PGEN COMMENTS ON EPA'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

I. Introduction

The Power Generators Air Coalition ("PGen") appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's ("EPA" or the "Agency") proposed rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting" ("Proposed Rule" or "Proposal").[1] PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—with a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of constructively evaluating and effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.[2] Our members include leaders in the ongoing transition to cleaner energy in the United States. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation.

This is a rulemaking in search of a problem. The Agency in 2020 promulgated the Project Emissions Accounting ("PEA") rule[3] to clarify in the Code of Federal Regulations what was promulgated and plainly intended in the 2002 "NSR reform" rules[4]: that under step 1 of the NSR emissions increase evaluation, both increases and decreases associated with a "project" (i.e., a physical or operational change) involving more than one emissions unit at the source must be accounted for in comparing projected emissions to baseline emissions. EPA in the rulemaking thoroughly considered and responded to comments that essentially sought to inject unfounded concerns about "accountability" to scuttle the rule. These commenters reasserted their comments in a petition for reconsideration, which EPA properly rejected because there was nothing new in it. Yet, and with no indication that these commenters' "concerns" have ever been shown to be anything more than sheer speculation, EPA now proposes multiple changes to the rule. EPA would be well-advised to use its limited resources to address real issues, rather than devoting its resources to chasing speculative concerns. If EPA proceeds with issuing a final rule, it should limit the changes to (1) codifying the New Source Review ("NSR") aggregation standard and (2) revising the reasonable possibility provisions to enhance NSR monitoring, recordkeeping, and reporting requirements.

[1] 89 Fed. Reg. 36,870 (May 3, 2024).

[2] Additional information on PGen and its members can be found at PGen.org.

[3] 85 Fed. Reg. 74,890 (Nov. 24, 2020).

[4] 67 Fed. Reg. 80,186 (Dec 31, 2002).

II. Comments

A. If EPA Revises the Definition of "Project" to Address Aggregation, PGen Urges EPA to Incorporate All of the 2009/2018 Aggregation Criteria in the Definition of "Project."

EPA presents no instances, much less evidence, that "over-aggregation" at step 1 is actually a common problem, or even an issue occasionally. Indeed, EPA all but concedes it is basing this rulemaking on little more than theoretical concerns, by "seeking comments on examples of under- or over-aggregation of activities."[5] Be that as it may, PGen does not object to the proposed revision of the definition of "project" to incorporate the criteria for aggregation set forth in EPA's 2009 and 2018 aggregation rulemakings.[6] Indeed, PGen agrees with comments cited in the Proposal that "NSR decisions based upon informal guidance and letters create confusion."[7] The same is true, even if at a lesser level of uncertainty, for what one might call formal guidance, such as the 2009 and 2018 aggregation rulemakings. Accordingly, revising the definition of "project" to incorporate the "substantially related" standard is a step in the right direction, even if not one that is particularly needed at this time.

PGen does object to EPA's failure to include the rebuttable presumption that discrete activities separated by 3 years should not be aggregated, for the same reason PGen supports the codification of the substantive standard for aggregation: minimizing uncertainty and confusion, which have unfortunately plagued the NSR program for decades. EPA explains its failure to include this rebuttable presumption on the grounds that there are a couple of examples of multi-year expansion projects that exceeded 3 years. But the 3-year period is already identified as a *rebuttable* presumption. Indeed, the two examples EPA posits are instances in which the presumption may appropriately have been rebutted. So, the guidance functioned appropriately. To reduce confusion and provide related entities and permitting authorities some modicum of increased certainty, EPA should codify the entirety of the 2009/2018 aggregation guidance.

B. EPA's Proposed Revisions to the Reasonable Possibility Provisions Are More Than Enough to Address Any Purported "Accountability" Concerns.

EPA presents no instances, much less evidence, of any issues associated with application of the PEA rule—only speculative concerns about "over-aggregation," "double-counting" of emission reductions, and the like. Because there is no indication that these concerns are well-founded in reality, this entire rulemaking is not needed. To the extent EPA is nevertheless concerned about these issues, its proposed revisions to the Reasonable Possibility Provisions are more than sufficient to alleviate these concerns. By requiring all source categories—not just steam electric generating units ("EGUs")—under defined circumstances to maintain records relating to the scope of the project and the pre-project emissions increase analyses, to submit these pre-project

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[5] 89 Fed. Reg. at 36,878.

[6] 74 Fed. Reg. 2,376 (Jan. 15, 2009) (establishing the "substantially related" standard for aggregation); 83 Fed. Reg. 57,324 (Nov. 15, 2018) (reaffirming and elaborating on the 2009 action).

[7] 89 Fed. Reg. at 36,878 (citations omitted).

information and analyses to the permitting authority, and to monitor actual post-project emissions, EPA ensures the purportedly needed "accountability."

While all of these requirements work together to enhance "accountability," the post-project monitoring and submittals are most effective in ensuring that, regardless of any pre-project evaluations of analyses, projects that ultimately result in actual significant emissions increases can at that time satisfy any NSR obligations.

C. EPA Should Not Make Emissions Decreases Enforceable.

1. The Purported Concern About "Double-Counting" of Emissions Reductions Is Not Well-Taken, and the Only Way to Avoid Double-Counting for Emissions Increases Is to Revise the Causation Provisions in the NSR Rules.

It is hard to understand what the concern about "double-counting" emission reductions is, and in which circumstances this concern may arise. The PEA rule addresses situations in which a project affects more than one emissions unit at a source, resulting in decreases at one (or more) unit(s) and increases at another one (or more) unit(s). The PEA rule requires the actual-to-projected-actual test, which is intended to assess the overall impact of the project at step 1, to account for both increases and decreases at the affected units in evaluating the project at issue. According to the preamble, double-counting an emissions decrease could occur where such a decrease from a previous project is projected in evaluating a subsequent, unrelated project. But if the decrease was part of an unrelated, previous project, it is necessarily not part of the current project at issue, and it cannot be aggregated with the current project. The aggregation standards (whether codified or not) are sufficient to preclude the use of a past emissions reduction projection that is not part of the same project being analyzed. In short, the prohibition on over-aggregation prevents the double-counting of emissions reductions. Making those reductions enforceable adds nothing.[8] Likewise any *actual* impact on emissions must be assessed in each part of the actual-to-projected test, which includes both actual and future decreases as well as actual and future increases. In other words, there is no double-counting; there is only equal recognition that both increases and decreases may affect any baseline or projection calculated at a later time.

If EPA is interested in resolving *real* double-counting issues, it should do so in connection with the double-counting of emissions increases in the circumstance EPA describes in the Proposal.[9] The double-counting problem that arises in these circumstances stems from the "could have been

[8] *See* 89 Fed. Reg. at 36,880 (stating that "the Agency believes that 'double counting' of emissions decreases will be addressed by the requirement (discussed below) that any decreases be made enforceable in order to be eligible for consideration in the step 1 applicability calculation"). EPA does not justify that "belief," and, as explained above, making the decrease enforceable has nothing to do with double counting.

[9] *See* 89 Fed. Reg. at 36,880 (acknowledging possibility of double counting emissions decreases).

accommodated" prong of the NSR causation provisions.[10] The logic of this prong makes sense only in the one-project circumstance posited in the WEPCo Rule (and adopted in the 2002 NSR Reform rules): if there is only one project that occurs, then projecting (or actually discharging) post-project emissions that exceed the level the unit could have accommodated in the baseline period is arguably an indication that the project caused the increase (by making it possible). But that logic breaks down if a later, interim project is actually responsible for the portion of the emissions increase that the unit could not have accommodated in the baseline period before the first project. The only way to avoid this incongruous result, we submit, is for EPA to replace the current NSR causation provisions with a requirement that the owner:

> Shall exclude, in calculating any increase in emissions that results from the particular project, 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 under paragraph (b)(48) of this section and that are also unrelated to~~ are not caused by the particular project, including any increased utilization due to product demand growth.[11]

2. Requiring Emissions Decreases to be Made Enforceable Is Inconsistent With the Actual-to-Projected-Actual Test Promulgated in 2002, and It Is Not Needed in Light of the Reasonable Possibility Provisions and Especially If EPA Revises Those Provisions As Proposed.

In both the WEPCo Rule and the 2002 NSR Reform Rules, EPA rejected the idea of making emissions increase projections enforceable because it would be inconsistent with the policy underlying the actual-to-projected-actual test and, in any event is not needed.[12] The actual-to-projected-actual test implements the "statutory and regulatory" causation requirement under NSR. It is hard to see how the projected emissions could be made enforceable limitations and still account for causation, due to the possibility that actual emissions can exceed projections without being caused by the project (for example, where actual demand growth exceeds projected growth). To the extent commenters argued for such enforceability for the sake of "accountability," EPA explained that was not needed because the monitoring, recordkeeping, and reporting requirements of the NSR rule as well as other Clean Air Act programs, and EPA's investigative (e.g., under Section 114 of the Act) and enforcement authorities were more than enough to ensure source accountability.[13] Finally, imposing an enforceability requirement would impose unnecessary administrative burdens on permitting authorities and sources alike, and would delay projects while the source obtains a permit to make reductions enforceable.[14]

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[10] By NSR causation provisions, we mean 40 CFR 52.21(b)(41)(ii)*(c)* and similar provisions.

[11] *See, e.g.,* 40 CFR 52.21(b)(41)(ii)(*c*).

[12] *See* 57 Fed. Reg. 32,314, 32,325 (July 21, 1992) (rejecting comments that NSR emissions projections must be made enforceable and explaining EPA added monitoring, recordkeeping, and reporting requirements to test source projections); 67 Fed. Reg. at 80,197, 80,203, and 80,204.

[13] *See* rulemakings cited in preceding footnote.

[14] *Cf.* 67 Fed. Reg. at 80,204.

All of these factors apply with equal force to projected emissions decreases associated with a project. This is all the more true if EPA revises the reasonable possibility provisions as proposed to further enhance enforceability and accountability.

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The NSR rules are some of the most complicated rules in the Code of Federal Regulations. EPA should not add even more "bells and whistles" merely to satisfy speculative concerns.

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