

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 02-1387 (and consolidated cases) COMPLEX

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents.

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

**PROOF OPENING BRIEF OF
ENVIRONMENTAL PETITIONERS**

Keri N. Powell
Howard I. Fox
Earthjustice
1625 Massachusetts Avenue, N.W.
Suite. 702
Washington, D.C. 20036
(202) 667-4500
Attorneys for Natural Resources Defense
Council, *et al.*

John D. Walke
David G. McIntosh
Natural Resources Defense Council
1200 New York Ave., N.W. Suite 400
Washington, D.C. 20005
(202) 289-6868
Attorneys for Natural Resources Defense
Council

Ann B. Weeks
Jonathan F. Lewis
Clean Air Task Force
77 Summer Street, 8th Floor
c/o Grants Management Association
Boston, MA 02110
(617) 292-0234 x12
Attorneys for Alabama Environmental
Council, *et al.*

James R. May
Mid-Atlantic Environmental Law Center
Widener University School of Law
4601 Concord Pike
Wilmington, DE 19803-04747
(302) 477-2060
Attorney for Delaware Nature Society

DATED: May 11, 2004

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 02-1387
)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	COMPLEX
)	
Respondent.)	

**CERTIFICATE OF ENVIRONMENTAL PETITIONERS
AS TO PARTIES, RULINGS, AND RELATED CASES**

Petitioners Alabama Environmental Council, American Lung Association, Clean Air Council, Communities for a Better Environment, Delaware Nature Society, Environmental Defense, Group Against Smog and Pollution, Michigan Environmental Council, Natural Resources Defense Council, Ohio Environmental Council, Scenic Hudson, Sierra Club, and Southern Alliance for Clean Energy (“Environmental Petitioners”) submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

These cases are consolidated petitions for review of final agency actions, not appeals from the ruling of a district court.

(ii) Parties to These Cases

Environmental Petitioners are listed above.

Government Petitioners are People of the State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New York, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, and State of Wisconsin; District of Columbia, City of New York, City and County of San Francisco, and twenty-six cities and towns in the State of Connecticut (Town of Cornwall, Town of East Hartford, Town of Easton, Town of Greenwich, City of Groton, City of Hartford, Town of Hebron, Town of Lebanon, City of Middletown, City of New Haven, City of New London, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, City of Stamford, Town of Thompson, Town of Wallingford, Town of Washington, City of Waterbury, Town of Westbrook, Town of Weston, Town of Westport, Town of Woodstock); California Air Resources Board, Monterey Bay Unified Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Air Pollution Control District, Santa Barbara County Air Pollution Control District, South Coast Air Quality Management District, Ventura County Air Pollution Control District, and Yolo Solano Air Quality Management District.

Industry Petitioners are Utility Air Regulatory Group, Alabama Power Co., Appalachian Power Co., Arizona Public Service Company, Arkansas-Missouri Power Company, Baltimore Gas and Electric Co., Boston Edison Co., Carolina Power and Light Co., Centerior Energy Corp., Cleveland Electric Illuminating Co., Toledo Edison Co., Central and South West Services, Inc., Kansas City Power and Light Co., Kentucky Power Co., Kentucky Utilities Co., Central Power and Light Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co., West Texas Utilities Co., Central Hudson Gas and Electric Co., Central Illinois Light Co., Central Illinois

Public Service Co., Cincinnati Gas and Electric Co., Columbus Southern Power Co., Commonwealth Edison Co., Consolidated Edison Company of New York, Inc., Dayton Power and Light Co., Delmarva Power and Light Co., Detroit Edison Co., Duke Power Co., Duquesne Light Co., Florida Power and Light Co., Florida Power Corp., Georgia Power Co., Gulf Power Co., Illinois Power Co., Indiana Michigan Power Co., Indianapolis Power and Light Co., Iowa Public Service Co., Long Island Lighting Co., Louisville Gas and Electric Co., Madison Gas and Electric Co., Minnesota Power Co., Mississippi Power Co., Monongahela Power Co., Montaup Electric Co., New England Power Co., New York State Electric and Gas Corp., Niagara Mohawk Power Corp., Northern Indiana Public Service Co., Oglethorpe Power Corp., Ohio Edison Co., Pennsylvania Power Co., Ohio Power Co., Ohio Valley Electric Corp., Oklahoma Gas and Electric Co., PacifiCorp Electric Operations, Pacific Gas and Electric Co., Pennsylvania Power and Light Co., Philadelphia Power and Light Co., Potomac Edison Co., Potomac Electric Power Co., PSI Energy, Inc., Public Service Company of New Mexico, Public Service Electric and Gas Co., Salt River Project, Savannah Electric and Power Co., South Carolina Electric and Gas Co., Southern California Edison Co., Tampa Electric Co., Tucson Electric Power Co., Union Electric Co., Virginia Power, West Penn Power Co., Wisconsin Electric Power Co., Wisconsin Power and Light Co., Wisconsin Public Service Corp., Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, Consumers Power Co., NSR Manufacturers Roundtable, Alliance of Automobile Manufacturers, American Boiler Manufacturers Association, American Chemistry Council, American Forest and Paper Association, Inc., American Iron and Steel Institute, American Petroleum Institute, Council of Industrial Boiler Owners, National Association of Manufacturers, National Mining Association, National Petrochemical and Refiners Association, Portland Cement Association, Newmont

Mining Co., National Environmental Development Association's Clean Air Regulatory Project, and the Clean Air Implementation Project.

Respondent is the United States Environmental Protection Agency.

Environmental Intervenors are the same as Environmental Petitioners.

Group I State Intervenors are State of Alaska, Attorney General of the State of Indiana, State of Kansas, State of Nebraska, State of North Dakota, State of South Carolina, State of South Dakota, State of Utah, and Commonwealth of Virginia.

Group II State Intervenors are the same as Government Petitioners and Illinois State Chamber of Commerce and Illinois Environmental Regulatory Group.

Industry Intervenors are the same as Industry Petitioners.

(iii) Amici in These Cases

Amici for Petitioners are Senator Hillary Rodham Clinton, Senator Jon S. Corzine, Senator James M. Jeffords, Senator Patrick J. Leahy, Senator Barbara Boxer, Senator Frank Lautenberg, Senator Charles E. Schumer, Senator Jack Reed, Clean Air Trust, American Thoracic Society, American College of Chest Physicians, National Association for the Medical Direction of Respiratory Care, and Anne Arundel County, Maryland.

Amici for Respondent is State of Florida.

(iv) Circuit Rule 26.1 Disclosures for Environmental Petitioners

Alabama Environmental Council. Alabama Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Alabama Environmental Council.

Alabama Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Alabama, works to protect and preserve Alabama's natural heritage.

American Lung Association. American Lung Association has no parent companies, and no publicly held company has a 10% or greater ownership interest in American Lung Association.

American Lung Association, a nonprofit corporation organized and existing under the laws of the State of Maine, is a national organization dedicated to the conquest of lung disease and the promotion of lung health.

Clean Air Council. Clean Air Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Clean Air Council.

Clean Air Council, a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, uses public education, community advocacy, and government oversight to ensure enforcement of environmental laws in its efforts to improve air quality throughout Pennsylvania and Delaware.

Communities for a Better Environment. Communities for a Better Environment has no parent companies, and no publicly held company has a 10% or greater ownership interest in Communities for a Better Environment.

Communities for a Better Environment (CBE) is a 501(c)(3) nonprofit corporation organized and existing under the laws of the State of California. CBE has approximately 20,000 members in California and is dedicated to improving the quality of the environment in California and throughout the United States.

Delaware Nature Society. The Delaware Nature Society has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Delaware Nature Society.

The Delaware Nature Society (DNS) is a private, non-profit membership organization organized under the laws of the State of Delaware. DNS fosters understanding, appreciation, and enjoyment of the natural world through education; preserves ecologically significant areas; and advocates stewardship and conservation of natural resources. DNS is the Delaware affiliate of the National Wildlife Federation.

Environmental Defense. Environmental Defense has no parent companies, and no publicly held company has a 10% or greater ownership interest in Environmental Defense.

Environmental Defense, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

Group Against Smog and Pollution. Group Against Smog and Pollution has no parent companies, and no publicly held company has a 10% or greater ownership interest in Group Against Smog and Pollution.

Group Against Smog and Pollution, a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is dedicated to creating a healthy, sustainable environment, with a focus on improving air quality in the Pittsburgh region.

Michigan Environmental Council. Michigan Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Michigan Environmental Council.

Michigan Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Michigan, is dedicated to addressing threats to Michigan's environment, promoting alternatives to urban blight and suburban sprawl, advocating for a sustainable

environment and economy, protecting Michigan's water legacy, promoting cleaner energy, and working to diminish environmental impacts on children's health.

Natural Resources Defense Council. Natural Resources Defense Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Natural Resources Defense Council.

Natural Resources Defense Council, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Ohio Environmental Council. The Ohio Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in The Ohio Environmental Council.

The Ohio Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Ohio, works to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources.

Scenic Hudson. Scenic Hudson has no parent companies, and no publicly held company has a 10% or greater ownership interest in Scenic Hudson.

Scenic Hudson is a nonprofit corporation organized and existing under the laws of the State of New York and is dedicated to protecting and enhancing the scenic, natural, historic, agricultural and recreational treasures of the Hudson River and its valley.

Sierra Club. Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Southern Alliance for Clean Energy. Southern Alliance for Clean Energy has no parent companies, and no publicly held company has a 10% or greater ownership interest in Southern Alliance for Clean Energy.

Southern Alliance for Clean Energy, a nonprofit corporation organized and existing under the laws of the State of Tennessee, is a regional organization working in eight southeastern states on energy issues, and dedicated to finding positive solutions to the negative impacts of power production by working for clean air policies and promoting the use of renewable energy and implementation of energy efficiency practices.

(B) Rulings Under Review

There are five final agency actions at issue in these consolidated cases: 45 Fed. Reg. 52,676 (Aug. 7, 1980); 57 Fed. Reg. 32,314 (July 21, 1992); 67 Fed. Reg. 80,187 (Dec. 31, 2002); 68 Fed. Reg. 11,316 (Mar. 10, 2003); and 68 Fed. Reg. 63,021 (Nov. 7, 2003).

(C) Related Cases

This Court has determined that these consolidated cases are related to *State of New York, et al. v. U.S. Environmental Protection Agency*, D.C. Cir. Case No. 03-1380 (and consolidated cases). December 24, 2003 Order at 2, *State of New York, et al. v. U.S. Environmental Protection Agency*, D.C. Cir. 02-1387 (and consolidated cases) and No. 03-1380 (and consolidated cases).

DATED: May 11, 2004.

Respectfully submitted,

Keri N. Powell

Keri N. Powell
Howard I. Fox
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorneys for American Lung Association,
Communities for a Better Environment,
Environmental Defense, Natural Resources
Defense Council, and Sierra Club

David G. McIntosh ^{by KP}

John D. Walke
David G. McIntosh
Natural Resources Defense Council
1200 New York Ave., N.W. Suite 400
Washington, D.C. 20005
(202) 289-6868

Attorneys for Natural Resources Defense
Council

Jonathan Lewis ^{by KP}

Ann B. Weeks
Jonathan Lewis
Clean Air Task Force
77 Summer Street, 8th floor
c/o Grants Management Associates
Boston, MA 02110
(617) 292-0234

Attorneys for 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

James R. May ^{by KP}

James R. May
Mid-Atlantic Environmental Law Center at
Widener University School of Law
4601 Concord Pike
Wilmington, DE 19803-04747
(302) 477-2060

Attorney for Delaware Nature Society

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS	2
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE	3
I. Nature of the Case, Course of Proceedings and Disposition in the Agency.	3
II. Statement of Facts	4
A. The Statute	4
B. <i>WEPCO</i> , The Energy Task Force, and EPA's Regulations	6
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW	10
ARGUMENT	11
I. The Ten-Year Lookback Exemption Unlawfully and Arbitrarily Allows Emissions Increases to Evade NSR, Simply Because They Do Not Reach Historical Levels.	11
A. The Act Requires NSR for "Any" Emissions-Increasing Change, Not Merely Some Such Changes.	13
B. Allowing Exemptions for Emissions Increases to Historical Levels Undermines the Act's Nonattainment and PSD Provisions.	13
C. EPA's Attempt to Justify Its Exemption On Causation Grounds Is Untenable.	15
1. EPA's Causation Argument Is Refuted By Another Provision of the 2002 Rule.	15

2.	EPA Fails to Offer a Reasoned Explanation For Why Any Emissions Increase up to The Highest Emissions Level Reached by a Source During the Ten Years Preceding a Change is <i>Per Se</i> Unrelated to That Change.	16
D.	EPA Arbitrarily Allows Sources to Estimate Their Pre-Change Emissions Levels of Different Pollutants Using Different Two-Year Periods.	19
E.	EPA’s Use of the Historical Emissions Test for Source-Wide Netting is Unlawful and Arbitrary.	20
1.	EPA Has Not Explained How a Fifteen-Year Netting Period Could Be Considered "Contemporaneous."	21
2.	EPA Has Not Explained Why Its Causation-Based Historical Ten-Year Lookback Methodology Should Apply in the Netting Context.	22
II.	The 2002 and 1992 Rules Unlawfully and Arbitrarily Allow Emissions-Increasing Changes at Electric Utilities to Evade NSR, Based on Five-Year-Old Emission Levels.	23
III.	EPA’s “Plantwide Applicability Limitation” Exemption Unlawfully and Arbitrarily Allows Emissions-Increasing Changes to Escape NSR, Simply Because Those Increases Do Not Exceed Historical Emissions Levels Prevalent Decades Ago.	24
A.	EPA’s PAL Exemption Unlawfully and Arbitrarily Exempts Emission-Increasing Changes from NSR.	26
B.	EPA’s Arguments Concerning this Court’s <i>Alabama Power</i> Decision Are Unavailing.	27
C.	The PAL Exemption Undermines Rather Than Furthers the Act’s Air Quality Objectives.	30
IV.	The 1992 and 2002 Rules’ Exclusion of Post-Change Emissions Increases Attributable to “Demand Growth” is Unlawful and Arbitrary.	31

V.	EPA Acted Unlawfully And Arbitrarily By Exempting Emissions Increases At So-Called "Clean Units" From NSR.	33
A.	EPA Lacks Authority to Exempt Some Emissions-Increasing Changes from NSR, Simply Because those Changes Occur at So-Called "Clean Units."	36
B.	EPA's Rationales Cannot Justify the Unlawful Clean Unit Exemption, and Fail to Meet Standards of Reasoned Agency Decisionmaking.	37
VI.	EPA Lacks Authority to Exempt Physical or Operational Changes That Increase Emissions of a Pollutant Merely Because Those Changes Also Reduce Emissions of a Different Pollutant.	40
A.	PCPs Constitute Physical or Operational Changes.	42
B.	EPA's Defense of Its PCP Exemptions Falls Short.	44
VII.	EPA's 1992 Rule Violates the Statutory Requirement That NSPS Apply to "Any" Change That Increases Emissions..	45
	CONCLUSION	47

TABLE OF AUTHORITIES

CASES

* <i>Alabama Power v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1980).....	<i>passim</i>
<i>Appalachian Power Co. v. EPA</i> , 249 F.3d 1032 (D.C. Cir. 2001).....	44
<i>Association of Data Processing Service Organizations v. Board of Governors</i> , 745 F.2d 677 (D.C. Cir. 1984).....	11
<i>Cajun Electric Power Cooperative v. FERC</i> , 924 F.2d 1132 (D.C. Cir. 1991).....	10
* <i>Chevron, USA v. NRDC</i> , 467 U.S. 837 (1984).....	10, 11
<i>Department of Housing and Urban Development v. Rucker</i> , 535 U.S. 125 (2002).....	13
<i>Engine Manufacturers Association v. EPA</i> , 88 F.3d 1075 (D.C. Cir. 1996).....	37
<i>General Electric Co. v. Department of Commerce</i> , 128 F.3d 767 (D.C. Cir. 1997).....	32
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578 (1980)(same).....	13
<i>Rettig v. Pension Benefit Guarantee Corp.</i> , 744 F.2d 133 (D.C. Cir. 1984).....	11
* <i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	28
<i>SEC v. Sloan</i> , 436 U.S. 103 (1978).....	44
<i>Sierra Club v. EPA</i> , 129 F.3d 137 (D.C. Cir. 1997).....	13

*Authorities upon which we chiefly rely are marked with asterisks.

Transactive Corp. v. US,
91 F.3d 232 (D.C. Cir. 1996).....11

**WEPCO v. Reilly*,
893 F.2d 901 (7th Cir. 1990)6, 42, 44, 46

STATUTES

Clean Air Act § 110(c), 42 U.S.C. § 7410(c)	1
*Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4)	5, 13, 46
*Clean Air Act §§160, 42 U.S.C. § 7470	36, 41
Clean Air Act § 161, 42 U.S.C. § 7471	1
*Clean Air Act § 165, 42 U.S.C. § 7475	36, 41
*Clean Air Act §§ 172, 42 U.S.C. § 7502	13
*Clean Air Act § 173, 42 U.S.C. § 7503	34, 35
*Clean Air Act § 171, 42 U.S.C. § 7501	13, 34
*Clean Air Act § 182, 42 U.S.C. § 7511a.....	43
Clean Air Act § 301(a), 42 U.S.C. § 7601(a)	1
*Clean Air Act § 307(b), 42 U.S.C. § 7607(b).....	1, 10, 20
Clean Air Act § 402(12), 42 U.S.C. § 7651a(12)	43
Clean Air Act § 409, 42 U.S.C. § 7651h	4, 43
*Clean Air Act § 415, 42 U.S.C. § 7651n	42

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 51.165	<i>passim</i>
40 C.F.R. §51.166	<i>passim</i>
40 C.F.R. §52.21	<i>passim</i>

FEDERAL REGISTER

57 Fed. Reg. 32,314 (July 21, 1992)	<i>passim</i>
61 Fed. Reg. 38,250 (July 23, 1996).....	<i>passim</i>
62 Fed. Reg. 38652 (July 18, 1997).....	2
63 Fed. Reg. 39,857 (July 24, 1998).....	7, 11, 20, 23, 32
66 Fed. Reg. 5002 (January 18, 2001)	
67 Fed. Reg. 80,186 (December 31, 2002)	<i>passim</i>
68 Fed. Reg. 614 (January 16, 2003)	2
68 Fed. Reg. 11,316 (March 10, 2003)	1, 4
68 Fed. Reg. 63,021 (November 7, 2003).....	1, 4

PUBLIC LAWS

Pub. L. No. 91-604, §4(a), 84 Stat. 1676 (1970)4, 5

LEGISLATIVE HISTORY

136 Cong. Rec. S16895-01, S16904 (Oct. 27, 1990)47
136 Cong. Rec. S3383-01, S3384 (daily ed. March 28, 1990)
136 Cong. Rec. S3717-06 (daily ed. Apr. 3, 1990)6
*H.R. Conf. Rep. 1783, 91st Cong., 2d Sess. (Dec. 17, 1970)4
A Legislative History of the Clean Air Act Amendments of
1990 (U.S. Senate Committee on Environment and Public
Works, November 1993) ("1990 L.H.")43, 45
S. Rep. 1196, 91st Cong., 1st Sess. (1970)43

GLOSSARY

BACT	best available control technology
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
GAO	United States General Accounting Office
JA	Joint Appendix
LAER	lowest achievable emissions rate
NAAQS	national ambient air quality standards
NNSR	nonattainment new source review
NO _x	oxides of nitrogen
NSPS	new source performance standards
NSR	new source review
PAL	Plantwide Applicability Limitation
PCPs	pollution control projects
PSD	prevention of significant deterioration
SIP	state implementation plan
TSD	Technical Support Document
VOC	volatile organic compound
WEPCO	Wisconsin Electric Power Company

JURISDICTIONAL STATEMENT

(A) Agency. Respondent U.S. Environmental Protection Agency (“EPA”) has jurisdiction to issue regulations implementing the Clean Air Act. CAA §§301(a)(1), 161, 110(c), 42 U.S.C. §§7601(a)(1), 7471, 7410(c).

(B) Court of Appeals. This Court has jurisdiction to review the final EPA actions (including promulgation of national regulations) challenged in this proceeding. CAA § 307(b)(1), 42 U.S.C. §7607(b)(1)

(C) Timeliness. Each petition addressed herein was timely filed within sixty days of the publication of the challenged final action in the *Federal Register* of 57 Fed. Reg. 32,314 (published July 21, 1992, petition filed September 11, 1992); 67 Fed. Reg. 80,187 (published December 31, 2002, petitions filed February 28 and March 3, 2003); 68 Fed. Reg. 11,316 (published March 10, 2003, petitions filed May 8 and May 9, 2003); 68 Fed. Reg. 63,021 (published November 7, 2003, petition filed December 5, 2003).

(D) Standing. The rules challenged herein apply to approximately 20,000 major sources around the country, including many located in communities where Petitioners’ members reside.¹ Each year, these sources make thousands of physical and operational changes.² As a direct result of the new rules, many such changes that cause dramatic emissions increases will escape new source review (“NSR”) and new source performance standards (“NSPS”). *See* 61 Fed. Reg. 38249, 38319/1(July 23, 1996)[JA ___]; 57 Fed. Reg. 32321/3[JA ___].

¹ EPA, “NSR 90-Day Review Background Paper,” at 7 (June 22, 2001)(www.epa.gov/air/nsr-review/bkgrnd/nsr-review.pdf)[JA ___]; EPA, “Title V Permit Issuance Statistics – March 31, 2004”(www.epa.gov/oar/oaqps/permits/maps/permtbl.html)[JA ___].

² *See* EPA, “New Source Review Report to the President,” at 10 (June 13, 2002)(A-90-37: IV-A-5)[JA ___](citing industry comments).

As organizations dedicated to protecting and improving air quality, Petitioners have standing to bring this challenge on behalf of their members, who are harmed by the increased emissions from projects that avoid NSR and NSPS under the new rules. Petitioners' members who are forced to breathe such pollution face heightened risk of asthma attacks, heart attacks, lost workdays, birth defects, hospital costs, and premature death.³ These members also are injured by environmental damage associated with increased air pollution.⁴ Moreover, because the new rules allow physical and operational changes that result in increased emissions to evade NSR and NSPS, the rule harms Petitioners' members by limiting their ability to review and comment upon such changes. Further support for Petitioners' standing appears in the materials cited in this brief and in the appended declarations.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in a separate addendum.

STATEMENT OF ISSUES

Whether EPA acted unlawfully or arbitrarily by promulgating rules whereby

1. a physical or operational change that increases emissions escapes NSR, unless the increase exceeds the highest historical emissions level from as much as a decade before the change;

³ 68 Fed. Reg. 614, 620-25 January 6, 2003)[JA____](describing negative health impacts of ozone); 62 Fed. Reg. 38652 (July 18, 1997)[JA____](describing negative health impacts of particulate matter).

⁴ See, e.g., 62 Fed. Reg. at 38875[JA____] (describing ozone-related "damage ... to vegetation and natural resources"); 62 Fed. Reg. 38680[JA____] ("impairment of visibility is an important effect of [particulate matter] on public welfare"); 66 Fed. Reg. 5002, 5025(January 18, 2001)[JA____] (describing acidification of lakes and streams attributable to emissions of sulfur dioxide and nitrogen oxides); *id.* 5026 (discussing contribution of nitrogen oxide emissions to eutrophication of waterbodies).

2. different pre-change emissions baselines are used for different air pollutants;
3. an emissions-increasing change at one unit escapes NSR, through netting with emissions decreases that occurred at other units as many as fifteen years earlier;
4. a physical or operational change that increases electric utility emissions escapes NSR, unless the increase exceeds the highest historical emissions level from as many as five years before the change;
5. a physical or operational change that increases plantwide emissions escapes NSR, unless the increase exceeds the plant's highest historical emissions level from ten, twenty or even thirty years before the change;
6. an emissions increase associated with demand growth escapes NSR, even if the increase is related to a physical or operational change;
7. an emissions-increasing change escapes NSR, if the change occurs at a unit EPA or the reviewing authority has designated as "clean;"
8. an emissions-increasing change escapes NSR, if the change is part of a "pollution control project" that decreases emissions of a different pollutant;
9. a physical or operational change that increases the maximum achievable hourly emissions rate escapes NSPS, unless the increase exceeds the highest hourly emissions rate achievable as many as five years before the change.

STATEMENT OF THE CASE

I. Nature of the Case, Course of the Proceedings and Disposition in the Agency.

These consolidated petitions seek review of final EPA actions that (1) change regulations concerning NSPS and NSR, 57 Fed. Reg. 32314 (July 21, 1992), 67 Fed. Reg. 80186 (December 31, 2002); (2) make the NSR changes applicable in every area lacking an EPA-approved

prevention of significant deterioration (“PSD”) program, 68 Fed. Reg. 11316 (March 10, 2003); and (3) respond to petitions requesting reconsideration of the NSR changes. 68 Fed. Reg. 63021 (November 7, 2003).

Unless otherwise expressly indicated, references in this brief to the “2002 rule” collectively include the December 2002 and March 2003 rules and the November 2003 reconsideration decision. To avoid multiple parallel citations, this brief sometimes cites one of the three CFR sections at issue (40 C.F.R. §§51.165, 51.166, and 52.21), rather than all three. In such instances, the arguments made, and challenges asserted herein, apply equally to the counterpart provisions in the other two CFR sections.

II. Statement of Facts

A. The Statute

Congress enacted the Clean Air Act Amendments of 1970 “to provide for a more effective program to improve the quality of the Nation’s air.” H.R. Conf. Rep. 1783, 91st Cong., 2d Sess. 1 (December 17, 1970)[JA__]. The Act requires EPA to promulgate national ambient air quality standards (“NAAQS”) for harmful air pollutants, 42 U.S.C. §7409, and directs the states to devise implementation plans for bringing polluted areas into line with the standards. *Id.* §7410.

In the 1970 Amendments, one required element of a state implementation plan (“SIP”) was “a procedure ... for review (prior to construction or modification) of the location” of any new or modified air pollution source. Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1670 (1970). A SIP had to require the submission, “prior to commencing construction or modification” of any air pollution source, of such information as necessary to permit the state to determine whether construction or modification at the proposed location would “prevent the attainment or

maintenance” of a NAAQS “within any air quality control region.” *Id.* at 1681. Since 1970, the Act has defined “modification” as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §7411(a)(4).

Also since 1970, the Act has required EPA to promulgate national performance standards for stationary sources. *See* Pub. L. No. 91-604, §4(a). 84 Stat. 1684. Once EPA establishes an NSPS for a source category that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. §7411(b)(1)(A), no source belonging to that category may operate in violation of its NSPS. *Id.* §7411(e).

The Clean Air Act Amendments of 1977 and 1990 supplemented the 1970 Act’s single pre-construction/pre-modification provision with additional, detailed requirements that an owner must meet before obtaining a permit to build or modify a major emitting facility. *Id.* §§7475, 7479, 7501, 7503. For example, in addition to demonstrating that emissions from the facility will not interfere with any area’s efforts to comply with the NAAQS, the owner now must show that the facility will not cause or contribute to exceedance of more protective ambient air caps known as increments, and that it will be “subject to the best available control technology [(“BACT”)] for each pollutant subject to regulation.” *Id.* §7475(a)(3), (a)(4). If the facility is located in an area already violating a NAAQS, the owner must demonstrate that the facility will achieve the “lowest achievable emissions rate” (“LAER”) for the NAAQS pollutant, and must

offset any increases in the NAAQS pollutant with decreases achieved elsewhere in the same “nonattainment” area. *Id.* §7503(a)(2), (a)(1)(A).⁵

B. WEPCO, the Energy Task Force, and EPA’s Regulations

In 1989, the Wisconsin Electric Power Company (“WEPCO”) petitioned the Seventh Circuit to review EPA’s determination that equipment replacement projects at WEPCO’s Port Washington power plant triggered NSR and NSPS. *WEPCO v. Reilly*, 893 F.2d 901 (7th Cir. 1990). WEPCO challenged EPA’s determination that the projects increased emissions, arguing that the pre-renovation emissions baselines identified by the agency had been artificially low, in part because they “reflected voluntary decisions by WEPC[O] regarding safety considerations ... and an electricity demand which did not require operation of the units at higher capacities.” *Id.* 914 (quoting WEPCO’s brief). The court rejected WEPCO’s arguments, because the company had been unable to show that EPA’s pre-renovation emissions tests “were conducted during a period of plant operations that substantially differed from the normal operations of the deteriorated Port Washington plant.” *Id.* 915.

During its deliberations over the 1990 Clean Air Act Amendments, the Senate considered a proposal to overturn the *WEPCO* decision by amending the Act to allow a unit to “undertake physical or operational changes without triggering new source requirements so long as it does not emit more than it was designed to emit.” 136 Cong. Rec. S3717-06, S3724(daily ed. April 3, 1990)(statement of Sen. McClure)[JA__]. The proposal was defeated, with opponents expressing concern that the “*WEPCO* fix” amendment “would tie the EPA’s hands and

⁵ The permitting requirements applicable in attainment areas are called “prevention of significant deterioration,” or “PSD.” The stricter requirements applicable in nonattainment areas are called “nonattainment new source review,” or “NNSR.” Collectively, PSD and NNSR are called “NSR.”

completely halt, or seriously deter, what little use the Agency has made of the modification provisions of the existing Act.” 136 Cong. Rec. S3383-01, S3384(daily ed. March 28, 1990) (remarks of Sen. Baucus)[JA ___].

Industry pressure continued to mount, however, and, in 1992, EPA changed its NSR and NSPS applicability rules with respect to electric utilities. 57 Fed. Reg. 32314 [JA ___]. The agency (1) adopted “a broad NSR exclusion for utility pollution control projects;” (2) declared that for electric utilities, the baseline for NSR applicability purposes would thereafter be the source’s average annual emissions over any two-year period within the five years immediately preceding the physical or operational change in question (unless the owner could convince the permitting authority that a different period was more representative of normal source operations); (3) stated that increased emissions attributable to growth in demand for a source’s product do not trigger NSR; and (4) altered its NSPS applicability rules “to provide that a utility may use for its pre-change baseline the highest hourly emissions rate achievable at any time during the 5 years prior to the physical or operational change.” *Id.* 32319-33[JA __-__].

Four years later, EPA proposed further changes to the NSR applicability rules, “to reduce costs and regulatory burdens for permit applicants.” 61 Fed. Reg. 38250, 38250/1 (July 23, 1996)[JA ___]. After soliciting further public comment in 1998, however, 63 Fed. Reg. 39857 (July 24, 1998)[JA ___], EPA elected not to finalize any of the proposed changes. Testimony of Carol M. Browner, former EPA Administrator, before Senate Committee on Health, Education, Labor, and Pensions, at 2-8 (September 3, 2002) (www.4cleanair.org/members/committee/permits/BrownerTestimony.pdf).

Shortly after taking office in January 2001, President Bush convened an energy task force and placed it under the direction of Vice President Cheney. The task force’s May 16, 2001 final

report asked the President to direct the EPA Administrator, in consultation with the Secretary of Energy and other relevant agencies, to review NSR regulations, including administrative interpretation and implementation, and issue a report to the President within 90 days on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection. *See* 67 Fed. Reg. 80188-89[JA__].

After the President issued the recommended directive, EPA studied NSR for several months and found that “the NSR program has not significantly impeded investment in new power plants or refineries.” EPA, “New Source Review: Report to the President,” at 1 (June 13, 2002)(A-90-37, IV-A-5)[JA__]. The agency also concluded that “preventing emissions of pollutants covered by NSR does result in significant environmental and public health benefits.” *Id.* 2. In the same report, however, EPA claimed that, with respect to existing power plants and refineries, “The NSR program has impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity.” *Id.* 1.

The General Accounting Office determined in August 2003 that this last claim was based on self-serving, unsubstantiated anecdotes submitted by industry, rather than on reliable data. GAO, “EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program,” at 4-5, 16-25(August 2003)(www.gao.gov/new.items/d03947.pdf). By that time, however, EPA had published a final action promulgating extensive revisions to its NSR applicability rules. 67 Fed. Reg. 80186 [JA__]. The agency explained that the revisions “implement[ed]” several agency recommendations made “in response to” the task force report, *id.* 80189/1[JA__], and that the final rule changes were “intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining.” *Id.* 80186/2[JA__]. EPA organized the changes into five groupings: a ten-year look-back approach to calculating the pre-

change emissions baseline for sources other than electric utilities; a method for projecting post-change emissions at all sources; “plantwide applicability limitations;” an exemption for “clean units;” and an exemption for “pollution control projects.” *Id.* 80186-91[JA__ - __].

SUMMARY OF ARGUMENT

NSR. The challenged actions unlawfully and arbitrarily exempt from NSR emissions-increasing changes that constitute “modifications” under the Clean Air Act. First, EPA has exempted changes that increase emissions over recent levels, simply because they do not exceed higher “historical” levels achieved by the source many years earlier -- ten years for non-utilities, and five for utilities. While EPA claimed that the exempted emissions are not causally linked to the preceding changes, another provision of the agency’s own regulations contradicts that claim, and the agency’s reasoning suffers from other fatal defects as well.

Not content with exempting increases based on five- or ten-year old emission levels at individual units, EPA has promulgated a “plantwide applicability limitation” provision exempting emissions increases in at an entire source, simply because those increases do not exceed higher levels achieved by the source two or three decades earlier. This provision suffers in heightened degree from the same defects that afflict its shorter five- and ten-year counterparts; ignores EPA’s own insistence that a lookback period longer than ten years is inappropriate; and contravenes this Court’s *Alabama Power* decision, which provides that only “contemporaneous” emissions decreases can be netted against increases.

EPA has also promulgated a blanket exemption for “any” emissions increase associated with demand growth. This provision contradicts the accompanying preamble, which concedes

that demand-growth-related emissions increases can only be exempted to the extent they are “not related” to a physical or operational change.

In two additional provisions, EPA purported to exempt emission-increasing changes (1) at units using technologies that EPA or reviewing authorities consider “clean,” and (2) in connection with “pollution control projects” that increase emissions of one pollutant while decreasing emissions of a different pollutant. EPA’s attempt to justify these exemptions on policy grounds must fail as a matter of law, and in any event ignores key statutory NSR safeguards abrogated by the exemptions.

NSPS. EPA’s 1992 rule unlawfully and arbitrarily allows a change to escape NSPS even if it increases a source’s maximum hourly emissions rate above the level achievable without the change -- so long as the increased rate does not exceed the highest rate achievable as many as five years before the change.

STANDARD OF REVIEW

The Act’s judicial review provision provides *inter alia* for reversal of EPA action found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” §307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A).

Statutory Interpretation. Under Step One of *Chevron*, the Court must “give[] effect” to congressional intent discerned using “traditional tools of statutory construction.” *Chevron, USA v. NRDC*, 467 U.S. 837, 843 n.9 (1984). An agency receives “no deference” on this issue. *Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

In *Chevron* Step Two, applicable where Congress has not expressed clear intent, the Court determines whether the agency interpretation is “reasonable” -- *i.e.*, substantively

consistent with the statute and supported by a reasoned explanation. *Chevron*, 467 U.S. at 845; *Rettig v. Pension Benefit Guarantee Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984).

Unless otherwise expressly indicated, references in this brief to “unlawful” agency action address both violation of congressional intent under *Chevron* Step One and unreasonable agency interpretation under Step Two.

Arbitrary and Capricious. Agency action is arbitrary and capricious if *inter alia* the agency has not “identified and explained the reasoned basis for its decision,” *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996), or if it has reached a conclusion that is unsupported by substantial evidence. *Assn. of Data Processing Service Orgs. v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

ARGUMENT

I. **The Ten-Year Lookback Exemption Unlawfully and Arbitrarily Allows Emissions Increases to Evade NSR, Simply Because They Do Not Reach Historical Levels.**

Under EPA’s 2002 rule, a physical or operational change that dramatically increases the harmful air pollution emitted by a source is exempt from NSR, so long as emissions do not exceed the source’s highest level in the decade preceding the change. This exemption is unlawful and arbitrary.

Background

To determine whether NSR applies to a physical or operational change under CAA §111(a)(4), a source’s post-change emissions level is compared to its pre-change emissions “baseline.” *See* 63 Fed. Reg. 39858/1[JA ____]. Under EPA’s prior regulations, the agency

“historically used the 2 years immediately preceding the proposed change to establish the baseline.” 61 Fed. Reg. 38254/1[JA ____].⁶

As sources age, they decline physically, to the point at which they are operating at only a fraction of their original capacity. Emissions, which are a function of operating time and intensity, decline as well. See Synapse Energy Economics, Inc., “Coal Unit Capacity Factor Decline With Age”(August 12, 1998)(attachment to NRDC Comments dated October 8, 1998)(A-90-37, IV-D-303)[JA __] (Study concluding that “older units operat[e] at lower capacity factors, by roughly one percentage point for each year of age.”). Therefore, physical or operational changes that restore an existing source to its original capacity significantly increase the amount of pollution emitted by that source as compared to its emissions level during the period immediately preceding the change.

In sharp contrast to EPA’s prior focus on recent pre-change emissions levels, the 2002 rule seeks “to preserve a unit’s historical operating levels and associated emissions.” TSD I-2-2[JA ____]. Specifically, the 2002 rule defines pre-change emissions as those prevailing during “any consecutive 24-month period selected by the owner or operator within the 10-year period” preceding the change. 40 C.F.R. §51.165(a)(1)(xxxv)(B)(emphasis added); *accord id.* §§51.166(b)(47)(ii), 52.21(b)(48)(ii). Even if post-change emissions significantly increase over recent levels, the change is exempt from NSR unless the increase significantly exceeds this ten-year high. See, e.g., *id.* §51.166(a)(7)(iv)(c). Thus for example, a source making a change in 2004 that dramatically increases its emissions over recent levels can nonetheless evade NSR if

⁶ “[I]n some cases,” EPA used an earlier two-year period, upon a finding that such period was “more representative.” 61 Fed. Reg. 38254/1[JA ____]; e.g., 40 C.F.R. § 51.165(a)(1)(xii)(B) (2001).

post-change emissions will not exceed the source's average annual emissions level from 1994 through 1996.

A. The Act Requires NSR for “Any” Emissions-Increasing Change, Not Merely Some Such Changes.

The Act requires NSR for “any” physical or operational change “which increases the amount of any air pollutant emitted by such source.” §111(a)(4), 42 U.S.C. §7411(a)(4) (emphasis added). *See Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002)(construing “any”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980)(same). EPA lacks authority to administratively excise the statutory word “any” by excluding some emissions-increasing changes.

Yet that is precisely what EPA has done. Even where post-change emissions dramatically exceed those preceding the change, the change is exempted from NSR if emissions remain below historical levels prevalent many years earlier. That exemption is unlawful. *See Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997)(“[T]his court has consistently struck down administrative narrowing of clear statutory mandates.”).

B. Allowing Exemptions for Emissions Increases to Historical Levels Undermines the Act’s Nonattainment and PSD Provisions.

In addition to contravening §111(a)(4) itself, EPA’s exemption allowing current emissions to increase all the way to emissions levels from as many as ten years earlier fundamentally conflicts with the Act’s NNSR and PSD provisions.

Nonattainment. The Act’s nonattainment provisions seek to reduce air pollution in areas with unhealthy air quality. For example, the Act requires “reasonable further progress” towards attainment of the NAAQS, §172(c)(2), which means achieving “annual reductions” in emissions. §171(1). *See also, e.g.*, §182(c)(2)(B) (emissions of ozone-causing pollutants must be reduced by

three percent each year until the attainment date). Thus, far from encouraging sources to increase their emissions to historical levels, the Act's nonattainment provisions embody the fundamental premise that even current emission levels are too high and must be reduced.

In direct conflict with these statutory provisions, EPA's exemption allows sources to dramatically increase current emissions to historical levels not seen for many years. According to EPA itself, "the purpose of new source review is to ensure that emissions from new or modified sources do not prejudice the transition to attainment." EPA Reply Merits Brief in *Chevron* (Feb. 17, 1984), 1982 Lexis U.S. Briefs 1005. That purpose is fundamentally undermined by allowing massive emissions increases to historical levels.

PSD. The PSD program seeks to "prevent[]" significant deterioration of air quality, §110(a)(2)(J), not to authorize such deterioration via emissions increases to historical levels.

For example, a PSD permit cannot issue for any modification whose emissions would cause or contribute to violation of specified air quality limits (including NAAQS, as well as more protective -specific caps known as "PSD increments"). §165(a)(3). Of key importance, the 2002 rule measures emissions increases for purposes of gauging compliance with §165(a)(3) using actual emissions during "the 2 years immediately preceding" the modification. 67 Fed. Reg. 80196/2[JA____](emphasis added). *Accord id.* 80196/1-2, 80202/1[JA____].

However, while conceding that the PSD permit process requires assessment of a modification's impact on current air quality, EPA adopted the opposite approach in defining whether a PSD permit is required in the first place, allowing use of historical emissions for that threshold determination. Of course, where a PSD permit is not required, none of the other PSD provisions apply. Thus, the 2002 rule allows emission-increasing changes that will deteriorate air quality to evade the PSD safeguards.

C. EPA's Attempt to Justify Its Exemption On Causation Grounds Is Untenable.

EPA did not dispute that “any” emissions-increasing changes must undergo NSR, but instead advanced a causation argument. EPA claimed that even when a change is followed by an emissions increase, that increase is *per se* causally unrelated to the change unless it also exceeds historical emissions levels. Specifically, EPA argued that to trigger NSR, “the [emissions] increase of concern should result from the change that is made,” TSD I-2-8[JA ___], and that the historical emissions exemption “allow[s] a source to distinguish between emissions increases that occur as a result of a physical or operational change versus increases that are not related to the change.” TSD I-2-7[JA ____] (emphasis added).

Initially, it bears emphasis that separate provisions of the 2002 rule exempt emissions increases that are “unrelated to the particular project.” *E.g.*, 40 C.F.R. §51.165(a)(1)(xxviii)(B)(3)(emphasis added). Thus, the only incremental effect of the ten-year lookback provision is to exempt increases that are related to a change.

EPA’s causation argument must be rejected for other reasons as well.

1. EPA’s Causation Argument Is Refuted By Another Provision of the 2002 Rule.

EPA’s causation argument is undermined by the rule’s approach to §165(a)(3). For purposes of gauging compliance with the NAAQS and PSD increments under §165(a)(3), the rule requires baseline emissions to be measured from the two years “immediately preceding” the project. *See* p. ____, *supra* (quoting EPA). Stated in statutory terms, EPA’s rule treats emissions increases over recent levels as “emissions from” the modification, even if the increases remain

below historical levels. §165(a)(3) (emphasis added).⁷ Yet in the applicability context, EPA claims these same emissions increases are unrelated to the physical or operational change. In short, EPA's rule rests on the arbitrary and internally contradictory claim that the same emissions increase is both unrelated and related to the very same physical or operational change.

2. EPA Fails to Offer a Reasoned Explanation For Why Any Emissions Increase up to the Highest Emissions Level Reached by a Source During the Ten Years Preceding a Change is *Per Se* Unrelated to That Change.

EPA's causation argument fails for other reasons as well. To identify emissions increases that result from a change, EPA claims the baseline emissions level "should reflect what the unit could emit under the representative operating levels just prior to the proposed change." TSD I-3-4[JA__](emphasis added). Those operating levels allegedly should reflect "a representative level of utilization (a level actually achieved by the unit) during a normal business cycle." *Id.* (emphasis added). This rationale is unlawful and arbitrary.

"Normal Business Cycle." EPA asserts that "a 10-year look back is reasonable and supported by a study performed to examine the typical length of business cycles for various types of major stationary sources." TSD I-3-4[JA__]. To the contrary, that study refutes EPA's ten-year exemption.⁸

As EPA admits, the study concluded that "business cycles differ markedly by industry and may vary greatly both in duration and intensity even within a particular industry." 67 Fed.

⁷ Section 165(a)(3) speaks of "emissions from construction or operation," (emphasis added), and § 169(2)(C) defines "construction" to include "modification (as defined in section [§ 111(a)(4)].)"

⁸ EPA's first mention of its reliance on the business cycle study to support a ten-year lookback appeared in the preamble to the final Rule. Thus, EPA erred in refusing to consider objections to its reliance on that study during the reconsideration process. *See* Recon. TSD 13[JA____].

Reg. 80200/1. Of the nine industrial sectors surveyed, business cycles varied from three to eight years -- with none reaching the ten-year period chosen by EPA. *See* Eastern Research Group, "Business Cycles in Major Emitting Source Industries," at 16(September 30, 1997)(A-90-37, IV-A-001)[JA__]. Far from supporting EPA's rule, the study confirms that the ten-year lookback exemption allows sources to evade NSR through use of historical emissions levels two to seven years beyond their business cycle.

"Could emit." EPA conceded that it would be inappropriate "to use a unit's actual emissions during the representative time period selected without some form of adjustment in cases when the unit is no longer able to emit the calculated amount of a pollutant at the time of a physical or operational change." TSD I-2-14[JA__]. However, the rule does just that.

EPA claimed that its rule ensures that a long-ago historical level can be used as the baseline only if the source still "could emit" at that level "just prior to the proposed change." TSD I-3-4[JA__](emphasis added). But the referenced rule provision requires only that a source still be legally allowed to emit at the historical level. *See* 40 C.F.R. §§51.165(a)(1)(xxxv)(B), 51.166(b)(47)(ii), 52.21(b)(48)(ii); TSD I-2-3[JA__](a historical emissions level can be used as a baseline if it "continues to be achievable under the most current legally enforceable emission limits and restrictions").

Even if a source could legally increase its emissions to historical levels, it does not follow that the source could practicably do so. For example, a source may not be able to operate at historical utilization levels because of aging and deteriorating equipment. *See* 67 Fed. Reg. 80219/1[JA__](actual emissions can decrease due to "a loss of capacity")[JA__]; Inland Steel Co., Comments dated August 24, 1998, at 4(A-90-37, IV-D-219) [JA__].

If emissions after a change increase to a level the source could not practicably have achieved prior to the change, the increase necessarily is related to the change. EPA's rule arbitrarily and unlawfully exempts such increases from NSR.

“Representative level of utilization.” As noted above, EPA contended that the baseline emissions level should reflect a “representative level of utilization.” *See* p. ____, *supra* (quoting EPA). Even judged by that standard, which has no statutory support and focuses improperly on utilization rather than emissions, the rule falls short.

First, far from requiring the source to choose a representative utilization level, the rule allows the source to choose any 24-month period during the preceding ten years, regardless of the utilization level prevalent during that period. *See, e.g.*, 40 C.F.R. §51.165(a)(1)(xxxv)(B). In particular, the source is free to choose any 24-month period “that enables it to maximize the average annual emissions.” TSD I-2-13[JA__](emphasis added).

Second, decisions by EPA and states under the predecessor rule refute the notion that any two-year period in the preceding ten years constitutes a “representative” baseline. EPA admits that when applying the pre-existing NSR rules—which allowed the reviewing authority discretion to select the two-year period preceding a change that it considered “representative of normal source operation”—EPA generally required sources to calculate their emissions level based on emissions during two years immediately preceding the planned change. *See* 61 Fed. Reg. 38254/1[JA__].

Moreover, a survey of state officials from eleven states reveals that ten of those states considered the two-year period preceding a change to be representative of normal source operations in the “majority” or “vast majority” of cases decided under the pre-existing rules. Environmental Integrity Project, NSR Reconsideration Comments, Attachment 4: “State

Regulatory Authorities Responses to Questionnaire on EPA's New NSR Rule" (August 28, 2003) (OAR-2001-0004-0549)[JA__]. All eleven states reported that they "never" or "very rarely" agreed that a period occurring five to ten years prior to a change was representative of normal source operation. *Id.*

This record evidence reflects case-specific determinations by agency officials familiar with the circumstances of the projects involved. EPA has offered no reasoned explanation for adopting a "representative" time period so widely divergent from that previously chosen by it and the states.⁹

D. EPA Arbitrarily Allows Sources to Estimate Their Pre-Change Emissions Levels of Different Pollutants Using Different Two-Year Periods.

The 2002 rule provides that "[a] different consecutive 24-month period can be used for each regulated NSR pollutant" for purposes of calculating a source's pre-change emissions level. 40 C.F.R. §§51.165(a)(1)(xxxv)(A)(3), (B)(4); 51.166(b)(47)(i)(c), (ii)(d); 52.21(b)(48)(i)(c), (ii)(d). This approach maximizes a source owner's ability to evade NSR for each pollutant, by separately choosing any 24-month period "that enables it to maximize the average annual emissions" of each pollutant. TSD I-2-13[JA__]. This provision is fundamentally inconsistent with EPA's claim that the ten-year lookback methodology is designed to address "normal fluctuations in market conditions during a business cycle." TSD I-2-5[JA__]. EPA does not—and cannot—claim that a source can be subject to a number of simultaneous yet independent business cycles, one for each pollutant that the source emits.

⁹ Though noting that the choice of a representative period was sometimes the subject of disputes between permitting authorities and applicants, *see* TSD I-2-6[JA__], 61 Fed. Reg. 38258[JA__], EPA never disputed the validity of the case-by-case "representativeness" determinations made by federal and state officials under the predecessor rules.

To the contrary, EPA expressly concedes that the same two-year period should be used for each pollutant. TSD I-3-9[JA __] (“baseline actual emissions for each affected pollutant must be based on the same 24 month period”)(emphasis added).

In response to a petition for reconsideration, EPA asserted that “NSR is a pollutant-specific program.” Recon. TSD, p. 14[JA __]. That assertion, however, simply indicates that each pollutant is to be addressed in a separate NSR determination. It does not explain why these separate determinations should use different 24-month periods.¹⁰

E. EPA’s Use of the Historical Emissions Test for Source-Wide Netting is Unlawful and Arbitrary.

Even where a planned physical or operational change would increase emissions from the changed unit above the unit’s highest historical emissions level, the 2002 rule nonetheless allows that increase to evade NSR by netting it against a long-ago decrease elsewhere at the source -- specifically, a decrease that occurred as many as fifteen years earlier. This exemption is unlawful and arbitrary.

Background

EPA’s longstanding NSR regulations allow source-wide netting: “[w]hen post-change emissions from a changed unit ... are significant, the proposed change at the source may nevertheless avoid review if, when considering any other contemporaneous emission increases and decreases at the source, the net emissions increase is less than significant.” 63 Fed. Reg. 39857 n.1[JA __](emphasis added). An emissions increase or decrease is “contemporaneous” if it occurs within five years prior to a change or—in state-administered programs—within a

¹⁰ EPA’s assertion that the multiple pollutant issue was not a proper subject for reconsideration (Recon TSD, p. 14) is meritless. The challenged provision, and EPA’s discussion of it, appeared for the first time in the final rulemaking package -- *i.e.*, “after the period for public comment.” See 42 U.S.C. § 7607(d)(7)(B).

“reasonable” timeframe selected by the state. 40 C.F.R. §§51.165(a)(1)(vi)(C)(1), 51.166(b)(3)(ii), 52.21(b)(3)(ii)(a).

Although the rule does not change the definition of “contemporaneous,” it “allows existing emissions units ... to calculate the baseline actual emissions for each contemporaneous event using the 10-year look back period.” 67 Fed. Reg. 80197[JA__](emphasis added). In other words, while the Rule requires the “event” that makes an emissions decrease creditable to be contemporaneous with the planned change, the actual emissions decrease may have occurred up to ten years prior to that event. The ten-year lookback is in addition to the five-year “contemporaneous” period. Thus, a source may avoid NSR by offsetting an emissions-increasing change with an emissions decrease that occurred up to fifteen years earlier. See TSD I-2-1[JA__].¹¹

1. EPA Has Not Explained How a Fifteen-Year Netting Period Could Be Considered “Contemporaneous.”

Emissions-increasing changes at one unit can evade NSR only if they “are offset by contemporaneous decreases of pollutants” elsewhere in the source. *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1980) (emphasis added). EPA does not and could not explain how an emissions decrease occurring as many as fifteen years prior to a change could be considered “contemporaneous” with that change. First, as explained in Part ___, *infra*, even an emissions decrease occurring ten years ago is not “contemporaneous.” Second, having rejected calls for a

¹¹ EPA’s claim that this issue was not appropriate for an administrative reconsideration petition is meritless. EPA admits that it did not propose to extend the 5-year contemporaneous period “for considering creditable emissions increases and decreases as part of the netting calculus” even if it established the 10-year baseline look back period. See TSD I-2-27[JA__]. Thus, the agency is incorrect in claiming that the public was on notice that the agency might allow use of the ten-year lookback for purposes of calculating the amount of a contemporaneous decrease. Recon. TSD 16[JA__].

lookback period exceeding ten years, TSD II-2-4[JA____], EPA cannot rationally claim that a period 50% longer is contemporaneous. EPA's attempt to apply the contemporaneity requirement to the "event" that makes a decrease creditable rather than to the decrease itself, Recon. TSD 17[JA__], ignores the purpose of the netting procedure: "to apply the permit process . . . only where industrial changes might increase pollution in an area, not where an existing plant changes its operations in ways that produced no pollution increase." *Alabama Power*, 636 F.2d at 401. A decrease that is not contemporaneous with a change cannot be used to demonstrate that overall source emissions will not increase at the time of that change.

2. EPA Has Not Explained Why Its Causation-Based Historical Ten-Year Lookback Methodology Should Apply in the Netting Context.

EPA concedes that the ten-year lookback methodology is inappropriate for "estimat[ing] a source's actual emissions at a particular time." 67 Fed. Reg. 80199/3[JA__]. Thus, the pre-existing definition of "actual emissions" (which generally requires that the amount of a post-change emissions increase be measured in comparison to average annual emissions during the two years immediately preceding the change) continues to apply for "determin[ing] [a] source's actual emissions on a particular date to satisfy all other NSR permitting requirements, including any air quality analyses . . . and the amount of emissions offsets required." *Id.* 80196/2[JA__]. EPA explains that the new ten-year lookback methodology serves a different purpose: to evaluate whether an expected post-change emissions increase will "result[] from" a preceding physical or operational change. *Id.* 80199/3[JA__]. Indeed, the ten-year lookback methodology is specifically designed to allow a source to discount the actual emissions increase following a change if the change occurs "at a time when utilization may not be at its highest." *Id.*

Like the other ambient air quality-focused NSR requirements, the focus of "netting" is on actual emissions at a particular time – namely, net emissions following a planned physical or

operational change. See 63 Fed. Reg. 39857 n.1[JA__](netting involves “[t]he summing of emission increases and decreases at the source that are contemporaneous with, but not resulting from, a proposed change” to determine whether “the net emissions increase” will be “less than significant” following that change.); see also *Alabama Power*, 636 F.2d at 401-402. The agency arbitrarily fails to offer a reasoned explanation for why the causation-focused ten-year lookback nonetheless is appropriate in the netting context.

II. The 2002 and 1992 Rules Unlawfully and Arbitrarily Allow Emissions-Increasing Changes at Electric Utilities to Evade NSR, Based on Five-Year-Old Emissions Levels.

In the 1992 rule’s preamble, EPA adopted a presumption that for purposes of calculating pre-change baseline emissions for an electric utility, “any 2 consecutive years within the 5 years prior to the proposed change is representative of normal source operations.” 57 Fed. Reg. 32323/2[JA__]. A source could use an even older two-year period if EPA determined “that such period is more representative of normal operations.” *Id.* This presumption was codified by the 2002 rule changes. See 40 C.F.R. §§51.165(a)(1)(xxxv)(A), 51.166(b)(47)(i), 52.21(b)(48)(i).

Like its ten-year non-utility counterpart, see Part I, *supra*, the five-year electric utility lookback exemption unlawfully and arbitrarily allows emissions-increasing changes to evade NSR. In a separate provision of the rule that applies to electric utilities along with other sources, EPA admits that emissions increases over recent levels are related to physical and operational changes, even if those increases remain below levels achieved five years before. See *supra* __ (discussing EPA’s approach to §165(a)(3)). Moreover, assuming *arguendo* that “annual variability in climatic or economic conditions ... or changes at other plants” (see 57 Fed. Reg. 32325/1[JA__]) might justify allowing some changes at some utilities to use a five-year baseline, EPA has offered no reasoned explanation for its blanket authorization of a five-year period for

all changes at all utilities -- including utilities lacking the variability that allegedly justifies the five-year baseline. In sharp contrast to the challenged blanket exemptions, the predecessor rule accommodated variability in a far more targeted manner, allowing a period earlier than the immediately preceding two years to be used upon a case specific showing that such earlier period was “more representative.” *See* p. ____, *supra*. Finally, EPA’s invocation of the five-year period defining changes that are “contemporaneous” for purposes of netting with other units (*id.* 32324-25[JA __]) mixes apples and oranges. *See* Part I.E.

III. EPA’s “Plantwide Applicability Limitation” Exemption Unlawfully and Arbitrarily Allows Emissions-Increasing Changes to Escape NSR, Simply Because Those Increases Do Not Exceed Historical Emissions Levels Prevalent Decades Ago.

The Rule includes a “Plantwide Applicability Limitation” (“PAL”) exemption that incorporates -- and exacerbates -- the flaws in the ten-year lookback approach discussed above. In particular, the PAL exemption allows emissions-increasing changes to escape NSR, simply because the source’s historical emission levels have not been exceeded. However, not content with exempting sources based on emission levels prevalent ten years previously, the PAL provision allows them to evade NSR based on historical emission levels as old as twenty years -- and, upon renewal of the PAL, thirty years. This exemption is unlawful and arbitrary.

Background

EPA’s rationale for the PAL exemption. The PAL exemption purports to follow an “actual emissions” approach. In the non-PAL context, that approach involves comparing a unit’s pre-change actual emissions to its projected post-change actual emissions to determine if there has been a significant increase. 67 Fed. Reg. 80193-94[JA ____ - ____]. Under a PAL, however, an entire plant’s actual pre-change emissions are compared to its projected actual post-change emissions. *Id.* 80216/1[JA ____].

According to the agency, this approach “do[es] not alter the fundamental question, which is whether there will be an increase in emissions from your source.” *Id.* The difference is that, for a PAL,

the inquiry begins and ends with the source. Your PAL represents source-wide baseline actual emissions. As such, it is the reference point for calculating increases in baseline actual emissions. If your source’s emissions will equal or exceed the PAL, then there will be an emissions increase at your source. There is no need to calculate increases and decreases at individual units.

Id. (emphasis added).

How the PAL exemption allows evasion of NSR based on decades-old emission levels.

In short, EPA purports to have designed the PAL as a source-wide measure of “baseline actual” emissions. The 2002 regulation provides that this source-wide baseline is set by summing the previous actual emissions of the source’s individual units. 40 C.F.R. §§51.165(a)(1)(xxxv)(D), 51.166(b)(47)(iv), 52.21(b)(48)(iv). Those unit-specific actual emissions levels -- the building blocks from which the PAL is created -- are calculated using the 10-year lookback methodology discussed in Part I, *supra*. See, e.g., TSD I-8-28[JA_____] (“You are free to select your consecutive 24-month baseline period in the last 10 years to maximize the baseline actual emissions that form the basis for your PAL.”). Thus, for a PAL set in 2004, the baseline can extend back as far as the two-year period from 1994 to 1996.

In reality, however, the PAL actually allows a source to evade NSR based on historical emissions levels far longer than ten years old. This is so for two reasons.

First, the PAL does not govern only those physical and operational changes undertaken during the year the PAL is set. On the contrary, the PAL governs changes undertaken any time during the ten-year period thereafter. 40 C.F.R. §§51.165(f)(8)(i), 51.166(w)(8)(i), 52.21(aa)(8)(i). In the above example, a PAL set in 2004 based on 1994-96 emissions continues

to govern physical and operational changes undertaken at the source through 2014. Thus, a change undertaken in 2014 that increases emissions dramatically over levels during the preceding period (*e.g.*, 2012-14) can nonetheless evade NSR based on two-decade-old emissions data from 1994-96.

Second, even after the first ten-year term has expired, EPA's regulations allow the PAL to be renewed for an additional ten-year term -- at the same level.¹² Thus, under a PAL set in 2004 and renewed at the same level in 2014, a change undertaken in 2024 that increases emissions dramatically over levels during the preceding period (*e.g.*, 2022-24) can nonetheless evade NSR based on three-decade-old emissions data from 1994-96.

A. EPA's PAL Exemption Unlawfully and Arbitrarily Exempts Emission-Increasing Changes from NSR.

As indicated above, EPA's PAL exemption applies to sources the same ten-year lookback methodology that the non-PAL provisions apply to units. *See* p. ____, *supra*. *See also* Recon TSD 27[JA____] (for existing units, "[t]here are no differences in determining baseline actual emissions for an emissions unit that is under a PAL as opposed to one that is not under a PAL"). Accordingly, for reasons already stated with respect to the unit-specific ten-year lookback, *see* Part I, *supra*, the source-wide ten-year lookback provision embodied in the PAL exemption is unlawful and arbitrary. Just as the unit-specific lookback exempts a unit's emission increases simply because those increases do not exceed historical levels, so too the PAL provision exempts a source's emission increases -- again, simply because those increases do not exceed historical levels.

¹² 40 C.F.R. § 51.165(f)(10)(iv)(B) (at renewal, the reviewing authority "may" -- not must -- "set the PAL at a level that it determines to be more representative of the source's baseline actual emissions"), *accord* §§ 51.166(w)(10)(iv)(b), 52.21(aa)(10)(iv)(b).

Second, even assuming *arguendo* that a ten-year lookback were appropriate, the PAL provision unlawfully and arbitrarily goes well beyond ten years, allowing a twenty-year lookback during the initial PAL term and a thirty-year lookback on renewal. EPA justified its ten-year lookback as a causation test -- a means of isolating those emissions increases “resulting from a physical or operational change.” TSD I-2-7[JA ____]. The agency has not even asserted that a lookback period of two or three decades is justifiable on causation grounds, and *a fortiori* has offered no reasoned, record-supported explanation for such an assertion.

To the contrary, EPA rejected arguments for a longer-than-ten-year lookback, stating that “10 years in itself is an ample period of time from which to select a representative operating level.” TSD I-2-10[JA ____] (emphasis added). Indeed, the business cycle study cited by EPA as the sole record support for its ten-year lookback offered not a single example of a business cycle exceeding ten years. *See* p. ____, *supra*. On the contrary, the agency itself conceded that “[w]e are unaware of any data demonstrating business cycles longer than 10 years.” *Id.*[JA ____]

B. EPA’s Arguments Concerning this Court’s *Alabama Power* Decision Are Unavailing.

In defending its rule, EPA advanced arguments concerning this Court’s *Alabama Power* decision. Those arguments are unavailing.

Alabama Power held that where an emissions-increasing change occurs at one unit, NSR can be avoided if there is a corresponding emissions decrease at another unit -- but only if the decrease is “substantially contemporaneous” with the increase. 636 F.2d at 402 (emphasis added). Pursuant to this ruling, EPA previously promulgated regulations (still in effect and not challenged here) defining contemporaneous changes as those that occurred within the previous five years, or -- in state-administered programs -- within a “reasonable” timeframe selected by the state. 40 C.F.R. §§52.21(b)(3)(ii), 51.166(b)(3)(ii).

As shown above, EPA's PAL exemption allows emissions-increasing changes at one unit to avoid NSR based on non-contemporaneous historical decreases at another unit -- indeed, decreases occurring as long ago as two or even three decades. Confronted with this contradiction, EPA argued that "the concept of contemporaneity, as articulated in *Alabama Power* and as set forth in the regulations governing the major NSR program, does not apply to PALs." 67 Fed. Reg. at 80215/3[JA_____] (emphasis added). Assuming *arguendo* that EPA is correct, however, this argument simply takes the agency out of the frying pan and into the fire. Having swept aside the contemporaneity concept, EPA chose to substitute a different concept -- that of a sourcewide actual emissions baseline -- that undermines rather than supports the PAL exemption. See Part III.A, *supra*. Thus, under EPA's own chosen rationale, the exemption is unsustainable. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

But EPA's attempt to dismiss the contemporaneity requirement is meritless. The function of the PAL exemption is to allow emission increases at one unit to be offset by decreases at another unit. See, e.g., 67 Fed. Reg. at 80,216/1. This is the precise practice addressed by *Alabama Power*'s netting holding, which applies when "increases are offset by contemporaneous decreases of pollutants." 636 F.2d at 400.

EPA argued that even if the concept of contemporaneity does apply to PALs, the PAL exemption meets it. 67 Fed. Reg. 80216/1[JA_____]. According to EPA, requiring the PAL to be renewed at ten-year intervals "is designed to prevent decreases that occurred outside of the current 10-year PAL term from being used to offset increases during that term," thus "ensur[ing] that each 10-year term represents a distinct 'contemporaneous' period." *Id.* 80216/2[JA_____]. This argument is doubly flawed.

First, the notion that a ten-year period could be considered contemporaneous contravenes both *Alabama Power* and the Act. In *Alabama Power* this Court construed PSD as applying “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.” 636 F.2d at 401. This approach reflects the statutory PSD provisions, which focus on preventing significant deterioration of existing air quality. *See* p. ____, *supra*. Likewise, the Act’s nonattainment program focuses on reducing current pollution levels, not allowing them to increase. *See* p. ____, *supra*. Past emissions decreases that occurred a decade before a physical or operational change in no way erase the adverse current air quality impacts of emissions increases associated with the change. To the contrary, as EPA itself observed in another context, “the environment has already seen the benefit of the reduced emissions.” 67 Fed. Reg. 80218/2.

A ten-year “contemporaneity” period also would disregard *Alabama Power*’s ruling that construction of the term “increases” involves “look[ing] at any change proposed for a plant, and decid[ing] whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant.” 636 F.2d at 401 (emphasis added). The “net effect” of a change is calculated by totaling the emissions-increasing and offsetting, emissions-decreasing “steps involved in that change.” *Id.* 401-402. EPA’s rule contravenes *Alabama Power* by allowing a source to offset the emissions increase projected to result from a change with prior emissions decreases that are not steps involved in that change, and not “substantially contemporaneous” with that change. The PAL’s ten-year period contravenes *Alabama Power*’s construction of “increases,” its requirement of “substantial contemporaneity,” and the structure and purposes of the modification provision.

Finally, contrary to EPA's assertion, netting under the PAL exemption is not limited to a ten-year period. Instead, the exemption allows increases to be offset by decreases occurring as long as two or three decades before. *See* p. ____, *supra*. The notion that increases are contemporaneous with decreases occurring as long as twenty or thirty years earlier is simply untenable. Moreover, having refused even to acknowledge that the PAL exemption allows netting over periods longer than ten years, EPA *a fortiori* offered no explanation -- much less a reasoned one -- as to how a two- or three-decade netting period could be considered "contemporaneous."

C. The PAL Exemption Undermines Rather Than Furthers the Act's Air Quality Objectives.

EPA claims that its exemption represents good air pollution control policy. 67 Fed. Reg. 80206/3[JA____] (claiming that exemption will promote voluntary controls and prohibit small, serial pollution increases). But EPA's policy arguments do not authorize the agency to adopt a regulation that violates the Act or is arbitrary, and in any event EPA's exemption fundamentally undermines the Act's air quality objectives by allowing increases in current emissions. *See* Part I.B, *supra*.

Moreover, the alleged air quality benefits touted by EPA are illusory. First, the agency's claim that the PAL exemption will "promot[e] voluntary improvements in pollution controls," *id.*, rested on the premise that sources will want to decrease emissions in order to create room for future emissions increases. *Id.* 80207/3[JA____] ("We found that in a cap-based program, sources strive to create enough headroom for future expansions by voluntarily controlling emissions.") (emphasis added). But EPA's exemption allows the PAL to be set -- and to remain -- far above current emission levels, based on distant historical levels. *See* p. ____, *supra*. Such sources have all too much "headroom for future expansions," without having to reduce their

emissions by one iota. Moreover, even assuming *arguendo* that some sources might have the incentive described by EPA, the agency lacks authority to shunt aside the Act's key NSR safeguards in search of temporary emissions decreases that will be erased by subsequent increases.

Second, EPA claimed that the PAL provisions "prohibit[] serial, small, unrelated emissions increases, which otherwise can occur under our existing regulations." 67 Fed. Reg. 80206/3[JA___]. See p. ____, *supra* (discussing EPA's pre-existing regulations, which define significance levels below which emissions increases do not trigger NSR). To the contrary, the PAL exemption authorizes both large and small emissions increases by allowing the PAL level to be set – and remain – far above the plant's actual emissions level. See *supra*, p. ____.

IV. The 1992 and 2002 Rules' Exclusion of Post-Change Emissions Increases Attributable to "Demand Growth" is Unlawful and Arbitrary.

The 1992 and 2002 rules requires operators making post-change emissions projections to exclude

that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish baseline actual emissions under paragraph (a)(1)(xxxv) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth.

40 C.F.R. §51.165(a)(1)(xxviii)(B)(3) (emphasis added), *accord* §§51.166(b)(40)(ii)(c), 52.21(b)(41)(ii)(c), 51.165(a)(1)(v)(C)(9)(xxi)(B), 51.166(b)(2)(iii)(k)(32)(ii), 52.21(b)(2)(iii)(k)(33)(ii). Despite EPA's recognition that emissions increases related to the physical or operational change cannot lawfully be excluded, the rules are written to create a *per se* exclusion for emissions attributable to "any increased utilization due to product demand growth" at non-utilities (for utilities, "any increased utilization due to the rate of electricity demand growth for the utility system as a whole") even for increased emissions related to the

physical or operational change. *Id.* The “including any” language of the rules effectively negates the preambles’ description of the provisions,¹³ and reveals that EPA has written unlawful rules that contradict its own record explanation and legal authority.

In its 1998 Notice, EPA severely criticized the 1992 rule’s existing “demand growth exclusion” for utilities, proposed to discontinue it, and concluded that it should not be extended to non-utilities. 63 Fed. Reg. at 39860-61. EPA recognized that emissions units at production facilities exist to meet market demand. The agency catalogued multiple problems with the exclusion and why it undermines the modification provision.¹⁴

The 2002 rule arbitrarily retains the exclusion for utilities and adopts it for all other industries, with no reasoned explanations for ignoring the agency experience, criticisms and conclusions in the 1998 Notice.¹⁵

The 2002 rule in another section even repeats the 1998 Notice’s argument regarding PALs -- that sources frequently undertake modifications to enable them better to compete in an open market¹⁶ -- but then ignores this reality in adopting the demand growth exclusion.

¹³ 67 Fed. Reg. at 80203/1 (“demand growth can only be excluded to the extent that the physical or operational change is not related to the emissions increase.”); 57 Fed. Reg. at 32327/1.

¹⁴ See generally 63 Fed. Reg. 39860-61[JA_____] (“no plausible distinction between emissions increases due solely to demand growth as an independent factor and those changes at a source that respond to, or create new, demand growth which then result in increased capacity utilization”; “demand growth exclusion would ignore the realities of a deregulated electric power sector,” exclusion problematic because “self-implementing,” “self-policing,” and undefined).

¹⁵ See *General Electric Co. v. Department of Commerce*, 128 F.3d 767, 774-75 (D.C. Cir. 1997) (vacating rule after agency failed to explain its deviations from proposal). The only explanation given by EPA for its total reversal is that “[n]umerous industry commenters oppose eliminating the demand growth provisions, stating that market factors do independently cause emissions increases absent physical and operational changes.” 67 Fed. Reg. at 80202/3.

Finally, the rules arbitrarily construct the exclusion to exacerbate the problems identified by EPA: the rules fail to define or provide criteria for when emissions increases are “unrelated” to a change; the exclusions remain self-implementing and self-policing; and source owners are invited to adopt their own interpretations, without reporting the basis for those interpretations.¹⁷

V. EPA Acted Unlawfully And Arbitrarily By Exempting Emissions Increases At So-Called “Clean Units” From NSR.

Under EPA’s rule, units applying pollution control technology can obtain designation as so-called “clean units.” Once designated, such units can make physical or operational changes that increase emissions -- without undergoing NSR. This exemption is unlawful and arbitrary.

Background

How the exemption works. EPA’s rule offers two paths to Clean Unit designation. First, a unit that previously underwent NSR “automatically” qualifies as a Clean Unit, as long as the previous NSR proceeding resulted in a permit requiring some reduction from uncontrolled emission levels. 67 Fed. Reg. 80223/1[JA ___]; 40 C.F.R. §§51.165(c)(3)(ii)(A), 51.166(t)(3)(ii)(a), 52.21(x)(3)(ii)(a). Second, a unit that has not previously undergone NSR can likewise be designated by the reviewing authority as a Clean Unit, based on (1) installation of control technology requiring reduction of emissions from uncontrolled levels, and (2) meeting an air quality-based test. 40 C.F.R. §§51.165(d)(3)(i)(A), (d)(3)(ii); 51.166(u)(3)(i)(a), (u)(3)(ii); 52.21(y)(3)(i)(a), (y)(3)(ii).

¹⁶ 67 Fed. Reg. at 80207/3 (need for physical or operational changes under PALs “critical for responding to product development needs and market demand, and for maintaining overall competitiveness.”)

¹⁷ The 2002 final rule offered Petitioners their first opportunity to review EPA’s rationale for reversing its 1998 position on the demand growth exclusion. Thus, EPA erred in denying reconsideration on this issue. *See* EPA Recon. Response 18.

Once designated as a Clean Unit, a unit may make physical and operational changes that increase emissions, without triggering NSR. Simply stated, “[n]o emissions increase is deemed to occur.” 40 C.F.R. §51.165(a)(2)(ii)(E) (emphasis added); *accord* §§51.166(a)(7)(iv)(e), 52.21(a)(2)(iv)(e). *See also* 67 Fed. Reg. 80225/1[JA_____] (in contrast to EPA’s “longstanding policy” that NSR is triggered by a “significant emissions increase following the physical or operational change,” the Clean Unit applicability test is a “different process”).

This exemption continues for a period of up to 10 years (measured from the installation or start-up date of the Clean Unit control technology or, in some cases, from the Clean Unit designation), *e.g.*, 40 C.F.R. §51.165(c)(5)(i), (d)(6), and can be renewed for additional 10-year periods. *E.g.*, 40 C.F.R. §§51.165(c)(3)(iii), (c)(5)(ii), (d)(3)(iv), (d)(6).

Lost NSR safeguards. By dispensing with NSR, EPA’s Clean Unit exemption shunts aside important safeguards:

- **Technology-based Controls.** NSR requires technology-based emission controls: LAER in nonattainment areas, and BACT in PSD areas. CAA §§173(a)(2), 165(a)(4). LAER and BACT are each governed by specific statutory definitions. §§171(3), 169(3). *See also* 40 C.F.R. §§51.165(a)(1)(xiii), 51.166(b)(12). The technology-based requirements of EPA’s Clean Unit exemption diverge from these LAER and BACT requirements in at least two ways.

First, to qualify for a Clean Unit status, a unit need not apply LAER or BACT, but instead need only implement controls that are deemed “comparable” to LAER or BACT under an open-ended, lenient test. §§51.165(d)(4), 51.166(u)(4)).¹⁸ As EPA itself acknowledged, Clean

¹⁸ First, the Clean Unit regulation allows a technology to be “presumed” comparable to LAER or BACT based on averaging and sampling tests that sharply diverge from the Act. *Compare* §171(3) *with* §51.165(d)(4)(i). *Compare also* §169(3) *with* §51.166(u)(4)(i). Second, even if a technology flunks these lenient tests, the reviewing authority can still deem the

Unit applicability is “independent from the case-by-case determination of BACT or LAER,” “is not necessarily equal to BACT or LAER for that unit,” and “in no way establishes a presumptive BACT or LAER for that unit, source type or category.” 61 Fed. Reg. 38258/1[JA ____].

Second, even apart from the above inadequacies in how Clean Unit comparability determinations are initially made, EPA’s regulation provides that those determinations continue to govern a unit for up to ten years. *E.g.*, 40 C.F.R. §51.165(d)(6). Thus, EPA’s rule exempts physical and operational changes from NSR based on a stale technology review that occurred years earlier, without consideration of subsequent technological advances (*i.e.*, advances occurring after the review, but before a subsequent physical or operational change). By contrast, “[t]he Act requires that BACT and LAER be current determinations.” 61 Fed. Reg. 38258/1[JA ____] (emphasis added).

• **Offsets.** In nonattainment areas, NSR includes a statutory requirement for emission offsets. §173(a)(1)(A). EPA’s rule requires no offsets for emissions increases resulting from Clean Units in nonattainment areas. 67 Fed. Reg. 80228-29[JA ____ - ____]; Recon TSD 59, 61 [JA ____, ____].

• **Air quality.** Under the Act’s PSD NSR provisions, the emissions increase associated with a physical or operational change must not violate NAAQS, PSD increments or air-quality-related values of pristine areas. CAA §165(a)(3), (d). That determination is made during the NSR permit proceeding -- *i.e.*, when the physical or operational change is proposed.

By contrast, under the Clean Unit exemption, no air quality determination is made at the time when a subsequent emissions-increasing change is made. Rather, the determination is made

technology adequate for Clean Unit purposes by finding it “substantially as effective” as LAER or BACT. §§51.165(d)(4)(ii), 51.166(u)(4)(ii); 67 Fed. Reg. 80224[JA ____].

only when the unit qualifies as a Clean Unit. *E.g.*, 40 C.F.R. §51.166(u)(3)(an emissions unit qualifies as a Clean Unit “when the unit meets” listed criteria, including -- in paragraph (ii) -- the air quality criterion). This same air quality determination continues to govern emissions increases from physical or operational changes over the next ten years, *e.g.*, 40 C.F.R. §51.166(u)(6), and thus fails to account for subsequent trends in ambient air quality in the area where the Clean Unit is located. For example, if local air quality deteriorates in the years following a Clean Unit designation, an emissions-increasing change at the Unit may cause a NAAQS or increment violation -- even if the Unit passed the air quality test years earlier, when air quality was better.

• **Public involvement.** Sources can proceed -- without NSR permitting -- to implement physical and operational changes at Clean Units, even where those changes significantly increase emissions. Accordingly, the public loses its opportunity to participate in the permitting process. CAA §§160(5), 165(a)(2).

As to sources that have previously undergone NSR, many of the foregoing safeguards are likewise lost -- including specifically the use of current (not stale) technology and air quality determinations to evaluate the consequences of an emissions-increasing change, and the opportunity for public participation in the permitting of that change.

A. EPA Lacks Authority to Exempt Some Emissions-Increasing Changes from NSR, Simply Because those Changes Occur at So-Called “Clean Units.”

While the Act requires NSR for “any” physical or operational change that increases emissions, §111(a)(4), EPA has unlawfully unlawful exempted some such changes -- specifically, those occurring at units using a technology blessed by EPA or a reviewing authority. TSD I-9-8[JA ____] (sources using Clean Unit technology “should not have to account for every

change at the source”); 61 Fed. Reg. 38255/2[JA____] (Clean Unit test “focuses on the existing emissions control of a unit, rather than the change”).

Indeed, the exemption is especially egregious here, where EPA has purported to bootstrap sources that have never undergone NSR into an exemption, based on EPA-defined criteria that fall substantially short of the statutorily required NSR safeguards. *See* p. 34-35, *supra*.

Likewise, for those sources that previously underwent NSR, EPA has administratively declared that they need not do so again, even if they undertake multiple emissions-increasing changes different from the change that triggered NSR previously. The Act contains no such exemption, and EPA lacks authority to create one.

B. EPA’s Rationales Cannot Justify the Unlawful Clean Unit Exemption, and Fail to Meet Standards of Reasoned Agency Decisionmaking.

The rationales offered by EPA cannot justify the agency’s unlawful Clean Unit exemption, and are unreasonable and arbitrary.

Incentive. EPA claims that the Clean Unit exemption “benefits the public and the environment by providing facilities with an incentive to install state-of-the-art emissions controls.” TSD I-9-4[JA____] (emphasis added). But the agency’s policy preferences cannot trump the Act. *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

In any event, EPA’s description of Clean Unit controls as “state-of-the-art” fundamentally misstates the lenient, vague technology-based test set forth in EPA’s exemption. *See* p. 34-35, *supra*. Second, EPA’s “incentive” argument is undermined by the agency’s own impacts analysis, which confirms that “the most frequent applicants for the Clean Unit Test will be those who have already installed, or will otherwise be installing,” Clean Unit controls. Supp. Envir. Analysis 10[JA____].

“Unnecessary” Clean Air Act requirements. EPA also contends that NSR is “unnecessary” for Clean Units because for such units “the major NSR permitting requirements impose a paperwork burden with little or no additional environmental benefit.” TSD I-9-4[JA ____] (emphasis added). But once again, EPA lacks authority to abrogate statutory requirements simply because the agency deems them “unnecessary.”

Moreover, the Clean Units provision exempts emissions increases at Clean Units, even when those increases exceed EPA’s own health-and-welfare-based significance levels. Increases of that magnitude do not magically cease being harmful, simply because they occur at a unit dubbed “clean.”

Finally, EPA’s benefit argument relies heavily on the assertion that application of NSR’s technology-based requirements to Clean Units would not be beneficial. 67 Fed. Reg. 80226, 80229[JA ____, ____]. That assertion is unavailing.

By focusing solely on NSR’s technology-based requirements, EPA’s assertion ignores the other key NSR safeguards abrogated by the Clean Unit exemption. *See* p. ____, *supra* (discussing other safeguards). These requirements apply, and provide benefit, regardless of whether there has been technological advance since the Clean Unit exemption was conferred.

Even as to the Act’s technology-based requirements, EPA’s assertion is untenable. The agency cannot know in advance that no meaningful innovation will occur during any given 10-year Clean Unit term. For example, EPA did not and could not deny that important advances in pollution control technology have occurred on numerous occasions over the last several decades. A Clean Unit exemption issued in the years preceding any of these significant innovations would have forfeited in advance an opportunity for major pollution control improvements. Indeed, even where technological improvements are incremental rather than revolutionary, they can result in

large emission reductions substantially exceeding EPA's health-and-welfare based significance levels. *See, e.g.*, 67 Fed. Reg. 80229/3[JA____] (advancements in scrubber technology, though incremental in percentage-reduction terms, were sufficient to reduce emissions at a single power plant by thousands of tons annually).

EPA itself recognized the weakness of its technology argument, offering the carefully hedged, vague prediction that additional NSR review "generally" will not result in additional controls "for a period of years" after a control technology determination. 67 Fed. Reg. 80226, 80229[JA____]. Moreover, though stating that the time frame during which no added environmental benefit will occur "will vary by emissions control technology and by pollutant," EPA nonetheless promulgated a universally available, ten-year exemption to "provide simplicity in our final rules." *Id.* 80229[JA____] (emphasis added). The agency lacks authority to shunt aside statutory requirements in quest of "simplicity."

"Alternative emissions test." Finally, EPA claims that the Act is "silent" on whether emissions increases "must be measured in terms of actual emissions, potential emissions, or some other currency," and that it is "reasonable" to determine NSR applicability "in terms of the emission limitations or work practice requirements in the [Clean Unit] permit." 67 Fed. Reg. 80228[JA____] (emphasis added). To the contrary, the Act requires NSR in connection with "any" physical or operational change "which increases the amount of any air pollutant emitted by such source." §111(a)(4) (emphasis added). EPA has unlawfully exempted some increases in the amount of pollutants "emitted" by Clean Units -- specifically, it has exempted those increases that fit within the unit's emission limitations or work practice requirements.

EPA's conflation of what is being "emitted" with what a source is allowed to emit not only contravenes §111(a)(4), but also ignores other Clean Air Act provisions showing that

Congress knew how to refer to an emission limitation when it wished to do so. For example, §169(3) defines BACT as “emission limitation” based on the maximum achievable degree of reduction of “each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility.” (Emphasis added.) *See also* §165(d)(2)(C)(iv), (d)(2)(D)(iii) (requiring NSR permitted-sources to comply with “emission limitations”). EPA’s attempt to erase Congress’s distinction between what is “emitted” by a source and what “emission limitation” is applicable to the source must be rejected.

VI. EPA Lacks Authority to Exempt Physical or Operational Changes That Increase Emissions of a Pollutant, Merely Because Those Changes Also Reduce Emissions of a Different Pollutant.

EPA’s 2002 and 1992 NSR rules both exempt specified “pollution control projects” (“PCPs”) from NSR. 67 Fed. Reg. 80232-39[JA ____ - ____]; 57 Fed. Reg. 32319-23[JA ____ - ____]. Both exemptions must be rejected under *Chevron* Step One as contrary to the Act’s plain meaning, or in the alternative as unreasonable under Step Two.

Background. The 2002 and 1992 regulations exempt PCPs that significantly increase emissions of a pollutant, while decreasing emissions of a different pollutant. 67 Fed. Reg. 80232/2[JA ____] (exemption applies where a source “reduces the emissions rate of one air pollutant while causing an increase in emissions of a different, ‘collateral’ pollutant”; “A common example of such a project is installation of a thermal incinerator, which forms NO_x as a collateral pollutant while reducing VOC emissions.”) (emphasis added).

The 2002 rule’s PCP exemption -- which applies to all industries -- has two aspects. First, listed projects -- including the installation of various devices as well as activities to accommodate fuel switching -- are presumptively exempt from NSR, with no requirement for advance approval by reviewing authorities. 40 C.F.R. §§51.165(a)(1)(xxv), 51.166(b)(31),

52.21(b)(32); 67 Fed. Reg. 80238/3, 80239/1[JA ____, ____]. Second, non-listed projects can be exempted from NSR on a case-by-case basis by reviewing authorities. 40 C.F.R §§51.165(e)(5), 51.166(v)(5), 52.21(z)(5). Under the 1992 rule's PCP exemption, which would come back into effect if the Court vacates the 2002 rule, certain categories of projects at electric utilities were exempted from NSR, with no requirement for advance approval by reviewing authorities. §§51.165(a)(1)(v)(C)(8), (a)(1)(xxv), 57 Fed. Reg. 32321/2[JA ____].

Emissions increases covered by these provisions are exempted from NSR and its key safeguards, including the obligation to apply up-to-date control technology to the pollutants being increased, and (in nonattainment areas) to offset increases with decreases elsewhere.¹⁹

Another key requirement of PSD is that emissions increases not violate NAAQS, PSD increments or air-quality-related values of pristine areas. CAA §165(a)(3), (d). While this requirement remains theoretically applicable, *e.g.*, 40 C.F.R. §51.166(v)(2)(ii), compliance with it is gauged by the source, with no requirement for approval by the permitting authority.

Moreover, because sources can proceed -- without reviewing authority approval -- to implement listed projects under the 2002 rule (and projects exempted under the 1992 rule), the public loses its opportunity to participate in the permitting process. CAA §§160(5), 165(a)(2).²⁰

¹⁹ The preamble claims that, under the 2002 rule, PCP-related emission increases be must be offset. 67 Fed. Reg. 80237/2[JA ____]. However, the rule itself contains no such requirement.

²⁰ EPA argued that “minor NSR permits may afford the public an opportunity to review and comment on the use of the PCP Exclusion.” 67 Fed. Reg. at 80238/3[JA ____](emphasis added). However, EPA studiously avoided claiming that minor NSR permits or Title V operating permit revisions will even be required for activities covered by the PCP exclusion -- and even if a minor NSR permit is required, many SIPs do not allow public participation for such permits. In any event, EPA's argument cannot justify an exemption from the Act.

A. PCPs Constitute Physical or Operational Changes.

Under §111(a)(4), a change triggers NSR when it “increases the amount of any air pollutant emitted” by the source. *See* 57 Fed. Reg. 32316/3[JA ____] (NSR applicability is “pollutant specific,” “requir[ing] a pollutant-by-pollutant projection of the emissions increases”). EPA did not dispute this, instead claiming that a PCP is not a “physical or operational change.” *See, e.g.*, 40 C.F.R. §51.165(a)(1)(v)(C)(8); 57 Fed. Reg. 32319/2[JA ____] (focusing on whether a project constitutes a change “avoids the need to undertake a quantitative emissions increase calculation in every case”).

But EPA has offered no textual basis for concluding that the installation of control devices at a source, or physical alterations to facilitate a fuel switch, or operational alterations associated with a fuel switch, fall outside §111(a)(4)’s broad coverage of “any physical change in, or change in the method of operation of, a stationary source.” To the contrary, the 2002 and 1992 preambles expressly characterized PCPs as physical or operational changes. 67 Fed. Reg. 80238/3[JA ____] (characterizing PCPs as “physical or operational changes undertaken to reduce emissions”) (emphasis added); 57 Fed. Reg. 32315/1[JA ____] (referencing “pollution control projects and other non-routine physical and operational changes”) (emphasis added). *Accord*, A Legislative History of the Clean Air Act Amendments of 1990 (U.S. Senate Committee on Environment and Public Works, November 1993) (“1990 L.H.”), at 798, 6876 (EPA 1990 letter to Indiana: the statutory reference to physical or operational changes “certainly is broad enough to encompass the addition or enhancement of pollution control equipment.”); 57 Fed. Reg. 32316/1[JA ____]; *WEPCO*, 893 F.2d at 905, 908.

EPA’s exemption is further undermined by other Clean Air Act provisions. For example, § 415 provides regulatory incentives for “physical or operational changes” undertaken in

furtherance of a “clean coal technology demonstration project,” §415(b)(1), 42 U.S.C. §7651n(b)(1) -- *i.e.*, a project “which will achieve significant reductions in air emissions.” §415(a). By expressly recognizing that projects involving installation of emissions-reducing technology constitute “physical or operational changes,” §415 undermines EPA’s contrary assertion.

Moreover, §415 and other CAA provisions show that Congress knew how to grant exemptions to PCPs when it wished to do so. In § 415, Congress granted targeted exemptions with carefully defined eligibility criteria -- which, for example, distinguished between temporary and permanent PCPs. §415(b)(2) and (3). *See also* §409(e), 402(12), 42 U.S.C. §7651h(e), 7651a(12) (sources reducing emissions through “repowering” can receive “expedited consideration” in NSR).

Likewise, § 182(e)(2) provides that, in ozone extreme areas, offset requirements shall not apply to a modification that “consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.” §182(e)(2), 42 U.S.C. §7511a(e)(2). This provision exempts certain PCPs from one of the substantive requirements imposed during NSR permitting, but not from the underlying obligation to obtain an NSR permit.

EPA’s PCP exemption also ignores legislative history showing that Congress rejected a PCP exemption when §111(a)(4) was originally enacted in 1970. S. Rep. 1196, 91st Cong., 2d Sess. 91 (1970) (provision omitted from the final 1970 Act would have defined “modification” to exclude “pollution abatement facilities”). Likewise, in 1990 Congress rejected attempts to enact exemptions broader than §415 -- including exemptions narrower than EPA’s. 1990 L.H. 4671 (Senate exemption, though broader than the final §415, would have applied only if “the project will not result in a significant net increase in actual emissions”); 6870-71, 6872, 6880 (Senators

noted EPA letters indicating that PCPs could be exempted from NSR only where they would not “increase the annual emissions of any pollutant regulated under the CAA”); 10738-39 (Administration’s proposed PCP exemption would -- in nonattainment areas -- have exempted only a PCP that “does not result in a significant net increase in representative actual annual emissions”), 819 (draft EPA interpretive ruling recognized that PCPs could produce collateral emissions increases, and cautioned that “[t]he resolution of possible exclusions for such projects depends on the outcome of deliberations on the amendments to the CAA”).

B. EPA’s Defense of Its PCP Exemptions Falls Short.

None of the arguments offered by EPA make the “extraordinarily convincing” showing necessary to justify divergence from the Act. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

First, EPA suggested that Congress in 1977 ratified a PCP exemption that had been in EPA’s pre-1977 NSPS regulations. 57 Fed. Reg. 32319/1-2[JA ____] However, EPA has cited no legislative history indicating congressional awareness of the NSPS PCP exemption, much less approval of its extension to NSR. *See, e.g., SEC v. Sloan*, 436 U.S. 103, 121 (1978). In particular, legislative intent to conform to “usage in other parts of the Act,” 57 Fed. Reg. 32319/2[JA ____] (quoting legislative history), falls short of ratifying the NSPS regulatory exemption.

Moreover, EPA’s ratification argument rests on generic legislative history language that is not limited to PCPs. Treating that general language as a congressional ratification would mean that Congress intended to import into NSR, not just the pre-1977 NSPS PCP exemption, but also every other aspect of EPA’s pre-1977 NSPS regulations as well. EPA itself has long recognized

that such a broad conflation of NSR and NSPS is untenable. 57 Fed. Reg. 32316/1[JA ____]; *WEPCO*, 893 F.2d at 905.

Second, EPA cited a 1990 conferee statement “urg[ing] a quick resolution of the *WEPCO* matter by EPA as appropriate.” 1990 L.H. 1794. Significantly, EPA’s own contemporaneous position was that the *WEPCO* decision did not involve PCPs. 1990 L.H. 809. More fundamentally, the conferees’ reference to an “appropriate” resolution cannot be read as an authorization of regulatory exemptions that contravene the Act -- especially given EPA’s and the Administration’s own contemporaneous advocacy of PCP exemptions that (unlike the exemptions at issue here) would have precluded emissions increases. *See* p. ____, *supra*. *See also* 1990 L.H. 792 (Majority Leader Sen. Mitchell cautioned against exempting PCPs that “would increase emissions”).

Third, EPA claims Congress could not have intended to require NSR for changes “undertaken to reduce emissions.” 67 Fed. Reg. 80238/3[JA ____]. Where such a project results in an emissions increase, however, there is no anomaly in reviewing it under NSR -- which expressly addresses changes that “increase[] the amount of any air pollutant.” §111(a)(4). EPA can scarcely be heard to argue that an approach previously espoused by the agency itself (i.e., denial of PCP exemption to projects that increase emissions) is so anomalous as to require divergence from the Act. *See* p. ____, *supra* (quoting EPA).

VII. EPA’s 1992 Rule Violates the Statutory Requirement That NSPS Apply to “Any” Change That Increases Emissions.

Under EPA’s regulations, NSR is triggered by any change that increases a source’s annual emissions, whereas NSPS is triggered by any change that increases a source’s hourly emissions rate. *See* 67 Fed. Reg. at 80,199/1; 40 C.F.R. §51.165(a)(1)(xxviii)(A); 57 Fed. Reg. at 32316/1, 32,330/2, 32331/2-3 (July 21, 1992). Before EPA promulgated its 1992 rule, an

increase in hourly emission rate was quantified by comparing, at each unit, the hourly emissions rate at maximum operating capacity just prior the change to the hourly emissions rate at maximum operating capacity after the change. *Id*; see also *WEPCO v. Reilly*, 893 F.2d at 914.

EPA's 1992 rule revised the regulations to provide that, "[n]o physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change." 57 Fed. Reg. at 32,339/2 (emphasis added); see also *id.* at 32,330/2 ("[T]he pre-change baseline for NSPS applicability purposes shall be calculated using the highest hourly emission rate achievable at any time during the 5 years prior to the change.").

Assuming *arguendo* that it is lawful for EPA to determine NSPS applicability based on whether a change will increase a source's "hourly emissions rate at maximum operating capacity,"²¹ EPA's attempt to exempt a change from NSPS even where it does cause such an increase violates the express language of CAA § 111(a)(4) requiring NSPS for "any" physical or operational change that "increases the amount of any air pollutant emitted by [the] source." 42 U.S.C. § 7411(a)(4). EPA claims that this rule change is "necessary to avoid the current regulations' undue emphasis on the physical condition of the affected facility immediately prior to the change", 57 Fed. Reg. 32,331/1, and that "the utility's baseline will be artificially low" under the preexisting regulations "if [the] unit has broken down and is need of repairs." *Id.*

²¹ Environmental Petitioners do not concede the lawfulness of the "hourly emissions rate at maximum operating capacity" comparison, or the lawfulness of the "hourly emissions rate" test generally. But those mechanisms were established in a previous rulemaking, and their lawfulness is not at issue here.

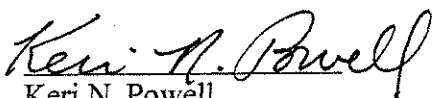
32,330/1[JA_____]. But these claims do not justify the agency's departure from the express statutory language. Repairs that "increase[] the amount of any pollutant emitted" above the level achievable without the repairs are precisely the kind of changes for which Congress intended to require NSPS. See 136 Cong. Rec. S16895-01, S16904 (Oct. 27, 1990) ("[M]any utilities are now choosing to extend the life of their plants rather than meet the new source performance standards mandated under current law.") (statement of Sen. Mitchell criticizing the "WEPCO fix" amendment that was subsequently defeated); see also *supra*, p. 6.

CONCLUSION

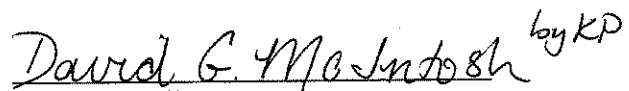
For the reasons stated above, Environmental Petitioners respectfully request that the Court vacate the rule provisions challenged herein.

DATED: May 11, 2004.

Respectfully submitted,


Keri N. Powell
Howard I. Fox
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorneys for American Lung Association,
Communities for a Better Environment,
Environmental Defense, Natural Resources
Defense Council, and Sierra Club

 ^{by KP}
John D. Walke
David G. McIntosh
Natural Resources Defense Council
1200 New York Ave., N.W. Suite 400
Washington, D.C. 20005
(202) 289-6868

Attorneys for Natural Resources Defense
Council

Jonathan Lewis ^{by KP}

Ann B. Weeks

Jonathan Lewis

Clean Air Task Force

77 Summer Street, 8th floor

c/o Grants Management Associates

Boston, MA 02110

(617) 292-0234

Attorneys for 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

James R. May ^{by KP}

James R. May

Mid-Atlantic Environmental Law Center at

Widener University School of Law

4601 Concord Pike

Wilmington, DE 19803-04747

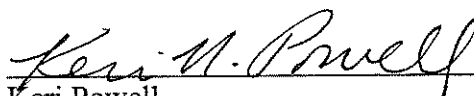
(302) 477-2060

Attorney for Delaware Nature Society

CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Proof Opening Brief of Environmental Petitioners** contains 13,443 words, as counted by counsel's word processing system.

DATED: May 11, 2004



Keri Powell

Earthjustice

1625 Massachusetts Ave., NW

Suite 702

Washington, DC 20036-2212

(202) 667-4500

Attorney for American Lung Association,
Communities for a Better Environment,
Environmental Defense, Natural Resources Defense
Council, and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Proof Opening Brief of Environmental Petitioners** has been served by United States Priority mail this 11th day of May 2004, upon the following:

Eliot Spitzer
Attorney General
Caitlin Halligan
Solicitor General
J. Jared Snyder
Michael J. Myers
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224-0341
For State of New York

Peter Hans Lehner
Attorney General's Office,
State of New York
Environmental Protection Bureau
120 Broadway, 26th Floor
New York, NY 10271
For State of New York

Richard Blumenthal
Attorney General
Kimberly P. Massicotte
Matthew I. Levine
Attorney General's Office,
State of Connecticut
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
For State of Connecticut

G. Steven Rowe
Attorney General
Gerald D. Reid
Attorney General's Office of State of Maine
6 State House Station
111 Sewall Street
Augusta, ME 04333-0006
For State of Maine

J. Joseph Curran, Jr.
Attorney General
Kathy M. Kinsey
Lorraine Herson-Jones
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Boulevard, Ste. 6048
Baltimore, MD 21230
For State of Maryland

Thomas F. Reilly
Attorney General
William L. Pardee
Frederick D. Augenstern
James Milkey
Assistant Attorneys General
Environmental Protection Division
200 Portland Street, 3rd Floor
Boston, MA 02114
For Commonwealth of Massachusetts

Peter W. Heed
Attorney General
Maureen D. Smith
Senior Assistant Attorney General
Environmental Protection Bureau
Office of Attorney General
33 Capitol Street
Concord, NH 03301-6397
For State of New Hampshire

Peter C. Harvey
Attorney General
Stefanie A. Brand
Ruth E. Carter
Kevin P. Auerbacher
Jean Reilly
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, NJ 08625-0093
For State of New Jersey

Patrick C. Lynch
Attorney General
Tricia K. Jedele
Special Assistant Attorney General
Dep't of Attorney General
150 South Main Street
Providence, RI 02903
For State of Rhode Island

William H. Sorrell
Attorney General
Erick Titrud
Kevin O. Leske
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
For State of Vermont

Norman L. Rave
Lois Godfrey Wye
Angeline Purdy
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23986
L'Enfant Plaza Station
Washington, DC 20026-3986
For US EPA, et al.

Monica Derbes Gibson
Alan Eckert
Office of General Counsel
U. S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (MC 2344A)
Washington, DC 20460
For US EPA, et al.

Michael P. Bedrin, Chief Counsel
Robert A. Reiley
Commonwealth of Pennsylvania,
Dept. of Environmental Protection
9th Floor RCSOB
P.O. Box 8464
Harrisburg, PA 17105-8464
For Commonwealth of Pennsylvania (D.C. Cir. 03-1016)

Barbara B. Baird, District Counsel
South Coast AQMD
21865 E Copley Drive
P.O. Box 4940
Diamond Bar, CA 91765-0940
For South Coast Air Quality Management District (D.C. Cir. 03-1033 and 03-1457)

Donna M. Murasky
Senior Litigation Counsel
Office of Corporation Counsel (Appellate Division)
441 Fourth Street, NW, Sixth Floor
Washington, DC 20001
For District of Columbia (D.C. Cir. 03-1036)

James R. May
James M. Stuhltrager
Mid-Atlantic Environmental Law Center
4601 Concord Pike, P.O. Box 7474
Wilmington, DE 19803-0474
For Delaware Nature Society (D.C. Cir. 03-1040)

M. Jane Brady, Attorney General
Valerie S. Csizmadia
Deputy Attorney General
Department of Justice
102 W. Water Street, 3rd Floor
Dover, DE 19904
For State of Delaware (D.C. Cir. 03-1041)

Bill Lockyer, Attorney General
Matthew J. Goldman
Mary E. Hackenbracht
Attorney General's Office of California
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2500
For People of the State of California, et al. (D.C. Cir. 03-1044)

Stephen S. Stark, County Counsel
William M. Dillon
Deputy County Counsel
County of Santa Barbara
105 E. Anapamu St. #201
Santa Barbara, CA 93101
For Santa Barbara County Air Pollution Control District (D.C. Cir. 03-1045)

Frank O. Sieh, County Counsel
Robert N. Kwong
Assistant County Counsel
County of Ventura
County Government Ctr., Admin Bldg.
800 South Victoria Avenue
Ventura, California 93009-1830
***For Ventura County Air Pollution Control
District (D.C. Cir. 03-1045)***

Katherine Currie Pittard
District Counsel
Sacramento MAQMD
777 12th Street, 3rd Floor
Sacramento, CA 95814
***For Sacramento Metropolitan Air Quality
Management District (D.C. Cir. 03-1045)***

David P. Schott, District Counsel
Monterey Bay Unified Air Pollution Control
District
24580 Silver Cloud Court
Monterey, CA 93940
***For Monterey Bay Unified Air Pollution
Control District (D.C. Cir. 03-1045)***

Steven M. Basha
County Counsel
Leslyn K. Syren
Deputy County Counsel
625 Court Street, Room 201
Woodland, CA 95695
***For Yolo Solano Air Quality Management
District (D.C. Cir. 03-1045)***

F. William Brownell
Henry V. Nickel
Douglas S. Burdin
David S. Harlow
Craig Harrison
Hunton & Williams LLP
1900 K Street, NW, Ste. 1200
Washington, DC 20006-1109
***For Utility Air Regulatory Group
(D.C. Cir. 03-1046), Alabama Power
Company, et al (D.C. Cir. 03-1176) and
(D.C. Cir. 03-1178)***

Leslie S. Ritts
Lorane F. Hebert
Hogan & Hartson
555 Thirteenth Street, NW
Washington, DC 20004-1109
***For National Environmental Development
Association's Clean Air Regulatory Project
(D.C. Cir. 03-1047)***

Christopher P. McCormack
Tyler Cooper & Alcorn, LLP
205 Church Street
P.O. Box 1936
New Haven, CT 06509-1910
***For City of Groton, City of Middletown,
City of Stamford, Town of Cornwall, Town
of East Hartford, Town of Easton, Town of
Greenwich, Town of Hebron, Town of
Lebanon, Town of Newtown, Town of
North Stonington, Town of Pomfret, Town
of Putnam, Town of Rocky Hill, Town of
Salisbury, Town of Thompson, Town of
Wallingford, Town of Washington, Town
of Westbrook, Town of Weston, Town of
Woodstock, Connecticut (D.C. Cir. 03-
1049)***

Daniel C. Esty
Esty & Associates
213 Preston Road
Cheshire, CT 06410
***For City of Hartford, City of New Haven,
City of New London, City of Waterbury,
and Town of Westport, Connecticut
(D.C. Cir. 03-1049)***

Peggy A. Lautenschlager
Attorney General
Thomas L. Dosch
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
For State of Wisconsin (D.C. Cir. 03-1050)

Denise W. Kennedy
Robert T. Connery
John F. Shepherd
Holland & Hart
555 Seventeenth Street
Suite 3200
Denver, CO 80202
***For Newmont Mining Corporation (D.C.
Cir. 03-1051)***

Lisa Madigan, Attorney General
Matthew J. Dunn
Thomas E. Davis
Environmental Bureau
500 South Second Street
Springfield, IL 62706
For State of Illinois (D.C. Cir. 03-1052)

Michael A. Cardozo
Corporation Counsel of the City of New York
Mark P. McIntyre
William Plache
Corporation Counsel's Office of the
City of New York
New York City Law Department
100 Church Street
New York, NY 10007
For City of New York (D.C. Cir. 03-1054)

Dennis J. Herrera
City Attorney
Andrew Schwartz
Office of the City Attorney
City and County of San Francisco
1 Dr. Carlton B Goodlett Place
City Hall, Room 234
San Francisco, CA 94102
***For City and County of San Francisco
(D.C. Cir. 03-1054)***

William H. Lewis Jr.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
***For Clean Air Implementation Project
(D.C. Cir. 03-1056), NSR Manufacturers
Roundtable (D.C. Cir. 03-1057) and
American Chemistry Council (D.C. Cir. 03-
1175) and Intervenors American
Petroleum Institute***

Jerry W. Kilgore
Attorney General
Roger L. Chaffe
Carl Josephson
Office of the Attorney General
Special Prosecutions Section
900 East Main Street
Richmond, VA 23219
For Commonwealth of Virginia

Steve Carter
Attorney General
Thomas M. Fisher
Office of the Attorney General
302 West Washington Street
IGC South, 5th Floor
Indianapolis, IN 46204-2770
***For Attorney General for the State of
Indiana***

Phil Kline
Attorney General
David W. Davies
129 SW Tenth Avenue, 2nd Floor
Topeka, KS 66612-1597
For State of Kansas

Jon C. Bruning
Attorney General
David Cookson
Natalee J. Skillman
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68509-8920
For State of Nebraska

Wayne Stenehjem
Attorney General
Lyle G. Witham
Dean J. Haas
Office of Attorney General
500 North Ninth Street
Bismarck, ND 58501-4509
For State of North Dakota

Henry D. McMaster
Attorney General
J. Emory Smith
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
For State of South Carolina

Lawrence E. Long
Attorney General
Roxanne Giedd
Office of the Attorney General
500 East Capitol Avenue
Pierre, SD 57501
For State of South Dakota

Mark L. Shurtleff
Attorney General
Fred G. Nelson
Office of the Attorney General
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
For State of Utah

Russell S. Frye
John L. Wittenborn
Collier Shannon Scott
3050 K Street, NW, Ste. 400
Washington, DC 20007
For American Forest & Paper Assn. (D.C. Cir. 03-1175), Specialty Steel Industry of North America, and Steel Manufacturers Assn.

Philip M. Jay, District Counsel
San Joaquin Valley Unified APCD
1990 East Gettysburg
Fresno, CA 93726
For San Joaquin Valley Unified Air Pollution Control District

Gregg D. Renkes, Attorney General
Steven E. Mulder,
Assistant Attorney General
Office of Attorney General
Department of Law
1031 West 4th Avenue, Ste. 200
Anchorage, AK 99501
For State of Alaska

Robert A. Messina
General Counsel
Illinois Environmental Regulatory Group
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705-5776
For Illinois State Chamber of Commerce and Illinois Environmental Regulatory Group

Dell E. Perelman
Leslie A. Hulse
Counsel
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209
For American Chemistry Council (D.C. Cir. 03-1175)

Martha Elizabeth Cox
Harry M. Ng
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
For American Petroleum Institute

William Bumpers
Baker & Botts
1299 Pennsylvania Avenue, NW
The Warner, Suite 1300 West
Washington D.C. 20004-2400
For Duquesne Light Company

Charles H. Knauss
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116
For Alliance of Automobile Manufacturers

Julie C. Becker
Alliance of Automobile Manufacturers
1401 Eye Street, NW, Suite 900
Washington, DC 20005
For Alliance of Automobile Manufacturers

Richard Wasserstrom
Environmental Counsel
American Forest & Paper Association, Inc.
1111 19th Street, NW, Suite 800
Washington, DC 20036
For American Forest & Paper Association

David Mark Driesen
Syracuse University College of Law
Offices of the Faculty
Syracuse, NY 13244-1030
***For Amici H. Rodham Clinton, J. Corzine,
J. Jeffords, P. Leahy, B. Boxer, F.
Lautenberg, C. Schumer, and J. Reed***

Christopher H. Schroeder
Duke University School of Law
P.O. Box 90360
Durham, NC 27708-0360
For Amicus Clean Air Trust

Charles J. Crist, Attorney General
Jonathan A. Glogau
Office of the Attorney General
The Capitol
Suite PL-01
Tallahassee, FL 32399-1050
For Amicus State of Florida

Hope M. Babcock
Senior Attorney/Director
Eric Albert
Staff Attorney
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW, Ste. 312
Washington, DC 20001
***For Amici American Thoracic Society,
American College of Chest Physicians, and
National Association for the Medical
Direction of Respiratory Care***

William D. Evans, Sr.
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, MD 21401
***For Amicus Anne Arundel County,
Maryland***

Julie James
Litigation Assistant