



## EPA Aggregation Guidance is Easily Forgotten and Easily Enforced

By: Ethan R. Ware

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Four years ago, EPA published its "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration" (New Source Review (NSR) Aggregation Action). 83 Fed. Reg. 57324 (November 15, 2018). It is an important policy for existing stationary sources to understand. Combined, the PSD and NNSR permitting program is known as "NSR Permitting" and applies to major sources.

### **NSR Permitting Program**

For purposes of the NSR Permitting program, a "major source" for most facilities located in attainment areas is a new source, or modification to an existing source, with a potential to emit 250 tons per year (tpy) of a regulated air pollutant. For certain facilities included on a list of twenty-eight (28) industries, a major source (either new or modified) for NSR Permitting is 100 tpy. This 100 tpy is generally also the threshold for sources in nonattainment areas, although lower standards can apply in certain circumstances.

An existing major stationary source may trigger NSR permitting requirements at a much lower level. A major modification occurs when an existing source undertakes a physical change or change in method of operation (i.e., a "project") that would result in (1) a significant emissions increase from that project, and (2) a significant net emissions increase from the source (i.e. a source-wide "netting" analysis that considers creditable emission increases and decreases occurring at the source as a result of other projects over a 5-year contemporaneous period). See, e.g., 40 CFR 52.21(b)(2)(i) and 40 CFR 52.21(b)(52). For this two-step process, the NSR regulations define what emissions rate constitutes "significant" for each NSR pollutant, which are often as low as 10 tpy for PM and 40 tpy for VOCs. See 40 CFR 51.165(a)(1)(x), 40 CFR 51.166(b)(23), and 40 CFR 52.21(b)(23).

### **Problem: Phase Project to Avoid NSR Permitting**

According to EPA, the NSR Aggregation Action is necessary to preclude a source from "carv[ing] up a higher-emitting project into two or more lower-emitting "projects" and avoid triggering major NSR

requirements. 83 Fed. Reg. at 57326. Project aggregation, therefore, ensures that nominally separate projects occurring at a source are treated as a single project for NSR applicability purposes where it is unreasonable not to consider them a single project. *Id.*

### **Aggregation Policy Factors**

Determining what constitutes the "project" is a case-by-case decision, which is both "site-specific and fact-driven." EPA recognizes there is no predetermined list of activities that should be aggregated for a given industry or industries. EPA published the NSR Aggregation Action to provide industry with those criteria necessary for determining when nominally-separate activities are considered one project under NSR. *Id.*

Evaluating potential for aggregation at existing sources should consider the following criteria to determine whether a series of plant upgrades are a "substantially related" single project:

1. **Timing.** Filing of more than one minor source or minor modification application associated with emissions increases at a single plant within a short period of time. Recent guidance indicates EPA allows a "rebuttable presumption" against aggregation where more than three years lapses between the construction projects.
2. **Application of Funding.** This criterion looks at whether the source has characterized the project as one modification for financial purposes.
3. **Consumer Demand.** Here, EPA evaluates planned product development or changes to determine if separate production phases are really related to the same overall project.
4. **Statements of Authorized Representatives.** The published statements by industry representatives may be reviewed, as well. In one example, EPA found illegal aggregation after finding prior permit applications, board meeting minutes, and production notes indicated key objectives for two separately permitted modifications were actually to (1) increase the overall production capacity of the operations; and (2) replace equipment that is near the end of its useful life.
5. **EPA Analysis of Economic Realities.** This criterion is one exclusively within the scope of EPA authority. "Based on information available to the EPA," the following may be evaluated for singleness of purpose of the project: shared resources and equipment, common use of products, coordination of production schedules, and interdependence of one phase upon another.

### **Recommended Strategy**

Any series of changes and modifications to a facility can look like an improper aggregation when viewed after-the-fact. After all, "hindsight is 20/20." However, it remains EPA's position that projects that are "substantially related" should be permitted as a single source, and the agency will review the timing, funding, consumer demand, statements by the company, and other economic realities to test the relationship of separate projects.

In order to minimize your company's exposure to liability for improperly aggregated projects, we

recommend that a facility undergoing a series of modifications take the following steps as part of an internal investigation:

**Step No. 1:** Phased construction projects should be evaluated for aggregation factors. Where improper aggregation has occurred, the company should consider voluntary disclosure under the EPA or state self-policing policies available to them.

**Step No. 2:** Develop an internal team to work on modifications together to prevent the projects from becoming problematic. Lack of communication among planners is often the missing link.

**Step No. 3:** Manage the message about plant development projects and product demand to prevent unwarranted inspection by EPA. If a project is not related to another, the company should not claim it is just for publicity.

**Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 83 Fed. Reg. 57324 (November 15, 2018).**

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- Ethan R. Ware ? 803.567.4610 ? [eware@williamsmullen.com](mailto:eware@williamsmullen.com)

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