

Overview of Proposed Changes to the Chapter 100, Subchapter 8, Section 36.2 Source Obligation Recordkeeping Requirements – a.k.a. the “Reasonable Possibility” Rulemaking

Air Quality Advisory Council Meeting
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Road Map for Today's Presentation

An overview of where we are going:

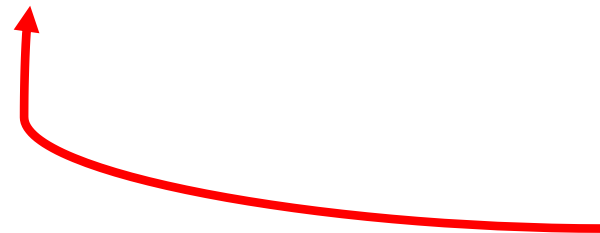
- ❖ Background.
- ❖ What is our approach? And why are we not adopting EPA's rule language verbatim?
- ❖ Possible future challenges.
- ❖ Proposed new rule text.

PSD Requirements for Attainment Areas

OAC 252:100-8-36.2. Source obligation

[. . .]

(c) Requirements when using projected actual emissions.



We are proposing revisions to these requirements.

Background

Major New Source Review (NSR), in general, and the Prevention of Significant Deterioration (PSD) program, in particular, requires owner/operators of facilities subject to those rules to evaluate each new project to determine whether it should be classified as a “major modification.”

Because Oklahoma is in attainment of all of the National Ambient Air Quality Standards (NAAQS), we will focus on the **PSD program**.

NSR Reform provided the option of using the “Actual-to-Projected-Actual” applicability test for existing emission units to calculate emission increases to determine whether a project exceeds the PSD significance levels.

Subsection (c) of Section 36.2 establishes the recordkeeping requirements that apply when a company uses projected actual emissions.

Proposed Changes to Air Quality Permitting Rules

Date	Action
December 21, 2007	EPA published a final rule titled "Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping". We will refer to this as the EPA Reasonable Possibility Rule .
February 15, 2008	The State of New Jersey submitted a petition requesting reconsideration of the rule. Initially, EPA rejected the petition, but on April 24, 2009, EPA announced that it was granting the petition and that it would begin the formal process of reconsidering the rule
November 5, 2019	EPA never completed that process and, in a letter to the Attorney General of New Jersey, EPA stated that it was no longer reconsidering the rule or taking public comment on the rule.

The Current Status of the Reasonable Possibility Rule

New Jersey then sued EPA over their decision not to reconsider the rule.

In the interim, the Reasonable Possibility rule remained in effect in jurisdictions where the EPA operates the PSD program or in jurisdictions where the state, local, or tribal agency has received formal delegation of the EPA program.

The Oklahoma DEQ operates its program under a federally approved State Implementation Plan (SIP), rather than under formal delegation of EPA's program.

Due to the concerns with the litigation between EPA and the State of New Jersey, we did not revise our rules to incorporate the Reasonable Possibility language. That changed on March 5, 2021, when the D.C. Circuit Court of Appeals ruled in favor of EPA and against the State of New Jersey

What Is Our Approach?

New Jersey raised a number of concerns with EPA's approach, but the most salient was EPA's failure to require facilities to maintain records (generated before a change) demonstrating that a project was eligible for the exemption from the requirement to maintain records *after* the change was made.

EPA's Failure: No Requirement for Pre-Change Recordkeeping.

We concur. Our remedy is to require pre-change recordkeeping, but exempt facilities that are *not* determined to have a reasonable possibility of exceeding the PSD significance thresholds from the post-change recordkeeping requirements.

Oklahoma's Solution: Require Pre-Change Recordkeeping.

What Is Pre-Change Recordkeeping?

Records that need to be maintained [252:100-8-36.2(c)(1)(A-C)]:

- A description of the project;
- Identification of the existing emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and
- A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under (B)(iii) of the definition of "projected actual emissions" in OAC 252:100-8-31 and an explanation for why such amount was excluded, and any netting calculations, if applicable.

EPA Doesn't Require Pre-Change Recordkeeping?

No, not in the version of the Reasonable Possibility rule that was adopted.

EPA claims that, in effect, other programs duplicate the requirement for these records. Perhaps not in a direct way, but indirectly.

The Oklahoma DEQ believes that it is more straightforward to just include these requirements *explicitly* in the Source Obligations section of the rules. That way there is no ambiguity.

Possible Future Challenges

As noted, on March 5, 2021, the D.C. Circuit Court of Appeals ruled in favor of EPA and against the State of New Jersey.

However, EPA could revisit the rule under the new administration.

Whatever happens, the Air Quality Division believes that our approach addresses the most significant flaw identified by New Jersey. If our proposed rule language is adopted, we will submit these changes to EPA Region 6 for incorporation into our SIP. Once the language is approved into our SIP, it would require separate action from EPA or from the courts to jeopardize our approach.

EPA's Proposed Error Correction

Federal Register / Vol. 84, No. 245 / Friday, December 20, 2019 / Proposed Rules

70095

On December 20, 2019, EPA published a notice in the Federal Register proposing to correct a number of errors in various NSR rules.

One of the proposed changes corrected a mistake in the identification which paragraph was referenced internally in the rule.

The Department's proposal today corrects that error, although the entire suite of error corrections included in that notice has not yet been published as a final rule.

e. On December 21, 2007, at 72 FR 72616, the EPA amended the NSR regulations by, among other things, adding new paragraphs to explain when a stationary source will have a “reasonable possibility” of causing a significant emissions increase. In § 51.166(r)(6)(vi)(b), reference is incorrectly made to “paragraph (a)(6)(vi)(a)” and “paragraphs (a)(6)(ii) through (v).” Both references mistakenly reference paragraph (a), which is where similar references are made in the “reasonable possibility” provision contained in § 51.165(a)(6)(vi)(B). The EPA is proposing to correct the references in § 51.166 by referencing the applicable subparagraphs under paragraph (r). See proposed § 51.166(r)(6)(vi)(b).

Chapter 100, Subchapter 8, Section 36.2 Changes

**TITLE 252. DEPARTMENT OF ENVIRONMENTAL QUALITY
CHAPTER 100. AIR POLLUTION CONTROL**

**SUBCHAPTER 8. PERMITS FOR PART 70 SOURCES AND MAJOR NEW SOURCE
REVIEW (NSR) SOURCES**

**PART 7. PREVENTION OF SIGNIFICANT DETERIORATION (PSD)
REQUIREMENTS FOR ATTAINMENT AREAS**

Please turn in your packets to the proposed amendments to rule text in Chapter 100, Subchapter 8, Section 36.2.

This document is available on the web:

[Subchapter 8, Section 36.2: Source Obligation \(Amended\)](#)

Chapter 100, Subchapter 8, Section 36.2 Changes

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252:100-8-36.2. Source obligation

(c) **Requirements when using projected actual emissions.** The following specific provisions apply to projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) of any regulated NSR pollutant, and the owner or operator elects to use the method specified in (B)(i) through (iii) of the definition of "projected actual emissions" in OAC 252:100-8-31 for calculating projected actual emissions.

(1) ~~Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:~~

- (A) A description of the project;
- (B) Identification of the existing emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and
- (C) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under (B)(iii) of the definition of "projected actual emissions" in OAC 252:100-8-31 and an explanation for why such amount was excluded, and any netting calculations, if applicable.

For projects that use projected actual emissions (PAE) for existing sources to determine whether a project will result in a significant emissions increase under the PSD rules, additional recordkeeping is required.

The changes shown clarify the reference to PAE in the definitions section of the PSD rules.

(1) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(A) A description of the project;

(B) Identification of the existing emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

(C) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under (B)(iii) of the definition of "projected actual emissions" in OAC 252:100-8-31 and an explanation for why such amount was excluded, and any netting calculations, if applicable.

Taking another look at the language in this paragraph, it is important to note that these requirements apply **whether or not** a project exceeds the "reasonable possibility" threshold.

← But these records are essential to establish the basis on which the determination was made **whether or not** the project has a "reasonable possibility" of exceeding the 50% threshold.

These are the "pre-change records" mentioned by EPA in their letter to New Jersey.

(2) Additional recordkeeping requirements for projects not requiring a PSD or Nonattainment NSR permit, but with a "reasonable possibility" of resulting in a significant emissions increase. If the project is determined to have a "reasonable possibility" of resulting in a significant emission increase, the owner or operator shall comply with the applicable requirements of subparagraphs (B) through (E) below.

(A) A "reasonable possibility" occurs when:

(i) The owner or operator calculates the project to result in a projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase,"

as defined in OAC 252:100-8-31 (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(ii) The owner or operator, in accordance with the procedures described in (B)(iii) of the definition of "projected actual emissions" under OAC 252:100-8-31, excludes a portion of one or more existing unit's emissions from the calculation of "projected actual emissions," and, if the owner or operator had not excluded those emissions, the projected actual emissions increase would be at least 50 percent of the amount that is a "significant emissions increase," as defined in OAC 252:100-8-31 (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant.

These changes represent the heart of the Oklahoma "reasonable possibility" approach. This language establishes the criterion under which a project is determined to have a "reasonable possibility" of resulting in a significant emissions increase (as defined by the PSD rules). If the project does **not** reach the 50% threshold, no additional records (beyond the pre-change records discussed previously) are required.

(2) Additional recordkeeping requirements for projects not requiring a PSD or Nonattainment NSR permit, but with a "reasonable possibility" of resulting in a significant emissions increase. If the project is determined to have a "reasonable possibility" of resulting in a significant emission increase, the owner or operator shall comply with the applicable requirements of subparagraphs (B) through (E) below.

(A) A "reasonable possibility" occurs when:

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as defined in OAC 252:100-8-31 (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(ii) The owner or operator, in accordance with the procedures described in (B)(iii) of the definition of "projected actual emissions" under OAC 252:100-8-31, excludes a portion of one or more existing unit's emissions from the calculation of "projected actual emissions," and, if the owner or operator had not excluded those emissions, the projected actual emissions increase would be at least 50 percent of the amount that is a "significant emissions increase," as defined in OAC 252:100-8-31 (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant.

All of the text shown to the left was inserted after the number (2) which previously started the paragraph discussing requirements for existing electric utility steam generating units (EUSGUs). This new text establishes the reasonable possibility exemption from post-change recordkeeping.

The (2) previously went here.

Paragraph (2) originally started with this text. However, the new text establishing the reasonable possibility exemption required that the following text be indented and renumbered.

(B) If the emissions unit is an existing EUSGU, before beginning actual construction, the owner or operator shall provide a copy of the information set out in OAC 252:100-8-36.2(c)(1) to the Director. Nothing in OAC 252:100-8-36.2(c)(2)(B) shall be construed to require the owner or operator of such a unit to obtain any determination from the Director before beginning actual construction.

(3)(C) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in OAC 252:100-8-36.2(c)(1)(B); and calculate and maintain a record of the annual emissions, in TPY on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit.


~~(4)~~(D) If the unit is an existing EUSGU, the owner or operator shall submit a report to the Director within 60 days after the end of each year during which records must be generated under OAC 252:100-8-36.2~~(e)~~~~(3)~~(c)(2)(C) setting out the unit's annual emissions during the calendar year that preceded submission of the report.

~~(5)~~(E) If the unit is an existing unit other than an EUSGU, the owner or operator shall submit a report to the Director if the annual emissions, in TPY, from the project identified in OAC 252:100-8-36.2(c)(1), exceed the baseline actual emissions (as documented and maintained pursuant to 252:100-8-36.2(c)(1)(C)) by an amount that is significant for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to 252:100-8-36.2(c)(1)(C). Such report shall be submitted to the Director within 60 days after the end of such year. The report shall contain the following:

~~(A)~~(i) The name, address and telephone number of the major stationary source;

~~(B)~~(ii) The annual emissions as calculated pursuant to OAC 252:100-8-36.2~~(e)~~~~(3)~~(c)(2)(C); and

~~(C)~~(iii) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).



The restructuring (“renumbering”) of the text continues here.

The paragraphs describing the post-change recordkeeping requirements are indented.

And the subparagraphs now have with lower case Roman numerals (e.g., i, ii, iii, etc.).

- (3) [RESERVED]
- (4) [RESERVED]
- (5) [RESERVED]

(6) The owner or operator of the source shall make the information required to be documented and maintained pursuant to OAC 252:100-8-36.2(c) available for review upon request for inspection by the Director or the general public.



The previous paragraphs (3), (4), and (5) were indented as shown above.

Here the numbers themselves are kept as “reserved” paragraphs (without content) to allow the paragraphs (with content) to continue with (6) without further renumbering.

Chapter 100 Changes

That concludes my presentation on our proposed changes to Section 36.2.

Please note that staff is recommending that the Council adopt the proposed rule changes to Chapter 100, Subchapter 8, Section 36.2 during today's meeting.

Thank you!