BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Final Rule:	)	
Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion	)	RIN 2060-AK28

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), the undersigned organizations[1] petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 68 Fed. Reg. 61,248, *et seq.* (Oct. 27, 2003). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).[2] Petitioners request that the Administrator stay the rule during the reconsideration. *See id.*[3]

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[1] Petitioners are: Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, 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.

[2] Petitioners believe that their extensive comments on the proposed rulemaking were sufficiently specific to put EPA on notice of the objections raised in this petition. However, the legal rationale offered by EPA in support of the proposed rule was sparse,

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I. EPA is Unable to Demonstrate Legal Authority for its New Interpretation of "Any Physical Change in . . . a Stationary Source."

EPA acknowledges that it has reinterpreted the statutory term, "any physical change in . . . a stationary source," in order to accommodate the breadth of the exemption that the new rule creates.[4] In the preamble to the final rule, the agency puts forward a number of new rationales (covering more than five pages in the Federal Register) intended to demonstrate legal authority for its new statutory interpretation. 68 Fed. Reg. at 61,268/3-73/3. For example, EPA argues that Congress did not express a clear intent as to whether the activities exempted in the final rule should trigger NSR and claims that its rule represents a reasonable interpretation on that issue. *Id.*

Although Section 307(d)(3)(C) of the Act requires EPA to accompany any proposed rule with "the major legal interpretations and policy considerations underlying [it]," 42 U.S.C. § 7607(d)(3)(C), the proposed version of this rule made no mention of the rationales that appeared in the preamble to the final version.[5] The grounds for Petitioners'

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and Petitioners could not have anticipated the array of new legal and factual justifications asserted by EPA in the preamble to the final rule. Out of an abundance of caution, Petitioners submit this petition to ensure that they have an adequate opportunity to raise -- and EPA has an adequate opportunity to respond to -- their objections to the new rationales that appear in the preamble to the final rule.

[3] Petitioners hereby incorporate by reference every document cited in this petition.

[4] "[W]e have previously interpreted 'change' such that virtually all changes, even trivial ones, are encompassed by the CAA. . . . Upon further consideration of the history of our actions, the statute, and its legislative history, EPA believes that a different view is permissible, and, for policy reasons discussed above, more appropriate. Therefore, we adopt this view prospectively in today's action." 68 Fed. Reg. at 61,272/3.

[5] In the notice of proposed rulemaking's "Legal Basis" section, which was only two paragraphs long, EPA merely asserted that "Congress did not intend to make every

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objections to those rationales thus "arose after the period for public comment" and are appropriately raised in this petition. *See id.* § 7607(d)(7)(B).

Each of the objections set forth below is "of central relevance to the outcome of the rule," *id.*, because each one demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious. *Id.* § 7607(d)(9)(A).

A. EPA's Final Rule Contravenes the Plain Intent of Congress.

There is no merit in EPA's claim that Congress expressed no intent on the question at issue. To the contrary, as shown below, Congress expressed such an intent, and EPA's rule contravenes it. Thus, EPA's claim for *Chevron* deference (*see*, *e.g.*, 68 Fed. Reg. 61270-73) must be rejected. *See Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (this Court "ha[s] always seen the first step [of *Chevron*] as one conducted under *de novo* review," and "[a]n agency is given no deference at all on the question whether a statute is ambiguous") (emphasis added); *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984) (if Congress has expressed an intent on the issue at hand, that intent "is the law and must be given effect").[6]

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activity at a source subject to the major NSR program," and that the proposed rule "will improve and help carry out the purposes" of the pre-existing regulatory exemption for "routine maintenance, repair and replacement." 67 Fed. Reg. at 80,296/2.

[6] On the specific issue posed in *Chevron*, the Supreme Court held that Congress had not expressed a clear intent, and hence reviewed it under Step Two. However, EPA's apparent attempt to infer that all new source review issues are therefore within Step Two is meritless. While the *Chevron* Court noted the paucity of statutory guidance on the meaning of the term "stationary source," *see, e.g.,* 467 U.S. at 859-63, here EPA's interpretation transgresses the intent of Congress expressed in Section 111(a)(4), other provisions of the Act, and the statutory purposes.

Section 111(a)(4). The Clean Air Act requires preconstruction permits for new major, stationary sources of air pollution as well as modifications of such sources. *See* 42 U.S.C. § 7475(a) (Prevention of Significant Deterioration, or "PSD," permits in attainment areas) *and* 42 U.S.C. §§ 7502(c)(5), 7503 (Nonattainment New Source Review, or "NSR," permits in nonattainment areas). The Act defines "modification" for NSR purposes 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), 7479(2)(c), 7501(4). Thus, the Act broadly applies NSR to "any physical change," and does not exempt, or authorize exempting, any such changes. Nonetheless, EPA's rule unlawfully purports to exempt certain physical changes from NSR based on, *inter alia*, their cost and whether they alter the source's original design. *See, e.g., Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997) ("this court has consistently struck down administrative narrowing of clear statutory mandates").

Indeed, EPA itself confirms in the preamble to the final rule that the term "physical change" in the Act's definition of "modification" could "encompass a range of activities from periodically replacing filters in production machinery, to once-in-a-lifetime anticipated replacement of a component, to complete replacement of a production unit." 68 Fed. Reg. at 61,271/3. The agency acknowledges that, until now, it has always read "any physical change" to refer to physical activity falling anywhere within that range. *Id.* at 61,272/3 ("we have previously interpreted 'change' such that virtually all changes, even trivial ones, are encompassed by the CAA"). But now, EPA

has reinterpreted "any physical change" to refer only to the uppermost end of that range – the narrow domain of fundamentally transforming physical changes "not usually seen in the industry." *Id.* at 61,257/3; *see also id.* at 61,255/1 (new rule "automatically excludes from major NSR functionally equivalent replacements that do not result in a significant change to the fundamental characteristics of the process unit"). This violates the Act, which requires NSR for "any physical change" that increases emissions -- not just for some of them.[7]

Furthermore, the Seventh Circuit's decision in *WEPCO* provides strong support for applying § 111(a)(4) as written -- *i.e.*, to "any physical change" that increases emissions. In *WEPCO*, the company had argued, as EPA does now, that "a unit should not be deemed 'modified as a result of the replacement of equipment with equipment similar to that replaced . . . [because] such like-kind replacement does not 'change or alter' the design or nature of the facility." *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 908 (7th Cir. 1990). The Seventh Circuit found "no reason to believe" that Congress intended "any physical change" to be read so narrowly. *Id.* at 909:

> [W]hether the replacement of air heaters and steam drums is a 'basic or fundamental change' in [defendant's facility] is irrelevant for our purposes, given Congress's directions on the subject: 'The term 'modification' means any physical change . . . .

[7] EPA argues that "'any' is simply a modifier that does not change the meaning of the word it modifies." 68 Fed. Reg. at 61,272/3 n.15. But EPA itself does not deny that the plain meaning of "change" encompasses the activities exempted by the October 2003 rule. Under the statutory term "any," all such activities, not just some of them, constitute modifications.

Id. at 908 (emphasis in original). *See also id.* at 913 ("the modification provision applies to any physical change, without regard to cost, that causes an increase in emissions") (emphasis added). Thus, the Seventh Circuit squarely held that the very interpretation of "any physical change" that EPA now advances in support of its new rule contradicted the intent of Congress clearly expressed in the language of the statute.[8]

Statutory Structure and Purpose. Under Step One of *Chevron*, 467 U.S. at 843 n.9, agencies and courts must respect the intent of Congress ascertained through "traditional tools of statutory construction." Among those tools are the statutory context. *See*, *e.g.*, *Pilon v. USDOJ*, 73 F.3d 1111, 1122 n.9 (D.C. Cir. 1996) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citation and internal quotations omitted). And of course, a key component of context is statutory purpose. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998) ("We are not quite as sanguine as the district court that, in applying the first prong of *Chevron*, it suffices to look only at the plain language of the statute. In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (emphasis added; brackets, citation and

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[8] EPA is thus incorrect in suggesting that, in *WEPCO*, the Seventh Circuit simply held that the statute did not require the interpretation of "any physical change" that the company had advanced. 68 Fed. Reg. at 61,273/1. What the Seventh Circuit actually held was that WEPCO's interpretation of "any physical change" conflicted with the intent of Congress as expressed in the clear language of the statute. *WEPCO*, 893 F.2d at 908-09.

internal quotations omitted); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (under *Chevron* Step One, Court rejected EPA interpretation that would "subvert the purposes of the [Clean Air] Act" by allowing delay in pollution control deadlines).

EPA has pointed to nothing in the statutory context or purpose that would justify interpreting the phrase "any physical change" to mean anything other than what it says. To the contrary, the substantive provisions and purposes of NSR envision careful review, and application of specified safeguards (such as BACT, LAER, and offsets), before pollution increases are allowed from new or modified major sources.

In nonattainment areas, NSR serves as a key component of the statutory program for attaining health-based air quality standards -- an objective the Supreme Court has described as the "heart" of, and "central" to, the Act. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 66 (1975); *Union Electric Co. v. EPA*, 427 U.S. 246, 258 (1976). Thus, in *Chevron* EPA told the Supreme Court that

> the new source review program was created to ensure that industrial growth did not worsen air quality. As the Senate Report explained, a "major weakness in implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines." S. Rep. No. 95-127, supra, at 55, 3 Leg. Hist. 1429. See also Hancock v. Train, 426 U.S. 167, 194 (1976). Based on this experience, it was concluded that "[s]ome mechanism is needed to assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards. * * * [This will] assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline" (S. Rep. No. 95-127, supra, at 55, 3 Leg. Hist. 1429). See also 123 Cong. Rec. 18018 (1977) (remarks of Sen. Muskie), 3 Leg. Hist. 716; 123 Cong. Rec. 18038 (1977) (remarks of Sen. Stafford), 3 Leg. Hist. 771. n.33.

> In sum, the overarching purpose of the new source review program was to assure that new plants and equipment would not prejudice the transition from nonattainment to attainment.

EPA Opening Merits Brief in *Chevron, U.S.A. v. NRDC*, S. Ct. 82-1005 (Aug. 31, 1983), 1982 Lexis U.S. Briefs 1005 (emphasis added). *Accord*, *id.* (NSR program "is designed by [*sic*] ensure that new 'sources' do not exacerbate the levels of pollution and thereby prevent reasonable further progress and timely attainment") (emphasis added); *id.* (NSR "is inextricably tied to the attainment or nonattainment of ambient air quality standards") (emphasis added); EPA Reply Merits Brief in *Chevron* (Feb. 17, 1984), 1982 Lexis U.S. Briefs 1005 ("the purpose of new source review is to ensure that emissions from new or modified sources do not prejudice the transition to attainment") (emphasis added); *id.* ("the statutory purpose of new source review" is "to ensure that emissions resulting from economic growth and industrial expansion do not interfere with the goal of attainment") (emphasis added).

In the 1981 regulation at issue in *Chevron*, EPA provided that emissions increases at a source did not constitute a modification if offset with contemporaneous decreases at the source, but at the same time the agency cautioned that, "[i]n order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." *Chevron*, 467 U.S. at 858 n.30 (quoting rulemaking preamble). *See also* 44 Fed. Reg. 3,277 (Jan. 16, 1979) (preamble to an EPA NSR proposal, quoted by EPA in its *Chevron* merits brief, stated that "there is less need to subject a modification of an existing facility to ... stringent requirements if the modification is accompanied by sufficient intrasource offsets so that

there is no net increase in emissions") (emphasis added); 44 Fed. Reg. 51,933 (Sept. 5, 1979) (preamble to another EPA NSR proposal, quoted by EPA in its *Chevron* merits brief, stated: "If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment.") (emphasis added).

EPA told the Supreme Court that the 1981 regulation "allow[ed] industrial growth that does not adversely affect air quality while prohibiting both the construction of all new facilities and the renovation of existing facilities for which there is a non-de minimis emissions increase." EPA *Chevron* Reply Br. (emphasis added). EPA explained that the 1981 regulation "is consistent with the objectives of the NSR program," because *inter alia* "[i]t ensures that emissions from new or modified sources do not prejudice attainment," it "holds air quality harmless on the road to attainment," and "it requires review of those projects that could interfere with achievement of national air quality standards." EPA *Chevron* Opening Br. (emphasis added). *Accord*, *id.* ("The plantwide definition is well suited to the NSR program because it requires new source review in those instances where the prospect of attainment might be threatened by a net increase in emissions.") (emphasis added).

The October 2003 regulation fails these very tests. A physical change that produces no net increase in emissions at a source, or even one that produces a *de minimis* increase, was already exempt from NSR under EPA's preexisting regulations. In sharp contrast to that approach, the October 2003 regulation exempts physical changes that do cause significant net increases in emissions, thus jeopardizing efforts to reach attainment.

Accordingly, the October 2003 regulation fundamentally disserves the purposes of nonattainment NSR.

With respect to PSD NSR, the same analysis holds true. In PSD areas, NSR is "the principal mechanism for monitoring consumption of allowable increments and for preventing significant deterioration," *Alabama Power Co. v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1979) (emphasis added), thus facilitating achievement of PSD's goals, which -- as repeatedly emphasized by Congress in the Act itself -- encompass air quality.

The purposes of th[e PSD] part are as follows:

> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;
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> (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
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> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
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> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
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> (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7470 (emphasis added).

By allowing physical changes to escape NSR even when they result in significant emissions increases, EPA fundamentally disserves each and every one of these purposes. For example, the unreviewed emissions increases authorized by the rule manifestly contravene PSD NSR's purpose "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." *Id.* § 7470(5) (emphasis added).

Construing other Clean Air Act provisions, which listed air quality as one among several factors, the D.C. Circuit has indicated that air quality properly dominates the task of interpretation. *Husqvarna AB v. EPA*, 254 F.3d 195, 200 (D.C. Cir. 2001) (construing Section 213, Court holds: "The EPA did not deviate from its statutory mandate or frustrate congressional will by placing primary significance on the 'greatest degree of emission reduction achievable' and by considering cost, noise, energy and safety factors as important but secondary factors. The overriding goal of the section is air quality and the other listed considerations, while significant, are subordinate to that goal.") (emphasis added). *Accord*, *American Petroleum Institute v. USEPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) (even though Section 211(k)(1) authorizes EPA to consider non-air-quality issues such as "cost" and "energy requirements," Court held: "The overriding goal is air quality, and the other listed considerations are subordinate to that goal.") (emphasis added). There is no reason to conclude that air quality should receive any less weight for NSR purposes than in construing these other provisions. In any event, whether air quality is the dominant factor, it clearly is an important one, that is fundamentally disserved by allowing the unreviewed

significant emissions increases exempted by the October 2003 rule. Accordingly, the statutory context and purpose offer no basis for overriding the broad applicability of Section 111(a)(4) to "any physical change" that increases emissions.[9]

By allowing massive increases in actual emissions, with the meaningless constraint that sources not exceed potential emissions levels, the new rule actively confounds these statutory purposes. EPA has noted previously that such actual emissions increases -- constrained only by permitted allowables -- would interfere with the assurance of economic growth in a manner consistent with the preservation of existing clean air resources:

> Finally, one of the most troubling side effects of the Exhibit B proposal is that it could ultimately stymie major

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[9] EPA places great weight on Section 101(b)(1), which provides that among the Clean Air Act's purposes is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7410(b)(1), *cited in* 68 Fed. Reg. at 61,271/1, and on Section 160(3), which provides that among PSD's purposes is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). *See* 68 Fed. Reg. at 61,271/1. But nothing in these provisions states or suggests that exemptions should be carved out of the phrase "any physical change." To the contrary, Congress believed that the application of NSR would promote economic growth. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 133 ("if each new or modified 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"). With regard to the PSD program specifically, the four statutory purposes that EPA conspicuously ignores express Congress's intent to protect public health and welfare – as well as natural resources – from air pollution (even pollution that does not violate national air quality standards), to prevent deterioration of air quality, and to ensure careful evaluation of "any decision to permit increased air pollution" in clean air areas. 42 U.S.C. § 7470(1), (2), (4), and (5). EPA's decision to allow sources to undertake emissions-increasing equipment replacements without undergoing NSR contravenes all five statutory purposes of the PSD program. In any event, statutory purposes cannot override substantive statutory provisions such as Section 111(a)(4). *See*, *e.g.*, *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986).

> new source growth by allowing unreviewed increases of emissions from modifications of existing sources to consume all available increment in PSD areas. After the minor source baseline date has been established in an area, all increases, whether subject to major NSR or not, consume increment. As illustrated in the example above, under the CMA Exhibit B test an old grandfathered source could experience a "significant" net increase in annual actual emissions, yet it would not necessarily be subject to review. Since increment consumption after the minor source baseline date is calculated based on actual emissions increases, the "minor" modification of the grandfathered source would still consume increment. If a major new source with state-of-the-art emission controls proposes to locate in an area in which the increment has been consumed in this manner, it would be barred from building unless and until the increment problem was resolved. At the same time, older plants would continue to be able to make changes resulting in significant unreviewed, and possibly uncontrolled, actual emission increases.

61 Fed. Reg. 38250, 38270 (July 23, 1996).

In short, the plain language of Section 111(a)(4), buttressed by the statutory context and purposes, express Congressional intent that NSR-triggering modifications encompass the activities exempted by EPA's October 2003 rule.

B. EPA Has Failed to Make the "Extraordinary Showing" Necessary to Justify Diverging from the Act's Plain Meaning.

The D.C. Circuit has held that an agency cannot contravene the literal meaning of statutory language unless it demonstrates "that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). In this case, EPA has not made -- and cannot make -- the "extraordinarily convincing justification" needed to satisfy that test. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

1. EPA is Unable to Demonstrate That, as a Matter of Historical Fact, Congress Did Not Mean to Apply NSR to "Any Physical Change in . . . a Stationary Source" That Increases Emissions.

EPA has cited no evidence that, as a matter of historical fact, Congress did not mean NSR to encompass "any physical change" that increases a stationary source's emissions.[10] Its assertions concerning congressional purpose are, as shown below, baseless.

2. EPA is Unable to Demonstrate That, as a Matter of Logic and Statutory Structure, Congress Could Not Have Intended to Apply NSR to "Any Physical Change in . . . a Stationary Source" That Increases Emissions.

EPA itself characterizes the literal interpretation of "any physical change" – an interpretation that lends "sweeping coverage" to the term, Brief for Respondent EPA in *TVA v. EPA*, Case No. 02-1231-E (11th Cir.), at 163 – as being "based on permissible constructions of the statute" and a "reasonable accommodation of the Clean Air Act's competing policies." 68 Fed. Reg. 61272/3 n. 14. Moreover, EPA announces that it "shall continue to seek deference" for the literal interpretation "in ongoing enforcement litigation." *Id.* The agency cannot credibly claim, then, that a literal reading of "any physical change" would lead to anomalous or absurd results.

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[10] The two legislative history citations offered by EPA in the final preamble, *see* 68 Fed. Reg. 61270/1, are unavailing. Both of them relate to new source performance standards, not NSR, and neither supports EPA's attempt to limit the reach of the statutory phrase "any physical change." *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 185 ("[N]ew sources must minimize emissions in order to maximize growth potential"), *id.* ("Building control technology into new plants at the time of construction will plainly be less costly then requiring retrofit when pollution ceilings are reached."). *See also* 116 Cong. Reg. 32918 (September 21, 1970) ("The concept is that wherever we can afford or require new construction, we should expect to pay the cost of using the best available technology to prevent pollution."). In any event, EPA cannot "resort to legislative history to cloud a statutory text that is clear." *See Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994).

Moreover, interpreting "any physical change" in accordance with its plain meaning would not lead to anomalous or absurd results. The determination that a physical change has occurred within the meaning of Section 111(a)(4) does not, by itself, trigger NSR. Instead, NSR applies only to those physical changes that increase emissions. Furthermore, under EPA's pre-existing NSR regulations, not just any emissions increase triggers NSR, but only significant increases surpassing specific *de minimis* thresholds. 40 C.F.R. §§ 51.165(a)(1)(x) and 52.21(b)(23)(i) (establishing significance thresholds for five pollutants; *e.g.*, the significance threshold for nitrogen oxides emissions is set at 40 tons per year); 68 Fed. Reg. 61273/3 ("An existing source—whether grandfathered or not—triggers NSR only if it makes a physical or operational change that results in an emissions increase. Thus, a facility can conceivably continue to operate indefinitely without triggering NSR— making as many physical or operational changes as it desires—as long as the changes do not result in emissions increases. This outcome is an unavoidable consequence of the plain statutory language ....") (emphasis added). Since changes that result in no or *de minimis* emissions increases are already exempt from NSR under EPA's pre-existing regulations, the sole effect of EPA's new regulation is to exempt physical changes that do produce significant emissions increases. It is utterly implausible to argue that Congress "almost surely could not have meant" to avoid such increases.

C. EPA's Attempts to Justify Its Interpretation Are Meritless.

In an effort to support its new interpretation, EPA advances several meritless arguments. First, EPA claims that Congress "generally" intended existing sources to escape NSR. Second, EPA argues that the purpose of NSR is simply to define the

opportune time for sources to install pollution controls. Third, the agency invokes a congressional ratification argument. All of these arguments are baseless.

1. EPA Cannot Shunt Aside the Express Terms of Section 111(a)(4) in Favor of an Alleged Congressional Intent that Existing Sources "Generally" Avoid NSR.

EPA argues that a literal reading of "any physical change" would "fail to give full effect to Congress's decision that existing sources generally would not be required to obtain permits." 68 Fed. Reg. at 61,270/1. This argument must be rejected.

First, the word "generally" appears nowhere in Section 111(a)(4), which instead prescribes a specific test defining what constitutes a "modification" triggering NSR. EPA lacks authority to shunt that test aside in favor of a presumption of the agency's choosing -- especially one that lacks any support in the statute, legislative, history and purposes, and indeed contravenes all of them.

Second, Congress made clear when it enacted the "modification" definition in 1970 that once a source undertook activity meeting that definition, it no longer would be an "existing source." Specifically, Congress defined "new source" to include "modification" while defining "existing source" simply as "any stationary source other than a new source." Pub. Law 91-604 § 4(a) (inserting new §§ 111(a)(2) and (a)(6)); *see also* Report of the House Committee on Interstate and Foreign Commerce on the Clean Air Act Amendments of 1970, Rep. No. 91-1146, 91st Cong, 2d Sess., June 3, 1970 ("new sources may take the form either of entirely new facilities or expanded or modified facilities . . . which result in substantially increased pollution"). The statutory language enacted in 1970 reflects Congress' intent that, for sources already in operation, as opposed to "entirely new" sources, "best adequately demonstrated control technology is

considered appropriate when any physical change or operational change is made which causes an increase in emissions to the atmosphere (this is a modification)." 40 Fed. Reg. 58,416, 58,417/3 (Dec. 16, 1975) (emphasis added). When Congress enacted the PSD provisions in 1977, it retained the distinction between "modified" sources and "existing" ones. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. at 144 ("Only new or modified major stationary sources are required to obtain a State permit prior to construction. (No permits are required for existing sources . . .)") (emphasis added). Thus, even if Congress had expressed an intent to generally shield "existing" sources from "new source" requirements, that intent would not apply to sources that underwent any physical or operational changes that increased emissions.

2. There Is No Merit to EPA's Claim That The Purpose Of The NSR Provisions Is Simply To Require The Installation Of Controls When it is Opportune For a Source To Do So.

EPA argues that Congress could not have meant to apply the NSR requirements to "any physical change" that increases a stationary source's emissions, because, "with respect to existing sources, the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time." 68 Fed. Reg. at 61,270/3. EPA concedes that a more inclusive definition of the sources subject to NSR would cause many sources to limit their emissions to avoid an NSR-triggering emissions increase. *See* 68 Fed. Reg. at 61270/2. However, by claiming that "the purpose of the NSR provisions is simply to require the installation of controls," *id.* 61270/3, EPA untenably argues that NSR was not designed to encourage sources to avoid such increases. *See also id.* 61270/2 ("[I]t is [not] the policy of the CAA to seek to promote emissions reductions by forcing new limits on hours of operation or rates of production of existing plants."). EPA claims

that it is inopportune for sources to install controls when they are undertaking an equipment replacement project that costs no more than twenty percent of the replacement cost of the affected process units, and, therefore, that Congress could not have intended for such projects to be subject to NSR. *Id.* EPA's argument is baseless.

Initially, it bears emphasis that EPA's current position represents a dramatic reversal of the agency's own prior recognition that nonattainment NSR's purpose is to ensure that emissions from new and modified sources do not prejudice efforts to attain the NAAQS. *See* pp. 7-9, *supra*. Indeed, the October 2003 rule's characterization turns on its head the approach taken by EPA in the 1981 rule at issue in *Chevron*, and in the agency's defense of that rule in the Supreme Court. The predecessor to the 1981 rule had decided that the trigger for NSR should be set so as to encourage installation of control technology. Specifically, that predecessor rule had rejected netting in nonattainment areas, arguing that by doing so the rule "will bring in more sources and modifications for review and will require better pollution control technology in nonattainment areas." 45 Fed. Reg. 52,698 (Aug. 7, 1980) (emphasis added), *quoted in* EPA's Opening *Chevron* Brief. The 1981 rule rejected that control-technology-based approach, instead opting to allow netting in both PSD and nonattainment areas, because "the purpose of new source review is to ensure that emissions from new or modified sources do not prejudice the transition to attainment." EPA Chevron Reply Br. (emphasis added). *Accord*, pp. 7-9, *supra* (presenting additional quotes to similar effect from EPA's *Chevron* briefs).

The October 2003 rule diametrically contradicts the approach embodied in the 1981 rule and EPA's *Chevron* briefs. Specifically, the 2003 rule untenably claims that emissions in nonattainment areas should be allowed to increase without benefit of NSR

safeguards, simply because the time is allegedly not opportune for installation of control technology. For all the reasons stated below, this position must be rejected.

Section 111(a)(4): "Increases the Amount of Any Air Pollutant Emitted." The statutory provision that EPA purports to be interpreting, Section 111(a)(4), does not even mention the installation of controls. *See* 42 U.S.C. § 7411(a)(4) (requiring NSR for "any physical change in, or change in the method of operation of, a stationary source that increases the amount of any air pollutant emitted."). Rather, the words that Congress actually used to define "modification" focus expressly on whether a change "increases the amount of any air pollutant emitted." *Id.* In light of this plain statutory language, EPA's argument that Congress intended for NSR to apply to an existing source only when it is "appropriate and opportune" for that source to install controls is untenable.[11]

Section 111(a)(4): "Change in the Method of Operation." By claiming that Section 111(a)(4) means merely that sources are required to install controls when it is opportune for them to do so, EPA reads the term "or change in the method of operation" out of the statute. Under the statute's plain terms, any change in the method of operation that increases emissions triggers NSR as a "modification" even if the operational change is unaccompanied by a physical change. An operational change can be undertaken without any significant financial expenditure and can be made without a lengthy shut down period. Thus, Congress plainly did not intend for Section 111(a)(4) to limit NSR applicability to circumstances where a source would find it economically "opportune" to

[11] In any event, "best adequately demonstrated control technology is considered appropriate when any physical change or operational change is made which causes an increase in emissions to the atmosphere (this is a modification)." 40 Fed. Reg. at 58,417/3 (emphasis added).

install controls. Rather, the plain language of that statutory provision makes it clear that Congress intended for NSR to apply whenever a source undertakes an activity that increases emissions, regardless of whether the source finds it opportune to install controls at that time.

NSR Provisions Demonstrating that Installation of Controls Is Not Necessarily Required, Even When NSR Is Triggered. EPA's interpretation of the statute as only requiring compliance with NSR when it is opportune for a source to install controls is also unlawful and arbitrary because the plain language of the statute allows a source, under appropriate circumstances, to comply with NSR without installing controls. The "best available control technology" ("BACT") requirement in the PSD program is actually "an emission limitation," not a requirement to install a particular type of pollution control equipment. 42 U.S.C. § 7479(3).[12] In setting a BACT emission limit for a source, the permitting authority must consider whether the limit "is achievable for such facility through application of production processes and available methods, systems,

[12] In full, the statute defines BACT as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. § 7479(3).

and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant." *Id.* (emphasis added). Similarly, the statute does not specify a particular method by which a source located in a non-attainment area is to attain the "lowest achievable emissions rate" ("LAER"). *See id.* § 7501(3).[13] In light of the plain language of the statute envisioning that sources can comply with NSR emissions limits without necessarily installing pollution control technology, Congress plainly did not intend to exclude activities from NSR on the basis that they do not represent an opportune time to install controls.

Statutory Provisions Providing for Feasibility Concerns to Be Addressed After NSR Has Been Triggered. EPA's decision to exclude activities from NSR based on the economic feasibility of installing controls also ignores other provisions in the statute that address this concern. Specifically, the statute explicitly requires that the BACT limit applied to a new or modified source be one that "the permitting authority, on a case-by-case basis, taking into account energy environmental, and economic impacts and other costs, determines is achievable for such facility." *Id.* § 7479(3). Similarly, the CAA exempts a new or modified source located in a non-attainment area from having to achieve "the most stringent emission limitation which is contained in the implementation

[13] The statute defines LAER as "for any source, that rate of emissions which reflects—(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance." 42 U.S.C. § 7501(3).

plan of any State for such class or category of source" if "the owner or operator of the proposed source demonstrates that such limitations are not achievable." *Id.* § 7501(3). The legislative history of the 1977 CAA Amendments indicates that Congress intended for the above provisions to protect a source from being made to adopt cost-prohibitive control strategies. *See* Conf. Rep. On H.R. 6161, 95th Cong, 1st Sess. (Aug. 3, 1977) (3 Leg. Hist. 537) ("If the cost of a given control strategy is so great that a major new source would not be built or operated, then such a control would not be achievable and could not be required by the Administrator."), H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (same).[14]

Indeed, a permitting authority theoretically could find that no method of controlling emissions is achievable for a given source.[15] Even when a permitting authority concludes a source is unable to reduce its emissions to the level that would otherwise be required by BACT or LAER, however, the statute still requires the source to

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[14] By applying the same generic twenty percent cost threshold to sources located in both attainment areas and non-attainment areas, EPA's new rule also unlawfully obviates the differences between the statutory PSD and non-attainment NSR provisions. Specifically, while CAA Section 169(3) expressly mentions "costs" as a factor to be taken into consideration in establishing a BACT limitation, no express mention of costs appears in the definition of LAER set forth in CAA Section 171(3). Rather, in the LAER context, the legislative history indicates that Congress only intended for costs to be taken into consideration under circumstances where the cost of complying with a particular emission limit is so high that it would prevent a source from being constructed or operated. See 1977 Legislative History at 537 (Conf. Rept.); H.R. Rep. No. 95-294 at 215. EPA's new rule unlawfully and arbitrarily ignores this significant difference between the PSD and non-attainment NSR provisions."

[15] With respect to LAER, however, if the permitting authority concludes that the strictest emission limitation contained in any State Implementation Plan is unachievable, the source still is required to comply with "the most stringent emission limitation which is achieved in practice by such class or category of source," without regard to whether such limit is achievable by the individual source. *See* 42 U.S.C. § 7501(3).

comply with the remaining statutory NSR requirements. For example a source located in a non-attainment area must offset any emission increase with emission decreases (from the same source or other sources) sufficient to ensure that overall stationary source emissions in the area will decrease. 42 U.S.C. § 7503(a)(1)(A). Similarly, a source located in an area with relatively unpolluted air must ensure that increased emissions resulting from the change will not result in a significant deterioration of air quality or cause a violation of the NAAQS. *Id.* § 7475(a)(3). Finally, an NSR permit cannot be issued until after affected members of the public are notified and given an opportunity to comment. *Id.* § 7475(a)(2); 40 C.F.R. §§ 51.160, 51.161 (providing for a 30-day public comment period).

Because Congress specifically required that concerns about achievability of emissions limits be addressed during the NSR process (for the purpose of establishing a BACT/LAER emissions limit), Congress could not have intended for the economic feasibility of installing controls to serve as a basis for entirely exempting a source from the NSR program. Thus, EPA acted unlawfully and arbitrarily in exempting a large category of equipment replacements from NSR on the basis that, *inter alia*, these activities do not cost enough to justify the expense of installing controls.

Statutory Provisions Providing for Case-by-Case Determination of Feasibility. EPA's blanket determination that the cost of installing controls is infeasible when an activity costs no more than twenty percent of the replacement cost for the entire process unit also disregards Congress' statutory directive that the achievability of control measures be determined on a case-by-case basis. *See* 42 U.S.C. § 7479(3)(requiring the permitting authority to determine "on a case-by-case basis, taking into account energy

environmental, and economic impacts and other costs" what is achievable by a particular facility), *id.* § 7501(3) (enabling "the owner or operator of the proposed source [to] demonstrate[] that such limitations are not achievable.") By EPA's own admission, the cost of installing controls varies widely from source to source. *See* 68 Fed. Reg. 61,258/1 (Stating that "20 percent . . . represents the approximate cost of retrofitting existing [electric utility] plants with state-of-the-art controls," and admitting that "the relative costs of air pollution controls in other industries vary more widely."). Moreover, EPA admits that "[t]here is obviously no single answer to the question of at what point [the cost of installing controls] becomes the deciding factor in an owner's decision whether to replace a piece of equipment." *Id.* Despite this admitted variability, EPA concluded that it was justified in establishing a general cost threshold for NSR applicability because "the costs and technical issues associated with retrofitting air pollution controls factor significantly into equipment replacement decisions." *Id.* EPA's establishment of such a threshold disregards the statutory language providing for case-by-case achievability determinations.

1977 Legislative History. The legislative history of the 1977 CAA Amendments confirms that Congress did intend to further the air quality-based purposes of the Act by encouraging sources to find ways to limit their emissions to avoid triggering NSR. *See* H.R. Rep. No. 95-294, 95th cong, 1st Sess. (May 12, 1977), at 217 (4 Leg. Hist. 2,684) (In discussing the requirement that sources pay a fee to obtain an NSR permit, stating that the fee "should create further incentive for the development of nonpolluting processes that would not require a permit.")(emphasis added). That intent is further supported by the legislative history demonstrating that Congress' primary goal in adopting the NSR

provisions was to protect public health from the dangers posed by unhealthy air quality. *See id.* at 208 (4 Leg. Hist. 2,675) (In discussing the non-attainment NSR provisions, stating that "protection of the public health remains the predominant goal of the Clean Air Act."); Conf. Rep. On H.R. 6161, 95th Cong, 1st Sess. (Aug. 3, 1977) (3 Leg. Hist. 537) (declaring that in administering the non-attainment NSR provisions, "health considerations are of primary importance.").

1990 Amendments. The 1990 Amendments further confirm the error in EPA's interpretation. Those amendments enact a variety of detailed provisions carefully calibrating the applicability and contours of NSR in various kinds of nonattainment areas -- including not only provisions specific to particular pollutants (such as ozone and particulate matter) but even to classifications within a given pollutant. *See*, *e.g.*, 42 U.S.C. §§ 7511a, 7512a, 7513a (including provisions governing tonnage thresholds for major sources, ratios for offsets, and netting at existing sources). These carefully crafted provisions show that Congress intended the NSR requirements to play an integral role in the statutorily mandated effort to clean up areas violating federal health standards. EPA's interpretation undermines that intent by allowing sources to undertake physical changes without an obligation to either avoid the resulting significant emissions increases or undergo NSR.

In addition, specific aspects of these amendments further undercut EPA's rationale. For example, Congress adopted several different tonnage thresholds for "major source," with lower thresholds applicable in more polluted areas. As to ozone serious areas, for example, the authors described these lowered thresholds as having three principal effects, first of which is that "new or modified sources emitting 50 tons or more

per year of VOCs will be subject to new source review requirements." H.R. Rep. No. 101-490 at 238 (emphasis added). Similar explanations were expressed as to other categories of nonattainment areas. *Id.* at 242 (major source definition for ozone severe areas has "the same principal effects as described for serious areas"); 243 (same for ozone extreme areas); 267 (similar comment addressing particulate matter serious areas). Indeed, Congress emphasized that sources emitting less than the Section 302(j) 100-ton threshold are a significant part of the emissions inventory. *Id.* at 234. This emphasis on the importance of sources that add 50, 25, or even 10 tons of pollutants undercuts EPA's argument that avoiding such amounts of emissions increases is not a statutory purpose of NSR.

Likewise, the 1990 Amendments include provisions governing the practice of netting to avoid triggering modification-based NSR. 42 U.S.C. §§ 7511a(c)(7), (e)(2). The authors explained that "[t]he netting process allows sources making modifications that would otherwise be subject to the new source review requirements of the Clean Air Act to escape such requirements upon a showing that the emissions increase associated with the modification is 'netted out' to a 'de minimis' overall level by emission decreases from elsewhere within the source." H.R. Rep. No. 101-490, at 234-35 (emphasis added). These netting provisions and their authors' explanation further refute EPA's argument that Congress did not intend sources to avoid emissions increases that might otherwise trigger NSR.

Moreover, by establishing important limitations on the availability and use of netting, the 1990 Amendments confirmed the importance Congress attached to pollution increases below the Section 302(j) 100-ton threshold. For example, Congress deemed

below-100-ton pollutant increases so important that it expressly prescribed a 25-ton maximum *de minimis* level for determining the applicability of modification-based NSR in serious and above areas. 42 U.S.C. § 7511a(c)(6); H.R. Rep. No. 101-490, at 241. Once again, these amendments undercut EPA's argument that avoiding emissions increases of that magnitude is outside Congress's purposes.

Netting. EPA's claim that Congress did not intend to encourage sources to avoid NSR by limiting their emissions disregards the longstanding agency and judicial provisions regarding netting. Specifically, under EPA's longstanding regulations, and *Alabama Power*, 636 F.2d at 400-03, sources can avoid an NSR-triggering modification by avoiding emissions increases through netting. *Alabama Power* stated that "Congress wished to apply the permit process ... only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase. It is true that Congress intended to generate technological improvement in pollution control, but this approach focused upon rapid adoption of improvements in technology as new sources are built, not as old ones were changed without pollution increase." 636 F.2d at 401 (emphasis added; internal quotations and footnote omitted).

Likewise, in upholding EPA's netting regulations, *Chevron* noted that EPA had advanced a "reasonable explanation for its conclusion that the regulations serve the environmental objectives" of the Act. 467 U.S. at 863. That EPA explanation expressly noted that, "[i]n order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be

required." *Id.* at 858 n.30 (emphasis added) (quoting EPA rulemaking preamble). In short, the very concept of netting is one based on limiting emissions increases to avoid new source review -- precisely the conduct that EPA now says is outside the scope of Congress' NSR intent.

De Minimis Thresholds. EPA's claim also disregards the fundamental basis underlying the de minimis exemptions defining significance levels, below which emissions increases do not constitute modifications triggering NSR. Specifically, EPA based those exemptions on the air quality impact that emissions increases cause. 45 Fed. Reg. 52,705-10 (Aug. 7, 1980).

Concerning criteria pollutants, for example, EPA noted that "extensive health and welfare information has been developed and documented in the respective criteria documents;" that "it appeared reasonable ... to base criteria pollutant *de minimis* cutoffs on air quality 'design values,'" and that "[t]he primary standard" -- i.e., the health-based NAAQS -- "was chosen as the basis for design values." *Id.* at 52,707. Having selected design values, the agency went on to choose specific significance levels within the resulting range, indicating that the "primary" factor guiding the selection of such levels was "the cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increases (thereby going unreviewed under PSD at the time of the change)." *Id*.

Considering the air quality impact of the significance levels also fits within the rationale articulated by *Alabama Power* for *de minimis* exemptions -- *i.e.*, that such exemptions may be appropriate "when the burdens of regulation yield a gain of trivial or no value," but not "where the regulatory function does provide benefits, in the sense of

furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." 636 F.2d at 360-61.

These regulatory and judicial authorities flatly contradict EPA's current position that NSR's statutory purposes do not encompass avoiding emissions increases, and the health and environmental impacts associated with such increases.

Inconsistency Between Treatment of New and Modified Sources. EPA's claim that NSR only addresses installation of emission controls, not avoiding emissions increases, ignores the statutory context provided by Section 169(1), and would anomalously create inconsistency between the requirements governing modified sources and those governing new sources. Under Section 169(1), a new source must undergo NSR if its emissions or potential emissions exceed specified thresholds. Concerning this provision, the D.C. Circuit has stated: "The purpose of Congress was to require preconstruction review and a permit before major amounts of emissions were released into the air." *Alabama Power*, 636 F.2d at 353 (emphasis added).

Thus, new sources may avoid triggering applicability of NSR by limiting their emissions so as to stay beneath the Section 169(1) thresholds. Indeed, *Alabama Power* expressly held that such emissions avoidance must be taken into account in determining whether the Section 169(1) potential emissions thresholds have been met. For example, a source whose uncontrolled emissions were 100 tons, would -- by applying 99% effective particulate matter controls -- "emit in actuality less than one ton per year." *Id.* at 354 (emphasis added). Under the *Alabama Power* holding, that emission reduction must be considered in calculating NSR applicability under Section 169(1). Thus, EPA's approach requires the assumption that avoiding emissions in the new source applicability context is

within the statutory purposes, but avoiding emissions in the modified source applicability context is not. That approach is a truly anomalous reading, and one that creates an unnecessary and unwarranted inconsistency between Sections 111(a)(4) and 169(1).

In short, EPA's assertion that the purpose of NSR is simply to identify an opportune time to install pollution controls, not to avoid emissions increases, is not only diametrically opposite to the agency's own prior reading, but is also refuted by the language of Section 111(a)(4), as well as the statutory context and purpose and the legislative history.

EPA and the courts have long recognized that one of the central policies of the Clean Air Act and its NSR program is to minimize emissions increases associated with increased utilization – whether increases in production or production time. Indeed, EPA has said that it is improper to exclude modifications that are likely to increase utilization, because this results in higher levels of emissions. These statements make clear that it is very much the policy of the Clean Air Act to limit emissions increases and to promote emissions reductions by regulating emissions-increasing changes that increase utilization:

- "Moreover, virtually any major capital improvement project at an existing source is designed in part to increase efficiency of production, and this will in turn almost always have the collateral effect of reducing emissions per unit of production, even though it may provide an economic incentive to increase total production, with the net result that actual emissions of air pollution to the atmosphere could increase significantly. There is nothing in the statutory terms or structure or in EPA's regulations which suggests that such major changes should be accorded exempt status under the NSR program. ... *See also Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297-98 (1st Cir. 1989) (modification of emissions unit that decreases emissions per unit of output, but may result in sufficient production increase such that actual emissions will increase, is subject to PSD)." Detroit Edison Applicability

Determination, at 5-6, n.1, Enclosure to Letter from Francis X. Lyons, EPA Regional Administrator, to Henry Nickel, Counsel for the Detroit Edison Company (May 23, 2000) (emphasis added).

- "The argument that only changes that increase a unit's emissions rate can trigger the NSR modification provisions has been rejected by two courts of appeals. As noted, see *supra* note 1, in Puerto Rican Cement, the First Circuit rejected a claim that modifications to a cement kiln, which made production more efficient and decreased the hourly emissions rate but could increase the plant's utilization rate, such that actual emissions to the atmosphere might increase, were exempt from PSD. . . . Similarly, in *WEPCO*, where the company was making "like-kind" replacements of components to restore the original design capacity of the plant, there was no increase in emissions per unit of output; rather, for PSD purposes, the emissions increase was attributable to increased utilization." *Id.* at 5-6 & 12, n.9.

- "As discussed, EPA considers emissions increases due to increased operations that could not be physically or legally accommodated during the representative baseline period but for the proposed physical or operational change, to result from the change. … Thus, physical or operational changes that improve operational characteristics will be treated in the same manner as any other changes. This means that where an improvement involves a routine change, it is excluded from the NSR definition of "major modification." Alternatively, where an improvement is not routine and an emissions increase results from the improvement, that portion of the emissions increase resulting from the improvement will be considered in determining whether the proposed change subjects the unit to NSR requirements." 57 Fed. Reg. 32,314 (July 21, 1992).

- "Adopting a policy that automatically excludes from NSR any project that, while lowering operating costs or improving performance, coincidentally lowers a unit's emissions rate, would improperly exclude almost all modifications to existing emissions units, including those that are likely to increase utilization and therefore result in overall higher levels of emissions." "Pollution Control Projects and New Source Review (NSR) Applicability,"

Memorandum from John S. Seitz, Director, EPA OAQPS, to EPA Regional Air Directors (July 1, 1994), at 11.

- "An exclusion of projects that do not increase a source's potential to emit would create an exclusion that could considerably reduce the effectiveness of the NSR program. Almost any modernization that a source undertakes has the incidental effect of lowering emissions. A new emissions unit or modernization generally has fewer emissions than one built 40 years earlier. Since these types of changes would not likely increase a source's potential to emit, industry would claim this as a pollution prevention project -- even though its' pollution prevention aspects are likely to be negligible and actual emissions may increase dramatically due to increased utilization." "Responses to Issues Raised by Industry on Clean Air Act Implementation Reform," EPA (May 30, 1995), at 20 (Response to Issue 3: Pollution Prevention Exemption).

In a similar vein, EPA has identified and extolled the benefits provided by the many ways in which the NSR program causes sources to limit their emissions to avoid an NSR-triggering emissions increase. Among the "many direct and indirect environmental benefits that the PSD program provides," EPA even under this administration has identified some of the following:

- "reductions that the environment sees by source owners who frequently take minor source limits to stay below the major source cutoff and thereby avoid the requirements of the program."

- "emission reductions that occur when source owners 'net out' of review. That is, source owners can reduce their emissions elsewhere at their facilities by an amount that compensates for emissions increases resulting from major modifications, such that there is no net increase in emissions, and as a result lawfully avoid the PSD requirements."

- "how the PSD [and nonattainment New Source Review (NSR)] program has pushed technology to evolve so that pollution controls now are more effective than when the

NSR program began, or how the costs of controls typically go down over time as more people use them."

- "the benefits to air quality and to the added protection of Class I areas which have occurred by helping to keep these national treasures pristine." "Benefits of the Prevention of Significant Deterioration Program," Memorandum from Karen L. Blanchard, Group Leader, Integrated Implementation Group (MD-12), to William T. Harnett, Director, Information Transfer and Program Integration Division (MD-12), October 17, 2001.

It is EPA's revisionist claims in the preamble to the final rule that are starkly at odds with these consistently held views and the purposes and policies of the NSR program.

3. EPA's Claim of Congressional Ratification Is Meritless.

EPA argues that Congress ratified a "flexible" approach to interpreting the term "any physical change" when it created the NSR program in 1977. *See* 68 Fed. Reg. at 61,273/3. EPA notes that the CAA § 111(a)(4) definition of "modification" also applies to the Act's New Source Performance Standard ("NSPS") provisions, and that NSPS regulations in effect when Congress adopted the NSR program already provided a number of exceptions from the definition of "modification." *Id*. From there EPA leaps to the assertion that Congress ratified the agency's authority to carve out exceptions from the plain meaning of "any physical change." This argument is meritless.

The Supreme Court has cautioned that it exercises "extreme care" before agreeing to recognize a claim of congressional acquiescence to an agency's statutory interpretation. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 169 (2001). In order to demonstrate that its interpretation of a statute was congressionally ratified, an agency must show that Congress was aware of that

interpretation in the first place. "[B]ecause the rationale of [this] canon must be, either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them, the government's argument has little weight absent some evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue." *Public Citizen, Inc. v. Dep't of Health and Human Services*, 332 F.3d 654, 669 (D.C. Cir. 2003) (internal quotations and citations omitted). *See also Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 121 (1978) (even where legislative history indicates some degree of awareness of an agency's statutory interpretation, "We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."). Moreover, the agency must show that Congress expressed approval of the interpretation at issue. *See, e.g.*, *Sloan,* 436 U.S. at 121 ("Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of [the statutory provision]."

EPA cannot tenably argue that Congress has ever ratified anything along the lines of the broad categorical exemption described in the new rule. The new exemption obviously did not even exist in the NSPS regulations in 1977, and EPA does not claim otherwise. Indeed, such a sweeping exemption has never been available under the NSPS program. Congress, therefore, could not have ratified EPA's ability to create such an exemption.

Finding itself incapable of making a traditional ratification argument, EPA

advances the novel and extraordinary argument that what Congress ratified was not a specific approach, but a general grant of discretion to carve out exemptions from the statutory term "any physical change." *See* 68 Fed. Reg. at 61,273/3. This argument is entirely without merit.

EPA's argument rests on the implausible assumption that, without saying a single word, Congress converted a clear statutory provision (i.e., "any physical change") into a vague standard subject to broad agency discretion. Not surprisingly, EPA fails to identify even a single judicial precedent extending the ratification doctrine to such lengths.

Nor does EPA cite any evidence that Congress was aware of, much less expressed approval of, an interpretation of "any physical change" that would allow substantial emission increases at major sources to escape NSR. Indeed, EPA itself has previously recognized that "the purpose of new source review is to ensure that emissions from new or modified sources do not prejudice the transition to attainment," *See* p. 8, *supra* (emphasis added) (quoting EPA's *Chevron* brief), and that an appropriate NSR regulation "allow[s] industrial growth that does not adversely affect air quality while prohibiting both the construction of all new facilities and the renovation of existing facilities for which there is a non-*de minimis* emissions increase." *Id.* 9 (emphasis added) (quoting EPA's *Chevron* brief). In light of those fundamental tenets of NSR, it is untenable -- and unsupported by any evidence -- to claim that Congress was aware of, much less ratified, an interpretation of "any physical change" that would allow substantial emissions increases to escape review.

Certainly the RMRR exemption gave no signal that EPA was claiming such broad exemption authority. EPA itself concedes that that exemption "arguably could be justified

as *de minimis.*" 68 Fed. Reg. at 61,272/1. Moreover, the agency has previously interpreted the exemption narrowly, so as to give "sweeping coverage" to the statutory phrase "any physical change." EPA TVA Br. at 163. Thus, the mere existence of the RMRR exemption does not demonstrate Congressional awareness of the far broader exemption authority claimed by the October 2003 rule. Nor is there any evidence of Congressional intent to approve such a broader exemption.[16]

Bereft of any more specific basis for its ratification claim, EPA points to the 1977 drafters' intent "to conform to usage in other parts of the Act." 123 Cong. Rec. 36331 (daily ed.) (Nov. 1, 1977) (emphasis added), *cited at* 68 Fed. Reg. at 61,269/2. But intent to conform to usage in other parts of the "of the Act" falls far short of ratifying exemptions that appeared only in NSPS regulations. In any event, the highly general observation cited by EPA falls far short of showing Congress knew of and approved either a general agency authority to flexibly interpret "any physical change" or an interpretation of that phrase that allows substantial emissions increases to escape NSR.

In short, EPA's argument that Congress ratified its new view of the statute as granting it broad discretion to exempt activities from the term "any physical change" is simply untenable.

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[16] Other exemptions alleged by the October 2003 preamble to be more likely associated with increases in emissions (such as for increased operating hours and rate of production) construe the statutory phrase "change in the method of operation," and thus do not support EPA's assertion of broad interpretational authority over the phrase "any physical change." Moreover, EPA has pointed to no evidence that Congress was aware of, or expressed approval of, those other exemptions -- much less invited EPA to create other emissions-increasing exemptions.

D. EPA's Attempt to Invoke *Chevron* Step Two Is Unavailing.

Even assuming *arguendo* that the issue addressed by EPA's October 2003 rule is one to which *Chevron* Step Two applies, that test is not a blank check for EPA to adopt any interpretation it chooses, but rather limits the agency to interpretations that are "reasonable." 467 U.S. at 845. Post-*Chevron* jurisprudence of the Supreme Court and D.C. Circuit has not hesitated to overturn agency interpretations under Step Two when those interpretations transgress the bounds of reasonableness.

Here, EPA's interpretation must be rejected because -- for reasons discussed above -- it "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear," and is "at odds with [the Act's] structure and manifest purpose." *See Whitman v. American Trucking Assns.*, 531 U.S. 457, 481-86 (2001) (rejecting EPA Clean Air Act interpretation under *Chevron* Step Two). *See also Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (under *Chevron* Step Two, court rejected agency interpretation that "diverges from any realistic meaning of the statute"); *Bluestone Energy Design v. FERC*, 74 F.3d 1288, 1295 (D.C. Cir. 1996) (under *Chevron* Step Two, court rejected agency interpretation that produced result "contrary to Congress's instructions"); *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("Because the range of permissible interpretations is limited by the extent of its ambiguity, an agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute"); *Natural Resources Defense Council v. Reilly*, 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring) (agency interpretation "fails the second step of *Chevron* because the agency seeks to exploit the

ambiguity rather than resolve it, and to advance its own policy goals rather than Congress'").

Moreover, to pass muster under *Chevron* Step Two, an agency interpretation must be accompanied by a reasoned explanation. *See*, *e.g.*, *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). Here, EPA has advanced explanations that are not only inconsistent with the Act and its legislative history and purposes, but also suffer from unexplained contradictions with other EPA statements in this very rulemaking as well as in prior proceedings. Likewise, EPA's explanations are unsupported by, and indeed affirmatively contradicted by, the rulemaking record. These flaws preclude any finding that the October rule passes muster under Step Two.[17]

In addition to the fundamental flaws in reasoning discussed *supra*, EPA's interpretation is internally inconsistent. Though EPA asserts that an equipment replacement that does not alter the design of the source is not a "change," *see e.g.,* 68 Fed. Reg. at 61,253/2, the new rule allows such a replacement to be treated as NSR-triggering "change" if it costs more than twenty percent of the replacement cost of the affected process unit. *See, e.g., id.* at 61,253/3, n.7 ("[A]lthough such activities would be functionally equivalent, they would still need to meet other criteria to qualify" for the

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[17] That the rule at issue in *Chevron* passed muster under Step Two does not establish that the present one does. Of key importance, the indicia of congressional intent were far sparser than they are here. *See* 467 U.S. at 859-63. Moreover, EPA's explanation emphasized that "[i]n order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." *Id.* 858 n.30. The Court's affirmance of that rationale does not support -- on the contrary, undercuts -- EPA's plea for deference for its October 2003 interpretation that does allow significant net increases in emissions to escape NSR review.

categorical exemption."). Thus, EPA's rule asserts at one and the same time that the phrase "any physical change" has one meaning for projects below twenty percent, and another for projects above it. This approach not only contravenes basic principles of statutory interpretation, but represents an unexplained internal inconsistency in EPA's rationale.[18]

Second, EPA argues that "existing plants should not have to install new control technology in the ordinary course of their operations," because "[t]o require them to do so" would *inter alia* "subject these plants and the consumers who rely on them to enormous dislocation and expense." 68 Fed. Reg. at 61,270/1 (emphasis added). At the same time, however, the agency claims that

> given the costs and technical problems associated with installing state-of-the-art pollution controls at existing facilities, we do not believe it plausible that, if faced with the choice of replacing equipment that has a value less than 20 percent of a process unit and having to install those controls, or coming up with another solution—such as repairing the existing equipment or limiting hours of operation so as to be confident that activity will not trigger NSR—the owner of a source would elect to replace the equipment if he also has to install the state-of-the-art controls. Rather, we believe he will repair the existing equipment or artificially constrain production.

Id. at 61,270/2 (emphasis added). Thus, EPA's rationale claims that a literal definition of "any physical change" should be rejected because (1) such a definition will "require"

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[18] Conversely, though EPA asserts that Congress could not have intended for an equipment replacement that costs less than the twenty percent threshold to be subject to NSR, *see* 68 Fed. Reg. at 61,270/3, EPA's new rule allows such a replacement to be treated as a "change" if it alters the source's design. EPA fails to offer a reasoned explanation for this internally contradictory position.

sources to install pollution controls and thereby cause "enormous dislocation and expense," and (2) sources will "not" install such controls, but instead will "repair the existing equipment or artificially constrain production." This is yet another internal contradiction for which EPA has failed to offer any explanation, much less a reasoned one.

Third, EPA claims that the pre-existing rules induced source owners to take the undesirable step of limiting plant productivity in order to avoid NSR: "[T]he owner or operator may curtail the plant's productive capacity by [1] replacing components with less than the best technology in order to be more certain that the replacement is within the RMRR regulatory bounds, or [2] he or she may [a] agree to limit the source's hours of operation or capacity or [b] install less than state-of-the-art air pollution controls to ensure no increase in emissions." 68 Fed. Reg. at 61,250/2. The agency does not suggest, much less provide any basis for believing, that sources will chose Option 1 over Option 2. *See id.* Within Option 2, moreover, EPA expressed its belief in the rulemaking proposal that source owners would limit emissions by installing less than state-of-the art pollution controls, rather than by limiting utilization. 67 Fed. Reg. at 80,302/2. The agency is thus left with the assertion that installing less than state-of-the-art controls will "result in loss of plant productivity." 68 Fed. Reg. at 61,250/2. EPA offers no evidence whatsoever to support that assertion, nor could it. The agency is thus unable to shake the reality that, under the pre-existing NSR rules, owners and operators could undertake plant improvements, take advantage of the increased utilization made possible by those improvements, and nevertheless avoid triggering NSR by installing less than state-of-the-art pollution controls without hindering plant productivity.

Finally, EPA repeats the assertion, made in its June 2002 report to the President, "that the NSR program has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity." *Id.* at 61,250/3. That conclusion was based, however, on nothing more than a handful of unsubstantiated, industry-supplied anecdotes. The General Accounting Office ("GAO") has already found that the unverified anecdotes carried no statistical validity, and that EPA lacked substantial evidence for the conclusion it sought to draw from them:

> Because EPA based its conclusion that NSR discouraged some energy efficiency projects on anecdotal information rather than a comprehensive survey or representative sample of industries subject to the program, its findings are not necessarily representative of the program's effect on energy efficiency projects throughout the industries subject to the program. In addition, EPA's findings that some foregone energy efficiency projects would have reduced air emissions was based on the assumption that facilities would not increase their production levels after performing the projects. However, facilities' future levels of production and emissions are uncertain because they may fluctuate in response to economic conditions, and other factors.

General Accounting Office Report No. GAO-03-947, "EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program," August 2003. The unsupported and discredited finding of the June 2002 report thus provides no rational basis for the final rule.

Accordingly, both the substantive inconsistency of EPA's interpretation with the Act, and the agency's failure to offer a reasoned explanation for that interpretation, would -- even if *Chevron* Step Two applies -- preclude a finding that that interpretation is reasonable. Moreover, to the extent that a court chose to review EPA's rationale under the

arbitrary and capricious standard,[19] the above-noted flaws in that rationale would require a finding that the October 2003 rule is arbitrary and capricious.

II. EPA's Selection of Twenty Percent of Process Unit Replacement Value as the Ceiling of the New Exemption is Arbitrary and Capricious.

The new rule identifies twenty percent of process unit replacement value as the ceiling of the category of physical activities that the rule purports to exclude from the statutory term, "physical change in . . . a stationary source." 68 Fed. Reg. at 61,277/2 (40 C.F.R. § 51.165(a)(1)(v)(C)(1)(xlvi)(h)(1)). In the preamble to the final rule, EPA puts forward a number of arguments intended to explain and justify its selection of twenty percent as the ceiling. *Id.* at 61,256/3-58/1, 61,265/3-66/1, 61,270/1-2. None of these arguments appeared in the preamble to the proposed rule.[20] The grounds for Petitioners' objections to them thus "arose after the period for public comment." 42 U.S.C. § 7607(d)(7)(B).

Petitioners set forth their objections below. Each of them is "of central relevance to the outcome of the rule," *id.* § 7607(d)(7)(B), because each one demonstrates that the rule contravenes the Clean Air Act and is arbitrary and capricious. Id. § 7607(d)(9)(A).

The NSPS provisions of the Act define "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations . . . prescribing a standard of performance under this section which will be

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[19] *See*, *e.g.*, *Natl. Assn. of Regulatory Utility Commrs. v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (discussing overlap between *Chevron* Step Two review and arbitrary and capricious review).

[20] In fact, nothing in the notice of proposed rulemaking gave any indication that the ceiling promulgated in the final rule would be twenty percent, as opposed to some other figure between zero and fifty.

applicable to such source." *Id.* § 7411(a)(2). In the preamble to the final rule, EPA notes that "[u]nder NSPS, when a source undertakes a replacement activity at an existing affected facility that constitutes half or more of the facility's capital replacement value, our rules require a case-by-case determination as to whether such replacements constitute construction." 68 Fed. Reg. at 61,256/1. EPA then argues that twenty percent of unit replacement value – a figure "less than one-half of the 50-percent reconstruction threshold" – is an appropriate ceiling above which to "require case-by-case consideration of the question whether equipment replacements constitute a modification of an existing process unit under major NSR." *Id.* at 61,256/1, 3.

Even assuming that EPA has discretion to decide that replacement activity costing less than fifty percent of facility replacement value does not qualify as "construction" – a proposition Petitioners reject – that does not mean that EPA has discretion to decide that replacement activity costing less than some lower percentage does not qualify as a "modification." For whereas the text of the Clean Air Act does not define "construction," it does define "modification." Moreover it defines "modification" without regard to cost. 42 U.S.C. § 7411(a)(4) (defining "modification" as "any physical change in . . . a stationary source which increases the amount of any air pollutant emitted by such source"); *WEPCO*, 893 F.2d at 913.[21] The fact that twenty percent is less than half of

[21] As the Seventh Circuit observed in *WEPCO*: "The reconstruction provision applies to any substantial replacement (more than 50% the cost of a new facility) even if the replacement causes no subsequent increase in emissions. In sharp contrast, the modification provisions apply only when a physical change is accompanied by an increase in emissions. To argue, therefore, that the reconstruction provision is the exclusive determinant of whether the cost, nature, and magnitude of a project will require the application of NSPS is to ignore the substantially different objectives of the reconstruction and modification provisions: The reconstruction provision is aimed

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EPA's reconstruction threshold is thus no explanation – much less a reasoned explanation – for a rule that ignores the Act's definition of "modification" and excludes from that term all equipment replacements costing no more than twenty percent of unit replacement value.

EPA goes on to claim that the "20-percent cost threshold would be consistent with the decision of the U.S. Court of Appeals for the Seventh Circuit in the *Wisconsin Electric Power Company v. Reilly* ("WEPCO") case, to the extent that it would not automatically allow the activities performed there to constitute RMRR." 68 Fed. Reg. at 61,256/3. But the Seventh Circuit did not hold, or even suggest, that any replacement project less dramatic than those at issue in the case would not constitute "any physical change":

> [N]othing in WEPCO suggests that any project smaller than WEPCO will automatically qualify as routine maintenance, or that WEPCO was some type of baseline for companies to compare its projects to in efforts to determine if they would qualify for routine maintenance. Rather, WEPCO was an easy case on routine maintenance – the EPA and the Seventh Circuit quickly disposed of the defendant's arguments that it qualified for routine maintenance.

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principally at 'discourag[ing] the perpetuation of a facility, instead of replacing it at the end of its useful life with a newly constructed affected facility,' without regard to emissions, 39 Fed. Reg. 36946, 36948 (1974), while the modification provision applies to *any* physical change, without regard to cost, that causes an increase in emissions. *See, e.g.*, *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978); *United States v. Narragansett Improvement Co.*, 571 F.Supp. 688, 695 (D. R.I. 1983) ('a "reconstruction" of an existing facility would occur "irrespective of any change in emission rate" upon the replacement of a "substantial portion of the existing facility's components."')." *WEPCO*, 893 F.2d at 913 (emphasis in original).

U.S. v. Southern Indiana Gas & Electric Co. ("SIGECO"), 245 F. Supp. 2d 994, 1017 (S.D. In. 2003); *see also U.S. v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 860 (S.D. Ohio 2003) (quoting *SIGECO* and reaching same conclusion).[22] So EPA's invocation of the *WEPCO* decision does not constitute an explanation – much a reasoned explanation – of the new rule's exemption for equipment replacements costing no more than twenty percent of process unit replacement value.

In their comments on the proposed rule, Petitioners demonstrated that the new rule would have exempted thirteen Tennessee Valley Authority ("TVA") equipment replacement projects, each of which EPA had itself found to qualify as "any physical change in . . . a stationary source." In response, EPA asserts in the preamble to the final rule that the NSR program "has in fact resulted in delay or cancellation of activities that would have maintained and improved the reliability, efficiency, and safety of existing energy capacity." 68 Fed. Reg. at 61,257/3-58/1.[23] "[T]o the extent the activities

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[22] In fact, the court showed no hesitation in finding a project to be "any physical change" even if the project was presumed to cost much less than twenty percent of unit replacement value. *WEPCO*, 893 F.2d at 912-13 ("the air heater replacements will presumably cost less than six percent of a wholly new facility"); *see also* 68 Fed. Reg. at 61,257/1 ("In the case of a steam electric generating facility, the process unit definition provided in today's rule is nearly identical to the make-up of the 'comparable new facility' that was used in the NSPS evaluation of the WEPCO renovation project.").

[23] EPA fails to note, of course, that activities that "maintain[] and improve[] the reliability, efficiency, and safety of existing energy capacity" would only implicate the NSR program if those activities were going to result in a significant net emissions increase. Nor does EPA's explanation emphasize, as it should to be accurate, that those activities would have been delayed or cancelled only as a result of source owner or operator decisions not to decrease emissions, or not to prevent emissions increases, associated with these activities in order to avoid NSR requirements. Understandably -- and tellingly -- EPA never claimed that such activities would have improved the environmental performance of existing energy capacity. The agency does not and cannot, of course, identify any statutory provision or legislative history to support the notion that

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addressed by [Petitioners] qualify for the ERP," EPA continues, "we now believe that such activities, if conducted in the future, should be excluded from major NSR." *Id.* at 61,258/1.

EPA does not assert that the thirteen TVA projects "maintained and improved the reliability, efficiency, and safety of existing generating capacity." *Id.* Even if it did make such a claim, the agency would not be able to erase its own prior finding that the projects nevertheless increased annual releases of air pollution by tens of thousands of tons. What is more, EPA does not assert that any of the thirteen TVA projects are outside the plain

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accommodations for the listed concerns can supplant or supersede the air quality and public health purposes of the NSR program. Addressing EPA's statement head on, the administrative record accompanying the final rule reveals no verifiable evidence of the NSR program resulting in "delay or cancellation of activities that would have maintained and improved the reliability, efficiency, and safety of existing energy capacity," relying only upon industry anecdotes and complaints. *See* "EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program," General Accounting Office, GAO-03-947 (Aug. 2003) (finding that EPA relied upon industry anecdotes to justify its fist set of changes to NSR program requirements). The record reveals no evidence that EPA sought to verify the veracity of these claims with any source-specific inquiries or other basic probative inquiries. The record reveals no evidence that EPA determined that the anecdotal projects even *would* have improved energy efficiency, for example, or would have improved energy efficiency to a degree equal or greater than activities that would have decreased total emissions. The administrative record reveals no record of maintenance or improvement activities outside the energy sector being delayed or cancelled allegedly as a result of NSR requirements, notwithstanding that EPA's final rule extends the exemption to all industries sectors subject to NSR. In addition, the administrative record reveals no evidence of so-called maintenance or improvement activities (within any industry sector) being delayed or cancelled where such activities would have decreased emissions – or simply failed to increase emissions by significant net amounts. Nor does the record explain or even address with any evidence what the impact on local, regional or national air quality, public health or ecosystems, and class I areas would be from allowing emissions increases from all industry sectors to occur in the name of reliability, efficiency, and safety, without requiring those emissions increases to be minimized or controlled under NSR. For all of the foregoing reasons, EPA's final rule is arbitrary and capricious.

meaning of the statutory phrase, "any physical change in . . . a stationary source," or even that any of the projects were "routine, maintenance, repair and replacement." The agency thus fails to explain – much less justify – its decision to set the ceiling of its new exemption so high as to accommodate projects that, according to EPA, were not routine, were physical changes, and did increase harmful emissions by staggering amounts.

In its comments on the proposed rule, the Utility Air Regulatory Group ("UARG") presented EPA with a list of the "major repair and replacement activities that its members believe must be undertaken at utility generating stations in order to keep those facilities operational." *Id.* at 61,257/3. In the preamble to the final rule, EPA concedes that the twenty-percent ceiling of the new rule's exemption is so high that would exempt not only the individual activities identified by UARG, but also "groupings of these activities." *Id.* What the rule would not exempt, according to EPA, would be "larger groupings of these activities – groupings that are not usually seen in the industry." *Id.* EPA has not and cannot support its implicit and untenable suggestion that anything that is "usually seen" in an industry constitutes an activity that is per se routine at each individual source within that industry. Moreover, EPA offers no support whatsoever for the assertion that the exempted UARG activities – and, in particular, the exempted groupings of activities – are "usually seen" in the utility industry. That utter absence of factual support alone demonstrates EPA's failure to offer a reasoned explanation for the level at which it has set the ceiling of the new exemption.

With respect to "other industrial sectors beyond electric utilities," EPA seeks to justify the twenty-percent ceiling by referencing six industry case studies performed by a contractor. *Id.* at 61,257/2. In two of the six industries, however, the contractor was

unable to identify any equipment replacement activity that would not be exempt under a twenty-percent ceiling. Appendix C to RIA (automobile manufacturing and carbon black manufacturing). EPA has failed to explain – much less justify – exempting as "routine" all equipment replacement activity in two entire industries from the Clean Air Act's requirement of NSR for "any physical change . . . in a stationary source."[24]

Finally, EPA asserts that, at an electric utility station, twenty-percent of process unit replacement value "represents the approximate cost of retrofitting existing plants with state-of-the-art controls." 68 Fed. Reg. at 61,258/1. The agency then claims that "it is reasonable to assume that if the cost of the controls is greater than the cost of the replaced equipment, it is likely to operate as a substantial deterrent to replacing the equipment at issue." *Id.*

This claim fails to explain – much less justify – the twenty-percent ceiling in the final rule. First of all, EPA does not even assert that twenty-percent of unit replacement value represents the cost of installing emissions controls at a process unit that is not a steam generating unit, so the claim cannot serve to explain the twenty-percent ceiling in the vast majority of the industries in which the new rule applies it. Secondly, EPA offers no support – much less substantial record evidence – for the assertion that twenty percent

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[24] In one of the remaining industries, the contractor had to assume that a facility would spend its entire annual budget for repair, maintenance, and replacement on a single activity at a single process in order to postulate an equipment replacement project that would exceed the twenty-percent ceiling. Appendix C to RIA (pharmaceutical manufacturing). EPA does not assert that such a project would be routine at an individual facility, or even in the industry as a whole. The agency thus fails to explain or justify applying the twenty-percent ceiling to this industry or any other industry, for that matter, considering the extreme lengths to which the agency has to go to pretend that even one or a few actual industry projects would be potentially subject to NSR once the twenty percent exemption is available.

of unit replacement value represents the cost of retrofitting a steam generating unit with controls. Third, as EPA itself admits, the cost of installing controls varies widely from source to source. See *supra* p. 24. Fourth, as EPA again admits, under circumstances where it is infeasible for a source to comply with NSR through adoption of pollution control measures, the owner or operator simply will take steps to avoid NSR applicability, e.g., by ensuring that post-change emissions do not exceed the NSR significance threshold. *See* 68 Fed. Reg. 61270/2.

Finally, EPA makes no attempt to explain its anomalous and conclusory assumption that "if the cost of the controls is greater than the cost of the replaced equipment, it is likely to operate as a substantial deterrent to replacing the equipment at issue." There is no reason to believe that EPA's assumption would be accurate. As the agency itself recognized in the notice of proposed rulemaking, it is the financial benefit of undertaking a physical change as compared to the cost of installing pollution controls – not the financial *cost* of undertaking the change as compared to the cost of installing the controls – that can be expected to influence a firm's decision. 67 Fed. Reg. at 80,302/1. If a source owner stands to reap substantial financial benefit from a given project, EPA has offered no basis to expect (much less a reasoned explanation supported by substantial evidence) that the owner would forego the project simply because of a requirement to install pollution controls.

For all the forgoing reasons, the final rule contravenes the Clean Air Act and is arbitrary and capricious.

III. EPA is Treating the New Rule As Retroactive, Notwithstanding the Agency's Recognition of the Fact That Such Retroactivity is Unlawful.

EPA must also reconsider the final rule and stay its application on additional grounds that arose after the period for public comment and are of central relevance to the outcome of the rule – namely, the agency's unlawful treatment of the rule as retroactive. This agency action contradicts EPA's admission that such retroactivity is illegal, caselaw bearing out this illegality, and EPA's prior characterization of the rule as non-retroactive. EPA's retroactive exemption of millions of tons of pollution increases from the utility sector alone – increases that violated NSR rules on the books at the time of the violations, and rules that will remain on the books for the next three years and beyond – represents an especially egregious and objectionable example of retroactive rulemaking.

We petition the Administrator to reconsider the final rule in light of the reversal of the preamble's assurance that the rule was not retroactive. The preamble to EPA's final rule notes the following:

> Today's rule provides revisions to the major NSR program to specify categories of equipment replacement activities that we will consider RMRR in the future. As recognized by the U.S. Supreme Court, an agency may not promulgate retroactive rules absent express congressional authority. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). The CAA contains no such expressed grant of authority and we do not intend by our actions today to create retroactive applicability for today's rule. 42 U.S.C. §§ 7401 *et seq*.

68 Fed. Reg. at 61263-64.

The week of November 3rd, however, just one week after the final rule was published in the Federal Register, word of EPA's radical decision to treat the final rule as retroactive leaked out of the agency, and EPA spokespersons were forced to admit that

the agency would (with the exception of cases already filed) be treating the rule as retroactive:

> "We are using the new rule to see if they are in violation. Anything that is filed (under the old rule) is untouchable, we are vigorously enforcing those," EPA spokeswoman Lisa Harrison told the AP Thursday.
>
> "Cases that are in the pipeline that have not been filed are going to be analyzed to see if they should be pursued or set aside. There's a very good chance that a number of them will be set aside," she said.

"NY Atty Genl Wants To Take Over EPA Investigations," Dow Jones International News (Nov. 7, 2003).

> "New enforcement against past conduct" will be undertaken only if the actions were "inconsistent with the new rule," Bill Wehrum, counsel in EPA's Office of Air and Radiation, said at a briefing sponsored by the Washington Legal Foundation.
>
> "The new rule is the yardstick to measure the cases," Wehrum said.

"EPA Air Official Confirms Past Actions To Be Measured Against New Pollution Rule," BNA Daily Environment Report (Nov. 13, 2003).

This EPA approach violates the Clean Air Act and the APA (including the requirement to seek notice and comment before announcing a change that will constrain the agency's future conduct),[25] and runs afoul of the governing Supreme Court decision noted by the agency itself. There is no express or implied authority in the Act to undertake such retroactive rulemaking, and EPA spokespersons or materials to date have

[25] *See*, *e.g.*, *Alaska v. USDOT*, 868 F.2d 441, 446-47 (D.C. Cir. 1989); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320-22 (D.C. Cir. 1988).

identified no such authority. EPA has failed to conduct rulemaking since adoption of the final rule to seek comment on retroactive rulemaking, and has instead treated the rule as retroactive through agency fiat, contravening the Act, APA and EPA's own stated intentions and contemporaneous understanding of Supreme Court caselaw.[26] Retroactive rulemaking, carried out so arbitrarily and in violation of governing law, provides grounds for reconsideration and stay of the final rule.

EPA cannot tenably pretend that there is any legal, policy, or practical difference between unlawful retroactive rulemaking, on the one hand, and treatment of the final rule as an enforcement "yardstick," on the other. The only way in which a newly adopted regulatory *exemption* like the final rule has significance retroactively, with respect to past conduct, is with respect to enforcement; obviously, because a future rule cannot govern past source behavior, retroactivity only has meaning to determine whether past actions that violated then-existing rules will be deemed unlawful, investigated and enforced against or, instead, whether newly adopted rules will retroactively bless those violations.

Additionally, EPA cannot justify this unlawful final agency action by suggesting that it lies within the agency's enforcement discretion. Such discretion does not extend to retroactive rulemaking in violation of the substantive provisions of the Clean Air Act and without undertaking notice and comment rulemaking. Permissible enforcement discretion does not extend to inviting and accepting wholesale violations of governing state and federal law now and for the indefinite future. Lawful enforcement discretion does not encompass the ability to adopt a posture of total abdication of enforcement over a

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[26] *See also Paralyzed Veterans v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

stronger set of health protections, by willfully abandoning the ability to exercise case-by-case enforcement decisions over pre-existing and continuing violations of the narrower RMRR exemption. Case-by-case review of potential modifications that proceeds bound by a policy not to enforce against modifications below the 20% exemption threshold does not represent enforcement "discretion"; it represents unlawful retroactive rulemaking, as well as an across-the-board abdication of EPA's enforcement authority.[27]

EPA's decision to treat the new rules as retroactive also amounts to permission, indeed an invitation, for source owners or operators to violate – and continue to violate -- governing NSR regulations in SIP-approved jurisdictions. This includes all nonattainment NSR programs in every state in the country and most PSD programs. These SIP-approved NSR regulations will not be changed by states in many instances for up to three years after promulgation of the final rule, as they are allowed, and EPA will not change SIPs as a matter of federal law for well after that.[28] All the while, the governing NSR rules under state and federal law in those jurisdictions will remain the NSR regulations that pre-date the 20% exemption, which regulations by EPA's own admission are far broader in covering modifications and do not authorize the 20% exemption.

EPA's retroactivity decision thus means that the agency is also purporting to change the governing law *prospectively* and immediately in those SIP-approved jurisdictions as well, without the required state or federal rulemakings. Such rulemaking,

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[27] *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

[28] Indeed, if history is any guide, there are instances in which EPA still has not acted on SIP submittals from states, despite holding those submittals for over a decade.

carried out so arbitrarily, without notice and comment, and in violation of the Clean Air Act, APA, and other governing state and federal law, provides further grounds for reconsideration and stay of the final rule.

CONCLUSION

For the reasons stated above, the Administrator must "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). Petitioners request that the Administrator stay the rule during the reconsideration.

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Respectfully submitted,

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