

between Laughlin Bridge and the northwest point of the AVI Resort and Casino Cove, Lower Colorado River, Laughlin, NV in position 35°00'45" N, 114°38'16" W.

(b) *Enforcement Period.* This safety zone will be enforced from 8 p.m. until the end of the fireworks show on May 27, 2007. The event is scheduled to conclude no later than 9:45 p.m. However, if the display concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into, transit through, or anchoring within this zone by all vessels is prohibited, unless authorized by the Captain of the Port, or his designated representative. Mariners requesting permission to transit through the safety zone may request authorization to do so from the U.S. Coast Guard Patrol Commander. The U.S. Coast Guard Patrol Commander may be contacted via VHF-FM Channel 16.

(d) *Enforcement.* All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel can be comprised of commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, State, and Federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: February 20, 2007.

**C.V. Strangfeld,**

*Captain, U.S. Coast Guard, Captain of the Port, San Diego.*

[FR Doc. E7-4114 Filed 3-7-07; 8:45 am]

**BILLING CODE 4910-15-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51 and 52

[EPA-HQ-OAR-2001-0004; FRL-8284-1]

RIN 2060-AN88

### Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reasonable Possibility in Recordkeeping

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA proposes 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 proposed 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 circumstances under which a major stationary source undergoing a modification that does not trigger major NSR must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. Recently, 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, we (the EPA) are proposing two alternative options to clarify what constitutes "reasonable possibility" and when the "reasonable possibility" recordkeeping requirements apply. The two options are the "percentage increase trigger" and the "potential emissions trigger."

**DATES:** *Comments.* Comments must be received on or before May 7, 2007.

*Public Hearing.* If anyone contacts EPA requesting a public hearing by March 22, 2007, we will hold a public hearing approximately 30 days after publication in the **Federal Register**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2001-0004 by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.

- *E-mail:* [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).

- *Fax:* (202) 566-1741.

- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attn:* Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

- *Hand Delivery:* Environmental Protection Agency, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's

normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OAR-2001-0004. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., 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 in <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public

Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566-1742.

**Public Hearing:** If a public hearing is held, it will be held at 9 a.m. in EPA's Auditorium in Research Triangle Park, North Carolina, or at an alternate site nearby. Details regarding the hearing (time, date, and location) will be posted on EPA's Web site at <http://www.epa.gov/nsr> not later than 15 days prior to the hearing date. People interested in presenting oral testimony or inquiring as to whether a hearing is

to be held should contact Ms. Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541-0641, fax number (919) 541-5509, e-mail address [long.pam@epa.gov](mailto:long.pam@epa.gov), at least 2 days in advance of the public hearing (see **DATES**). People interested in attending the public hearing must also call Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action.

**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](mailto:sutton.lisa@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does This Action Apply To Me?*

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

Industry Group	SIC <sup>a</sup>	NAICS <sup>b</sup>
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.

<sup>a</sup> Standard Industrial Classification.

<sup>b</sup> North American Industry Classification System.

Entities affected by the rule also include States, local permitting authorities, and Indian tribes whose lands contain new and modified major stationary sources.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. **Submitting CBI.** Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for Preparing Your Comments.** When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and provide substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Commenters wishing to submit proprietary information for consideration must clearly distinguish such information from other comments and clearly label it as CBI. Send submissions containing such proprietary information directly to the following address, and not to the public docket, to ensure that proprietary information is not inadvertently placed in the docket: Attention: Mr. Roberto Morales, U.S. Environmental Protection Agency, OAQPS Document Control Officer, 109 TW Alexander Drive, Room C404-02, Research Triangle Park, NC 27711. EPA will disclose information identified as CBI only to the extent allowed by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies a submission when it is received by the EPA, the information may be made available to the public without further notice to the commenter.

*C. Where Can I Obtain Additional Information?*

In addition to being available in the docket, an electronic copy of this proposed rule is also available on the World Wide Web. Following signature

by the EPA Administrator, a copy of this proposed rule will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at <http://www.epa.gov/nsr>.

#### D. How Is This Preamble Organized?

The information presented in this preamble is organized as follows:

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- V. Statutory Authority

## II. Introduction

### A. Purpose of Proposed Rulemaking

On December 31, 2002 (67 FR 80187), we promulgated final changes (variously, "2002 NSR reform rules," "NSR reform," or "reform rules") to the major NSR program contained in 40 CFR 51.165, 51.166, 52.21, and 52.24. Major elements of these NSR reform changes concerned baseline emissions, actual-to-projected-actual methodology, Clean Units, Plantwide Applicability Limitations (PALs), and Pollution Control Projects (PCPs). At that time we also added "reasonable possibility" recordkeeping requirements, to apply to projects at existing emissions units at a

major stationary source (other than projects at a Clean Unit or at a source with a PAL). Further, the "reasonable possibility" requirements only apply if such a project relies on a projection of post-project actual emissions (as opposed to potential to emit) in order to demonstrate that the project is not part of a major modification.

It was our intent to finalize changes to another part of the major NSR program, at 40 CFR part 51, appendix S ("Appendix S"), precisely as we finalized the NSR reform changes. Appendix S provides NSR requirements applicable to nonattainment areas after EPA promulgates a new or revised NAAQS but before the area has an approved NSR SIP. However, in the *New York* case, the Court remanded the "reasonable possibility" recordkeeping and reporting provision of the 2002 NSR reform rules for the EPA either to provide an acceptable explanation or to devise an appropriately supported alternative. The *New York* case also vacated the Clean Unit provision and the PCP exemption in the 2002 NSR reform rules. In a separate **Federal Register** notice published on this date, we are finalizing changes to Appendix S to add the December 2002 NSR reform changes. These final changes also include an interim interpretation of the "reasonable possibility" standard based on the "percentage increase trigger" option as described later.

To reflect that the Court vacated the Clean Unit provision, this proposed rule omits reference to Clean Units in the description of projects to which the "reasonable possibility" provisions apply.

The purpose of this rulemaking is to address the Court's remand by clarifying the reasonable possibility standard and thus clarifying the circumstances under which records must be kept for projects that do not trigger major NSR. For purposes of 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51 appendix S, we are proposing two main options for clarifying the "reasonable possibility" standard.

### B. Background

#### 1. 2002 NSR Reform Rule

In our 2002 NSR reform rule, we revised the major NSR applicability test by promulgating an actual-to-projected-actual applicability test for projects involving existing emissions units. Under this test, sources base major NSR applicability determinations on projected actual emissions (not necessarily their future potential to emit).

Until promulgation of the 2002 NSR reform rules, sources that were not electric utility steam generating units (EUSGUs) were subject to the "potential to emit" test for determining emissions increases and therefore were not required to keep records of projected emissions. The 2002 NSR reform rules changed the applicability test for non-EUSGU sources and created certain recordkeeping requirements under what is referred to as the "reasonable possibility" standard. The NSR reform rules added the same "reasonable possibility" recordkeeping and reporting requirements for EUSGUs.

#### 2. July 1992 Rule for EUSGUs

Primarily as a result of *Wisconsin Elec. Power Co. v. Reilly* ("WEPCO"), 893 F.2d 901 (7th Cir. 1990), we revised our NSR regulations in 1992 to apply an actual-to-future-actual test on all physical or operational changes at EUSGUs except those that are an addition of a new unit or constitute a replacement of an existing unit. The 1992 regulation (57 FR 32314, July 21, 1992) provides a "representative actual annual emissions" methodology that requires the EUSGU (other than a new unit or the replacement of an existing unit) to compare its baseline emissions with its estimated future actual emissions to determine how much the proposed change will increase actual emissions. A discussion of the WEPCO case is included in the preamble to the 1992 regulation.

In the 1992 regulation, EPA added a reporting provision as a safeguard to ensure that future actual emissions resulting from the change that exceeded the estimate would not go unnoticed or unreviewed. Under the reporting provision, sources that utilize the "representative actual annual emissions" methodology to determine that they are not subject to NSR must maintain and submit sufficient records to determine if the change results in an increase in representative actual annual emissions. The regulation generally required that the owner or operator submit records to the reviewing authority on an annual basis for a period of 5 years from the date the unit resumes regular operation after the change; however, it allowed for a longer tracking period, not to exceed 10 years, in cases where the permitting agency determined that such longer period was necessary to capture normal source operations. We expected that documentation of post-change actual annual emissions would not impose any additional data collection burden on the part of the EUSGUs, because the EUSGUs would submit the same data

normally used to report emissions or operational levels under other existing requirements. As we noted in the preamble to the 1992 regulations (57 FR at 32325), the purpose of the provision is “to provide a reasonable means of determining whether a significant increase in representative actual annual emissions resulting from a proposed change at an existing utility occurs within the 5 years following the change.” Prior to 1992, no sources were required to keep records of projected emissions under major NSR because only the actual-to-potentials test was used.

### C. Reasonable Possibility Standard

Under the two-step applicability test of the 2002 NSR reform rules, a physical or operational change is a major modification for a regulated NSR pollutant if it causes both: (1) A significant emissions increase (*see, e.g.*, 40 CFR 52.21(b)(40)); and (2) a significant net emissions increase (as defined pursuant to, *e.g.*, 40 CFR 52.21(b)(3) and (b)(23)). Under the first step of this test, you compare baseline actual emissions before the change to projected actual emissions after the change to determine whether the change would result in a significant increase in emissions. The regulation defines “projected actual emissions” such that the owner or operator of the major stationary source projects the post-project maximum annual rate at which an existing emissions unit would emit a regulated NSR pollutant. *See, e.g.*, 40 CFR 52.21(b)(41)(i). This definition provides that an owner or operator may use the emissions unit’s potential to emit, in tons per year, in lieu of a projection. Under the second step, which is referred to as netting, you net the contemporaneous emissions decreases and increases that occurred at the source against the emissions increase determined under the first step. If the net amount equals or exceeds the significant level, then the change triggers major NSR. (“Significant levels” for regulated NSR pollutants are commonly called “significance levels” or “significance thresholds,” and these terms are used interchangeably for purposes of this proposed action.)

In the reform rules (*see* 40 CFR 51.165(a)(6), 40 CFR 51.166(r), and 40 CFR 52.21(r)), EPA determined that a source making a change need not keep records of its emissions (including data on which the source based its projections and data of actual emissions going forward) unless the source believes there is a “reasonable possibility” that the change may result

in a significant emissions increase. *See, e.g.*, 40 CFR 52.21(r)(6).

The provisions of this paragraph (r)(6) apply to projects at an existing emissions unit at a major stationary source (other than projects at \* \* \* a source with a PAL) in circumstances where there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase 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.

To determine whether a change at an existing emissions unit will result in an emissions increase, you must use an actual-to-projected-actual applicability test. Note, however, that you may opt to use the source(s) potential to emit as its projected actual emissions (*see, e.g.*, 40 CFR 52.21(b)(41)(ii)(d)).

The “reasonable possibility” standard requires that a source keep records if it meets the following three requirements: (i) The source projects post-change actual emissions and does not use the actual-to-potential test. (ii) The source determines that the change would not trigger major NSR. (iii) The source nevertheless believes that there is a reasonable possibility that the change may significantly increase emissions.<sup>1</sup> For subject sources, the “reasonable possibility” recordkeeping requirements apply to all regulated NSR pollutants, and they apply to each emissions unit that could be affected by the project. Further, if the project increases design capacity or PTE of any regulated NSR pollutant, the recordkeeping and reporting requirements apply for 10 years instead of 5 years. (For purposes of this proposed action, we refer to the physical or operational change as, interchangeably, a change or a project.)

More specifically, if your change or project has a reasonable possibility of resulting in a significant emissions increase, then you must: (1) Keep certain records that are created before construction (description of the project, identification of emissions units affected by the project, and a description of the applicability test); and (2) monitor emissions, calculate annual emissions, and maintain records of emissions for 5 years (or 10 years in certain cases) once the change is completed. If the change’s annual emissions for a calendar year exceed the

baseline by a significant amount and also differ from the projection, then you are additionally required to report emissions for the calendar year.

### D. Court Remand of Reasonable Possibility Standard

In the *New York* case, the Court held, “Because 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 supported alternative.” 413 F.3d at 35–36. The Court explained:

The problem is that EPA has failed to explain how, absent recordkeeping, it will be able to determine whether sources have accurately concluded that they have no ‘reasonable possibility’ of significantly increased emissions. We recognize that less burdensome requirements may well be appropriate for sources with little likelihood of triggering NSR, but EPA needs to explain how its recordkeeping and reporting requirements allow it to identify such sources.

413 F.3d at 34. The Court added:

[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.”

*Id.* at 35.

We are proposing options for determining the circumstances under which a change would have a reasonable possibility of significantly increasing emissions. With the final rulemaking, we intend to clarify the meaning of the “reasonable possibility” standard through the selected option(s) and thus fully address the Court’s remand.

### E. Interim Interpretation of Reasonable Possibility in Appendix S

As stated earlier, in a separate **Federal Register** notice published on this date, we are establishing an interim interpretation of the reasonable possibility provisions for purposes of implementing appendix S. In that rulemaking, EPA is revising the major NSR requirements that are applicable to major sources in a State after EPA

<sup>1</sup> The “reasonable possibility” standard covers both EUSGUs and non-EUSGUs. As noted above, prior to promulgation of the “reasonable possibility” standard, an EUSGU that made a change that did not result in a significant emissions increase (under the actual-to-projected-actual measure) was required to provide the permitting authority with at least 5 years of data to confirm the accuracy of the projection.

revises a NAAQS but before the State receives EPA approval of its NSR SIP. The purpose of these revisions is to reflect the requirements of the 2002 NSR reform rule, taking into account the decision in *New York*.

For purposes of Appendix S, we are providing an interim interpretation of “reasonable possibility” to apply during the period until we promulgate our clarification of the “reasonable possibility” standard. Under the interim interpretation, we conclude that there is a “reasonable possibility” that the change would result in a significant emissions increase if the change’s projected actual emissions increase equals or exceeds 50 percent of the applicable NSR significance level for any pollutant. We base this conclusion on an assumption that the magnitude of projected actual emissions correlates positively to the likelihood of a significant emissions increase. This test may be termed the “percentage increase trigger” that we propose in this action, as described below.

### III. Description of This Proposed Action

This action responds to the Court’s remand by proposing two options for determining the circumstances under which a change or project must be considered to have a “reasonable possibility” of significantly increasing emissions. We explain our basis for why each option is enforceable and solicit input from the public.

In this section, we also solicit comment on how the “reasonable possibility” standard is generally applied and what is to be recorded and reported in the case of a change or project for which there is a reasonable possibility that the change will result in a significant emissions increase.

#### A. Application of “Reasonable Possibility” Standard

This proposed action makes clear that the requirements of the “reasonable possibility” standard are triggered on a pollutant-specific basis and apply on a project-wide basis. This approach is consistent with our 2002 NSR reform rules. In 40 CFR 52.21(r)(6)(iii), for example, we require the owner or operator to monitor “emissions of any regulated NSR pollutant that could increase as a result of the project” for which there is a reasonable possibility of a significant emissions increase.

Note that the “reasonable possibility” standard is specific to projects at a major stationary source (*see, e.g.*, 40 CFR 52.21(r)(6)). Therefore, the proposal to clarify this standard does not apply to existing minor sources. As a result, existing minor sources will not become

subject to the “reasonable possibility” recordkeeping and reporting standard, even when they make changes that would, if they were major sources, trigger the applicability of those requirements. Minor sources remain subject to appropriate recordkeeping and reporting requirements in the State’s minor NSR program.

Note further that “synthetic minor modifications” are also not subject to the “reasonable possibility” standard. When a major stationary source undertakes a project that would be a major modification (as defined at 40 CFR 52.21(b)(2) and elsewhere) except that the source accepts a practically enforceable restriction in order to limit the project’s increase in emissions to less than significant emissions increase level, the project is termed a “synthetic minor modification.” Such a source must keep records as part of the practically enforceable restriction (*e.g.*, under a State’s minor source NSR program) in order to demonstrate that the increase in potential emissions resulting from the project remains below the significance levels. However, these “synthetic minor modifications” are not subject to the “reasonable possibility” standard.

When we finalize this action to clarify the “reasonable possibility” standard, we intend to apply the clarification where we refer to “reasonable possibility” in 40 CFR 51.165(a)(6), 51.166(r)(6), 52.21(r)(6), and part 51 appendix S. Our final rule will supersede the interim interpretation of “reasonable possibility” that we are establishing for appendix S in a separate **Federal Register** notice published on this date.

#### B. Options for Circumstances Under Which “Reasonable Possibility” Standard Applies

We propose the following two options for identifying the circumstances under which the increase in emissions caused by a project triggers the “reasonable possibility” recordkeeping and reporting requirements. Our preferred option is the “percentage increase trigger,” and as an alternative we propose the “potential emissions trigger.” The amendatory rule language included in this proposed rule is specific to the “percentage increase trigger” option. We believe the “potential emissions trigger” option would be effective without need for amendatory rule language.

##### 1. Percentage Increase Trigger

As our preferred option, we propose what we refer to as the “percentage increase trigger” option for applying the

“reasonable possibility” standard. This “percentage increase trigger” is also our interim interpretation for Appendix S purposes, as described earlier. Under this proposed option, you would conclude there is a reasonable possibility that your change will result in a significant emissions increase if the change’s projected actual emissions increase equals or exceeds a percentage of the applicable NSR significance level for any pollutant. We propose to use 50 percent of the significance level for the relevant regulated NSR pollutant as the trigger, but we solicit comment on use of a different percentage to trigger recordkeeping and reporting, such as 25, 33, 66 or 75 percent. The significance levels for regulated NSR pollutants are provided in 40 CFR 51.165(a)(1)(x), 51.166(b)(23)(i), 52.21(b)(23)(i), and paragraph II.A.10 in appendix S to part 51.

As noted earlier, the Court found that EPA had not explained how, under the “reasonable possibility” methodology, EPA can ensure NSR compliance without a source’s maintaining relevant data. The Court explained that for each major NSR applicability determination, the methodology 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.

We believe that the proposed “percentage increase trigger” option addresses these concerns. The Court observed, “We recognize that less burdensome requirements may well be appropriate for sources with little likelihood of triggering NSR, but EPA needs to explain how its recordkeeping and reporting requirements allow it to identify such sources.” *Id.* at 34. The “reasonable possibility” requirements apply only in the case of a change that the source considers small, in that the source believes it increases projected emissions by only a small amount. That is, the requirements apply only with respect to a change that may result in a “significant emissions increase.”

The significance levels for most regulated NSR pollutants are on their face small. Thus, the projects associated with these amounts are relatively small. This is particularly so because under the “reasonable possibility” standard, the requirements are triggered only by projects that may result in the specified levels of increased emissions, without

taking into account netting. For the same reasons, very large sources are less likely to make changes that are covered by the “reasonable possibility” standard because virtually any change that a very large source makes may be expected to increase emissions above the significance levels and require a major NSR permit.

Moreover, under our proposal, a project would avoid triggering the “reasonable possibility” requirements only if the source believed that the emissions increase from the project

would be no more than 50 percent of the significance levels. Therefore, our proposal considerably limits the number of projects that could avoid “reasonable possibility” requirements. By assuming that the magnitude of projected actual emissions correlates positively to the likelihood of a significant emissions increase, this “percentage increase trigger” option provides that you keep records for projects with a reasonable possibility of significant emissions increases but also takes into account the

impracticality of your having to keep records when anticipating only a small increase in emissions. Thus, EPA believes this interpretation addresses the issues identified by the Court in the *New York* case, in that we are providing a clear distinction, prior to construction, between projects more and less likely to trigger NSR. Table 1 illustrates by example how the “percentage increase trigger” option would apply to two hypothetical projects at a major stationary source.

TABLE 1.—EXAMPLE APPLICATION OF PERCENTAGE INCREASE TRIGGER

	Project 1 example—smaller increase in actual emissions	Project 2 example—larger increase in actual emissions
Example pollutant’s NSR significance level (tpy).		40.
Trigger level, based on 50 percent of significance level (tpy).		20.
Baseline actual emissions (tpy) .....	50 .....	50.
Projected actual emissions after change (tpy) ..	60 .....	90.
Increase in actual emissions (tpy) .....	10 .....	40.
Does project trigger “reasonable possibility” requirements?	No, because “increase in actual emissions” (10 tpy) is less than “trigger level” (20 tpy).	Yes, because “increase in actual emissions” (40 tpy) is greater than “trigger level” (20 tpy).

Under the “percentage increase trigger” option, we acknowledge that a source with projected actual emissions below 50 percent (or some other percentage) of the NSR significance levels would be able to avoid “reasonable possibility” recordkeeping and reporting requirements. However, we believe that EPA has numerous means of enforcing the NSR provisions against such a source, even in the absence of records kept under the “reasonable possibility” standard. Two types of records a source owner or operator is generally expected to keep are: (1) Records to report emissions; and (2) records for business purposes. Records for business purposes could include corporate minutes, blueprints, plant manager logs, records of capital costs and purchases of materials, and other documents that would describe the types of changes made at the source (wholly apart from changes in emissions that result from the changes). Businesses also have incentives to maintain design parameter information for safety and maintenance reasons. We note that these records give EPA an adequate basis to bring to bear certain enforcement tools, such as the authority to compel document production, conduct inspections, and compel oral testimony, in order to enforce the “reasonable possibility” standard. We solicit comment on the types of records sources keep for business purposes.

We request comment on whether to adopt a percentage increase trigger for recordkeeping requirements under the “reasonable possibility” standard.

2. Potential Emissions Trigger

We propose an alternative interpretation, what we refer to as the “potential emissions trigger” option. Under this option, you would conclude there is a reasonable possibility that your change will result in a significant emissions increase if the post-change potential to emit equals or exceeds NSR significance levels (even though the source opts to base its determination as to whether NSR applies on projected actual emissions).

The EPA believes the “potential emissions trigger” approach would also resolve the issues identified by the Court in the *New York* case. The Court raised the concern that the “reasonable possibility” methodology, as it currently stands, fails to explain how EPA can ensure NSR compliance without the source’s maintaining relevant data. We explain below that potential emissions represent the upper bound of post-change emissions, and so under the “potential emissions trigger,” records of projected actual emissions are unnecessary for the purpose of ascertaining whether post-change emissions increased beyond expectations. As long as a project’s post-change potential emissions are at or

above significance levels, then the source will either trigger major NSR or will be subject to recordkeeping and reporting requirements under the “potential emissions trigger.” If the project’s post-change potential emissions are below significance levels, then clearly the project’s projected actual emissions would also necessarily be below significance levels, and the “reasonable possibility” standard would not apply. Thus, short of requiring recordkeeping and reporting for all projects that do not trigger major NSR, the “potential emissions trigger” requires recordkeeping and reporting of the greatest number of projects under the “reasonable possibility” standard.

IV. 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. The action was determined to be a “significant regulatory action” because it raises policy issues arising from the President’s priorities. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been

documented in the docket for this action.

### B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not promulgating any new paperwork requirements (e.g., monitoring, reporting, recordkeeping) as part of this proposed action. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) 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 1230.17. A copy of the OMB approved Information Collection Request (ICR) EPA ICR number 1230.17 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.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or 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, and disclosing and providing information; adjust 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 Analysis (RFA)

The 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 the rule 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 as defined by the Small Business Administration's (SBA) regulations at 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 proposed action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

### 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, 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. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector.

Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### 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 proposal 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 13175. Thus, Executive Order 13175 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA is soliciting comment on this proposal from State and local officials.

### 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 proposed rule does not have tribal implications, as specified in Executive Order 13175. There are no tribal authorities currently issuing major NSR and title V permits. Thus, Executive Order 13175 does not apply to this rule.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits comment on this proposed rule from Tribal officials.

*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.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This proposed 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 is not 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 is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 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, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, February 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, 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 proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed rule provides explanation of an existing recordkeeping and reporting standard.

**V. 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 notice 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.

*40 CFR Part 52*

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.

Dated: February 28, 2007.

**Stephen L. Johnson,**  
*Administrator.*

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be 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 the following specific provisions apply on a pollutant-by-pollutant basis with respect to any regulated NSR pollutant associated with 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 projected actual emissions increases of at least 50 percent of the significant level defined



in paragraph (a)(1)(x) of this section for the regulated NSR pollutant.

\* \* \* \* \*

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 the following specific provisions apply on a pollutant-by-pollutant basis with respect to any regulated NSR pollutant associated with 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 projected actual emissions increases of at least 50 percent of the significant level defined in paragraph (b)(23)(i) of this section for the regulated NSR pollutant.

\* \* \* \* \*

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.* The provisions of this paragraph IV.J apply on a pollutant-by-pollutant basis with respect to any regulated NSR pollutant associated with 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 projected actual emissions increases of at least 50 percent of the significant level defined in paragraph II.A.10 of this section for the regulated NSR pollutant.

\* \* \* \* \*

**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) The provisions of this paragraph (r)(6) apply on a pollutant-by-pollutant basis with respect to any regulated NSR pollutant associated with 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 projected actual emissions increases of at least 50 percent of the significant level defined in paragraph (b)(23)(i) of this section for the regulated NSR pollutant.

\* \* \* \* \*

[FR Doc. E7-3897 Filed 3-6-07; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R07-OAR-2006-1015; FRL-8284-9]

**Approval and Promulgation of Implementation Plans; Iowa; Interstate Transport of Pollution**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a revision to the Iowa State Implementation Plan (SIP) for the purpose of approving the Iowa Department of Natural Resources’ (IDNR) actions to address the “good neighbor” provisions of the Clean Air Act Section 110(a)(2)(D)(i). These provisions require each state to submit a SIP that prohibits emissions that adversely affect another state’s air quality through interstate transport. IDNR has adequately addressed the four distinct elements related to the impact of interstate transport of air pollutants. These include prohibiting significant contribution to downwind nonattainment of the National Ambient Air Quality Standards (NAAQS), interference with maintenance of the NAAQS, prevention of significant deterioration of air quality, and significant deterioration of visibility. The requirements for public notification were also met by IDNR.

**DATES:** Comments on this proposed action must be received in writing by April 9, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R07-OAR-2006-1015 by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail:* [Hamilton.heather@epa.gov](mailto:Hamilton.heather@epa.gov).

3. *Mail:* Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier.* Deliver your comments to Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. Such deliveries are only accepted during the Regional Office’s normal hours of operation. The Regional Office’s official hours of business are Monday through Friday, 8 to 4:30, excluding legal holidays.

Please see the direct final rule that is located in the Rules section of this **Federal Register** for detailed