



### NSR Reform Meeting 3 Comments

#### Commentors

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B	John A. Paul, Supervisor of RAPCA
C	The Ohio Environmental Council
D	Industry Members of the PPEC (Permit Processing Efficiency Committee)  Chris Korleski, Honda of America Mfg., Inc. Maxine Dewbury, Procter & Gamble Bill R. Miller III, Ph.D., General Motors Corporation

## **Topic: Actual-to-Projected Actual Applicability Test**

### **Comment - Commentor B:**

RAPCA recommends against the adoption of the new federal language. Due to the combination of several provisions in the new federal regulation, we feel NSR for existing source modifications will be virtually eliminated. The provisions we specifically object to are:

- ?? The new definition of “baseline actual emissions” which allows a 10-year look back and the establishment of a baseline using the highest 24-month period of emissions.
- ?? The projection of “future actual emissions” which has no required submission of calculations to the reviewing authority prior to construction, lax record keeping requirements for projects that increase emissions, no enforceable requirements on future emissions, and no preconstruction review or control requirements even for sources that increase capacity.
- ?? The provision for exemption of emissions increases which are claimed to be “due to increased demand” for the product being made.

### **Comment - Commentor B:**

If Ohio proceeds with adoption of the federal rule, we have several recommendations.

- ?? First, Ohio EPA must be committed to keeping its state rules which require preconstruction review for all new units and existing unit modifications which increase allowable emissions. Ohio EPA absolutely must resist industry pressure to weaken or eliminate the existing state permit to install rules.
- ?? Second, Ohio EPA should adopt record keeping and reporting requirements for sources that choose to implement the federal applicability test. Suggested wording for such is provided in the STAPPA/ALAPCO Menu of Options.
- ?? Third, Ohio EPA must devise a process for tracking and analyzing the impact of actual emissions increases that will be allowed under the federal rule. We suspect that PSD increment will be consumed by these increases, but will not be reviewed under the federal rule. If Ohio allows these increases and increment consumption to occur without review, then air quality will be degraded and a SIP revision eventually required. Note: for the purposes of air quality impact, the definition of “actual emissions” remains; thus, actual emissions increases will consume increment and should be analyzed.

**Comment - Commentor B:**

From the STAPPA/ALAPCO Menu of Options General Discussion of Applicability

In order to determine whether a source modification triggers NSR, the source must determine what the emissions increase will be. The revised federal rule allows all existing emissions units to use the "actual-to-projected-actual" test, predicting what the unit's actual emissions will be for five years after the project, and subtracting emissions increases that the source predicts will be due to production increases that the facility could have accommodated without the change (i.e., "demand growth exclusion"). State and local air agencies have several significant concerns with this provision, including that it allows for a demand growth exclusion, provides the permitting authority no opportunity for reviewing the projections before the project is constructed, does not make the projected emissions levels enforceable limits on the source, and does not require adequate reporting after the project to assure the project did not result in significant emissions increases

**Comment - Commentor B:**

From the STAPPA/ALAPCO Menu of Options General Discussion of Applicability:

The Menu of Options includes three options for regulatory provisions related to estimating the emissions after the project.

The first option retains the actual-to-potential applicability test from the old federal rule, applying this test to all types of new and existing emissions units. Under the actual-to-potential test, the source may elect to take an enforceable limit on the potential to emit in order to avoid NSR, if the post-project emissions increases are expected to be less than the significance level.

The Menu also includes an option that utilizes the actual-to-potential test for all new and existing emissions units except existing EUSGUs. Under this option, EUSGUs are provided the actual-to-projected actual test.

The third option for establishing rules to determine emissions after the project uses the same basic applicability tests as the revised federal rule. That is, new emissions units use the actual-to-potential test and any existing unit may use the actual-to-projected actual test. However, under the STAPPA and ALAPCO option, any source relying on the actual-to-projected actual test to avoid NSR must submit the applicability determination, including the projections for post-project emissions and the basis for those projections, to the permitting authority prior to construction of the project. Also, the source must determine actual emissions each year for 10 years following the project, and review the applicability determination using the actual emissions data to assess whether the project resulted in a significant emissions increase. Reports of the annual review must be submitted to the permitting authority.

**Comment - Commentor B:**

From the STAPPA/ALAPCO Menu of Options General Discussion of Applicability:

For programs that adopt the actual-to-projected actual test, two options are also provided with regard to the demand growth exclusion. In the first option, the demand growth exclusion is eliminated. In the second, if the demand growth exclusion is used, the Menu provides pre-construction reporting and post-construction record keeping and reporting to verify that the emissions excluded are based on increased demand.

**Comment - Commentor B:**

Finally, I need to respond to comments submitted to Ohio EPA by industry representatives regarding the STAPPA/ALAPCO Menu of Options. In their comments, the industry representatives make the following statements.

Moreover, the S/A menu of options approach is not broadly supported but has been developed by S/A's working group, which includes only a small subset of state and local regulators. Indeed, despite S/A press statements claiming Indiana's support for S/A's model rule, Indiana is actually proceeding to adopt the federal rules as written in almost all respects. (Indiana has issued a proposal to adopt the 10-year baseline actual emissions definition and IDEM intends to issue its rulemaking package in February 2004 and submit it to US EPA for approval shortly thereafter) The menu of options has not been subject to notice and comment and to the extent it contains elements on which US EPA solicited comment during its 10- year rulemaking process, those options were rejected by US EPA.

I believe the comments were inappropriate and misinformed and submit the following comments to correct the record with regard to the STAPPA/ALAPCO Menu of Options.

- ?? The Menu of Options is precisely what the name implies, a menu of options, which any state or local agency is free to use in whole or in part.
- ?? Participation in the formulation of the document was widespread with nearly every air agency in the country participating. Our conference calls on this document had more than 100 participants on each call. Once a writing committee was formed, that committee reported back to the membership on a continuing basis.
- ?? The STAPPA/ALAPCO press release made no mention of any state or local, including Indiana. News articles may have stated individual state and local agency support, but those reports did not originate with STAPPA/ALAPCO.
- ?? The Menu of Options is a draft document. We are seeking comment from all

stakeholder groups and are arranging meetings with stakeholders to take comments and suggestions for improvement. Any interested party is free to participate in this process.

### **Comment - Commentor A:**

Honda wishes to file its own separate comments in order to emphasize its belief that this particular revision is perhaps the most important of all the pending NSR revisions. Under Ohio EPA's current (and long-standing) application of the "actual to potential" test, Honda continuously finds itself in the position of having to analyze and address PSD requirements even in the context of minor physical or operational changes that will result in only very minor increases of actual emissions, *i.e.*, actual emission increases well below the "significant net emissions increase" threshold.

Honda often finds it necessary to modify its emissions units such that the "physical change or change in the method of operation" criteria is triggered. Such non-exempt modifications may result in a very slight increase in the actual emissions from the modified units. For example, Honda may install 2 new spray guns in a coating booth in order to improve product quality and booth efficiency. Although the actual emission increase is very small (*e.g.*, 2 TPY), these very minor physical modifications are, via the application of the "actual to potential" test, still subject to either a netting exercise or the full application of PSD requirements.

Utilizing a hypothetical example, let's assume that Honda has a spray coating emission unit with a permitted PTE of 80 TPY VOC. Assume that for the last few years, Honda has operated the unit in such a manner that **actual** emissions have been only 25 TPY VOC. Through the installation of 2 new spray guns, Honda expects actual emissions to increase by 2 TPY VOC. While the actual emission increase is projected to be only 2 TPY VOC (substantially less than the 40 TPY PSD "trigger"), through the application of the "actual to potential test" Ohio EPA will conclude that there has been an increase of 55 TPY VOC (*i.e.*,  $80 \text{ TPY} - 25 \text{ TPY} = 55 \text{ TPY}$ ), an increase well above the 40 TPY PSD trigger. Consequently, because of an entirely fictional calculation which bears no resemblance whatsoever to the actual emission increase, Honda finds itself facing an immersion into the rigorous and time-consuming PSD program notwithstanding the very minor nature of the changes.

Honda is then faced with several paths. First, Honda could subject itself to the expensive and time consuming PSD process. Second, it could attempt to net out of PSD. Third, Honda could potentially establish a synthetic minor permit for the emission unit in question, such that the change does not result in a significant net emissions increase. And finally, Honda simply might opt to not pursue the change at all due to the burdens attendant on undergoing PSD review. This last option is particularly troublesome, as it means that easily achievable

improvements in efficiency (e.g., less emissions per unit of production) and quality are forfeit because of the desire to avoid the time-consuming PSD process.

The “Actual to Projected Actual” test brings a much needed degree of reality to the permitting process and would allow facilities to efficiently implement necessary improvements that result in minimal emission increases. And, as a safeguard, the new NSR rules provide that **if** there is a reasonable possibility that actual emissions may go above significance levels, appropriate recordkeeping and reporting is required.

**Comment - Commentor A:**

Honda also wishes to stress its desire to see the federal NSR rules adopted by Ohio in their current form. While we recognize the expertise and experience of groups such as STAPPA/ALAPCO, we simply feel that the time is past for alternative approaches to NSR that do not mirror the federal rules. Regardless of the source of alternative proposals, there are three obvious concerns with deviating from the federal rules:

- ?? First, to pursue an alternative applicability test would, in Honda’s view, be akin to starting the entire NSR reform process all over again in Ohio. Honda, as well as numerous other parties, spent a considerable amount of time reviewing and participating in the development of the revised federal rules, a process begun well in advance of the 1996 proposal by USEPA. To reopen that “rule development process” in Ohio would only serve to delay the implementation of NSR rules in Ohio while the parties “rehash” the same arguments that were put forth and roundly discussed during the federal process. Speaking frankly, the present NSR process, particularly the “actual to potential” test, is so problematic that the concept of delaying reform by another several years to adequately evaluate potential alternatives in Ohio is, from Honda’s perspective, unwise and unwarranted.
  
- ?? Second, for corporations such as Honda with facilities in multiple states, consistency is important. Indeed, one of the biggest problems with the prior federal NSR program was the degree to which it was controlled by inconsistent guidance, interpretive letters and the like. While we can accept and anticipate that various states will have different formatting and other nuances in their state rules, we generally anticipate that most state rules will ultimately follow the main themes of the federal rules. Having a different and unique PSD applicability test in Ohio would then serve only to promote the kind of inconsistency and confusion that has bedeviled the PSD program, Ohio EPA, and Honda for so long.
  
- ?? Third, it is no secret that USEPA tends to subject Ohio EPA’s air programs and policies to a high degree of scrutiny and criticism. To the extent that Ohio EPA wanted to take a new and different tack in its NSR regulations and vary significantly from the federal regulations, (particularly in terms of applicability tests) it would certainly significantly delay Region 5 approval, if not forestall approval altogether. Given the

degree of USEPA involvement in the PPEC's exemption threshold rule development, one can only imagine the involvement and scrutiny that would be triggered by the Ohio's development of alternatives to the now-effective federal NSR rules.

Clearly, the prudent and most efficient path to achieving approvable NSR rules in Ohio is by following the template of the now effective federal rules.

**Comment - Commentor A:**

As a last point, we are aware of some recent NSR case law developments that appear to invalidate the "actual to potential test" and validate the new applicability test. We do not know the extent to which Ohio EPA is aware of or has considered these cases, but we have seen no indication that Ohio EPA intends to stop its application of the long-standing "actual to potential test" under the existing Ohio NSR rules. Therefore, we feel that is important for Ohio to focus on the language of the new federal rules and adopt it expeditiously.

**Comment - Commentor C:**

As an initial matter, the Ohio Environmental Council states that the final New Source Review rules promulgated by the U.S. EPA on December 31, 2002 violate the Clean Air Act and are less protective of the public health and the environment than the NSR regulations which they replaced. Also, the OEC reiterates its position that applicable law provides that in order to receive delegated authority to enforce the Clean Air Act in Ohio, Ohio's air pollution control program needs to be at least as stringent as, yet can be more stringent than, the federal air pollution control program. In this instance, the attempt by U.S. EPA through administrative fiat to relax and weaken the requirements of the Clean Air Act should be rejected by Ohio EPA. A decision by Ohio not to adopt the federal rule on "actual to projected-actual applicability" would make Ohio's program more stringent than the federal program and would avoid the legal defects associated with the new federal rules. Accordingly, the OEC recommends that Ohio EPA reject this federal rule in its entirety.

**Comment - Commentor C:**

As a secondary matter, the Ohio Environmental Council reiterates that the "actual to projected-actual applicability test" rule package ("the federal rule") presented by Ohio EPA at the NSR discussion group meeting on November 20<sup>th</sup> was not very clear. For example, there is no draft proposed Ohio rule that corresponds to the federal rule that Ohio EPA considers adopting. Moreover, it is not clear which of the December 31, 2002 federal revisions to the federal rule Ohio EPA is proposing to adopt; is Ohio EPA adopting the federal rule in its entirety or just portions of that rule? Moreover, it is not clear whether Ohio EPA is asking for comments to all of the revisions to the December 31, 2002 federal rule or just portions of it. In addition, it is not clear from the materials presented whether Ohio EPA is asking for comments to the federal rule as promulgated on December 31, 2002 or whether comments are sought on existing Ohio EPA rules and the effect the federal rule will

have on existing Ohio EPA rules. Finally, it is not clear whether the adoption of the December 31, 2002 federal rule would result in Ohio EPA promulgating entire new rules or amendments to existing Ohio EPA rules. For all of these reasons, the OEC recommends that further rulemaking and public participation and comment take place before any proposed rules are submitted to JCARR.

**Comment - Commentor C:**

In addition, and for the sake of consistency, clarity and certainty, the OEC recommends that Ohio EPA should not replace “actual emissions” and “representative actual annual emissions” as currently defined at Ohio Adm. Code 3745-31-01(C) and (SSS) with the definition of “projected actual emissions” that is currently defined in 51.165(a)(1)(xxviii). Adding another definition, “projected actual emissions,” to an already confusing, cumbersome and rather unwieldy regulatory program would result in the expenditure of more time and resources than Ohio EPA currently has, thereby lengthening the permitting process to the detriment of human health and the environment.

Moreover, the United States District Court for the Southern District of Ohio has already issued an opinion that discusses the definitions of “modification,” “actual emissions,” “representative actual annual emissions,” “net emissions increase” and “contemporaneous.” See United States v. Ohio Edison, Case No. 2:99-CV-1181 (August, 2003). This opinion provides for regulatory certainty and establishes legal precedent. Adding another definition, “projected actual emissions,” to an already confusing, cumbersome and rather unwieldy regulatory program, for which regulatory certainty and legal precedent have been established, would add more confusion and result in the expenditure of more time and resources than Ohio EPA currently has, thereby lengthening the permitting process to the detriment of human health and the environment.

**Comment - Commentor C:**

Finally, as Ohio EPA’s Chief of the Division of Air Pollution Control conceded on November 20, 2003, the proposed federal rules package of December 31, 2002 “don’t make things simpler” and will require Ohio EPA to do “a lot of work incorporating” them into Ohio EPA’s existing regulatory program. Consequently, it makes no sense for Ohio EPA to devote substantial amounts of time, energy, resources and labor incorporating into its regulatory program federal rules that weaken, relax and are inconsistent with the Clean Air Act.

**Comment - Commentor C:**

However, if Ohio EPA insists on being in lock-step with U.S. EPA on this issue, the OEC, without waiving its legal right to contest the current federal rules or to contest any rules proposed by or promulgated by Ohio EPA, incorporates each of the above general comments into each of the following specific comments to the proposed rules.

1. 51.165(a)(1) . . . (xxviii)

a. the phrase in (A) that reads “a regulated NSR pollutant” is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, the definition of “NSR pollutant” is not consistent with the statutory definitions of “air contaminant” and “air pollution” that are contained in Revised Code Chapter 3704.

b. the phrase in (A) that reads “in any one of the 5 years (12-month period)” should be replaced with “for the two year period.” A five year “look ahead” is not representative of actual emissions. Moreover, a two year look ahead provides just as much “certainty” as does a 5-year look ahead.

c. the phrase in (A) that reads “following the date the unit resumes regular operation after the project” should be replaced with “after a physical change or change in the method of operation of a unit.” The proposed rule would allow additional emissions into the atmosphere without being accounted for, i.e., emissions from the date of startup to the date of “regular operation,” and would thus be detrimental to human health and the environment. In addition, the proposed rule fails to define “regular operation,” thus allowing additional emissions into the atmosphere to the detriment of human health and the environment. The sooner the “projected-actual” calculation is begun, the lesser the adverse impact the construction will have on human health and the environment.

d. the language in (A) that begins with “or in any one of the 10 years” and the language that constitutes the remainder of the sentence should be deleted in its entirety because it makes no sense. As written, a source could *increase its potential to emit without being subject to New Source Review*. This is clearly contrary to the existing definition of “modification” as contained in both the Clean Air Act and the Ohio Administrative Code. For example, any source that increases its potential to emit would, as a matter of law, be increasing its “allowable” emissions, and under current Ohio law any such increase that is a result of a physical change or change in the method of operation of a source constitutes a “modification” and must be preceded by the issuance of a Permit to Install. The proposed rule, however, would compare those increased emissions to a “baseline” to determine whether “significant” threshold levels are exceeded, and if not then New Source Review is unnecessary. Thus, the proposed rule provides for an anomaly, i.e., a source may increase its allowable emissions yet not be subject to New Source Review. Consequently, the proposed rule creates an absurd result and should not be adopted by Ohio EPA. If Ohio EPA ultimately decides to adopt the proposed rule, it would be impossible for the Ohio Attorney General to certify that Ohio’s Permit to Install program is “more stringent” than the federal New Source Review program.

e. the language in (B) that states “before beginning actual construction” should

be changed to read “before commencement of actual construction” in order to be consistent with current Ohio law.

f. section (B)(2) should be deleted in its entirety. There is no way to determine a maximum annual rate of emissions associated with startups, shutdowns and malfunctions. Moreover, implicit in the definition of “projected actual emissions” is that such emissions should be “representative” of the source’s “normal” operation, and emissions associated with startups, shutdowns and malfunctions are not at all representative of normal operations. In addition, including emissions from startups, shutdowns and malfunctions in a projected actual emissions determination results in an artificial projection. Moreover, emissions from startups and shutdowns are not included in a source’s “actual” emissions for purposes of determining compliance with the source’s allowable emission limit so they should not be included in determining any projected actual emission level for the source. Finally, the proposed rule as written would allow a source to include as part of its “projected actual” calculation all “actual” emissions that exceed its “allowable” emissions, creating an absurd result, i.e., including non-complying emissions in a “projected actual” calculation.

2. 51.165(a)(2)(ii) . . . (C)

a. since this proposed rule refers to “baseline actual emissions,” all of OEC’s comments to the baseline rule are incorporated herein.

3. 51.165(a)(6)

a. the prefatory language should define what is meant by “projects.” Is it all projects? Pollution control projects? Pollution prevention projects? Pre-construction projects? Modifications?

b. the prefatory language should also define what is meant by “reasonable possibility.” Who makes this “reasonable possibility” determination, the Director or the owner/operator? What standards will be used to measure whether a “reasonable possibility” has occurred?

c. the prefatory language should also define what is meant by “a part of.” Does “part of” refer to projects that are part of the same “project” expenses? Does “part of” refer to projects that are operationally united in some way? Does “part of” refer to projects that are expensed or capitalized in the same budget? Does “part of” refer to projects that emit different pollutants?

d. what does it mean that only one of the three specified methods trigger the plan provision? If the emissions unit’s potential to emit is used as the method for projecting

actual emissions, does the plan provision even apply? Conversely, if the unit's PTE is the method used, does this mean that the project does NOT have to result in a significant emissions increase in order for the plan provision to be triggered? Clarification is needed on what the intent is behind including only three of the applicable methods for calculating projected actual emissions.

e. the language in (6)(i) that reads "before beginning actual construction" should be changed to read "before commencement of actual construction" in order to be consistent with current Ohio law.

f. the language in (6)(i)(B) that reads "of a regulated NSR pollutant" is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of "air contaminant" and "air pollution" that are contained in Revised Code Chapter 3704.

g. the language in (6)(i)(C) that reads "regulated NSR pollutant" is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of "air contaminant" and "air pollution" that are contained in Revised Code Chapter 3704. In addition, a "description" of the applicability test is not sufficient; the owner/operator should be required to cite to a specific regulatory provision that specifies and authorizes the selected applicability test.

h. a new section (6)(i)(D) should be added that requires the owner/operator to submit the required information to the Director before commencing actual construction, and that requires the owner/operator to maintain the required information at the facility for a period of at least five years.

i. section (6)(ii) should be deleted in its entirety. This section makes no sense other than to provide preferential treatment to owners/operators of existing electric utility steam generating units.

j. the language in (6)(iii) that reads "regulated NSR pollutant" is too narrow and should be deleted because it excludes many types of emissions from regulation. For example, many types of toxic emissions would escape regulation under the proposed rule. Moreover, it is not consistent with the statutory definitions of "air contaminant" and "air pollution" that are contained in Revised Code Chapter 3704. In addition, the phrase that reads "a record of the annual emissions" should be changed to read "a record of actual annual emissions." Also, the phrase that reads "on a calendar year basis" should be modified read "on a calendar year basis or as otherwise required by applicable law" to avoid any inconsistency with permit terms and conditions, e.g., a rolling 12 month basis.

The phrase “regular operations” should either be defined or the phrase should read “5 years following the change.” The portion of the sentence that begins with the phrase “or for a period of 10 years” and continuing to the end should be deleted in its entirety.

k. section (6)(iv) should be deleted in its entirety. This section makes no sense other than to provide preferential treatment to owners/operators of existing electric utility steam generating units.

l. section (6)(v) should apply to all owners/operators, hence the phrase “If the unit is an existing unit other than an electric utility steam generating unit,” should be deleted. Also, “annual emissions” should be changed to include “actual annual emissions.” Again, the phrase “regulated NSR pollutant” is too narrow. See previous comments. The phrase “and if such emissions” should be changed to read “and if the actual amount of such emissions.”

m. the language in section (6)(v)(B) that reads “The annual emissions as calculated” should be changed to read “The amount of actual emissions as monitored.”

4. 51.165(a)(7)

a. section (a)(7) should be deleted in its entirety. Documents or information required by law to be kept or submitted to an agency constitute public records, except as otherwise provided by applicable law. This proposed section (a)(7) is nothing more than a regulatory attempt to circumvent the public records laws. In this case, the addition of section (a)(7) adds nothing that Ohio’s public records act does not already provide but its inclusion does create the potential for conflicts and inconsistencies in the law.

5. 51.166(a)(7)(iv) . . . (c)

a. comment 2.a. above is incorporated herein. In addition, since this proposed rule refers to “baseline actual emissions,” all of OEC’s comments to the baseline rule are also incorporated herein.

6. 51.166(b) . . . (40)(i)

a. comments 1.a. through f. are incorporated herein.

7. 51.166(r) . . . (6) and (7)

a. comments 3.a. through m. and 4.a. are incorporated herein.

**Comment - Commentor D:**

The “Actual-to-Projected Actual” test is the core element of the revisions that U.S. EPA issued and is of vital importance to all of Ohio's many and diverse industries. Ohio has lost upwards of 174,000 manufacturing jobs over the past 3 years.<sup>1</sup> Any steps that can be adopted to ensure that businesses can return to full operations as the economy improves should be implemented as expeditiously as possible. The NSR Improvement Rules will ensure that sources will not be forced to give up capacity simply because operations have been reduced due to the downturn in the economy and will help allow business to bring jobs back to Ohio consistent with the Clean Air Act and its goals.

**Comment - Commentor D:**

**Ohio EPA should adopt the federal definition of projected actual emissions as written and should not make changes to it.**

As a general matter, Ohio EPA should adopt the federal rules directly into state law. This is the most direct route to an approved nonattainment NSR and PSD program for the state. It is critical that Ohio have an approved program so that it retains its autonomy over permitting decisions. Moreover, the federal rules have been subject to years of public comment. They have been reviewed, again and again, by regulatory experts, and they reflect a balanced and reasonable approach to projecting the impacts of a project while not inappropriately confiscating the capacity of existing plant equipment or discouraging efficiency improvement projects.

Any deviations from the federal rule will potentially jeopardize approval of the program as well as reduce the benefits that U.S. EPA intended to achieve from the issuance of these rules. First, U.S. EPA's in-depth study of the prior NSR rules showed an adverse impact on investment in expanding and preserving manufacturing capacity resulting from several aspects of the regulations, including specifically the distortion of future projected emissions by the blanket application of an actual-to-potential test by many regulators. Second, U.S. EPA determined that plants often declined to make efficiency and environmental improvements due to the actual-to-potential methodology. Third, the Agency further concluded in an environmental analysis of the rules that overall emissions of air contaminants would not be expected to increase as a result of the new emission increase calculation methodology.

As a practical matter, significant variations between state and Federal NSR regulations, and among various state programs are problematic for efficient business planning, particularly for companies with operations in many states. Finally, state rules that differ from the federal rules may put a state at an economic disadvantage to other states when investment and employment decisions are made.

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<sup>1</sup> Source: US Department of Labor; Sept 2003; [www.bls.gov](http://www.bls.gov); Series ID - SMS390000300000001, seasonally adjusted.

**Comment - Commentor D:**

**The NSR Improvement Rules create a consistent and *understandable* approach to projecting emissions, an approach absent from the pre-2003 regulations.**

The pre-2003 rules relied on the definition of “actual emissions” to define both baseline and post-change emissions. In addition, the rules focused on the concept of whether a unit “had begun normal operations” to determine if emissions should be projected based on a unit’s expected emission levels following a change or its potential-to-emit (PTE). In *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), (*WEPCo*), the federal Court of Appeals determined that U.S. EPA must consider an emissions unit that had been operating for a number of years to have begun normal operations and allow it to use the actual-to-actual test. Under that test, *WEPCo* was required to project its *actual* emissions after the change.<sup>2</sup> Thus, the actual-to-potential test is not, and has not been, the law for already-operating emission units. While U.S. EPA changed its regulations in 1992 for utilities to more clearly specify how the past-actual-to-future actual test should be implemented, no such clarification of the regulations was issued for non-utility units. The NSR Improvement Rules provide that needed clarification and, though they do not change the test that applies to existing units under the case law, they provide certainty and clarification to facilities and the public by:

- ☞ Explaining the parameters and data required for projecting future emissions; and
- ☞ Establishing validation mechanisms for source projections of future emissions through uniform recordkeeping and reporting requirements to track emissions after a change.

These two elements of the rule actually enhance the enforceability of the pre-2003 rules by imposing consistent and replicable requirements for all sources to document the impact of projects on emissions and to track those emissions over time.

**Comment - Commentor D:**

**Ohio EPA should adopt the requirements to project emissions for existing units based on the maximum expected emissions in the 5-year period following a project (or 10-year period if the project will increase design capacity or PTE of a regulated NSR pollutant).**

The NSR Improvement Rules state that future actual emissions for an existing unit should be based on the maximum annual rate in tons per year at which a unit is projected to emit a

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<sup>2</sup> Judge Sargus of the Southern District of Ohio and Judge Bullock of the Middle District of North Carolina held likewise. Opinion and Order in *U.S. v. Ohio Edison Co.*, No. 2:99-CV-1181, 2003 WL 21910738 (S.D. Ohio Aug. 7, 2003); Memorandum Opinion in *U.S. v. Duke Energy Corp.*, No. 1:00CV01262, 2003 WL 22024780 (M.D.N.C. Aug. 26, 2003).

regulated NSR pollutant in any one of the 5 years following the change. The projection period begins on the date that the unit resumes regular operation. In addition, this period is extended to 10 years for any unit that will experience an increase in design capacity or PTE of a regulated NSR pollutant. The PPEC supports the approach in the federal rules because it sets reasonable periods over which emissions impacts from a project would be expected to occur, depending on the scope of the project relative to current emissions and production capacity. In our experience, the impacts of a project are typically seen within the first 2 to 3 years of a project, so the 5-year period provides more than an adequate time frame to ensure that emissions related to a change will be considered and evaluated by Ohio EPA.

**Comment - Commentor D:**

**Ohio EPA should adopt the federal post-project recordkeeping and reporting requirements to ensure that a source's projection of actual emissions for an existing unit is validated after a unit resumes regular operation.**

As noted above, the NSR Improvement Rules establish clear requirements for documenting the expected impact of a project and for tracking emissions relative to that projection over a reasonable period of time. These requirements apply when there is a *reasonable possibility* that a project will result in a significant emissions increase. The pre-2003 rules contained no such requirements. Neither regulators nor regulated facilities were certain what recordkeeping was appropriate to establish whether a project triggered NSR. With the new rules, all sources are on a level playing field and are on notice of the recordkeeping and reporting requirements that apply. Ohio EPA should adopt the reasonable possibility test, particularly in light of the fact that U.S. EPA recently reaffirmed its appropriateness in response to petitions for reconsideration on the final rule, as well as the associated recordkeeping, emissions tracking and reporting requirements in the federal rule.

One topic of discussion raised during the November 20, 2003 meeting involved the extent of reporting that should be required of sources utilizing the "Actual-to-Projected Actual" emissions test. One suggestion was to require notification to Ohio EPA every time a facility uses the "Actual-to-Projected Actual" test. In addition, it was suggested that any minor NSR PTI required would include an explanation of how the emissions test was done for the project. We disagree with these suggestions and urge EPA not to implement reporting requirements that go beyond the federal regulations.

Reporting on any change that uses the "Actual-to-Projected Actual" test would impose unreasonable burdens on both the state and regulated facilities. The agency would be flooded with "notifications" regarding projects that do not have a reasonable possibility of causing an emission increase and that do not trigger NSR. As U. S. EPA stated in its Notice of Reconsideration, the "reasonable possibility" provision was included because the Agency was concerned that, without some qualifier on when sources must retain records and report, the rules "would encompass any physical or operational change you undertake no matter how

inconsequential and unlikely that an emissions increase would result.” 68 *Fed. Reg.* 44627 (July 30, 2003). At a time when Ohio EPA has not had enough resources to deal with the PTI applications that are pending, it does not make sense to require that additional paperwork be filed that would also need to be reviewed by permit engineers. For sources, this would impose an unreasonable burden and would fundamentally change the nature of the NSR program. As U.S. EPA stated in the Technical Support Document (TSD)<sup>3</sup> in which it reaffirmed the “reasonable possibility” test for when records must be kept of a change:

The NSR program has always relied upon sources to decide when and whether they need a major NSR permit. If a source ignores the requirement to obtain a permit, we have the option of bringing an enforcement action. We think that a strong enforcement presence is the proper response to deter violators, and that under an effectively enforced program, we expect a high level of compliance.

TSD at 72.

U.S. EPA also recognized the substantial burden that expanding the recordkeeping requirements of the rule would impose on sources:

We have decided to retain the “reasonable possibility” qualifier as it applies to recordkeeping and reporting requirements under the revised major NSR program. As stated in our request for reconsideration on this issue and as some commenters have agreed, we believe that this provision provides the necessary balance between retaining information necessary to demonstrate compliance and the burden of unnecessary recordkeeping and reporting.

TSD at 94.

The NSR program has always been a self-implementing program at the applicability determination stage. The consequences of changing that approach would be severe. We therefore urge the Division to adopt the federal rule which requires that records be kept (and be available for inspection by enforcement authorities) when there is a *reasonable possibility* that a project will result in a significant emissions increase and not add any additional notification requirements.

**Comment - Commentor D:**

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3 Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration; EPA-456/R-03-005 (October 30, 2003).

**Ohio EPA should incorporate the definition of “replacement unit” adopted by U.S. EPA on October 27, 2003, and should treat replacement units as existing units for purposes of baseline and projected actual emissions.**

In the NSR Improvement Rules that were finalized on December 31, 2002, U.S. EPA stated in the preamble that emission units that replaced other units would be treated as existing units. In such a case, the replacement unit would receive the baseline of the unit it replaces and the replacement unit would project emissions based on its expected maximum operations in the next 5 or 10 years. U.S. EPA reasoned that:

[A]s with modified units, the fact that replacement units are replacing similar units with a record of historical operational data provides sufficient reasons to believe that a projection of future actual emissions can be sufficiently reliable that an up-front emissions cap based on PTE is unnecessary. In other words, a source replacing a unit should be able to adequately project and track emissions for the replacement unit based, in part, on the operating history of the replaced unit.

*67 Fed. Reg. 80194.*

On October 27, 2003, U.S. EPA provided additional clarification of its approach to replacement units, and added a regulatory definition. The new definition ensures that a replacement will be closely tied to the capabilities of the existing emissions unit to ensure that post-project emissions can be reliably predicted based on past operating history. This approach for replacement units makes sense. For example, in many instances a facility might replace a small oil-fired boiler with a gas-fired one. Replacing the boiler would not impact in any way steam demand for the plant. Therefore, it is clear that the demand on the boiler can be reliably predicted based on past operating history of the oil-fired boiler.

**Comment - Commentor D:**

**Ohio EPA should require that new units project actual emissions using PTE.**

The NSR Improvement Rules retain the requirement from the pre-2003 rules that new units project emissions based on their PTE. The PPEC supports adopting this approach in the Ohio rules.

**Comment - Commentor D:**

**Ohio EPA should adopt the provision that eliminates the recordkeeping requirements of the rule if PTE is used to project emissions for an existing unit.**

As noted above, the NSR Improvement Rules establish comprehensive recordkeeping, emissions tracking and reporting requirements whenever there is a reasonable possibility that

a project will result in a significant emissions increase. For facilities that do not wish to meet these requirements, U.S. EPA provided an option to use the actual-to-potential test. If a facility uses and project would not trigger NSR under the actual-to-potential test, the extensive requirements in the rule for tracking future actual emissions do not apply. Ohio EPA should adopt this same streamlining option for sources that elect to use the actual-to-potential test.

**Comment - Commentor D:**

**Ohio EPA should adopt the provisions which exclude emissions impacts that are unrelated to the change and that could have been accommodated during the baseline period.**

Under the federal rules, U.S. EPA has adopted for all sources the exclusion of emissions unrelated to the change that has been explicitly in the rules for utilities since 1992 (referred to as the “demand growth exclusion”). This exclusion recognizes that requirement in the Clean Air Act and the pre-2003 rules that emissions increases must actually result from the project in order to trigger NSR permitting requirements. Now, U.S. EPA has more formally codified this element of the emissions increase test. This element of the rule is critical to the reforms that U.S. EPA has adopted and it should be adopted by Ohio as well.<sup>4</sup>

**Comment - Commentor D:**

**Ohio EPA Should Not Adopt the STAPPA/ALAPCO Menu of Options Approach to the Projecting Future Actual Emissions.**

During the November 20, 2003 meeting, the NSR Menu of Options being developed by STAPPA/ALAPCO (S/A) was raised.. While it appears that S/A has devoted considerable resources to developing these options, we believe the S/A options do not address the fundamental deficiencies of the pre-2003 rules and the way in which they were implemented. For example, with respect to projecting future emissions, they essentially impose an actual-to-potential test on all sources, resulting in confiscation of capacity and discouraging environmentally beneficial and energy efficient projects. Consequently, they should not be adopted by Ohio EPA. The agency should focus its evaluation on the rules issued by U.S. EPA on December 31, 2002 (67 *Fed. Reg.* 80186) and October 27, 2003 (68 *Fed. Reg.* 61248), which resulted from an extensive public participation process (including a multi-year notice and comment period, stakeholder meetings, conferences with U.S. EPA and the like). The federal rules should be adopted by Ohio EPA.

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<sup>4</sup> One example of how this provision is useful is in projecting future startup, shutdown and malfunction (SSM) emissions. If a facility can demonstrate that a project would not impact SSM emissions, it can exclude any emissions related to SSM from the emissions calculation (both on the baseline and projected actual side of the equation), thus greatly simplifying the process of determining emissions increases and in no way compromising environmental protection. A similar approach could be taken with fugitive emissions.

