supporting Statement for Information Collection Request, EPA ICR Number 1230.17, at Docket Item EPA-HQ-OAR-2004-0001-0835, p. 14.

¹⁰ The EPA's Central Data Exchange (<http://www.epa.gov/cdx/>) is the point of entry on the Environmental Information Exchange Network for environmental data submissions to the Agency.

¹¹ Currently, there are no tribal permitting agencies with an approved TIP to implement the major NSR permitting program.

Although no SIP revision may be necessary in certain areas that adopt these changes by interpretation, we encourage State and local authorities in such areas to revise their SIPs to adopt these changes, in order to enhance the clarity of the existing rules.

For State and local authorities that revise their SIPs to adopt these changes, the changes are not effective in such areas until we approve the SIP revision. These State and local authorities must submit revisions to SIPs to EPA for approval within 3 years.

State and local authorities may adopt or maintain NSR program elements that have the effect of making their regulations more stringent than these rules. Several State and local authorities have regulations already approved into their SIPs that are more stringent than these rules. These State and local authorities must submit notice to EPA within 3 years to acknowledge that their regulations fulfill these requirements.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises policy issues arising from the President’s priorities. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB’s recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden as the burden imposed by this rule has already been taken into account in previously approved information collection requirement actions under the NSR program. The OMB has previously approved the information collection requirements contained in the existing 40 CFR parts 51 and 52 regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0003, EPA ICR number 1230.19. A copy of the OMB-approved Information Collection Request (ICR), EPA ICR number 1230.19 may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566–1672.

It is necessary that certain records and reports be collected by a State or local agency (or the EPA Administrator in non-delegated areas), for example, to: (1) Confirm the compliance status of stationary sources, including identifying any stationary sources subject/not subject to the rule, and (2) ensure that the stationary source control requirements are being achieved. The information is then used by the EPA or State enforcement personnel to ensure that the subject sources are applying the appropriate control technology and that the control requirements are being properly operated and maintained on a continuous basis. Based on the reported information, the State, local, or tribal agency can decide which plants, records, or processes should be inspected. Such information collection requirements for sources and States are currently reflected in the approved ICR referenced above for the NSR program.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information; processing and maintaining information; disclosing and providing information; adjusting the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that this action will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, a small entity is defined as: (1) A small business

that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA because this action merely provides explanation of an existing recordkeeping and reporting standard.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely provides explanation of an existing recordkeeping and reporting standard. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination With Indian Tribal Governments” (65 FR 13175, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This action does not have tribal implications, as there are no tribal authorities currently issuing major NSR permits. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, entitled “Protection of Children From

Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action does not establish an environmental standard intended to mitigate health or safety risks but rather provides explanation of an existing recordkeeping and reporting standard.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action does not constitute a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it will not likely have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not

consider the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations. The reason for EPA’s determination is because this action does not affect the level of protection provided to human health or the environment as it merely provides an explanation of an existing recordkeeping and reporting standard.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action does not constitute a “major rule” as defined by 5 U.S.C. 804(2). Therefore, this action will be effective January 22, 2008.

VII. Judicial Review

Under section 307(b)(1) of the Act, judicial review of this final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 19, 2008. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final

action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

VIII. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 14, 2007.

Stephen L. Johnson,
Administrator.

■ For reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below.

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart I—[Amended]

■ 2. Section 51.165 is amended by revising paragraph (a)(6) introductory text and adding paragraph (a)(6)(vi) to read as follows:

§ 51.165 Permit requirements.

(a) * * *

(6) Each plan shall provide that, except as otherwise provided in paragraph (a)(6)(vi) of this section, the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within

the meaning of paragraph (a)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (a)(1)(xxviii)(B)(1) through (3) of this section for calculating projected actual emissions. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(6)(i) through (vi) of this section.

* * * * *

(vi) A “reasonable possibility” under paragraph (a)(6) of this section occurs when the owner or operator calculates the project to result in either:

(A) A projected actual emissions increase of at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (a)(1)(xxvii) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(B) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (a)(1)(xxviii)(B)(3), sums to at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (a)(1)(xxvii) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (a)(6)(vi)(B) of this section, and not also within the meaning of paragraph (a)(6)(vi)(A) of this section, then provisions (a)(6)(ii) through (v) do not apply to the project.

* * * * *

■ 3. Section 51.166 is amended by revising paragraph (r)(6) introductory text and adding paragraph (r)(6)(vi) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(r) * * *

(6) Each plan shall provide that, except as otherwise provided in paragraph (r)(6)(vi) of this section, the following specific provisions apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of

this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(40)(ii)(a) through (c) of this section for calculating projected actual emissions. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (r)(6)(i) through (vi) of this section.

* * * * *

(vi) A “reasonable possibility” under paragraph (r)(6) of this section occurs when the owner or operator calculates the project to result in either:

(a) A projected actual emissions increase of at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (b)(39) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(b) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(40)(ii)(c), sums to at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (b)(39) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(b) of this section, and not also within the meaning of paragraph (a)(6)(vi)(a) of this section, then provisions (a)(6)(ii) through (v) do not apply to the project.

* * * * *

■ 4. Appendix S to Part 51 is amended by revising paragraph IV.J introductory text and adding paragraph IV.J.6 to read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

IV. * * *

J. *Provisions for projected actual emissions.* Except as otherwise provided in paragraph IV.J.6(ii) of this Ruling, the provisions of this paragraph IV.J apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph IV.J.6 of this Ruling, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs II.A.24(ii)(a) through

(c) of this Ruling for calculating projected actual emissions.

* * * * *

6. A "reasonable possibility" under paragraph IV.J of this Ruling occurs when the owner or operator calculates the project to result in either:

(i) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph II.A.23 of this Ruling (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(ii) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph II.A.24(ii)(c), sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph II.A.23 of this Ruling (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph IV.J.6(ii) of this Ruling, and not also within the meaning of paragraph IV.J.6(i) of this Ruling, then provisions IV.J.2 through IV.J.5 do not apply to the project.

* * * * *

PART 52—[AMENDED]

■ 5. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 6. Section 52.21 is amended by revising paragraph (r)(6) introductory text and adding paragraph (r)(6)(vi) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(r) * * *

(6) Except as otherwise provided in paragraph (r)(6)(vi)(b) of this section, the provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)(a) through (c) of this section for calculating projected actual emissions.

* * * * *

(vi) A "reasonable possibility" under paragraph (r)(6) of this section occurs when the owner or operator calculates the project to result in either:

(a) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(b) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(c) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(b) of this section, and not also within the meaning of paragraph (r)(6)(vi)(a) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project.

* * * * *

[FR Doc. E7-24714 Filed 12-20-07; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2006-0928; FRL-8509-4]

Approval and Promulgation of Air Quality Implementation Plan; South Dakota; Revisions to New Source Review Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to Chapter 74:36:09 of the South Dakota Administrative Rules (Prevention of Significant Deterioration) for incorporation into the South Dakota State Implementation Plan (SIP). South Dakota adopted these rule revisions on August 29, 2006 and May 14, 2007, and submitted the requests for approval to EPA on September 1, 2006 and June 28, 2007. One rule provision that EPA had proposed to disapprove has been corrected by South Dakota. Therefore, EPA is also approving that provision. South Dakota was granted delegation of authority by EPA on July 6, 1994, to implement and enforce the federal Prevention of Significant Deterioration (PSD) permitting regulations. As part of this final rule EPA is rescinding South Dakota's delegation of authority for implementing the federal PSD regulations. This action is being taken

under section 110 of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective January 22, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2006-0928. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Cindy Cody, Air and Radiation Program, U.S. Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6228, cody.cynthia@epa.gov.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *South Dakota* mean the State of South Dakota, unless the context indicates otherwise.

Table of Contents

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- III. What were the comments received and EPA's response?
- IV. What action is EPA taking?
- V. Statutory and Executive Order Reviews

I. What is being addressed in this document?

Chapter 74:36:09 was submitted to EPA for inclusion in the State