

1996 preamble recognized this preclusion in our discussion of extending the WEPCO rule to other industrial sectors, *see* 62 FR 38267, the proposed regulatory language removed the preclusion and would have allowed all emissions units (EUSGUs and non-EUSGUs), including replacement units, to use the actual-to-future-actual emissions test. *See* proposed 40 CFR 52.21(b)(21)(ii), 61 FR 38338.

In the final rules, we concluded we should not preclude use of the actual-to-projected-actual test either for EUSGUs or non-EUSGUs replacement units. We explained the basis for our conclusion in the final rule. *See* 67 FR 80194. Although we discussed this issue in the proposal, we are seeking comment on our determination on this issue and the basis for it set forth in the preamble to the final rules.

D. Clean Unit

1. Background

Our December 31, 2002 final rules finalize provisions that provide added flexibility to emissions units that install state-of-the-art emissions controls. Specifically, we promulgated a new type of major NSR applicability test for emissions units that are designated as Clean Units.

The Clean Unit applicability test ("Clean Unit Test") measures whether an emissions increase occurs, based on whether a project affects the Clean Unit status of the emissions unit. The Clean Unit Test provides that when you meet emission limitations based on installing state-of-the-art emissions control technologies (add-on controls, pollution prevention, or work practices) that are determined to be BACT or LAER (or comparable to BACT or LAER), you may make any physical or operational change to the unit without triggering major NSR, provided that the change does not (1) necessitate a revision in the emission limitations or work practice requirements in the permit for the unit that were adopted in conjunction with BACT, LAER, or Clean Unit determinations; or (2) alter any physical or operational characteristics that formed the basis for the BACT, LAER, or Clean Unit determination for the unit.

Today, we are requesting comment on one aspect of the final rules for Clean units. This issue is discussed below.

2. Effect of Redesignation on Clean Unit Status

The final rules allow you to maintain Clean Unit status at an emissions unit even if the area in which you are located was attainment for the pollutant at the time the emissions unit was designated

clean but is subsequently redesignated to nonattainment. Our 1996 proposal did not specifically address this issue. It did, however, propose that Clean Unit status would presumptively apply for the 10 years following issuance of the major NSR permit, and it did not indicate that the presumption would be revoked if the area was redesignated. Therefore, we believe a natural implication of the proposal is that the Clean Unit status would presumptively continue to apply even if the area were redesignated.

We continue to believe that you should be allowed to maintain your Clean Unit status even if your area is redesignated from attainment to nonattainment for the pollutant for which your emissions unit is designated clean. This approach is most consistent with our current practices and fundamental to the policy of creating incentives to reduce emissions.

As a general rule, permitting decisions are not *per se* invalid, or retroactively changed by virtue of a change in an area's attainment status. For example, we do not require sources that have applied BACT to upgrade controls to comply with LAER or obtain offsets when an area's designation changes.

Moreover, a fundamental premise in creating the Clean Unit Test is to provide you with an incentive to install better emissions control technologies even when there is no State, local or Federal regulation requiring this level of control. We believe that this incentive will be undermined if you are unable to know with certainty that the added flexibility will be available to you for the full 10-year period.

We also believe that this approach is consistent with the Clean Air Act. The requirements of section 173 of the Act, including the requirements to apply LAER and obtain offsets, apply only if a project will result in an emissions increase. As long as an emissions unit maintains its status as a Clean Unit, it has not increased emissions. Thus, the provisions of section 173 do not apply to such emissions units.

Finally, because States will have established the Clean Units either through the major NSR permitting process or another permitting process, the State will be aware of which emissions units qualify as Clean Units at the time an area is redesignated. Thus, States that are concerned that Clean Units may have adverse impact on their attainment demonstrations if the full effect of their potential emissions is realized are able to make appropriate adjustments in their attainment demonstrations to account for these

permitted emissions. In this respect, we believe that the Clean Unit Test provides States with a better planning tool than may otherwise exist in the absence of the Clean Unit Test.

As noted above, we proposed in 1996 that an emission unit's Clean Unit status would remain in place for 10 years, and implicitly indicated that nonattainment redesignation would not affect the unit's status during that 10 years. We, however, request comment on this approach and the rationale set forth above.

V. Statutory and Executive Order Reviews

On December 31, 2002, we finalized rule changes to the regulations governing the NSR programs mandated by parts C and D of title I of the Act. With today's action we are proposing no changes to the final rules, and are seeking additional comments on some of the provisions finalized in the December 2002 **Federal Register** notice (67 FR 80186). Accordingly, we believe that the rationale provided with the final rules is still applicable and sufficient.

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to