

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 51 and 52**

[EPA-HQ-OAR-2014-0464; FRL-8992-01-OAR]

Denial of Petition for Reconsideration and Administrative Stay: “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting”**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notification of action denying petition for reconsideration and administrative stay.

SUMMARY: The Environmental Protection Agency (EPA) is providing notice that it has responded to a petition for reconsideration and administrative stay of a final action under the Clean Air Act (CAA) published in the **Federal Register** on November 24, 2020, titled, “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” (“Project Emissions Accounting rule”). On January 22, 2021, the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), the Environmental Integrity Project (EIP), the Sierra Club, and the Adirondack Council (“petitioners”) submitted a petition requesting that the EPA reconsider and stay the effective date of the Project Emissions Accounting rule. The EPA has denied this petition in a letter to the petitioners for the reasons that the EPA explains in that letter. The EPA is not taking action at this time on the petitioners’ additional request to withdraw the memorandum titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program” (March 13, 2018) (“March 2018 Memorandum”).

DATES: October 18, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Tanya Abrahamian, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, 109 T.W. Alexander Drive, Mail Code C539-04, Research Triangle Park, NC 27711; phone number: (919) 541-5690; email address: abrahamian.tanya@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Where can I get copies of this document and other related information?**

This **Federal Register** document, the petition for reconsideration and

administrative stay, and the response letter to the petitioners are available in the docket that the EPA established for the Project Emissions Accounting rulemaking, under Docket ID NO. EPA-HQ-OAR-2018-0048.

All documents in the docket are listed in the index at <https://www.regulations.gov>. Although listed in the index, some information may not be publicly available, *i.e.*, 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.

Due to public health concerns related to COVID-19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

In addition, the EPA has established a website for the New Source Review permitting program, including New Source Review rulemakings, at: <https://www.epa.gov/nsr>. This **Federal Register** document, the petition for reconsideration and administrative stay, and the response letter denying the petition are also available on this website along with other information.

II. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” Judicial challenges to the EPA’s denials of petitions for reconsideration of CAA actions belong in the same venue as any challenge to

the action that such petitions request the agency to reconsider.¹

On January 19, 2021, the States of New Jersey, Maryland, Minnesota, Oregon, and Washington, and the Commonwealth of Massachusetts, the Commonwealth of Pennsylvania, and the District of Columbia filed a petition for review of the Project Emissions Accounting rule in the D.C. Circuit. On January 22, 2021, EDF, NRDC, EIP, the Sierra Club, and the Adirondack Council filed a petition for review on the same action in the D.C. Circuit. Those cases have been consolidated and are temporarily being held in abeyance.

The D.C. Circuit is the appropriate venue for challenges to the final action titled, “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” 85 FR 74890 (November 24, 2020), because it is nationally applicable. *See* 85 FR 74908. Therefore, challenges to the action denying the administrative petition on the Project Emissions Accounting rule must also be filed in the D.C. Circuit.

Under CAA section 307(b), any petition for review of this action denying the petitions for reconsideration and/or stay must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this document is published in the **Federal Register**.

III. Description of Action

On November 24, 2020, the EPA finalized the Project Emissions Accounting rule, which codified in the New Source Review (NSR) regulations the EPA’s interpretation of the NSR applicability test contained in the March 2018 Memorandum.² That memorandum and the subsequent Project Emissions Accounting rule

¹ *Cf. Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988) (the clause in CAA section 307(b) governing “nationally applicable regulations” provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration).

² Memorandum from E. Scott Pruitt, to Regional Administrators, “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program,” March 13, 2018 available at: https://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf. The March 2018 Memorandum explained that “the EPA interpreted the current NSR regulations as providing that emissions decreases as well as increases are to be considered in Step 1 of the NSR applicability process, where those decreases and increases are part of a single project.” More specifically, in the March 2018 Memorandum the EPA interpreted the major NSR regulations to mean that emissions increases and decreases could be considered in Step 1 for projects that involve multiple types of emissions units in the same manner as they are considered for projects that only involve new or only involve existing emissions units.

clarified that both increases and decreases in emissions resulting from a proposed project can be considered in Step 1 of the NSR major modification applicability test.³

On January 22, 2021, following promulgation of the final rule, the EPA Administrator received a petition for reconsideration of the final rule pursuant to CAA section 307(d)(7)(B). The petition for reconsideration was filed by EDF, NRDC, EIP, the Sierra Club, and the Adirondack Council. The petition for reconsideration requests that the EPA (1) stay the effectiveness of the rule during reconsideration for 90 days; (2) conduct reconsideration proceedings and withdraw the Project Emissions Accounting rule within the 90-day stay period; and, (3) immediately withdraw the March 2018 Memorandum. CAA section 307(d)(7)(B) requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule “can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” The EPA has carefully reviewed the petition for reconsideration and evaluated all issues raised. The EPA has determined that they do not meet the CAA section 307(d)(7)(B) criteria for mandatory reconsideration, and has sent a letter to the petitioner denying the petition for reconsideration and request for administrative stay of the Project Emissions Accounting rule. The letter articulates the rationale for the EPA’s

final response and is available in the docket for this action.

Michael S. Regan,
Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2020–0254; FRL–8727–03–R9]

Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; West Mojave Desert, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: On September 27, 2021, the Environmental Protection Agency (EPA) issued a final rule titled “Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; West Mojave Desert, California.” That publication incorrectly listed the transportation conformity budgets for the West Mojave Desert Nonattainment Area (West Mojave Desert) for the 2008 ozone NAAQS. Additionally, the regulatory text in that publication inadvertently included portions of the State’s submittal addressing contingency measures for failure to attain or to make reasonable further progress (RFP). This document corrects these errors and amends the regulatory text.

DATES: This rule will be effective on November 17, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2020–0254. All documents in the docket are listed on the <https://www.regulations.gov> website. 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 through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please

contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Tom Kelly, Air Planning Office (AIR–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3856, or by email at kelly.thomas@epa.gov.

SUPPLEMENTARY INFORMATION: On September 27, 2021, the EPA issued a final rule titled “Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; West Mojave Desert, California.”¹ That publication incorrectly listed the transportation conformity budgets provided in Table VI–3 of the “2018 Updates to the California State Implementation Plan” (“2018 SIP Update”).² The corrected values for the transportation conformity budgets are shown in Table 1 below.

TABLE 1—TRANSPORTATION CONFORMITY BUDGETS FOR 2020, 2023 AND 2026 FOR THE 2008 OZONE NAAQS IN THE WEST MOJAVE DESERT

[Average summer weekday, tons per day]^a

Budget year	VOC	NO _x
2020	7.9	17.6
2023	6.8	11.0
2026	6.2	10.2

^aSource: Table VI–3 from the 2018 SIP Update.

Other aspects of our final action regarding transportation conformity budgets are accurately described in the final rule, and the correct numbers were included in our May 10, 2021 proposed rule for this action.³

Additionally, while the final rule deferred action on the attainment plan’s contingency measures for failure to attain or to make RFP, the regulatory text adopted by the final rule inadvertently included portions of the State’s submittals related to the contingency measures element. This action corrects the regulatory text at 40 CFR 52.220(c)(514)(ii)(A)(9) and 40 CFR 52.220(c)(563)(ii)(A)(1), (c)(563)(ii)(B)(1), and (c)(563)(ii)(C)(1) to specify that these portions of the submittals are excluded from the EPA’s approval.

The EPA has determined that this action falls under the “good cause” exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA)

¹ 86 FR 53223.

² Letter dated December 5, 2018, from Richard Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, and electronically transmitted to the EPA’s State Planning Electronic Collaboration System on December 11, 2018.

³ 86 FR 24809.

³ An existing major stationary source triggers major NSR permitting requirements when it undergoes a “major modification.” The EPA’s implementing regulations for NSR establish a two-step process for determining major NSR applicability for projects at stationary sources. To be subject to major NSR requirements, the project must result in both (1) a significant emissions increase from the project (the determination of which is called “Step 1” of the NSR applicability analysis); and (2) a significant net emissions increase at the stationary source, taking account of emissions increases and emissions decreases attributable to other projects undertaken at the stationary source within a specific time frame (called “Step 2” of the NSR applicability analysis, or “contemporaneous netting”). For this two-step process, the NSR regulations define what emissions rate constitutes “significant” for each NSR regulated pollutant. See 40 CFR 52.21(a)(2)(iv)(a); 40 CFR 51.165(a)(1)(v); 40 CFR 51.166(b)(2)(i); 40 CFR part 51, appendix S, section II.A.5.(i).