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ORAL ARGUMENT SCHEDULED FOR JANUARY 25, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, et al.,	
Petitioners,	
v.	Case No. 02-1387 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	**Complex**
Respondent.	

On Petitions for Review of Final Actions
of the United States Environmental Protection Agency

BRIEF OF GOVERNMENT PETITIONERS

The States of New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, and Wisconsin, and the District of Columbia,

The South Coast, Santa Barbara County, Ventura County, Sacramento Metropolitan, San Joaquin Valley, Monterey Bay Unified, and Yolo Solano, California local air pollution control districts,

The City of New York and the City and County of San Francisco,

The Connecticut municipalities of Cornwall, East Hartford, Easton, Greenwich, Groton, Hartford, Hebron, Lebanon, Middletown, New Haven, New London, Newtown, North Stonington, Pomfret, Putnam, Rocky Hill, Salisbury, Stamford, Thompson, Wallingford, Washington, Waterbury, Westbrook, Weston, Westport, and Woodstock.

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Dated: October 18, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

A. PARTIES AND AMICI

Petitioners

The following parties appear in these consolidated cases as petitioners:

Challenges to the EPA Rule published at 67 Fed. Reg. 80,185 (Dec. 31, 2002)

In case no. 02-1387, filed December 31, 2002, the State of New York, State of Connecticut, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of Rhode Island, and State of Vermont.

In case no. 03-1016, filed February 2, 2003, the Commonwealth of Pennsylvania Department of Environmental Protection.

In case no. 03-1033, filed February 20, 2003, the South Coast Air Quality Management District.

In case no. 03-1036, filed February 24, 2003, the District of Columbia.

In case no. 03-1040, filed February 26, 2003, Delaware Nature Society.

In case no. 03-1041, filed February 26, 2003, the State of Delaware.

In case no. 03-1044, filed February 27, 2003, the People of the State of California ex rel. Bill Lockyer, Attorney General of California, and California Air Resources Board.

In case no. 03-1045, filed February 27, 2003, the Santa Barbara County Air Pollution Control District, Ventura County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Air Pollution Control District, Monterey Bay Unified Air Pollution Control District, and Yolo Solano Air Quality Management District.

In case no. 03-1047, filed February 27, 2003, National Environmental Development Association's Clean Air Regulatory Project.

In case no. 03-1048, filed February 28, 2003, Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, and Communities for a Better Environment.

In case no. 03-1049, filed February 28, 2003, the City of Groton, City of Hartford, City of Middletown, City of New Haven, City of New London, City of Stamford, and City of Waterbury, the Town of Cornwall, Town of Easton, Town of Greenwich, Town of Hebron, Town of Lebanon, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, Town of Thompson, Town of Wallingford, Town of Washington, Town of Westbrook, Town of Weston, Town of Westport, and Town of Woodstock, Connecticut.

In case no. 03-1050, filed February 28, 2003, the State of Wisconsin.

In case no. 03-1051, filed March 3, 2003, Newmont USA Limited, d/b/a Newmont Mining Corporation.

In case no. 03-1052, filed February 28, 2003, the State of Illinois.

In case no. 03-1054, filed March 3, 2003, the City of New York and the City and County of San Francisco.

In case no. 03-1055, filed March 3, 2003, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, The Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

In case no. 03-1056, filed March 3, 2003, Clean Air Implementation Project.

In case no. 03-1057, filed March 3, 2003, NSR Manufacturers Roundtable.

Challenges to the EPA Rule published at 68 Fed. Reg. 11,316 (March 10, 2003)

In case no. 03-1104, filed April 17, 2003, the State of California, State of Connecticut, Commonwealth of Massachusetts, State of New Jersey, State of New York, District of Columbia, Santa Barbara County Air Pollution Control District, and South Coast Air Quality Management District.

In case no. 03-1130, filed May 8, 2003, Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, and Communities for a Better Environment.

In case no. 03-1131, filed May 9, 2003, Michigan Environmental Council and Scenic Hudson.

In case no. 03-1135, filed May 9, 2003, the State of Illinois.

Challenges to EPA's Action on Reconsideration published at 68 Fed. Reg. 63,021 (Nov. 7, 2003)

In case no. 03-1437, filed December 5, 2003, Environmental Defense, Natural Resources Defense Council, Sierra Club, American Lung Association, and Communities for a Better Environment.

In case no. 03-1448, filed December 19, 2003, the State of New York, State of Connecticut, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, and State of Vermont.

In case no. 03-1457, filed December 20, 2003, the South Coast Air Quality Management District.

Respondent

The United States Environmental Protection Agency is respondent in these consolidated cases.

Intervenors

The following parties have intervened in these consolidated cases: NSR Manufacturers Roundtable, Clean Air Implementation Project, American Petroleum Institute, Utility Air Regulatory Group, National Environmental Development Association's Clean Air Regulatory Project, Commonwealth of Virginia, Attorney General of Indiana, State of Alaska, State of Kansas, State of Nebraska, State of North Dakota, State of South Carolina, State of South Dakota, State of Utah, Specialty Steel Industry of North America, Steel Manufacturers Association, Illinois State Chamber of Commerce, Illinois Environmental Regulatory Group, State of California, State of Connecticut, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New York, State of Rhode Island, State of Vermont, Commonwealth of Pennsylvania Department of Environmental Protection, South Coast Air Quality Management District, District of Columbia, Delaware Nature Society, State of Delaware, State of California, California Air Resources Board, Santa Barbara County Air Pollution Control District, Ventura County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Air Pollution Control District, Monterey Bay Unified Air Pollution Control District, Yolo Solano Air Quality Management District, Natural Resources Defense Council, Inc., Environmental Defense, American Lung Association, Communities for a Better Environment, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental

Council, The Ohio Environmental Council, Scenic Hudson, Southern Alliance for Clean Energy, American Paper Institute, National Forest Products Association, and the Alliance of Automobile Manufacturers.

Amici

The following parties appear as amici in these consolidated cases:

In support of petitioners State of New York et. al: Clean Air Trust, Anne Arundel County (Maryland), American Thoracic Society, American College of Chest Physicians, National Association for the Medical Direction of Respiratory Care, Sen. Hillary Rodham Clinton, Sen. Jon S. Corzine, Sen. James M. Jeffords, Sen. Patrick J. Leahy, Sen. Barbara Boxer, Sen. Frank Lautenberg, Sen. Charles E. Schumer, and Sen. Jack Reed.

In support of respondent EPA: the State of Florida (on the issue of pollution control projects).

B. RULINGS UNDER REVIEW

Government Petitioners in these consolidated cases seek review of three final actions by EPA:

1. A rule entitled "Prevention of Significant Deterioration and Nonattainment New Source Review: Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects," published at 67 Fed. Reg. 80,185 (Dec. 31, 2002), that amends 40 C.F.R. §§ 51.165, 51.166, and 52.21.

2. A rule entitled "Approval and Promulgation of Implementation Plans; Prevention of Significant Deterioration (PSD)," published at 68 Fed. Reg. 11,316 (March 10, 2003), that amends sections of 40 C.F.R. § 52 to incorporate the provisions of the December 31, 2002 rule

into the state implementation plans of certain States. See 40 C.F.R. §§ 52.96, 52.144, 52.181, 52.270, 52.343, 32.382, 52.499, 52.530, 52.632, 52.683, 52.738, 52.793, 52.833, 52.986, 52.1165, 52.1180, 52.1234, 52.1382, 52.1436, 52.1485, 52.1603, 52.1634, 52.1689, 52.1829, 52.1929, 52.1987, 52.2178, 52.2233, 52.2303, 52.2346, 52.2497, 52.2581, 52.2630, 52.2676, 52.2729, 52.2779, and 52.2827.

3. EPA's decision on reconsideration of these two rules, published at 68 Fed. Reg. 63,021 (Nov. 7, 2003).

C. RELATED CASES

The matter on review has not been previously heard in this or any other court. One related case, State of New York, et. al. v. EPA (No. 03-1380), is currently pending before the Court. On December 24, 2003, the Court denied Government Petitioners' motion to consolidate case no. 03-1380 with the instant case, but granted the alternative request for briefing of the two cases before the same three-judge panel. The Court deferred ruling on whether to hear oral argument of both cases be on the same day. Pursuant to the Court's April 2, 2004 Order, briefing in case no. 03-1380 will begin shortly after briefing is completed in the instant case.

Dated: October 18, 2004

Respectfully submitted,

By: 

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

BACT	Best Available Control Technology
EPA	U.S. Environmental Protection Agency
LAER	Lowest Achievable Emission Rate
NAAQS	National Ambient Air Quality Standard
NOA	Notice of Availability
NO_x	Nitrogen oxides
NSPS	New Source Performance Standards
NSR	New Source Review
PSD	Prevention of Significant Deterioration
SDWA	Safe Drinking Water Act
SEA	Supplemental Environmental Analysis
SIP	State Implementation Plan
SO_2	Sulfur dioxide
VOC	Volatile organic compound
WEPCO	Wisconsin Electric Power Company

PRELIMINARY STATEMENT

In 1977, Congress amended the Clean Air Act (the "Act") to compel existing sources of air pollution to comply with New Source Review (NSR) permitting and pollution control requirements when they make a "modification" that increases emissions. In 2002, the Environmental Protection Agency (EPA), in furtherance of the Administration's energy policy, issued regulations that reinterpret "modification" to exempt many existing sources from NSR requirements even if they make modifications that increase emissions. The new regulations cannot be reconciled with the express statutory language and will perpetuate the "grandfathering" of uncontrolled sources of pollution, contravening congressional intent. The resulting increases in air pollution will harm public health and the environment, delay the attainment of air quality standards, and degrade air quality in areas that are in attainment. Therefore, the regulations should be vacated.

JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction to review any "nationally applicable regulations promulgated, or any final action taken" under the Act by EPA. 42 U.S.C. § 7607(b). In these consolidated cases, Government Petitioners challenge EPA's nationally applicable regulations at 67 Fed. Reg. 80,185 (Dec. 31, 2002) (the "Rule") and 68 Fed. Reg. 11,316 (March 10, 2003), and EPA's final action on reconsideration of these regulations, at 68 Fed. Reg. 63,021 (Nov. 7, 2003). As set forth in the Certificate as to Parties, supra at i-iii, Government Petitioners filed petitions for review of the Rule, the March 10 regulations, and EPA's action on reconsideration within the 60-day period provided in 42 U.S.C. § 7607(b).

STATEMENT OF ISSUES

1. Whether EPA's Rule provision that allows sources of air pollution to use decade-old emissions data to set "baseline emissions" to determine whether projects qualify as "modifications" and to establish plantwide emissions caps conflicts with the Act because it enables sources making physical or operational changes that significantly increase emissions to avoid NSR permitting and pollution control requirements.

2. Whether EPA acted arbitrarily in promulgating the Rule provision that authorizes sources to use an "actual-to-projected-actual" emissions calculation methodology to calculate whether a change will result in a significant emissions increase and therefore be considered a "modification," where the methodology contains unenforceable, subjective elements and EPA has left it to the discretion of sources whether to keep records of their determinations and report the results to permitting authorities.

3. Whether EPA's Rule provision that allows emissions units deemed to be "clean" to avoid NSR permitting, pollution control, and offset requirements for ten years, even if these sources are modified in ways that increase pollution and even if air quality in the area becomes degraded, conflicts with the Act.

4. Whether EPA's decision to mandate that States adopt these relaxed Rule provisions must be vacated because it violates the Act's reservation of state authority and its prohibition against "backsliding," and because EPA committed procedural error by failing to provide notice that it intended to require States to adopt all of the Rule provisions.

STATUTES AND REGULATIONS

The relevant provisions of the Act in this case are 42 U.S.C. §§ 7411(a) (definitions),

7416 (retention of state authority), 7470-79 (prevention of significant deterioration), 7501-03 (nonattainment NSR), and 7515 (anti-backsliding). The regulations at issue have been promulgated at 40 C.F.R. §§ 51.165, 51.166, and 52.21. The provisions (and cited legislative history) are contained in the Addendum.

STATEMENT OF THE CASE

State and local governments, environmental groups, and industry filed petitions challenging EPA's new Rule that alters the approach for determining whether existing sources of pollution trigger NSR permitting and pollution control requirements when they modify their facilities. Certain state and local governments and environmental groups have also filed petitions seeking review of EPA's March 10, 2003 regulations that incorporate the Rule into the state implementation plans (SIPs) of those States that do not have their own federally-approved Prevention of Significant Deterioration (PSD) programs, but instead implement some or all of the federal PSD regulations. See 68 Fed. Reg. 11,316. In addition, certain state and local governments and environmental groups seek review of EPA's actions on reconsideration of both the Rule and the March 10 regulations. See 68 Fed. Reg. 63,021. By order dated June 26, 2003, this Court consolidated these petitions and designated State of New York v. EPA (No. 02-1387) as the lead case.[1]

STATEMENT OF FACTS

A. Statutory Background

Congress passed the Act in 1970 "to speed up, expand, and intensify the war against air

[1] The Court also consolidated challenges to EPA's 1980 and 1992 NSR regulations with the instant case. Because Government Petitioners are not challenging those regulations, the issues raised in those petitions are not addressed in this brief.

pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1 (1970). At the heart of the legislation are national ambient air quality standards (NAAQS) and SIPs to implement those standards. Congress also required that EPA promulgate New Source Performance Standards (NSPS) to regulate the emissions of air pollutants from new and modified sources. See 42 U.S.C. § 7411. Congress intended "that existing sources of pollutants either should meet the standard of the law or be closed down . . . ." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 3 (1970).

1. Enactment of NSR Provisions

In light of insufficient progress being made toward clean air, in 1977 Congress added the NSR provisions, subjecting new and modified major stationary sources to NSR permitting and pollution control requirements. The legislative purposes of NSR include protecting public health, ensuring that economic growth occurs in a manner consistent with the preservation of existing clean air resources, and assuring that emissions from one State do not compromise the ability of another State to prevent deterioration of its own air quality. See 42 U.S.C. § 7470.

NSR consists of two programs: one for areas in attainment with the NAAQS, one for nonattainment areas. In attainment areas, a source must comply with PSD requirements, including obtaining a preconstruction permit, demonstrating that it will not cause a violation of an air quality "increment" (designed to prevent air quality from deteriorating significantly), and comply with an emission rate equal to the Best Available Control Technology (BACT). See 42 U.S.C. § 7475. In nonattainment areas, sources must obtain a preconstruction permit, obtain emission offsets (thereby assuring that reasonable progress toward attainment of the NAAQS

occurs), and comply with the more stringent Lowest Achievable Emission Rate (LAER). See 42 U.S.C. § 7503. Congress intended these requirements to foster the development of control technology. See S. Rep. No. 95-127, 95th Cong., 1st Sess. 31 (1977).

Acknowledging the expense of retrofitting existing sources with pollution controls, and expecting that many older facilities would soon reach the end of their useful lives and be retired, Congress grandfathered existing major stationary sources that predated the 1977 amendments from NSR requirements. However, Congress neither expected nor intended this grandfathering to continue infinitely. Thus, Congress also provided that existing sources must comply with NSR if they undergo a "modification," which the Act broadly defines as:

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

See 42 U.S.C. §§ 7479(2)(C) and 7501(4) (incorporating definition of "modification" found in 42 U.S.C. § 7411(a)(4)).

2. Role of the States

When Congress enacted the Act in 1970, it recognized that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Accordingly, States must develop SIPs that provide for the implementation, maintenance, and enforcement of the NAAQS. Id. § 7410(a)(1). With respect to NSR, state and local pollution control agencies were given primary responsibility for implementing and enforcing NSR permitting requirements. Id. § 7410(a)(2)(C).

Congress also explicitly acknowledged the right of States to maintain stricter air quality

standards. For example, the Act provides that nothing "shall preclude or deny the right of any State or political subdivision to adopt or enforce" any emission limitation or other requirement to abate pollution that equals or is more stringent than federal standards. 42 U.S.C. § 7416. Although States can enact stricter requirements, the statute prohibits States from "backsliding" on any control requirement in effect in a nonattainment area unless it alternatively ensures equivalent emission reductions. 42 U.S.C. § 7515.

B. NSR Regulations

To implement the NSR statutory provisions, in 1978 EPA issued regulations applicable to new and modified sources. Those regulations were upheld in part and vacated in part by this Court in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979). Subsequently, EPA issued revised NSR regulations, 45 Fed. Reg. 52,676 (Aug. 7, 1980), that interpreted "modification" in three material respects. First, EPA promulgated exemptions for physical or operational changes of a minor nature. See id. at 52,698 (e.g., exemption for "routine maintenance, repair, and replacement"). Second, EPA established, on the basis of air quality analyses, "significance" thresholds necessary for emissions increases to trigger NSR. See id. at 52,698 and 52,705-10. Third, EPA promulgated provisions allowing sources to offset expected emissions increases from changes to emission units by "netting" the expected increases with contemporaneous decreases. See id. at 52,703-04.

EPA further revised the NSR regulations in 1992, 57 Fed. Reg. 32,314 (July 21, 1992), in response to Wisconsin Elec. Power Co. v. EPA (WEPCO), 893 F.2d 901 (7th Cir. 1990), in which the court held that EPA had impermissibly measured emissions increases from modifications at an electric utility using the utility's "potential-to-emit." In the "WEPCO rule," EPA promulgated

– for utilities only – an "actual-to-projected-actual" emissions calculation methodology, under which an emissions increase is determined by comparing a unit's actual emissions before the change with its projected actual emissions following the change. Id. at 32,324. In predicting post-change emissions, utilities could deduct any emissions increases attributable to increased utilization of the unit in response to "demand growth" for electricity (if that utilization level could have been achieved before the change). See id. at 32,326. However, to prevent significant emissions increases from going "unnoticed and unreviewed," utilities were required to record their projections, monitor actual emissions from any changed unit, and submit the results annually to their permitting authority for at least five years after the change. Id. at 32,325.[2]

C. The 1996 Proposed Rule and 1998 Notice of Availability

In 1996, after completing a stakeholder process involving States, environmental groups, and industry, EPA proposed a rule addressing several aspects of the NSR program. 61 Fed. Reg. 38,249 (July 23, 1996). Among other things, EPA proposed to revise NSR permitting by establishing new exemptions and revising how to calculate whether physical or operational changes cause emissions increases. Id. at 32,251. These revisions were to "provide States with greater flexibility to customize their own regulations implementing the NSR program." Id. The rule was also intended to "significantly reduce the number and types of activities at sources that would otherwise be subject to major NSR under the existing NSR program regulations." Id. EPA estimated that, under the proposed rule's provisions, 51 percent of modifications that

[2] Given the highly regulated nature of utilities at the time, EPA believed that permitting authorities would also be able to obtain records readily from other agencies, enabling them to check the accuracy of company "demand growth" projections (e.g., demand forecasts provided public utility commissions in ratemaking proceedings). See id. at 32,333.

previously would have been subject to NSR could avoid NSR requirements. See id. at 38,319. EPA stated, however, that the final rule would promote industry flexibility without sacrificing the environmental benefits of NSR. Id. at 38,252.

After reviewing public comments on the proposed rule, EPA issued a Notice of Availability (NOA), in which it stated its intent to alter certain aspects of the proposal. See 63 Fed. Reg. 39,857 (July 24, 1998). EPA explained that "changed circumstances" led it to conclude that the proposed rule could not protect the environment and ensure accountability by industry without additional safeguards. See id. at 39,859-62. For example, although EPA initially proposed that the actual-to-projected-actual methodology from the "WEPCO rule" be extended to all sources, 61 Fed. Reg. at 38,266, EPA proposed in the NOA an "actual-to-future-enforceable-actual" test. 63 Fed. Reg. at 39,861. Under the revised approach, a source determining NSR applicability for a change by projecting its actual emissions after the change would have to accept its projection as an enforceable emissions limitation. Id. EPA viewed this safeguard as necessary given its discovery that "changes to utility units as well as post-change emissions estimates are not being reported to permitting agencies." Id. at 36,860.

At about the same time, as a result of "one of the largest investigations in the history of EPA," EPA announced the filing of lawsuits against eight utilities for NSR violations at twenty-four power plants. See EPA Press Announcement (Nov. 3, 1999) (Joint Appendix (hereinafter "J.A.") 2663). EPA found that these companies had modified units at their plants "without applying for permits, without public notice and without installing pollution control technology" (J.A.2664).

D. The Final Rule

Less than two years later, EPA fundamentally altered its approach to NSR to focus on NSR's impact on energy generation and efficiency. See EPA Report to the President (June 1, 2002) (J.A.2673-74). As part of this switch, EPA solicited input on the effect of the NSR program on energy sources (but neither sought comments on the 1996 proposed rule and 1998 NOA nor reopened the rulemaking record for comment). See National Academy of Public Administration report on NSR (April 2003) ("NAPA Rpt.") (J.A.2937, 3014). Shortly thereafter, in June 2002, EPA announced that it would revise aspects of the proposed rule. See EPA NSR Recommendations (June 2002) (J.A.2705-09). These revisions were made in response to energy policy developed by Vice President Cheney's National Energy Policy Development Group. See 67 Fed. Reg. at 80,189. Without affording an opportunity for public comment on the revisions, EPA issued the final Rule in November 2002.

The Rule contained five provisions: (1) a new way of setting baseline emissions, (2) an "actual-to-projected-actual" emissions calculation methodology for all sources, (3) a plantwide emissions cap, (4) a "clean unit" exclusion, and (5) a pollution control project exclusion. 67 Fed. Reg. at 80,189-90. This brief addresses the first four provisions:

- ***Baseline emissions.*** Establishing "baseline emissions" is integral to determining whether a physical or operational change will result in a significant net emissions increase, triggering NSR. Previously, the average of the most recent two-year period of operations was typically used as the baseline. Under the Rule, existing major sources (other than electric utilities) now set baseline emissions by calculating the average of any two-year period of emissions in the past decade. This "ten-year lookback" method is used both in

the emissions calculation methodology to determine whether a physical or operational change will result in a significant emissions increase, and in setting the level of a plantwide emissions cap, as discussed below. See 67 Fed. Reg. at 80,191-80,204.

- ***Emissions Calculation Methodology.*** The Rule extended the actual-to-projected-actual emissions calculation methodology, previously applicable only to utilities, to all sources. Previously, sources other than utilities had to evaluate their post-change emissions using the "actual-to-potential" test, pursuant to which pre-change actual emissions were compared to the unit's potential-to-emit after the change. Under the Rule, a source determines whether the change will result in a significant emissions increase by comparing its baseline emissions to its expected post-change emissions. In calculating post-change emissions, a source must exclude any emissions increases that it attributes to increased utilization from product demand growth. The Rule, however, relaxes the recordkeeping and reporting requirements in the proposed rule and NOA. Instead of requiring sources to record their projections and verify to the permitting authority that no significant emissions increase has occurred, the Rule requires recordkeeping and reporting only if the source concludes that there is a "reasonable possibility" that the change may cause a significant emissions increase. See 67 Fed. Reg. at 80,191-80,204.

- ***Plantwide Emissions Caps.*** Sources may now avoid NSR permitting for modifications by agreeing to a plantwide emissions cap (also called a plantwide applicability limitation, or "PAL"), determined as follows: After using the ten-year lookback to determine its baseline, the source adds an operating margin equal to the "significance" level of the pollutant (*e.g.*, 40 tons of sulfur dioxide). The source avoids NSR for the following ten

years if its plantwide emissions remain below this cap. See 67 Fed. Reg. at 80,206-22.

- ***"Clean Unit" Exemption.*** This exemption allows an emissions unit designated as "clean" to undergo any physical or operational changes – regardless of the resulting emissions increase – so long as the change does not alter the status of the "clean unit" designation. An emissions unit qualifies as "clean" if, within the past ten years, the unit has undergone permitting that resulted in the implementation of controls or work practices equivalent to BACT or LAER, or if the source demonstrates that previously installed controls or work practices were comparable to BACT or LAER. The exemption lasts for ten years. See 67 Fed. Reg. at 80,222-32.

Unlike the proposed rule, which would have allowed States to decide whether to adopt any of these applicability provisions, EPA abandoned its approach of giving States flexibility, mandating that all States adopt the Rule provisions as "minimum program elements" in their SIPs. 67 Fed. Reg. at 80,240-41.

E. The March 10, 2003 Regulations

On March 10, EPA published final regulations incorporating the Rule provisions into SIPs of States that do not have federally-approved PSD programs, see, e.g., 40 C.F.R. § 52.1689 (New York). 68 Fed. Reg. at 11,316. The March 10 regulations retroactively made the Rule provisions effective in those States as of March 3, 2003. Id.

F. EPA's Reconsideration

In early 2003, several States and environmental groups filed petitions for reconsideration with EPA to raise objections that arose after the close of the public comment period on the 1996 proposal and 1998 NOA. The States identified several aspects of the Rule that differ

significantly from the proposal and explained how EPA ignored environmental and health studies published in the period between the proposal and the Rule. See generally States' Reconsideration Petition (Jan. 31, 2003) (J.A.2673). In response, EPA granted reconsideration on six issues, including the Rule's environmental impact; the "reasonable possibility" trigger for recordkeeping and reporting requirements; and the propriety of allowing a source to retain its "clean unit" exemption even if air quality is reclassified from attainment to nonattainment. See 68 Fed. Reg. 44,620 (July 30, 2003). On November 7, 2003, EPA announced that it would not change the Rule in any material respect and denied reconsideration on remaining issues, including Government Petitioners' objection that EPA failed to provide notice that it would require States to adopt all of the Rule provisions. See 68 Fed. Reg. 63,021.

STANDARD OF REVIEW

The Court may reverse an agency action if it is arbitrary, contrary to constitutional right, in excess of statutory authority, or without observance of procedure required by law. See 42 U.S.C. § 7607(d)(9). To constitute reversible error, a procedural failure must be arbitrary, the subject of a timely objection (or a showing of impracticality), and likely to have resulted in a significant change to the rule if the failure had not been made. See id.

In determining whether EPA has complied with the Act, the Court must use the traditional tools of statutory construction to determine whether Congress has spoken to the question at issue. Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). These tools include examination of the statute's text, legislative history, structure, and purpose. See City of Tacoma v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003). If this search yields a clear result, "'that is the end of the matter; for the court, as well as the agency,

must give effect to the unambiguously expressed intent of Congress.'" Sierra Club v. EPA, 356 F.3d 296, 301 (D.C. Cir. 2004) (quoting Chevron, 467 U.S. at 842-43). If the statute is ambiguous, the Court proceeds to step two. Chevron, 467 U.S. at 843. Under step two, the Court will defer to the agency's interpretation if it is reasonable and consistent with the statutory purpose and legislative history. See Natural Resources Defense Council, Inc. v. Daley, 209 F.3d 747, 752-53 (D.C. Cir. 2000).

In evaluating whether the agency has acted arbitrarily and capriciously, the Court will examine whether the agency failed to engage in reasoned decision making. American Petroleum Institute v. EPA, 216 F.3d 50, 57-58 (D.C. Cir. 2000) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983) (State Farm)). Under the State Farm analysis, an agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend it to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be the product of agency expertise. See 463 U.S. at 43.

SUMMARY OF ARGUMENT

The Act charges States with the primary responsibility for ensuring that the Act's air quality goals are met. States, in turn, rely upon the NSR program as a critical tool to attain and maintain these air quality standards. The Rule severely undermines this tool by requiring States to allow older, poorly-controlled sources to continue operating without pollution controls well into the future, contrary to the Act's directive that NSR requirements apply when such sources undertake "modifications" that increase emissions.

In the Rule, EPA dramatically changed its approach from the 1996 proposal and 1998

NOA. After a review ordered by the Vice President's energy group of whether NSR was an "impediment" to the Administration's energy policy, EPA broadened the applicability provisions of the proposal and eliminated the safeguards from the NOA intended to ensure accountability and continued environmental benefits. The Rule's five provisions ease regulatory requirements by making it easier for sources to avoid triggering NSR, but do so at great expense to air quality. In addition, EPA abandoned its proposed approach of giving States the choice of whether to adopt these applicability provisions.

The Rule is unlawful because it impermissibly relaxes NSR as it applies to "modifications" in four ways. First, the "ten-year lookback" method of calculating "baseline emissions," used in determining whether a project triggers NSR and in setting the level of a plantwide emissions cap, conflicts with the statute. It will enable sources to avoid NSR permitting and pollution control requirements by relying on inflated "baselines" to mask the actual effect of projects that significantly increase emissions over current levels. The ten-year lookback conflicts with the plain meaning of the statute and will frustrate the purpose of the modification provision: limiting the grandfathering of poorly-controlled sources. Furthermore, the ten-year lookback contravenes the express goals of NSR, principally the protection of public health.

Second, EPA's "actual-to-projected-actual" emissions calculation methodology is impermissibly vague, subject to manipulation, and unenforceable. The Rule allows sources to exclude emissions increases attributable to "demand growth," even though EPA had concluded that emissions increases attributable to a change cannot be distinguished from increases attributable to demand growth. In addition, allowing sources to determine – without independent

review by the permitting authority – whether to keep records of their applicability determinations and to report verifying data renders the Rule unenforceable. Moreover, this self-policing scheme ignores record evidence that utilities have repeatedly abused their discretion in making NSR applicability determinations, even under the prior more rigorous recordkeeping and reporting regulations.

Third, the Rule's "clean unit" exemption contravenes the express language of "modification" because it authorizes physical and operational changes that significantly increase emissions to avoid NSR. Furthermore, EPA lacks the statutory authority to allow "clean units" to avoid other statutory requirements, such as obtaining emissions offsets, which are independent of any obligation to install control technology. EPA also exceeded its authority by allowing sources to retain their "clean unit" exemption even after an area is downgraded from attainment to nonattainment. Even if EPA had authority to exempt a unit that has installed BACT from other NSR requirements in attainment areas, it plainly lacks the authority to exempt that same unit from the more stringent nonattainment requirements.

Fourth, EPA exceeded its statutory authority by mandating that States adopt the Rule. Section 116 of the Act gives States the authority to maintain more stringent programs than EPA, and in several respects the Rule weakens NSR requirements in their SIPs. EPA also committed procedural error by refusing to grant reconsideration on its failure to provide notice that the Rule's provisions would be mandatory on States. The mandatory nature of the Rule is not a logical outgrowth of the proposal's "menu of options" and EPA's infringement on the ability of States to maintain stricter pollution abatement requirements is of central relevance to the Rule. Moreover, because of the fundamental alteration in the nature of the rulemaking, there is a

substantial likelihood that the Rule would have been significantly changed had the States and the public been given an opportunity to be heard. Finally, compelling States to adopt the Rule conflicts with Section 193 of the Act, which prohibits "backsliding" on control requirements in place in nonattainment areas unless equivalent emission reductions are required.

Collectively, the Rule provisions undermine the core statutory objectives of protecting public health, both in the proximity of sources and in downwind States where emissions from such sources impede the attainment of air quality standards. Substantively and procedurally, the Rule is contrary to law, arbitrary, and capricious.

ARGUMENT

POINT I

THE RULE CONFLICTS WITH THE ACT BY ALLOWING SOURCES TO AVOID TRIGGERING NSR BY INFLATING THEIR BASELINE EMISSIONS USING EMISSIONS LEVELS FROM UP TO TEN YEARS AGO

The Rule's method for determining "baseline emissions" in evaluating changes at emissions units and in establishing plantwide emissions caps conflicts with the Act's definition of "modification." The statutory language is unambiguous: any change at an existing plant that increases emissions above the level that existed prior to the change triggers NSR permitting and pollution control requirements. See 42 U.S.C. § 7411(a)(4). The Rule, however, allows sources to determine whether a change will increase emissions by using a baseline from as long as ten years ago rather than using the emissions level immediately before the change. Therefore, a change that increases emissions will not trigger NSR as long as the source can find a 24-month period in the past decade with higher emissions. Not only could a source take advantage of historic emissions levels in evaluating projects today, the Rule authorizes a source with a

plantwide emissions cap to use these inflated levels to avoid triggering NSR for ten years into the future. The record shows that emissions often vary significantly over ten years, so that actual increases many times larger than the defined "significant" level would, under the Rule, not trigger NSR. These increased emissions will harm public health and make it more difficult for States to prevent significant deterioration of air quality in clean areas and make reasonable progress in bringing nonattainment areas into compliance. Because EPA's interpretation violates the plain meaning and purpose of the modification provision and conflicts with the goals of NSR, the ten-year lookback is unlawful.

A. The Rule Improperly Allows Sources to Inflate Their Baselines in Evaluating Plant Changes and Setting Plantwide Emissions Caps, Thereby Avoiding NSR Permitting and Pollution Control Requirements.

The level of baseline emissions is critical to determining whether a change triggers NSR permitting and pollution control requirements: a higher baseline makes it less likely that there will be a significant emissions increase, which triggers NSR.[3] The Rule authorizes sources (other than utilities) to inflate their baselines – thereby decreasing the likelihood NSR will be triggered – in two ways. First, sources use the ten-year lookback in determining whether physical or operational changes will result in significant emissions increases. See 40 C.F.R. §§ 51.165(a)(1)(xxxv)(B), 52.21(b)(48)(*d*)(ii).[4] Before the Rule, the most recent two-year period before the change was used to establish baseline emissions unless the source could demonstrate

[3] For example, if the significance level of a pollutant is 40 tons per year and a source predicts that its post-change emissions would be 1,050 tons, the source would trigger NSR if its baseline is 1,000 tons, but would not trigger NSR with a higher baseline of 1,100 tons.

[4] The Rule provisions in 40 C.F.R. § 51.166 (applicable to States with approved PSD programs) and § 52.21 (applicable to States without EPA approval) are materially the same, so this brief cites to § 52.21 only, along with pertinent citations to § 51.165 (nonattainment NSR).

to the permitting agency that another two-year period was more representative of operations. See, e.g., 40 C.F.R. former § 52.21(b)(21)(ii) (2001); see also 67 Fed. Reg. at 80,188 (EPA "historically used the 2 years immediately preceding the proposed change" to set baseline). Second, the ten-year lookback is employed in setting plantwide emissions caps. To determine its cap, a source may select any 24-month period in the past decade to determine its baseline. 40 C.F.R. §§ 51.165(f)(6), 52.21(aa)(6). The source then adds an "operating margin" equal to the significance level of the pollutant. Id. The source would then avoid NSR for the next ten years if its emissions remain below this level. Id. §§ 51.165(f)(8), 52.21(aa)(8).

B. The Ten-Year Lookback Conflicts with the Plain Meaning and Purpose of the Modification Definition and Would Frustrate the Goals of NSR.

The ten-year lookback provision violates the plain meaning of "modification" by allowing a source to pretend that an increase in emissions over current levels is really not an "increase" after all. The ten-year lookback also enables poorly-controlled sources to operate well into the future, frustrating congressional intent to limit grandfathering. Moreover, the ten-year lookback contravenes the goals of NSR: protecting public health and promoting economic growth that will not degrade clean air.

1. The ten-year lookback conflicts with the plain meaning and purpose of the modification provision.

Under the statute's definition of "modification," NSR applies to "any physical change or change in the method of operation" at an existing source that "increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Although Congress did not define "increases," the lack of a statutory definition does not render a term ambiguous but instead means that the court

should give the term its ordinary meaning. See American Fed'n of Gov't Employees v. Glickman, 215 F.3d 7, 10 (D.C. Cir. 2000). In determining whether a change "increases" emissions, the ordinary meaning would require comparing the emission level just prior to the causative event (the modification) with the level afterwards. Analogously, a weather forecaster discussing the "increase" in temperatures after the arrival of a high pressure system would be commonly understood to mean the temperature reading just before the system arrived, not a reading from eight or ten years ago. Likewise, in determining whether the replacement of an automobile's engine "increased" the value of the car, it is immaterial that the automobile may have been worth more five years earlier, before the need for the replacement. However, under EPA's logic, the engine replacement does not "increase" the car's value. By allowing sources to determine whether a change will "increase" emissions compared to levels of up to a decade ago, EPA has divorced the emissions increase inquiry from the change at issue, diverging from a common sense reading of the statute.

EPA's rationale for the ten-year lookback is based on the key assumption that in evaluating whether a change will increase emissions, levels from ten years ago are just as "representative" of source operations as current levels. See 67 Fed. Reg. at 80,199-80,200. For this conclusion, EPA relies primarily on a 1997 study of business cycles. See Eastern Research Group report (Sept. 30, 1997) (J.A.2443). However, that study did not determine, or even consider, whether emissions levels vary with business cycles. Furthermore, none of the industries referenced in the study had a business cycle of as long as ten years. See id. (J.A.2459) (reporting business cycles of three to eight years). Thus, EPA had no reasoned basis to depart from the ordinary meaning of "increases" to allow sources to determine emissions increases

today on the basis of emissions levels ten years ago.

The ten-year lookback also frustrates the purpose of the modification provision. The Court has previously found that the modification provision clearly expresses the intent of Congress that sources lacking modern pollution controls not be allowed to operate in perpetuity:

> The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

Alabama Power, 636 F.2d at 400; see also WEPCO, 893 F.2d at 908-909 (interpreting "modification" narrowly would frustrate congressional aims to improve air quality and force technology improvements); United States v. Southern Indiana Gas & Elec. Co., 245 F. Supp. 2d 994, 1014 (S.D. Ind. 2003) ("[I]t would be inconsistent for the EPA to broadly define a regulatory exemption that would delay application of NSR to existing sources.").

By allowing use of an inflated baseline, the ten-year lookback will perpetuate the grandfathering of individual sources that Congress sought to limit. The use of the ten-year lookback in establishing plantwide emissions caps will extend that grandfathering even further. A source can lock in an inflated plantwide cap for another ten years, thereby extending its grandfathered status unless it makes a change that increases emissions above that artificially-inflated cap. This scheme is plainly inconsistent with congressional intent. See Alabama Power, 636 F.2d at 400.[5]

[5] Indeed, evidence shows that "grandfathering has clearly persisted much longer than Congress envisioned or intended" already. See NAPA Rpt. (J.A.3042).

2. The Rule's ten-year lookback provision conflicts with the purposes of NSR by allowing changes that will increase emissions yet avoid NSR permitting and pollution controls.

The ten-year lookback provision will result in an increase in overall air emissions and frustrate the goals that Congress explicitly set forth in the Act.

a. The ten-year lookback will cause emissions to increase.

The Rule is designed to encourage sources to modify their plants. See 67 Fed. Reg. at 80,192. Although sources that perform modifications may improve efficiency, reducing their emissions per unit of production, EPA acknowledges that these projects "may dramatically increase source operations" because the source will have an economic incentive to boost its use of the modified unit. 61 Fed. Reg. at 38,262. Efficiency projects can therefore increase emissions over current levels. See id. at 38,263; see also Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 297 (1st Cir. 1989) (Breyer, J.) ("[A] firm's decision to introduce new, more efficient machinery may lead the firm to decide to increase the level of production, with the result that, despite the new machinery, overall emissions will increase."). Under the Rule, all major non-utility sources – thousands of facilities nationwide – will have the same incentive to use their highest emitting years to establish baselines in order to avoid triggering NSR for such facility expansions.

Evidence in the record demonstrates several examples in which the Rule would allow changes causing increases well above the 40-ton thresholds for sulfur dioxide (SO_2), nitrogen oxides (NO_x), and volatile organic compounds (VOCs) to escape NSR. For example, the ten-year lookback would enable three pulp and paper mills in Maine to triple their baselines for SO_2 at certain units compared to a baseline from the two most recent years, allowing them to

undertake changes collectively increasing SO_2 emissions by more than 7,000 tons annually without triggering NSR. See Cone Affidavit, ¶¶ 6-8 (J.A.2863-64); see also Wright Affidavit ¶¶ 22-24 (J.A.2847-49), (New Hampshire paper mill could inflate baselines for SO_2 by 648 tons and NO_x by 110 tons); Atay Affidavit, ¶ 8 (J.A.2856-58) (two New Jersey automobile manufacturers could inflate baselines for VOCs by 565 tons and 212 tons, respectively); Delaware Reconsideration Comments (J.A.1902) (oil refinery could inflate baselines for SO_2 by 3,000 tons, NO_x by 1,475 tons, and VOCs by 494 tons).

Similarly, a study conducted by the Environmental Integrity Project and Council of State Governments (EIP/CSG) that examined emissions data and operating permits concluded that the ten-year lookback would allow emissions to increase across the board in the twelve States surveyed. The study concluded that the ten-year lookback would allow 1,273 major sources to increase emissions of particulate matter, NO_x, SO_2, VOCs, and carbon monoxide by a total of 1.4 million tons compared to the default baseline of the past two years, without triggering NSR. See EIP/CSG Report (Aug. 18, 2003) (J.A.3177-78).[6]

Apart from the adverse effects of emission increases, opportunities for emission reductions are lost when sources avoid NSR permitting and pollution control requirements. EPA estimated that during a recent two-year period (1997-99), PSD requirements prevented more than

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[6] See also Abt Associates, Mobil-Joliet Refinery (Oct. 21, 2002) (J.A.2723) and Nucor Steel (Oct. 21, 2002) (OAR-2001-0004-0709) (J.A.2729) (if the ten-year lookback had been in effect when refinery and steel plant undertook changes in the late 1990s, the plants would have avoided NSR, likely resulting in emissions increases exceeding the significance levels for SO_2 and/or NO_x).

one million tons of emissions annually.[7] See Report to the President (J.A.2699); see also NAPA Rpt. (J.A.3037-38) ("[W]hen it is utilized, the NSR permitting process does succeed in tightening emission control standards over time.").

EPA's belief that the ten-year lookback will not result in increased emissions because sources must adjust their baselines to account for any enforceable emissions limitations (e.g., the source may be required to meet an emissions rate equivalent to the Reasonably Available Control Technology (RACT) to limit its NO_x emissions), see 67 Fed. Reg. at 80,201, is unfounded. EPA does not (and cannot) claim that all sources have enforceable emissions limitations. Even if a source has an emissions limitation, significant emissions increases are still likely to occur. See Cone Aff., ¶¶ 5-8 (even at the two paper mills that had emissions limitations, the facilities still could have set their baselines 800 tons higher using the ten-year lookback than if required to use the two most recent years) (J.A.2863-64); see also Wright Aff., ¶ 22 (J.A.2847-48) (facility with RACT limitation could still inflate NO_x baseline by 110 tons); EIP/CSC Rpt. (J.A.3179-80) (operating permits of six major sources revealed that at least half could set baselines that would allow for emissions increases over the 40-ton threshold). This conclusion is further bolstered by EPA's own review of state operating permit programs, in which it concluded that "typical source operation frequently does result in actual emissions that are below allowable emission levels." See Technical Support Document (November 2002) ("Rule TSD") (J.A.592). In the face of this evidence, EPA's mere belief that existing emission limitations will prevent emissions increases is

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[7] This figure underestimates emissions reductions achievable under NSR, given that EPA did not include reductions achieved through the nonattainment NSR program or consider reductions that would have been realized if the numerous sources that violated NSR, see infra at 36-37, had complied with the law.

insufficient. See Northeast Maryland Waste Disposal Authority v. EPA (Northeast Maryland), 358 F.3d 936, 953-54 (D.C. Cir. 2004) (remanding EPA-established emissions limitations that were promulgated on basis of EPA's unsupported belief that state permit limitations reflected actual performance of emissions units).

b. The ten-year lookback conflicts with the purposes of NSR.

The ten-year lookback provision is unlawful because it contravenes the purposes of NSR, including the five goals set forth in the PSD section of the statute, see 42 U.S.C. § 7470. The first of these goals, protecting public health, id. § 7470(1), will be thwarted because emissions will rise. Given that even small increases in emissions can cause deleterious health and environmental impacts,[8] the substantial emissions increases allowed under the ten-year lookback will inevitably harm public health. EPA failed, however, to analyze the emissions increases or to consider the resulting health impacts.[9] Instead, EPA disregarded the effects of the Rule on public health, stating that the Agency's "common-sense application of general statutory principles" were "paramount" in the rulemaking, not "the levels at which human health effects occur." See Technical Support Document: Reconsideration (Oct. 30, 2003) (Reconsideration TSD) (J.A.828). This rationale flies in the face of the statutory goal that the law be used to protect public health. See 42 U.S.C. § 7470(1).

The ten-year lookback would also frustrate the congressional goal of ensuring that

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[8] See Declaration of Dr. David Brown, ¶¶ 3-7 (J.A.2756-61) (summarizing results of recent scientific studies).

[9] EPA's Supplemental Environmental Analysis (SEA), which, through a series of erroneous and unsubstantiated assumptions, concluded that the ten-year lookback will have a "negligible" effect on emissions, SEA (J.A.920), was not used as a basis of the Rule. SEA (J.A.908).

economic growth occurs in a manner consistent with the preservation of existing clean air resources, see 42 U.S.C. § 7470(3). As explained in the House Committee Report, "if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 133 (1977). As described above, however, the ten-year lookback provision will enable dirtier sources to ramp up production and increase pollution without installing controls, using up air quality increments that would otherwise be available to site newer, cleaner sources.

The ten-year lookback is also inconsistent with the remaining three statutory goals. By allowing sources to undertake changes that increase emissions, yet avoid NSR, the ten-year lookback would make it more difficult for States downwind of these sources to protect air quality in national parks and to prevent air quality deterioration, contrary to the Act. See 42 U.S.C. §§ 7470(2), 7470(4). Finally, because many sources will be able to use the ten-year lookback to avoid the NSR permitting process altogether, the goal of assuring that any decision to permit increased air pollution is made only after careful evaluation and public participation, see 42 U.S.C. § 7470(5), will be thwarted.

Ultimately, EPA's justification for the ten-year lookback is its claim that NSR discourages projects that improve energy efficiency. See 67 Fed. Reg. 80,192. However, EPA has not shown that energy efficiency projects that would have improved air quality were prevented by the previous regulations or that efficiency projects encouraged by the Rule will benefit air quality. Instead, as the General Accounting Office (GAO) found, EPA relied on unverified industry anecdotes. See GAO Report (August 2003) (OAR-2001-0004-0589) at 23

(J.A.3167).[10] Even if the Rule would result in some projects that decrease source emission rates per output, EPA acknowledges that sources will have an economic incentive to use the modified units more, and that could translate into overall emissions increases from those sources. See supra at 21. In any event, even if the ten-year lookback does encourage energy efficiency projects, EPA may not subordinate the fundamental goal of the statute – ensuring clean air – in pursuit of other goals. See American Petroleum Institute v. EPA, 52 F.3d 1113 (D.C. Cir. 1995) (vacating EPA air regulation intended to further energy conservation where the record showed emissions of VOCs could increase as a result of the rule). Given that the ten-year lookback provision conflicts with the language and purpose of the modification definition and would frustrate the goals of the Act, this aspect of the Rule should be vacated.

POINT II

THE RULE'S ACTUAL-TO-PROJECTED-ACTUAL EMISSIONS CALCULATION METHODOLOGY IS UNENFORCEABLE AND IGNORES OVERWHELMING RECORD EVIDENCE OF INDUSTRY NONCOMPLIANCE

The Rule excludes emissions increases associated with "demand growth" in determining NSR applicability for modifications despite EPA's finding that emissions attributable to demand growth are not separable from emissions associated with a physical or operational change. To compound this error, because a source need only record and report its applicability determination to the permitting agency if the source itself decides that a "reasonable possibility" exists that its own emissions projection will turn out to be wrong, enforcement will be severely undermined, hindering the ability of States to meet air quality standards. This "self-policing" scheme is not

[10] As EPA concedes, efficiency projects not projected to increase emissions did not trigger NSR under the previous regulations. See Report to the President (J.A.2688) (Detroit Edison project did not trigger NSR because emissions were not projected to increase).

only impermissible as a matter of law, it is factually indefensible given the record evidence that sources have repeatedly ignored reporting and recordkeeping requirements.

A. EPA Promulgated an Exclusion for Emissions Increases Attributable to "Demand Growth" Without Addressing Its Earlier Findings that Such Increases Are Indistinguishable from those Attributable to Physical or Operational Changes.

Under the Rule's actual-to-projected-actual emissions calculation methodology, a source predicts whether a physical or operational change will result in a significant emissions increase – thereby triggering NSR applicability – by comparing its baseline emissions to its expected post-change emissions. See 40 C.F.R. §§ 51.165(a)(2)(ii)(C), 52.21(a)(2)(*c*). In calculating post-change emissions, sources must ignore "that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth." 40 C.F.R. §§ 51.165(a)(1)(xxviii)(B)(3), 52.21(b)(41)(ii)(*c*).[11] Before the Rule, the actual-to-projected-actual methodology and demand growth exclusion could be used only by electric utilities, and only if they recorded their projection and tracked their emissions to confirm the validity of the projection. See, e.g., 40 C.F.R. former § 52.21(b)(21)(v) (2001).

In extending the methodology and exclusion to all sources, EPA completely reversed its position from the 1998 NOA not only that the demand growth exclusion should not be extended

[11] For example, if a source calculates that a change will increase emissions of a pollutant by 100 tons and a 40-ton increase is the threshold, NSR would be triggered. However, if the source attributes 70 tons of the increase to increased utilization of the unit to meet demand growth for its product, the source will avoid NSR as long as it could have accommodated this demand growth prior to the change.

to non-utilities, but that the exclusion should be eliminated altogether. 63 Fed. Reg. at 39,860. Based on its experience with utilities' use of the demand growth exclusion, EPA had concluded by 1998 that emissions increases from market demand could not be accurately distinguished from emissions increases caused by physical or operational changes. Id. at 39,861 ("There is no plausible distinction between emissions increases due solely to demand growth as an independent factor and those changes that respond to, or create new, demand growth which then results in increased capacity utilization."). Therefore, EPA "seriously question[ed] whether market demand should ever be viewed as a significant factor in answering . . . whether an emissions increase results from a physical or operational change . . . ." Id. at 39,860 (emphasis added). EPA viewed application of the demand growth exclusion to "consumer-driven" industries as even more problematic than utilities because "demand is inextricably intertwined with changes that improve a source's ability to utilize its capacity" and improve its market position. Id. at 39,680-81.

Without addressing this problem, and despite conceding that the demand growth exclusion will result in emission increases,[12] EPA contends that the exclusion is required by the definition of "modification," which is triggered by a change that "results in" an emissions increase. See 67 Fed. Reg. at 80,203. However, if demand growth and changes are "inextricably intertwined," then emissions increases that follow a change are a "result[]" of that change, and cannot be excluded from coverage by the statute. See 42 U.S.C. § 7411(a)(4). Furthermore,

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[12] See Rule TSD (J.A.557) ("[W]e have concluded that it is appropriate to extend the demand growth exclusion to all existing emissions units and the emissions cap placed on units under the [NOA's] 'actual-to-enforceable-future-actual'" approach would have likely prohibited such [emission] increases from occurring.").

given that EPA failed to address any of its findings in the 1998 NOA regarding the impracticality of a demand growth exclusion, it failed to engage in reasoned decisionmaking. See State Farm, 463 U.S. at 43 (agency action is arbitrary if it failed to consider an important aspect of the problem); Public Citizen v. Steed, 733 F.2d 93, 99-101 (D.C. Cir. 1984) (agency acted arbitrarily where it failed to give reasoned explanation for abrupt change in position); see also American Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998) (given that Congress gave EPA "the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, [EPA] has the heaviest of obligations to explain and expose every step of its reasoning.").

B. The Recordkeeping and Reporting Requirements Are Impermissibly Vague and Unenforceable.

Prior to the Rule, the only category of sources that could use the actual-to-projected-actual methodology and take advantage of the demand growth exclusion, electric utilities, had to both record their emissions projections and, if the projection did not predict a significant emissions increase, supply their permitting authority with at least five years' worth of data to verify the accuracy of the projection. See, e.g., 40 C.F.R. former § 52.21(b)(21)(v) (2001). All other sources were required to evaluate post-change emissions using the "actual-to-potential" test, pursuant to which pre-change actual emissions were compared to the unit's potential-to-emit after the change. Id. § 52.21(b)(21)(iv); see 57 Fed. Reg. at 32,316. A non-utility source, however, could avoid NSR permitting and pollution control requirements by first obtaining from its permitting agency a revised operating permit with an emissions limitation prohibiting the source from significantly increasing emissions after the change. See Rule TSD (J.A.495) (this

emissions limitation "is often set forth in a minor NSR permit or other enforceable mechanism, and must be accomplished before construction may begin."). By contrast, the actual-to-projected-actual emissions methodology enables a source to undertake a change without having in place an "enforceable mechanism" to limit emissions, if its calculation of post-change actual emissions reveals no significant increase. EPA explained this distinction in its response to comments on the Rule:

> [T]he essential difference between the two methods is that under the 'actual-to-potential' approach, the projection of actual emissions may be set forth in a minor NSR permit or other enforceable emissions-capping mechanism before construction, whereas the "actual-to-projected-actual" approach relies on emissions tracking and recordkeeping to insure that projected actual emissions are not exceeded (unless the company obtains a major NSR permit).

Rule TSD (J.A.505).

Because the actual-to-projected-actual approach will result in significantly fewer sources projecting that changes will cause significant emissions increases[13] – thereby avoiding the need to obtain an enforceable emission limitation from the permitting agency – it is essential that a source record and report its emission projection and provide verification to the agency so that the agency can provide an independent check on the source's determination. As EPA acknowledged in its response to comments, it is "very important that the source retain a record of all information available to support its initial claim that an emissions increase predicted to occur as a result of demand growth did not result from the physical or operational change to an emissions

[13] See 61 Fed. Reg. at 38,319 (estimating that 25 percent fewer changes would trigger NSR as a result of sources using the actual-to-projected-actual methodology in lieu of the actual-to-potential test).

unit. This information may be required by the reviewing authority should there be a question about the project being a major modification." Rule TSD (J.A.578); see also 61 Fed. Reg. at 38,267 (annual reporting requirement necessary to "guard against the possibility that significant unreviewed increases in actual emissions would occur.").

Despite EPA's acknowledgment that recordkeeping and reporting are the building blocks needed to ensure that the actual-to-projected-actual methodology is enforceable, the Rule now permits all sources to use this methodology with even more lax recordkeeping and reporting requirements, essentially adopting a self-policing system. The new methodology is unenforceable in two respects.

First, the Rule only requires sources to record their emissions determinations and provide emissions data to their permitting authority verifying the accuracy of their projections if the source determines itself that there is a "reasonable possibility" that the physical or operational change may lead to a significant emissions increase (i.e., the source keeps records only if it believes that its projection may be wrong). See 40 C.F.R. §§ 51.165(a)(6), 52.21(r)(6). The term "reasonable possibility" is neither defined in the Rule nor explained in the preamble. As a result, if a source decides that a "reasonable possibility" does not exist that it has wrongly predicted that its project will not significantly increase emissions, there is no independent check on that determination, as the source need not provide its calculations to the permitting agency or even keep a record of its determination. Such a "standard" is impermissibly vague, see Atlas Copco, Inc. v. EPA, 642 F.2d 458, 465 (D.C. Cir. 1979) (the "absence of an indication of the factors [to be] considered" renders a standard "impermissibly vague"), rendering the methodology unenforceable.

Second, several aspects of the actual-to-projected-actual methodology itself are highly subjective, making independent review by the permitting agency even more essential. Unlike the straightforward actual-to-potential test, the actual-to-projected-actual emissions methodology includes two aspects that are vague and therefore subject to manipulation by sources that want to avoid the expense of installing pollution controls. As explained above, the Rule requires a source to ignore in its calculation any anticipated emissions increases attributable to "demand growth," which EPA concedes is a highly subjective endeavor. See 63 Fed. Reg. at 39,861 ("Because there is no specific test available for determining whether an emissions increase results from an independent factor such as demand growth . . . [i]nterpretations may vary from source to source."). The Rule also requires sources to include in their calculation of baseline emissions "emissions associated with startups, shutdowns, and malfunctions." See 40 C.F.R. §§ 51.165(a)(1)(xxxv)(B)(*1*), 52.21(b)(48)(ii)(*a*). These emissions can comprise a significant percentage of total yearly emissions at many types of sources.[14] Although sources are also supposed to include these emissions from malfunctions, etc. in their estimation of post-change emissions, id. §§ 51.165(a)(1)(xxviii)(B)(*2*), 52.21(b)(41)(ii)(*b*), these inherently unpredictable events will make it difficult for sources to project future emissions associated with these periods. See EIP Rpt. (J.A.2749-50). To avoid NSR, sources will have an incentive to underestimate future emissions attributable to periods of atypical operation.

EPA's inclusion of the "demand growth" and startup, shutdown, and malfunction elements make predicting emissions under the actual-to-projected-actual methodology at best an

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[14] See Environmental Integrity Project report (Dec. 1, 2002) (EIP Rpt.) (J.A. 2749) (malfunctions resulted in approximately 700 tons of VOCs being released in one year at chemical plant).

inexact science. These elements make the methodology highly susceptible to manipulation, especially given the incentive sources have to avoid the costs of installing pollution controls. For these reasons, as EPA has recognized, emission projections must be subject to independent review by the permitting agency. Conditioning such independent review on a source's "reasonable possibility" determination, however, adds yet another layer of subjectivity, and will result in inconsistent determinations and manipulation of emission projections to avoid triggering NSR.[15] As a result, this self-policing system for recordkeeping and reporting is unlawful. See WEPCO, 893 F.2d at 917 (EPA "cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions" to determine NSR applicability); Environmental Defense Ctr. v. EPA, 344 F.3d 832, 855 (9th Cir. 2003) (invalidating EPA "Phase II" storm water regulation that gave sources discretion to decide what reduction in discharges would be the maximum practical reduction, because "[n]o one will review the operator's decision to make sure that it is reasonable, or even in good faith."); cf. Specialty Equipment Market Ass'n v. Ruckelshaus, 720 F.2d 124, 138-39 (D.C. Cir. 1983) (vacating regulations directing reimbursement for replacement parts that cause violations of emission standards because EPA failed to develop sufficient details of how reimbursement would work).

[15] In testimony before Congress, former EPA Administrator Browner, who was Administrator when the proposed rule was issued, described the final Rule's reporting and recordkeeping scheme as "a catch-me-if-you-can approach that relies upon facilities to set their own limits, keep their own records, and turn themselves in to regulators if they exceed their own limits." See Testimony of Carol M. Browner (Sept. 3, 2002) (J.A.2717).

C. EPA's "Self-Policing" Scheme for Recordkeeping and Reporting Is Arbitrary Because It Overlooks Record Evidence of Widespread Industry Noncompliance.

Even if a "self-policing" system for recordkeeping and reporting could theoretically be lawful, EPA cannot defend such a scheme on the record here, especially given EPA's recognition of widespread noncompliance by sources in the utility industry and elsewhere.

In the 1998 NOA, EPA cited to enforcement problems that inevitably arise from a "self-policing" approach as the basis for proposing an "actual-to-enforceable-future-actual test," which would have required sources determining applicability on the basis of emission projections to obtain enforceable emission limitations. See 63 Fed. Reg. at 39,860 (noting that "changes to utility units as well as post-change emissions estimates are not being reported to permitting agencies"). Shortly thereafter, as a result of "one of the largest investigations in the history of EPA," EPA (joined by several States) filed lawsuits against eight utilities for NSR violations at twenty-four power plants. EPA concluded that these sources had modified units at their plants "without applying for permits, without public notice and without installing pollution control technology." See EPA Announcement (J.A.2663-64).[16] The track record of the utility industry is particularly important because, prior to the Rule, only utilities could use the WEPCO rule's actual-to-projected-actual methodology in calculating the emissions associated with physical or operational changes.

However, instead of strengthening reporting and recordkeeping requirements in response

[16] See also Reconsideration Comments of Natural Resources Defense Council, et al. (J.A.1971) (citing January 1999 EPA Enforcement Alert reporting that several industry sectors had "widespread" NSR violations, including improper use of exemptions and improper emission estimates).

to the utility sector's failure to self-report physical changes and emissions increases, EPA expanded industry discretion to determine whether NSR applies to changes.[17] By ignoring its own record findings and evidence of widespread industry abuse uncovered in its own investigations, EPA's action is arbitrary and capricious. See Kent County v. EPA, 963 F.2d 391, 397 (D.C. Cir. 1992) (vacating EPA decision to list property as Superfund site because EPA statements in the record contradicted technique for sampling that formed basis for EPA's listing determination).

POINT III

EPA EXCEEDED ITS STATUTORY AUTHORITY IN PROMULGATING THE "CLEAN UNIT" EXEMPTION AND BY ALLOWING SOURCES TO RETAIN "CLEAN UNIT" STATUS EVEN IF AIR QUALITY IN THE AREA WORSENS

The "clean unit" exemption[18] contravenes the express statutory language by authorizing sources to expand their operations and significantly increase emissions without having to install state-of-the-art controls or fulfill other statutory requirements, including acquiring emission offsets. This exemption will result in missed opportunities for emission reductions and undermine the ability of States to use NSR to achieve air quality goals. Furthermore, EPA exceeded its authority by allowing sources to retain their "clean unit" exemption even after an area has its air quality downgraded from attainment to nonattainment.

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[17] EPA's experience that other companies in other industry sectors – notably pulp and paper, petroleum refining, and, most recently, ethanol – have ignored NSR permitting requirements, see NAPA Rpt. (J.A.2993-95, 3130), offers an additional reason why reporting and recordkeeping requirements should not be relaxed.

[18] EPA referred to the clean unit "exclusion" in the proposed rule, 61 Fed. Reg. at 38,255; in the Rule it refers to the clean unit "test." 67 Fed. Reg. at 80,223. As explained below, the effect is the same: units that qualify as "clean" are effectively exempted from NSR permitting and pollution control requirements.

A. EPA Exceeded Its Authority by Authorizing Sources with a "Clean Unit" to Undertake Changes that Significantly Increase Emissions Without Having to Comply with NSR Statutory Requirements.

The "clean unit" exemption is unlawful because it allows changes that cause significant emission increases to avoid NSR requirements, contrary to the expressed intent of Congress. See United States Telecom Ass'n v. FCC, 359 F.3d 554, 592 (D.C. Cir. 2004) (an agency cannot, absent strong structural or contextual evidence, exclude items that fall within plain meaning of the statute); Sierra Club v. EPA, 129 F.3d 137, 140 (D.C. Cir. 1997) ("[T]his court has consistently struck down administrative narrowing of clear statutory mandates."); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 (9th Cir. 2002) ("EPA may not exempt a source from NPDES permit requirements that clearly meets the statutory definition of a point source by 'defining' it as a non-point source.").

1. The "clean unit" exemption contravenes the express statutory language requiring modified sources that increase emissions to undergo NSR permitting.

Under the previous regulations, which tracked the language of the modification provision, a source was required to undergo preconstruction review for any physical or operational change projected to result in a significant emissions increase (unless the source could "net" out of review). See, e.g., 40 C.F.R. former § 52.21(b)(2)(i) (2001). This included a requirement that the source obtain a preconstruction permit with an emission limitation equivalent to BACT (in attainment areas), id. § 52.21(j) or LAER (in nonattainment areas), id. § 51.165(a)(2) (2002).

Now, a source with a "clean unit" can undertake a project at that emissions unit for up to

ten years[19] without triggering preconstruction review so long as the project does not alter the status of the "clean unit." An emissions unit automatically qualifies as "clean" if, within the past ten years, it has undergone NSR permitting that resulted in the implementation of controls or work practices equivalent to BACT or LAER. 40 C.F.R. §§ 51.165(c), 52.21(x). A unit that has not undergone NSR permitting can also be designated as "clean" if the source demonstrates that any previously installed controls or work practices were "comparable to" BACT or LAER (either by comparing the unit to similar sources in EPA's database or by demonstrating to the permitting authority that the unit has controls or work practices that are "substantially as effective" as BACT or LAER). Id. §§ 51.165(d), 52.21(y). Once the unit is designated "clean" under either method, a source can make any physical or operational change that "does not cause the need for a change in the emission limitations or work practice requirements" or "alter any physical or operational characteristics that formed the basis for" the BACT or LAER determination. Id. §§ 51.165(c)(2)(ii) and (d)(2)(ii), 52.21(x)(2)(ii) and (y)(2)(ii).[20] This exemption may be applied retroactively for as long as ten years (*i.e.*, a source that installed controls nine years ago could qualify today for the exemption). See id. §§ 51.165(c)(5) and (d)(6), 52.21(x)(5) and (y)(6).

By promulgating the "clean unit" exemption, EPA has fundamentally altered the nature of NSR applicability from a focus on emissions increases to a focus on the technology of the unit in question. Instead of determining NSR applicability based on whether the change "increases the

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[19] In the Rule, EPA announced that it would soon propose to increase the duration of the "clean unit" exemption to fifteen years. 67 Fed. Reg. at 80,226 n.33.

[20] See also id. §§ 51.165(c)(7) and (d)(9), 52.21(x)(7) and (y)(9) ("clean unit" status lost if the change "causes the emissions unit to function in a manner that is inconsistent with the physical or operational characteristics that formed the basis for" the BACT or LAER determination).

amount of any air pollutant emitted," 42 U.S.C. § 7411(a)(4), EPA would ask instead at "clean units" whether "the physical change or change in the method of operation affects the Clean Unit status of the unit."). 67 Fed. Reg. at 80,222 (emphasis added); see also id. at 80,225 (if the source maintains its "clean unit" status, "no emissions increase is deemed to occur from the project for the purposes of major NSR," regardless of increases in fact).

In altering the nature of NSR applicability from one based on the measuring the effect of the physical or operational change on emissions to measuring the effect of the change on the "status of the unit," EPA has strayed from congressional intent expressed in the modification provision. As the Court found in Alabama Power, "the term 'modification' is nowhere limited to physical changes exceeding a certain magnitude." 636 F.2d at 400. By limiting NSR applicability only to changes that exceed a certain magnitude (cause a "need" for a revision in emission limitations or work practice requirements), the "clean unit" exemption runs afoul of the Court's interpretation of the modification provision. See id. ("If these [existing] plants increase pollution, they will generally need a permit."); cf. Sierra Club v. EPA, 992 F.2d 337, 343-45 (D.C. Cir. 1993) (where statute required groundwater monitoring by "facilities" potentially receiving enumerated wastes, EPA acted unlawfully by requiring monitoring only at facilities of a certain size).

EPA defends its approach by asserting that Congress did not specify whether a physical or operational change constituting a modification is to be measured on the basis of "actual emissions, potential emissions, or some other currency." 67 Fed. Reg. at 80,228. It argues that measuring emissions increases in terms of the "status" of the unit is consistent with the purposes of NSR because units designated as "clean" will have undergone – within the past ten years –

either BACT or LAER analysis or minor NSR review that has determined that the unit has controls or work practice requirements "comparable to" BACT or LAER. See id.

EPA's claim is based on the unfounded assumption that "once you [industry] have installed state-of-the-art emissions control, an additional major NSR review will generally not result in any additional emissions controls for a period of years after the original control technology determination is made," 67 Fed. Reg. at 80,222. This assumption is erroneous because a unit need not have "state-of-the-art" controls to qualify as "clean." For example, "qualifying air pollution control technologies" can include a pollution prevention technique that results in emissions reductions equal to "the level of a standard, uncontrolled emissions unit of the same type." See 40 C.F.R. §§ 51.165(d)(3)(i)(A), 52.21(y)(3)(i)(*a*). To qualify, the source need only demonstrate that it has "made an investment to install the control technology," which can include "expenses to research the application of a pollution prevention technique," id. §§ 51.165(d)(3)(i)(B), 52.21(y)(3)(i)(*b*).[21] By setting the bar so low for a unit to qualify as "clean," EPA undermines its assumption that additional review during the ten-year duration of the designation would not result in additional emissions reductions. In the 1996 proposed rule, EPA recognized that a broad exemption could frustrate congressional intent: "Criteria which allow a broad range of units to qualify could largely transform the existing applicability system into one based solely on assessing a unit's potential emissions, with the possibility of a dramatic increase in a unit's actual emissions without undergoing NSR." 61 Fed. Reg. at 38,256.

[21] The source would also have to demonstrate that its allowable emissions will not cause or contribute to a violation of a NAAQS or PSD increment. Id. §§ 51.165(d)(3)(ii), 52.21(y)(3)(ii). This demonstration would be made when obtaining a "clean unit" designation or re-qualification, however, and would not have to be done when the unit subsequently undergoes a change that significantly increases emissions.

This assumption also overlooks evidence that "clean unit" determinations will become quickly outdated because pollution control technology advances rapidly over just a few years. See, e.g., Comments of U.S. Dept. of Interior (J.A.1730) (EPA's BACT/LAER database demonstrates that control technology can improve significantly over a five-year period); Comments of New York State Dept. of Environmental Conservation (J.A.1254) (explaining tenfold increase in the capture of NO_x considered to be BACT for gas turbine plants during five-year span); Comments of Institute of Clean Air Companies (J.A.1147-48) (discussing significant advances in NO_x control at coal plants over five years). Therefore, EPA cannot reasonably presume that no additional controls would result from a source undergoing NSR less than ten years after review triggered by the initial modification. See State Farm, 463 U.S. at 43 (agency acts arbitrarily where it offers an explanation for its decision that runs counter to the evidence before it).

Nor can the "clean unit" exemption be justified based on a contention that it will only allow changes to units that cause *de minimis* emissions increases to avoid preconstruction review. Although EPA apparently has taken the position that it need not demonstrate that the exemption would result in only *de minimis* emissions increases avoiding review, the Court has stated previously that any exemptions from the modification provision must be justified on grounds of *de minimis* impact or administrative necessity. Alabama Power, 636 F.2d at 400; see also Ober v. Whitman, 243 F.3d 1190, 1195 (9th Cir. 2001) ("EPA must cite information to explain why it exempted certain sources as *de minimis*, and without data . . . we owe no deference to EPA's line-drawing.") (citation and internal quotations omitted).

Here, the provision that the unit's "clean" designation would be lost if a change would

result in the unit exceeding its emissions limitation would not prevent significant emissions increases from occurring. For example, a unit operating at its hourly permit limit could undergo a change that increases its availability (*e.g.*, replacement of a major boiler component), resulting in significant emissions increase due to the additional hours of operation made possible by the change. By virtue of its status as a "clean unit," however, the source would be exempt from NSR requirements, despite an increase in hundreds or thousands of tons of emissions. The effect of these increased emissions on the environment is significant when it exceeds the *de minimis* threshold, regardless of whether the unit is called "clean."

2. EPA erred in allowing emissions units designated as "clean" to avoid other NSR statutory requirements, including the obligation to secure emissions offsets, even if they undergo changes that result in significant emissions increases.

The "clean unit" exemption is unlawful on the additional ground that it allows sources to avoid NSR statutory requirements in addition to emissions control obligations. Under the Rule, a unit designated as "clean" that undergoes a physical or operational change that results in a significant emissions increase would be exempted from the requirements that it secure emissions "offsets" prior to undertaking the modification (in nonattainment areas), see 42 U.S.C. § 7503(a)(1)(A) and (c), and prepare an air quality increment analysis (in attainment areas), see 42 U.S.C. § 7475(a)(3). See 40 C.F.R. §§ 51.165(c)(2)(ii) and (d)(2)(ii), 52.21(x)(2)(ii) and (y)(2)(ii). However, these requirements in the statute are independent of any obligation to install control technology. For example, even if a source is equipped with LAER when it is modified, it still must obtain offsets, thereby reducing the level of pollution in a nonattainment area. See 42 U.S.C. § 7503(a)(1)(A) and (c). By the same token, if a source is equipped with BACT when

it is modified, the Act still requires it to perform an increment analysis to ensure that its emissions increases do not result in the violation of a PSD increment. Id. § 7475(a)(3) Therefore, even if EPA were correct that the applicable control technology will not change over the ten-year duration of the exemption, it cannot lawfully excuse a source from complying with these other statutory requirements.

There is no validity to EPA's assertion that "clean units" satisfy emissions offset requirements because the source must demonstrate that the emissions "have been previously offset, or the reviewing authority will have to show that these emissions will not interfere with the State's ability to achieve attainment." See 67 Fed. Reg. at 80,228. Once that initial offset requirement has been fulfilled, the Rule excuses sources from the obligation to obtain additional offsets for the duration of the "clean unit" exemption even if it undertakes other modifications that increase emissions. See 40 C.F.R. § 51.165(c)(2)(ii) and (d)(2)(ii). Under the statute, however, offsets are mandatory for each modification. 42 U.S.C. § 7503(a)(1)(A) and (c).

B. EPA Exceeded Its Authority in Allowing Sources to Retain "Clean Unit" Exemptions Even if an Area Is Reclassified as Nonattainment.

The "clean unit" exemption also violates the statute by allowing a "clean unit" in an attainment area to keep its exemption even if the unit is modified after the area is redesignated as nonattainment. The Act requires sources that undertake modifications in nonattainment areas to meet stringent nonattainment requirements, including complying with LAER and obtaining emissions offsets to ensure reasonable progress toward attainment of the NAAQS. See 42 U.S.C. § 7503. Furthermore, EPA has previously recognized that Congress intended that nonattainment NSR would "be applied to the greatest extent possible" and envisioned it as "an important tool in

the drive toward attainment of ambient air quality standards." 45 Fed. Reg. at 52,697 (citations omitted). In addition to maximizing the control of pollution from new sources, "Congress meant to use [nonattainment] new source review as a means of cleaning up existing sources as well." Id. (emphasis original).

However, the Rule would let a source modified in a newly-designated nonattainment area to avoid the stringent nonattainment requirements. Specifically, if an emissions unit received "clean unit" status while located in an attainment area and the area's attainment status subsequently changes to nonattainment, the unit retains its exemption until the exemption expires. See 40 C.F.R. §§ 51.165(c)(9) and (d)(11), 52.21(x)(9) and (y)(11). As a result, a "clean unit" modified in a redesignated nonattainment area will be allowed to continue to rely on its previously applied BACT, a less stringent control technology than required by the Act. See 42 U.S.C. § 7503(a)(2). By reducing the number of modifications subject to the LAER and offset requirements, this provision also frustrates congressional intent, recognized by EPA, that nonattainment NSR "be applied to the greatest extent possible." See 45 Fed. Reg. at 52,697.

EPA's interpretation, if allowed to stand, will make it more difficult for States to meet their obligation to make reasonable progress in nonattainment areas toward meeting the NAAQS, especially given that upcoming implementation of revised NAAQS for particulate matter and ozone will result in dozens of additional counties losing their attainment status for these pollutants. The provision allowing sources to retain the "clean unit" exemption in redesignated areas undermines the States' ability to require sources to obtain offsets, one of the most valuable tools to ensure that economic development can occur without impeding a State's progress toward attainment status. For these reasons, the "clean unit" exemption should be vacated.

POINT IV

EPA CANNOT REQUIRE STATES TO ADOPT THE RULE'S RELAXED APPLICABILITY PROVISIONS AS "MINIMUM PROGRAM ELEMENTS"

The Rule is less stringent than the previous NSR regulations because, as discussed above, it provides multiple opportunities for sources to undertake changes that result in significant emissions increases without having to obtain an NSR permit or install pollution controls. These loopholes will result in more pollution, making it more difficult for States to meet air quality standards. Despite the fact that the Rule is less stringent, EPA has made the Rule provisions mandatory for States. This action is unlawful for three reasons. First, States have the right under the Act to adopt and maintain stricter pollution standards than EPA. Second, EPA erred in failing to reconsider the mandatory nature of the Rule, which was not a "logical outgrowth" of the proposal's "menu of options." Third, compelling States to adopt the Rule's relaxed applicability provisions runs afoul of the Act's "anti-backsliding" provision.

A. The Act Precludes EPA from Mandating that States Adopt the Rule's Relaxed Applicability Provisions.

By requiring States to adopt the Rule's relaxed approaches to NSR applicability, EPA would force Government Petitioners to give up their more stringent existing programs, a result at odds with Section 116 of the Act.[22] Section 116 provides, in relevant part:

> [N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution;

[22] This is true for States with NSR programs that EPA has previously found to be more stringent than federal regulations that pre-dated the Rule (including the California air pollution control districts) as well as for States that have NSR regulations that mirror or incorporate the pre-existing federal rules.

> except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416. This provision enables States to adopt stricter pollution abatement requirements than EPA. See Union Electric v. EPA, 427 U.S. 246, 263-264 (1976); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 336 (6th Cir. 1989); cf. American Corn Growers v. EPA, 291 F.3d 1, 8 (D.C. Cir. 2002) (rejecting EPA's attempt to circumscribe the authority Congress provided to the States). Section 116 is consistent with other statutory provisions that give States primary authority to control emissions from sources in their State and to adopt and enforce their own pollution control programs so long as they are at least as stringent as the federal requirements. See, e.g., 42 U.S.C. § 7410.

Despite this bedrock principle, EPA has mandated that States adopt all of the Rule's relaxed applicability provisions. See 67 Fed. Reg. at 80,240 ("To be approvable under the SIP, State and local agency programs implementing Part C (PSD permit program in § 51.166) or Part D (nonattainment NSR program in § 51.165) must include today's changes as minimum program elements.") (emphasis added); see 40 C.F.R. §§ 51.165(a)(1), 51.166(a)(6). EPA purports to reserve decision on whether States have the "choice" of maintaining their current programs. See id. at 80,241 ("[I]f a State decides it does not want to implement any of the new applicability provisions, that State will need to show that its existing program is at least as stringent as our revised base program."). However, given that EPA's rationale for mandating the Rule stems from its "belief that the NSR program will work better as a practical matter and will produce better environmental results if all five of the new applicability provisions are adopted

and implemented," see id., this "choice" is illusory. Cf. Virginia v. EPA, 108 F.3d 1397, 1404 (D.C. Cir. 1997) (where the "alternative" offered is really "no alternative at all," EPA impermissibly treads on authority reserved to States); Michigan v. EPA, 213 F.3d 663, 687 (D.C. Cir. 2000) (EPA must offer States a "real choice").

Furthermore, as discussed in Points I-III above, four of the Rule provisions are less stringent than the previous NSR regulations.[23] Therefore, requiring States to adopt all of these provisions will necessarily result in weaker programs in their SIPs than exist now. However, Section 116 prevents EPA from requiring a State to revise its SIP to mirror EPA's program, provided that the State's program "is more stringent than required by the Clean Air Act." See Duquesne Light Co. v. EPA, 166 F.3d 609, 613 (3d Cir. 1999) (holding that utility lacked standing to challenge EPA's SIP approval of Pennsylvania's definition of "actual emissions" given that Pennsylvania's definition was more stringent than EPA's and "EPA may not require less stringency.").

EPA's suggestion that the Rule is actually more stringent than previous NSR regulations lacks record support and contravenes the Agency's previous position that rules that increase flexibility for industry are less stringent. EPA's contention that the Rule will result in greater environmental protection because sources will voluntarily undertake projects that reduce emissions, see 67 Fed. Reg. at 80,241, fails because EPA relies on unsubstantiated claims by industry supporters of the Rule. See GAO Rpt. (J.A.3167). Even if these anecdotes were credible, the GAO concluded that only one-third of the examples indicated that emissions would

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[23] See supra at 18-26 (baseline emissions and plantwide emissions cap); 26-33 (actual-to-projected-actual methodology); and 35-43 ("clean unit" exemption).

decrease after the change (and then only if sources did not increase their use of the modified units). See id. (J.A.3167-68).

Indeed, EPA has previously taken the position that NSR regulations that increase industry flexibility are less stringent. For example, in the Duquesne Light case referenced above, EPA argued that the State's definition of "actual emissions" was more stringent than EPA's because it limited industry flexibility to "look back" to set its baseline for purposes of calculating emissions reduction credits. See Brief of Respondent EPA in Duquesne Light Co. v. EPA, 1998 WL 34084103, at 13 (Oct. 26, 1998) ("Pennsylvania's definition is easily recognized as more stringent than the federal definition."). In support of this argument, EPA cited the "ten-year lookback" provision in its own 1996 proposed rule as an example of a regulation that "increases industry flexibility" and therefore is less stringent. Id. at 19; see also id. at 18 (it is "self-evident" that a state regulation that prohibits a facility from using a "bubble" approach in measuring emissions increases is more stringent than an EPA regulation with the "bubble" concept). Therefore, EPA has violated Section 116 in requiring the States to adopt the Rule.

B. EPA Committed Reversible Error in Refusing to Reconsider the Mandatory Nature of the Rule.

EPA must grant reconsideration if a party demonstrates that its objection could not have been raised during the public comment period and that the objection is "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Here, Government Petitioners' objection regarding the mandatory nature of the Rule arose after the public comment period because this aspect of the Rule is not a "logical outgrowth" of the proposal. This objection is also "of central relevance" to the outcome of Rule because it cuts to the very heart of States' primary authority

under the Act to manage emissions. See id., §§ 7410, 7416. Because there is a "substantial likelihood that the rule would have been significantly changed" if the error had not been made, EPA acted arbitrarily in denying reconsideration. See id., § 7607(d)(8).

1. EPA failed to provide notice that the Rule provisions would be mandatory on States.

EPA is required under the Act to give notice and describe "the range of alternatives being considered with reasonable specificity." Horsehead Resource Dev. Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir.), cert. denied, 513 U.S. 816 (1994). The Agency deprives parties of adequate notice if the final rule differs from the proposal and is not a "logical outgrowth" of the proposal. See Northeast Maryland, 358 F.3d at 951-52. A rule is deemed a "logical outgrowth" if parties should have reasonably anticipated the change made in the final rule and therefore addressed the subject during the comment period. See id.

Here, EPA has required States to adopt all of the Rule's applicability provisions. See 67 Fed. Reg. at 80,240. Neither the language nor the purpose set forth in the 1996 proposed rule, however, gave States forewarning that EPA would consider mandating adoption of the Rule. The proposal presented the applicability provisions as a "menu of options," allowing States to adopt "all, some, or none" of these provisions, as they saw fit. 67 Fed. Reg. at 80,241; see also 61 Fed. Reg. at 38,253 (if EPA were to adopt both the "clean unit" and PAL options, States could choose to keep their existing programs "without making changes."). Accordingly, EPA solicited comments on how States might incorporate this menu of options into their programs. Id.

Moreover, EPA's decision to make all the provisions mandatory runs contrary to one of the central purposes behind the 1996 proposal, "to provide States with greater flexibility to

customize their own regulations." 61 Fed. Reg. at 38,251. The 1998 NOA gave no indication that EPA would abandon this approach. See 63 Fed. Reg. 39,857-66. Four years later, after completing its review of the effect of NSR on the energy industry, EPA fundamentally changed its rulemaking approach to focus solely on relieving regulatory burden on industry, and, without taking additional public comment on the Rule, mandated that States adopt the Rule. As this Court has previously held, a significant change in EPA's regulatory approach between the proposal and final rule is evidence that parties did not receive adequate notice. See Shell Oil Co. v. EPA, 950 F.2d 741, 751-52 (D.C. Cir. 1991) (citing to a "marked shift in emphasis" in EPA's "regulatory strategy" between the proposed and final rules as basis to conclude that RCRA final rules were not a "logical outgrowth" of the proposals).

Moreover, EPA has a duty to examine key assumptions as part of its duty to promulgate a nonarbitrary rule. Northeastern Maryland, 358 F.3d at 948; Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 534-35 (D.C. Cir. 1983); cf. Shell Oil, 950 F.2d at 752 (petitioners need not submit new arguments to invalidate final rule where the agency has failed to comply with notice and comment requirements and offered no persuasive evidence that possible objections have been given sufficient consideration). Here, EPA did not examine and explain its key assumption for making the Rule provisions mandatory, i.e., its belief that the NSR program "will produce better environmental results if all five of the new applicability provisions are adopted and implemented," 67 Fed. Reg. at 80,241.

2. Government Petitioners' objection to the Rule on the basis that States have the right to maintain more stringent emission requirements is of "central relevance" to the outcome of the Rule.

Government Petitioners' objection regarding the mandatory nature of the Rule is "of central relevance" to the outcome of the Rule and EPA was therefore required under the Act to grant reconsideration. See 42 U.S.C. § 7607(d)(7)(B). As discussed in Point IV.A., supra, the Rule infringes on the rights of States to maintain more stringent standards under the Act. See also States' Petition for Reconsideration (J.A.2811-12). By mandating that States adopt the Rule provisions, thereby relaxing current standards in place, EPA would undermine critical tools used by States to meet the NAAQS. See id. Moreover, EPA has failed to explain how its new program can be regarded as more stringent when, in practice, it enables sources to avoid NSR altogether. Id. (J.A.2812).

3. EPA committed reversible error by refusing to reconsider the mandatory nature of the Rule on States.

When the Court finds that there is "a substantial likelihood that the rule would have been significantly changed" had EPA not committed procedural error, the rule should be vacated. See 42 U.S.C. § 7607(d)(8). Here, the standard is met because the nature of the rulemaking would have been fundamentally different had States been notified that EPA was contemplating requiring adoption of all of the Rule provisions, instead of allowing States to adopt any (or none) of the "menu of options." See Horsehead Resource, 16 F.3d at 1267 ("notice of individual parts of a proposed rule is not necessarily notice of the whole."). By failing to provide States and the public with notice and a chance to comment after fundamentally altering the nature of the rulemaking, EPA committed reversible error. See id. at 1268 (vacating hazardous waste standard

where EPA proposed individual elements of standard but "the component parts were never collected together in such a fashion" to adequately inform parties of the final standard adopted by EPA). Therefore, the Court should vacate EPA's decision to make the Rule provisions mandatory SIP requirements. At a minimum, EPA should be required to reconsider the mandatory aspect of the Rule after providing the States and the public with an opportunity to be heard.

C. The Rule Violates the Anti-Backsliding Provision of the Act.

Given that several provisions of the Rule are less stringent than the previous regulations, the Rule also conflicts with Section 193, which prohibits the "backsliding" of control requirements in nonattainment areas, 42 U.S.C. § 7515. Section 193 provides that no control requirement in effect in any nonattainment area before November 15, 1990 may be altered unless the revision insures equivalent or greater emission reductions. Id. This anti-backsliding provision prohibits States from revising their SIPs "unless equivalent or more restrictive standards are adopted." American Lung Ass'n v. Kean, 856 F. Supp. 903, 907 (D.N.J. 1994). In the Senate floor debate, Senator Chafee stated that Section 193 "was intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a [SIP] in the past, or that EPA has added to State plans on its own initiative or pursuant to a court order or settlement." 136 Cong. Rec. S17,232, S17,237 (October 26, 1990). EPA has acknowledged that Section 193 prohibits backsliding unless alternative emissions reductions are secured:

> [T]he language is in fact "extraordinarily rigid" in its requirement to provide equivalent or greater emission reductions to offset relaxations to pre-1990 rules. . . . [S]ection 193 unambiguously requires any relaxations to control requirements or plans in effect prior to enactment of the CAA amendments of 1990 to be offset by equivalent or greater emission reductions. The clarity of the statutory language supported by the legislative history evidences intent by Congress that relaxations to pre-1990 requirements should occur only where compensating strengthening will result in no increase in emissions.

64 Fed. Reg. 70,652, 70,654 (Dec. 17, 1999) (emphasis added). Furthermore, "compensating reductions must be contemporaneous with the relaxation." Id. at 70,656.

The prior NSR regulations constitute "control requirements" incorporated into SIPs to enable States to attain the NAAQS. See Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130, 1149 n.37 (D.C. Cir. 1980) (referring to measures in SIPs that impose pollution control requirements on sources). If the Rule's provisions become part of a SIP, as required by EPA, see 67 Fed. Reg. at 80,240, sources in nonattainment areas could increase their emissions without triggering NSR permitting and pollution control requirements. Furthermore, contrary to the anti-backsliding provision, the Rule does not require equivalent or greater emission reductions. Cf. City of Waukesha v. EPA, 320 F.3d 228, 240-42 (D.C. Cir. 2003) (vacating EPA rule that violated the Safe Drinking Water Act's anti-backsliding provision where the statutory language required EPA to maintain at least the level of protection that had been achieved by the existing standard even if science demonstrates that the prior level posed less of a risk than EPA initially thought).

Here, for the reasons set forth in Points I-III above, the Rule is much less protective than the previous regulations. Mandatory incorporation of the less stringent Rule provisions into SIPs

for nonattainment areas will result in "backsliding" and is therefore in direct conflict with Section 193.

CONCLUSION

Because EPA has exceeded its statutory authority and acted arbitrarily and capriciously, Government Petitioners respectfully request that the Court vacate the Rule, vacate the March 10, 2003 regulations that made the Rule effective in certain States on March 3, 2003, and vacate EPA's decision to make the Rule mandatory for States (or, at a minimum, require EPA to reconsider that decision).

Dated: October 18, 2004

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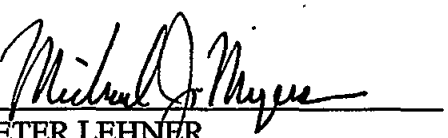
By: 

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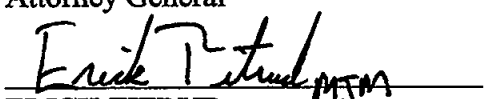
By: 

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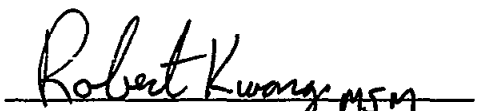
By: 

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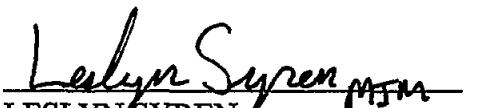
By: 

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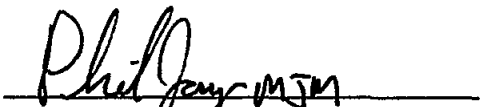
By: 

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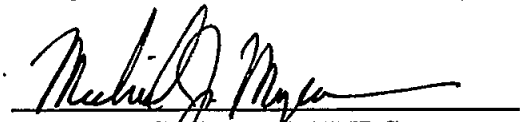
CERTIFICATE OF COMPLIANCE WITH WORD-VOLUME LIMITATIONS

I hereby certify that the foregoing brief of Government Petitioners complies with Fed. R. App. P. 32(a)(7), as modified by the Court's February 24, 2004 Order. The word count function of the word processing system used to prepare this brief indicates that it contains 15,329 words (inclusive of footnotes and citations but exclusive of certificate as to parties, rulings and related cases, tables of contents and authorities, glossary, attorney's certificates, and addendum).



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