Coast Guard Captain of the Port or the designated representative.

(4) 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.

(5) The Coast Guard may be assisted by other federal, state, or local agencies in the enforcement of this section.

Dated: January 2, 2009.

T.H. Farris,

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

[FR Doc. E9–849 Filed 1–14–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2003–0064, FRL–8762–8]

RIN 2060–AL75

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The EPA is taking final action on one part of the September 14, 2006 **Federal Register** proposed rule for the New Source Review (NSR) program. The purpose of the proposed rule was to clarify for sources and permitting authorities three aspects of the NSR program—aggregation, debottlenecking, and project netting—that pertain to how to determine what emissions increases and decreases to consider in determining major NSR applicability for modified sources. This final action addresses only aggregation.

This action retains the current rule text for aggregation and interprets that rule text to mean that sources and permitting authorities should combine emissions when activities are ''substantially related.'' It also adopts a rebuttable presumption that activities at a plant can be presumed not to be substantially related if they occur three or more years apart.

With respect to the other two components of the originally proposed rule, the EPA is taking no action on the proposed rule for project netting and, by way of a separate document published in the ''Proposed Rules'' section of this **Federal Register**, is withdrawing the proposed provisions for debottlenecking.

DATES: This final rule is effective on February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. David Svendsgaard, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number: (919) 541–2380; fax number: (919) 541–5509, e-mail address: *svendsgaard.dave@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122.
Petroleum Refining	291	324110.
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188.
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199.
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510.
Natural Gas Liquids	132	211112.
Natural Gas Transport	492	486210, 221210.
Pulp and Paper Mills	261	322110, 322121, 322122, 322130.
Paper Mills	262	322121, 322122.
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213.
Pharmaceuticals	283	325411, 325412, 325413, 325414.
Mining	211, 212, 213	21.
Agriculture, Fishing and Hunting	111, 112, 113, 115	11.

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

Entities potentially affected by the subject rule for this proposed action also include state, local, and tribal governments.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

II. Background

The reader is referred to 67 FR 80187–88 (December 31, 2002) for an overview of the NSR program of the Clean Air Act (CAA) and to 71 FR 54237 (September 14, 2006) for background on this rulemaking.

III. Aggregation

A. Overview

1. What is ''Aggregation''?

When undergoing a physical or operational change, a source determines major NSR applicability through a two-step analysis that first considers whether the increased emissions from a particular proposed change alone are significant, followed by a calculation of the change's net emissions increase considering all contemporaneous increases and decreases at the source (*i.e.*, source-wide netting calculation) to determine if a major modification has occurred. *See,* for example, 40 CFR 52.21(b)(2)(i). The term ''aggregation'' comes into play in the first step (Step 1), and describes the process of grouping together multiple, nominally-separate but related, physical changes or changes in the method of operation into one physical or operational change, or ''project.'' The emission increases of the nominally-separate changes are combined for purposes of determining whether a significant emissions increase has occurred from the project. *See,* for example, 40 CFR 52.21(b)(40). In addition, when undertaking multiple nominally-separate changes, the source must consider whether NSR applicability should be determined collectively or whether the emissions from each of these activities should separately undergo a Step 1 analysis.[1]

Neither the CAA nor current EPA rules specifically address the basis upon which to aggregate nominally-separate changes for the purpose of making NSR applicability determinations. Instead, we [2] have developed our aggregation policy over time through statutory and regulatory interpretation and applicability determinations. Our aggregation policy aims to ensure the proper permitting of modifications that involve multiple physical and/or operational changes. Thus, multiple, nominally-separate activities that are sufficiently interrelated should be grouped together and considered a single project for the purpose of Step 1 in the NSR applicability test. When these sorts of activities are evaluated separately, they may circumvent the purpose of the NSR program, which is designed to address emissions from projects that have a significant net emissions increase.

[1] Even if activities are determined to be separate and subject to an individual Step 1 analysis, the emission increases and decreases may still be included together in the netting calculation if the projects occur within a contemporaneous period.

[2] In this notice, the terms ''we,'' ''us,'' and ''our'' refer to the EPA.

2. This Action

On September 14, 2006 (71 FR 54235), we proposed to revise the NSR regulations in 40 CFR parts 51 and 52 to state that a source must aggregate emissions from nominally-separate changes that are dependent on one another to be technically or economically viable. More specifically, we proposed that if a source or reviewing authority determines that nominally-separate changes are dependent on each other for their technical or economic viability, the source and reviewing authority must consider these activities to be a single project and must aggregate all of the emissions increases to properly evaluate major NSR applicability. In our notice's preamble, we offered definitions for the terms ''economic dependence'' and ''technical dependence,'' and we discussed example scenarios to describe how the test should work. We took comment on all aspects of the proposed regulatory clarification for NSR Aggregation.

As we described in our 2006 proposal preamble, our aggregation policy has never been spelled out in detail in a single letter or memorandum. We have consistently interpreted the CAA to require the grouping of related activities when determining which emissions changes result from a physical or operational change at a facility. At issue is what constitutes a ''project'' for purposes of determining NSR applicability under the CAA. Proper characterization of this term is important for regulated entities to understand their permitting obligations.

Over the years, our aggregation policy has evolved in large part from specific, case-by-case after-the-fact inquiries related to the possible circumvention of NSR in existing permits. The letters and memoranda resulting from these inquiries have been, until now, the sole resource for permitting authorities and sources to rely upon in making aggregation decisions. However, the decision to aggregate or disaggregate activities is highly case-dependent, such that letters and memoranda that opine on whether to aggregate a particular set of activities at one facility are not necessarily transferrable to a decision to aggregate a similar set of activities but with a slightly different set of circumstances at another plant. Our 2006 proposal aimed to address concerns about applying our policy in such instances.

This **Federal Register** notice takes final action on the regulations concerning NSR aggregation. More specifically, we are finalizing an interpretation of the existing rule language with respect to our policy on aggregation. This interpretation is intended to describe how to approach aggregation under the existing NSR rules. However, elements of this interpretation were proposed for this first time in this action, and are being finalized as a definitive agency position for the first time in this notice. As such, this interpretation will only apply prospectively. As explained below, we are not adopting the amended regulatory text in 40 CFR parts 51 and 52 that we proposed. Through this notice we retain the current relevant regulatory text for ''project'' and provide our new interpretation of that text regarding when emissions at a source should be aggregated into a single project for purposes of determining major NSR applicability.

In this preamble, we enumerate several principles of our aggregation policy that apply to the existing rule text. We explain that activities should be aggregated for the purposes of the NSR applicability determination only in cases where there is a substantial relationship among the activities, either from a technical or an economic standpoint. The determination of this relationship is based on the relevant case-specific facts and circumstances; as such, sources and permitting authorities should be careful to not over apply the examples in this final notice to cases with slightly different sets of facts and circumstances. In addition to the discussion of the technical or economic relationship, this notice also reiterates the role of timing in making aggregation decisions and establishes for the first time a rebuttable timing-based presumption that permitting authorities may rely upon to support a determination for nonaggregation.

This notice serves as final agency action with respect to our September 2006 proposed criteria for NSR aggregation. This action should enable the aggregation policy to be applied consistently by both those considering the applicability of NSR to potential modifications and those conducting an after-the-fact inquiry regarding whether or not NSR was circumvented through the failure to aggregate dependent physical or operational changes at a source.

B. EPA's Policy on Aggregation

1. Substantial Relationship

We received many comments on our September 2006 proposed rule for aggregation. Comments from all stakeholder groups raised a variety of concerns about our attempts to define

terms used in the proposed rule and preamble. We sought comment on how to best define the terms ''technical dependence'' and ''economic dependence.'' Our intent in proposing to add these terms to our regulations was to frame them in a manner that could be universally applied and reduce the subjective nature of the aggregation test. We also requested comments on specific examples of dependence and independence, and asked for other suggestions for maximizing the clarity with which to articulate these criteria.

Many commenters, representing a variety of stakeholder groups, expressed that our definitions and examples were too prescriptive and would lead to increased confusion as compared to the existing policy being applied. They raised specific concerns that our hypothetical examples would restrict one's ability to handle cases that are similar but that have small nuances, and could lead to aggregating physical or operational changes that are truly independent or disaggregating changes that are truly dependent. Commenters also asserted that determining economic dependence would be highly site- and project-specific, so what may prove to be sufficiently related from an economic standpoint at one plant may not have the same level of interconnection at another plant. For example, one commenter stated ''* * * it is virtually impossible to craft a meaningful, easy-to-apply test for economic dependence. EPA's proposed criteria for economic dependence may work in some situations * * * but it will not work in the more common situations, where the processes at a source are at least somewhat interrelated.'' [3] Commenters also raised similar concerns with our efforts to define technical dependence, but to a lesser degree.

We agree with many of the commenters that the proposed definitions for economic and technical dependence/viability were overly prescriptive, and we also agree that the decision to aggregate activities is highly case-specific and requires consideration of factors that are difficult to fully characterize with a bright-line test. We recognize the challenges to precisely describe these terms, particularly when the definitions must apply to the myriad cases that permitting authorities encounter. We have concluded, upon considering the comments, that the terms ''dependence'' and ''viability,'' though used by EPA in past guidance memoranda, should not be adopted as regulatory ''bright lines'' regarding whether to aggregate activities under the NSR program. Although we are not adopting regulatory language, we do note that whether a physical or operational change is dependent on another for its viability is still a relevant factor in assessing whether the changes should be aggregated. Technical or economic dependence may be evidence of a substantial relationship between changes, though projects may also be substantially related where there is not a strict dependence of one on the other.

Activities at a source should be aggregated when they are substantially related. To be ''substantially related,'' there should be an apparent interconnection—either technically or economically—between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity. Two examples offered in our 2006 proposal at 71 FR 54246 present clear cases of a ''substantial relationship'' between two physical or operational changes: (1) The installation of burners on a utility boiler and a required modification to the air handling system in order to avoid severe impairment when operating the new burners; and (2) the installation of a process heater to make a new product and the installation of a holding tank necessary to hold the new product after its manufacture.

When there is no technical or economic relationship between activities or where the relationship is not substantial, their emissions need not be aggregated for NSR purposes. For example, in most cases, activities occurring in unrelated portions of a major stationary source (*e.g.*, a plant that makes two separate products and has no equipment shared among the two processing lines) will not be substantially related. The test of a substantial relationship centers around the interrelationship and interdependence of the activities, such that substantially related activities are likely to be jointly planned (*i.e.*, part of the same capital improvement project or engineering study), and occur close in time and at components that are functionally interconnected. We note that these factors are not necessarily determinative of a substantial relationship, but are merely indicators that may suggest that two or more activities are likely to be substantially related and, therefore, candidates for aggregation.

For example, at an automotive assembly facility, the mere fact that the various operations at the plant ultimately produce a car does not necessarily mean that a physical or operational change performed at the facility's boiler house is always ''substantially related'' to any change at the automotive coating operation. Some changes to an industrial boiler may not be substantially related to a particular change at a coating line, since a boiler often serves many other operations at an automotive plant. For instance, if higher pressure steam is needed to drive a steam pump elsewhere within the plant, the boiler island could be retrofitted with an additional heat exchanger to superheat the steam. Even though the boiler may provide power or may heat the make-up air for the coating line enclosures, an expansion at the coating line would not necessarily have a need for the new higher pressure steam output, would probably not be related to the steam pump, and would not necessarily operate more efficiently because of the higher pressure steam that is required by the steam pump. Absent any evidence demonstrating a substantial relationship between such a retrofit at the boiler and the change at the coating line, a permitting authority need not aggregate emissions from these physical changes. On the other hand, if an automotive facility installs a new, larger gas-fired cure oven to handle the increased throughput from the expanded surface coating operation, then we would expect that a substantial relationship between the oven and the coating line activities would exist and these activities' emissions should be aggregated.

Furthermore, simply because a physical or operational change occurs at the same process unit as a previous change does not automatically establish a substantial relationship. As a commenter noted, ''[a]lmost all plant improvements are dependent on another piece of equipment as a technical matter. For instance, a chemical synthesis operation may install a new process dryer or a coater may install a new dryer or oven simply because of processes *already* present at a facility. The decision to install the new dryer or oven, however, is separate because of other factors that could include efficiency or fuel improvements, market factors or demand for a new product or the original group of products, or process refinements.'' [4] We agree with this commenter that, despite the fact that the changes occur at the same process unit, the dryer installation could be separate from other

[3] Douglas J. Fulle, Oglethorpe Power Corporation, EPA–HQ–OAR–2003–0064–0050.1.

[4] Leslie Sue Ritts, National Environmental Development Association's Clean Air Project, EPA–HQ–OAR–2003–0064–0066.1.

modifications to the process unit if, as suggested by the comment, there was not a substantial technical or economic relationship among the changes. (As noted above, however, a case-specific inquiry is necessary to confirm this.)

Finally, while examining the technical and economic relationship among activities has always been central to aggregation decisions, we note that a portion of one of our past letters addressing a site-specific scenario may have been applied beyond the specific scenario it discussed. In a memorandum issued in 1993 related to a research facility owned by 3M Company in Maplewood, Minnesota [5] (hereafter ''3M-Maplewood memo''), after describing different factors that could be considered in deciding whether the source may have circumvented NSR by not aggregating related research and development activities, we concluded the determination by stating that modifications at plants which are expected to modify regularly in response to consumer and projected production demands or research needs ''cannot be presumed independent given the plant's overall basic purpose to support a variety of research and development activities.'' This portion of the analysis could be taken to posit a presumption that all activities at a facility are related for NSR purposes if they contribute to the plant's basic business purpose. This suggestion that all changes consistent with the basic purpose of the source can and should be aggregated is inconsistent with the policy we are adopting in this notice that aggregation should be based on a substantial technical or economic relationship among the activities. Moreover, we are concerned that it could be interpreted to imply that almost any activity is related to any other activity at that source simply because they are both capital investments and support the company's goal to make a profit. This action explains that this is not our interpretation of the NSR rules, and that a source's ''overall basic purpose'' is not a sufficient basis for determining that activities should be aggregated.

Thus, we affirm that the decision to aggregate nominally-separate changes hinges on whether they have a substantial relationship, and we acknowledge the case-specific nature of this assessment, as well as the multiple considerations that contribute to the assessment. We understand that this policy stops short of providing the bright line criteria we sought to provide in our proposal, and we acknowledge there will continue to be gray areas that sources and permitting authorities will ultimately have to work through in deciding whether or not to aggregate a set of changes at a facility. Permitting authorities, as they have long done, will continue to exercise their best judgment in determining the technical and economic relationship of activities.

2. Timing of Activities

a. Closely-Timed Activities

Another aspect of our past aggregation policy that has at times been unclear relates to how activities that are performed close in time to each other should be handled in making an NSR applicability assessment. At times, timing of construction has been used, usually in conjunction with one or more other factors, by some permitting authorities as a basis for aggregating or disaggregating activities for NSR applicability. While the relative timing of two or more activities cannot by itself be used to determine whether they have a technical or economic relationship, it is nevertheless an objective criterion that is simpler to apply than assessing the technical and/or economic interaction of the physical or operational changes. As such, it has some appeal, and may have even been used in some cases, as a surrogate for actually establishing a relationship that serves as a basis to aggregate activities.

We are explaining in this notice that timing, in and of itself, is not determinative in a decision to aggregate activities. We do not believe that timing alone should be a basis for aggregation because it is inconsistent with our policy discussed earlier in this notice that the appropriate basis for aggregation should be a substantial technical and economic relationship. Aggregation based on timing alone could, in some cases, clearly result in aggregation of activities that have no technical or economic relationship whatsoever. There should be no presumption that activities automatically should be aggregated as a result of their proximity in time. Activities that happen to occur simultaneously at different units or large integrated manufacturing facilities do not necessarily have a substantial relationship. Even if they occur over a short period of time, multiple activities should be treated as a single project for NSR purposes only when a substantial technical or economic relationship exists among the changes.

Within certain industries, it may be common practice for certain types of activities to be done separately (though not necessarily at separate times). A company's decision to do a series of activities at the same time—*e.g.*, during a conventional scheduled outage, ''turnaround'' or ''annual shutdown''—should not be viewed as evidence of their technical or economic relatedness. In fact, absent an evaluation of the technical or economic relationship among the activities, the only presumption that should be gleaned from the practice of utilities, refineries, and other types of industry to do many activities during normally scheduled outages is that it is efficient and cost-effective to undertake multiple activities at the same time. Some of these activities will, in fact, be unrelated, but are done simultaneously simply because it is easier to make these changes at a time when the source is not operating. These activities should not be automatically aggregated.

We recognize that there has been some confusion over the aforementioned 3M-Maplewood memo and how it portrays the use of timing in making aggregation decisions. While the 3M-Maplewood memo suggested that activities that are timed within one year or eighteen months of each other may be related, and it advises authorities to scrutinize closely-timed minor source permit applications, it did not suggest that such a scenario should be the sole basis for a decision to aggregate. It simply reaffirmed our view that multiple changes over a short period of time ''should be studied'' for treatment as one project. Hence, it is consistent with this notice.

A state commenter observed ''[i]n certain circumstances timing may be a relevant consideration, together with technical and economic factors, but timing is not a conclusive factor as to whether a series of changes should be aggregated. The staging of a project into multiple smaller construction activities within a short time period may signal that further inquiry into a facility's construction activities is appropriate and under the right circumstances, timing may provide evidence, along with other factors, that a facility has or is attempting to circumvent NSR.'' [6] We agree with this commenter that knowing the timing between activities is useful solely from a standpoint of directing resources to further scrutinize activities that are timed closer together because these changes are generally more apt to be substantially related as opposed to activities that are separated by larger

[5] ''Applicability of New Source Review Circumvention Guidance to 3M-Maplewood, Minnesota'' (U.S. EPA, June 17, 1993).

[6] Carl Johnson, New York State Department of Environmental Conservation, EPA–HQ–OAR–2003–0064–0035.2.

time frames. In fact, activities that are substantially related are often so heavily aligned or interconnected that constructing only one of the activities at a time is technically unsound or illogical.[7] Therefore, even though activities that occur simultaneously are not to be presumed ''substantially related,'' it makes sense to look closer at these activities since close timing may be one—but should not be the only—indicator of whether a technical or economic relationship exists and is substantial.

b. Time-Based Presumption for Nonaggregation

In our proposal, we also solicited comment on whether we should change our aggregation approach and include a time-based presumption against aggregation. We specifically solicited comments on whether we should create a presumption in the final rule that changes separated by a certain number of years, *e.g.*, three, four, or five years, are independent and not aggregated for NSR purposes. We also solicited comments on whether we should create a rebuttable or irrebuttable presumption.

Some commenters thought that creating a timing presumption for nonaggregation would be beneficial, if properly bounded, since it would streamline the decision making process and add regulatory certainty. Others felt that it was unwarranted and would lead to incorrect results, particularly if it was made to be irrebuttable. Some commenters stated that if we set a timing upper bound for nonaggregation, we should also establish a timing lower bound for automatic aggregation.

In making aggregation decisions, we acknowledge that the determining factor—*i.e.* , whether the activities are ''substantially related''—is not always a straightforward analysis. On the other hand, the passage of time provides a fairly objective indicator of nonrelatedness between physical or operational changes. Specifically, the greater the time period between activities, the less likely that a deliberate decision was made by the source to split an otherwise ''significant'' activity into two or more smaller, non-major activities. If there is a large timeframe between the construction and operation of the activities, it is reasonable to conclude that they should be treated individually and that the CAA did not expect activities separated by large periods of time to constitute a single event when evaluating NSR applicability and control levels.

We believe that if a previous physical or operational change has operated for a period of three or more years, permitting authorities may presume that a newly constructed change is not substantially related to the earlier change. When activities are undertaken three or more years apart, there is less of a basis that they have a substantial technical or economic relationship because the activities are typically part of entirely different planning and capital funding cycles. The fact that the earlier activities were constructed and operated independently for such a long a period of time tends to support a determination that the latter activities are technically and economically unrelated and independent from the other earlier constructed activities. Even if activities are related, once three years have passed, it is difficult to argue that they are *substantially* related and constitute a single project. We note that the selection of a 3-year timeframe is long enough to ensure a reasonable likelihood that the presumption of independence will be valid, but is short enough to maintain a useful separation between relevant construction cycles, consistent with industry practice. For example, in the case of electric utilities, a commenter explained that companies plan and schedule major turbine outages every four to five years.[8]

Nevertheless, we understand that there may be exceptions to the more typical set of circumstances. Therefore, for our 3-year presumptive timeframe that we are adopting, we are making it rebuttable, such that an alternative decision can be made if conditions warrant and if the changes are, in fact, substantially related. In order to rebut the presumption of nonaggregation, there should be evidence that demonstrates a substantial relationship between the activities. For example, evidence that a company intends to undertake a phased capital improvement project, consisting of enhancements to major plant components scheduled for 2009 and 2013 that have a substantial economic relationship would likely be sufficient to rebut the presumption of nonaggregation.

Although some commenters requested that our presumption for nonaggregation be irrebuttable, we have concerns that making it irrebuttable does not fully recognize the fact that sources often implement significant modifications in a series of phased construction projects over a period of years. Setting an irrebuttable presumption would therefore hamper permitting authorities of the ability to monitor compliance with the rules in these instances. A rebuttable presumption, on the other hand, enables the permitting agencies to retain the authority to ensure that facility owners and operators do not engage in a pattern of development including phasing, staging, and delaying or engaging in incremental construction at a facility which, except for such pattern of development, would otherwise require a permit.

While having a timeframe-based presumption for nonaggregation may appear at odds with the previous section of this notice, in which we reject the use of timing alone in making aggregation decisions, the two positions are consistent because they both stem from the same principle that aggregation is based on a technical or economic relationship. Our primary concern with the use of timing in making aggregation decisions has been the interpretation of the 3M-Maplewood memo that aggregates activities occurring within 12 to 18 months of each other without also determining whether a substantial relationship exists between the activities. Thus, we disagree with the commenters who asserted that an upper bound timeframe for nonaggregation should be coupled with a lower bound presumption for aggregation. Establishing an upper bound for timing, particularly one which can be refuted, serves to define a reasonable threshold for what is considered not to be a substantial relationship. Furthermore, by making the presumption rebuttable, we are assuring that the decision is not based on timing alone but must also consider the technical and economic relationship that could overturn the presumption.

While we are establishing this 3-year rebuttable presumption for nonaggregation, we are setting forth our view that activities separated by less than three years have no presumption. If activities within this time period are presumed aggregated, there could be numerous physical or operational changes across a plant that are aggregated without any substantial relationship among them. We believe that, even without a presumption, permitting authorities will continue to be able to aggregate activities when it determines that there is a substantial technical or economic relationship among them. We believe that establishing this presumption will help to streamline and provide some added certainty to the permit decision-making

[7] At the same time, the construction of some projects that are substantially related may occur at entirely different times, simply because of funding or other reasons which dictates the projects be phased.

[8] Bridgett K. Ellis, Tennessee Valley Authority, EPA–HQ–OAR–2003–0064–0088.1.

process. This 3-year rebuttable presumption will apply prospectively from the effective date of this notice. At that time, we will begin using this 3-year presumptive timeframe when reviewing activities that postdate the effective date of this notice for aggregation. Furthermore, permitting authorities may also adopt this presumptive timeframe as guidance for their sources.

In applying this presumption, the time period separating physical or operational changes should be calculated based on time of approval (*i.e.*, minor NSR permit issuance). If a permit has not been, or will not be, issued for the physical or operational changes, the time period should be based on when construction commences on the changes.

C. Retention of Current Rule Text

In our 2006 proposal, we proposed to amend our rule definition for ''project'' to provide that ''[p]rojects occurring at the same stationary source that are dependent on each other to be economically or technically viable are considered a single project.'' As discussed earlier in this notice, we have concluded that the terms ''economically viable'' and ''technically viable,'' and what is meant to be economically or technically dependent, are difficult to define clearly and should not be adopted as regulatory bright lines. We are, therefore, not promulgating the proposed rule for aggregation,[9] nor are we adopting the descriptions of technical and economic viability and dependence that were set forth in the 2006 proposal preamble. We believe the statements made in this notice better explain the NSR Aggregation policy and enable permitting authorities and sources to better implement the current rule text without revision.

D. Environmental Impact

We have determined that the aggregation policy set forth in this notice will not significantly affect air quality and not interfere with achievement of the purposes of the NSR program. Although this notice aims to add certainty to some aspects of the process for making aggregation decisions, it is very unlikely to change the aggregation outcomes in the vast majority of instances.

For example, while this policy clearly specifies that the basis for aggregation is a substantial technical or economic relationship, our experience is that most prior aggregation and nonaggregation decisions already relied on technical or economic relationships to a large degree even if it was not clearly specified that this should be the basis, and we expect that they would have continued to do so even absent this action. Moreover, even allowing for the possibility that a future aggregation or nonaggregation decision could, absent this notice, theoretically have been expressed as relying upon factors other than the technical or economic interrelationship of activities (*e.g.*, on timing alone, or the plant's overall basic purpose), it is not a given that such an aggregation decision would have been any different if the reviewing authority had instead examined the technical or economic relationship.

Even under the new 3-year rebuttable presumption for nonaggregation, we do not expect a significant difference in outcome compared to how physical or operational changes would have been aggregated without the presumption. We expect that there would be few cases under the prior aggregation policy where activities divided by three years or more would have been aggregated for purposes of NSR unless there was a strong technical or economic linkage between them. This outcome would be identical under this policy, which allows for the 3-year presumption to be rebutted in such cases. Thus, while the presumption can assist permitting authorities by streamlining the process for aggregation decisions, it is not likely to lead to appreciably different outcomes.

Therefore, we conclude that there would be negligible environmental impact associated with this final action on aggregation.

IV. Project Netting

In our September 14, 2006 proposal, we proposed a regulatory change to enable emissions decreases from a project to be included in the calculation of whether a significant emissions increase will result from the project. We refer to this NSR concept as ''project netting.'' [10]

We are not taking action on the proposal rule for project netting at this time. We are still considering whether and how to proceed with the project netting proposal. Until we decide on how to proceed with the 2006 proposal for project netting, there is no change in how the Agency views project netting. Therefore, nothing in the September 2006 proposed amendments on project netting should be taken as establishing any change in the Agency's interpretation of its current rules, nor should any of the statements in the 2006 preamble characterizing our current rules be cited as demonstrating the Agency's interpretation of our current rules.

V. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

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, 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. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that 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; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a

[9] Proposed at §§ 51.165(a)(1)(xxix)(A); 51.166(b)(51)(i); and 52.21(b)(52)(i).

[10] *See* 71 FR 54248–9 for a more complete description of ''project netting.''

substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' See 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

A Regulatory Flexibility Act Screening Analysis (RFASA) developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal analysis, showed that the changes to the NSR program due to the 1990 CAA Amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 ''small business'' major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible ''cost to sales'' (regulatory cost divided by the business category mean revenue) ratio for this source group. Currently, and as reported in the current ICR, there is no economic basis for a different conclusion.

We have therefore concluded that this notice will not increase, and will possibly decrease, the regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This final action is not expected to increase the burden imposed upon reviewing authorities. In addition, we believe this notice may actually reduce the regulatory burden associated with the major NSR program by streamlining the NSR applicability decisionmaking process for permitting authorities and regulated entities. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed above, this final rule does not impose any new requirements on small governments.

E. Executive Order 13132—Federalism

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

This final action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. In addition, we believe this final action will actually reduce the regulatory burden associated with the major NSR program by streamlining the NSR applicability decisionmaking process for permitting authorities and regulated entities. Thus, Executive Order 13132 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 specifically solicited comments on the proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). No tribal government currently has an approved tribal implementation plan (TIP) under the CAA to implement the NSR program; therefore the Federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden from this final action, nor should their laws be affected with respect to implementation of this action. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

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, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, 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.

EPA has determined that this final action 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 action, in conjunction with other existing programs, would not relax the control measures on sources regulated by the final action and therefore would not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective February 17, 2009.

L. Judicial Review

Under CAA section 307(b), judicial review of this final action is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before March 16, 2009. Under CAA section 307(d)(7)(B), only those objections to the final rule that were raised with specificity during the period of public comment may be raised during judicial review. Moreover, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brough by EPA to enforce these requirements.

VI. 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, Baseline emissions, Intergovernmental relations, Netting, Aggregation, Major modifications, Reporting and recordkeeping requirements.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Baseline emissions, Intergovernmental relations, Netting, Aggregation, Major modifications, Reporting and recordkeeping requirements.

Dated: January 12, 2009.

Stephen L. Johnson,

Administrator.

[FR Doc. E9–815 Filed 1–14–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–1153; FRL–8762–4]

Approval and Promulgation of Air Quality Implementation Plans; Arkansas; Emissions Inventory for the Crittenden County Ozone Non-Attainment Area; Emissions Statements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Arkansas State Implementation Plan (SIP) to meet the Emissions Inventory and Emissions Statements requirements of the Clean Air Act (CAA) for the Crittenden County ozone nonattainment area. EPA is approving the SIP revision because it satisfies the Emissions Inventory and Emissions Statements requirements for 8-hour ozone nonattainment areas. EPA is approving the revision pursuant to section 110 of the CAA.

DATES: This direct final rule will be effective March 16, 2009 without further notice unless EPA receives adverse comments by February 17, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2007–1153, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*.
- Follow the online instructions for submitting comments.
- *EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6coment.htm*. Please click on ''6PD (Multimedia)'' and select ''Air'' before submitting comments.
- *E-mail:* Mr. Guy Donaldson at *donaldson.guy@epa.gov*. Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7242.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket No. EPA–R06–OAR–2007–1153. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or e-mail. The *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 *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, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index,