

would have to be implemented through rulemaking, which would require a considerable amount of time, analytical effort, and resources.

A commenter suggested two ways by which we could develop a list of qualifying activities. First, we could review records for ongoing enforcement activity, to identify activities that we have and have not already alleged to be RMRR. There is an ample body of knowledge for electric power plants. Second, we could identify where activities would fall with respect to the cost criteria, then adjust the classification of each activity based on the WEPCO criteria to prepare lists of routine and nonroutine activities.

Some commenters felt that industry-specific lists of routine and nonroutine activities would provide the best interim clarification to major NSR until legislative reform is in place. Other commenters opposed the development of lists of activities that are considered RMRR, contending that such lists would become quickly outdated.

Some commenters requested that certain activities be specifically classified as RMRR. These suggested activities included the following:

- The common practice of changing out the engine core in a combustion turbine when it is due for overhaul (to reduce downtime). The removed engine core is overhauled offline, and is then available to be switched in for the next like-kind engine core that reaches the point of overhaul. Unless the components are upgraded, the heat input remains the same and so does the emissions rate.

- Any change that does not increase the achievable hourly emissions (as determined based on the permit and/or original design parameters) of existing equipment, processes, and emissions units.

- Certain activities, for example, boiler tuning and maintenance, repair and replacement of air pollution equipment or CEMS should be categorically excluded as RMRR.

- Any activity that is part of a long-term service agreement (primarily gas turbines) should be categorically excluded from major NSR.

- Any activity involving steam turbine overhaul work should be categorically excluded from major NSR.

Activities such as the above might be RMRR, but we believe there are simply too many activities in too many industries to effectively improve major NSR implementation through creation of lists. Moreover, lists would be a "snapshot in time" that would need to be reviewed and periodically updated for each industry sector. We have

consequently decided not to attempt to list activities that are categorically excluded as RMRR.

M. Stand-Alone Exclusion for Energy Efficiency Projects

In the proposal, we acknowledged that certain types of activities that improve energy efficiency would not qualify as RMRR. We solicited comment on whether there was the need for a "stand-alone" exclusion for activities that promote energy efficiency.

Many commenters supported a stand-alone exclusion from major NSR for energy efficiency projects. With the following safeguards, they favored specifically excluding from the definition of "major modification" activities that promote energy efficiency and/or resource conservation when: (1) The activity results in lower emissions per unit of production or lower energy utilization per unit of production; (2) the percent decrease in emissions or energy utilization per unit of production is greater than the percent increase in maximum hourly emission rates; (3) activity costs do not exceed 50 percent of the replacement value of the process unit; and (4) the activity does not result in an increase in allowable emissions.

Other commenters pointed out that efficiency upgrades will frequently create incentives to further utilize a source and subsequently increase mass emissions. One commenter stated that if activities that result in small efficiency gains can qualify as RMRR, older, dirtier electric generating units will be better able to out-compete newer, much cleaner plants (that have higher costs due to emission controls).

One commenter stated that EPA is incorrect in stating that energy efficiency projects are being discouraged by major NSR, particularly under the new actual-to-projected-actual applicability test. This commenter added that the only projects that are discouraged by major NSR are ones that increase emissions. This commenter felt that the December 2002 final major NSR rules provide a broad range of major NSR exclusions (including revised baseline determinations, Clean Unit designations, pollution control projects, PALS, and combinations of these provisions, as well as an RMRR exclusion) under which energy efficiency projects will certainly occur.

We strongly support efforts to improve energy efficiency at existing power plants. These activities reduce the amount of air pollution emitted per unit of electricity generated. We believe that today's ERP supports energy efficiency projects and that the actual-to-projected-actual applicability test

contained in the December 2002 NSR final rules also should remove impediments to energy efficiency projects. Together, these rules will obviate the need for a specified RMRR provision for energy efficiency projects. Thus, at this time we are not finalizing a provision to categorically exclude energy efficiency projects from major NSR.

N. Legal Basis

1. How Does the NSR Program Address Existing Sources and Why Is Today's Rule Consistent With This Approach?

The core of the NSR program is to require preconstruction permits for all new major sources. Congress specifically decided that existing sources generally would not be required to obtain permits. These considerations are the starting point for understanding its application to "modifications" and the meaning we should give that term.

The NSR program's scope is closely related to the scope of the NSPS program, created seven years earlier in the CAA Amendments of 1970. In section 111 of the CAA, which sets forth the NSPS provisions, Congress applied the New Source Performance Standards to "new sources," secs. 111(b)(1)(B), 111(b)(4). Congress determined that as a general matter it would not impose the NSPS standards on existing sources, instead leaving to the State and local permitting authorities the decision of the extent to which to regulate those sources through "State Implementation Plans" designed to implement National Ambient Air Quality Standards (NAAQS). See sec. 110.

Congress followed a similar approach in determining the scope of the major NSR program established by the 1977 Amendments to the CAA. As amended, the CAA specifies that State Implementation Plans must contain provisions that require sources to obtain major NSR permits prior to the point of "construction" of a source. Secs. 172(c)(5); 165 (a). By contrast, the CAA generally leaves to State and local permitting authorities in the first instance the question of the extent, means and timetable for obtaining reductions from existing sources needed to comply with National Ambient Air Quality Standards. See secs. 172(c)(1), 161.

NSR's applicability to existing sources to which a "modification" is made is an exception to this basic concept. This exception likewise finds its roots in the NSPS program's applicability to "modifications" of existing sources. The 1970 CAA made the NSPS program applicable to modifications through its