

ORAL ARGUMENT SET FOR JANUARY 25, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1387 (and consolidated cases) COMPLEX

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

Petition for Review of Final Action of the
United States Environmental Protection Agency

**PROOF REPLY BRIEF OF
ENVIRONMENTAL PETITIONERS**

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GLOSSARY

CAA	Clean Air Act
EPA	United States Environmental Protection Agency
NSPS	new source performance standards
NSR	new source review
PAL	Plantwide Applicability Limitation
PCP	pollution control project
PSD	prevention of significant deterioration
SIP	state implementation plan
TSD	Technical Support Document

SUMMARY OF ARGUMENT

EPA concedes that its ten-year lookback provision allows sources “to increase emissions without being subject to NSR.” EPA Br. 81. This contravenes §111(a)(4), which requires NSR for any physical or operational change that “increases the amount of any air pollutant emitted” by a source. A similar provision allowing utilities to increase emissions up to five-year-old levels likewise contravenes §111(a)(4).

EPA’s netting rule violates §111(a)(4) and this Court’s *Alabama Power* decision by allowing increases at one unit to escape NSR, through netting with non-contemporaneous decreases that occurred at other units as many as fifteen years earlier.

The agency’s plantwide applicability exemption not only incorporates the rule’s unlawful ten-year-lookback provision, but also compounds the error by allowing increases up to levels not seen for twenty or even thirty years. Exempting such increases from NSR contravenes §111(a)(4). Moreover, basing the exemption on such long-ago reductions violates *Alabama Power*’s ruling that emissions increases at a unit can avoid NSR only if they are offset with “substantially contemporaneous” decreases at other units.

Though EPA acknowledges that it would be improper to exempt emissions increases that are related to a change, the plain language of the demand growth exemption does just that. Moreover, EPA has failed to explain its retreat from its prior recognition that emissions increases attributable to demand growth cannot be isolated from those attributable to physical and operational changes.

EPA’s “clean unit” exemption allows actual emissions to increase, simply because they do not exceed higher levels embodied in the source’s emission limitation and work practice

requirements. This violates §111(a)(4), which expressly requires NSR for any physical or operational change that “increases the amount of any air pollutant emitted” by a source.

EPA concedes in both its rule and brief that pollution control projects fall within the plain meaning of §111(a)(4)’s reference to “any physical change in, or change in the method of operation of, a stationary source.” The agency’s rule exempting such emissions-increasing projects is therefore unlawful.

The agency’s 1992 rule exempts a physical change that increases a utility’s emissions up to the maximum level that the source could have achieved when it was five years newer, even if the source never could have achieved that level again without the physical change. That result contravenes §111(a)(4)’s requirement of NSPS for any physical change that “increases the amount of any air pollutant emitted” by a source.

ARGUMENT

Unless otherwise expressly indicated, references in this brief to unlawful agency action address both violation of congressional intent under Step One of *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), and unreasonable agency interpretation under Step Two.

I. EPA’s Ten-Year Lookback Provision Unlawfully and Arbitrarily Exempts Emissions Increases, Simply Because They Do Not Exceed Historical Emissions Levels From As Many As Ten Years Earlier.

Even where a change “increases the amount of any air pollutant emitted” (§111(a)(4)) by a source, EPA’s rule allows the change to escape NSR, simply because it does not exceed the source’s historic emission levels from up to ten years earlier. Envir. Br. 12. The agency’s lawyers defend this result with the untenable assertion that a change that causes emissions to rise does not “increase[]” them. EPA Br. 69-71, 86. This assertion is so extraordinary that even

EPA's lawyers are unable to stay on script, repeatedly conceding that such changes indeed "increase" emissions. *See* pp. 4-5, *infra* (quoting EPA).

EPA's position below and shift here. In the rulemaking documents explaining the ten-year lookback, EPA asserted that its rule distinguished between emissions increases due to market fluctuation and those caused by a physical or operational change. *See* TSD I-2-7[JA ____]. In this Court, however, EPA insists that it "did not base the rule on any concept of causation." EPA Br. 85 (emphasis in original).

EPA's litigation position is contradictory. On the one hand, EPA insists that, under its rule, every emissions increase caused by a change must undergo NSR. *Id.* 96 (rule "explicitly prohibits facilities from excluding any increases in emissions that are associated with a change"). On the other hand, however, the agency concedes that, even where a physical or operational change causes emissions to increase to the highest emissions level achieved by the source in the preceding decade—and indeed, even when the source could not physically have accommodated the increase absent the change¹—the change is still exempt. *Id.* 86 (noting petitioners' argument that EPA's rule "may allow facilities to increase their emissions over levels they are physically able to emit," and responding: "The revised baseline is not designed to distinguish between emissions that are or are not caused by a physical change, and thus the fact that it does not do so is irrelevant.").

¹ EPA's claim that this argument was not raised in comments (EPA Br. 86 n.47) is wrong. NRDC's 1998 comments attached and discussed a study finding that deteriorating equipment reduces facility capacity at least 1% annually. *See* NRDC 1998 Comments 4-5(IV-D-303)[JA ____]. Citing that study, NRDC noted that "absent investments at a facility, its rate of operation and its annual emissions will inevitably decline over time." *Id.* 5. Moreover, EPA's waiver argument is irrelevant, for it addresses a rationale that EPA expressly disclaims (i.e., that the ten-year lookback is justified on causation grounds). *See* EPA Br. 85-86.

A. A Change that Causes Emissions to Rise to Ten-Year-Old Levels “Increases” Them.

The sole textual basis EPA asserts for its extraordinary position is an argument based on the word “increases” in §111(a)(4). Specifically, EPA claims that, even when a change causes emissions to rise to the highest level reached in the past ten years, it does not “increase[.]” them. EPA Br. 69-71, 86. According to EPA’s untenable argument, Congress did not specify how an increase is to be measured, and thus left EPA free to interpret “increases” as it wishes. *Id.*

The term “increases” is not an empty vessel that EPA can fill as it chooses. Instead, absent further congressional guidance, the term must be given its ordinary meaning. *Engine Mfrs. Assn. v. South Coast Air Quality Management District*, 124 S. Ct. 1756, 1761 (2004); *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004). The ordinary meaning of “increase” is “to make greater, as in number, size, strength, or quality.” Random House Webster’s Unabridged Dictionary, 2d Ed. (1999), at 969. Thus, a change that makes emissions greater “increases” them. EPA’s interpretation contravenes the Act’s plain meaning under *Chevron* Step One, or in the alternative “diverges from any realistic meaning” under *Chevron* Step Two. *See, e.g., NRDC v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).²

Indeed, EPA itself recognizes as much, repeatedly characterizing a rise in emissions above recent levels as an increase—even if emissions do not rise above a source’s ten-year high. For example, the agency concedes that some facilities “may be able to increase emissions without being subject to NSR under the revised rule.” EPA Br. 81 (emphasis added). *See also id.*

² Industry’s defense of EPA’s ten-year lookback rests on its untenable capacity-based approach. *See* Envir. Interv. Br. 2-9. Industry’s concerns about industrial flexibility (Ind. Interv. Br. 15) are meritless. Under EPA’s preexisting rules, sources can avoid NSR by refraining from significant emissions increases. Even if NSR is triggered, an emissions-increasing change can go forward if it meets NSR’s safeguards.

81 n.44 (recognizing that the revised baseline may “result[] in increased emissions from some sources”) (emphasis added); *id.* 86 (referring to “emissions increases below the revised baseline”)(emphasis added).

In short, EPA’s argument concerning “increases” conflicts with the term’s ordinary meaning, and with the agency’s own characterization elsewhere. By allowing sources to “increase emissions without being subject to NSR,” *id.* 81, EPA has contravened §111(a)(4), which requires NSR for “any” physical or operational change that increases emissions.³

B. *Alabama Power* Precludes—Rather Than Supports—EPA’s Exemption of Emissions Increases Up To Historic Levels.

EPA’s reliance on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), (EPA Br. 69), is unavailing. EPA states that the decision found the statutory term “increases” to be ambiguous “as to whether emissions are to be measured on a facility-wide or unit-specific basis.” *Id.* But an alleged ambiguity on that issue⁴ fails to establish an ambiguity on the issue posed here, namely, whether a change that causes emissions to rise “increases” them.

On the latter issue, *Alabama Power* precludes rather than supports EPA’s reading. The Court held that a change “increases” emissions when the net effect “is to increase the emission of any air pollutant.” 636 F.2d at 401. Only two exceptions were recognized: when increases “are *de minimis*,” and when they “are offset by contemporaneous decreases of pollutants.” *Id.* 400. EPA does not attempt to justify the ten-year lookback on *de minimis* grounds. *See e.g.*, 40 C.F.R.

³ Contrary to EPA’s suggestion (EPA Br. 72 n.40), comments did argue that all modifications (rather than just some) are subject to NSR. NRDC 1996 Comments 3[JA ___]; Alabama Environmental Council Pet. for Recon. 17[JA ___]. In any event, EPA’s position is not that §111(a)(4) allows exemption of some emissions increases, but that a rise to ten-year-old levels is not an “increase” at all. EPA Br. 86.

⁴ In reality, *Alabama Power* ruled that “increases” must be measured facility-wide, rather than at a single unit. 636 F.2d at 401-03. EPA’s claim of ambiguity on that issue is thus meritless.

§51.165(a)(1)(v)(A), (a)(1)(x) (preexisting regulations already included separate *de minimis* provisions). Nor has it argued that the lookback—which addresses how to measure increases at an individual unit—implements *Alabama Power*'s ruling on facility-wide netting.

Far from supporting EPA, *Alabama Power*'s emphasis on “contemporaneous” increases undercuts the agency’s attempt to exempt emission increases, simply because the increases remain below non-contemporaneous emission levels prevalent ten years earlier. As EPA concedes, *Alabama Power* based its contemporaneity ruling on PSD’s “air quality” purpose. EPA Br. 93. Thus, the decision emphasized that its interpretation was “precisely suited to preserve air quality,” in that “decisions to permit increased air pollution” would be made only after “careful evaluation of all the consequences of such a decision,” and “opportunities for informed public participation in the decisionmaking process.” 636 F.2d at 401-402. EPA’s approach eliminates those safeguards by exempting emissions increases up to historic levels.

C. EPA’s Interpretation of “Increases” Contravenes Statutory Purposes and Context.

EPA’s attempt to exempt emissions increases contravenes not only the language of §111(a)(4), but also NSR’s statutory purpose. *See* Envir. Br. 13-14. It is no answer for EPA to argue that NSR is designed to limit emissions increases rather than require reductions. EPA Br. 73-75. EPA’s own brief concedes that the rule allows sources to “increase” emissions. *See* p. 4-5, *supra*.

EPA also attempts to minimize the importance of NSR, arguing that the agency is entitled to “balance” competing goals by shunting aside NSR in favor of other approaches—such as state “minor” NSR programs and State Implementation Plan development. EPA Br. 73-77. But “major” source permitting provisions are the “principal” means of achieving PSD’s statutory goals. *Alabama Power*, 636 F.2d at 362. As EPA acknowledges outside this litigation, “Congress

enacted PSD to regulate sources that might contribute to the significant degradation of local air quality despite NSPS and other CAA provisions.” EPA Br. in *U.S. v. Duke Energy Corp.*, 4th Cir. 04-1763 (Sept. 3, 2004), at 5 (attached).

Likewise, “major” source permitting provisions are also crucial to the Act’s nonattainment program. *See* S.Rep. No. 95-127, at 55 (1977) (emphasizing importance of “a case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard”). Indeed, in 1990 Congress reemphasized and increased its reliance on NSR by requiring review of smaller sources, increasing offset ratios, and limiting use of netting. 42 U.S.C. §7511a(a)(4), (b)(5), (c)(6)-(8), (c)(10), (d), (d)(2), (e), (e)(1)-(2); 1990 H. Rep. 234-35, 238, 242-43, 267.

EPA may disagree with Congress’s decision to require NSR for all emissions-increasing changes, but the agency’s policy preferences do not entitle it to adopt an interpretation that conflicts with §111(a)(4)’s meaning and undermines its purposes.

Finally, EPA offers no cogent response to the statutory contextual evidence that undermines the agency’s interpretation. *See, e.g.*, Envir. Br. 15 (citing §165(a)(3)).⁵ Instead, the agency offers the uncorroborated assertion that a ten-year lookback “is consistent with the time frames generally used in air quality planning.” EPA Br. 84. To the contrary, the Act as amended

⁵ EPA’s waiver argument concerning §165(a)(3) is meritless. Environmental Petitioners’ “objection” to the historical emissions exemption (*see* CAA §307(d)(7)(B)) is that it diverges from §111(a)(4). Environmental Petitioners’ statutory context arguments constitute authorities in support of that objection, not independent “objection[s]” that must be raised in comments. *See Natl. Petrochemical & Refiners Assn. v. EPA*, 287 F.3d 1130, 1139-40 (D.C. Cir. 2002) (rejecting “hair-splitting” approach to §307(d)(7)(B) exhaustion); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998)(§307(d)(7)(B) “does not require that precisely the same argument that was made before the agency be rehearsed again, word for word, on judicial review”). Moreover, Environmental Petitioners did raise §165(a)(3) below. *See* NRDC Recon. Comments 9[JA__].

in 1977—as well as the current version reflecting extensive 1990 amendments—embodies attainment deadlines far shorter than ten years. *See, e.g., A Legislative History of the Clean Air Act Amendments of 1977* (U.S. Senate Committee on Environment and Public Works, Nov. 1993), at 23-24 (§110(a)(2)(A)), at 101 (§172(a)(1) & (2)) (three-year attainment deadline, with possible five-year extensions); §181(a)(1) (ozone deadlines enacted in 1990 include intervals between three and six years).

D. EPA Fails to Offer a Statutory Basis For Allowing Sources to Take Into Account Multiple Business Cycles in Establishing Their Pre-Change Baseline.

The sole study cited by EPA in support of its lookback provision undermines the selection of a ten-year period. That study surveyed nine industrial sectors, and found cycles varying from three to eight years. *Envir. Br.* 16.

Confronted with this contradiction, EPA has shifted ground. Instead of justifying the ten-year lookback as a “representative time frame for encompassing a source’s normal business cycle,” 67 Fed. Reg. 80186, 80200/1 (Dec. 31, 2002)[JA__], *see also id.* (referring to “an entire industry cycle”)(emphasis added),⁶ EPA’s brief argues that the ten-year lookback “establish[es] a period in which at least one peak of the business cycle [will] occur for most industries.” *Id.* 83 (emphasis added). This *post hoc* rationale fails to explain why it is lawful or rational to allow a source to escape NSR, when it increases emissions above the most recent business cycle peak. Indeed, as documented by EPA’s own study (which found business cycles of three, four, and five years for some industries), EPA’s ten-year period allows not one, but two or even three peaks for many sources.

⁶ *Accord*, TSD I-3-6[JA__]; TSD I-2-5[JA__]; TSD I-3-4[JA__]; TSD I-3-12[JA__].

Moreover, allowing use of the oldest peak within the decade preceding a physical or operational change does not simply allow a source to select the high end of its “range of operations” (*id.* 84) in the absence of the change. Instead, such a long-ago peak reflects an earlier historical period, when the source was newer and thus able to pollute more. *See* Env. Br. 12.

EPA also suggests that a ten-year period is justifiable as means of addressing industries that “may have longer business cycles” than ten years. EPA Br. 83. This argument conflicts with EPA’s statement below that it is “unaware of any data demonstrating business cycles longer than ten years.” TSD I-2-10[JA ____].

II. EPA’s Rule Unlawfully Allows Non-Contemporaneous Fifteen-Year Old Decreases to Offset Increases.

In its ruling on facility-wide netting, *Alabama Power* held that PSD aims to ensure review of “any decision to permit increased air pollution in any area,” 636 F.2d at 401 (emphasis in original), and should therefore only apply “where industrial changes might increase pollution, not where an existing plant changed its operations in ways that produced no pollution increase.” *Id.* In determining whether net emissions will increase, however, the Court cautioned that only “substantially contemporaneous” emissions decreases could be used to offset an emissions increase. *Id.* 402.

Contrary to *Alabama Power* and §111(a)(4)’s language triggering NSR for any change that “increases the amount of any pollutant emitted,” the 2002 rule unlawfully and arbitrarily allows sources to “net” out of NSR by offsetting an emissions-increasing change with an emissions decrease that occurred as many as fifteen years earlier. *See* Envir. Br. 21. Specifically, the rule allows a source to look back up to five years to identify an “action” that locks in an emissions decrease (*e.g.*, the permanent shut down of a boiler), and then allows the source to look back an additional ten years to calculate the emissions decrease attributable to that change.

See EPA Br. 88. Thus, for example, if a source shifted a boiler from full-time to back-up use nearly fifteen years ago, but did not permanently shut it down until fewer than five years ago (e.g., surrendered the operating permit and incapacitated the boiler), the source could count the actual emissions decrease that occurred nearly fifteen years ago to offset an emissions-increasing change taking place now.

EPA says nothing to defend the use of a fifteen-year-old emissions decrease to offset an emissions-increasing change, but instead asserts that EPA “has not changed the definition of ‘contemporaneous.’” EPA Br. 88. EPA mischaracterizes its rules. Prior to the 2002 amendment, the agency required the “decrease in actual emissions” to be “contemporaneous.” See, e.g., 40 C.F.R. §52.21(b)(3)(ii)(emphasis added). Under the 2002 rules, only the “action” that formalizes the emissions decrease must be contemporaneous—even though the actual emissions decrease may have occurred up to fifteen years earlier. See EPA Br. 88. See also 67 Fed. Reg. 80245 (40 C.F.R. §51.165(a)(1)(vi)(A)(2) (the ten-year lookback shall be used to calculate a “contemporaneous” emissions decrease). Such a distant emissions decrease is not “substantially contemporaneous” with the emissions-increasing change, and does nothing to reduce the increase’s air quality impact. See EPA Br. 93 (“air quality” concerns underlay *Alabama Power*’s ruling that netting must be contemporaneous).

Finally, the ten-year lookback methodology is inappropriate for determining the actual net emissions increase at the time of a change. See Envir. Br. 22. EPA rightly determined that the ten-year lookback methodology should not be used for “estimat[ing] a source’s actual emissions at a particular time,” e.g., for purposes such as calculating PSD increment consumption. *Id.* (quoting 67 Fed. Reg. 80199/3). But netting calculations require the same degree of accurate,

actual emissions estimates as calculating increment consumption. EPA's brief is silent on this inconsistency, which lacks any reasoned record explanation.

III. EPA's Five-Year Lookback Methodology For Utilities is Unlawful and Arbitrary.

Like the ten-year lookback, the rule allowing utilities to increase emissions up to levels prevalent five years earlier is unlawful and arbitrary under §111(a)(4). *Envir. Br.* 23-24. EPA's brief offers no reason to believe otherwise.

IV. EPA's PAL Provisions Unlawfully and Arbitrarily Allow Emissions-Increasing Changes to Escape NSR, Simply Because Those Increases Do Not Exceed Historical Emissions Levels Prevalent Decades Ago.

EPA's "plantwide applicability limitation" ("PAL") provisions unlawfully and arbitrarily allow emissions-increasing changes to escape NSR, simply because the source's historical emission levels have not been exceeded. Indeed, going well beyond the ten-year lookback provision addressed in Part I, the PAL provisions allow sources to increase their emissions to levels not seen for twenty or even thirty years. *See Envir. Br.* 25-26.

Initially, it is important to emphasize what is not at issue. EPA broadly asserts that Environmental Petitioners are "challeng[ing] EPA's authority to establish PALs," *EPA Br.* 90, and argues that a "facility-wide" approach to calculating emissions increases is permissible under *Chevron. Id.* 91. But as EPA acknowledges elsewhere, *EPA Br.* 93, Environmental Petitioners are not challenging EPA's authority to adopt a facility-wide approach, but instead challenge how the 2002 rule does so.⁷

In establishing a facility-wide approach, EPA must respect §111(a)(4)'s requirement that NSR is triggered by any change that "increases" emissions. EPA's PAL provisions transgress

⁷ EPA acknowledges that the 2002 PAL provisions exempt changes that would trigger NSR under the preexisting rule's facility-wide netting provisions. 67 Fed. Reg. 80207/1.

that requirement, fail to meet standards of reasoned agency decisionmaking, and violate this Court's precedent.

A. EPA's PAL Lookback Is Far Longer Than—and More Egregiously Unlawful and Arbitrary Than—the 2002 Rule's General Ten-Year Lookback Provision.

Ten years. It is undisputed that EPA's PAL exemption applies to facilities the same ten-year lookback methodology that the non-PAL provisions apply to units, and does so based on the "same rationale." EPA Br. 92. Accordingly, EPA's PAL provision is unlawful and arbitrary. *See* Part I, *supra*; Envir. Br. 11-23.

Twenty years. It is likewise undisputed that the PAL rule adds a second ten-year period (*i.e.*, the ten-year PAL term) to the ten-year lookback period. EPA Br. 92 ("PALs are established for ten years using the ten-year lookback methodology.")(emphasis added); Envir. Br. 25. Thus, under a PAL set in 2004 using 1994-96 emissions levels, a change undertaken in 2014 that increases emissions dramatically over levels during the preceding period (*e.g.*, 2012-14) can nonetheless evade NSR based on two-decade-old emissions data from 1994-96.

EPA cites to no place in the record where the agency offers an explanation—much less a reasoned one—for the untenable proposition that emissions increases are exempt under §111(a)(4) simply because they remain below two-decade-old levels. To the contrary, EPA ducks the issue entirely, focusing its defense of a greater-than-ten-year lookback solely on the PAL rule's renewal provision. EPA Br. 92-93. However, EPA's rule allows a twenty-year lookback during the PAL's initial term, before the source has any need to invoke the renewal

provision. Envir. Br. 25. Other than an incorrect allegation about Environmental Petitioners' brief,⁸ EPA has offered no defense of such a result.

In particular, the agency has not shouldered the impossible task of explaining away its own statements rejecting requests for a longer-than-ten-year lookback period, or its own business cycle study that undermines such a protracted lookback. *See* Envir. Br. 27.

Thirty years. Finally, it is undisputed that the twenty-year lookback allowed during the PAL's initial term can be extended for an additional ten years via the rule's renewal provision. Thus, under a PAL set in 2004 using 1994-96 emissions levels and renewed in 2014, a change undertaken in 2024 that increases emissions dramatically over levels during the preceding period (*e.g.*, 2022-24) can nonetheless evade NSR based on three-decade-old emissions data from 1994-96.

EPA touts the renewal provision's procedural components, including a requirement that—in certain circumstances—permitting authorities must consider reducing the PAL's level. EPA Br. 92-93. However, EPA does not deny that its rule leaves permitting authorities free to reject any such reduction. *See* Envir. Br. 26 n.12. Thus, EPA's rule allows a source to evade NSR for emissions-increasing changes, simply because the increases remain below levels prevalent thirty years earlier. That approach contravenes §111(a)(4), and EPA's policy preferences⁹ cannot justify shunting aside the statute. Moreover, the rule's thirty-year lookback

⁸ EPA argues that Environmental Petitioners' objection to a longer-than-ten-year lookback period is "without citation of any statutory or other authority." EPA Br. 92. To the contrary, Environmental Petitioners' PAL discussion expressly references the preceding ten-year lookback section (which cites §111(a)(4) and other authority), and also expressly cites EPA administrative record statements. Envir. Br. 26-27.

⁹ *See* EPA Br. 94 (advancing various policy rationales).

presents an even more egregious—and unexplained—contradiction of EPA’s own statements elsewhere in the record rejecting a longer-than-ten-year lookback. *See* Envir. Br. 27.

B. The PAL Provisions’ Protracted Lookback Violates *Alabama Power*.

Under *Alabama Power*, emissions reductions from one unit can be used to offset emissions increases at another unit only if the reductions are “substantially contemporaneous.” 636 F.2d at 402. EPA’s PAL provisions egregiously violate *Alabama Power* by allowing emissions increases at one unit to be offset against non-contemporaneous reductions that occurred ten, twenty, or thirty years earlier at other units.

(1) *Alabama Power* applies to the PAL provisions.

EPA asserts that *Alabama Power* does not apply to the agency’s PAL provisions. EPA Br. 94. Even if this assertion were correct, the PAL provisions must still be rejected for reasons stated in Part IV.A of this brief and Part III.A of Environmental Petitioners’ opening brief. But EPA’s assertion is wrong.

EPA itself told this Court in this very proceeding that the PAL rule “is based on the ‘bubble’ concept,” which the agency said had been “expressly approved” by this Court in *Alabama Power*. EPA Stay Opp. (2/21/03) at 2, 16. EPA cited the *Alabama Power* pages (400-03) containing the contemporaneity ruling. *Id.* 16.

EPA’s attempt now to argue the contrary is untenable. EPA argues that, unless the PAL limit is exceeded, “there has been no ‘increase.’” EPA Br. 94. However, this characterization simply confirms the applicability of *Alabama Power*, which addressed how to “construe the term ‘increases.’” 636 F.2d at 401. *See also id.* (changes producing no net increase “are not ‘modifications’ at all”). Moreover, EPA itself explains that “[o]ne way of viewing a PAL” is as a means of determining whether “decreases that have occurred” at “individual emissions units”

within a facility “are sufficient to offset any increase that occurs” at another unit, such that “net emissions from [the] source as a whole” have not increased. 67 Fed. Reg. 80216/1. This is precisely the situation governed by *Alabama Power*. 636 F.2d at 401-402.

(2) Emissions Decreases That Occurred Ten, Twenty, Or Thirty Years Ago Are Not “Contemporaneous.”

EPA also argues that the PAL provisions meet *Alabama Power*’s contemporaneity requirement. EPA Br. 94. However, EPA’s brief addresses only a period of “ten years,” *id.*, and does not even attempt to argue that a twenty- or thirty-year period is contemporaneous. Because the PAL provisions undisputedly allow emissions increases to be offset by decreases that occurred as many as twenty or thirty years earlier, they violate *Alabama Power*’s contemporaneity requirement.

Even as to ten years, EPA’s position fails. According to its brief, *Alabama Power* “held that because the PSD provisions of the statute were concerned with controlling a facility’s impact on air quality, in order to determine whether PSD applies, a facility must be able to consider whether there is a ‘net increase of any pollutant from contemporaneous changes.’” EPA Br. 93 (emphasis added). EPA’s brief never even attempts to justify a ten-year (much less twenty- or thirty-year) netting period in light of these air quality concerns. Nor could it. When emissions increase in the here and now, air quality worsens—with resulting implications for public health and the environment. It is cold comfort for breathers to know that there were decreases ten, twenty, or thirty years previously. *See* Envir. Br. 29.

C. EPA’s PAL Provisions Undermine the Act’s Air Quality Goals.

Confronted with the stark conflict between its PAL provisions and the Act’s air quality goals, EPA resorts to mischaracterization. According to EPA, Environmental Petitioners believe that “NSR’s purpose is to compel emissions reductions from existing sources,” when (the agency

claims) the program is in reality designed “to limit increases of emissions.” EPA Br. 94 (emphasis in original). However, Environmental Petitioners’ brief expressly argued that EPA’s PAL provisions undermine the Act’s air quality goals “by allowing increases in current emissions.” Envir. Br. 30. The features of EPA’s PAL rule that allow such increases—specifically, its exemption of emissions increases up to levels prevalent ten, twenty, or thirty years earlier—are undisputed.

Unable to deny what its rule so clearly allows, EPA cites case studies under PAL programs that did not share the fundamental flaws challenged here—*i.e.*, reliance on emissions baselines ten, twenty, or thirty years old. *See* EPA Br. 95. Indeed, these “fundamental differences” led a state air official to protest EPA’s reliance on these case studies—precisely because, *inter alia*, the state’s PAL was “of shorter duration than the EPA proposal[,] permit[ted] a ‘look back’ of only 5 years,” and included a “hard and fast requirement” that the PAL be revised at renewal. NRDC Reconsideration Comments at 14-16[JA ___ - ___].

Finally, EPA claims authority to balance environmental protection against economic growth. EPA Br. 95. However, EPA cannot balance away §111(a)(4)’s express requirement that a change undergo NSR when it increases emissions—nor may EPA violate the fundamental principles that agency interpretations must be “reasonable,” *see Chevron*, 467 U.S. at 845, and must meet basic standards of reasoned agency decisionmaking. Envir. Br. 10-11. For reasons stated above and in Environmental Petitioners’ opening brief, the 2002 PAL rule transgresses all of these principles.

V. The 1992 and 2002 Rules’ Exclusion of Emissions Increases Attributable to “Demand Growth” is Unlawful and Arbitrary.

EPA’s rule unlawfully discounts “that portion of the unit’s emissions following the project ... that are ... due to product demand growth,” 40 C.F.R. §51.165(a)(1)(xxviii)(B)(3),

even where the emissions are also due to the physical or operational change in question. Envir. Br. 31. In response, EPA does not dispute Environmental Petitioners' argument that such a categorical demand growth exemption would violate the Act, *see* Envir. Br. 31-32, but instead asserts that it is "incorrect" to construe the rule as granting such an exemption. EPA Br. 96. But EPA offers no reason to doubt the rule's categorical provision that emissions "unrelated to the particular project" include "any increased utilization due to product demand growth." 40 C.F.R. §51.165(a)(1)(xxviii)(B)(3).

Though EPA claims that the "description in the preamble of the effect of the demand growth exclusion is accurate," EPA Br. 96, a preamble cannot alter regulatory text. *See National Wildlife Federation v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002). Thus, EPA's explanation does nothing to resolve the direct conflict between the rule's categorical "demand growth" exclusion and the Act's requirement that NSR apply to "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any pollutant emitted." CAA §111(a)(4). That conflict with the statute renders the demand growth provision unlawful. Moreover, EPA arbitrarily has offered no reasoned explanation for its rule text.

Even if EPA correctly reads the demand growth provision to exclude only emissions increases due solely to demand growth that are entirely unrelated to a preceding physical or operational change, the agency arbitrarily fails to offer a reasoned explanation for abandoning its 1998 determination that there is no "plausible distinction" between those emissions increases resulting from a change and those due solely to demand growth. Envir. Br. 32 n.14 (citing 63 Fed. Reg. 39860-61). EPA's brief merely offers the conclusory assertion that "emissions increases from demand growth and physical changes can be distinguished," without explaining why that is so. *Id.* 95-97 (emphasis added). *See also* 67 Fed. Reg. 80203[JA___](same).

Considering EPA's repeated failures to provide such an explanation, it is apparent that the agency cannot. Instead, the rule leaves to the unfettered, unreviewed discretion of self-interested sources the authority to invent those distinctions. The indeterminate demand growth exclusion, and EPA's failure to explain or justify it, are the essence of arbitrary decisionmaking. *See Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

VI. EPA Acted Unlawfully and Arbitrarily in Exempting Emissions-Increasing Changes at So-Called "Clean Units" From NSR.

Under EPA's rules, a change that "increases the amount of any air pollutant emitted" (§111(a)(4)) at a so-called clean unit escapes NSR—simply because the emissions increase does not exceed a still higher historic emission limitation. *Envir. Br.* 33-34. Because "most emissions units are operating at an activity level much lower than the allowed activity level," 67 Fed. Reg. 80199/2, the clean unit provision enables sources to increase their actual emissions dramatically without undergoing NSR. EPA does not dispute that the clean unit provision exempts from NSR changes that cause actual emissions to rise. Indeed, because changes that do not increase emissions (or that increase them by insignificant amounts) were already exempt from NSR, there would be no reason for EPA to adopt the "clean unit" provision other than to exempt changes that do significantly increase emissions.

EPA's sole textual defense of this result is untenable. The agency plucks one word—"increases"—from §111(a)(4), and argues that that word leaves the agency free to define an increase however it chooses. *EPA Br.* 108-09. Congress did not enact a one-word definition, however, but instead required NSR for any change that "increases the amount of any air pollutant emitted" by the source. §111(a)(4)(emphasis added). EPA's brief—like its rule—does not even address these other words, which decisively refute the agency's attempt to conflate the amount of a pollutant "emitted" by a source with the source's "emission limitation." *Envir. Br.* 39. Nor does

EPA's brief address the other contemporaneous Clean Air Act provisions showing that Congress knew how to reference an "emission limitation" when it wished to do so. *Id.*¹⁰

Lacking a tenable statutory argument, EPA advances the semantic assertion that its clean unit rule is not an exemption, but an "alternative NSR applicability test." EPA Br. 103. To the contrary, EPA's rule would indeed exempt from NSR a subset of the changes described in §111(a)(4). Envir. Br. 36. *See also* 61 Fed. Reg. 38249, 38255-58 (July 23, 1996) [JA ___] (NSR proposal repeatedly called the clean unit provision an "exclusion"). In any event, calling the provision an alternative test rather than an exemption does not entitle EPA to flout fundamental principles of statutory interpretation by ignoring language in §111(a)(4) and other provisions.

EPA touts the alleged safeguards of the agency's clean unit provision. EPA Br. 111-113. But the agency does not dispute any of the key differences between the statutory NSR safeguards and the rule's watered-down substitutes. *See* Envir. Br. 34-36. Indeed, the agency expressly disclaims any argument that these differences are *de minimis*. EPA Br. 108 n.60.

EPA attempts to justify these differences on policy grounds. However, its claim that the exemption will "create an environmental benefit" by giving sources "an incentive to install air pollution controls" (EPA Br. 102) is refuted by the very study on which the agency relies. Envir. Br. 37.

The argument that the exemption is needed to promote "flexibility to make rapid changes" (EPA Br. 102) ignores the flexibility built into §111(a)(4) and EPA's preexisting regulations, under which a change that produces no emissions increase—or a *de minimis*

¹⁰ Industry intervenors argue that the "clean unit" provision "embodies the 'potential-to-potential' approach." Ind. Interv. Br. 12-13, 26. But under §111(a)(4), any change that "increases the amount of any air pollutant emitted" by a source triggers NSR, whether or not the source's potential to emit has increased. *See* Envir. Interv. Br. 2-11 (refuting industry's interpretation).

increase—was already exempt from NSR. *See* 40 C.F.R. §§51.165(a)(1)(x) and 52.21(b)(23)(i). Where a change does produce a significant emissions increase, the threat to health and welfare is not diminished by dubbing the unit “clean.” *Envir. Br.* 37.

Ultimately, however, EPA’s policy arguments are irrelevant. Whatever EPA may think of the statutory NSR program, the agency lacks authority to shunt that program aside and substitute an alternative, weaker program of the agency’s choosing. *See Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002).

VII. EPA’s Attempt to Exempt Emissions-Increasing “Pollution Control Projects” Must Fail.

Like the 2002 and 1992 rules, EPA’s brief advances no textual basis for concluding that emissions-increasing “pollution control projects” (“PCPs”) fall outside §111(a)(4)’s reference to “any physical change in, or change in the method of operation of, a stationary source.” To the contrary, in light of the 2002 and 1992 preambles’ express concession that PCPs are indeed physical or operational changes, *Envir. Br.* 42, EPA’s attorneys wisely concede that “EPA has never claimed that installing a PCP is not a physical change in the literal sense of the phrase.” *EPA Br.* 119 n.66.

EPA falls far short of the “extraordinarily convincing” showing necessary to justify divergence from the Act’s plain meaning. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). As to “statutory structure” and “historical fact,” *see id.*, EPA advances no real affirmative arguments of its own, instead contenting itself with unavailing attacks on Environmental Petitioners’ arguments.

First, EPA argues that Congress’s enactment of narrow PCP exemptions does not undermine EPA’s broader exemptions. *EPA Br.* 120-21. This stands normal statutory

interpretation on its head. *See Sierra Club*, 294 F.3d at 160.¹¹ Second, EPA’s half-hearted suggestion that the 1977 Amendments ratified the PCP exemption must be rejected for reasons already stated, *Envir. Br.* 44, and confirmed by the agency, *EPA Br.* 38-40.

EPA is left to argue (*EPA Br.* 117, 119-120) that applying §111(a)(4) as written would produce “absurdities.” But the sole incremental effect of EPA’s PCP exclusion is to exempt projects that increase emissions significantly.¹² EPA concedes—as §111(a)(4) itself establishes—that NSR is designed “to limit emissions increases resulting from physical or operational changes.” *EPA Br.* 73-74 (emphasis in original). *See also Envir. Br.* 45.

The alleged safeguards associated with the PCP exemption (*EPA Br.* 121-25) fall short of the statutory NSR safeguards. *Envir. Br.* 41. EPA’s policy preference for weaker safeguards cannot justify administratively amending the Act. *See Sierra Club*, 294 F.3d at 161.

VIII. EPA’s 1992 Rule Unlawfully and Arbitrarily Exempts Emissions Increases From New Source Performance Standards.

The 1992 rule unlawfully and arbitrarily allows a physical or operational change that “increases the amount of any pollutant emitted” by a utility to evade NSPS simply because the increased emissions do not exceed the highest level that the source physically could have achieved when it was five years newer. This is the case even if the source never could have achieved that historical maximum level again in the absence of the change. 57 Fed. Reg. 32314,

¹¹ Contrary to EPA’s assertion (at 120 n.67), Environmental Petitioners did not waive arguments concerning statutory context and legislative history. Environmental Petitioners’ objection to the PCP exemption is that it diverges from §111(a)(4), and their context and history arguments are simply additional authorities in support of that objection. *See* note 5, *supra*. In any event, §182(e)(2), which NRDC did raise below (*see* NRDC 1991 Comments 14[JA ____]); shows Congress knew how to craft PCP exemptions. *See Envir. Br.* 43.

¹² A project that does not increase emissions at all is exempt from NSR under §111(a)(4), and a project that increases emissions by insignificant amounts is exempt under EPA’s preexisting 1980 *de minimis* regulations. *See, e.g.*, 40 C.F.R. §51.165(a)(1)(v)(A), (a)(1)(x).

32339/2 (July 21, 1992)(§60.14(h)). *See also* Envir. Br. 46. Thus, under the 1992 rule, generating equipment that has lost capacity due to deterioration and age is allowed to upgrade, restore lost capacity, increase the unit's maximum ability to pollute to what it was five years before, and increase pollution significantly – all without meeting NSPS as Congress prescribed when facilities make such physical changes.¹³ EPA's brief offers no textual justification for this interpretation, and indeed there is none, since NSPS is required for “any physical change ... that increases the amount of any air pollutant emitted.” §111(a)(4).

EPA effectively admits that the rule change was designed to exempt previously regulated pollution increases from non-routine projects, in the name of facility “flexibility”¹⁴—without requiring controls for the projects and their resulting pollution increases. EPA Br. 101 (rule meant to give “facilities some flexibility in scheduling non-routine repair, replacement, and maintenance projects”). Nowhere does EPA offer a reasoned explanation why this approach comports with §111(a)(4), or why Congress would adopt a pollution control technology-based program that allows sources to make changes to upgrade deteriorated units, increase actual emissions significantly to maximum theoretical levels from five years before, and evade the NSPS technology meant to be installed when such changes occur.

¹³ EPA acknowledged in the 1992 preamble that a source's maximum physical ability to pollute immediately before a physical change often will be substantially lower than it was just a few years earlier. 57 Fed. Reg. at 32330/2-3 (reduction in maximum ability to pollute occurs where the source “has broken down and is in need of repairs,” or where the source has merely suffered some “physical deterioration”).

¹⁴ “Routine” repair, replacement and maintenance projects were already exempt from the NSPS modification regulations. 40 C.F.R. §60.14(e)(1).

CONCLUSION

Environmental Petitioners respectfully request that the Court grant their petitions, and enter the relief requested in their opening brief.

DATED: September 20, 2004.

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Proof Reply Brief of Environmental Petitioners** contains 6,655 words, as counted by counsel's word processing system.

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Attachment

No. 04-1763

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB;
NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP,
Plaintiff-Intervenor-Appellants,

v.

DUKE ENERGY CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES (PAGE-PROOF VERSION)

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permit proceedings; that the owner or operator demonstrate that emissions will not contribute to a NAAQS violation; and that “the proposed facility is subject to the best available control technology [(“BACT”)].” Id. 7475(a); see id. 7410(a)(2)(C) (SIPs must contain NSR programs), 7479 (defining terms).

The PSD provisions define “construction” to include “modification,” which is defined in turn by reference to the statutory provisions for the separate New Source Performance Standards (“NSPS”) program. Id. 7479(2)(C). Those provisions define the crucial term “modification” 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.” Id. 7411(a)(4).

c. Differences between NSPS and PSD. — Although NSPS, like PSD, is a CAA program applying in some respect to “new” sources of air pollution, the programs differ in vital respects. The NSPS program, enacted in 1970, directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories. Id. 7411. These standards are based on application of the best demonstrated system of emission reduction and apply regardless of the actual effect that a source’s emissions has on local air quality. Id.

In contrast, when Congress enacted PSD in 1977, its purpose was to prevent a significant decline of air quality in areas where ambient air quality standards

were already being met.²¹ Id. 7470; see Ala. Power v. Costle, 636 F.2d 323, 346–51 (D.C. Cir. 1979). Such a decline can occur when the addition of new sources or modification of existing sources increases the overall annual load of pollutants. Thus, rather than focus on technology-based performance standards like NSPS does, the PSD program focuses directly on the effect of new construction and modification on local air quality. 42 U.S.C. 7475(a)(3). In other words, Congress enacted PSD to regulate sources that might contribute to the significant degradation of local air quality despite NSPS and other CAA provisions. Id. 7470(1); see Ala. Power, 636 F.2d at 346–51; 44 Fed. Reg. 51,924, 51,931 (1979).

Thus, in developing regulations after PSD’s enactment, EPA understood that the two programs had different purposes and structures and that PSD regulations need not adopt NSPS-based definitions and interpretations. In particular, EPA concluded that the term “modification” could be interpreted differently in the PSD and NSPS contexts. E.g., 43 Fed. Reg. at 26,394. The definition of “modification” under PSD has continued to differ from that for NSPS in critical respects.

²¹ PSD was initially a regulatory program resulting from a lawsuit. 39 Fed. Reg. 42,510 (1974). Congress significantly expanded this program’s requirements and scope in 1977. 43 Fed. Reg. 26,388, 26,390 (1978).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Proof Reply Brief of Environmental Petitioners** has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 20th day of September 2004, upon the following:

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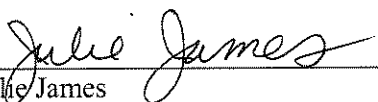
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