Petition for Reconsideration of EPA's Final Rules: Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review; and Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration	**Docket Nos.: EPA-HQ-OAR-2017-0757; EPA-HQ-OAR-2017-0482.** *November 13, 2020* *Via Email and First-Class Mail*

Center for Biological Diversity, Clean Air Task Force, Earthjustice, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club submit the following petition for reconsideration of EPA's final rules "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57,018 (Sept. 14, 2020) ("Review Rule") and "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," 85 Fed. Reg. 57,398 (Sept. 15, 2020) ("Reconsideration Rule").

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Center for Biological Diversity, Clean Air Task Force, Earthjustice, Earthworks, Environmental Defense Fund, Environmental Integrity Project, Environmental Law and Policy Center, National Parks Conservation Association, Natural Resources Defense Council, and Sierra Club (collectively "Petitioners"), hereby request that the U.S. Environmental Protection Agency ("EPA" or "agency") reconsider the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57,018 (Sept. 14, 2020) ("Review Rule") and the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," 85 Fed. Reg. 57,398 (Sept. 15, 2020) ("Reconsideration Rule").

I. Introduction

Clean Air Act section 307(d)(7)(B) provides

> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator *shall* convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B) (emphasis added). Employing the mandatory, "shall," the section requires EPA to convene a reconsideration proceeding upon the required demonstration. The fundamental purpose of the reconsideration process is to grant the public an opportunity to comment on important aspects of a final rule that were not properly noticed in a proposed rule, and to avoid such notice problems in the first place.

> Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of review.

Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005). "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA* ("*Small Refiner*"), 705 F.2d 506, 547 (D.C. Cir. 1983). "[A]mbiguous comments and weak signals from the agency g[i]ve petitioners no . . . opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the . . . rules exceed the limits of a logical outgrowth." *Int'l Union, UMW v. MSHA*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (internal citations omitted). Therefore, considering the purposes of notice, a final rule may only differ from a proposed rule insofar as the former is a logical outgrowth of the latter. *See Envtl. Integrity Project*, 425 F.3d at 996.

An objection is of central relevance if it "provides substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012), aff'd in part, rev'd in part on other grounds sub. nom. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *see also* 42 U.S.C. § 7607(d)(7)(B).

Both the Review Rule and the Reconsideration Rule contain issues that were not adequately noticed in the Proposals—i.e., to which commenters were not able to raise an objection—and Petitioners' objections as to these issues are of central relevance to the outcomes of the rules. EPA must therefore convene a proceeding to reconsider the rules and afford commenters their statutorily guaranteed right to comment on them.

II. EPA Must Reconsider the Review Rule Due to Its Failure to Provide Adequate Notice and Opportunity for Public Comment on Its Position Regarding Significant Contribution Findings Under Section 111 of the Clean Air Act.

The Review Rule "adopts an interpretation of Clean Air Act ['CAA' or 'Act')] section 111 under which EPA, as a predicate to promulgating [new source performance standards ('NSPS')] for certain air pollutants, must determine that the pertinent pollutant causes or contributes significantly to dangerous air pollution." 85 Fed. Reg. at 57,018. The adopted position contrasts starkly with EPA's proposal to retain its longstanding position that "section 111 does *not* require the Agency to make a pollutant-specific determination . . . as a prerequisite to promulgating an NSPS." 84 Fed. Reg. 50,244, 50,261 (Sept. 24, 2019) (emphasis added). As we demonstrate below, while EPA did solicit comment on whether it should revise its position, the brainstorming exercise found in the proposed rule, 84 Fed. Reg. 50,244 (Sept. 24, 2019) ("Proposal"), did not provide the "major legal interpretations and policy considerations" reflected in the final Review Rule, which would be required for adequate notice on anything but its proposal to retain its previous interpretation. 42 U.S.C. § 7607(d)(3)(C). Moreover, to the extent that EPA discussed any possible alternative interpretation of section 111 in the Proposal, it focused on a different subsection of the CAA and a different legal theory than it did in the Review Rule.

The Review Rule is a surprising departure from the Proposal and impacts a far broader universe of regulated entities and differently situated parties than those potentially affected by the Proposal. And, in the present rulemaking, EPA's novel interpretation supplies an unexpected and unfounded basis for deregulating emissions of methane from the production and processing segments of the oil and gas industry. EPA must provide the public with an opportunity to comment on, and must reconsider in light of those comments, its new interpretation of CAA section 111 through reconsideration proceedings because the changes were not noticed in the Proposal and Petitioners' objections to the new interpretation, discussed below, are of central relevance to the rulemaking. 42 U.S.C. § 7607(d)(7)(B).

A. EPA's Vague and Roving Proposal Did Not Propose Any Alternative Interpretation of Section 111 or Articulate the Legal Basis for an Alternative Interpretation in a Manner Sufficient to Allow Petitioners to Comment.

A proposed rule must contain the "legal authority" under which it is proposed and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(2)-(3). Under the CAA, the proposal must also include "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). In the Proposal at issue here, EPA's only concrete proposal was "to retain its current interpretation that it is not required to make a pollutant-specific [significant contribution finding, or 'SCF'], for the same reasons that it noted in the 2016 NSPS." 84 Fed. Reg. at 50,261. While the agency inquired as to "whether the interpretation of section 111(b)(1)(A) that EPA set forth in the 2016 NSPS . . . is correct," *id.* at 50,262, and solicited comment on a myriad of general questions regarding this issue, it

did not actually propose any specific alternative interpretation. Thus, Petitioners were unable to provide comment as to any particular interpretation except the interpretation the agency set forth in 2016 and embraced in the Proposal—that a pollutant-specific finding was not required.

The agency asked whether the plain language of section 111(b)(1)(A) required an SCF for individual pollutants or whether such an interpretation was permissible, and whether it "might be reasonable" to find that Congress did not mean what it said in the plain language of the statute based on 1) "potential[] anomal[ies];" 2) or that the "rational basis" for regulating a pollutant is not sufficiently defined given that the well-established "arbitrary and capricious" standard that the rational basis reflects applies to every EPA action; or 3) that the CAA's legislative history "might be read to indicate that Congress" intended a pollutant-specific SCF; or 4) because there are pollutant-specific requirements in other sections of the Act. *Id.* at 50,263-66.

As Petitioners noted in comments, the vague and meandering character of the agency's solicitation did not provide any discernible signal as to the agency's actual position or propose any change to its previous position; this necessarily precluded Petitioners' ability to comment on a hypothetical new position. *See Shell Oil v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). The Proposal was seemingly fashioned as an advance notice of proposed rulemaking, posing various legal questions that might warrant revisiting the agency's position. Because Petitioners' objections to the agency's new position are of central relevance to the rulemaking, for the reasons discussed below, the agency must convene reconsideration proceedings and provide the public with appropriate notice and an opportunity to comment.

The agency's novel interpretation is even more consequential because, although it applies to *all* section 111 source categories, it appears for the first time in a final rule that revises standards for just a single source category—the oil and gas industry. Moreover, the Proposal would have retained the agency's historical approach, which would not change anything for the unnoticed source categories. EPA's dramatic about face in the final Review Rule will impact the dozens of industries regulated under section 111 (either now or in the future) and affect a larger portion of the public, yet these stakeholders were not put on notice that this rulemaking—purportedly directed at the oil and gas industry—could have significant consequences for them. *See* 84 Fed. Reg. at 50,247, tbl. 1 (listing only oil and gas entities as those "potentially affected by this action"). Thus, the agency's failure to provide notice seriously compromises the purposes of the CAA's and Administrative Procedure Act's notice requirements, including exposing the Proposal to diverse comments, affording fairness to affected parties, and providing the opportunity to build a record for judicial review. *Envtl. Integrity Project*, 425 F.3d at 996.

B. The Final Review Rule Is a Sharp Deviation from the Proposal as It Is Based on a Different Subsection of the Act and a New Legal Theory.

To the extent that EPA's Proposal discussed potential alternatives to retaining its historical position on the SCF, the agency's hypothetical position seemed to be that while section 111(b)(1)(A) "contemplate[s] that EPA is required to make a SCF for the source category only when it is first added to the list," there may nevertheless be reason to believe that Congress could not have meant what it said. 84 Fed. Reg. at 50,263. As discussed above, as part of its brainstorming exercise, and without taking any definitive positions, the agency considered, among other things: 1) that it might be anomalous to regulate pollutants that were not considered in the original source category listing without making a pollutant-specific finding; 2) that the arbitrary and capricious standard may not be sufficient to ensure that decisions to regulate individual pollutants from listed source categories are

reasonable; 3) that legislative history might be read as supporting a pollutant-specific SCF requirement; and 4) that a pollutant-specific finding might be required because other sections of the Act require one. *Id.* at 50,263-66.

The Review Rule is "surprisingly distant" from the Proposal, however, and does not rely on any of these enumerated considerations. *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir 2009). The final rule recapped these issues in a brief description of the Proposal, relegating most to a footnote. 85 Fed. Reg. at 57,034 & n.42. Not only did the agency finalize a dramatic change in its previous position contrary to the Proposal, but, to the extent that it did discuss an alternative interpretation, EPA focused solely on a different subsection of 111 and an entirely different legal rationale.

In the Proposal, EPA posited that while the plain language of section 111(b)(1)(A) did not require a pollutant-specific SCF, the statute might nevertheless be interpreted to require one based on other indicators that overrode its plain language. 84 Fed. Reg. at 50,263. By contrast, in the Review Rule, EPA dismisses these indicators and instead announces that the plain language of the statute *does* require—or at least permits EPA to require—a pollutant-specific SCF before regulating new pollutants from a listed source category. Specifically, while the Proposal did not discuss section 111(b)(1)(B) in this regard, the agency now interprets section 111(b)(1)(B)'s requirement to "'establish[]…standards of performance' …together with the CAA section 111(a)(1) definition of 'standard of performance' as a 'standard for emissions of air pollutants' – to limit standards of performance to only those air pollutants that the Administrator determined cause or contribute significantly to dangerous air pollution when listing the source category under CAA section 111(b)(1)(A)." 85 Fed. Reg. at 57,033.

Citing *Utility Air Regulatory Group v. EPA* ("*UARG*"), 573 U.S. 302 (2014), EPA now argues that the statutory context limits section 111(a)(1) air "emissions" subject to regulation to those found to significantly contribute to dangerous pollution. 85 Fed. Reg. at 57,035-36. While the Proposal made general reference to the subsections EPA decided to rely on in the Review Rule, it did not propose a new legal interpretation of section 111 based upon them, nor did it even reference *UARG*, the central case upon which EPA relies in the final rule. This is not merely a "refinement of [its] interpretation," *id.* at 57,033, but is a new statutory interpretation altogether. The language the agency is construing and its basis for that construction are the central tenets of any proposal, and EPA's failure to provide them at the outset deprived commenters of notice and an adequate opportunity to comment. The agency admits as much, stating that the "interpretation of sections 111(b)(1)(B) and (a)(1) differ from the interpretation of CAA section 111(b)(1)(A) that the EPA described in the 2019 proposal." *Id.* at 57,037 n.46.

With perfect hindsight, the closest the agency came in its roving Proposal to describing the position it ultimately took in the Review Rule was an isolated sentence noting that "section 111(b)(1)(B) and (d)(1) require the EPA and states, respectively, to promulgate for the affected sources 'standards of performance,' which…are defined…as 'standard[s] for emissions of air pollutants' – as a result it seems potentially anomalous not to require that the EPA make a SCF for those pollutants as a prerequisite for promulgating the standards of performance." 84 Fed. Reg. at 50,263. However, this is still far afield from the Review Rule for two reasons. First, finding that the prior reading may lead to "potential[] anomal[ies]" is not a coherent legal theory upon which to reverse its previous reading. Moreover, this theory is merely a half-baked, hypothetical reason to interpret *section 111(b)(1)(A)* counter to its plain language, rather than an argument that that EPA's novel interpretation limiting regulated "emissions of air pollutants" in section 111(a)(1) in light of a separate instruction for

source categories in 111(b)(1)(A) is actually *compelled* by the text, or at least is a reasonable interpretation of those provisions in combination. Second, Petitioners cannot be expected to "pick this single sentence out" as an indication that the agency would finalize a rule based on another provision of the Act and the agency's understanding of *UARG. CSX Transp.*, 584 F.3d at 1082. The Proposal does not pass the "reasonably specific" bar for the Review Rule to constitute a logical outgrowth of the Proposal. *Small Refiner*, 705 F.2d at 549.

C. Petitioners Would Have Provided EPA with Significantly Different Comments Had EPA Provided Adequate Notice of Its Novel Position.

"[A] new round of notice and comment would provide the *first* opportunity for interested parties to offer comment that could persuade the agency to modify its rule." *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (internal quotations omitted) (emphasis original). In the absence of proper notice, Petitioners seek reconsideration in order to have a full opportunity to respond to EPA's novel legal theory. EPA's interpretation limiting the emissions of air pollutants for which the agency can set standards to those emissions that it has formally determined cause or contribute significantly to dangerous air pollution does not find support in the statute or further statutory purposes.

Section 111(b)(1)(A) requires EPA to "publish a list of categories of sources" for regulation and to "include a category of sources in such list if in [EPA's] judgment it 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). Thus, on its face, this section requires regulation of "*categories of sources*" that significantly contribute to dangerous air pollution; in other words, it is the "category of sources" significantly contributing that triggers section 111's regulatory requirements. This text indicates that the section is focused on dangerous air *pollution* from such "categories of sources," and says nothing that could be construed to limit the agency to promulgating standards only for individual "air *pollutant*[*s*] that contribute[] significantly to dangerous air pollution." 85 Fed. Reg. at 57,033 (emphasis added). Plainly it is *the source category* that must cause or contribute significantly to dangerous air pollution, not its emissions of each individual pollutant.

A separate provision of the statute—section 111(b)(1)(B)—concerns the issuance of standards for individual *pollutants* from a source category *after* it has been listed. Nowhere does the language in this latter provision state or even imply that the SCF required at the *source category listing* stage be carried over into the *emissions standard-setting* stage with respect to individual pollutants. On the contrary, the Supreme Court has instructed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (internal quotations omitted).

EPA's new theory imposing an atextual barrier to regulation is particularly puzzling in light of the fact that section 111 serves a gap-filling role by directing EPA to issue standards for listed source categories' emissions of "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under sections 108-110 or 112." 40 Fed. Reg. 53,340 (Nov. 17, 1975); *see also* S. Rep. No. 91-1196, at 20 (1970). In determining whether to regulate an individual air pollutant from a listed source category, EPA is certainly permitted to consider whether the pollutant was assessed when the listing was made. Yet there is no reasonable basis (especially under a statute whose primary purpose is to protect public health and welfare) to erect a barrier to regulation by

requiring the agency to determine that a specific pollutant, *by itself*, satisfies the SCF threshold before EPA may regulate its emissions from a listed source category. Such an interpretation would transform section 111 into a provision that mandates regulation of large emitters of dangerous pollutants into a much narrower authority that applies only to those emissions that rise to the same level of significance as all of the emissions of a source category considered as a whole, contrary to the text of the statute, its purpose, and common sense. Because section 111(b)(1)(A) itself imposes no limits on the individual pollutants that must be regulated, but only pertains to source categories as a whole, it would be unreasonable to impose one based on the language of that provision. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (rejecting respondents' challenge where they could point to no "textual commitment of authority to EPA to consider costs").

The agency newly argues that its previous interpretation—that EPA may regulate a pollutant from a listed source category so long as it has a rational basis for doing so—is foreclosed by the Supreme Court's *UARG* decision striking down EPA's Tailoring Rule. Yet that case is entirely inapposite. Regulating pollutants emitted from a listed source category unless there is a rational reason for not regulating them does not create any practical problems like those found in *UARG*. In that case, understanding the CAA to require a source's greenhouse gas emissions to trigger Title V and PSD requirements, the agency chose between a rule that would temporarily depart from the plain language of the CAA or a reading that would dramatically expand EPA's authority to previously unregulated and small sources with minimal impact on pollution levels. *UARG*, 573 U.S. at 310-11. EPA explained in that rule that it tailored the statute "because the PSD program and Title V were designed to regulate 'a relatively small number of large sources' and requiring permits for all sources with greenhouse gases above the statutory thresholds would radically expand those programs, making them both administrable and 'unrecognizable to the Congress that designed' them." *Id.* at 312. The Court found the solution of tailoring the statute's plain language impermissible. *Id.* at 325.

No such problem exists here because, as noted, EPA is not required to regulate every pollutant emitted by a listed source category. Indeed, the Supreme Court has implied that EPA could legitimately decline to regulate a pollutant from a source category listed under section 111 if its inaction were non-arbitrary. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011).

EPA nonetheless asserts that an analogous problem might arise under section 111 if the agency were permitted to list a source category based on its significant contribution to air pollution generally and then regulate an individual pollutant that did not, by itself, contribute significantly to dangerous air pollution. But this outcome is not "inconsistent with the statutory scheme." *UARG*, 573 U.S. at 319. For example, EPA could very well articulate a sound and rational basis for regulating an individual pollutant that was emitted from a listed source category in small quantities, but nonetheless posed danger to nearby populations or needed to be reduced in order to address an air pollution problem, without compromising the structure of the statute or ignoring its plain language. This potential outcome does not "radically transform [section 111] and render [it] unworkable as written." *Id.* at 320. Rather, EPA would proceed to regulate the emissions of that pollutant by setting an emission limitation that reflects the best system of emission reduction for the relevant sources, taking into account cost and other factors. 42 U.S.C.§ 7411(a)(1). Furthermore, it would not expand the universe of regulated sources at all because EPA may only set standards for those sources that it has already determined significantly contribute to dangerous air pollution and listed as such. And not only would it not ignore any plain language in section 111, it would hew much more closely to that language than would EPA's new interpretation.

In fact, *UARG* found that it was reasonable to control greenhouse gases from sources already subject to the PSD program. *UARG*, 573 U.S. at 331-33. The same is true for any standard of performance for a newly-regulated pollutant under section 111; no *additional* sources would be regulated. For example, controlling dangerous methane pollution from the already-listed oil and gas source categories—for which new source performance standards are already in place, including standards that EPA admits will lead to reductions in methane pollution—does not "increas[e] the demands EPA . . . can make of entities already subject to its regulation." *Id.* at 332. As in *UARG*, standards for performance for newly-regulated pollutants within listed source categories "may sensibly be encompassed within the particular regulatory program." *Id.* at 319. In this regard, *UARG* simply does not support EPA's new position that section 111 requires pollutant-specific SCFs.

Comments along these lines would "provide[] substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation*, 684 F.3d at 125. As noted, EPA's final Review Rule rescinding methane standards rests partly on the agency's interpretation that an SCF is required specifically for the production and processing sector's methane emissions and that EPA must utilize established criteria to make this determination. *See* 85 Fed. Reg. at 57,038.[1] If EPA's novel interpretation of section 111 is incorrect, no methane-specific SCF would be required at all and EPA's 2016 rational basis to regulate methane emissions from the oil and gas subcategory would be sufficient. Therefore, the objections that Petitioners seek to present in reconsideration proceedings, as outlined above, are of central relevance to the rulemaking, and the CAA mandates reconsideration of the rule. 42 U.S.C. § 7607(d)(7)(B); *see also Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 322 (D.C. Cir. 2020) (petitioners' issues are of central relevance if they "go to the very legality of the Final Rule[]").

III. EPA Must Reconsider the Reconsideration Rule Due to Its Failure to Provide Adequate Notice and Opportunity for Public Comment on Its Definition of a "Low-Production Well."

EPA must also reconsider the Reconsideration Rule due to a dramatic change from proposal to final of the definition for "low production wells." EPA established two definitions of a "low production well": one for new wells based on the first 30 days of production, 40 C.F.R. § 60.5397a(a)(1)(i), and one based on a 12-month rolling average for affected wells that do not immediately meet the first requirement, 40 C.F.R. § 60.5397a(a)(1)(ii). This final definition deviates significantly from EPA's Proposal, which defined "low production well sites" as those "with average combined oil and natural gas production for the wells at the site less than 15 [barrels of equivalent] per day averaged over the first 30 days of production." 83 Fed. Reg. 52,056, 52,062 (Oct. 15, 2018). The newly added, unnoticed part of EPA's definition classifies well sites in the context of future production and opens the door for the removal of applicable new source standards of performance from all well sites at some point in the future.

[1] The Review Rule provides a second rationale for rescinding methane standards: that methane standards are "redundant" of VOC standards and that EPA therefore had no rational basis to regulate methane. As discussed elsewhere, this rationale is not supported by the record and is not a legitimate basis for rescinding the methane standards. Regardless, EPA claims that each rationale independently justifies the rescission of methane standards; thus, each is centrally relevant to EPA's decision to rescind methane standards, and refuting one of EPA's grounds would provide substantial support for the argument that the regulation should be revised.

Though EPA solicited comment on the definition of "low production well," EPA's final definition of "low production well" is such a drastic departure from the proposed definition that Petitioners could not have reasonably been expected to raise a specific objection in their public comments. *Int'l. Union, UMW*, 407 F.3d at 1261 ("[W]eak signals from the agency g[i]ve petitioners no . . . opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the . . . rules exceed the limits of a logical outgrowth.") (internal citations omitted). If given the opportunity, Petitioners would have objected to this definition. By defining "low production well" in the context of what the well will become, not what it is, 40 C.F.R. § 60.5397a(a)(1)(ii), and *removing* standards of performance for those wells, EPA significantly expands the regulatory loophole by which well sites will avoid leak detection and repair ("LDAR") requirements.

In essence, EPA finalized a definition that allows every single affected well to avoid any LDAR requirements once production decreases below 15 barrels of oil equivalent for that well. According to our estimates, approximately 9,300 additional well sites will immediately avoid LDAR requirements as a result of this new, 12 month rolling average definition. However, EPA acknowledged that declining production is a characteristic of all well sites, 85 Fed. Reg. 57,428 (noting that a commenter stated that "production declines over time such that eventually all well sites become low production"), which means that all well sites subject to the rule will eventually be exempted from LDAR requirements over time.

Moreover, nowhere did EPA provide any explanation why wells that are low-producing at the beginning of their operating lives should be treated in the same manner as wells whose production declines years or even decades later. In the Reconsideration Rule, EPA removes LDAR requirements for low production wells on the theory that those wells have fewer equipment components (and thus lower emissions) than higher-producing wells. 85 Fed. Reg. at 57,417. Indeed, EPA acknowledged that declining production is a characteristic of all wells. 85 Fed. Reg. 57,428 (noting that a commenter stated that "production declines over time such that eventually all well sites become low production"). Petitioners vigorously dispute the accuracy of this claim across the board, but in any event, EPA provides no evidence to suggest that its assumption holds true for both those wells that are low production at the beginning of their operating lives and those that eventually *become* low production wells after many years. EPA's decision to include the additional component of the definition is therefore unexplained, unsupported by the evidence in the record, and unsustainable under the CAA. 42 U.S.C. § 7607(d)(9)(A) (providing for reversal of arbitrary agency action). Absent an adequate explanation for this decision, the Reconsideration Rule must be revised.

It was impracticable for Petitioners to raise any objection to this definition during the public comment period, and their objection is of central relevance because it "provides substantial support for the argument that the regulation should be revised." *Coal. for Responsible Regulation*, 684 F.3d at 125. EPA must therefore open reconsideration proceedings to re-evaluate the definition, and regulation, of "low production wells."

IV. Conclusion

For the foregoing reasons, Petitioners respectfully request that the Administrator convene a proceeding for reconsideration of the final Review Rule and Reconsideration Rule pursuant to Clean Air Act section 307(d)(7)(B).

DARIN SCHROEDER
JAY DUFFY
ANN BREWSTER WEEKS
Clean Air Task Force
114 State St., 6th Floor
Boston, MA 02109
(617) 624-0234
dschroeder@catf.us
jduffy@catf.us
aweeks@catf.us
Counsel for Petitioners Clean Air Task Force, Earthworks, and National Parks Conservation Association

DAVID DONIGER
PETER HUFFMAN
Natural Resources Defense Council
1152 15th St. NW, Suite 300
Washington, DC 20005
Phone: (202) 289-2403
ddoniger@nrdc.org
phuffman@nrdc.org
Counsel for Petitioner Natural Resources Defense Council

ANDRES RESTREPO
Sierra Club
50 F Street NW, 8th Floor
Washington, DC 20001
Phone: (215) 298-0335
andres.restrepo@sierraclub.org
JOANNE SPALDING
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Phone: (415) 977-5725
joanne.spalding@sierraclub.org
Counsel for Petitioner Sierra Club

ELIZABETH JONES
CLARE LAKEWOOD
Center for Biological Diversity
660 S. Figueroa St., Suite 1000
Los Angeles, CA 90017
Phone: (213) 785-5400
ljones@biologicaldiversity.org
clakewood@biologicaldiversity.org
Counsel for Petitioner Center for Biological Diversity

ROSALIE WINN
PETER ZALZAL
VICKIE PATTON
Environmental Defense Fund
2060 Broadway, Ste. 300
Boulder, CO 80302
Phone: (303) 447-7212
rwinn@edf.org
Counsel for Petitioner Environmental Defense Fund

ROBIN COOLEY
CAITLIN MILLER
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Phone: (303) 623-9466
rcooley@earthjustice.org
cmiller@earthjustice.org
Counsel for Petitioners Earthjustice

ADAM KRON
Environmental Integrity Project
1000 Vermont Ave. NW, Suite 1100
Washington, DC 20005
Phone: (202) 263-4451
akron@environmentalintegrity.org
Counsel for Petitioner Environmental Integrity Project

JUSTIN VICKERS
ANN JAWORSKI
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
(312) 795-3736
jvickers@elpc.org
ajaworski@elpc.org
Counsel for Petitioner Environmental Law & Policy Center

A copy of the foregoing Petition for Reconsideration was served on November 13, 2020, by email and first-class mail, on the following:

Andrew Wheeler, Administrator
Office of the Administrator (Mail Code 1101A)
U.S. Environmental Protection Agency
WJC South Building
1200 Pennsylvania Ave., NW
Washington, DC 20460
Wheeler.Andrew@epa.gov

Penny Lassiter, Sector Policies and Programs Division (Mail Code C404-04)
Office of Air Quality Planning and Standards
U.S. Environmental Protection Agency
Research Triangle Park, NC 27711
Lassiter.Penny@epa.gov

Associate General Counsel for the Air and Radiation Law Office
Office of General Counsel (Mail Code 2310A)
U.S. Environmental Protection Agency
WJC South Building
1200 Pennsylvania Ave., NW
Washington, DC 20460
A-and-R-Docket@epamail.epa.gov