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Federal Courts Issue Conflicting NSR Decisions

In August 2006, two federal courts issued conflicting decisions regarding the appropriate emissions increase test to be applied under the 1980 NSR rules. In the most significant decision, the Seventh Circuit affirmed the lower court's holding that the emissions increase determination is to be based upon whether there is an annual increase in actual emissions. *U.S. v. Cinergy Corp.,* Case No. 06-1224 (7th Cir. Aug. 17, 2006). In *U.S. Alabama Power Co.,* Case No. 2:01-cv-00152-VEH (N.D. Ala., S.D.), the federal district court ruled, consistent with its earlier preliminary rulings, that emissions increases are to be determined based upon whether there is an increase in the hourly emissions rate. The court also ruled that the routine maintenance, repair and replacement (RMRR) exclusion is determined based upon whether a project is routine within the industry.

Cinergy Decision

On August 17, 2006, the Seventh Circuit issued its opinion on the appeal of Cinergy of the district court's ruling that the emissions increase test to be applied under the 1980 NSR rules is whether there is an annual increase in actual emissions. *U.S., et al. v. Cinergy Corp., et al.*, Case No. 06-1224. The district court's decision was issued in connection with EPA's NSR enforcement action brought against Cinergy, arguing that major replacements projects at its electric generating units triggered major new source review (NSR). The district court certified its ruling on the emissions increase test legal issue and the Seventh Circuit agreed to hear the appeal.

The Seventh Circuit first sets out the respective positions of Cinergy and EPA in the case. Cinergy's position was that the applicable test under the 1980 NSR rules is whether a physical or operational-method change resulted in an increase in the maximum hourly emissions rate of a unit. EPA's position was that the appropriate test is whether there would be an annual increase in actual emissions.

After reviewing the relevant statutory and regulatory definitions, particularly focusing on the fact that "net emissions increase" is defined as "any increase in actual emissions from a particular physical change or change in method of operation," 40 C.F.R. § 52.21(b)(3)(i)(*a*), the court states:

> Since both the base emissions rate from which a significant increase is calculated, and the amount of the increase, are in terms of tons per year rather than per hour, the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered.

Slip op. 3-4.

The court then considers the practical implications of the respective tests. It particularly focuses on a change that would permit an increase in utilization. It indicates that a projection of future utilization should be made and any increase should be taken into account in determining NSR applicability. The court states that, since the rule is focused on an increase in actual emissions, rather than a "*potential*" increase in emissions, the plant "could not *automatically* be assumed to operate 24 hours a day after the modification was made -- there might not

be enough demand to justify such continuous operation." It states that a comparison of pre- and post-change emissions, taking into account the "reasonable estimate" of future utilization, "would determine whether the company needed a permit for the modification."

The court then reviews various incentives that would be created by application of the hourly emissions rate test. Among them is, in its view, that the hourly emission rate test would "distort the choice between rebuilding an old plant and replacing it with a new one." The court indicates that "there is an expectation that old plants will wear out and be replaced by new ones that will be subject to the more stringent pollution controls that the Clean Air Act imposes on new plants." The court recognizes, however, that making a "reasonable estimate" of the amount of emissions that a change will cause "may be a very difficult estimate to make." The court states that "prescience" is not required, merely a reasonable estimate.

After reviewing the practical implications of the respective emissions increase tests, the court then states that Cinergy's principal argument has nothing to do with the consequences of alternative interpretations, but rather that Congress required that the regulation define modification based upon a change in the hourly emissions rate. The court then states that, since "the regulation does not define it so," Cinergy's argument "seems an attack on the validity of the regulation, rather than an argument about its meaning," and goes on to indicate that issues of validity are only within the purview of the D.C. Circuit.

The court states that the D.C. Circuit rejected the hourly emissions rate argument in the 2002 NSR rule case. This is true insofar as the question of whether the statute compels EPA to adopt the hourly emissions rate test for determining NSR applicability. However, the court goes on to indicate that the D.C. Circuit upheld EPA's interpretation of the 1980 NSR rule, which is not the case. The D.C. Circuit explicitly stated that it was not ruling on the proper interpretation of the regulation, even though it did reject the position that Congress required that the NSR rules incorporate an hourly emissions rate test.

Possibly the most surprising part of the opinion is the court's stated views regarding the Fourth Circuit's decision in the *Duke Energy* case. After explaining that it rejects the argument that the 1980 NSR rules must be interpreted to determine applicability based upon an hourly emissions rate test, the Seventh Circuit states that "the Fourth Circuit stepped out of bounds" in ruling that the hourly emissions rate test is the appropriate test under the 1980 rules. The Seventh Circuit indicates that the premise underlying the argument in support of the hourly emissions rate test "is incorrect." It further states that the "same word can mean different things in the same statute," citing a number of Supreme Court and federal appellate court cases.

The court concludes by explaining that, while the new source performance standards (NSPS) and the NSR provisions of the Clean Air Act "are at one in defining a modification as a physical change in a plant that results in an increase in emissions," the statutory provisions "are silent on whether the increase is in the hourly rate of emissions or in some other rate." The court further states, in probably the most important statement for prospective adoption of an hourly emissions rate test, that the "task of deciding [whether the test should be based upon an increase in the hourly rate of emissions or in some other rate] was left to the EPA." In other words, EPA, according to the court's dicta, could adopt an hourly emissions rate test for NSR if it chose to do so.

Alabama Power Decision

On August 14, 2006, the Federal District Court for the Northern District of Alabama (S.D.) issued its ruling on Alabama Power's motion for summary judgment on claims of EPA and an environmental group that major replacement projects triggered the NSR permitting requirements under the 1980 rules. The court granted Alabama Power's summary judgment motion with respect to each of the replacement projects at issue. The court's ruling is consistent with its rulings in its "Legal Tests Memorandum" entered on June 3, 2005. *U.S. v. Alabama Power Co.,* 372 F. Supp. 2d 1283 (N.D. Ala. 2005). The court did not enter an order on the Legal Tests Memorandum because it entered a "Mediation Order" the same day.

The court first notes that EPA (and an environmental group plaintiff) entered into a stipulation with Alabama Power, stating that the sole basis for claiming that the projects at issue would result in a significant net emissions increase was that the projects would have been projected to result in increased utilization of the units at issue. Neither plaintiff contended that the projects caused an increase in the maximum hourly emissions rate. EPA and the environmental group further stipulated that the projects involved work "of a type performed commonly within the industry," although perhaps infrequently at any specific one of Alabama Power's plants.

The court then briefly reviews the 1970s EPA NSPS and PSD regulations defining modification. It specifically focuses on the 1976 EPA regulation defining "major modification" as one "*which increases the allowable emissions rate. . . .*" The court explains that Congress explicitly defined the term the same way EPA had in its initial PSD regulatory program when it indicated that the term was used "as defined by" the NSPS program. The court then reviews, in some depth, the opinion of D.C. Circuit Judge Williams concurring in the denial of rehearing in the 2002 NSR rule case, finding that the Judge's analysis "seems circular." Judge Williams had indicated that the existence of two slightly different, but consistent, definitions of "modification" indicated that the inference that Congress intended that the modification definition be based upon increases in potential or allowable emissions was "extremely weak." The *Alabama Power* judge states that, contrary to Judge Williams' opinion, Congress was not acting "in a vacuum" and knew when it adopted the 1977 amendments that EPA was defining modification by reference to an increased emissions rate, as opposed to actual emissions. The *Alabama Power* Judge then indicates that the "statements [of Judge Williams of the D.C. Circuit] are simply made, and appear to be more afterthought than analysis. *New York I* did not discuss the extensive prior usage history outlined above and in the Legal Tests Memorandum, nor include the fact that Congress's PSD modification definition was not the only place in the 1977 amendments where modification was adopted by reference to NSPS modifications; in another new provision governing hazardous emissions, Congress defined 'modification' by stating that it 'shall have the same meaning as . . . under section 111(a).'" Section 112(a)(5).

The Judge then reviews the *WEPCO* decision and the WEPCO rule adopted in response to the decision. She reviews the discussion in the 2002 NSR rule case reviewing the test for electric utilities in the 1992 WEPCO rule and the NSR enforcement proceedings that resulted in EPA bringing complaints against 32 utilities in 10 states.
In concluding her review of the regulatory history, the Judge indicates that, in the *Alabama Power* case, "EPA sought and, . . . still seeks, regulation by litigation instead of by notice and comment rulemaking." She states that the "history of the agency's emissions rulemaking process had been characterized by problems with reviewing courts, [citations omitted], exacerbated by EPA's inconsistent interpretation and application of the 'applicable rule.'" She further states that the "term 'applicable rule' is itself an oxymoron since, for all practical purposes there was **no** 'applicable rule' from the late 1970s until *New York I* was decided in 2005, because the 1980 and 1992 Rules had been stayed by the D.C. Circuit pending settlement discussions and new rulemaking by EPA."

The court then reviews the D.C. Circuit decision in the NSR rule II case, in which the D.C. Circuit vacated the Equipment Replacement Provision (ERP) rule, and concludes that the opinion does not cast doubt on her conclusion that the RMRR exclusion is properly interpreted to be applicable where a replacement project is routine within the industrial source category. The court indicates that the Eleventh Circuit recognized that the principal "bone of contention" between the parties over RMRR, *i.e.*, whether routine is to be based upon whether a project is routine within an industry versus routine to the unit in question, is not one within the exclusive jurisdiction of the D.C. Circuit.

The court rejects EPA's position that the D.C. Circuit rejected "the common in the industry" test, pointing out that the 2002 and 2003 cases "don't say that." She points out that she is not applying the 2003 ERP rule, but rather the RMRR exclusion in the 1980 NSR rules.

The Judge concludes that "EPA's position here is a litigation position not entitled to *Chevron* deference,

and even if it weren't a litigation position, EPA's contradictory applications and multiple inconsistent interpretations of the emission rules here would counsel against *Chevron* deference," 372 F. Supp. 2d 1306. She then points out several EPA inconsistencies.

> I don't understand how EPA can tell the D.C. Circuit within the last twelve months that Congress was defining modification in the 1977 amendments by reference to EPA's 1976 NSPS definition of modification (emissions rates defined by increased rates of emissions), and then take a contrary position here as to those amendments, but insist on *Chevron* deference and deny that litigation position is involved.

Slip op. 28.

The court concludes that nothing presented by EPA and the environmental group plaintiff have caused her to change her conclusion that RMRR should be determined by whether a project is routine within the relevant industry and that the determination of emissions increase should be based upon hourly emissions rate. Accordingly, the court issues summary judgment on the replacement projects at issue.

Following the *Cinergy* decision, EPA sought an order of "clarification," which the court indicates is essentially an attempt to assist EPA in its appeal of the Judge's decision and to revisit the question of whether it would be best to stay the *Alabama Power* case awaiting the decision of the Supreme Court in the *Duke Energy* case. The court tersely indicates that the court has said all that it intends to say with regard to addressing the questions that have been presented to it. However, as to staying the action, the court indicates that it does have more to say and proceeds to explain why "staying this action is likely to be more time wasting than saving." The Judge explains that the Supreme Court may resolve the question regarding the appropriate emissions increase test to be applied under the 1980 NSR rules, but "could, however, decide *Duke Energy II* based upon whether the Fourth Circuit was correct in its decision to apply modified, as opposed to deferential, *Chevron* analysis because that issue was outcome determinative."

The court then proceeds to attack the *Cinergy* opinion, pointing out several weaknesses in it. First, the court states that the "language of the PSD regulations and 'contemporaneous interpretations,'" of EPA's regulations are not before the Supreme Court and thus staying the *Alabama Power* action would not lead to guidance from the Supreme Court on these issues. The court states that it is likely that "either *Cinergy* or *Duke Energy*, and perhaps both, will remain in litigation for years to come. Staying this case, again, would ensure a similar outcome here."

The Judge then challenges the Seventh Circuit's reference to "different philosophies of pollution control" underlying the NSPS and NSR programs. The Judge states that neither the *Duke Energy* decision, nor her opinion, are based on "philosophies of pollution control," EPA's or otherwise.

Next, she states that she does "not understand the *Cinergy* court's observation" that "'. . . the Fourth Circuit stepped out of bounds . . . ." She states that the appellate disagreement is over "the level of *Chevron* deference accorded. The Seventh Circuit deferred to EPA; the Fourth Circuit felt that the statute was clear and there was no room for regulatory involvement."

In conclusion, the Judge states that her summary judgment opinion is not unclear and that the bases for the entry of summary judgment do not require further comment or explanation.

EPA Issues Debottlenecking, Aggregation, and Project Netting Proposal

On September 14, 2006, EPA issued its proposal addressing debottlenecking, aggregation, and project netting. 71 Fed. Reg. 54,235. The 2002 Report to the President proposed regulatory changes to address, and EPA had long promised to issue, debottlenecking and aggregation proposals, but EPA only recently made it clear that project netting would

be addressed as well. Summarized below are key aspects of the proposal.

Debottlenecking

Background

EPA's discussion of the debottlenecking proposal begins with a brief review of what constitutes "debottlenecking." EPA points out that when equipment and units of different capacities are operated at a facility, one unit may constrain other units from operating at their full design capacity or maximum output rating, either by limiting input to those other units or by limiting usable output. "Such constraining equipment and units are commonly called 'bottlenecks' in a process." EPA points out that the constrained emissions units can be situated either in advance of the constraining emissions unit (*i.e.*, "upstream") or after it ("*i.e.*, "downstream").

EPA then sets out its definition of "debottlenecking" as follows:

> When a constraining unit or piece of equipment is changed to increase its capacity, another unit may increase its operations (depending on whether some or all of the constraint was removed) to provide input to the changed unit or use output from it. We have historically referred to this phenomenon as "debottlenecking." This increased operation of the upstream or downstream emission unit(s) can contribute to increased emissions from the unit(s).

EPA then indicates that, under the current NSR rules, increases in emissions at existing units not being modified as a part of a project that experience emissions increases as a result of the change are taken into account in determining increases from a proposed change. EPA points out that, in the past, EPA has presumed that increases in emissions at a debottlenecked unit are caused by the project and, thus, included in determining NSR applicability for the project.

EPA then explains that there has been confusion over past policies regarding calculating emissions from debottlenecked units and from units experiencing an "increase in utilization." EPA indicates that its proposed rule, when finalized, will apply to any unchanged unit at a source that increases its utilization following a change elsewhere at the source.

EPA next reviews in greater detail how the current rules have been interpreted with regard to debottlenecking. In particular, it indicates that increases at debottlenecked units are, under the 2002 rules, to be determined based upon an "actual-to-projected-actual" test, unless the source chooses to apply an "actual-to-potential" test. EPA indicates that there had been some confusion regarding whether increases in emissions from debottlenecked units continued to be required to be determined in the same manner as under prior rules. EPA indicates that it believes a fair reading of the 2002 rules support the determination of emissions increases at debottlenecked units by applying an "actual-to-projected-actual" test. EPA also confirms that only the "changed unit" undergoes a BACT or LAER analysis if NSR permitting is triggered.

EPA Proposal

EPA indicates that its proposal is intended to amend the NSR rules in light of not only the 2002 Report to the President, but also the D.C. Circuit decision in the 2002 NSR rule case. Specifically, EPA indicates that it proposes that only emissions increases at debottlenecked units that are "'caused'" by the physical change or operational-method change are to be included in the modification analysis. EPA's proposal, however, "seeks to refine the causation requirement" by establishing a "but for" causation requirement in light of various "legal, physical, and economic constraints" that might exist on debottlenecked units. EPA then sets out three options for determining whether emissions increases at debottlenecked units will be considered to have been caused by a proposed change. These are captioned as: (1) legal causation; (2) physical causation; and (3) economic causation. EPA indicates that its strong preference is for the "legal causation" approach.

EPA initially intended to base emissions increases at debottlenecked units upon a "potential-to-potential" test, resulting in increases only being included if a limit on an upstream or downstream unit had to be increased to accommodate the proposed change. EPA seems to believe that the "legal causation" test most clearly approximates the establishment of a "potential-to-potential" emissions increase methodology for debottlenecked units.

EPA indicates that it believes it is "appropriate to revisit the causation requirements" for determining when an emissions increase at a debottlenecked unit is caused by a particular change elsewhere at the source. It indicates that the statutory language clearly reflects Congress' intent that emissions increases be caused by a particular change in order to be included in the determination of whether NSR permitting is triggered. EPA further indicates that, even if "Congress failed to articulate unambiguously that section 111(a)(4) requires a causal link between the proposed change at any post-change increase in emissions," the Agency's approach is a reasonable interpretation of the statute and EPA should be given deference on this issue under the *Chevron* 2-step analytical framework.

1. Legal Causation

EPA states that the "causation" test that is the most straightforward to apply and enforce for debottlenecked units would be a legal causation test under which an emissions increase at a debottlenecked unit would not be considered to have been caused by a physical or operational change if the debottlenecked unit's post-project emissions were already authorized by a pre-existing air quality permit. EPA states that this test would apply to any debottlenecked unit with a permit "that is enforceable as a practicable matter." EPA elaborates further as follows:

> For example, if a unit is debottlenecked by a change elsewhere at the source, but it had previously been permitted (with a qualifying permit) to emit at operating levels that could be reached but would not be exceeded after the debottlenecking, under this legal causation test any change in emissions at this unit actually resulted from the initial authorization and not from the proposed change.

EPA indicates that the reasoning behind this interpretation is particularly clear when considering units with nonattainment NSR permits where the source has obtained offsets under its original permit for a level of emissions that represents the maximum operation allowed for the unit by its original permit. However, EPA makes clear that this approach would apply to all air quality permits enforceable as a practical matter, not just nonattainment NSR permits.

EPA emphasizes the practical implications of the proposed debottlenecking rule. It points out that, because BACT or LAER controls are not required on the unchanged unit, the only potential practical effect of the debottlenecking proposal on emissions controls would be that controls might not be required on a changed unit that would be subject to NSR permitting if emissions increases at debottlenecked units were considered. EPA points out, though, that this result would only occur where the increases at the changed unit would be "less than the *de minimis* significance levels," so any reduction in pollution would also be *de minimis*.

Up to this point, EPA's explanation in the preamble to the proposal of the debottlenecking approach seems to offer an outcome similar to what would have occurred if a permit-based "potential-to-potential" test had been incorporated in the proposal. However, EPA then sets forth three criteria that must be met for an emissions increase at a debottlenecked emissions unit to be considered caused by the prior "permitting action," and not by the proposed change:

> The unit's maximum emissions levels for each of the NSR pollutants in question is explicitly contained in a permit;
>
> The permit contains an allowable emissions limit (or operational limit that has the effect of constraining emissions) for the regulated NSR pollutant that is

enforceable as a practical matter (*e.g.*, Title V operating permit); and

The unit itself is unchanged.

Obviously, many unchanged units may not be subject to "maximum emissions levels for each of the NSR pollutants in question" in a permit that is enforceable as a practical matter. Also, units may not be subject to an "allowable emissions limit (or operational limit that has the effect of constraining emissions)."

EPA elaborates on the implications of three criteria by pointing out that the legal causation approach "is based on the fact that the reviewing authority has made an objective decision to authorize the unit to emit up to a certain level." EPA states that the approach "is not dependent on air quality modeling," but points out that the reviewing authority for a permit has a "statutory obligation to ensure that permitting in their jurisdictions will not cause or contribute to a violation of a NAAQS or PSD increment or adversely impact an air quality related value (AQRV) in a Class I area."

In contrast to the listing of criteria in the preamble, the regulatory language seems to establish a test that would not impose the constraints of the first two criteria. The language EPA proposes to add to the definition of "projected actual emissions" states that "an emissions increase results from a project if, before the project, the emissions unit was legally incapable of operating at the post-change emissions rate without violating a legally and practically enforceable term or condition of any previously issued air quality permit." This seems to indicate that an emissions increase does not result from a project if the emissions unit was legally capable of operating at the post-change emissions rate without violating a legally and practically enforceable permit term or condition.

EPA solicits comment on all aspects of the preferred legal causation approach and on the proposed rule changes. Among the specific issues on which it solicits comments are:

- The proposal to apply legal causation to all permit limits that are enforceable as a practical matter.

- Whether the legal causation approach may need to account for additional factors such as the level of air quality or attainment modeling associated with the original permit limit.

- Whether the approach should be limited in application when the prior permit lacked air quality or attainment modeling.

2. Physical Causation

The second approach to the causation requirement on which EPA seeks comment would focus upon "physical causation." Under this approach, the emissions increase at an unchanged unit "would result from the change at the 'bottlenecking' unit (and its emissions would be included in the project's emissions increase calculation) if the unchanged unit was physically incapable of operating at a higher level absent the change at the debottlenecking unit. EPA states that an emissions unit would be considered "physically incapable of operating at the post-change emissions rate" if "pre-change operations at the major stationary source could not supply material to or accept material from the emissions unit due to inherent capacity constraints at the major stationary source, and there is not a market from which, or to which, the major stationary source could purchase or sell the material, or if there is no other reasonable means of disposing of the material." EPA includes a number of examples regarding when the physical causation approach would result in upstream or downstream emissions being included. EPA indicates that "[h]aving to consider the physical capabilities of all emissions units at a source that are impacted by a project adds a degree of complexity to the causation evaluation," which is quite an understatement. EPA further states:

> Whereas the "but for" legal causation boils down to whether or not the emissions increase was

> previously authorized, in this case there will need to be a technical judgment as to whether a source could have procured the input from another source.

EPA solicits comments on how to most objectively determine at what level an underutilized unit is physically capable of operating, and, in general, how to most effectively evaluate projects using a "but for" physical causation test.

3. Economic Causation

EPA also solicits comments on an "economic causation" approach under which emissions increases at debottlenecked units would not be considered to have resulted from a proposed change "if it would have been both physically possible and economically rational for the unchanged unit to have operated at the post-change level." Under this approach, "in addition to those increases that result from physical causation as described above, an additional category of emissions increases would result from the change at the 'debottlenecking' unit (and their emissions would be included in the project's emissions increase calculation)." This category would include units for which, "although they may have been physically capable of operating at a higher level prior to the change at the debottlenecking unit, operating at the higher level would have been economically irrational." EPA further elaborates as follows:

> An emissions unit is economically constrained from operating at the post-change emissions rate, if a market exists to which the major stationary source could purchase or sell the material, where there is a reasonable means of disposing of the material, but the cost of such a transaction is so unreasonable it would preclude the major stationary source from engaging in the transaction.

EPA concludes its brief discussion of this approach by indicating that, while it is soliciting comment on it, "EPA believes this option offers little benefit over the current NSR rules in reducing the complexity of permitting." In another example of understatement, EPA indicates that "this test would be more difficult to administer than either of the two options discussed above."

Aggregation

EPA proposes to establish for the first time regulatory language to govern when two or more projects should be aggregated and treated as a single project. EPA indicates that multiple projects that are interrelated should be grouped together and considered as a single project in determining whether a significant emissions increase will result from a proposed change.

EPA indicates that the Agency's aggregation policy has never been spelled out in detail in a single letter or memorandum. However, it indicates that one of the more important guidance letters is the one EPA issued in 1993 that was related to a research facility owned by 3M Company in Maplewood, Minnesota. In that guidance letter, EPA used "'objective indicia'" to identify circumvention situations. EPA states that the 3M letter, which has been quite controversial, "consistently applies our long-held position on aggregating related projects." The 3M letter indicated that "if an individual project would not be funded or it would not be economically viable if operated on an extended basis without the other project in place, this would indicate that the projects are part of a single project and should be reviewed as such for NSR purposes." The 3M letter also indicated:

> These emissions [from individual projects] and thereby modifications cannot be presumed to be independent given the plant's overall basic purpose to support a variety of research and development activities. Therefore, even though each research project may have been individually conceived and separately funded, it is appropriate to look at the overall expected research activity in assessing NSR applicability and enforcement.

EPA indicates that there has been confusion over the 3M letter and the use of timing in making

aggregation decisions. EPA states that some have read the letter to suggest that timing of minor NSR permits is a decisive, stand-alone factor in determining whether projects should be aggregated. However, EPA indicates that timing considered as a factor alone is not conclusive to an analysis of whether projects are interrelated such that they should be aggregated.

EPA states that, as a result of questions and issues that the 3M letter raised, "NSR stakeholders have expressed concerns that EPA's position on aggregation is in need of clarification." EPA indicates that the clarification would ensure consistent application of the aggregation policy in prospectively determining applicability of NSR to potential modifications and conducting a case-by-case after-the-fact inquiry regarding whether NSR was circumvented through the failure to aggregate dependent projects.

The preamble states that EPA is proposing that "when a particular project is technically or economically dependent upon another project, the emissions resulting from each of the projects must be added together for purposes of determining NSR applicability." EPA seeks comment on whether the proposed rule accurately characterizes its current aggregation policies. EPA further requests comments on the proposed rule changes to address aggregation.

EPA states that the "terms 'technically dependent' and 'technical dependence' describe the interrelationship between projects such that one project is incapable of performing as planned in the absence of the other project." This means that, "absent another project, the process change cannot operate without significant impairment or for the planned amount of hours, or at the planned rating or production level, or that it operates in a manner that results in a product of inferior quality." EPA indicates that one indication of technical dependence is "that a project cannot operate within its maximum design parameters for an extended period of time without the other project(s)." It states that another indication of technical dependence is "that a source cannot achieve its maximum production without implementation of both projects." It further states that another indication of dependence is "if the intention for a project is to make a new product, and [the] absence of another project would not allow for full production of the new product, then the projects are technically dependent." It states that projects occurring in unrelated portions of a major stationary source are "generally not technically dependent."

In describing "economic dependence," EPA states that activities are "dependent on each other for their economic viability if the economic revenues or 'Return on Investment' (ROI) associated with the project could not be realized without the completion of the other project." EPA further states that economic dependence is "generally evidenced when a particular project that may indeed be capable of operating technically independent from other planned projects is nevertheless planned or integrated as part of a larger project goal and is interrelated to such an extent that it is not economically viable as a stand-alone project because both (or all) the projects are necessary for the larger project to achieve the operational level that justifies the investment of the planned project." EPA does indicate that larger sources, "having multiple independent process lines, often undertake numerous activities that are unrelated and not parts of larger projects."

EPA requests comments on the examples in the preamble and whether they arrive at appropriate conclusions of aggregation or disaggregation based on the economic relationship of projects. EPA states that it recognizes that "implementation of the proposed aggregation test for economic viability may not be as straightforward as that of technical viability." EPA further indicates that it is concerned with the portion of its proposal dealing with economic dependence and requests comments on providing clarity of criteria of economic dependence.

EPA specifically solicits comment on considering timing and aggregation decisions. Among the issues related to timing that EPA requests comments on is whether it should change its approach and include a "time-based presumption against aggregation." For example, should it create a presumption in the final rule that projects separated by a "certain number of years, *e.g.*, three, four, or five years," are independent and not aggregated for NSR purposes. It also seeks comments on how strong the presumption should be. For example, to overcome the presumption, "would the evidence need to show that the projects

were dependent, or would there have to be a showing that the projects were separated intentionally to circumvent NSR?" EPA also seeks comments on whether it should establish an irrebutable presumption that projects are not

appropriate than the extensive discussion of when projects should be aggregated in the preamble. The rule language states that "[p]rojects occurring at the same major stationary source that are dependent on each other to be economically or technically viable are considered a single project." The phrase "dependent on each other" seems to suggest that both of the projects must be dependent on the other. In contrast, the preamble seems clear that if one project is dependent on the other, the projects are to be aggregated. This would mean that a project that is economically and technically viable on its own merits that is followed by a project that is technically or economically dependent upon the prior project would be aggregated with the subsequent project. This seems contrary to current understandings of when projects should be aggregated.

Project Netting

EPA first describes its current policies regarding netting. EPA indicates that the "initial inquiry as to whether the project, standing alone, will result in an increase in actual emissions is calculated by determining the emissions increase from the particular emissions units that are 'changed' or added and any other emissions increases resulting from the proposed physical change or change in method of operation (*e.g.,* debottlenecked units)." In other words, emissions decreases are not considered in the initial inquiry. If there would be a significant emissions increase calculated by considering only the emissions increases that would result, the source would go to the next step in which it would consider emissions decreases from the project and other increases and decreases within the contemporaneous period. EPA indicates that it recognizes that in the past "some sources and permitting authorities have counted decreases in emissions at the individual units involved in the project when determining an overall project emissions increase . . . , while some have not."

In this proposal, EPA proposes to authorize the consideration of increases and decreases in the first aggregated if they are separated by "between three and five years."

As in the case of the proposed rule language for debottlenecking, the proposed rule language addressing aggregation seems much more step of determining NSR applicability. In other words, "project netting" would be specifically sanctioned in rulemaking language. EPA states that it is conceivable that fewer projects would trigger major NSR, but that it does not have sufficient information to quantitatively analyze if an emissions increase will result from the proposed rule change. EPA seeks comment and data on the impact of allowing project netting.