ORAL ARGUMENT SCHEDULED FOR JANUARY 25, 2005

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

No. 02-1387 and consolidated cases
(COMPLEX)

STATE OF NEW YORK, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

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

BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Authorities chiefly relied upon are marked with an asterisk.

STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

BACT	Best Available Control Technology
CAAAC	Clean Air Act Advisory Committee
Clean Unit Test	Clean Unit Applicability Test
Environmental Analysis	Supplemental Analysis of the Environmental Impacts of the 2002 Final NSR Rules
Env. Br.	Proof Opening Brief of Environmental Petitioners
EPA	Respondent United States Environmental Protection Agency
GAO	General Accounting Office
Ind. Br.	Joint Brief of Industry Petitioners
LAER	Lowest Achievable Emissions Rate
NAAQS	National Ambient Air Quality Standards
NOx	Nitrogen Oxides
NSPS	New Source Performance Standards
NSR	New Source Review
PAL	Plantwide Applicability Limit
PCP	Pollution Control Project
PSD	Prevention of Significant Deterioration
RACT	Reasonably Available Control Technology
Recons. TSD	Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration
SIPs	Standard Implementation Plans

SOx	Sulfur Oxides
State Br.	Brief of Government Petitioners
TSD	Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations.
VOC	Volatile Organic Compounds

JURISDICTIONAL STATEMENT

As explained in the Argument, the Court lacks jurisdiction over Industry Petitioners' challenges. The Court has jurisdiction over the claims of State and Environmental Petitioners pursuant to 42 U.S.C. § 7607(b)(1).

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are included in the addenda to the petitioners' briefs. Statutes and regulations not submitted in Petitioners' addendum are attached at the end of this brief.

STATEMENT OF ISSUES

1. Whether the Clean Air Act gives EPA the discretion to define "modification" differently for purposes of New Source Review ("NSR") and New Source Performance Standards ("NSPS") regulations.

2. Whether Industry Petitioners waived their opportunity to challenge the "actual-to-potential" test for measuring actual emissions.

3. Whether the 2002 preamble simply restated EPA's long-standing interpretation of the NSR applicability test promulgated in the 1980 NSR regulations.

4. Whether the revised baseline for determining whether an emissions increases will occur reflects a reasonable interpretation of the statute and is otherwise lawful.

5. Whether the use of a plantwide limit for determining whether an emissions increase will occur is consistent with the statute.

6. Whether the NSR rule is adequately enforceable.

7. Whether the Clean Unit applicability test is consistent with the statute.

8. Whether EPA properly concluded that Congress could not have intended that qualifying pollution control projects be subject to NSR permitting requirements.

9. Whether EPA properly specified selection of a two-year period within a fixed ten-year period as the baseline for actual emissions.

10. Whether EPA properly added the reforms adopted in the Rule to the base federal NSR program.

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves challenges to the New Source Review ("NSR") Reform Rule ("2002 Rule") promulgated by EPA pursuant to parts C and D of Title I of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q. 67 Fed. Reg. 80186 (Dec. 31, 2002).[1/] The challenged regulations implement the Act's NSR provisions, which require preconstruction review of new and modified major stationary sources of air pollution that cause emissions increases.

Congress substantially amended the Act in 1970 "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (emphasis added). The statute's dual purpose was reemphasized in the adoption of the Prevention of Significant Deterioration ("PSD") program (which applies in areas that have attained air quality standards) in the 1977 amendments to the Act: the program's purpose is "to protect public health and welfare from any actual or potential adverse effect" of air pollutants and "to insure that economic growth will occur . . . consistent with the

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[1/] State Petitioners challenge only the 2002 Rule. Environmental Petitioners also challenge certain aspects of EPA's 1992 NSR rule. Industry Petitioners challenge EPA's 1980 NSR rules and challenge EPA's 1992 and 2002 rules to the extent they allegedly "reinterpret" the 1980 rules.

preservation of existing clean air resources." 42 U.S.C. § 7470(1), (3). EPA first promulgated NSR regulations in 1974, and has amended them several times since then, including in 1978, 1980, 1992, and 2002. Each revision has reflected EPA's experience with the NSR program and the Act as a whole. With each revision, EPA has applied its evolving knowledge to shape the NSR program to better achieve the goals of the Act.

The 2002 Rule was the result of over ten years of review, analysis, and communications with stakeholders designed to evaluate the NSR program in light of the experience of EPA, states, and the regulated community in implementing the program. As EPA explained:

> The [2002 Rule is] intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection.

67 Fed. Reg. 80186/2; see also id. at 80189/1 (rule will reduce burden, maximize flexibility, improve environmental quality, and promote administrative efficiency). In promulgating the 2002 Rule, EPA modified the NSR applicability provisions to improve the efficiency of the program and to give facilities more flexibility to respond to changing market conditions, as well as to provide incentives to implement environmentally beneficial efficiency-enhancing and pollution control projects. The Rule revises the test used to determine whether a change at a unit will cause a significant net increase in emissions to make the test more accurately reflect the unit's full range of operations; gives facilities the flexibility to adopt a plant-wide limit; provides an alternative emissions test for Clean Units; and excludes qualifying pollution control projects from NSR.

The 2002 Rule, like EPA's prior NSR Rules, is designed to address both the environmental and economic purposes of NSR. The revised applicability test provides a more realistic and simpler way of measuring emissions increases, and the provision for plantwide limits gives

facilities the flexibility to respond to market conditions while keeping emissions below an established cap. The clean unit and pollution control project provisions encourage facilities to adopt environmentally beneficial control technology. The enhanced flexibility will be economically beneficial, while at the same time, according to EPA's analysis:

> collectively, the five NSR Improvements that the Agency is finalizing will be environmentally beneficial compared to the current program, and will improve air quality by reducing emissions from industrial facilities. The improvements in air quality will result in health and welfare benefits from reduced concentrations of pollutants regulated by the NSR program, primarily criteria pollutants.

Supplemental Analysis of the Environmental Impacts of the 2002 Final NSR Rules, ("Environmental Analysis") at 2 (JA XXXX). Thus, the 2002 Rule streamlines the NSR program and gives the regulated community greater flexibility without sacrificing environmental protection.

The petitions brought by industry, states, and environmental groups challenge the applicability provisions for modifications of existing major sources. The NSR provisions in the Act do not define "modification" themselves. 42 U.S.C. §§ 7479(2)(C), 7501(4). Rather, they reference the definition of "modification" found at CAA § 111(a)(4): "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). This two-step definition contemplates that, first, a source must determine whether a physical or operational change will occur. If so, the source must determine whether the change will result in an emissions increase. Central to all of these challenges, therefore, is EPA's discretion to interpret the ambiguous words included in the statutory definition of the term "modification."

II. STATUTORY AND REGULATORY BACKGROUND

A. History And Nature Of The NSR Program.

The CAA Amendments of 1970 established the basic statutory framework of the Act. The foundation of the Act was the provision for National Ambient Air Quality Standards ("NAAQS"), together with state-adopted plans to implement those standards. Alabama Power Co. v. Costle, 636 F.2d 332, 346 (D.C. Cir. 1979) (per curiam). CAA Section 109 requires EPA to promulgate NAAQS, which set forth maximum concentrations of pollutants permitted in the air. Section 110 requires states to develop plans, known as State Implementation Plans, ("SIPs"), to achieve and maintain those air quality standards. Id. Section 111 requires EPA to develop uniform, technology-based emissions standards for new or modified sources in certain industrial categories. Id. These technology-based standards are known as "New Source Performance Standards," ("NSPS"). Sources of pollution subject to NSPS must comply with them regardless of the impact of their emissions on local air quality. Id.

The genesis of the PSD program can be traced to a 1972 lawsuit claiming that the Act required EPA to ensure that air quality did not deteriorate in areas where air quality met the NAAQS ("attainment areas"). Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972). The initial PSD regulations were promulgated in December 1974. See 39 Fed. Reg. 42510 (Dec. 5, 1974). The program required that new or modified major sources of pollution in attainment areas undergo preconstruction review. To obtain a PSD permit, a source had to demonstrate that it would used best available control technology ("BACT") and would not increase ambient pollution levels by more than an allowable amount (the "increment"). The preamble to the 1974 rules explained that at that time EPA intended the PSD definition of "modified source" to be consistent with the definition of that term under NSPS regulations. Id. at 42513. Accordingly, the 1974 PSD

regulations defined "modification" the same way for both programs: "any physical change in, or change in the method of operation of, a stationary source which increases the emissions rate of any pollutant. . . ." 40 C.F.R. § 52.01(d) (1975); see 39 Fed. Reg. 42514. EPA also carried over from the NSPS rules exclusions for increases in production rates and hours of operations from the definition of "change." Id.

1. The Clean Air Act Amendments of 1977.

The 1977 Amendments to the Act expanded PSD requirements and broadened the applicability of the program. As this Court explained in Alabama Power "[t]he 1977 Amendments maintain the basic structure of regulation of stationary sources through state plans, but made substantial changes in the requirements governing those plans." 636 F.2d at 349. In particular, new CAA section 161 now provided "an express directive that state plans include measures to prevent the significant deterioration of air quality" in areas meeting the NAAQS. Id. Additionally, section 165 imposed several "stricter requirements" for PSD review. Id. at 350. In promulgating regulations pursuant to those amendments, EPA recognized that Congress intended to broaden the reach of the PSD program: "These requirements follow the outline of the pre-existing regulations, but are in general more comprehensive and stringent. . . . [M]any more sources are covered." 43 Fed. Reg. 26380 (June 19, 1978); see also id. at 26390 ("The new PSD requirements might subject up to twenty-four times as many sources to a more restrictive control technology review as did the old requirements."); 44 Fed. Reg. 51924 (Sept. 5, 1979) (Amendments "follow the outline of the old regulations, but are more elaborate and in many ways more stringent.").

The 1977 Amendments also required EPA to develop a permitting program for those parts of the country where air quality does not meet the NAAQS. 42 U.S.C. §§ 7501-7515. See

Alabama Power, 636 F.2d at 349. This program is known as nonattainment NSR.[2/] The Act requires States to include nonattainment NSR provisions in their SIPs. 42 U.S.C. § 7502(c)(5). Together, the PSD program and nonattainment NSR are known as New Source Review, or NSR.[3/]

The Act required each SIP to include "a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C and D." 42 U.S.C. § 7410(a)(2)(C). Indeed, "air pollution control at its source is the primary responsibility of States and local governments" under the Act. 42 U.S. C. § 7401(a)(3). As of 1977, the Act required states to have permitting programs for major sources (i.e., the programs required by Parts C and D of Title I), and a separate permitting program for non-major sources and modifications. To be approved, a SIP was required to satisfy the minimum criteria laid out in federal regulations. See, e.g., 40 C.F.R. §§ 51.160 - 51.164 (minimum criteria for permitting

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[2/] Nonattainment NSR requirements are more stringent than PSD. In particular, nonattainment NSR requires sources to meet the Lowest Achievable Emissions Rate ("LAER") and to obtain offsets, i.e., emissions reductions from other sources, so that new emissions will be offset by reductions from other sources in the area, with the result that total emissions in the area will not increase or, in some instances, will decrease. 42 U.S.C. § 7503(a)(1)-(2).

[3/] For clarity, with one exception, this brief will refer to the regulations at issue using the same nomenclature as that adopted by Industry Petitioners. Thus, the New Source Performance Standards will be referred to as "NSPS," and the Prevention of Significant Deterioration regulations will be referred to as "PSD," but the nonattainment regulations will be referred to as "nonattainment NSR," instead of NNSR. When both PSD and nonattainment regulations are intended, "NSR" will be referenced. As Industry Petitioners indicated, Ind. Br. at 3 n.4, there are four sets of regulations at issue: regulations that apply in states without an approved program, 40 C.F.R. §§ 52.21 (PSD) and 52.24 (nonattainment); and regulations that apply to states with an approved program, 40 C.F.R. §§ 51.166 (PSD) and 51.165 (nonattainment). While the PSD and nonattainment programs have very similar applicability provisions, they are not, as Industry Petitioners assert "identical." Ind. Br. at 3 n.4. Nevertheless, they are sufficiently similar that this brief will referenc,e the regulations found at 40 C.F.R. §52.21 as representative of all four sets of regulations, unless otherwise indicated.

programs for non-major sources); 51.165 (minimum criteria for major source permitting programs for nonattainment areas); 51.166 (minimum criterial for major source permitting programs for attainment areas).

In developing regulations to implement these new congressional directives, EPA came to understand that the NSPS and NSR programs had different purposes and structures and that, while relevant and informative, NSPS-based definitions and interpretations were not necessarily controlling for NSR purposes. In particular, EPA recognized that the term "modification" should be interpreted differently in NSPS and NSR contexts. For example, in the 1978 PSD regulations, EPA interpreted "modification" to include a plant-wide approach, even though that very approach had been found unlawful as applied to the NSPS program in ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978). 43 Fed. Reg. 26394.[4/] EPA determined that "[s]ince the PSD program is ultimately concerned with effects on air quality, EPA does not feel bound to apply mechanically the pre-ASARCO case definition of 'modification' in section 111, a section directed toward technology, as to frustrate the air quality protection purpose of PSD." Id.

Thus, as early as 1978, EPA recognized that the same statutory terms should be interpreted differently as applied to the different purposes of the NSPS and NSR programs, and its regulations implementing the statutory NSR program enacted in 1977 reflected these differences.

[4/] In ASARCO, various petitioners challenged EPA's definition of "new source" under the NSPS regulations, in which EPA had incorporated a "bubble concept." EPA had included within the definition of "stationary source" any combination of facilities but allowed a source to avoid NSPS review if emissions reductions at other facilities within the source "cancelled out" increases from modified facilities within the source. This Court concluded that "the regulations incorporating the bubble concept must be rejected as inconsistent with the language of Act," especially in view of "the purpose of the [CAA] and Section 111. . . ." 578 F.2d at 327.

Challenges to the 1978 regulations were resolved by this Court in Alabama Power Co., et al. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). The regulations EPA developed in 1979 and 1980 responded to the interpretations that this Court laid out in that case.

2. The Alabama Power Decision.

Petitioners challenging the 1978 regulations raised numerous issues. Several of these challenges addressed matters fundamental to the NSR program; consequently, the Court's decision caused EPA to re-examine and refine several fundamental elements of the program. This Court affirmed some aspects of the regulations and remanded others, and in so doing, took the unusual step of issuing its opinion in two stages. Alabama Power Co., et al. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979) ("Alabama Power (per curiam)"), which summarized the Court's holdings, and Alabama Power Co., et al. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) ("Alabama Power"), which superceded the per curiam decision and set forth the Court's reasoning more fully.

Major NSR applies to "major emitting facilitie[s]." 42 U.S.C. § 7479. A "major emitting facility" is a stationary source with the "potential to emit" 250 tons per year or more of any pollutant, except for sources in 28 specified categories, where the threshold is 100 tons per year. Id. § 7479(1). See 44 Fed. Reg. 51929. The 1978 regulations provided that "potential to emit" would be without regard to any pollution control equipment installed on the source. 40 C.F.R. § 52.21(b)(3) (1978). See 44 Fed. Reg. 51929. This Court remanded that definition, saying that the "potential to emit" was required to be based on a source's design capacity, including pollution control equipment. Alabama Power (per curiam), 606 F.2d at 1076.

In the absence of a statutory definition of "stationary source" specific to PSD, EPA defined the term in the 1978 regulations. See 40 C.F.R. § 51.24(b)(4) (1978). This Court found that the statutory definition of "stationary source" for NSPS, CAA section 111(a)(3), 42 U.S.C.

§ 7411(a)(3), governed for PSD as well. Alabama Power (per curiam), 606 F.2d at 1077. The Court held that EPA's regulatory definition unlawfully expanded that definition. Id.; see 44 Fed. Reg. 51931. The Court held that EPA had discretion to define "stationary source" differently in its regulations for purposes of PSD and NSPS. Alabama Power (per curiam), 606 F.2d at 1077 n.13. As EPA later explained, "the key constraint on EPA's discretion is that 'the definitions must be reasonably appropriate for the purposes of those sections.'" 44 Fed. Reg. 51931 (citing id.). Thus, this Court held that even where statutory definitions are incorporated from the NSPS program into the PSD program, the regulatory definitions of those terms need not be the same, provided the different regulations are keyed to the different purposes of the programs.

Finally, as noted above, the PSD and NSR provisions of the statute reference the definition of "modification" in the NSPS provision. 42 U.S.C. §§ 7479(2)(C), 7501(4). That provision defines "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). The 1978 PSD regulations defined "modification" as a "major modification," that is, a change that resulted in an emissions increase of 100 or 250 tons per year (depending on the pollutant). This threshold was incorporated from the statutory definition of "major emitting facility." This Court rejected that approach. 606 F.2d at 1081. Instead, the Court said that a "modification" occurs whenever there is an increase "in Any amount" [sic] of the pollutants emitted. Id.[5/] The Court also held that any emissions increase that is entirely offset by contemporaneous emission reductions at the source would not be considered a modification. Id.

[5/] The Court did hold that EPA could provide for de minimis exceptions and exceptions based on administrative necessity. 606 F.2d at 1081.

As instructed by the Court, EPA immediately undertook to revise its regulations and, prior to the Court's final opinion with its complete explanation of its reasoning, proposed significant revisions to the method for determining whether a change at the facility constituted a "major modification" that triggers NSR permitting. 44 Fed. Reg. 51924 (Sept. 5, 1979). Under the proposal, a major modification occurred if there was a significant increase in a source's potential to emit a pollutant. The 1979 proposal included several major changes from the 1974 rules. First, EPA proposed to revise the level of emissions increase that would trigger NSR requirements by replacing the 100/250-ton per year threshold with pollutant-specific de minimis threshholds. Id. at 51937-38.

Second, EPA proposed to define "potential to emit" to take into account pollution control devices to implement the Court's interpretation of "design capacity." In calculating a source's annual "potential to emit," the proposal provided that "maximum annual rated capacity, year-round hours of operation, and any enforceable permit conditions on the type of materials combusted or processed will be used." Id. at 51925. This was intended to reflect the Court's direction that "potential to emit" be based on full design capacity, taking capacity utilization, and hence, annual emissions to the atmosphere, into account. See id. at 51929.

Third, EPA proposed definitions of "stationary source" for NSR that differed from the definition for NSPS. EPA proposed to apply PSD review to all groupings of units at a plant, and to allow offsetting emissions reductions (the "bubble" concept). Id. at 51932. To accomplish this purpose, EPA proposed to define a source as a grouping of contiguous or adjacent properties under common control. Id. For nonattainment areas, the proposal defined "source" as not only a plant-wide grouping of activities, but also individual pieces of process equipment to prevent use of

the plant-wide bubble where inappropriate. Id. at 51932-34. Both of these definitions differ from the definition of "stationary source" in the NSPS regulations.[6]

To calculate whether an emissions increase would occur, EPA proposed to consider the "source" as a whole: an emissions increase at one unit would not be considered a major modification where it was entirely offset by a contemporaneous emissions reduction elsewhere at the source. Id. at 51934. Thus, the proposed definition was revised to read: "'Major modification' means any . . . change . . . or series of contemporaneous . . . changes . . .that would result in a significant net emissions increase in the source's potential to emit . . . . The term 'major modification' serves as the definition of 'modification' or 'modified' when used in the Act in reference to a major stationary source." Id. at 51948.[7]

On December 14, 1979, this Court issued its final opinion in Alabama Power, setting the Court's reasoning forth in significantly greater detail.[8] In its1980 final rule, EPA explained that these expanded instructions, along with comments received on the 1979 proposed regulations,[9] had caused EPA to reconsider some of its proposals. 45 Fed. Reg. 52676, 52680 (Aug. 7 1980). In

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[6] NSPS regulations define "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant. . . ." 40 C.F.R. § 60.2.

[7] The exclusion for increases in hours of operation was omitted from the proposal because the source's potential to emit was to be calculated based on "full design capacity assuming year-round, 24-hour-a-day operation;" and only "an actual change that reduces design capacity can be credited" as an offset. The proposal further stated that a legal restriction on hours of operations "will not, by itself, qualify as an actual change decreasing potential to emit." 44 Fed. Reg. at 51934.

[8] The December 14 opinion was amended on April 21, 1980.

[9] EPA extended the comment period on the 1979 proposal to accept additional comments after the Court's opinion in Alabama Power. 45 Fed. Reg. 6802 (Jan. 30, 1980). EPA invited comment on specific issues, but did not limit comment to those issues. Id.

particular, the baseline for determining whether a significant net emissions increase would occur was changed from a source's potential to emit to the source's actual emissions. EPA explained, "[s]uch reductions, as well as significant increases, will be quantitatively assessed on the basis of an 'actual emissions' baseline, rather than a 'potential to emit' baseline, as was proposed." Id. (emphasis added). Under the new approach, the baseline for determining whether an increase would occur would be actual tons of emissions per year. Id. at 52699.

The preamble explained that EPA was "[f]ollowing the lead of the court" in "shift[ing] the focus of its regulatory definitions from 'potential to emit' to 'actual emissions.'" Id. at 52700. In particular, this shift in the Court's emphasis led EPA to change to an actual annual emissions baseline. Id. EPA explained that the first step in determining whether a change would result in a "significant net emissions increase" was to quantify the proposed emissions increase. Id. at 52677. The baseline for the comparison is set presumptively using the actual emissions of the source for the two years preceding the change. Id. at 52699. Where a unit had "not begun normal operations," post-change emissions would "generally be the potential to emit of the new or modified unit." Id. See 40 C.F.R. § 52.21(b)(21)(iv) (1981). This is known as the "actual-to-potential test."

The 1980 regulations resulted in numerous challenges, which were consolidated in Chemical Manufacturers Association v. EPA, No. 79-1112 ("CMA"). After petitioners' briefs were filed, the parties entered into a Settlement Agreement. Paragraph 8 of that Settlement Agreement required EPA, inter alia, to propose and take final action on revisions to the NSR regulations that would have established an NSPS-like "hourly potential to hourly potential" emissions test for modifications to existing sources. JA XXXX. Exhibit B of the Agreement ("CMA Exhibit B"), at A.1, set forth the language that EPA agreed to propose: "A major

modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions." Paragraph 12 of the Settlement Agreement provided that if EPA promulgated a final amendment to the 1980 rules with substantially the same effect as CMA Exhibit B, then petitioners who brought such challenges would dismiss them; if EPA did not take such action, "industry petitioners reserve[d] their rights to proceed further with this litigation." Id. EPA proposed the Exhibit B language in 1996, 61 Fed. Reg. 38250, 38268-70 (July 23, 1996) and took final action on the proposal in the 2002 Rule by declining to promulgate those changes. 67 Fed. Reg. 80204-06.

3. The Puerto Rican Cement Case.

While EPA's action on the settlement was pending, challenges were brought to EPA's implementation of the 1980 rules. The first court to address these issues was the First Circuit, in Puerto Rican Cement Co., Inc. v. EPA, 889 F.2d 292 (1st Cir. 1989). In that case, then-Circuit Judge Breyer examined EPA's application of the regulations to Puerto Rican Cement's proposed modification of cement kilns. The court examined the regulatory definitions, particularly the section providing that "actual emissions" for a unit "which has not begun normal operations" is equal to "the potential to emit" of the unit. Id. at 297. The court also looked to the 1980 preamble, citing 45 Fed. Reg. 52677. Id. Although the court noted that an agency's interpretation of its own regulations is generally given "controlling weight unless it is plainly erroneous or inconsistent with the regulation," id., Judge Breyer said, "[i]n this case EPA needs little help from this principle, for both the language and expressed purpose indicate that EPA applied the regulations properly." Id. The court recognized EPA's authority to interpret the statute, noting that the agency, in developing the actual-to-potential test "[took] account of, and [gave] controlling weight to . . . the fact that a

firm's decision to introduce new, more efficient machinery may lead the firm to decide to increase the level of production, with the result that, despite the new machinery, overall emissions will increase." Id. (emphasis in original).

The court acknowledged that there might be circumstances when the actual-to-potential test was not reasonable. But where "EPA could plausibly fear an increase in actual emissions . . . . this seems the very type of case for which the regulations . . . were written." Id. at 297-98.

4. The "WEPCo" Decision.

In 1988, the Wisconsin Electric Power Co. ("WEPCo") sought a determination from EPA as to whether certain planned renovations would be subject to PSD and NSPS. EPA applied the hourly potential-to-potential test for NSPS and the actual annual-to-potential test for PSD. EPA determined that both PSD and NSPS requirements would apply to the project. WEPCo challenged that determination in the Seventh Circuit. Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) ("WEPCo"). The Seventh Circuit noted that for a project to be a "modification" within the terms of the statute, both "a physical change" and "an increase in emissions" must be present. Id. at 907. The court found that the renovations did constitute a "physical change," but disagreed with the Agency's application of the PSD rules and remanded the matter to EPA. Id.

Turning to whether there was in increase in emissions, the court examined the differences between the NSPS and PSD regulations. As to NSPS, the court explained that "EPA compares the hourly emissions of the unit at its current maximum capacity to its potential emissions at maximum capacity after the change." Id. at 913. The court found that EPA had properly applied the test to WEPCo's project and that the project was subject to NSPS requirements. Id. At 914-15.

As to PSD, the court explained, "[u]nlike NSPS, PSD is concerned with changes in total annual emissions, expressed in tons per year." Id. at 915 (emphasis in original). It then looked at

the regulatory definitions that form the actual-to-potential test. The court focused on EPA's decision that WEPCo's modified units had "not begun normal operations," which meant that WEPCo's post-change emissions would be presumed to be the full potential to emit of the modified units. Id. at 916. Under the facts before it, where a history of operations was available, the court disagreed with EPA's conclusion that the units had "not begun normal operations." Id. at 917.

While the WEPCo court disagreed with EPA's determination under the facts of that case that the modified source had "not begun normal operations," it did not find that the annual emissions approach conflicted with the statute or EPA's regulations. On the contrary, it recognized and underscored the differences between NSPS and PSD, approved the use of different applicability tests under the two programs, approved the use of a total annual emissions test measured in tons per year (not tied to maximum hourly emission rates) for PSD, and rejected the same interpretation of the hours-of-operation exclusion that Industry Petitioners advance in this case.

As instructed by the court, EPA reconsidered whether there would be an "increase in emissions" from WEPCo's proposed project. EPA did not, as claimed by Industry Petitioners, reject the WEPCo court's approach as "incorrect." Ind. Br. at 18. Rather, EPA explained that the Industry Petitioners' interpretation of that opinion is incorrect:

> A conceivable interpretation of the court's opinion is that EPA must calculate WEPCo's post-modification emission increases based on 'present hours and conditions.' However, for the reasons discussed below, EPA believes that this interpretation is incorrect.

Letter from Reich to Boston, June 8, 1990, at 6, JA at XXXX (emphasis in original) ("Reich Letter to Boston"). EPA explained that the better reading of the court's opinion was that the Agency

should base its decision on the actual facts known about the project. EPA explained that since "WEPCo has definite plans to return the plant to historical levels of utilization that are well above baseline levels of utilization, and which could not be physically or economically attained but for the renovation project," while it would not be consistent with the WEPCo opinion to assume utilization at 100 percent capacity, it would be equally inconsistent to ignore the projected increased usage and its resulting impact on air quality. Id. Based on this analysis, EPA determined that PSD requirements would apply to the project as to one pollutant. Id. at 2, 7. WEPCo did not appeal this final determination.

5. The WEPCo Rule.

After the WEPCo decision, EPA promulgated a new regulation addressing the applicability of NSR requirements to the specific types of utility sources addressed in WEPCo. 57 Fed. Reg. 32314 (July 21, 1992). This is known as "the WEPCo Rule." In the preamble, EPA again explained the distinction between NSPS and NSR:

> The modification provisions of the NSPS and NSR programs are based on the broad NSPS definition of "modification" in section 111(a)(4) of the CAA. That section contemplates a two-step test for determining whether activities at an existing facility constitute a modification subject to new source requirements. In the first step, which is largely the same for NSPS and NSR, the reviewing authority determines whether a physical or operational change will occur. If so, the reviewing authority proceeds in the second step to determine whether the physical or operational change will result in an emissions increase over baseline levels. In this second step, the applicable rules branch apart, reflecting the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR. . . .
>
> Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity. On the other hand, the NSR regulations examine total emissions to the atmosphere. For applicability determination purposes, emissions increases under NSR are determined by changes in annual emissions as expressed in tons per year (tpy).

Id. at 32316 (footnotes omitted) (emphasis added); see also 56 Fed. Reg. 27630, 27631 (June 14, 1991) (proposed rule).

EPA also determined that its "extensive experience with electric utilities, and the generally similar nature of operations within this source category, provide EPA an adequate basis on which to predict future actual emissions from such units in most cases." Id. Based on that experience, EPA promulgated what it called an "actual-to-actual" test[10/] for specified electric utility units. Id. Future actual emissions under this test are the product of: (1) the hourly emissions rate and (2) the projected post-change capacity utilization (based on the unit's historical capacity utilization and all available information regarding expected future use). 57 Fed. Reg. at 32323. The WEPCo rule also revised the NSPS baseline for utilities, provided an exclusion for pollution control projects, and allowed utilities to use any two years in the past five years as their NSR baseline. Id. at 27634, 27631, 27636.

The WEPCo Rule was challenged by various industry and environmental petitioners. These cases were consolidated with the CMA cases and stayed pending the outcome of EPA's actions under the Settlement Agreement.[11/] Certain aspects of the WEPCo rule are now before this Court.[12/]

[10/] This test is now more commonly referred to as the "actual-to-future-actual" test.

[11/] On December 15, 1999, this Court administratively terminated the consolidated cases challenging the various NSR rules. The Order provides that the 1980 and 1992 cases may be reopened "by any party upon the filing, within 60 days of EPA's final action on the proposed rule to revise the New Source Review program . . . of a motion which sets forth issues remaining to be presented to the court." JA XXXX. (emphasis added).

[12/] Certain aspects of the WEPCo rule have been challenged by Environmental Petitioners. See infra at 89 (discussing the revised baseline calculation) and 115-120 (discussing PCPs).

6. The 2002 Rule.

In August 1992, EPA began work to address concerns that the "major NSR regulations were too complex and burdensome." 61 Fed. Reg. at 38252.[13/] This effort involved soliciting ideas and recommendations from the Clean Air Act Advisory Committee's (CAAAC) Subcommittee on NSR Reform, a panel of industry representatives, State and local air pollution control officials, environmentalists, other experts, and members of the public. EPA stated that its goal was "to eliminate as much of the program complexity, administrative burden and resultant project delays as possible without sacrificing the current level of environmental protection and benefits derived from the program." Id. at 38252. After four years of gathering and analyzing information about the way the program worked in practice, in 1996 EPA proposed extensive changes to the NSR Rules. Id. at 38251-52. These proposed changes were "based primarily on [EPA's] consideration of recommendations provided through the NSR Reform effort, but also based on independent EPA initiatives to clarify the NSR program." Id. at 38252. The proposal included the elements of the 2002 Rule, as well as other proposed changes to the NSR regulations on which EPA has not yet taken final action.

In relevant part, EPA's proposal included the five elements challenged by State and Environmental Petitioners:

(1) "Actual-to-future-actual test." EPA proposed to establish an alternative method for non-utilities to use to determine whether a physical or operational change will result in an

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[13/] Comments received on the 1996 proposal suggested that while the NSR program was working well with respect to new sources, as applied to existing sources, the 1980 rules discouraged companies from making changes to their facilities that would increase their operating efficiency, lower their emissions rates, or would otherwise be environmentally beneficial. TSD I-4-5, 17; I-5-41 (JA XXXX, XXXX, XXXX).

emissions increase. The proposed rule responded to the concern that the actual-to-potential method of measuring emissions increases can overestimate the increase associated with a change because all potential post-change increases are automatically attributed to the change. 61 Fed. Reg. at 38254/2. In the 1992 WEPCo rule, EPA had limited the "actual-to-actual" test to utilities because it was uncertain that other industries would be able to project and track their emissions with sufficient accuracy. Id. at 38266/3. But in 1996, EPA believed that "most major sources in the country will be upgrading their monitoring and reporting capabilities due to the Act's monitoring and title V operating permit programs" and would accordingly be able to track their emissions. Id. at 38268/1. Thus EPA proposed a new option, styled as an "actual-to-future-actual test," id. at 38266-67, for both utility and non-utility sources. Under the proposed test, a facility could determine whether an emissions increase would occur by comparing its baseline actual emissions before a change to "a prediction of its post-change actual emissions." Id. Facilities that elected to use this test would be required to track their post-modification emissions for five to ten years, depending upon the nature of the change. EPA proposed to allow States to continue to use the actual-to-potential test if they chose. Id. at 38266/3. EPA also proposed to carry over from the WEPCo rule the exclusion from the projection of future emissions any increases due to factors unrelated to the change, such as demand growth. Id. at 38267.

(2) 10-year Baseline. The proposal would have changed the method that non-utility sources use to calculate their baseline for determining whether an emissions increase has occurred. EPA first noted that the WEPCo rule had already abandoned the 1980 rule's presumptive two-year baseline as applied to electric utility steam generating units ("utilities"), replacing it with a presumptive baseline of any two consecutive years during the past five years.

Id. at 38255/1-2. For non-utilities, EPA noted that CAAAC deliberations had disclosed examples where industries facing periods of low production believed they were forced either to surrender capacity (by capping their potential to emit at current low levels) or to obtain NSR permits "for even small, non-excluded changes to a portion of the plant." Id. at 38258/2-3. In essence, periods of low production resulted in correspondingly low emissions baselines under the 1980 rule's presumptive two-year baseline, which sometimes unnecessarily constrained facility operations during subsequent periods of higher production. Accordingly, EPA proposed to allow non-utilities to calculate their baseline emissions using the highest utilization rate in any consecutive 12 month period in the ten years before the change for which the facility has adequate data, and to delete the provision for selecting a more representative period outside that range. Id. at 38258-59. The baseline was to be adjusted to account for any more stringent limits that may have been imposed since the end of the 12-month period. Id.

(3) PALs. To provide an alternative applicability approach that would be easy for plant managers to understand, EPA proposed to establish a new method of determining NSR applicability on a plant-wide basis. Id. at 38264. Under the proposal, a State could establish a Plantwide Applicability Limit ("PAL"), which sources could voluntarily accept on a source-by-source basis. Id. at 38264/2. EPA based its proposal on its experience with both voluntary site-specific permits embodying plantwide limits, and on the favorable experience of the State of Oregon, which had adopted plantwide NSR permits similar to PALs. Id. Facilities with PALs would be permitted to make changes without triggering NSR provided such facilities remained below the emission limits established in their PAL. EPA solicited comments on several options for establishing the baseline, including several measures of actual emissions. Id.

at 38265/2. The PAL proposal was intended to provide a "straightforward, flexible approach to determine whether changes to an existing major stationary source result in an emissions increase." Id. at 38264/1. In contrast to the complex case-by-case applicability approach required by the 1980 Rules, the PAL proposal was designed "as an alternative that a plant manager could readily understand." Id. As long as the facility-wide emissions cap was not exceeded, "[p]roduction units can be started and stopped, product lines reconfigured, and products changed and revamped without delay from major NSR." Id.

(4) Clean Units. EPA proposed a simplified applicability test for Clean Units, in part because "representatives of State and local regulators as well as environmental groups expressed general support for the idea that 'benign' changes at existing emissions units should not be subject to the complicated NSR applicability rules related to determining a significant net emissions increase" and in response to general "support for the proposition that the NSR applicability test should provide some deference to sources that have already undergone major NSR." Id. at 38255. The proposed test would allow facilities to make any change to a "Clean Unit" as long as the change did not increase the unit's maximum hourly emissions rate (i.e., the NSPS test). Id.

(5) Pollution Control Projects ("PCPs"). EPA recognized that requiring NSR permits for the installation of pollution control devices such as scrubbers could impede the implementation of the acid rain program and the new nonattainment requirements in the 1990 CAA Amendments. EPA therefore adapted the NSPS exclusion for PCPs and in the 1992 WEPCo Rule applied it to exclude from NSR PCPs undertaken by utilities. 57 Fed. Reg. at 32317-23. EPA issued guidance in 1994 that explained the circumstances in which PCPs undertaken by

other types of facilities could be excluded from major NSR. July 1, 1994, Memorandum from John Seitz, Director, OAQPS, "Pollution Control Projects and New Source Review (NSR) Applicability" (JA XXXX). In 1996, EPA proposed to replace the WEPCo exclusion and the 1994 guidance with a comprehensive regulatory exclusion. 61 Fed. Reg. at 38260. The proposal would have excluded specified types of pollution control projects from major NSR. Id. at 38261. The proposal also established a means by which new technologies could be eligible for the exclusion on a case by case basis. It also required environmental safeguards, such as prohibiting proposed pollution control projects from resulting in an emissions increase that would cause or contribute to a violation of any NAAQS or PSD increment, or adversely impact pristine areas such as national parks. Id. at 38262.

Finally, EPA noted that it had in the past "required States to follow a single [NSR] applicability methodology," although they could have a more stringent approach. EPA proposed instead to "consider placing all or some of the applicability options presented today as permissible alternatives" in its rules. Id. at 38253.

As part of the 1996 proposal, EPA satisfied its initial obligations under CMA Exhibit B to publish proposed revisions to the NSR rules that would establish an hourly potential to hourly potential applicability test for NSR. Id. at 38250, 38268-70. On July 24, 1998, EPA published a Notice of Availability that requested additional comment on three of the proposed changes. 63 Fed. Reg. 39857 (July 24, 1998). In its consideration of the 1996 proposal, EPA held two public hearings and more than 50 stakeholder meetings. Environmental group, industry, state, local, and federal agency representatives participated in these numerous discussions. 67 Fed. Reg. 80188/3.

In May 2001, the President's National Energy Policy Development Group issued findings and recommendations for a National Energy Policy. See id. Among the recommendations was that the EPA Administrator, in consultation with the Secretary of Energy and other relevant agencies, review the NSR regulations. Id. In response, in June 2001, EPA issued a background paper giving information about the NSR program and soliciting comments on the program. Id. at 80189/1. In developing its report to the President, EPA met with more than 100 groups, held four public meetings around the country, and received more than 130,000 written comments. EPA's Report to the President and EPA's Recommendations concerning NSR were issued on June 13, 2002. New Source Review: Report to the President (June 2002), A.R. IV-A-5 (JA XXXX-XX); New Source Review: Recommendations (June 2002), A.R. IV-A-4 (JA XXXX-XX).

To examine the potential environmental impact of the proposed rule, EPA commissioned a study, which concluded that "collectively, the five NSR Improvements that the Agency is finalizing will be environmentally beneficial compared to the current program, and will improve air quality by reducing emissions from industrial facilities." Environmental Analysis at 2 (JA XXXX). The study found that revising the baseline for calculating emissions increases was not likely to have any significant environmental effect because it would apply to only three percent of the universe of emissions potentially subject to NSR. Id. at 13 (JA XXXX). However, the study found that the actual-to-future-actual test as a whole (of which the revised baseline is a part) would have a net positive environmental impact because it would remove disincentives in the current rule to implementing efficiency-enhancing projects. Id. at 14 (JA XXXX). PALs were determined to be environmentally beneficial, based on facilities that had received PALs

under pilot programs, because facilities tended to lower their emissions below the PAL level in order to have maximum operational flexibility. Id. at 6-8 (JA XXXX-XX). Similarly, the study found that the Clean Unit and Pollution Control Project provisions in the Rule provide an environmental benefit by encouraging facilities to adopt more stringent control technology. Id. at 8-13 (JA XXXX-XX).

The final NSR Improvement Rule was promulgated on December 31, 2002, after more than a decade of official analysis. 67 Fed. Reg. 80186. Although EPA did not take final action on all elements of the proposal, the 2002 Rule is the culmination of EPA's efforts to improve the administration of the program in the five areas described above. EPA adopted these five changes because they "will reduce burden, maximize operating flexbility, improve environmental quality, provide additional certainty, and promote administrative efficiency." Id. at 80189/1. The 2002 Rule also reflects EPA's consideration of comments on the proposal:

(1) EPA rejected its proposal to allow States to decide which elements of the proposal to adopt, and instead promulgated them as elements of the base federal NSR program. Id. at 80241.

(2) In adopting the actual-to-projected-actual test, EPA rejected the potential-to-potential test of CMA Exhibit B. Id. at 80204-06. In addition, it decided not to require post-change tracking of emissions in some circumstances if there is no reasonable possibility that the change will result in a significant emissions increase. Id. at 80194. Facilities may also elect to continue to use the actual-to-potential test. Id. at 80191.

(3) EPA's revised baseline provisions generally tracked the proposal, but specified a 24-month instead of a 12-month baseline period and discarded the requirement that the baseline reflect the period of highest utilization. Id. at 80194-95.

(4) Noting that PALs will allow sources "to respond rapidly to market changes" and will also "benefit the public and the environment," id. at 80206, EPA issued final PAL rules that set PALs based on the same baseline actual emissions as were required for the actual-to-projected-actual test. Id. at 80189. EPA also established stringent new monitoring, record-keeping, and reporting requirements for sources seeking PALs. Id. at 80211-14.

(5) The final rule simplified the Clean Unit Applicability Test: a Clean Unit must have BACT or LAER or comparable air pollution control technology, and must demonstrate that the unit's annual allowable emissions would not cause or contribute to a NAAQS or PSD increment violation or adversely impact a federal Class I area. Id. at 80223. The final rule also laid out procedures for a unit to requalify as a Clean Unit.

(6) With regard to PCPs, the final rule generally tracked the proposal, but eliminated the need to consider the intent behind the PCP in determining whether a project would qualify as a PCP. Id. at 80232. The final rule also reflected developments in air pollution control technology during the rulemaking by expanding the list of presumptively beneficial projects. Id. at 80233.

Numerous parties filed reconsideration petitions with EPA on the final Rule. EPA granted reconsideration so interested parties could comment on the Environmental Analysis and on five specific aspects of the final rule. 68 Fed. Reg. 44620 (July 30, 2003). The Agency denied reconsideration as to all other issues raised in the reconsideration petitions. 68 Fed. Reg. 63021

(Nov. 7, 2003). The Agency considered the comments received during the reconsideration comment period and determined that none of the information presented warranted modification of the conclusions underlying the 2002 Rule. Id. at 63023/3. The Agency did, however, make two clarifying changes to the regulations. Id. at 63023/3-24.

B. State Minor NSR

Outlined above is the "major NSR program," which applies to "major sources," i.e., sources whose emissions exceed thresholds established in the statute, and to "major modifications" at those sources. States are also required to have "minor" NSR programs, which apply to new and modified sources that do not meet the emission thresholds for major sources.[14/] See 42 U.S.C. § 7410(a)(2)(C); Public Citizen, Inc. v. EPA, 343 F.3d 449, 453 (5th Cir. 2003). Federal regulations establish minimum requirements for state minor NSR programs. See 40 C.F.R. § 51.160-164. Minor NSR programs must require permit applicants to provide information to the reviewing authority regarding the facility at issue, its emissions, and its impact on air quality. 40 C.F.R. § 51.160(b). They must also provide for public comment on information submitted by permit applicants. 40 C.F.R. § 51.161. Minor NSR permits may be used to implement some of the provisions in the 2002 Rule, such as PALs and obtaining Clean Unit status; in addition, minor NSR permits may be used to cap emissions below the major source threshold so that a new or modified facility would not trigger major NSR.

C. Title V Permitting

In 1990, Congress enacted Title V of the Act. The Title V operating permit program generally does not impose new substantive air quality control requirements. Rather, major

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[14/] Unless otherwise indicated, references to the "NSR program" are to the major NSR program.

stationary sources of air pollution and other sources covered by Title V are required to obtain an operating permit that includes"applicable requirements" and monitoring, recordkeeping, and other requirements to assure compliance with those requirements.[15/] See 42 U.S.C. § 7661c(a), (c); see generally Public Citizen, 343 F.3d at 453. Title V permits primarily are a tool for clearly identifying all substantive CAA requirements that apply to a given source.

SUMMARY OF ARGUMENT

Industry, State, and Environmental Petitioners challenge EPA's regulations specifying how a facility determines whether a physical or operational change will result in a significant emissions increase that triggers NSR requirements. These challenges all fail for the same reason – the Clean Air Act does not specify how an emissions increase is to be calculated, the Act allows EPA to specify that administratively, and EPA has reasonably exercised its discretion to balance environmental protection and economic growth as intended by Congress. In 1980, in light of this Court's decision in Alabama Power, EPA determined that the Act did not require that NSR applicability be based on the same emission rate test used in the NSPS program and established a test based on actual emissions. Then, based on the experience the Agency and the regulated community accumulated under the 1980 Rules and the continuing development of the CAA program as a whole, EPA modified the test in 2002 in a manner that continued to carry out the statutory purposes. Both the 1980 and 2002 Rules are reasonable interpretations of the statute, and both should be upheld.

[15/] "Applicable requirements" that must be incorporated into Title V permits include SIP rules, the terms and conditions of preconstruction permits issued pursuant to SIP-approved rules, and requirements pursuant to the NSPS, National Emissions Standards for Hazardous Air Pollutants, and Acid Rain programs. 40 C.F.R. § 70.2.

There is no basis for Industry Petitioners' contention that, by adopting the same statutory definition of "modification" for NSPS and NSR, Congress mandated that EPA adopt the same regulations for both programs. This Court has recognized EPA's discretion to define the same statutory terms differently in NSR and NSPS regulations. Alabama Power, 636 F.2d 323. For Industry Petitioners to suggest otherwise is to ignore thirty years of caselaw and statutory and regulatory development. Industry Petitioners' claim that EPA's 1980 regulations also incorporated the NSPS applicability requirement is contrary to the language of the regulations, the preamble, and judicial interpretation.

More fundamentally, Industry Petitioners have waived their right to make these arguments. Industry Petitioners failed to challenge the NSR applicability provisions in their original challenge to the 1980 regulations. They cannot now assert for the first time an argument that they not only failed to make but actually disavowed more than 20 years ago. Nor can they claim that they were unaware of EPA's interpretation of the regulations, which has been repeatedly and consistently set forth since the regulations were first promulgated. Industry Petitioners themselves admit they were aware of the Agency's view of the regulations no later than 1988. Ind. Br. at 17. To the extent Industry Petitioners argue the NSR applicability test in the 1980 Rule is invalid due to inadequate notice, they also have waived that argument by their failure to bring a petition for reconsideration to the Agency, as required by CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

State and Environmental Petitioners' (collectively "State/Environmental Petitioners") challenges to the 2002 Rules also must be rejected. Initially, these petitioners' claims are grounded on the assertion that the 2002 Rules relax prior rules and will reduce the environmental

effectiveness of the NSR program. See, e.g., State Br. at 13-14; Env. Br. at 12-14, 30-31, 35-36. This claim is simply untrue. EPA performed an in-depth analysis of the environmental impact of the 2002 Rule. After taking public comment on the analysis, EPA concluded that the 2002 Rule will improve the environmental effectiveness of the program.

State/Environmental Petitioners' challenge to the revised baseline for calculating when an emissions increase will occur is without merit. The Act does not specify how an increase is to be calculated, and allows EPA to address that issue administratively. EPA reasonably determined that allowing sources to look back up to ten years (with appropriate safeguards) allows sources to consider their full range of normal operations in determining whether a change will result in an emissions increase. The revised baseline provides economic benefits by giving facilities greater flexibility to take advantage of periods of lower production to undertake efficiency-enhancing projects, and such projects result in a net environmental benefit. The record supports EPA's conclusion that petitioners' claims of adverse environmental impacts are purely speculative and that the revised baseline is likely to be environmentally neutral or beneficial.

State/Environmental Petitioners' challenge to the rule's PAL provisions are likewise without merit. The statute gives EPA ample discretion to determine emissions increases on a plantwide basis, and the record demonstrates that PALs have both economic and environmental benefits because facilities reduce emissions in order to have adequate flexibility to make operational changes while remaining below the plantwide limit. Use of the ten-year baseline to establish PALs is reasonable because it allows facilities to consider their full range of normal operations in determining an appropriate limit.

State/Environmental Petitioners' claim that the rule is unenforceable has no basis. Under the Act, only emission increases that are caused by a "change" are subject to NSR. EPA reasonably determined that such increases can be distinguished from those caused by demand growth. The record also supports EPA's determination that sources have adequate incentive to properly determine whether a change is reasonably likely to cause a significant increase in emissions and that existing regulatory mechanisms provide adequate monitoring.

State/Environmental Petitioners' claim that the Clean Unit test exceeds EPA's authority should also be rejected. They allege that the Clean Unit test improperly exempts certain emissions increases from NSR. But the Clean Unit applicability test is not an exemption; instead, it is an exercise of EPA's Chevron discretion to interpret the ambiguous statutory term "increase," establishing an allowable-to-allowable NSR applicability test in limited circumstances. Under this new applicability test, physical or operational changes at a Clean Unit will not trigger NSR provided the conditions of the permit granting Clean Unit status (including any emissions limitations in that permit) remain satisfied. State/Environmental Petitioners also overlook the regulatory safeguards surrounding Clean Unit status. A unit may qualify as a Clean Unit only by demonstrating that it has installed state-of-the-art pollution controls that achieve Best Available Control Technology/Lowest Achievable Emissions Rate ("BACT/LAER") or comparable levels of emissions control; moreover, prospective Clean Units that have not already been through NSR are required to demonstrate that allowable emissions from the Clean Unit will not have an adverse air quality impact. The Clean Unit test thus provides an environmental benefit by providing an incentive to install high-quality pollution controls to gain additional

operational flexibility. It is both rational and consistent with the Act, and therefore must be upheld.

Environmental Petitioners also challenge EPA's Pollution Control Project ("PCP") exclusion, arguing that it exceeds EPA's authority under the Act and improperly exempts some emissions increases from NSR. The PCP exclusion, however, serves the purposes of the Act by eliminating a regulatory disincentive that discourages sources from adding environmentally beneficial pollution control equipment. In some cases, the addition of pollution control equipment may itself cause a collateral emissions increase that would otherwise trigger NSR. EPA concluded that Congress could not have intended NSR to apply in these circumstances. In the 1992 Rule, EPA therefore created a limited exemption for pollution control projects at electric utilities, and the 2002 Rule extended that exemption to all industries. The exemption is surrounded with safeguards, including the requirement that a source demonstrate that a PCP will be environmentally beneficial (a requirement that may be initially satisfied by selecting from among the PCPs that EPA has found to be presumptively environmentally beneficial) and that addition of the PCP will not have an adverse air quality impact. The PCP exclusion should therefore be upheld.

Newmont Mining Corporation's ("Newmont's") claim that the 2002 Rule unlawfully restricts a source's ability to use a baseline longer than ten years before a change must be rejected. EPA considered whether to allow facilities the option of demonstrating that a period beyond ten years was more representative of normal operations and reasonably concluded that the certainty and environmental benefits of a fixed period outweighed any benefits to allowing such a demonstration.

Finally, EPA properly incorporated the 2002 Rule into the base federal NSR program. Since 1980, EPA regulations have established minimum criteria that all State NSR programs must meet or exceed. State Petitioners challenge EPA's decision to continue that practice, arguing both that the 2002 Rule would require States to create less stringent NSR programs and that EPA's decision to add to the roster of minimum program elements was not a logical outgrowth of the proposal.

State Petitioners' substantive claim is unripe. There is no dispute that States are authorized to create alternative NSR programs provided they are no less stringent than the base federal program. Until EPA is presented with a state plan that contains NSR program elements different from those contained in the Rule, and has acted on that plan, any claim that EPA has improperly denied a State the opportunity to craft an alternative plan is simply not ripe for review.

State Petitioners' procedural claim is, moreover, without merit. It is true that EPA initially proposed to deviate from its longstanding approach by adopting the reforms contained in the Rule as a "menu" of options from which States could select. EPA's statement that it was considering a change in approach necessarily implied, however, that it was also considering not making such a change. EPA's ultimate decision to incorporate the reforms contained in the Rule into the base federal program was therefore a logical outgrowth of the proposal.

STANDARD OF REVIEW

The standard of review is set forth in CAA Section 307(d), 42 U.S.C. § 7607(d). Section 307(d)(9) provides that challenged portions of the final rule may not be set aside unless they are

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9).

The "arbitrary or capricious" standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise, courts are extremely deferential. Ethyl Corp., 541 F.2d at 36 "[The court] must look at the [agency's] decision not as the chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."); American Trucking Ass'ns v. EPA, 283 F.3d 355, 374 (D.C. Cir. 2002).

With regard to questions of statutory interpretation, the Court must first consider whether Congress has directly addressed the particular question at issue. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). However, if the statute is silent or ambiguous on a particular issue, the Court must accept the agency's interpretation if it is reasonable; the agency's interpretation need not represent the only permissible reading of the statute nor the reading that the Court might originally have given the statute. Id. at 843 & n.11. Agencies are also accorded significant deference in interpreting their own regulations. Auer v. Robbins, 519 U.S. 452, 461 (1997).

ARGUMENT

This case arises primarily from EPA's ongoing efforts to reform the NSR program "to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, [provide] greater environmental protection." 67 Fed. Reg. 80186/2. These efforts are embodied in the 2002 Rule, which is the culmination of over twenty years of experience in implementing the NSR program, ten years of evaluation by three administrations, and an intensive process of obtaining advice from the CAAAC and the public.

For two reasons, though, we start by addressing industry's challenges to EPA's 1980 NSR rules. First, industry's challenge is largely an attack on EPA's authority to promulgate an NSR program that differs from the NSPS program by focusing on actual annual emissions rather than hourly emission rates; because that authority underpins the 2002 Rule as well, it is necessary first to establish that EPA has correctly interpreted the scope of its authority. Second, the 2002 Rule is in large part an outgrowth of EPA's experience in administering the 1980 rules. Specifically, the Agency's interpretation of key terms in the CAA has evolved over time, both as EPA has gained experience and as it has reexamined ambiguities in the statute in light of Chevron. Thus, addressing the 1980 rules first provides important background regarding the evolution of the NSR program and sets the stage for a fuller understanding of the authority for and reasonableness of the Agency's 2002 Rule.

I. INDUSTRY PETITIONERS' ARGUMENTS ARE WITHOUT MERIT.

Industry Petitioners raise four arguments. First, they argue that the CAA mandates that to constitute a "modification" for NSR purposes, a change must first constitute a modification for NSPS purposes (the "NSPS test" argument). Second, they claim that the 1980 rules in fact include an NSPS-style applicability test, and that subsequent EPA interpretations of those regulations as not including such a test are inconsistent with the 1980 regulations and preamble. Third, they contend that to the extent that the 1980 rules adopted an actual annual emissions applicability test instead of an NSPS hourly emissions test, EPA did so without providing adequate notice. Finally, Industry Petitioners argue that, in the 2002 Rules, EPA unlawfully interpreted the "actual-to-potential" applicability test inconsistently with the regulations and its historical interpretation of that test. For the reasons below, these arguments are without merit and should be rejected.

A. The CAA Does Not Compel EPA To Adopt The NSPS Test To Measure Modifications For NSR Purposes.

Industry Petitioners' NSPS test argument rest on the idea that, in 1977, Congress sub silentio incorporated EPA's then-existing NSPS applicability test into the statutory definition of "modification" for NSR, and that a source need not determine whether there will be an increase in the total actual annual emissions unless it first determined that there will be an increase in the hourly emissions rate.[16/] Industry Petitioners believe that "an increase in the amount of any air pollutant emitted," CAA section 111(a)(4), for NSR purposes, occurs only when there are both more pollutants being emitted and they are being emitted faster. Their interpretation, however,

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[16/] An increase for NSR purposes is based on total annual emissions, whereas an increase for NSPS purposes is based on hourly potential to emit.

has no support in the statute or the legislative history, as nearly every court to consider the question has concluded. The statutory definition of "modification" provides only that a modification occurs where a change "increases the amount of any air pollutant emitted," 42 U.S.C. § 7411(a)(4). It provides no guidance on how such "increases" are to be measured. Accordingly, the issue is left to EPA to resolve and the Court must defer to EPA's reasonable interpretation of this term. Chevron, 467 U.S. at 843.

1. Neither The Language Of The CAA Nor Its Legislative History Requires That Sources Subject To NSR Meet The NSPS Applicability Test.

As the Alabama Power Court recognized, the purpose of the PSD program is "to prevent [air quality] thresholds from being exceeded." 636 F.2d at 362. EPA has contrasted the PSD program, which is "ultimately concerned with effects on air quality," with the technology-based goals of NSPS. 43 Fed. Reg. 26394. Disregarding this fundamental distinction, Industry Petitioners argue that because Congress incorporated the NSPS statutory definition of "modification" into the PSD provisions, EPA's then-existing NSPS regulations interpreting "modification," including the NSPS hourly emission rate test, were somehow also automatically incorporated into the statute, thus divesting EPA of all discretion to make any changes to those regulations. Ind. Br. at 24-28**.** This proposition is wholly incorrect. CAA Section 169(2)(C), 42 U.S.C. § 7479(2)(C), incorporates CAA section 111(a)(4), 42 U.S.C. § 7411(a)(4), by reference, but makes no mention of the regulatory interpretation and gives no indication that EPA is constrained in the PSD context by NSPS regulations that were promulgated in 1975.

Industry Petitioners support their position that Congress incorporated the NSPS regulatory definition of "modification" into the NSR program by relying on one quote from the

legislative history indicating that the definition and "usage" of section 111(a)(4) were incorporated into the PSD program. Ind. Br. at 7. This argument reads far more into "usage" than can be justified, and certainly is insufficient to constitute an unequivocal expression of congressional intent. EPA has taken the quoted language as indicating that the NSPS regulations could be an acceptable interpretation of "modification," particularly as it relates to the legitimacy of the common-sense exclusions from the term. See, e.g., 43 Fed. Reg. 26,388, 26,397 (1977 legislative adoption of NSPS "modification" definition supports regulatory exclusion of fuel switches). But EPA long ago recognized that differences in the purposes of the NSPS and NSR programs justify different interpretations. See, e.g., id. at 26394 (explaining that because PSD "is primarily concerned with air quality," EPA did not feel bound to apply NSPS definition of "modification"). To conclude that by incorporating a pre-existing statutory provision, Congress meant to congeal regulations under that provision in statutory language without any specific indication of any such intent, is contrary to both case law and common sense.

First, as a matter of statutory construction, this Court has held that it requires a clear indication of congressional intent to conclude that pre-existing regulatory provisions have been incorporated by reference into a statute. In Continental Air Lines, Inc. v. DOT, 843 F.2d 1444 (D.C. Cir. 1988), this Court rejected petitioners' argument that Congress had intended to incorporate by reference a pre-existing regulatory definition of the term "commuter airlines" when it amended a statute. The Court reasoned that "Congress might have defined 'commuter airlines' with greater specificity by explicitly incorporating definitional references to agency regulations, but it chose not to do so. We cannot say that Congress meant to incorporate those regulatory definitions absent indications of its intention to do so in the statute or the legislative

history." Id. at 1454. See also American Airlines, Inc. v. DOT, 202 F.3d 788, 809 (5th Cir. 2000) (same).

Similarly, had Congress intended to mandate that EPA use the same regulatory definition for both NSPS and NSR, it could have expressly adopted the regulatory provisions by reference along with the statutory definition. Indeed, on several occasions Congress did precisely that in amending the CAA. See, e.g., Section 129(a)(1) of the CAA Amendments of 1977 (uncodified), (incorporating by reference EPA's Federal Register notice incorporating its "offset ruling"); CAA §181(a)(1) (1991) (incorporating "the interpretation methodology issued by the Administrator most recently before November 15, 1990 [the date of enactment of the CAA Amendments of 1990]"); CAA §182(a)(2)(A) (1991) (incorporating EPA pre-1990 guidance on "reasonably available control technology"); CAA §182(a)(2)(B) (1990) (applying EPA pre-1990 guidance to state vehicle inspection and maintenance programs).

By contrast, Congress did not do so here. The passage regarding incorporation of the NSPS definition of modification relied on by Industry Petitioners is a simple technical amendment. The amendment itself states only that it implements an agreement to include "modifications" as well as "construction" "to conform to usage in other parts of the Act." Act of November 1, 1977, P. L. No. 95-190, 1977 U.S.C.C.A.N. Vol. 3 at 3665. The most plausible reading of this amendment is that Congress was simply concerned that the PSD provisions it had enacted inadvertently covered only "construction" and therefore might be read to apply only to "new" sources and not to modifications of existing sources. Congress corrected this problem in an expedient manner – by passing a technical amendment to the Act defining "construction" to include "modification" and taking advantage of the pre-existing definition of "modification" in

the NSPS provisions. It is unsurprising that such an oversight took place given the haste with which the CAA Amendments were enacted. See Citizens to Save Spencer County v. EPA, 600 F.2d 844, 866-67 (D.C. Cir. 1979).

In these circumstances, it is not reasonable to conclude that Congress chose this vehicle to deny EPA the ability to tailor NSR regulations to the policy issues unique to that program. See Common Cause v. Federal Election Comm'n., 842 F.2d 436, 444 (D.C. Cir. 1988) (a "compelling indication" of congressional intent is necessary in legislative history to "overturn an agency's reading that is in harmony with the express language of the legislation"). Nowhere in the legislative history is there any indication that Congress intended to mandate that the regulatory definition of "modification" adoped for NSPS be applied to the PSD program.

2. The Courts Have Recognized The Distinction Between NSPS And NSR And Have Approved Different Definitions Of The Same Term To Serve Different Purposes.

Neither does the case law support the notion that NSR can only be required where NSPS first applies. This Court has long recognized that a statutory term may be interpreted differently in different regulations so as to further statutory purposes. In addition to holding in Alabama Power that EPA could define "source" differently for PSD and NSPS, see supra at 9-10, this Court recently reiterated that point, upholding EPA's ability to define "major source" differently for different parts of the Act. National Mining Ass'n v. EPA, 59 F.3d 1351, 1358 (D.C. Cir. 1995) (citing Alabama Power, 636 F.2d at 397-98). This Court similarly upheld the Federal Election Commission's differing interpretations of "name" as used in 2 U.S.C. §§ 432(e)(5) and 432(e)(4) because of the different purposes of the two provisions. Common Cause, 842 F.2d at 442; see also National Ass'n of Cas. and Sur. Agents, et al. v. Board of Governors of the Fed.

Reserve Sys., 856 F.2d 282, 287 (D.C. Cir. 1988), (upholding the Board's differing interpretations of grandfather clauses in the statute, where the clauses had different economic impacts). As the Court explained in Abbott Labs. v.Young, 920 F.2d 984, 987 (D.C. Cir. 1990), "it is not impermissible under Chevron for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.". See, e.g., Comite Pro Rescate De La Salud, et al. v. Puerto Rico Aqueduct and Sewer Auth., 888 F.2d 180, 187 (1st Cir. 1989) (then-Judge Breyer held that under RCRA, EPA can define same statutory terms differently in regulations because Congress delegated interpretive power to agency "tailoring its scope to fit the needs and objectives of the statute's different parts"); Pharmanex v. Shalala, 221 F.3d 1151, 1157 (10th Cir. 2000) (citing Abbott Laboratories).

That different statutory purposes exist for the two programs justifying different regulatory definitions of "modification" can hardly be disputed. In Alabama Power, the Court contrasted the "technology-based" aspects of NSPS, which apply "regardless of whether [a source's] emissions caused ambient standards to be exceeded," with NSR, which focuses on impact on air quality. 636 F.2d at 346, 349. The Court observed that PSD "by its title and by its terms, is designed to prevent significant deterioration of air quality in the nation's 'clean air areas' in general." 636 F.2d at 361. Its method for doing that, according to Alabama Power, was through "maximum allowable increases ('increments') in pollution concentrations." Id.

The WEPCo court similarly recognized these different purposes and approved the use of "fundamentally distinct" applicability tests for those programs. The Seventh Circuit acknowledged that PSD is "concerned with increases in total annual emissions" and explained:

> To determine whether a physical change constitutes a modification for purposes of NSPS, the EPA must determine whether the change increases the facility's

> hourly rate of emission. 40 C.F.R. § 60.14 (1988). For PSD purposes, current EPA regulations provide that an increase in the total amount of emissions activates the modification provisions of the regulations. 40 C.F.R. § 52.21(b)(3) (1988).

WEPCo, 893 F.2d at 905 (emphasis in original); see also Puerto Rican Cement, 889 F.2d at 293-94, 297-98 (holding that PSD could apply to a modification that would have increased annual emissions solely by making it more economical to increase the annual production capacity of a modified source, even where rate of emissions would decrease); United States v. Ohio Edison Co., 276 F. Supp. 2d 862, 875 (S.D. Ohio 2003) (finding the differences between NSPS and NSR "abundantly clear").

Industry Petitioners' theory that a source can be subject to NSR only if it meets the NSPS applicability test flies in the face of these long-recognized distinctions. Their claim that PSD's reach is somehow narrower than the reach of NSPS because PSD focuses on air quality and NSPS does not, see Ind. Br. at 8, is both illogical and entirely unfounded. Thus, their claims that the 1980 rule should have included an NSPS emissions test and, alternatively, that the 2002 Rule unlawfully interpreted that test, must fail.

B. Contrary to Industry Petitioners' Assertion, the 1980 NSR Rules Did Not Include an NSPS Hourly Emissions Test

Not only do Industry Petitioners incorrectly argue that the CAA mandates that the NSPS hourly emission test be an element of the NSR applicability test, they argue that the 1980 regulations in fact include such a test. Again, the plain language of the 1980 rules and case law demonstrate that this claim is false. Moreover, Industry Petitioners waived this claim.

1. The Preamble to the 1980 Rules Clearly Articulated the Actual Annual Emissions Approach and How It Would Be Applied.

Contrary to Industry Petitioners' contention that the 1980 NSR rule actually promulgated the NSPS applicability test and did not as much as "hint" that the NSPS emissions rate applicability test was being replaced by a new actual annual emissions approach for PSD, see Ind. Br. at 35, the preamble highlights the new actual emissions test in painstaking detail. In the "Highlights" section, EPA stated, "[t]he definition and treatment of modification have been changed since the September 5, 1979 proposal." 45 Fed. Reg 52680. EPA then explained that reductions and increases in emissions "will be quantitatively assessed on the basis of an 'actual emissions' baseline, rather than a 'potential to emit' baseline, as was proposed." Id. (emphasis added). In the summary of the rule, under the heading "Who is Subject to the Prevention of Significant Deterioration Regulations?," EPA described "how PSD review as modified in response to Alabama Power will apply." Id. at 52677. EPA then explained that the "primary criterion" for determining PSD applicability was whether the project is sufficiently large to be a "major stationary source or a major modification." Id. EPA described the definition of "major modification" as a change "which would result in a significant net emissions increase." Id. The preamble then sets forth the step-by-step process for determining whether there will be a significant net emissions increase. EPA explained that post-change emissions will be "the potential to emit of the new or modified unit" when the unit has not begun normal operations and that figure must be compared with "the old level of actual emissions." Id. Nowhere in this discussion of "Who is Subject" to these regulations did EPA mention NSPS or an hourly emissions rate test. Nor did the regulation or the preamble ever state that triggering NSPS was a prerequisite to triggering PSD.

The Agency did not stop there, however. In the portion of the preamble specifically addressing "Modification," EPA again identified as the pertinent inquiry whether there was a significant net emissions increase and further stated that this determination was based on "actual emissions." EPA also reiterated the step-by-step process by which this is calculated. Id. at 52698.

Later in this discussion, EPA emphasized:

> Under the final PSD regulations, the phrase 'actual emissions' means the rate at which an emissions unit actually emits a particular pollutant. See §§ 51.24(b)(21) and 52.21(b)(21). In general, that rate as of a particular date equals the average rate in tons per year at which the unit actually emitted the pollutant during a two-year period which precedes the particular date. . . . For any unit which has yet to begin normal operations on the date in question, its actual emissions equal its 'potential to emit' on that date.

Id. at 52699 (emphasis added). The Agency then explained that this new approach reflected this Court's discussion in Alabama Power, which, throughout, emphasized reliance on actual impacts on ambient air. Id. at 52700. See 61-63, supra.

Finally, EPA provided a lengthy example of how the definitions would work though a series of changes at a hypothetical source, as well as a series of examples of how emissions should be measured. Id. at 52704, 52711. Every one of those examples is addressed in terms of tons per year, not maximum hourly emission rates. None of them mentions the need to meet the NSPS applicability test before making the PSD inquiry. In short, the plain text of the 1980 rule and preamble utterly dispels Industry Petitioners' claim that the 1980 Rule included an NSPS emissions test.

2. Case Law Demonstrates that the 1980 Rules Did Not Include an NSPS Hourly-Emissions Test That Must Be Met Before a Modification Could Be Subject to NSR

As the First Circuit found in Puerto Rican Cement, the approach of using "actual" emissions to determine NSR applicability is spelled out with specificity in the 1980 regulations. The court noted that the definition of "major modification" requires PSD review for "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant." 899 F.2d at 296 (quoting 40 C.F.R. § 52.21(b)(2)(1) (emphasis in the original)). A "net emissions increase," in turn, occurs when the "sum of . . . any increase in actual emissions," plus or minus other qualifying changes, exceeds zero. Id. (quoting 40 C.F.R. § 52.21(b)(3) (emphasis in Puerto Rican Cement)).

"Most importantly," the court continued, "[the regulations] define the words 'actual emissions' in a special way." Id. According to that definition, the court reasoned, "actual emissions" are measured differently before and after the date of the physical or operational change. Prior to that date, "actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant" during a specified two-year period. Afterward, "for any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." Id. at 296-97 (quoting 40 C.F.R. § 52.21(b)(21)(ii) and (iv)) . The court specifically rejected the petitioner's claim that considering actual annual emissions was contrary to the regulations. Id. at 296. Instead, the court held that EPA had properly looked to actual annual emissions in applying the actual-to-potential test, noting that the calculation is performed based on tons of emissions per year, not, as Industry Petitioners argue here, on the hourly rate of emissions. Id. at 297.

The Seventh Circuit in WEPCo similarly found the actual annual emissions approach to be readily apparent from the 1980 regulations and distinct from the test applicable in the NSPS

context. More specifically, the court found that the PSD emissions test was based on an "increase in the total amount of emissions," 893 F.2d at 905 (citing 40 C.F.R. § 52.21(b)(3)(1988)) (emphasis in WEPCo), which it contrasted with the "fundamentally distinct" NSPS emissions test, noting that the NSPS test is based on "the facility's hourly rate of emission." Id. at 905, 913 (citing 40 C.F.R. § 60.14(1988)) (emphasis in WEPCo). Although the WEPCo court found that the actual-to-potential test should not have been applied in that case, the court expressly found that the NSR test was different from the NSPS test and that EPA's approach of using different tests to measure increases in emissions under the two programs was consistent with law. See also Ohio Edison Co., 276 F. Supp. 2d at 875 (recognizing the actual-to-potential test as promulgated in the 1980 regulations as distinct from the NSPS test).[17/] As these courts have found, Industry Petitioners' arguments that the actual annual emissions approach does not appear as the sole basis for the actual-to-potential test in the 1980 regulations cannot be reconciled with the text of the regulations.

3. Industry Petitioners Misconstrue the Hours-of-Operation Exclusion.

Industry Petitioners attempt to circumvent the plain language of the regulation and these court decisions through a tortured reading of the "hours-of-operation" exclusion. In 1980, EPA changed the definition of "major modification" to exclude increases in hours or rate of operation. In the preamble to the 1980 regulations, EPA explained that the exclusion "stems largely from EPA's decision that the definitions of 'major modification' should focus on changes in 'actual emissions'" and that its purpose was to allow companies to respond to market conditions where

[17/] But see United States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D. N.C. 2003). The United States has appealed this decision to the Fourth Circuit.

other changes were not taking place. 45 Fed. Reg. 52704. EPA has consistently interpreted this provision to exclude only increases in hours or rate of operation that are unrelated to any physical or non-excluded operational change.[18/]

Industry Petitioners nevertheless argue that EPA included the hours-of-operation exclusion as a means to reconvert the actual annual emissions approach to a NSPS applicability test. Ind. Br. at 11-14. They contend that Congress not only directed EPA to adopt identical modification regulations (including emissions tests) under NSPS and PSD but that EPA in fact complied with this directive in its 1980 regulations, not by simply reproducing (or even cross-referencing) the NSPS hourly rate test in the PSD regulations (which would have been the obvious way to comply with any such Congressional directive), but rather by defining emissions completely differently under PSD (in terms of actual annual emissions) and then nullifying this approach by means of an "hours-of-operation exclusion" that reconverts the PSD test back into the NSPS "maximum hourly rate" test. The actual annual emissions approach, they argue, comes into play only after the "maximum hourly rate test" has been met, and is only used for netting. Ind. Br. at 13-14.

[18/] See, e.g., 45 Fed. Reg. 52704 (distinguishing between construction activity and increasing operations to respond to shifting market conditions); 57 Fed. Reg. 32327 ("Conversely, where the increase could not have occurred during the representative baseline period but for the physical change, the change will be deemed to have resulted in the increase"); id. at 32328 ("Although a source may vary its hours-of-operations, an increase in emissions attributable to an increase in hours-of-operation or production rate which is the result of a construction-related activity is not excluded from review."); Clay Memo at 7 ("the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes.") (JA XXXX); Final WEPCo Determination at 4-5 (rejecting WEPCo's interpretation of the hours of operation exclusion) (JA XXXX); Revised Final WEPCo Determination at 9-10 (reiterating that an increase in hours of operation attributable to a physical or operational change can trigger a PSD emissions increase) (JA XXXX).

Industry Petitioners' argument is illogical and is contrary to the plain language of the exclusion upon which they purport to rely. Under the NSR regulations, the test for a "major modification" has two steps: there must be both (1) a physical or operational "change" and (2) a resulting significant "net emissions increase." 40 C.F.R. § 52.21(b)(2)(i)(1981).[19] The plain terms of the hours-of-operation exclusion provides only that "an increase in the hours of operation" is excluded from the definition of a physical or operational "change," (i.e., the first step of the major modification test), not from any of the separate NSR provisions describing emissions calculations to determine whether there is a significant "net emissions increase" (i.e., the second step):

> A physical change or change in the method of operation shall not include . . . An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition . . . .

40 C.F.R. § 52.21(b)(2)(iii)(f)(1981) (emphasis added). Thus, contrary to Industry Petitioners' argument, the exclusion says nothing about exempting increased hours-of-operation from the calculation of projected emissions increases resulting from a physical or operational change. Rather, the exclusion merely ensures that an increase in hours of operation will not itself be considered a physical or operational change. A source can therefore be sure that simply increasing its hours of operation (e.g., to respond to fluctuating market conditions) will not itself

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[19] This two-step test is entirely distinct from the two-part test posited by Industry Petitioners. Under the Industry Petitioners' test, the first step is to determine whether there has been an increase in the maximum hourly emissions rate and the second step is to determine whether there has also been an increase in annual emissions. Ind. Br. at 9-10. In fact, theirs is really a three-part test. First, one determines whether there is a physical or operational change. Next, one determines whether NSPS applies, and only then does one consider whether there has been a significant net increase in total annual emissions.

be considered a "change" for NSR purposes, unless doing so would violate an enforceable permit condition.

Industry Petitioners contend that the WEPCo court agreed with their interpretation of the hours-of-operation exclusion, citing footnote 14 of that opinion. Ind. Br. at 14. That footnote, however, merely noted that WEPCo had failed to give EPA enough information to determine whether an emissions increase would occur if the unit was operated under "present hours and conditions." 893 F.2d at 918 n.14. The court had earlier specifically acknowledged that EPA had "assumed that emissions increases at Port Washington would come not from an increase in emission rate, but rather from increases in production rate or hours of operation." Id. at 916. If the Seventh Circuit had agreed with Industry Petitioners that hours and rates of operation must be held constant, it would have decided, based on EPA's assumption about emissions rates, that PSD did not apply. Instead, the court overturned EPA's application of the "actual to potential" test to the WEPCo projects and remanded the question of PSD applicability to the agency. See id. at 916-18.

In fact, the WEPCo court specifically rejected Industry Petitioners' reading of the hours-of-operation exception, noting that the exception "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity," and holding that EPA had properly refused to apply the exclusion to the WEPCo project. WEPCo, 893 F.2d at 916 n.11. See also Puerto Rican Cement, 889 F.2d at 298 (construing this exception to apply to increased use of existing capacity to increase input, not to use of new capacity); Ohio

Edison, 276 F. Supp. 2d at 876 (exclusion applies to increase in hours "unaccompanied by physical construction to the unit itself.") (emphasis in original).[20/]

4. Industry Petitioners' Reliance on Erroneous Statements in Documents From The Early 1980s Is Misplaced.

In an attempt to support their argument, Industry Petitioners cite two letters written by EPA personnel in 1981 and one written in 1983 in response to questions about NSR applicability.[21/] Ind. Br. at 15, 29-30. These documents are not official statements of the Agency's position, and courts have found such documents not to constitute appropriate authority. Furthermore, the interpretation in the 1981 letters is inconsistent with the official explanations of Agency policy, such as the preamble to the 1980 rules. The 1983 memo addressed a unit that had not undergone a physical change, and hence is irrelevant.

The notion that EPA correspondence can dictate regulatory requirements when it conflicts with the regulations is insupportable. This Court's decision in Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997), makes clear that the interpretation

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[20/] Only one court has found to the contrary. In United States v. Duke Energy Corp., 278 F.Supp.2d 619 (M.D. N.C. 2003), a district court found that post-change emissions rates must be measured using the same hours and rates of operation used to calculate pre-change emissions. Id. at 641. That court found that the limitation on the hours-of-operation exclusion, i.e., that it be used only when increased use is not associated with a "change," "is not provided in the plain text of the regulations." Id. This conclusion, however, ignores EPA's two-step approach to assessing NSR applicability and the fact that "hours of operation" are excluded only from step one (determining whether a "change" has occurred) not from step two (calculating emissions increases). In its discussion of this exemption, the court did not address the contrary decisions in Puerto Rican Cement, WEPCo, and Ohio Edison, and its holding should therefore be afforded little weight.

[21/] Petitioners rely on Letter of E. Reich, EPA, to A. Gill, General Electric (June 24, 1981), EPA Docket A-90-06, II-B-14 (JA XXXX); Memorandum E. Reich to Whitmore (Jan. 22, 1981) (JA XXXX); and Letter from E. Reich, EPA, to M. Johnston, EPA Region X (July 28, 1983) (JA XXXX).

provided in the preamble is controlling. See Independent Equip. Dealers v. EPA, 372 F.3d 420, 428 (D.C. Cir. 2004); General Motors Corp. v. EPA, 363 F.3d 442, 451 (D.C. Cir. 2004). This Court held that once an agency has announced its interpretation of a regulation, it may not change that interpretation without undertaking notice and comment rulemaking. Id. at 586. Here, EPA explained its interpretation of the 1980 regulations in the preamble to those regulations, and made clear that an actual annual emissions approach would apply to modifications. A mere letter from an EPA official would therefore be legally insufficient to alter EPA's position, even if the letter had the import Industry Petitioners ascribe to it.

Courts considering the PSD program have rejected similar arguments regarding the 1981 documents. The First Circuit in Puerto Rican Cement explained that it had examined the materials called to its attention to support the proposition that EPA had inconsistently interpreted its regulations. The court was not able "to find any significant conflict," 889 F.2d at 299.[22/] The court cited the 1980 preamble as an example. Id. The court also found that of the documents provided to the court, only one internal memorandum indicated a different interpretation and that this was insufficient to support a legally cognizable conflict. The court observed that "[n]o large

[22/] The court did not identify the documents in question. However, EPA's brief in that matter indicates that the 1981 letter to General Electric, JA XXXX, was one of the documents under review. EPA characterized the letter as "an isolated mistake," and the only document that "misinterprets the PSD regulations." Brief of EPA in Puerto Rican Cement, at 31 (JA XXXX). The other 1981 determination presented by Industry Petitioners here is inapplicable, since in that case EPA had determined that emission increases associated with the work at issue there would be de minimis; accordingly, the comment regarding the hours-of-operation exclusion was not the basis for EPA's decision.

agency can guarantee that all its administrators will react similarly, or interpret regulations identically, throughout the United States."[23/] Id. at 299.

The Seventh Circuit also rejected Industry Petitioners' arguments concerning Mr. Reich's 1981 statements that PSD applicability at a previously operating source is based on an evaluation of hourly emissions rates. WEPCo cited the same 1981 letter to General Electric in an attempt to support the same long-rejected interpretation of the hours-of-operation exclusion that Industry Petitioners urge here. See Initial Brief of Petitioner Wisconsin Elec. Power Co. in WEPCo, at 61-64 (JA XXXX). As discussed above, the Seventh Circuit explicitly rejected this argument. WEPCo, 893 F.2d at 916 n.11; see 49, supra.

The United States District Court for the Southern District of Ohio recently rejected arguments based on these documents as well. Ohio Edison, 276 F. Supp. 2d at 876-77. The court found that the documents offered "no support" for the defendants' reliance on the hours-of-operation exclusion because they were contrary to the language of the regulation itself. This result, and the results in Puerto Rican Cement and WEPCo, are entirely consistent with the

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[23/] Industry Petitioners' reliance here on the 1983 document is entirely misplaced as well. The comment in that letter indicating that post-change emissions would not be measured by "potential-to-emit" was referencing a piece of equipment that was not undergoing a change. See Ind. Br. at 29; 1983 Memo at 2 (JA XXXX). In that circumstance, the facility was making changes to a digester and a bleaching plant which would increase plant capacity, therefore increasing the use of a boiler. Increased emissions from the boiler needed to be taken into account in assessing an emissions increase because the definition of actual emissions required a source to take into account increases and decreases throughout the facility, whether or not the particular equipment itself was undergoing a physical or operational change. 1983 Memo at 3 (JA XXXX). Nevertheless, because the boiler was not undergoing a change, it "has been in operation for some time" and the potential-to-emit test of subparagraph (iv) did not apply. Id. at 2 (JA XXXX). In addition, because the boiler was not undergoing a change, the source would not have to install BACT on the boiler. Id. at 3. This letter does not say that the potential-to-emit test is not applied to sources undergoing a change, which are therefore deemed not have begun normal operations.

reasoning of Paralyzed Veterans, because EPA's first interpretation of the rule, announced in the preamble to the rule itself, is controlling, not allegedly differing later views expressed in selected letters without any notice and comment procedure to indicate a change in the agency's position.[24/]

A more complete look at EPA's statements after the 1980 Rule makes it clear that EPA has repeatedly and consistently articulated the position taken in 1980. See, e.g., 45 Fed. Reg. 52676 (the preamble to the 1980 Rule); 56 Fed. Reg. 27630 (the preamble to the proposed WEPCo Rule); 57 Fed. Reg. 32314 (the final WEPCo Rule); Draft New Source Review Workshop Manual (October 1990 Draft),[25/] (JA XXXX), see also Memorandum from Reich to Davis, April 21, 1983 (JA XXXX) (advising Southwest Pacific Service Co. that PSD might still apply, even where NSPS did not); supra, n. 18.

5. Industry Petitioners Waived Any Challenge To The Emissions Test Promulgated In The 1980 Rule.

As set forth above, EPA reasonably interpreted the CAA and in 1980 clearly promulgated the actual annual emissions test, and Industry Petitioners' challenge must therefore fail. More fundamentally, however, Industry Petitioners' challenge to the test as it was set forth in 1980

[24/] Again, the sole contrary authority is the opinion of the District Court for the Middle District of North Carolina in Duke Power. In that case, disregarding the text of the regulation and EPA's explanation of the applicability test set forth in the 1980 preamble, the court concluded that the 1981 Reich letter comprised EPA's first interpretation of the rule and that EPA was therefore required to abide by that interpretation. 278 F. Supp. 2d at 642.

[25/] The Draft NSR Workshop Manual was revised and published by EPA in1990 to assist the regulated community in complying with NSR requirements. It has been cited as authoritative by several courts. LaFleur v. Whitman, 300 F.3d 256, 262 (2d Cir. 2002) (citing Workshop Manual as authoritative source of EPA policy on PSD issue); Sur Contra la Contaminacion v. EPA, 202 F.3d 443 (1st Cir 2000) (same).

must be dismissed because UARG and ACC, the only Industry Petitioners to have moved to reopen the challenge to that rule, have waived their right to bring such a challenge.[26/]

This Court has long held that an issue not raised in a party's initial brief is waived. Benkelman Tel. Co. v. FCC, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000) (argument held "waived because the argument was raised for the first time in the petitioners' reply brief"); National Lime Ass'n v. EPA, 233 F.3d 625, 633 (D.C. Cir. 2000) (declining to reach argument raised for first time at oral argument, even though it had been raised in petitioner's rulemaking comments). Although this rule most typically is applied to arguments raised in a party's reply brief, it should apply with even greater force under the unique circumstances presented here, where petitioners are attempting to raise issues for the first time more than 20 years after filing their initial merits brief. Because neither UARG nor ACC challenged the emissions test in 1980 (and indeed, UARG vehemently disavowed any such challenge), they cannot raise the issue for the first time now.

a. Industry Petitioners Did Not Challenge The Emissions Test In 1980.

Several briefs were filed in the litigation challenging the 1980 NSR rule before that case was stayed. While one of those briefs did challenge some aspects of the emissions test, neither UARG nor ACC joined that brief, nor did they adopt it in any way.[27/] Rather, UARG joined separate briefs raising completely different issues relating to the definition of source and federal

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[26/] EPA raised this objection in its response to Industry Petitioners' motion to reopen the 1980 and 1992 litigation. In granting Industry Petitioners' motion, this Court did not rule on this objection. Order dated June 26, 2003. Therefore, EPA renews the objection at this time.

[27/] Only General Motors Corporation, the United States Steel Corporation and American Iron and Steel Institute signed the industry brief challenging the 1980 emissions test.

enforceability. ACC (under the name Chemical Manufacturers Association) joined only the 1980 brief on federal enforceability.[28/]

Moreover, in 1989, UARG explicitly denied having joined the industry challenge to the 1980 emissions increase test. UARG participated in the WEPCo litigation as an amicus curiae.[29/] In response to EPA's position that UARG and WEPCo should have raised their arguments about the applicable emissions increase test for modifications at existing units in the litigation challenging the 1980 rules, UARG's attorney (from the same law firm currently representing Industry Petitioners) specifically denied that UARG had raised this issue in the earlier litigation, stating, "[UARG] did not join in the [non-utility industry] brief on the actual vs. allowable emissions issue." JA at XXXX Moreover, UARG's counsel made clear that UARG did not endorse those arguments. Id. In its reply brief in the 7th Circuit WEPCo case, UARG member WEPCo again stressed that it did not join in or endorse any challenge to the test in the 1980 Rule: "as the signature page of that 1980 brief shows . . . Alabama Power Co., et al. did not join in that brief. See Attachment B to this Reply." JA at XXXX(emphasis in original).[30/] Thus, in 1989, UARG explicitly affirmed that in the 1980 CMA litigation it was not litigating issues concerning the emissions test.

[28/] ACC's claims should also be rejected because it failed to seek reopening within the 60 days provided by the Court's Order holding the 1980 case in abeyance. See EPA Opposition to ACC's Motion to Reopen Administratively Terminated Petitions For Review.

[29/] In the Seventh Circuit litigation, WEPCo (as petitioner) and UARG (as amicus) argued that the 1980 rules already contained their desired potential-to-potential test for certain changes at existing units. Thus, they argued that there was no reason for them to challenge the 1980 rules on this issue. As discussed, the WEPCo court found that the actual emissions measurement approach did exist in the 1980 Rule, but that the actual-to-potential test should not have been applied to the specific WEPCo project that was before the court. 893 F.2d at 916-17.

[30/] WEPCO has been a member of UARG since at least 1980.

Far from preserving this argument for litigation, UARG and ACC made a strategic choice in the original challenges to the 1980 rule to disavow this position. They then reaffirmed that strategy in 1989. Accordingly, UARG and ACC have waived any challenge they might have had to the emission test in the 1980 Rule and cannot now "reopen" an issue they expressly declined to open in the first place. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("an intentional relinquishment or abandonment of a known right or privilege" constitutes a waiver); see also, West Virginia. v. EPA, 362 F.3d 861, 871-72 (D.C. Cir. 2004) (declining to hear on appeal after remand to the Agency arguments not raised in initial briefs challenging rule under CAA).

b. Nothing In The Settlement Agreement Or The Court's Administrative Termination Order Allows Industry Petitioners To Raise New Challenges To The 1980 Rule.

Although the Settlement Agreement and the Court's Order administratively terminating No. 79-1112 and consolidated cases allow petitioners to resume their challenges to the 1980 rule, neither of those gives Industry Petitioners the right to initiate completely new challenges to the 1980 rule.

The Settlement Agreement provides that, if EPA does not adopt the provisions in Exhibit B to the Agreement, Industry Petitioners "reserve their rights to proceed further" with the 1980 litigation. JA at XXXX (emphasis added). Because EPA has now taken final action not to adopt Exhibit B, Industry Petitioners have the right under the Settlement Agreement to move forward from the point where the parties were situated at the time the Settlement Agreement was executed, at which time UARG and ACC were not challenging the emissions test provisions in the 1980 rule. Nothing in the Settlement Agreement gives UARG and ACC the right now to raise claims that they had already waived at the time the agreement was signed. This is

particularly significant in light of the CAA's careful structure governing when and how objections to rules can be raised. See 42 U.S.C. §§ 7607(d)(7)(B), 7607(d)(8). As this Court held in American Petroleum Inst. v. Costle, "the essential message of so rigorous a standard is that Congress was concerned that EPA's rulemaking not be casually overturned for procedural reasons, and we of course must respect that judgment." 665 F.2d at 1187 (D.C. Cir. 1981) (quoting Sierra Club v. Costle, 657 F.2d 278, 391-92 (D.C. Cir.1981)).[31/]

Similarly, this Court's 1999 Order administratively terminating the case stated that as part of a motion to reopen, the moving party should include "the issues remaining to be presented to the court." JA at XXXX (emphasis added). Industry Petitioners never raised an issue with the emissions test as part of the 1980 litigation; thus, it is not an issue that Industry Petitioners have "remaining" before the Court.[32/] See American Trucking Ass'ns., 283 F.3d at 371 (D.C. Cir. 2002) (petitioners were limited to issues raised in initial briefs on remand from Supreme Court to resolve "preserved" issues).

[31/] The Settlement Agreement itself underscores that it was the parties' understanding at the time of the Agreement that the petitioners were preserving only those arguments they had previously raised. Paragraph 12 of the Agreement requires that, if EPA were to promulgate a final rule substantially the same as CMA Exhibit B, then not all petitioners, but only "any industry petitioner who in these cases sought review of the amended provision" was required to seek dismissal. JA XXXX.

[32/] It is unclear whether Industry Petitioners seek to challenge the 1992 WEPCo Rule in this action. They do not present any direct challenges, but do make reference to the rule. See, e.g., Ind. Br. at 20. To the extent they do seek to bring such a challenge, it is not properly before this Court either. This Court's 1999 administrative termination Order provides that the 1992 litigation can be reopened on a motion identifying the issues "remaining" to be litigated. Inherent in that statement is a requirement that any issue a party seeks to litigate on reopening must be one that could have been litigated in the original litigation. The issue concerning hours of operation that UARG now wants to litigate could not have been litigated in the original 1992 litigation because the relevant regulatory revision was neither changed nor reinterpreted by the 1992 rules.

c. Industry Petitioners' Challenge Is Untimely Because Industry Petitioners Knew The Test Existed Long Before The 2002 Rule.

As described above, the actual annual emissions test was clearly promulgated in 1980. Assuming, arguendo, that the test was somehow promulgated at some later time, Industry Petitioners have failed to meet the CAA procedural requirements for pursuing such a challenge in a timely fashion.

CAA Section 307(b) requires that any petition for review of EPA rules be brought within 60 days from the date the rule is published in the Federal Register. 42 U.S.C. § 7607(b)(1). For objections based on grounds arising after the 60th day, the statute requires that those challenges be brought "within sixty days after such grounds arise." Id. This Court has recognized that this 60-day time frame is "clearly jurisdictional." See, e.g., Texas Mun. Power Agency v. EPA, 89 F.3d 858, 867 (D.C. Cir. 1996).

It is not credible for Industry Petitioners to claim that they did not know within 60 days of its publication in the Federal Register that EPA would interpret the 1980 rule to require an assessment of actual annual emissions. This very issue was raised in the CMA litigation. The 1980 Industry Brief on the emissions test identified as one of its "Issues" the following question: "Did EPA exceed its statutory authority . . . when it provided that a modification subject to review under [NSR] would occur whenever actual emissions from a source increased as a result of an alteration to that source, even where the source's capacity to emit remains constant." JA XXXX. In view of the fact that this issue was being litigated by some petitioners, it is not supportable for Industry Petitioners to profess ignorance in this case of the Agency's position in 1980.

Even if Industry Petitioners could have harbored any doubts on the subject, however, those doubts must have been dispelled by the CMA settlement, to which Industry Petitioners are parties. That settlement required EPA to propose a potential-to-potential test to replace the test promulgated in the 1980 rules. JA XXXX. No such agreement would have been necessary if EPA had interpreted the 1980 rules themselves to include a potential-to-potential test. See 13-14, supra

More significantly, Industry Petitioners admit in their brief that they were aware no later than 1988 that EPA interpreted the 1980 rule to include an actual-to-potential test. See Ind. Br. at 17 (describing PSD applicability test applied by EPA to WEPCo as a comparison of actual "pre-repair" emissions with post-change emissions measured by "potential to emit."). If, despite the evidence to the contrary, EPA's applicability determination for WEPCo applying the actual-to-potential test was the first time Industry Petitioners learned of EPA's interpretation of the 1980 regulations, then CAA section 307(b)(1) and this Court's decision in Oljato Chapter of the Navajo Tribe et al. v. Train, 515 F.2d 654, 661, 666 (D.C. Cir. 1975), required Industry Petitioners to bring new information to EPA's attention and, if necessary, file their objections with this Court within 60 days of EPA's response on that issue.

Finally, because the discussion of the "actual-to-potential" test in the preamble to the 2002 Rule merely reiterates information provided at least three times before in the Federal Register and in numerous other statements from EPA, that discussion does not itself constitute a "final action" challengeable by Industry Petitioners here. See Independent Equip. Dealers Ass'n, 372 F.3d at 425 (no final agency action where agency letters simply restated existing agency policy); General Motors, 363 F.3d at 451 (same); Molycorp, Inc. v. EPA, 197 F.3d 543, 546-47

(D.C. Cir. 1999) (if EPA unlawfully changed its regulation, it did so at the time of its first statement, not when it subsequently "expressed substantially similar views"); American Iron & Steel Inst. v. EPA, 886 F.2d 390, 397-98 (D.C. Cir. 1989) (dismissing as time-barred a challenge to interpretative statements in EPA preamble that reiterated statements appearing in earlier preamble). See also National Ass'n of Reversionary Property Owners v. Surface Transp. Bd., 158 F.3d 135, 145 (D.C. Cir 1998) ("The mere act of repeating old reasons for an old policy . . . is not the equivalent of reconsidering, and therefore reopening, the old issue").

C. Industry Petitioners' Claim Of Lack Of Notice Of The 1980 Rule Must Be Rejected.

Industry Petitioners assert that, if the 1980 Rule promulgated a test relying on the measurement of actual emissions in tons per year, the regulation is invalid because the proposal gave no notice of this test and it was not a "logical outgrowth" of the proposal. Ind. Br. at 34-36. This argument should be rejected both because it was not properly presented and because Industry Petitioners had notice of the possibility of the test as a result of the Alabama Power decision.

1. Industry Petitioners' Assertion That They Had No Notice Of A Test Based on Actual annual Emissions Is Waived Because They Failed To File A Petition For Reconsideration.

As a threshold matter, Industry Petitioners have waived this procedural argument by failing to comply with CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). This section provides that only an objection raised during the notice and comment period may be the grounds for judicial review, and that where the petitioner can demonstrate that such an objection was "impracticable," or if the grounds for the objection arose after the close of the comment period, a petitioner must seek reconsideration by the Agency before it can seek review in the courts. Id.

Industry Petitioners did not seek reconsideration by EPA on this issue; accordingly, this argument is not properly before this Court. The law on this point is clear. This Court has repeatedly held that where no petition for reconsideration is filed, this Court cannot consider whether notice was adequate. See, e.g., Appalachian Power Co. v. EPA, 249 F.32d 1032, 1064 (D.C. Cir. 2001); Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1096-97 (D.C. Cir. 1996); American Petroleum Inst., 665 F.2d at 1187; Sierra Club, 657 F.2d at 391-92 (D.C. Cir. 1981).

Industry Petitioners' failure to petition EPA for reconsideration is fatal to their claim that the emissions test is invalid due to lack of notice, and this claim should be dismissed for lack of jurisdiction.

2. EPA's Decision To Change The PSD Applicability Test In 1980 Met Applicable Procedural Requirements.

Even if the Court had jurisdiction, Industry Petitioners' procedural claim has no merit. As discussed above, in the 1980 rule, EPA acknowledged that it was altering the NSR applicability test from that in the proposal and explained that it changed the rule because the Agency believed it was required to do so by this Court's decision in Alabama Power. 45 Fed. Reg. 52700. EPA stated that in Alabama Power (per curiam), the Court had seemed to discuss "modification" generally in terms of "potential to emit," but that in the later Alabama Power decision, "the court used an entirely different set of terms to describe 'modification.' Instead of using 'potential to emit,' it used language which, like the section 111(a)(4) definition, suggests changes in actual emissions." Id. EPA then provided some examples of that language and

concluded, "[f]ollowing the lead of the court, EPA has also shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions.'" Id. EPA added that this approach had the additional benefit of solving the "paper offset" problem and made netting of emissions more practical.[33/] Id.

Nor was EPA alone in reading Alabama Power to refocus EPA's attention on the effects of the program on air quality rather than unit capacity. At least one commenter in 1979 recognized this shift in emphasis: "The entire thrust of the Court's opinion on this issue points towards a more realistic view of what a specific source actually emits." Comments of Rosenman Colin Freund Lewis & Cohen, Nov. 2, 1979, at 7 (JA XXXX).

The message of Alabama Power was clear. This Court interpreted the statute to require EPA to consider effects on air quality. It was a short step from that requirement to EPA's final action adopting an actual emissions comparison for modifications. Commenters either knew, or should have known, that such an action was a logical outcome of the Court's opinion, on which they had an ample opportunity to comment. EPA acted appropriately in following this Court's lead.

[33/] Under EPA's 1979 proposed regulations, a "major modification" would have been deemed to occur when the "potential to emit" of a source experienced a net increase greater than a de minimis amount. 45 Fed. Reg. 52700. To establish a reduction in emissions for purposes of the netting analysis, a source would have had to demonstrate that the physical capability of the source to emit a pollutant had been actually reduced. This approach, however, had problems. "A computation of an existing source's potential to emit could give a figure considerably higher than what it is actually emitting." Id. Therefore, even if a source demonstrated a reduction in its physical capability to emit pollutants, it would not necessarily have actually reduced its emissions. This would cause a "paper offset," with the result that a source could "net out" of NSR, modify an emissions unit, and begin emitting additional pollutants without having made corresponding reductions in emissions elsewhere. This "could permit actual air quality to deteriorate seriously." Id. The "actual emissions" approach solved that problem.

Furthermore, petitioners' claim is prudentially moot[34/] because petitioners had ample opportunity to comment on the actual annual emissions approach in the 1992 rulemaking, when EPA adopted the actual-to-future-actual test for utilities, and the 2002 rulemaking, which extended the actual-to-future-actual test to other sources and specifically took comment on the potential-to-potential test advocated by Industry Petitioners. Thus, EPA has already considered the issue on which petitioners sought to comment, any procedural violation has been cured, and there would be no point in remanding the issue to the Agency.[35/]

D. Industry Petitioners' Assertion that EPA Adopted A New Interpretation of the Actual-to-Potential Test Is Wrong.

Industry Petitioners also allege that, in the 2002 Rules, EPA reinterprets the "actual-to-potential" test contrary to plain language of the 1980 regulations and the Agency's

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[34/] Petitioners' notice-and-comment challenge to the 1980 rule may not be technically moot, as that rule continues to be applied through incorporation in SIPs still in effect in most states, and because of ongoing litigation regarding liability for pre-2002 conduct.

[35/] Moreover, even if the Court were to determine that the claim is not prudentially moot, and if the Court were to determine that a procedural violation did occur, the Court should exercise its equitable discretion and refrain from vacating the 1980 rule. This Court has recognized that it need not vacate a rule for failing to provide proper notice and comment when doing so would be disruptive. Sugar Cane Growers Co-op of Fla. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002); Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Despite a recent decision by a divided panel of this Court that it lacks such discretion to fashion a remedy under the CAA, Honeywell Int'l, Inc. v. EPA, No. 02-1294 (July 23, 2004), for the reasons stated by Judge Rogers in dissent, EPA believes that the decision in Honeywell is contrary to Circuit precedent, and that the Court does have such discretion in CAA cases. See Northeast Md. Waste Disposal Agency v. EPA, 358 F.3d 936, 949-50 (D.C. Cir. 2004); Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1460 (D.C. Cir. 1997); see also 42 U.S.C. § 7607(d)(9) (court "may" reverse agency action for procedural violation). In this case, the provisions of the 1980 Rule have been incorporated into every State's SIP, and EPA, the States and the regulated community have been basing their actions on the rule for 24 years. Vacatur would disrupt those SIPs, raise doubts about the validity of existing permits and cause significant disruption. Petitioners have chosen not to pursue their claim for 24 years, and, if the Court finds a procedural violation, it should exercise its discretion not to vacate the rule.

historic interpretation of that test. Industry Brief at 32-33. Industry Petitioners misinterpret the 2002 preamble. EPA did not reinterpret the actual-to-potential test in the 2002 preamble, or at any other time after 1980. Consequently, Industry Petitioners' argument is meritless and should be denied.

Industry Petitioners's claim is based on EPA's statement in the 2002 preamble that "[p]rior to today, the regulations applied an actual-to-future-actual applicability test for utilities and an actual-to-potential applicability test for all other emissions units." 67 Fed. Reg. at 80199/1. To the extent that Industry Petitioners view that as a retroactive change in EPA's position, they overread the statement. This statement appears in the course of an explanation of the Agency's decision to establish a new actual-to-projected-actual test for all emissions units. The sentence following the cited sentence states: "Today, we are establishing a new applicability test for calculating emissions increases for "Clean Units" and an actual-to-projected-actual applicability test for all other emissions units." Id. The focus of the passage as a whole is on the new rules, not the old. In context, the reference to the "actual-to-potential" test is simply a shorthand description of the test in the 1980 rules.

If the Agency had intended a shift in its historical interpretation, it would have said so or at least provided a far more detailed explanation of its reasoning. Accordingly, this statement says no more than EPA had already said in the preamble to the WEPCo rule, where the Agency noted that it had "left unchanged the regulations which require that for any unit which has not

begun normal operations, actual emissions are considered equal to the unit's potential-to-emit." 57 Fed. Reg. at 32,326/1.[36/]

Since 1980, the actual-to-potential test has applied to units that have not "begun normal operations." In 1992, EPA created the alternative WEPCo test for qualifying utilities. To be clear: EPA has not changed or altered its interpretation of these tests since their promulgation, particularly not in the 2002 rules. Consequently, this claim should be denied.

II. STATE/ENVIRONMENTAL PETITIONERS' CHALLENGES SHOULD BE REJECTED.

State and Environmental Petitioners challenge various aspects of the 2002 Rule on the grounds that they are contrary to the statute and will have an adverse environmental impact. As explained in detail below, there is no merit to these claims.

Virtually all of State and Environmental Petitioners' claims rest on the assertion that the 2002 Rule represents a relaxation of the NSR program that will cause the program to be less environmentally protective. See, e.g., State Br. at 13-16, 52-53; Env. Br. at 11, 23-24, 30-31, 36-37, 40-41. EPA properly concluded, however, that this is not the case. The Agency conducted an extensive analysis of the impact of the 2002 Rule on the environmental effectiveness of the program, and concluded that "collectively, the five NSR improvements that the Agency is finalizing will be environmentally beneficial compared to the current program and will improve air quality by reducing emissions from industrial facilities." Environmental Analysis at 2 (JA

[36/] Industry petitioners also point (Ind. Br. at 31 n. 51) to another passage in the 2002 preamble that they claim constitutes a new interpretation: "when the actual-to-potential test is applied, it is automatically assumed that the emissions unit has not begun normal operations after the change period." 67 Fed. Reg. at 80,194/2. Again, they misread the passage. The passage merely states the obvious that when the actual-to-potential test applies, it must be assumed that the unit has not begun normal operations.

XXXX). Furthermore, the Agency determined that four of the five improvements will result in environmental improvement and one of the five (the revised method for determining emissions baselines) will have negligible environmental effects. Id.

Because of the importance of this issue, EPA granted partial reconsideration of the final rule to, among other things, provide the public a full opportunity to comment on the Environmental Analysis and submit relevant data and information. 68 Fed. Reg. 44620, 44624. State and Environmental Petitioners submitted arguments and information in support of their environmental harm claim. EPA carefully considered all comments submitted on the Environmental Analysis and prepared a detailed response. See generally Recons. TSD Section V (JA XXXX). In its Final Action on Reconsideration, EPA reaffirmed its conclusion that the 2002 Rule is environmentally beneficial, finding that "none of the new information presented [by commenters] leads us to conclude that the analysis was incorrect or substantially flawed." 68 Fed. Reg. 63023/3. Thus, the assertion of environmental harm that animates the State and Environmental Petitioners' claims was carefully considered by EPA and rejected for reasons explained in detail in the record. These technical conclusions are entitled to deference from this Court. Stripped of their erroneous claims of environmental harm, petitioners' claims are easily refuted.

The Clean Air Act gives EPA considerable discretion to determine when a physical or operational change triggers NSR permitting requirements. In the 2002 Rule, EPA reasonably exercised that discretion to address difficulties experienced by the Agency and the regulated community had experienced in implementing the 1980 Rule. The specific provisions of the 2002 Rule, i.e., the revised baseline and use of an actual-to-future-actual test for calculating emissions

increases, allowing for plantwide applicability limits, and the special applicability provisions for Clean Units and Pollution Control Projects, are intended to remove the impediments posed by the 1980 Rule to implementation of efficiency-increasing and environmentally-beneficial projects, while achieving the clean air goals of the statute. EPA reasonably determined that the 2002 Rule is environmentally beneficial and represents a reasonably interpretation of the Act.

A. The Revised Baseline Is Consistent with the Statute.

In the 2002 Rule, EPA revised the methodology for determining an emissions unit's pre-change baseline, which is used to determine whether a change results in an emissions increase. To determine whether a project will result in an emissions increase, and thus potentially trigger NSR, a source compares emissions before the change to emissions after the change. Under the 1980 rule, facilities determine the actual emissions baseline from a modified unit by averaging annual emissions for the two years immediately prior to a change (or another period that the permitting authority agreed was more representative). Under the 2002 rules, facilities may select as their pre-change baseline the average annual emissions from any consecutive 24-month period during the ten years before the change. The selected baseline must be adjusted downwards to reflect applicable requirements that have been promulgated since the 24-month baseline period.[37/] A facility must have adequate records to document the emissions levels for the 24-month period it selects. If it does not, it cannot use that 24-month period. With the adoption of this rule, a facility cannot use as its pre-modification baseline any period earlier than the ten year lookback period, even if it believes an earlier period is more representative. 67 Fed. Reg. at 80195/2.

[37/] For example, if a source has become subject to an NSPS or a specific SIP requirement since the baseline period, the baseline must be adjusted to account for the new requirement.

EPA had several reasons for changing the methodology for determining pre-change emissions. Many people, including some State Petitioners, recognized that there were difficulties with the 1980 methodology. For example, while the 1980 rules allowed permitting authorities to consider periods other than the two years immediately preceding a change, in practice, conflicts arose between applicants and permitting authorities over what constitutes "more representative" operations, resulting in increased administrative burdens and delays. In comments, petitioner New Jersey advocated a more flexible baseline approach to eliminate "[c]onflicts over what constitutes 'normal source operation,'" and noted that the pre-2002 approach "results in a baseline that decreases each time production decreases. In other words, if economic downturn temporarily slows production at a facility for a few years, that facility's baseline actually decreases and the facility loses operational flexibility. It also discourages facilities from voluntarily implementing pollution prevention measures." Docket IV-D-172, Attach. I at 5 (JA XXXX).[38/]

In an effort to define a baseline that would address the concerns with the actual emissions baseline methodology, EPA reviewed market data for a number of industries. Based on these data, EPA concluded that most industries experience at least one full market cycle within a ten-year period. Baseline Study (JA XXXX-XX); 67 Fed. Reg. at 80199-200 & n.23. Thus, allowing sources to look back ten years to establish their baseline emissions allows most facilities to consider their entire range of normal operations.

Based on this analysis, EPA revised the baseline to: (1) reduce administrative burden; (2) eliminate the concept of "more representative period" by recognizing that there are fluctuations

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[38/] Petitioners Pennsylvania and Maryland also supported increasing the period of time from which emissions before a change are measured in comments filed with the Agency. Docket IV-D-262 at 1, IV-D-177 at 1 (JA XXXX, XXXX).

throughout normal business cycles; and (3) focus permitting authority resources on the types of changes more likely to have significant environmental impacts. 67 Fed. Reg. 80191-92, 80199-200. By allowing facilities to consider their full range of normal operations and requiring that all applicable regulatory requirements are accounted for, the 2002 Rule removes existing impediments to facilities using low production periods to make efficiency-enhancing changes, while ensuring that changes that cause actual emissions increases are subject to NSR requirements. Thus the revised baseline fulfills the statutory goal of balancing economic growth with the need to protect air quality.

1. The Statute Is Ambiguous.

a. The Term "Increase" Is Ambiguous.

There is no basis for Petitioners' claim that the term "increase," as used in CAA section 111(a)(4), has an unambiguous meaning that requires setting the baseline as the period immediately preceding a change. State Br. at 18-20. An NSR permit is required for a "modification," which the statute defines in relevant part 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 . . . ." 42 U.S.C. § 7411(a)(4). To determine whether there has been an increase requires a comparison of post-change emissions with some period – the baseline – before the change. The statute is silent on how an "increase" is measured and, more specifically, on what baseline period should be used. Consequently, EPA has the discretion to use its expertise to interpret the ambiguous term "increase." Alabama Power, 636 F.2d at 401 ("increase" is ambiguous as to whether emissions are to be measured on a facility-wide or unit-specific basis).

EPA has long recognized that the baseline should reflect a facility's normal operations. Indeed, the 1980 NSR regulations provided that a facility may utilize a period other than the period

immediately prior to the change if the reviewing authority determines that period is more representative of normal operations. See 67 Fed. Reg. at 80188/2. For example, if a facility were shut down for part of the two-year period because of an event such as a strike, its baseline would be artificially low and could require NSR permitting even where the facility's post-change emissions are no greater than those during normal operations. The 2002 Rule eliminates the ambiguity and administrative cost associated with these case-by-case determinations. Id. at 80200/1.

Petitioners do not address EPA's longstanding interpretation of the statute, but instead assert that the "ordinary meaning" of "increase" requires the use of the period just before the physical change. State Br. at 19. To support this contention, they rely on two "real world" examples. Id. Neither of these examples supports Petitioners' claim. State Petitioners first assert that a meteorologist would speak about an increase in temperature resulting from a weather front by comparison to the period immediately before the front arrives. Id. However, if a front comes through in the evening, Petitioners' meteorologist would not compare nighttime temperatures after the front with daytime temperatures before the front, but rather would compare temperatures taken at analogous times of day.[39/] Similarly, the 2002 Rule allows facilities to compare emissions during analogous periods of operation, thus requiring NSR permitting only for changes that represent a real emissions increase. State Petitioners' car engine example, id., suffers from the same defect. If a car's engine must be replaced because it has become defective, for the purpose of determining whether to replace the engine or buy another car, the appropriate comparison of the car's value and

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[39/] So too, a meteorologist looking at longer-term trends in temperatures would look not just at the preceding day, week, or month in determining whether there been a general increase or decrease in temperature, but would attempt to define a more representative period for comparison.

performance is not the car with the defective engine versus the car with the new engine, but the car with the old engine when it was working properly versus the car with the new engine.

Thus, even in Petitioners' chosen examples, how an "increase" is calculated depends on the purpose of the calculation. A meteorologist interested in long-term trends will calculate an increase differently than one interested in day-to-day events. The owner of a classic car will calculate appreciation differently than if the car is just basic transportation. The term "increase" has no fixed unambiguous meaning in normal discourse, and there is no basis for the Court to read one into the Clean Air Act. To the contrary, EPA must exercise its discretion to determine how an increase is determined, and EPA has done so here in a way that maximizes facilities' flexibility to implement efficiency-enhancing projects while also requiring NSR permitting for projects that result in an increase of emissions above a facility's normal range of operations.

b. The Cases Cited By State Petitioners Are Inapposite.

None of the cases cited by State Petitioners, State Br. at 20, supports their claim that the revised baseline is inconsistent with the statute. In Alabama Power, this Court noted that sources that "increase" pollution are required to go through NSR. Yet that decision did not address what constitutes an emissions "increase," nor does it preclude EPA from allowing facilities to consider their normal range of operations to determine whether a particular physical change is likely to cause an increase in emissions. In fact, the overall thrust of that decision was that the NSR provisions should be triggered only when a change at a facility results in an actual increase in pollution:

> Congress wished to apply the permit process, then, only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase. It is true that Congress intended to generate technological improvement in pollution control, but this

> approach focused upon rapid adoption of improvements in technology as new sources are built, not as old ones were changed without pollution increase.

636 F.2d at 401. The 2002 Rule is consistent with that approach, and imposes NSR requirements only when a change in a facility results in emissions that exceed those emitted by the facility during its full range of operations.

Both the WEPCo and Southern Indiana Gas & Electric decisions cited by State Petitioners address not how to determine whether an increase has occurred, but whether certain activities constitute a "physical change." Those opinions are addressed to suggested interpretations of the statute that would exclude categories of changes from NSR permitting regardless of whether they caused an emissions increase, however calculated.

c. The Revised Baseline Is Consistent With The Statutory Requirement That "Any" Change That Causes An Increase In Emissions Be Subject To NSR.

Environmental Petitioners' argument that the revised baseline is inconsistent with the presence of the adjective "any" in the statutory phrase "any physical change," Env. Br. at 13, is similarly without merit.[40/] By revising the baseline EPA is not excluding any facilities at which a physical change causes an increase in emissions. Rather, EPA is applying its expertise and discretion to define the ambiguous statutory term "increase." Any physical change that causes an increase in emissions, as calculated by the procedures in the Rule, is subject to NSR permitting. Thus Environmental Petitioners' argument about the meaning of the term "any" is irrelevant.

[40/] This argument has also been waived, because Environmental Petitioners did not raise it in their comments to the Agency. See 42 U.S.C. § 7607(d)(7)(B) (only objection raised "with reasonable specificity" during comment period may be raised during judicial review); Appalachian Power Co. v. EPA, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (recognizing "black-letter administrative law" that party must present comments to agency during rulemaking in order for court to consider issue); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1308 (D.C. Cir. 1991) (statutory challenge to EPA authority not raised in rulemaking had been waived)

2. The Revised Baseline Is Based On A Reasonable Interpretation Of The Statute.

a. The NSR Provision Requires EPA To Balance Economic And Environmental Factors.

Because the statute is ambiguous, EPA's interpretation must be upheld if reasonable. The Supreme Court has recognized that, in the NSR provisions, Congress was concerned with balancing the need for cleaner air with the need to ensure economic growth, and Congress left the details of that balancing to EPA. Chevron, 467 U.S. at 861, 865. EPA has determined that the 2002 Rule as a whole, including the revised baseline, is environmentally and economically beneficial. It is economically beneficial because it focuses the NSR program on changes most likely to result in real emission increases and provides needed flexibility for facilities to make operational changes during periods of low utilization that will increase the facilities' efficiency during subsequent periods of higher utilization. 67 Fed. Reg. at 80191-92; TSD I-2-7 (JA XXXX). In turn, improved efficiency benefits the environment. Id. at 80192 ("The new test will remove disincentives that discourage sources from making the types of changes that improve operating efficiency, implement pollution prevention projects, and result in other environmentally beneficial changes."); see also NSR Report at 15-16 (JA XXXX-XX). If facilities use periods of lower production to pursue efficiency-enhancing projects, they can return to higher historic production levels with lower emissions.

b. The Purpose Of The NSR Program Is Not To Compel Existing Sources To Reduce Emissions.

Petitioners' claim that EPA's interpretation is inconsistent with statutory intent is based on a misreading of the Act and its legislative history. Contrary to the claims of Petitioners, see, e.g., State Br. at 20, 22-23, and amici Senator Clinton, et al., the purpose of the NSR provisions is not to

compel emissions reductions from existing sources, but to limit emissions increases resulting from physical or operational changes. This is evident from the statutory requirements. The NSR provisions are triggered only where a new source or a modification to an existing source results in a significant increase in emissions. If Congress had intended NSR to compel decreases in emissions, it would be irrational for the requirement to be triggered only when a facility, in fact, increases its emissions. Rather, the purpose of New Source Review is to require that facilities making changes that increase their emissions meet emission limits that reflect state-of-the-art control technology, analyze the increased emissions from their facilities to ensure that they will not adversely affect air quality, and, in nonattainment areas, offset their emissions increases with emission reduction credits.[41/]

There is no basis to the claims of Petitioners and amici that the legislative history indicates Congress intended NSR to compel emission reductions from older plants as they were refurbished. First, the most definitive indication of congressional intent is the language of the statute, Lamie v. United States Trustee, 124 S. Ct. 1023, 1030 (2004), and the statutory language is inconsistent with Petitioners' claim. Second, discussion of the legislative history of the 1970 Act, e.g., State Br. at 4, Clinton Br. at 3-4, is inapposite. The NSR programs were not created until the 1977 Act, and therefore nothing discussed by Congress in 1970 is relevant. See supra at 5-6. Nor is the legislative history of CAA section 123 (42 U.S.C. § 7423), Clinton Br. at 5-6, relevant. That is a completely different section of the statute intended to address a specific problem - the construction of tall stacks to address local pollution issues - which has nothing to do with how Congress

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[41/] In the 1990 Amendments Congress provided that in ozone nonattainment areas offsets would be required in greater than one-to-one ratios. 42 U.S.C. § 7511a. The 1990 Amendments did not, however, address NSR applicability, and the actions of Congress in 1990 say nothing about the intent of the 1977 Congress that created the NSR provisions.

intended the NSR provisions of the statute to be implemented. That Congress, in addressing the tall stacks problem, expected older facilities to be closed down more rapidly than has proven to be true says nothing about whether Congress intended the unrelated NSR provisions to compel emissions reductions from existing sources.

Because both State Petitioners and amici misstate Congress' intent, there is no basis for their claim that EPA is substituting its preferred policies for congressional intent. State Br. at 26, Clinton Br. at 7-11. Congress did not intend the NSR provisions to be used to compel emission reductions from existing sources, but plainly did intend that EPA balance economic and environmental considerations in implementing NSR. See 73, supra. That is exactly what EPA has done.

Rather than NSR, the Act's primary mechanisms for achieving the emissions reductions needed to attain or maintain NAAQS are State Implementation Plans. NSR Report at 30 (JA XXXX); see 7, supra. In their SIPs, States are required to provide measures necessary to achieve or maintain the NAAQS. 42 U.S.C. § 7410(a). In nonattainment areas, SIPs must contain measures to achieve specified annual percentage reductions in emissions to ensure progress towards attainment. Id. §§ 7502(c)(2), 7511a(b)(1). These SIP requirements work in concert with federal programs such as the NOx SIP Call (63 Fed. Reg. 57356 (Oct. 27, 1998)) and the Title IV Acid Rain program. Because of this complex array of programs designed to achieve air quality standards, EPA has reasonably determined that the appropriate role for the NSR program is to ensure that emissions increases from new or modified sources are subject to control and air quality analysis, which is entirely consistent with the statutory language.

c. The Revised Baseline Will Not Impair Achievement Of Air Quality Goals.

EPA has reasonably determined that implementation of the 2002 Rule, including the revised baseline, will be environmentally beneficial, or at worst, neutral. See 24-25, supra. Furthermore, to the extent there are emissions increases at sources, not triggering federal NSR, these would be subject to the minor NSR programs that every State SIP includes. 42 U.S.C. § 7410(a)(2)(C). The chief requirement of such programs is that any modification at a major source, including modifications that are not subject to the major NSR program, must not interfere with plans for attainment of the NAAQS. 40 C.F.R. § 51.160(a). Thus, any potential increases in emissions from particular sources are subject to review and regulation by the States, which have the authority to restrict any emissions posing a threat to human health or the environment.

Nor is there any basis to State Petitioners' claims that the revised baseline provision is inconsistent with any of the other statutory goals of the PSD program. State Br. at 24-26. As State Petitioners themselves point out, one of the explicit goals of the statute is to balance environmental protection and economic growth. Id. at 25. The purpose of the revised baseline is to ensure that only changes causing a real increase in pollution are subject to NSR. While EPA's former NSR rules dealt with this issue in a different way (i.e., by allowing case-by-case determinations that another period was more representative), in light of the development of the NSR program over the last 24 years, the development and implementation of SIPs, and the imposition of other federal requirements, EPA reasonably determined that the revised baseline would simplify administration of the NSR program and increase the ability of facilities to respond to changes in markets or other circumstances while still protecting air quality. The Agency's balancing of such factors is due considerable deference. Chevron, 467 U.S. at 851, 865-66.

There is also no basis to State Petitioners' claim that the revised baseline impedes the ability of States to achieve ambient air standards because of increased pollution from other States. State Br. at 25. EPA determined that the 2002 Rule will not have an adverse environmental impact. See 24-25, supra. Furthermore, State SIPs must include whatever provisions are necessary to ensure that sources do not contribute significantly to nonattainment in other States. 42 U.S.C. § 7410(a)(2)(D). EPA may enforce this requirement by compelling States to modify SIPs that are inadequate. See Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). The statute also allows affected States to seek relief from sources or groups of sources in other States that impair their ability to achieve air quality standards. 42 U.S.C. § 7426(b); see West Virginia v. EPA, 362 F.3d 861 (D.C. Cir. 2004). Thus, the States have more than adequate means to control sources that contribute to interstate pollution problems.

Finally, State Petitioners' argument concerning public involvement (State Br. at 25) is misplaced. The revised baseline does not allow for emissions increases, but rather recognizes that the appropriate baseline for determining whether an increase has occurred is one reflecting the full range of a facility's operations. Thus, the statutory policy that "increases" in emissions be subject to public scrutiny is not implicated. Moreover, most changes that are not subject to federal NSR are subject to State minor NSR programs, which are required to have provisions for public involvement. 40 C.F.R. § 51.161.

3. EPA Reasonably Determined That The Environmental Impacts Of The Revised Baseline Would Be Minimal.

a. EPA's Analysis Demonstrates That The 2002 Rule Is Environmentally Beneficial.

During the rulemaking, EPA concluded that the efficiency gains from the revised regulations would result in a net environmental benefit. 67 Fed. Reg. 80192/3; see 24-25, supra. Although EPA's Environmental Analysis found it was not possible to make exact predictions, the study found that the Rule "will result in health and welfare benefits from reduced concentrations of pollutants." Environmental Analysis at 2 (JA XXXX). With regard to the change in the method for calculating baseline actual emissions, the study concluded that the rule would not result in any significant impact, due primarily to the fact that the change would affect only a small percentage of the sources potentially subject to NSR requirements. Id. at 13-14 and App. F (JA XXXX-XX, XXXX-XX). The revised baseline does not affect new sources, new units, modifications to power plants (which are the largest emitting category)[42/], or modifications at sources where emissions have either been at their highest in recent years or relatively stable. The study estimates that these unaffected sources represent 90 percent of the emissions benefit from the NSR program. Id. at 13, F-3 to F-4 (JA XXXX, XXXX-XX). Among the remaining sources, the study estimates that, 70 percent of the time, sources that have substantially lower recent emissions do so because of enforceable controls or other limitations that have gone into effect at the source, and thus would not be able to increase their emissions. Id. at 13, F-5 to F-6 (JA XXXX, XXXX-XX). Some sources might also be able to use a different period under the 1980 rules if it was more

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[42/] Power plants have been able to use any two consecutive years out of the last five as their baseline since 1992. This provision was codified, but not substantively changed, in the 2002 Rule.

representative. Thus, the study concludes that only for a small number of facilities, representing approximately 3 percent of total emissions (i.e., 30 percent of the 10 percent of total emissions produced by sources potentially affected by the new baseline), might a higher baseline may be warranted in some cases due to patterns of usage. Id. at F-5 to F-6 (JA XXXX-XX). Because they represent a small percentage of total emissions, these facilities are unlikely to have a significant environmental impact, and thus the change in the baseline is likely to have minimal environmental impacts.

b. The Studies Cited By Petitioners Are Flawed.

Petitioners base their claim that the revised baseline methodology will result in emissions increases on studies submitted to EPA during the reconsideration process. State Br. at 21-23. These studies compare the highest emission levels from selected facilities over the last 10 years with the levels in the last two years and conclude that these facilities could increase their emissions to the 10-year baseline levels without triggering NSR. However, none of Petitioners' studies provides any rationale why these facilities would increase their emissions or demonstrates that they are likely to do so.

EPA examined these studies and determined that they are seriously flawed because they fail to consider several significant factors. Recons. TSD at 131-38 (JA XXXX-XX). First, Petitioners' studies fail to identify why emissions at these facilities decreased over the 10-year period. Id. at 131-33 (JA XXXX-XX). Without such an analysis, it is impossible to determine whether the revised baseline would have any effect on these facilities' ability to increase emissions. Over the last 10 years facilities have reduced their emissions due to the imposition of numerous CAA requirements, none of which is changed by the revisions in the NSR rules. Examples of these requirements include category-specific controls such as NSPS and Maximum Achievable

Control Technology regulations for hazardous air pollutants, and controls imposed by specific SIPs. Facilities that have reduced their emissions because of these requirements would be unlikely or unable to increase them to former levels. Indeed, some sources will have lower baselines under the 2002 rules than under the 1980 rules due to recent imposition of required emissions reductions.

Petitioners' studies also do not address whether any of the emissions reductions were the result of units that have been shut down or altered in ways that permanently reduce their emissions. Recons. TSD at 132-33 (JA XXXX-XX). Nor do the studies consider whether, under the pre-2002 rules, any of the facilities could have utilized a period other than the immediately preceding two years as more representative. Id. Finally, Petitioners' studies do not take into account the fact that if the emission reductions are the result of market factors or other conditions, the facility may increase its emissions to pre-existing levels provided the increase is not the result of a physical change at the facility. Id. at 133 (JA XXXX).

Petitioners' studies are also flawed because they consider emissions on a facility-wide basis, while, except for PALs, the applicability of NSR requirements generally begins with a unit-specific analysis.[43/] Id. Because a number of things can cause emissions from a facility to decrease without affecting emissions from a particular unit (the most obvious being the shutdown of another unit at the facility), an analysis of facility-wide emissions provides no basis to predict whether a modification to a specific unit would or would not trigger NSR requirements.

State Petitioners' analysis also does not account for netting. Under the netting provisions of both the prior and the revised regulations, an increase in emissions from one unit will not trigger NSR requirements if it is offset by emission reductions from other units at the facility. See

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[43/] A facility may contain a number of individual units. See 11-12, supra.

67 Fed. Reg. 80188. The fact that the facilities identified by State Petitioners have experienced emission reductions over the past 10 years means that those facilities may be able to use some or all of those reductions to "net out" of NSR requirements for any emission increases at an individual unit under the prior rule.

In short, after consideration of both its own analysis and the studies submitted by Petitioners, EPA determined that the revised baseline is not likely to have an adverse environmental impact. While some small number of facilities may be able to increase emissions without being subject to NSR under the revised rule when they would not have been able to do so under the old rule, other facilities will take advantage of the flexibility offered by the revised rule to make environmentally beneficial changes. 67 Fed. Reg. 80191-92; NSR Report at 30-31 (JA XXXX-XX); Environmental Analysis at F-7 to F-8 (JA XXXX-XX).[44/] Such technical determinations by the Agency are entitled to considerable deference by the Court. American Trucking, 283 F.3d at 362 (D.C. Cir. 2002). The Agency's decision is supported by the record and should be upheld.

4. EPA's Determination That The 2002 Rule Will Be Economically Beneficial Is Supported By The Record.

State Petitioners, relying on a report by the General Accounting Office ("GAO") that reviewed the rulemaking, challenge EPA's determination that the revised applicability provisions will encourage facilities to implement efficiency-increasing projects. State Br. at 25-26. Energy

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[44/] State Petitioners misstate EPA's analysis when they assert EPA concluded that the revised baseline will not result in emission increases because sources will be compelled to revise their baseline to account for more recent regulatory requirements. State Br. at 23. EPA expects that this will be true at many sources (and that some sources will, in fact, have lower baselines under the revised rule). However, even if the revised baseline results in increased emissions from some sources, any such increases would be counterbalanced by decreases elsewhere resulting from increased efficiency and the imposition of other regulatory requirements.

efficiency is only one of the considerations on which EPA based the rule. Moreover, in its reconsideration of the environmental effects of the 2002 Rule, EPA specifically considered that report and determined that it provided no basis for the Agency to revise the rule. Recons. TSD at 112 (JA XXXX). The GAO report asserts that there are uncertainties concerning the potential impacts of the 2002 Rule, a fact that EPA acknowledges. As EPA noted, however, the GAO report did not find that the Environmental Analysis was incorrect or that the final rule was unjustified. Id. After considering the extensive comments received on the proposals and during reconsideration and the numerous meetings that EPA held with interested parties, EPA determined that the 2002 Rule will be economically beneficial and have minimal environmental impact. That conclusion is supported by the record and is due substantial deference by the Court.

State Petitioners, citing American Petroleum Inst v. EPA, 52 F.3d 1113 (D.C. Cir. 1995), also assert that EPA cannot base its rulemaking on goals other than the pursuit of clean air. State Br. at 26. In that case, the Court invalidated standards for oxygenated gasoline that EPA had promulgated, in part, to encourage the use of ethanol, a renewable resource, over other additives because the specific statutory provision at issue required EPA to base the standard solely on the ability of the oxygenated fuel to reduce emissions. 52 F.3d at 1119. That case is inapposite because, as the Supreme Court recognized in Chevron, the NSR provisions are not so narrowly written, and Congress specifically intended for EPA to consider economic factors in developing the NSR rules. 467 U.S. at 851. Thus, EPA's consideration of both economic and environmental factors in developing the 2002 Rule is entirely consistent with congressional intent.

5. EPA's Analysis Of Business Cycles Supports Use Of A 10-Year Baseline.

There is no basis to Petitioners' claim that EPA could not reasonably base the 10-year lookback period on its analysis of business cycles. See State Br. at 19-20; Env. Br. at 16-17. EPA based the length of the period on a study it commissioned that analyzed business cycles in nine industries. 67 Fed. Reg. 80199/3; J.R. O'Connor, Eastern Research Group, "Business Cycles in Major Emitting Source Industries" (9/30/97) (IV-A-001) (JA XXXX).[45/]

Petitioners' claim that the fact that the 10-year period exceeds the lengths of the cycles identified in the study is inconsistent with EPA's rationale, State Br. at 19; Env. Br. at 16-17, appears to be based on a misunderstanding of the concept of a cycle. While 10 years may exceed the length of a business cycle for most industries, emissions in the years preceding a peak will generally be lower than the peak value. EPA's intent was to establish a period in which at least one peak of the business cycle would occur for most industries. Since the study found that business cycles in nine source categories varied from three to eight years, the choice of a 10-year period makes it likely that at least one cycle peak will occur within the lookback period. 67 Fed. Reg. at 80200/1.[46/] Thus, the fact that the period is longer than one cycle in no way undermines EPA's rationale. Furthermore, the study was limited in scope, and EPA is aware that some industries may have longer business cycles. 67 Fed. Reg. at 80200. Based on the evidence

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[45/] There is no basis to Petitioners' claim that EPA was required to provide notice of the business cycle study. Env. Br. at 16 n.8. EPA provided notice and opportunity to comment on the use of a 10-year lookback period. Recons. TSD at 13 (JA XXXX). Moreover, Petitioners have identified no additional information that they would have provided had the study been available for comment, and thus even if there was error, it was harmless. See 42 U.S.C. § 7607(d)(8).

[46/] As discussed at 126-127, infra, EPA determined that it would be inappropriate to extend the baseline period further than 10 years.

available, EPA reasonably determined that a 10-year period best provides that a maximum number of sources will experience at least one peak during the period, while still being consistent with the time frames generally used in air quality planning.

It is also reasonable for EPA to allow sources to establish their baseline on the basis of emissions rather than utilization. See Env. Br. at 18. EPA properly assumed that emissions are highly correlated with utilization. See Puerto Rican Cement, 889 F.2d 297-98 (recognizing that increased production is generally correlated with increased emissions). The decision to shift from utilization to emissions, however, reflects the Agency's determination that a number of factors other than utilization can influence emissions, including the price and availability of alternative fuels or raw materials and the varying product mixes that a facility may produce. TSD I-2-11 to I-2-12 (JA XXXX-XX). EPA's goal in establishing the baseline was to allow facilities to consider their entire range of operations. Thus, EPA reasonably allowed facilities to employ their maximum emissions as the baseline rather than attempting to establish alternative criteria that may be inapplicable to some facilities. Furthermore, to the extent that a facility has had lower levels of emissions since the baseline year because of the imposition of additional regulatory requirements, the Rule requires that the baseline be reduced to account for those requirements. TSD I-3-8 to I-3-9 (JA XXXX-XX).

Finally, there is no basis to Petitioners' claim that the fact that implementation of EPA's former rules generally required sources to employ the immediately preceding two years as their baseline renders the revised rule arbitrary or capricious. Env. Br. at 18-19. As described above, EPA has determined that allowing a facility to consider its entire scope of normal operations in establishing its baseline is both economically and environmentally beneficial. The new regulation

is intended to remove the administrative obstacles that hindered facilities from doing so under the old regulations. See 19-21, supra.

6. EPA Did Not Base The Revised Baseline On "Causation Grounds."

Environmental Petitioners' claim that EPA cannot justify the revised baseline on "causation grounds," Env. Br. at 15-19, is meritless because EPA did not base the rule on any concept of causation. Rather, as discussed above, EPA based the revised baseline on its determination that: (1) allowing facilities to consider their full range of operations in determining whether an emissions increase would occur is more appropriate than always requiring facilities to employ the immediately proceeding two years; and (2) the use of a fixed time period creates more certainty and less administrative burden than the current provision, which allows sources to employ a more representative period if authorized by their permitting authority. 67 Fed. Reg. 80199-200.

Environmental Petitioners base their argument on an apparent misunderstanding of two sentences from the Technical Support Document. Env. Br. at 15. Read in proper context, these sentences do not have the meaning ascribed to them by Petitioners. The first sentence simply reiterates the statutory requirement that, to be considered a modification, an emissions increase must result from a physical change. TSD at I-2-8 (JA XXXX). This principle must be part of any methodology to determine whether an emissions increase has occurred. The second sentence cited by Petitioners was made in the context of responding to comments concerning whether the revised rule makes increment tracking more difficult. It simply states that the revised rules allow a source to distinguish between those emission increases that are related to the change and those that are not and that both types must be counted for the purpose of calculating increment consumption. Id. at I-2-7 (JA XXXX). Neither of these sentences states that EPA adopted the revised baseline to enable facilities to distinguish between these two types of emission increases.

Because EPA did not base the revised baseline on "causation grounds," Petitioners' claim that the rule is inconsistent because it retains the use of the immediately preceding two years for calculating increment consumption, Env. Br. at 15-16, is a non sequitur. Furthermore, increment consumption is calculated using the emissions of all sources in an area over the prior two years. It has nothing to do with how the baseline is calculated for determining NSR applicabiltiy. 67 Fed. Reg. 80196/2, 80202/1; TSD at I-2-7 (JA XXXX). For the same reason, Petitioners' argument that EPA's rule is inconsistent because it may allow facilities to increase their emissions over levels they are physically able to emit, Env. Br. at 17-18, is meritless.[47/] The revised baseline is not designed to distinguish between emissions that are or are not caused by a physical change, and thus the fact that it does not do so is irrelevant.

Environmental Petitioners further misrepresent EPA's actions when they state that EPA determined that any emissions increases not exceeding the revised baseline are "per se unrelated to that change." Env. Br. at 16. In promulgating the revised baseline, EPA did not determine that emission increases below the revised baseline are not related to a physical change, but rather that emission levels that do not exceed those during the range of a facility's operations prior to the change are not an "emissions increase" that should be subject to NSR. Accordingly, Environmental Petitioners' claim that the revised baseline is arbitrary and capricious is meritless.[48/]

[47/] These two arguments were also waived, because they were not raised in comments to the Agency. See note 40, supra.

[48/] Environmental Petitioners' related argument that the revised baseline serves only to exempt increases that are related to a change, Env. Br. at 15, has been waived because it was not raised in comments to EPA. See note 40, supra.

7. EPA Reasonably Allowed Facilities to Employ Different Baseline Periods For Different Pollutants.

Environmental Petitioners provide no basis for their assertion that the amount of different pollutants emitted by a facility cannot vary on different cycles. Env. Br. at 19-20. To the contrary, the level of pollutants emitted by a facility is based on a number of factors that may vary on different time frames. For example, the emissions of nitrogen oxides ("NOx") from a boiler may be primarily dependent on the level of utilization of the boiler, while the emissions of sulfur oxides ("SOx") may be primarily dependent on the price and availability of fuels containing different levels of sulfur. Under those circumstances, the levels of NOx and SOx will vary on different time scales because they are linked to different business cycles. Similarly, a facility may produce more than one product, each of which would produce its own mix of emissions. Because those products will likely be subject to different business cycles, their peak emissions of different pollutants may well occur at different times. Because the purpose of the revised baseline is to ensure that only emissions above the facility's normal range of operations trigger NSR requirements, it is appropriate to consider each pollutant separately.

Petitioners misread EPA's statement in the TSD when they assert that EPA has conceded that the same period must be used for all pollutants. Env. Br. at 20. Rather, EPA simply agreed with a comment that, for any given pollutant, all units involved in a modification should use the same baseline. TSD I-3-7 to I-3-9 (JA XXXX-XX).

Environmental Petitioners' claim that they did not have an opportunity to comment on this issue, Env. Br. at 20 n.10, is meritless. NSR applicability has always been determined on a pollutant-specific basis, and thus it is certainly reasonable that any revised methodology for

determining the emissions baseline would also be applied on a pollutant-specific basis. Recons. TSD at 14 (JA XXXX).

B. Use of the 10-Year Lookback Period to Determine the Amount of Contemporaneous Decreases or Increases Is Reasonable.

Due to this Court's decision in Alabama Power, EPA's NSR regulations have long provided that, if a physical change at a single unit at a facility would result in a significant emissions increase, the facility may aggregate emissions increases and decreases resulting from "contemporaneous" changes at the facility as a whole to determine if there has been a "net" significant increase in emissions. See 8 and n.4, supra. The regulations define the contemporaneous period as five years or other reasonable period established in a SIP, 40 C.F.R. §§ 52.21(b)(3)(ii), 51.166(b)(3)(ii), and require that for emissions reductions to be credited in the netting analysis the reductions must be surplus, quantifiable, enforceable, and permanent. Id. § 51.165(a)(1)(vi).

Environmental Petitioners assert that EPA has violated Alabama Power by allegedly extending the "contemporaneous" period to 15 years because the 2002 Rule allows use of the 10-year lookback method for calculating the amount of a decrease (or increase). Env. Br. at 20-23. This argument must be rejected because EPA has not changed the definition of "contemporaneous." Recons. TSD at 17 (JA XXXX). While a source can look back up to 10 years to determine the size of the emissions reduction, to get credit for it, sources must have taken an action within the five year (or State-specified) period that reduced the amount of the pollutant that the facility could legally emit.

Environmental Petitioners' claim that the use of the lookback period for netting is inconsistent with EPA's "causation" rationale, Env. Br. at 22-23, is meritless. As discussed above,

EPA's adoption of the 10-year lookback period was not based on any concept of "causation."[49/] Rather, EPA's rationale for this regulatory change is the same as that described above: based on information gathered during a long rulemaking process, EPA has determined that a facility should be able to consider its range of operations in determining whether an emissions increase or decrease has occurred.

C. The Five-Year Lookback Period for Electric Utility Steam Generating Units Is Appropriate.

In the preamble to its 1992 NSR regulations, EPA articulated a presumption that, for utilities, any two years within the previous five would be the appropriate baseline, although utilities could seek a different baseline if more appropriate. 57 Fed. Reg. 32325-26. EPA codified this presumption in the 2002 Rule. Like the 10-year lookback period that EPA has adopted for other sources, the baseline test for utilities allows them to consider their range of activities in determining whether a physical change has resulted in an emissions increase that requires NSR permitting.[50/] Accordingly, Environmental Petitioners' claim, Env. Br. at 23-24, should be rejected.

D. The PAL Provisions Are Consistent with Clean Air Act Requirements.

The Plantwide Applicability Limit ("PAL") provisions of the 2002 Rule allow a facility to establish a plantwide emissions limit and provide that NSR does not apply to any changes made at

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[49/] There is no basis to Petitioners' claim that EPA failed to provide notice of its use of the 10-year baseline for netting. Env. Br. at 21 n.11. EPA provided notice of its intent to generally change the baseline period, and it sought comment on changing the contemporaneous period. Reconsideration TSD at 16-17 (JA XXXX-XX). That EPA might use the same baseline methodology for calculating all emission increases and decreases used in the netting analysis was foreseeable from the proposal.

[50/] EPA has determined that a five-year period is generally adequate to capture the variability in the emissions of electric utilities. 67 Fed. Reg. 80200/2-3.

the facility provided its emissions, as a whole, do not exceed the PAL. 67 Fed. Reg. 80206-07. PALs are established by adding the NSR significance levels to the facility's baseline, which is established using a 10-year lookback procedure.[51/] EPA determined that PALs have both economic and environmental benefits. Id. at 80207-08. The economic benefits result from the additional flexibility that PALs provide facilities to make changes in their production processes without undertaking activity-specific applicability determinations and possibly undergoing an NSR permit process. This allows facilities to respond more quickly to changes in the marketplace. The environmental benefits accrue because facilities with PALs will reduce their emissions to have "headroom" to make future changes and because facilities may not exceed their PALs even for changes resulting in emission increases below the significance levels and thus would not otherwise trigger NSR. 67 Fed. Reg. 80207-08; Environmental Analysis at 6-8 (JA XXXX-XX).

Environmental Petitioners challenge EPA's statutory authority to establish PALs, asserting that the PAL provisions violate the "contemporaneity" requirement of Alabama Power. Env. Br. at 24-30. State Petitioners do not challenge EPA's authority to establish PALs, but they, like Environmental Petitioners, challenge the use of a 10-year baseline in setting PAL levels. State Br. at 20. However, the statute gives EPA ample discretion to make NSR applicability determinations on a facility-wide basis and to use the 10-year baseline. The contemporaneity requirement does not

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[51/] Specifically, the facility's baseline for each pollutant is determined by taking the average emissions rate, in tons per year, of any consecutive 24-month period in the previous 10 years, then subtracting any decreases in emissions resulting from enforceable requirements that have gone into effect since the chosen period and adding the potential to emit of any units that have been constructed at the facility after the chosen period. 67 Fed. Reg. 80208-09.

apply because emissions are capped at a level reflecting baseline actual emissions, thus ensuring that changes will not result in a facility-wide significant emissions increase.

1. EPA Has Statutory Authority To Allow Facilities To Determine Their Emissions On A Facility-Wide Basis.

In Chevron, the Supreme Court determined that Congress did not unambiguously decide whether a facility must determine whether it is a major source on the basis of the emissions of the facility as a whole or the emissions of individual units. Chevron, 467 U.S. at 861-63. Thus, the Court ruled that EPA had discretion to allow States to make that determination on a facility-wide basis. Id. at 865. The statute is similarly ambiguous as to how a facility must calculate its emissions when determining whether a physical change has resulted in a significant increase in emissions. Thus, EPA has discretion to allow a facility to determine whether a change will result in a significant emissions increase on a facility-wide basis.

In the 2002 Rule, EPA exercised its discretion to allow facilities to calculate their emissions on a facility-wide basis where the facility is subject to an enforceable facility-wide emissions limit based on baseline actual emissions. EPA's decision was largely based on its analysis of the experience of facilities in States that have utilized the PAL approach under the previous regulations. These facilities found the use of PALs to be economically beneficial because they provide facilities with increased flexibility to alter their production processes without making time- and resource-intensive case-by-case applicability determinations. The use of PALs was also environmentally beneficial, resulting in emissions reductions compared with what would have occurred without PALs. 67 Fed. Reg. at 80207-08; Environmental Analysis at 6-8 (JA XXXX-XX). On the basis of this analysis, EPA determined that it would be appropriate to include an explicit PAL option in the NSR regulations.

2. The 10-Year Baseline For PALs Is Reasonable.

The Act is silent on how an increase in emissions is to be calculated to determine whether NSR applies. See 36-37, 69, supra. EPA has discretion to fill that gap and has reasonably exercised that discretion by determining that NSR should be required only where a physical change at a facility causes an increase in emissions above those levels that the facility has emitted during its normal range of operations. EPA further determined that 10 years is a reasonable period to capture the normal range of operations for most facilities. This same rationale applies to the PAL provision, which allows facilities to set a facility-wide emissions level that represents the facility's normal range of operations. Allowing the facility to look back 10 years allows it to consider its normal range of operations is just as appropriate for establishing a facility-wide baseline as for establishing a unit-specific baseline.[52/]

Environmental Petitioners state – without citation to statutory or other authority -- that the mere fact that a facility can have the same emissions limit for 20 or 30 years renders the baseline methodology unlawful. Env. Br. at 27. The fact that the PAL can be renewed, after a public process that includes analysis of the facility's emissions during the PAL period, is irrevelant to the lawfulness of the baseline methodology. Furthermore, EPA determined that the renewal provisions further the economic and environmental goals of the PAL provision. PALs are established for 10 years using the 10-year lookback methodology. 67 Fed. Reg. 80208-10. At the time of renewal, if the facility's emissions have been within 80 percent of the PAL during the PAL period, the PAL can presumptively be renewed at the same level. If emissions have not reached that level, the permitting

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[52/] EPA did not base the revised baseline on a need to establish causation between a physical change and an emission increase. See 85-86, supra. Thus Environmental Petitioners' arguments about a causation rationale, Env. Br. at 27, are inapposite.

authority must determine what PAL level is appropriate, considering a number of factors, including the facility's actual emissions. Thus, although the PAL could be lowered, EPA decided not to require an automatic reduction, which "discourages [sources] from undertaking voluntary reductions," which PALs were established to encourage. Id. at 80220/1.

3. The PAL Provisions Are Consistent With Alabama Power.

Environmental Petitioners do not address EPA's statutory authority to allow facilities to calculate emission levels facility-wide. Env. Br. at 26-31. Rather, they assert that the PAL provisions are inconsistent with the contemporaneity requirement of Alabama Power. This claim is meritless. EPA's prior regulations define this contemporaneous period as five years or other reasonable period adopted by the State in its SIP. See 88, supra. Environmental Petitioners assert that the PAL provisions violate this requirement by allowing facilities to offset emission increases with decreases that occurred more than five years earlier. However, there is no conflict between Alabama Power and the PAL provisions of the 2002 Rule.

In Alabama Power, this Court examined EPA's 1978 PSD regulations, which required a facility to undergo PSD review if a change in any unit at the facility resulted in a significant increase in emissions. The Court held that because the PSD provisions of the statute were concerned with controlling a facility's impact on air quality, in order to determine whether PSD applies, a facility must be able to consider whether there is a "net increase of any pollutant from contemporaneous changes." 636 F.2d at 403. Accordingly, EPA's rules were modified to provide that, in determining whether NSR applies, a facility can consider all changes to the facility in the specified period and is subject to NSR only if there has been a net emissions increase greater than the significance levels. See 11-12, supra.

The PAL provisions do not raise the issue of concern in Alabama Power because the determination of whether a change at a facility operating under a PAL triggers NSR is based not on whether there has been an increase in emissions from a particular unit, but on whether the facility-wide emissions limit has been exceeded. 67 Fed. Reg. 80215/2. Under the PAL provisions, if the facility's emissions do not exceed its emissions limits, there has been no "increase" in emissions at all. Thus, the concept of netting, and the accompanying concept of contemporaneity, is completely irrelevant. Accordingly, Alabama Power is inapplicable to the PAL provisions.

Moreover, even if some aspect of the contemporaneity concept were applicable to PALs, the provisions of the rule are consistent with it. See 67 Fed. Reg. 80215-16. Nothing in the statute specifies the length of the contemporaneous period; the matter is left to EPA's discretion. While for States without an approved program, EPA has defined the period as five years for the purpose of considering whether significant increases from a single unit trigger NSR permitting, there is no reason that EPA cannot determine that a longer period is appropriate where a facility is receiving an enforceable limitation on its facility-wide emissions. Because of the amount of effort required to establish a PAL, and the environmental and economic benefits that accrue from the use of PALs, EPA determined that 10 years is an appropriate PAL term.

4. PALs Are Consistent With Statutory Intent.

Environmental Petitioners also contend that the PAL provisions are inconsistent with the Act's intent, apparently based on their belief that NSR's purpose is to compel emissions reductions from existing sources. Env. Br. at 29. As discussed at 5-8, supra, that is the role of the States through their SIPs. NSR is designed to limit increases of emissions from new or modified sources.

Moreover, Congress intended that, in implementing NSR, EPA balance the need for environmental protection with the need for economic growth. Chevron, 467 U.S. at 865.

The PAL provisions do exactly that. They give facilities the flexibility to modify their operations, while simultaneously imposing an enforceable limitation on the facility's emissions. EPA's determination that PALs will have environmental benefits is supported by studies in the record documenting the emissions reductions associated with facilities that have been subject to PALs under existing State programs. 67 Fed. Reg. 80209-10. In contrast, Environmental Petitioners offer nothing but speculation to support their assertion that PALs will result in environmental harm. Env. Br. at 30-31. EPA's conclusion that the PAL provisions properly balance the environmental and economic concerns of the NSR statutory provisions is supported by the record and should be upheld.

E. The Demand Growth Exception Is Reasonable.

Petitioners challenge the provision of the 2002 Rule that allows the determination of whether a change at a facility would result in a significant emissions increase to exclude increases that are unrelated to the change and that result from growth in demand for the facility's product. State Br. at 27-29, Env. Br. at 31-33. These claims are unfounded. Under the statute, NSR permitting is triggered only when a physical or operational change "increases" air pollutant emissions or "results in" emission of a new pollutant. 42 U.S.C. § 7411(a)(4). There must be a causal relationship between the change and emission increases. The so-called "demand growth" exclusion is consistent with this statutory requirement. See 67 Fed. Reg. 80203/2; Recons. TSD at 18 (JA XXXX).

EPA's actual-to-potential applicability test presumed that all emission increases occurring after a non-exempt change were related to the change. Based on its experience with implementing

the statute, in 1992 EPA altered that rule for utilities, allowing them to distinguish between emissions increases unrelated to a change and attributable to independent factors such as demand growth and those related to the change itself. 57 Fed. Reg. 32327-28. In the 2002 Rule, EPA did the same for all facilities. 67 Fed. Reg. 80202-03. The question of enforceability is one uniquely within the Agency's expertise and thus is entitled to considerable deference from the Court. EPA's decision to allow facilities to exclude emission increases associated with demand growth is reasonable and supported by the record.

As an initial matter, Environmental Petitioners' assertion that the demand growth provision excludes even those emissions increases associated with a physical change, Env. Br. at 31-32, is incorrect. The 2002 Rule states that a facility may exclude emissions "that are also unrelated to the particular project." 40 C.F.R. § 51.165(a)(1)(xxviii)(B)(3) (emphasis added). The rule explicitly prohibits facilities from excluding any increases in emissions that are associated with a change, even if they could have been accommodated before the change. See 67 Fed. Reg. 80203/1. Accordingly, EPA's description in the preamble of the effect of the demand growth exclusion is accurate.

Petitioners base much of their argument on the fact that in its 1998 Notice, EPA "tentatively concluded" that demand growth should not be excluded from projected post-change emissions because of enforceability concerns. State Br. at 28-29; Env. Br. at 32-33; see 63 Fed. Reg. at 39,860-61. The fact that EPA has altered its views since the 1998 Notice does not make its final decision unlawful. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). In fact, the purpose of the Notice was to solicit comments before EPA made a final decision. 63 Fed. Reg. at 39857/1. EPA received numerous comments on the demand growth exclusion. See generally TSD at I-4-32 to I-4-37, I-5-37 to I-5-44 (JA XXXX-XX, XXXX-XX);

Recons. TSD at 17-20 (JA XXXX-XX). Commenters provided an array of circumstances, other than a physical or operational change at a facility, that could lead to an increase in future emissions, such as a surge in popularity of a product or a shutdown at a competing facility. In developing its final rule, EPA considered those comments and concluded that retaining the demand growth exclusion is consistent with the CAA, which requires a causal link between the proposed change and any post-change emissions. See, e.g., 67 Fed. Reg. 80202-03; TSD at I-5-43 (JA XXXX-XX). In doing so the Agency determined that emissions increases from demand growth and physical changes can be distinguished and that it is not unreasonable for the owner or operator to make the determination. See Recons. TSD at 19, 21 (JA XXXX, XXXX).

Petitioners' reliance on the 1998 Notice is therefore misplaced. EPA is best-positioned to assess whether any difficulties in enforcement may arise from the demand growth exclusion. See, e.g., 67 Fed. Reg. at 80,204/1 ("The Act provides ample authority to enforce major NSR requirements . . . ."). After considering comments regarding enforceability, EPA concluded that such difficulties would arise in only "a very few cases." TSD at I-5-43 (JA XXXX). Petitioners have provided no record evidence, other than EPA's admittedly tentative remarks in the Notice, to suggest that this conclusion is not reasonable. Neither have petitioners explained how the demand growth provision is inconsistent with the causal link in the CAA. EPA has provided adequate explanation of its departure from the tentative conclusion expressed in the Notice, and nothing more is required. State Farm, 463 U.S. at 43. Again, EPA's interpretation of the statute is entitled to deference. United States v. Mead, 533 U.S. at 218, 227-31 (2001).

F. The 2002 Rule Is Enforceable.

There is no basis for State Petitioners' claim that the 2002 Rule is unenforceable because the regulation does not require sources to keep records if they determine that there is no "reasonable

possibility" that they will be covered by the regulations. State Br. at 29-35. There are numerous regulatory provisions in place, including State Minor NSR programs and CAA Title V, that allow States and EPA to effectively monitor emissions from major sources and determine whether a facility has inappropriately determined that it did not require an NSR permit. TSD I-4-44 (JA XXXX).

In the 2002 Rule, EPA did not alter any of the mechanisms provided by the CAA to take enforcement action against sources that improperly determined that NSR does not apply. In fact, it added a monitoring requirement for changes that have a reasonable possibility of resulting in a significant increase. The previous NSR rules did not previously require non-utility sources that determined that a change would not result in a significant emissions increase to keep such records. Yet, EPA has enforced the NSR requirements against such sources in the absence of a record keeping requirement in the NSR rules. The CAA provides that EPA may bring an enforcement action for, inter alia, a violation of NSR, "on the basis of any information available to the Administrator . . . ." See 42 U.S.C. § 7413(a)(3) (emphasis added). The absence of a recordkeeping requirement for the projected actual emissions, if there is not a reasonable possibility that such emissions will exceed the baseline by a significant amount, does not make the rules unenforceable.

Permits required by State Minor NSR and Title V programs provide an effective means for the States and EPA to monitor the emissions of individual facilities. See 27-28, supra. Minor NSR programs require permitting, generally including monitoring, for most changes that do not require a major NSR permit. The Title V program requires all major sources to have an operating permit, which includes monitoring for applicable requirements. These permit programs provide ample

opportunity for the States and EPA to determine if a facility has made a change that required an NSR permit.[53/] TSD at I-4-40 to I-4-44 (JA XXXX-XX).

State Petitioners further assert that the provision that facilities need not keep records of post-change emissions unless there is a reasonable possibility that a change will result in a significant increase is vague and therefore unenforceable. State Br. at 31-32. However, sources have always had to determine whether a particular activity triggered NSR requirements, and the term "reasonable possibility" has a plain meaning that can easily and consistently be applied. If there is no reason to believe that a significant increase would occur, there is no benefit gained from keeping a record of such decision.

There will be many cases where there will be a reasonable possibility that a significant increase will occur, and the 2002 Rule imposes new recordkeeping requirements in those circumstances. 67 Fed. Reg. at 80197/1; TSD I-2-24, I-4-26 (JA XXXX, XXXX). If a source does not maintain records in that situation, it will have violated the recordkeeping requirements of the NSR Rule. Moreover, States concerned about a lack of recordkeeping "may adopt more stringent provisions in their NSR rules to establish greater accountability on the part of the source if they believe it is appropriate to do so." TSD I-2-24 (JA XXXX).

Nor is there any basis for State Petitioners' claim that including startup, shutdown, and malfunction emissions in calculating both baseline actual and future actual emissions renders the rule unenforceable. State Br. at 32. The regulation merely codifies EPA's existing policy that such emissions should be considered in calculating actual emissions. Recons. TSD at 6-7 (JA XXXX).

[53/] EPA also has authority to enter and inspect facilities, and to require them to provide "such . . . information as the Administrator may reasonably require." 42 U.S.C. § 7414(a)(1)(G). States generally have comparable inspection and information-gathering authority.

State Petitioners' argument is based on an assumption that facilities will unlawfully manipulate their calculations of emissions before and after a change. However, State Petitioners offer no basis for assuming unlawful behavior. Furthermore, as discussed above, EPA and the States have the opportunity to review facilities' emissions; thus, facilities have a strong incentive to estimate their emissions accurately.

The cases cited by State Petitioners do not support their claims. Environmental Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003), dealt with policing of stormwater dischargers admittedly covered by the regulations at issue. In contrast, the 2002 Rule does not impose a recordkeeping obligation on entities that have no reasonable possibility of coming within the regulations (while imposing new requirements on sources that do). EPA will not rely on a source's "own unenforceable estimates of its annual emissions." WEPCo, 893 F.2d at 917. Nor has EPA "put forth only a broad outline of a reimbursement scheme and told the members of the affected industries to figure out the rest for themselves." Specialty Equip Market Ass'n v. Ruckelshaus, 720 F.2d 124, 139 (D.C. Cir. 1983).

As noted, many sources will be required to maintain records for five (or sometimes ten) years. A source must report any exceedances in emissions and a source must make its records available for inspection at the request of the permitting authority. 67 Fed. Reg. 80204/2. Significantly, these record-keeping requirements did not exist in the 1980 regulations, which depended almost entirely on sources to determine the applicability of NSR. In adopting these new record-keeping and reporting requirements, there was no reason for EPA to impose administrative burdens for those sources that cannot reasonably be expected to come within the program. Id.; TSD I-5-25 (JA XXXX). See also comments by petitioner New York, IV-D-053, at 7 (JA XXXX)

(supporting generally the actual-to-future-actual methodology of calculating the baseline and adding, "If adopted, we request that the reporting and record keeping be minimized.").

Finally, there is no basis to State Petitioners' claim that past violations demonstrate that the regulations are unenforceable. State Br. at 34-35. To the contrary, the existence of vigorous enforcement demonstrates that EPA is willing and able to enforce its rules and that facilities have an incentive to be accurate in how they determine whether NSR applies. Furthermore, based on comments, as well as EPA's assessment of other mechanisms that exist to monitor emissions, EPA has reasonably concluded that sources have adequate incentive to accurately determine whether they are subject to NSR requirements. TSD I-4-25 to I-4-27 (JA XXXX-XX). EPA has provided an adequate basis for its decision.

G. The Five-Year Baseline for New Source Performance Standards Is Lawful.

Environmental Petitioners challenge EPA's decision in the 1992 Rule to change the NSPS requirements for electric utilities to provide that NSPS applies only if a change at a unit causes the unit's hourly emissions rate to exceed the highest hourly rate at the unit in the preceding five years. Env. Br. at 45-47; see 57 Fed. Reg. 32330-31. This change in NSPS baseline paralleled the changes that EPA made in the NSR baseline for such units in the same rulemaking (i.e., providing that utilities could use any two consecutive years in the last five as the baseline). The purpose of the change to the NSPS applicability provisions was to ensure that the baseline reflects current achievable levels of operations while simultaneously giving these facilities some flexibility in scheduling nonroutine repair, replacement, and maintenance projects. 57 Fed. Reg. 32331. EPA was particularly concerned that utilities not be unduly burdened in making the changes necessary to comply with the acid rain provisions of the 1990 CAA Amendments. Id.

In challenging the revised NSPS baseline, Environmental Petitioners argue (as they did for NSR) that the statute requires NSPS for "any" physical change that increases emissions. Env. Br. at 46. This argument fails with regard to NSPS for the same reason it fails with regard to NSR. See 72, supra. The revised baseline does not provide an exemption from NSPS requirements. Rather, it specifies what constitutes an "increase" in emissions. Any change that increases emissions, as defined by the regulations, is subject to NSPS. Therefore, the regulation is consistent with the statute, and must be upheld.

H. The Clean Unit Applicability Test Represents A Reasonable Interpretation Of Ambiguous Statutory Language And Will Produce Environmental Benefits.

The Clean Unit applicability test ("Clean Unit test") provides sources installing state-of-the-art air pollution controls on a unit with a limited period of additional certainty and operational flexibility during which – provided the terms and conditions of the Clean Unit permit are satisfied – physical or operational changes at the Clean Unit will not trigger NSR. EPA anticipates that the Clean Unit test will improve the NSR regulations in several ways. First, it will create an environmental benefit, giving sources an incentive to install air pollution controls that would not otherwise be required in order to gain the flexibility that comes with Clean Unit status. Environmental Analysis at 8 (JA XXXX).[54/] The test will also promote efficiency, because once a unit has qualified as a Clean Unit, a facility has increased flexibility to make rapid changes in response to market demands without needing to obtain a preconstruction permit. TSD at I-9-4 (JA XXXX); 67 Fed. Reg. 80222/3. In addition, reviewing authorities benefit from increased

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[54/] Good examples of this are utilities that will install, or have installed, seasonal NO_x controls. For the relatively modest added cost of operating and maintaining these controls year-round, these utilities could presumably qualify for the Clean Unit designation, and the flexibility offered by Clean Unit test may offer an incentive for them to do so. See Environmental Analysis at 9 (JA XXXX).

administrative efficiency, because the Clean Unit test eliminates permitting requirements that produce little or no environmental benefit. Id.

The Clean Unit test remains protective of the environment. A unit cannot qualify as a Clean Unit without demonstrating both that it has installed state-of-the-art pollution controls and that emissions from the unit will not have an adverse air quality impact. 67 Fed. Reg. 80222/2-3; see also 104-06, infra. Furthermore, all of the conditions on which Clean Unit status is predicated – emissions limitations, work practice requirements, and any other requirements or assumptions underlying the grant of Clean Unit status – must be incorporated into a permit. If a project at a Clean Unit would require a change in any of the limitations or assumptions embodied in the permit, then the unit loses its Clean Unit status. 40 C.F.R. § 52.21(x)(2)(iii), (y)(2)(iii); see also TSD at I-9-8 (JA XXXX). Then, a source would be required to either: (1) re-qualify that unit as a Clean Unit based on its new operating conditions, or (2) forego the flexibility offered by Clean Unit status and undergo NSR if the project results in a significant increase in emissions. Id.

State and Environmental Petitioners' arguments against the Clean Unit test are largely based on a fundamental misconception, i.e., that EPA has determined that some emissions increases should be "exempt" from NSR, or has otherwise allowed sources to "avoid" applicable NSR requirements. State Br. at 36-42; Env. Br. at 33-37. In creating the Clean Unit test, EPA exercised its discretion to interpret the ambiguous statutory term "increase" and created an alternative NSR applicability test. See 40 C.F.R. § 52.21(a)(2)(iv)(e); see also 67 Fed. Reg. 8089/3-190/1 (explaining that Clean Unit test "does not exclude consideration of physical changes or changes in the method of operation of Clean Units from major NSR, but rather changes the way emissions increases are calculated for these changes"). Because that test is rational and consistent with the Act it must be upheld.

1. Regulatory Restrictions On Attaining And Maintaining Clean Unit Status.

There are two categories of potential Clean Units: units that have undergone major NSR and installed Best Available Control Technology ("BACT") or Lowest Achievable Emissions Rate ("LAER") air pollution controls, and units that have not been through major NSR but nonetheless have installed BACT/LAER or comparable air pollution controls. See 40 C.F.R. § 52.21(b)(42), (x)(1), (y)(1).

a. Restrictions on Qualifying for Clean Unit Status via Major NSR.

Any unit that has obtained a major NSR permit within the last 10 years is potentially eligible for Clean Unit status. Id. § 52.21(x)(1), (x)(3)(i). In order for that unit to qualify as a Clean Unit, however, the NSR permit must have required the installation of air pollution control technology that "achieves the BACT or LAER level of emissions reductions." Id. § 52.21(x)(3)(ii)(a); see also 67 Fed. Reg. 80225/1. Control technology may include add-on air pollution controls, work practices designed to reduce air pollution, or pollution prevention activities, provided some "investment" was made to install the control technology.[55/] Id.; 40 C.F.R. § 52.21(x)(3)(ii)(b). However, the unit is not eligible for Clean Unit status "if the BACT determination resulted in no requirement to reduce emissions below the level of a standard, uncontrolled, new emissions unit of the same type." 40 C.F.R. § 52.21(x)(3)(ii)(a).

[55/] In some cases, a reviewing authority's BACT or LAER determination may result in an emissions limitation that can be satisfied without employing any control technology. 67 Fed. Reg. 80225/1. In that case, a unit would not qualify as a Clean Unit by virtue of having gone through major NSR. Id. The unit could, however, voluntarily install pollution controls and seek Clean Unit status via the alternative permitting process discussed below. See 40 C.F.R. § 52.21(y)(3)(i).

b. Restrictions on Qualifying for Clean Unit Status via Alternative Permitting Process.

Units that have not been through major NSR may qualify as Clean Units via a permit issued through a process including public notice and comment opportunities. Id. § 52.21(y)(7). To qualify a unit as a Clean Unit, a source must demonstrate that it has made an investment to install BACT/LAER or comparable air pollution control technology that reduces the relevant unit's emissions below the level of standard, uncontrolled emissions from a unit of the same type. Id. § 52.21(y)(3)(i). A unit that has not been through major NSR must also demonstrate that "the allowable emissions from the [prospective Clean Unit] will not cause or contribute to a violation of any national ambient air quality standard or PSD increment, or adversely impact an air quality related value . . . ." Id. § 52.21 (y)(3)(ii).

A source may demonstrate that a prospective Clean Unit's air pollution controls are comparable to BACT/LAER in one of two ways. Id. § 52.21(y)(4). The first option is to compare the unit's air pollution control technology to data contained in EPA's RACT/BACT/LAER clearinghouse ("RBLC") database.[56/] Id. However, as EPA noted, "[t]he RBLC may not always identify all the types of control technology strategies that should qualify an emissions unit as a Clean Unit, or it may not provide a representative sample for making an appropriate determination."

[56/] The RBLC database is an on-line registry containing previous RACT, BACT, and LAER determinations. 40 C.F.R. § 52.21(y)(4)(i). Air pollution control technology is presumed to be comparable to BACT or LAER "if it achieves an emission limitation that is equal to or better than the average of the emission limitations achieved by all the sources for which a BACT or LAER determination has been made within the preceding 5 years and entered into the RBLC, and for which it is technically feasible to apply the BACT or LAER control technology to the emissions unit." Id. The reviewing authority must further compare this presumption to any additional BACT or LAER determinations of which it is aware, and consider information received during the public comment period to determine whether the presumption is correct. Id.

67 Fed. Reg. 80224. EPA thus provided a second option, allowing a source to demonstrate that its control technology is "substantially as effective" as BACT/LAER. 40 C.F.R. § 52.21(y)(4)(ii). During the required public comment period "any other person" (i.e., persons other than the source owner or operator) may provide evidence related to whether the control technology is substantially as effective as BACT/LAER. Id.

c. Restrictions on Retaining and Re-qualifying for Clean Unit Status.

Regardless of which route a unit takes to obtain Clean Unit status, the requirements for maintaining that status are the same. All terms and conditions related to the Clean Unit designation must be incorporated into a source's Title V permit, which must include the following information:

- a statement that the unit is a Clean Unit, and a list of the pollutant(s) as to which the unit qualifies as a Clean Unit;[57/]
- the effective and expiration dates of the Clean Unit designation;
- all emissions limitations and work practice requirements adopted in conjunction with the BACT/LAER determination (or the determination that the unit has BACT/LAER-comparable pollution control technology), and any physical or operational characteristics that formed the basis for that determination;
- monitoring, recordkeeping, and reporting requirements to demonstrate that the emissions unit continues to meet Clean Unit criteria; and
- terms establishing the source owner or operator's duties to maintain the Clean Unit designation and the consequences of failing to do so.

[57/] A Clean Unit designation applies individually for each regulated pollutant emitted by a unit. 40 C.F.R. § 52.21(x)(3), (y)(3). Thus, a unit that emits multiple pollutants could qualify as a Clean Unit with respect to one pollutant but not with respect to other pollutants.

40 C.F.R. § 52.21(x)(6), (y)(8). A unit retains its Clean Unit status only so long as the source complies with all permit terms that relate to the Clean Unit designation. Id. §52.21(x)(7), (y)(9). Most significantly, a source loses Clean Unit status, and becomes potentially subject to all NSR requirements, if a proposed project would "cause the need for a change in the emission limitations or work practice requirements . . . for the unit" and "would . . . alter any physical or operational characteristics" on which the BACT/LAER or comparability determination was based. Id. § 52.21(x)(6), (x)(2)(ii), (y)(2)(ii).[58/] Finally, Clean Unit status automatically expires ten years after its effective date.[59/]

Once Clean Unit status has been lost, or has expired, a unit may re-qualify as a Clean Unit using either method discussed above. Id. § 52.21(x)(3), (y)(3). A source is not necessarily required to make an additional investment in air pollution control technology in order to re-qualify as a Clean Unit. 67 Fed. Reg. 80226/3. Beyond that, however, the source must meet all elements of the Clean Unit test, including demonstrating that the unit's air pollution control technology meets BACT/LAER standards at the time of renewal. Id.; see also 40 C.F.R. § 52.21(x)(3)(iii), (y)(3)(iv). If the technology does not meet current standards, then the unit will be required to adopt additional pollution controls if it wishes to re-qualify as a Clean Unit. 67 Fed. Reg. 80226/3.

[58/] A project that causes the loss of Clean Unit status is itself potentially subject to NSR requirements as if the unit were not Clean Unit. 40 C.F.R. § 52.21(x)(2)(iv); see also id. § 52.21(y)(2)(iii), (iv).

[59/] The Clean Unit effective date varies. For those units that have been through major NSR, Clean Unit status is effective on the earlier of the date that the unit's air pollution control technology is placed into service or three years after the major NSR permit is issued. 40 C.F.R. § 52.21(x)(4)(i). For units that have not been through major NSR, the effective date is the later of the date that the unit's air pollution control technology is placed into service or the date that the required permit is issued. Id. § 52.21(y)(5).

2. Petitioners Have Failed to Demonstrate That EPA's Adoption of the Clean Unit Test Was Arbitrary Or Capricious.

State and Environmental Petitioners challenge the Clean Unit test, arguing that it does not represent a reasonable interpretation of the Act. See generally State Br. at 35-41; Env. Br. at 33-40. Their challenge is not well-founded. Although the Act provides that NSR is triggered by a physical or operational change that produces an "increase" in emissions, it does not specify how, or from what point, the "increase" is to be measured. EPA reasonably interpreted this ambiguous term such that, provided a Clean Unit remains in compliance with its Clean Unit permit (including any emissions limitations in that permit), physical or operational changes at that unit will not be deemed to cause an "increase" in emissions, and thus will not trigger NSR. See 67 Fed. Reg. 80228-29. Petitioners also understate the requirements of the Clean Unit test and the safeguards that apply once Clean Unit status has been established. Finally, Petitioners overlook the environmental benefits EPA determined will accrue from the Clean Unit test. See Environmental Analysis at 8-11 (JA XXXX-XX). State and Environmental Petitioners' challenge to the Clean Unit test should therefore be rejected.

a. EPA Reasonably Interpreted Ambiguous Statutory Language.

In creating the Clean Unit test, EPA exercised its Chevron discretion to interpret an ambiguous term in the Act.[60/] A "modification" triggering NSR is defined as a physical or operational change "which increases the amount of any air pollutant emitted" by a stationary source. 42 U.S.C. § 7411(a)(4). The reference to an "increase" is ambiguous, in that it leaves unstated both the baseline (i.e., the level from which the "increase" is measured) and the method of measuring that

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[60/] State Petitioners argue that EPA cannot justify the Clean Unit test as a de minimis exemption from NSR. See State Br. at 40. EPA has not attempted to do so.

"increase." See 67 Fed. Reg. 80228/2 (Act "is silent on whether increases in emissions for purposes of determining whether a physical or operational change constitutes a modification must be measured in terms of actual emissions, potential emissions, or some other currency"); see also 69-71, supra. EPA applied its discretion to establish an allowable-to-allowable NSR applicability test for certain limited circumstances, whereby physical or operational changes at a Clean Unit will not trigger NSR provided the facility complies with the conditions of its Clean Unit permit. See 67 Fed. Reg. 80189/3-190/1; 80229/1.

EPA's establishment of the Clean Unit test is a reasonable exercise of discretion and serves the purposes of the Act. As EPA explained:

> . . . Clean Units improve the NSR regulations in several ways. The Clean Unit applicability test benefits the public and the environment by providing facilities with an incentive to install state-of-the-art emissions controls, even if they would not otherwise be required to control emissions to this level. Owners or operators will benefit from these final rules because they are provided with increased operational flexibility. Once facilities have installed state-of-the-art emissions controls on an emissions unit and it has been designated a Clean Unit, they may make changes to respond rapidly to market demands without having to obtain a preconstruction major NSR permit. Moreover, the facility and the reviewing authority will benefit from increased administrative efficiency.

TSD at I-9-3-4 (JA XXXX-XX); see also id. at I-9-8 (JA XXXX); Recons. TSD at 121 (JA XXXX); 67 Fed. Reg. 80222/2-3. EPA's conclusions regarding the potential environmental benefits of the Clean Unit test are supported by EPA's review of a flexible permit pilot program, under which a facility with a flexible permit installed controls going beyond minimum requirements, and five facilities with flexible permits lowered their emissions over their permit terms. See Environmental Analysis at 9 (JA XXXX); see also id. at App. A p. 4 (JA XXXX).[61/]

[61/] The six pilot permits studied by EPA each included "one or more plant-wide caps on emissions of Volatile Organic Compounds (VOC) and/or criteria air pollutants." Environmental (continued...)

[61/](...continued)
Analysis

(continued...)

State and Environmental Petitioners argue that the Clean Unit test improperly "switche[s] focus" from emissions increases to the pollution control technology installed at a source. State Br. at 37-38; Env. Br. at 34-35. This is not an accurate characterization. The focus remains on emissions increases, as it must under the Act. The question the Act leaves unanswered, and that EPA addressed in creating the Clean Unit test, is how an "increase" in emissions is to be measured. For units qualifying as Clean Units, EPA reasonably determined that an "increase" can be measured with reference to the emissions limitations or work practice requirements contained in their permits. 67 Fed. Reg. 80228/2. In other words, the terms of the permit establish the Clean Unit's baseline. Installing pollution control technology thus is a necessary step towards qualifying as a Clean Unit, but it is not sufficient – unless the Clean Unit continues to comply with the emissions limitations or work practice requirements contained in its permit (i.e., remains at or below its baseline), it will lose Clean Unit status, and will be potentially subject to NSR.

State Petitioners further argue that the 10-year duration of Clean Unit status "overlooks evidence that 'clean unit' determinations will become quickly outdated because pollution control technology advances rapidly over just a few years." State Br. at 40; see also Env. Br. at 38. EPA did not "overlook" anything; rather, it weighed all of the information in the record, including data suggesting that changes in pollution control technology over a span of 10 years are likely to be incremental at best. Environmental Analysis at 10-11 and Appendix C (JA XXXX); TSD at I-9-8,

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[61]/(...continued)
App. A at 12 (JA XXXX). EPA found that "five of the sources with flexible permits lowered actual plant-wide emissions during their permit terms, and the sixth source lowered its emissions per unit of production during the permit term." Id. App. A at 4 (JA XXXX). Furthermore, under its flexible permit, one facility installed VOC controls that went beyond current minimum requirements "because it expected to make a series of innovations and related operational changes." Id. at 9 (JA XXXX).

20-21, 23-24, 25 (JA XXXX, XX-XX, XX-XX, XX); TSD at II-5-3 (JA xxxx); Reconsideration TSD at 122 (JA XXXX). EPA also took into account the anticipated useful life of pollution control equipment, which EPA found to generally exceed 10 years. 67 Fed. Reg. 80226/3, 80229/2-3. The 10-year Clean Unit duration reflects EPA's reasonable "balance between the unit's useful emissions control equipment life and the time frame in which additional major NSR review is likely to result in no added environmental benefit." Id. at 80229/2. At the end of that 10 years, moreover, a unit that wants to re-qualify as a Clean Unit would have to adopt any intervening advances in pollution control technology necessary to meet then-current BACT/LAER standards.

b. State and Environmental Petitioners Understate the Regulatory Safeguards Surrounding Clean Unit Status.

As earlier explained, the purpose of NSR is to require that facilities that make changes that increase their emissions meet emission limits reflecting state-of-the-art control technology, and to assure that any increased emissions from such facilities will not adversely affect air quality or exceed PSD increments. See 73-75, supra. The Clean Unit test is subject to strict limitations that meet these objectives. A unit cannot be designated a Clean Unit without having gone through either a major NSR review that resulted in the adoption of BACT/LAER air pollution controls or an alternative permitting process that confirms that the unit has BACT/LAER or comparable air pollution controls. Sources that have not been through major NSR must also demonstrate that allowable emissions from the Clean Unit will not cause or contribute to a violation of a NAAQS or PSD increment. 40 C.F.R. § 52.21(y)(3)(ii). Finally, all of the assumptions and conditions underlying the grant of Clean Unit status must be incorporated into a permit. If a source does not comply with those permit terms, or if it undertakes a project that would require a change in the terms of its Clean Unit permit, then it loses Clean Unit status. Id. § 52.21(x)(2)(iii); see also 67 Fed.

Reg. 80230/3.[62] Finally, Clean Unit status lasts only for 10 years – a time span over which EPA concluded that pollution control technology is unlikely to change significantly. TSD at I-9-4 (JA XXXX); 67 Fed. Reg. 80229/2-3.

State/Environmental Petitioners ignore or understate these regulatory safeguards. First, State Petitioners understate the level of pollution control technology required to qualify for Clean Unit status. State Br. at 39 (claiming that a unit can qualify as a Clean Unit merely by reducing emissions to "the level of a standard, uncontrolled emissions unit of the same type"). Any source seeking Clean Unit status is required to demonstrate that it has air pollution controls in place, and that those controls either are approved as BACT/LAER or attain comparable levels of control. The source must demonstrate that its pollution control technology reduces emissions "below the level of a standard, uncontrolled emissions unit of the same type." 40 C.F.R. § 52.21 (x)(3)(ii)(a), (y)(3)(i)(a); see also 67 Fed. Reg. 80225, 80230; TSD at I-9-25, 26, 43 (JA XXXX, XXXX, XXXX); Reconsideration TSD at 49 (JA XXXX).

Environmental Petitioners also gloss over a critical safeguard by referring to Clean Unit status being "renewed" after it has expired. See, e.g. Env. Br. at 34 (alleging that Clean Unit status "can be renewed for additional 10-year periods"). Clean Unit status cannot be "renewed" in the automatic manner suggested by Environmental Petitioners; rather, a unit must re-qualify every 10 years if it wishes to remain a Clean Unit. This is more than a semantic distinction. To re-qualify, a unit must meet the Clean Unit criteria as if it were qualifying for the first time. 40 C.F.R.

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[62] State Petitioners' claim that a Clean Unit could freely undertake a physical change that allowed it to increase its hours of operation, and thereby its emissions, without undergoing NSR is thus without merit. See State Br. at 40-41. The Clean Unit permit will contain protections preventing any emissions increase that could cause or contribute to a violation of a NAAQs or a PSD increment.

§§ 52.21(x)(3), (y)(3).[63] Critically, this includes the requirement that a source demonstrate that it is employing BACT/LAER (or comparable) pollution control technology based on then-current standards, and that it make the required air quality showing. Id. If the source's existing air pollution control technology no longer meets BACT/LAER standards, then it will be required either to upgrade its air pollution controls or to forego future Clean Unit status.

Finally, Environmental Petitioners claim that the public "loses its opportunity to participate in the permitting process" when a Clean Unit makes physical or operational changes without going through NSR. Env. Br. at 36. This is not accurate. A unit cannot become a Clean Unit without going through some public process. Units that have not been through major NSR (which includes a public process) may qualify as Clean Units "only . . . through a permitting program that has been approved by the Administrator and that . . . [includes] requirements for public notice of the proposed Clean Unit designation and opportunity for public comment." 40 C.F.R. § 52.21(y)(7) (emphasis added); see also 67 Fed. Reg. 80231/1. In addition, the terms and conditions underlying the grant of Clean Unit status must be incorporated into the source's Title V permit. 40 C.F.R. § 52.21(y)(8). This allows for a second round of public participation. Finally, changes at a Clean Unit that do not trigger major NSR may still require the source to obtain a State minor NSR permit – and federal regulations require that State minor NSR programs include public participation. See 42 U.S.C. § 7410(a)(2)(C); 40 C.F.R. §§ 51.160-51.163. Thus there is no support for Environmental Petitioners' contention that the public is shut out of the Clean Unit process.

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[63] The one exception is that if the unit's existing pollution control technology still meets BACT/LAER standards at the time of re-qualification, a source may not be required to make an additional investment in pollution control technology. 67 Fed. Reg. 80226/3.

c. EPA Properly Concluded That Clean Unit Status Is Not Automatically Lost When an Area Is Redesignated.

The Clean Unit test provides that if an area is re-designated from attainment to nonattainment, Clean Units in that area do not automatically lose their Clean Unit status. 40 C.F.R. § 52.21(y)(11). Thus, a Clean Unit that installed BACT or comparable air pollution controls remains a Clean Unit (until Clean Unit status is lost or expires) without being required to install LAER or comparable controls.

State Petitioners' objections to this provision of the Clean Unit test are misplaced. See State Br. at 42-43.[64/] First, under the 1980 rules, sources that have undergone major NSR and obtained permits based on the installation of BACT are not required to convert to LAER or obtain offsets to retain their NSR permits when an area is redesignated, unless they make a subsequent change that triggers NSR; thus, it would be inconsistent to require Clean Units to do so. See Recons. TSD at 99 (JA XXXX). Second, this limited window lasts only until the Clean Unit designation expires or is lost. At that time, Clean Unit status can only be regained if the unit re-qualifies under the requirements applicable in the redesignated area. Id. Thus, if anything, Clean Units are subject to more scrutiny following redesignation than would otherwise be the case. A unit that has gone through major NSR and obtained a permit based on the installation of BACT could continue to operate indefinitely, even if the area were redesignated, provided it did not trigger NSR again. A

[64/] State Petitioners claim that Clean Unit status "excuses" units from meeting offset requirements (in nonattainment areas) or from preparing an air quality increment analysis (in attainment areas). State Br. at 41-42. Because the Clean Unit provisions establish an alternate NSR applicability test, these requirements never come into play. Recons. TSD at 59 (JA XXXX). EPA reasonably determined that there is no increase in emissions (and hence NSR is not triggered) provided a Clean Unit complies with its Clean Unit permit. These arguments were also waived because they were not raised in comments to EPA. See note 40, supra.

Clean Unit, if it wishes to remain a Clean Unit, must be re-assessed every ten years under the then-current attainment and BACT/LAER standards.

Finally, State Petitioners offer no factual support for their contention that the retention of Clean Unit status when an area is re-designated will make it more difficult for states to attain the NAAQS. State Br. at 43. EPA reasonably concluded that, taken as a whole, the changes embodied in the 2002 Rule will have a neutral or beneficial environmental impact compared to preceding rules, and that the availability of the Clean Unit test is likely to produce an environmental benefit by encouraging facilities to install state-of-the-art air pollution controls that would not otherwise be required. See 78-79, 102-03 supra.

I. EPA Reasonably Exempted Projects Designed to Reduce Emissions from NSR.

EPA promulgated the Pollution Control Project ("PCP") exclusion to address the Catch-22 faced by sources when air pollution control technology decreases emissions of one pollutant but increases collateral emissions. 67 Fed. Reg. 80232/2.[65/] If collateral emissions increase significantly, the addition of pollution control equipment could trigger NSR, even if such controls produce a net environmental benefit. This, in turn, creates a regulatory disincentive, discouraging sources from voluntarily installing environmentally beneficial pollution control technology. Id.; see also TSD at I-10-2 (JA XXXX) (PCP exclusion "removes a regulatory disincentive that might otherwise prevent industry from undertaking voluntary pollution control measures that result in a net environmental benefit"); Environmental Analysis at 11 (JA XXXX) ("NSR regulations can serve as a disincentive for sources seeking to implement environmentally beneficial projects");

[65/] One common example of this situation is the installation of a thermal incinerator, which reduces VOC emissions but produces NOx. 67 Fed. Reg. 80232/2.

Recons. TSD at 127 n.9 (JA XXXX) (noting that rulemaking record includes examples of foregone pollution control projects). EPA reasonably interpreted the Act to avoid this result, reasoning that "Congress could not have intended to require that, and the Act should not be construed such that, physical or operational changes undertaken to reduce emissions undergo NSR." 67 Fed. Reg. 80283/13. Environmental Petitioners argue that EPA lacks the authority to exempt PCPs from NSR. Env. Br. at 40-45. For the reasons discussed below, this argument is without merit and should be rejected.

1. Congress Could Not Have Intended That The Installation Of Environmentally Beneficial Pollution Control Projects Be Subject to NSR.

The Act provides that NSR is triggered where a source has undergone a "modification," defined in relevant part as a "physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted" by that source. 42 U.S.C. § 7411(a)(4). It is well established that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989). Where a purely literal reading of a statute would produce results "demonstrably at odds with the intentions of its drafters," then "a more flexible, purpose-oriented approach" is called for. Environmental Def. Fund Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996) (citing United States v. Ron Pair Enterprises Inc., 489 U.S. 235, 242 (1989)); see also In re Nofziger, 925 F.2d 428, 434 (D.C. Cir. 1991) ("In statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities – manifest intent prevails over the letter."). Consistent with this basic principle of statutory interpretation, EPA has long held that there are certain activities that, although they are physical or operational changes in an abstract sense, are not activities that Congress intended to be "modifications" triggering NSR. 67 Fed. Reg.

80238/3; 57 Fed. Reg. 32319 ("EPA has always recognized that Congress did not intend that every activity at an existing facility be considered a physical or operational change for purposes of the [sic] NSR"); see also 56 Fed. Reg. 27632.

EPA has long excluded certain pollution control projects from NSR permitting requirements. EPA first included a formal PCP exclusion (applicable only to electric utilities) in the 1992 WEPCo rule. Even before the 1992 Rule, EPA had excluded certain pollution control projects from NSR on a case-by-case basis. See 56 Fed. Reg. 27630 (exclusion would "confirm [ ] EPA's current practice that, pollution control projects which 'do not render the unit less environmentally beneficial' are not 'physical or operational changes,' and hence, are not modifications" for purposes of NSR); 57 Fed. Reg. 32319 ("EPA has consistently excluded pollution control projects from NSR provided that the proposed project would be environmentally beneficial, taking into account ambient air quality.")

In the 1990 amendments, Congress added Title IV to the Act to address the problem of acid rain, requiring dramatic reductions in certain power plant emissions. 57 Fed. Reg. 32318. EPA reasoned that the new regulatory scheme would "provide powerful incentives to sources to undertake pollution control projects." Id. at 32319. EPA further concluded that the "massive industry-wide undertaking of pollution control projects" warranted clarification of NSR applicability, in order to prevent NSR regulations from "inadvertently bias[ing] a utility towards or against any means of complying with the acid rain provisions." Id. In adopting the PCP exclusion for electric utilities, EPA also noted that when Congress adopted the NSR provisions of the Act in 1977, it incorporated the NSPS definition of "modification" by reference. 57 Fed. Reg. 32319. At that time, EPA's regulations defining "modification" for NSPS purposes excluded certain pollution control projects. Id.

Although the exclusion adopted in the WEPCo rule applied only to utilities, EPA thereafter issued guidance under which any source was potentially eligible for the PCP exclusion. See Guidance On Excluding Pollution Control Projects From Major New Source Review (July 1, 1994) (JA XXXX) ("1994 guidance"). The case-by-case approach of the 1994 guidance produced environmental benefits, but only "in a limited fashion." Environmental Analysis at 12 (JA XXXX); see also id. at E-2 (JA XXXX) (calculating that fewer than 10 sources per year had applied for and received exclusion since 1994). Because so few sources sought the PCP exclusion, overall emissions reductions traceable to this exclusion remained small. Environmental Analysis at 12 (JA XXXX). Anecdotal evidence indicated that sources did not apply for the PCP exclusion because: (1) it was too narrow; and (2) the qualification process was uncertain and time-consuming. Id. at Appendix E-2 (JA XXXX). In the 2002 Rule, EPA therefore acted to codify and streamline the PCP approval process to add certainty for sources that seek to qualify for a PCP exclusion. Id. at 12 (JA XXXX). EPA anticipates that these revisions will result in more PCP applicants and a modest increase in qualifying projects, with a corresponding increase in environmental benefit. Id. at 13 (JA XXXX); see also id. at E-1 (JA XXXX). As EPA explained, potential environmental benefits from PCPs "stem not only from reduced adverse effects of criteria pollutants, but also from reduced [Hazardous Air Pollutant] exposures, decreased emissions of stratospheric ozone depletion compounds and greenhouse gases, and benefits in other media." Id. at Appendix E-7 (JA XXXX); see also id. at 11-12 (JA XXXX), E-3-4 (JA XXXX).

Environmental Petitioners argue that the PCP exclusion is contrary to the plain meaning of the Act, and therefore invalid under step one of Chevron.[66/] Env. Br. at 40. Chevron, however,

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[66/] In support of their statutory argument, Environmental Petitioners cite EPA's references to (continued...)

allows for the use of "traditional tools of statutory construction" in assessing Congress's intent. Chevron, 467 U.S. at 843 n.9. As already established, one of those "traditional tools" is the principle that "statutes must be construed reasonably so as to avoid absurdities." In re Nofziger, 925 F.2d at 434. Indeed, this Court has stated that in assessing a statute, it is "incumbent upon [an] agency not to rest simply on its parsing of the statutory language," but to "bring its experience and expertise to bear in light of the competing interests at stake." PDK Labs. Inc. v. DEA, 362 F.3d 786, 797-98 (D.C. Cir. 2004) (emphasis added). That is what EPA did here, concluding that "Congress could not have intended to require that, and the Act should not be construed such that, physical or operational changes undertaken to reduce emissions undergo NSR." 67 Fed. Reg. 80238/3.

Environmental Petitioners also argue that the PCP exclusion is not a reasonable interpretation of an ambiguous statutory term, and therefore fails under Chevron step 2. Env. Br. at 40. EPA believes that the term "physical change" is ambiguous, but EPA was not interpreting that ambiguity in this rulemaking. Instead, EPA concluded that Congress could not possibly have intended that PCPs be considered "physical changes" that would undergo NSR. 67 Fed. Reg. 80238/3. EPA thus did not rely on a Chevron step 2 analysis here. EPA's interpretation would nonetheless be sustainable on Chevron principles as a reasonable construction of an ambiguous statutory term. See American Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (citation omitted) (where literal reading of statutory term would lead to absurd results, term has no

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[66/](...continued)
PCPs as "physical and operational changes." Env. Br. at 42. EPA has never claimed that installing a PCP is not a physical change in the literal sense of the phrase. The key question is whether it is a "physical change" within the meaning of the statute, i.e., whether Congress intended that it is a "physical change" that would subject a source to NSR.

plain meaning and is "the proper subject of construction by the EPA and the courts"). EPA found that "[t]he expression 'any physical change . . . or change in the method of operation' . . . is not defined," 67 Fed. Reg. 80187/3, and reasonably determined that excluding PCPs that meet the criteria in the regulations from NSR requirements is consistent with the goals of the statute.

Environmental Petitioners further argue that the PCP exclusion is unjustified because Congress "knew how to grant exemptions to PCPs when it wished to do so." Env. Br. at 43. In support of this argument, Petitioners cite two limited Clean Air Act provisions. First, Petitioners rely on 42 U.S.C. § 7651n, which provides that certain physical or operational changes made in connection with clean coal technology demonstration projects are not subject to NSR. 42 U.S.C. § 7651n(b). Petitioners did not raise this argument in their comments on either the 1992 or the 2002 rule or in their petitions for reconsideration, and therefore it has been waived. See note 40, supra.[67] In any event, it is without merit. There is no reason to conclude that, solely by creating the clean coal exemption, Congress somehow precluded EPA from crafting a broader regulatory exemption for pollution control projects in general.

Petitioners also rely on 42 U.S.C. § 7511a(e)(2), which provides that a source in an "Extreme [nonattainment] Area" need not acquire offsets for emissions resulting from installation of required pollution control equipment. Env. Br. at 43. Given that there are only two such areas in

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[67] Petitioners' arguments based on the legislative history of the 1970 and 1990 amendments are similarly waived because they were not previously raised. It is, moreover, inaccurate to characterize Congress's prior actions as a permanent "rejection" of PCPs. See Env. Br. at 43. Congress declined to adopt particular PCP exemptions, but there is nothing in the legislative history to suggest that Congress thereby preempted EPA from ever creating a regulatory exemption for PCPs. Finally, Environmental Petitioners' characterization of some of the legislative history appears overly broad. Env. Pet. Br. at 43-44. They reference a discussion of "EPA letters" articulating certain views about a pollution control project exclusion; the discussion in fact concerns a draft EPA interpretive ruling that was never finalized. Legislative History of the Clean Air Act Amendments of 1990 at 6879-6880.

the country (Los Angeles and the San Joaquin Valley), this provision is extremely limited in its applicability, and certainly does not preclude EPA from adopting a more general PCP exemption. As EPA explained in its response to comments when this issue was raised in 1992:

> While there may be some overlap (i.e., utility compliance projects undertaken in the Los Angeles area that qualify under this rule as pollution control projects), in general the two provisions are quite different. Today's rule [i.e., the 1992 PCP exclusion] is limited to utilities but applies to all areas of the country, while section 182(e)(2) applies to all source categories but only to the Los Angeles area. Section 182(e)(2) also appears to apply to a broader category of changes. There is no evidence that Congress intended this limited provision to preempt EPA from adopting a broad pollution control project exclusion.

57 Fed. Reg. 32321-22.[68/]

2. The PCP Exclusion Contains Numerous Safeguards To Ensure Environmental Benefit.

There are two ways of qualifying for the PCP exclusion: a source may either install one of the pollution control technologies that EPA has found to be presumptively environmentally beneficial, or apply to its reviewing authority for approval of an alternative pollution control technology. 67 Fed. Reg. 80239. A source seeking to install one of the presumptively beneficial PCPs is required to notify the relevant reviewing authority, but need not wait for approval before beginning to construct the project, whereas a source seeking to employ any other PCP must obtain approval before proceeding. 40 C.F.R. § 52.21(z)(4)-(5). Regardless of whether a source submits a notice or an application, however, the information provided to the reviewing authority is the same. The notice or application must contain, at a minimum:

- a description of the proposed project;

[68/] At that time, Los Angeles was the only Extreme Area in the country. The San Joaquin Valley was reclassified as Extreme on April 16, 2004, at the request of the San Joaquin Valley Air Pollution Control District. 69 Fed. Reg. 20550 (Apr. 16, 2004).

- a demonstration that the project will be environmentally beneficial (which requirement may be satisfied by a statement that the source will be using one of the presumptively beneficial PCPs);
- information regarding potential increases and decreases of emissions of any pollutant regulated under the Act;
- a demonstration that the project "will not cause or contribute to a violation of any national ambient air quality standard or PSD increment, or adversely impact an air quality related value . . . . ";
- a description of the monitoring and recordkeeping to be used to demonstrate that the project is environmentally beneficial; and
- a certification that the project will be designed and operated in a manner consistent with the environmentally-beneficial analysis, the air quality analysis, and in a manner that minimizes emissions of collateral pollutants.

Id. § 52.21(z)(2).[69/]

If the proposed project does not involve one of the presumptively beneficial PCPs identified by EPA, it must be approved by the reviewing authority via a SIP-approved permitting process that includes public participation and comment. Id. § 52.21(z)(5); see also TSD at I-10-41 (JA xxxx).

[69/] Environmental Petitioners note that the rule contains no explicit requirement that PCP-related emissions increases in nonattainment areas be offset. Env. Br. at 41 n.19. The rule does, however, require that a PCP "not cause or contribute to a violation of any [NAAQS] or PSD increment." Any PCP-related emissions increase that would cause or contribute to such a violation will necessarily have to be offset. See 67 Fed. Reg. 80237/2 ("[B]ecause increases in a nonattainment pollutant contribute to the existing nonattainment problem, you or the reviewing authority must offset with acceptable emissions reductions any significant emissions increase in a nonattainment pollutant resulting from a PCP").

Moreover, even if a proposed project is on EPA's list of presumptively beneficial PCPs, the source may proceed with construction without awaiting approval only if that is allowable under the reviewing authority's regulations (including State minor NSR programs) and the source's existing permit. 40 C.F.R. § 52.21(z)(4); see also TSD at I-10-30 (JA xxxx) (nothing in rule creates exemption from State minor NSR requirements). Finally, a reviewing authority always remains free to rebut the presumption that the PCPs identified by EPA are environmentally beneficial. As EPA explained,

> . . . the environmentally beneficial determination is a presumption that can be overturned in cases where site-specific factors would cause the permitting authorities to determine that a particular proposed PCP project is not environmentally beneficial (for example, an unacceptable increase in collateral pollutant emissions). Also, this presumption does not apply when a source can reasonably suspect that (1) the PCP is not designed, operated, or maintained in a manner consistent with standard and reasonable practices; or (2) the collateral pollutant emissions increases are not minimized within the physical configuration and operational standards usually associated with the emissions control device or strategy; or (3) the unit will be less environmentally beneficial. Also, when a reviewing authority determines that an otherwise listed project would not be constructed and operated consistent with standard practices, they may rebut the environmentally beneficial presumption for that application of the technology.

TSD at I-10-26-27 (JA XXXX-XX) (emphasis added).

Finally, a source's obligations do not stop once a PCP is in place. The source owner or operator is subject to an ongoing duty to "operate the PCP in a manner consistent with proper industry and engineering practices, in a manner that is consistent with the environmentally beneficial analysis and air quality analyses . . . with information submitted in the notice or permit application . . . and in such a way as to minimize, within the physical configuration and operational standards usually associated with the emissions control device or strategy, emissions of collateral pollutants." 40 C.F.R. § 52.21(z)(6)(i). The owner or operator must also maintain onsite copies of the environmentally-beneficial analysis, the air quality impact analysis, and "monitoring and other

emission records to prove that the PCP operated consistent with the general duty requirements" identified above. Id. § 51.166(v)(6)(ii).

Environmental Petitioners ignore these regulatory safeguards, claiming first that under the PCP exclusion, "the public loses its opportunity to participate in the permitting process." Env. Br. at 41. This is not the case. With regard to those PCPs that have been identified in this Rule as presumptively environmentally beneficial, the public had the opportunity to participate in the rulemaking process. In addition, the installation of many presumptively beneficial PCPs will still require State minor NSR permits.[70/] Furthermore, every major source is required to have a Title V permit, which requires public participation at both issuance and renewal. See 27, supra; see also 40 C.F.R. § 52.21(z)(5), (6)(iii). Finally, where a source seeks approval to install any PCP that is not on the "presumptively beneficial" list, the public is guaranteed the right to participate in the permitting process. Non-listed PCPs may only be approved via a permitting process that includes public notice and the opportunity for comment. 40 C.F.R. § 52.21(z)(5).

Environmental Petitioners also challenge PCPs as improvidently self-policing, stating that compliance with air quality requirements "is gauged by the source, with no requirement for approval by the permitting authority." Env. Br. at 41. First, it is not the case that the PCP exclusion is entirely self-policing. Any source seeking to install a PCP is required to demonstrate to its reviewing authority that any collateral emissions increase will not have an adverse air quality

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[70/] Environmental Petitioners note that State minor NSR permits may not be required for presumptively beneficial PCPs, or that even if they are, state minor NSR programs may not require public participation. Env. Br. at 41 n.20. Federal regulations require that State minor NSR programs include the opportunity for public notice and comment. See 40 C.F.R. §§ 51.160-163. Moreover, EPA cited State minor NSR programs as one potential avenue for public participation, but did not rely solely on their existence to justify the PCP exclusion for presumptively beneficial projects.

impact. 40 C.F.R. § 52.21(z)(3). If the PCP is on EPA's list of presumptively beneficial projects, it is true that construction may begin on the PCP without approval from the reviewing authority; however, the reviewing authority always has the option of rebutting the presumption of environmental benefit. 67 Fed. Reg. 80234/3-80235/1; TSD at I-10-27 (JA XXXX); see also 67 Fed. Reg. 80,190 (JA XXXX) (source that fails to meet obligations of any of the NSR Reform provisions may be subject to enforcement provisions of Act). Moreover, if the proposed PCP is not on EPA's list of presumptively beneficial projects, construction cannot proceed without approval from the reviewing authority. 40 C.F.R. § 52.21(z)(5). Finally, to the extent that the PCP exemption is self-policing, it is no different from many other provisions of the Act. In some sense, virtually the entire NSR program is self-policing. EPA and States do not tell sources when they must apply for an NSR permit; rather, sources are expected to know the relevant laws and regulations, and to apply for permits when they are required to do so.

III. NEWMONT'S PETITION SHOULD BE REJECTED BECAUSE EPA HAS APPROPRIATELY REVISED THE BASELINE REQUIREMENTS.

Petitioner Newmont Mining Corporation challenges the provision of the 2002 Rule that limits the baseline period to actual emissions from the past ten years, even if the facility has a permit limit that is higher than actual emissions achieved in that period. Newmont asserts that the 10-year actual emissons limit is too burdensome on industry, requires companies to use all their permitted capacity or lose it, and contravenes the federalism concepts of the CAA. Newmont Br. at 8-10. Newmont also argues that the change is inconsistent with the APA because it is inadequately explained. Id. at 11-13. None of these arguments has merit.[71/]

[71/] As a preliminary matter, the 1980 Rules do not give States the unbridled discretion asserted by Newmont to utilize source-specific allowable emissions to determine NSR applicability. See 45 (continued...)

As discussed at 83-85, supra, EPA explained at length its decision to adopt the 10-year lookback method for calculating the actual emissions baseline to be used in determining whether a change at a unit has resulted in a significant emissions increase. EPA determined that the baseline should allow facilities to consider their full range of normal operations and, based on the data in the record, EPA found that 10 years would capture at least one business cycle for most industries. 67 Fed. Reg. 80199-200 & n.23. EPA considered whether to allow facilities to utilize an alternative method if the 10 years was somehow not representative, but determined that the benefits of a fixed time frame gave "clarity and certainty to the process," and outweighed any flexibility advantages associated with allowing an alternate time frame to be used. Id. at 80200. In responding to comments that a longer period should be allowed in circumstances like those posited by Newmont, the Agency stated, "[a] bounded 10-year look back period provides certainty to the regulated community that may be undermined by an option to allow an unbounded alternative period as well." Id. EPA further explained that "[t]he new rules eliminate the need for a demonstration by the applicant – and a determination by the reviewing authority – of what particular period of time best represents normal source operation. The existing procedures added resource burden and delay in the issuance of a permit determination." TSD I-2-10 (JA XXXX).

Moreover, Newmont disregards the fact that NSR requirements only come into play if a unit undergoes a physical or operational change that results in an emissions increase. 40 C.F.R.

[71/](...continued)
Fed. Reg. 52718 (presumption that allowable emissions represent actual conditions can be rebutted if data shows otherwise). Although Newmont cites the Alaska SIP as an instance in which state regulations, allowed a state discretion to use the source-specific allowable emissions as a substitute for actual emissions, Newmont Br. at 3-4, EPA has criticized the State for using this exemption when there was adequate information available on actual emissions. Final Report, State of Alaska Department of Environmental Conservation Permit-to-Construct Program Review.

§ 52.21(b)(2)(iii)(f). If increased emissions are due solely to increased hours of operation, NSR does not apply. Id. However, if a source needs to bring older units back into use in order to meet increased demand, EPA has explained, "[i]t is more likely that most units that have not been operated for such lengths of time are in need of extensive repairs and refurbishment in order to become fully operable again. Our view is that these are the types of sources that Congress intended to undergo NSR if they are to be brought back into regular operation." TSD I-2-11 (JA XXXX). EPA reasonably determined that the environmental and economic benefits of a fixed 10-year lookback period outweighed any benefits that might accrue from allowing greater flexibility, and that determination is entitled to deference. Chevron, 467 U.S. at 865-66.

Newmont's federalism concerns are also meritless. The statute requires EPA to promulgate regulations governing NSR, e.g., 42 U.S.C. § 7503(a)(1), and the Agency's compliance with that requirement does not impinge on any State's rights. Moreover, the 2002 Rule does not divest States of significant previously-existing discretion because the "source specific allowables" provision was applicable only in narrow circumstances, and in any event it has no utility within EPA's substantially revamped applicability provisions.

Finally, contrary to Newmont's assertions, EPA also explained at length why it concluded that an "allowables" approach is not an appropriate means to measure baseline. See, e.g., TSD I-3-11 (JA XXXX) (discussing why EPA does "not believe allowable emissions . . . are appropriate in general for determining pre-change baseline emissions"); id. at I-5-9, I-5-11; II-3-9 (JA XXXX, XXXX, XXXX). Newmont also contends that EPA has not explained why an "allowables" approach would be acceptable for PALs but not otherwise. Newmont Br. at 11 (citing 67 Fed. Reg. 80206). Newmont overlooks the fact, however, that EPA promulgated a PALs program based on actual emissions, and merely indicated it would propose at a later date a PALs program based on

allowable emissions. 67 Fed. Reg. 80206. EPA has no obligation to explain why it believes an allowables approach is acceptable in a PALs setting unless and until such a rule is promulgated.[72/]

EPA's revised baseline methodology is reasonable, and Newmont's arguments should be rejected.

IV. EPA PROPERLY ADOPTED THE APPLICABILITY TESTS CONTAINED IN THE RULE AS ELEMENTS OF THE BASE FEDERAL NSR PROGRAM.

The Act establishes a federal/state partnership, under which EPA sets air quality standards and States then design implementation plans ("SIPs") (which must be approved by EPA) to meet those standards. See 42 U.S.C. § 7410; see generally Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1202 (D.C. Cir. 1998). The Act requires that SIPs include NSR permitting programs. 42 U.S.C. §§ 7410(a)(2)(C) & (I), 7502(b). Over twenty years ago, in 1980, EPA implemented this statutory mandate through regulations that, inter alia, established mandatory minimum requirements for State NSR programs. See Recons. TSD at 74-75 (JA XXXX-XX); see also 40 C.F.R. § 51.166(a)(7) (iv) (plans "shall use" specified applicability tests); id. § 51.166(b) (plans "shall use" specified definitions). The 1980 regulations also provide that alternative plans may be approved if a State "specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as" the base federal program. 40 C.F.R. § 51.166(a)(7)(iv); see also id. § 51.166(a)(7)(ii)(b).

In its analysis of the environmental impact of the Final Rule, EPA concluded that "collectively, the five NSR Improvements that [EPA] is finalizing will be environmentally beneficial compared to the current program, and will improve air quality by reducing emissions

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[72/] Furthermore, the "allowables" PAL that EPA has considered would require plant-wide limits based on the BACT level of control, and is thus far different from the "any permit limit no matter how old" approach advocated by Newmont.

from industrial facilities." Environmental Analysis at 2 (JA XXXX). These air quality improvements will in turn promote health and welfare benefits by reducing concentrations of regulated pollutants. Id. This conclusion was based on EPA's "thorough review of the rulemaking record" and its long experience with how sources respond to various NSR provisions. Id. at 6 (JA XXXX). EPA further concluded that the various elements of the Rule will work better, and will produce better environmental results, if they are adopted and implemented as a whole. 67 Fed. Reg. 80241/1. EPA therefore added all five elements of the Rule to the base federal NSR program. Id. In so doing, however, EPA simultaneously reaffirmed that "State and local jurisdictions have significant freedom to customize their NSR programs" by adopting alternative NSR programs that are no less stringent than the base federal program. Id.

State Petitioners argue that by adopting additional minimum program elements, EPA has impermissibly encroached on the States' authority. State Br. at 44-46. This claim is unripe. Unless and until EPA is presented with a State plan that contains NSR program elements different from those contained in the Rule, and has acted on that plan, there is no basis on which to judge State Petitioners' claim that EPA has improperly denied them the opportunity to craft an alternative plan.

State Petitioners also claim that EPA's statement that it was considering deviating from a decades-old practice did not provide adequate notice that EPA might equally well decide not to change its existing approach. State Br. at 47-49. This claim is entirely without merit. The 2002 Rule is a logical outgrowth of the proposal, and it must be upheld.

A. State Petitioners' Claim That EPA Has Forbidden Them From Adopting Alternative, Equally Stringent, Applicability Tests Is Not Ripe.

The central premise of State Petitioners' argument is that, by adding to the elements of the base federal NSR program, EPA forced States to adopt NSR permitting programs that are less stringent than their existing programs, or preempted States from developing alternative programs in the future. State Br. at 44-47, 51. This premise is flawed. EPA is not only authorized, but in fact is required to approve a SIP that contains an NSR permitting program that is no less stringent than the base federal program, provided it otherwise meets all applicable requirements. 42 U.S.C. §§ 7410(k)(3), 7416; see also Duquesne Light Co. v. EPA, 166 F.3d 609, 613 (3d Cir. 1999) ("EPA thus has no power to require Pennsylvania to make its plan the same as the federal requirement, provided Pennsylvania's is more stringent than required by the Clean Air Act; rather, EPA by statutory directive must approve a plan when it conforms to the federal minimum."). In adopting the 2002 Rule, EPA specifically recognized that States may still submit alternative NSR permitting programs for approval. See 67 Fed. Reg. 80241/2 (noting that several States have "implemented programs that work every bit as well as our own base programs, yet depart substantially from the basic framework established in our rules," and discussing example of Oregon's plantwide permit program); see also TSD at I-12-3-4 (JA XXXX). As EPA explained, however, the revisions made to the base federal NSR program in this rulemaking simply "do not deal with whether any

individual State programs are more or less stringent than the federal program." Recons. TSD at 76 (JA XXXX) (emphasis in original).

Thus, State Petitioners' substantive challenge to EPA's decision to include the provisions of the Rule as elements of the base federal NSR program is unripe.[73] The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" as well as "protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967). The "familiar two-part test" established in Abbott Laboratories examines (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986). As to the first prong of this test, even where an agency has taken final action, a claim may be unfit for judicial review if the issues raised by that claim "are not suitable for decision in the abstract." Clean Air Implementation Project, 150 F.3d at 1205. Where there are still "too many imponderables," a court will decline review pending further factual development. Id.; see also State Farm, 802 F.2d at 479 (citation omitted) (even when agency action is final and issues presented are purely legal, court may find matter unripe "if postponing review would provide for a more efficient examination and disposition of the issues" or if "the court's deliberations might benefit from letting the question arise in some more concrete and final form").

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[73] It is also without merit. EPA determined that taken collectively, the improvements adopted in the 2002 Rule will be environmentally beneficial compared to the existing NSR program and will improve air quality. Environmental Analysis at 2 (JA XXXX).

To address State Petitioners' challenge to the addition of base program elements now, the Court would be required to assume that: (1) adding the applicability tests found in the Rule to State NSR programs will, necessarily and inevitably, render each and every one of those programs automatically less stringent and less protective of air quality than it is now, and (2) that States will not even attempt to develop alternative state programs, or that if they do so, EPA will necessarily disapprove those programs. The need to make so many assumptions renders State Petitioners' claim unripe. Unless and until a State submits a SIP for EPA approval that includes an NSR program that differs in some respect from the base federal NSR program, and EPA acts on that plan, the Court simply will not have the facts it needs. Without knowing the specifics of what a State submitted, whether EPA approved or disapproved that submission, and why EPA acted as it did, the Court is left with a completely abstract claim.[74/] Moreover, until a State has submitted a plan that it believes to be at least as stringent as the base federal program and had that plan disapproved, the State has not suffered the "immediate, direct, and significant" harm required to satisfy the second prong of the Abbott Laboratories test. Cronin v. Federal Aviation Admin., 73 F.3d 1126, 1133 (D.C. Cir. 1996) (citation omitted).[75/] State Petitioners' challenge to EPA's decision to incorporate the various

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[74/] The claim is rendered even more diffuse by the fact that there are multiple State Petitioners here, each of which may ultimately pursue a different path in its NSR program. The Court is thus faced not with one hypothetical claim, but with a plethora of them.

[75/] State Petitioners would undoubtedly prefer to resolve this issue now, rather than waiting to challenge EPA's action on specific state plans. This desire does not, however, rise to the level of hardship necessary to justify review. Clean Air Implementation Project, 150 F.3d at 1206 (fact that it would be easier and cheaper to bring a single lawsuit rather than defending enforcement actions did not justify review in otherwise unripe case); see also Cronin, 73 F.3d at 1133 (declining review where only hardship plaintiffs would suffer was burden of having to file another lawsuit).

provisions of the Rule into the base federal NSR program elements is thus unripe, and should be dismissed.[76/]

B. State Petitioners' Procedural Challenge Lacks Merit.

In the 1996 proposal, EPA stated that it was considering deviating from its longstanding approach to minimum NSR program elements in one respect:

> In the past, EPA has essentially required States to follow a single applicability methodology. States could, of course, have a more stringent approach but most followed closely the EPA prototype. The EPA is proposing to break with this one-size-fits-all approach to applicability by proposing to adopt these changes as a menu of options from which a State may pick and choose in order to customize a specific approach for its individual needs. . . . . States will then be free to adopt any combination of these menu options into their own regulations and SIP to offer sources these alternatives.

61 Fed. Reg. 38253/1; see also id. at 38251/3 ("Instead of one-size-fits-all solutions to applicability and other issues, states will be allowed for the first time to choose applicability and implementation approaches from a menu of alternatives."). Ultimately, however, EPA decided to retain its existing approach:

> In today's final rule, we have decided not to implement the menu approach. We have opted instead to retain our longstanding approach of incorporating all of the new provisions into our "base" NSR program requirements . . . . Our decision is based primarily on our belief that the NSR program will work better as a practical matter and will produce better environmental results if all five of the new applicability provisions are adopted and implemented. . . . .

67 Fed. Reg. 80241/1-2.

[76/] State Petitioners also argue that the Rule violates the "anti-backsliding" standards contained in Section 193 of the Act, 42 U.S.C. § 7515. See State Br. at 51-52. The State Petitioners again assume that States will have no ability to adopt NSR applicability tests that differ from those in the Rule. For the reasons discussed above, this claim is also unripe.

State Petitioners argue that EPA failed to provide adequate notice that it intended to follow its longstanding practice and incorporate the applicability tests in the Rule into the base federal NSR program, and that EPA further erred by declining to grant reconsideration on this issue. State Br. at 47. This procedural claim is governed by section 307 of the Act, which provides that a court may reverse an action found to be "without observance of procedure required by law" 42 U,.S.C. § 7607(d)(9)(D) only if that action was arbitrary or capricious and "the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8).

EPA is required to provide notice of a proposed action with "reasonable specificity." See Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994). Notice is sufficient so long as it "adequately frame[s] the subjects for discussion" and gives interested parties a fair opportunity to comment. Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982). An agency "need not renotice changes that follow logically from . . . the rules it proposed originally." Id.

The proposal adequately framed the issue of whether the proposed applicability tests would be added to the base federal NSR program. EPA explicitly stated that it was considering a change from its longstanding practice of incorporating revisions to NSR definitions as minimum program elements. See 61 Fed. Reg. 38253/1. In addition, EPA explicitly sought comments addressed to "this [i.e., the proposed "menu"] approach," and included a request for comments regarding "what restrictions, if any, EPA should place on States in selecting applicability options." Id.

It is not credible for the State Petitioners to claim that these statements were insufficient to "forewarn" them that EPA might incorporate the provisions of the Rule into the base federal program. See State Br. at 48. The claim that EPA did not adequately identify the range of possible alternatives is nonsensical – there were two alternatives suggested by the proposal (that EPA would incorporate the Rule into the base federal NSR program, or that it would not), and EPA ultimately selected the first alternative.[77/] EPA's statement that it was considering a change in approach necessarily implied that it was also considering not making such a change; thus, the "logical outgrowth" requirement is satisfied. See American Iron, 886 F.2d at 400 ("One logical outgrowth of a proposal is surely, as EPA says, to refrain from taking the proposed step"); see also Association of Am. R.R.s v. DOT, 38 F.3d 582, 589 (D.C. Cir. 1994) (where Federal Railroad Administration proposed to extend its authority to all aspects of railroad bridge worker safety, noted overlapping jurisdiction with OSHA in some areas, and ultimately left some safety matters to OSHA, final rule was logical outgrowth of proposal. "It takes no great leap of logic or imagination to contemplate that the ultimate outcome of this rulemaking might be no rule, or only partial adoption of the proposed comprehensive rule; and in either case, already-applicable OSHA standards would continue to apply . . . "). In American Iron, this Court concluded that although the language of the final rule "differed radically" from the proposal, the final rule represented a "formal restatement" of a long-established interpretation and thus could be viewed as a logical outgrowth of the proposal. American Iron, 886 F.2d at 400-01. Here, EPA similarly restated and affirmed a longstanding practice, with no corresponding "radical" difference in language.

[77/] Horsehead Resource is thus distinguishable. In that case, none of the alternatives identified by EPA in the proposal included the standard adopted by EPA. Horsehead Res., 16 F.3d at 1267-68.

That the 1996 proposed rule adequately framed the issues is further indicated by the fact that EPA received comments both in favor of and in opposition to making the applicability options contained in the rule into minimum NSR program elements. Reconsideration TSD at 74-75 (JA XXXX).[78] As this Court noted in Horsehead Resource, while notice may not be established based solely on the existence of public comments, "insightful comments may be reflective of notice and may be adduced as evidence of its adequacy." Horsehead Res., 16 F. 3d at 1268; see also Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 ((D.C. Cir. 2004) (where comments were filed in support of and in opposition to proposed distinction, interested parties had understood issues and stakes involved); Association of R.R.s, 38 F.3d at 589 (upholding rule where rulemaking "generated diverse public comment, was fair to affected parties, and gave affected parties an opportunity to develop evidence in the record.")

State Petitioners' argument that the final rule represents an improper change in "regulatory approach" (from promoting state flexibility to relieving burdens on industry) is equally unsupported. State Br. at 49. Both the proposal and the final rule identify NSR reform goals as, inter alia, relieving unnecessary burdens on industry and enhancing industry flexibility, and both the proposal and the final rule recognize that States retain the flexibility to craft alternative, equally stringent

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[78] See, e.g., Comments of the National Environmental Development Association's Clean Air Regulatory Project (IV-D-147) at 7 (JA XXXX) (commenting that proposal gives states too much discretion to "take or leave" NSR reforms); Minnesota Pollution Control Agency Comments (IV-D-52) at 2 (JA XXXX) (urging EPA to "[r]etain one consistent, nation-wide set of definitions and rules for the backbone of the NSR program" but also to "allow each permitting authority to choose one or more options from a short list of alternatives that includes plantwide applicability limits, pollution control/pollution prevention project exclusions, and an option to conduct regulatory 'experiments'."); Kansas Department of Health & Environment comments (IV-D-70) at 2 (JA XXXX) (supporting "menu" approach); Clean Air Implementation Project comments (IV-D-153) at 9 (JA XXXX) (changes should not be implemented through menu format, but should be promulgated as minimum requirements for all SIPs).

NSR permitting programs to suit their individual needs. See 61 Fed. Reg. 38251, 38252/2; 67 Fed. Reg. 80189/1, 80241/1-2. There certainly was no "change in approach" when EPA followed its longstanding practice and adopted the provisions of the Rule as mandatory minimum program elements. See Duquesne Light, 166 F.3d at 611 (noting that "EPA has promulgated regulations regarding minimum criteria for EPA approval of New Source Review SIPs for nonattainment areas which contain a number of definitions which must be used by the states for this purpose."). Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991), cited by State Petitioners for the proposition that a "shift in emphasis" may violate the "logical outgrowth" requirement, is thus distinguishable, because there has been no such "shift" here. See State Br. at 49. Moreover, in Shell Oil the "shift" at issue led to a change in the substance of the rule itself, to the point that EPA adopted two entire rules that had not been included in the proposal. Shell Oil, 950 F.2d at 750. There was no equivalent difference between proposed and final rules here.

State Petitioners have thus failed to show that there was any procedural error, or that there is a "substantial likelihood" that the rule would have been "significantly changed" had EPA followed some different procedure. Their procedural challenge should therefore be rejected.

CONCLUSION

For the reasons stated above, the petitions for review should be denied.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief contains 43771 words as computed by WordPerfect 9.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY have been served by United States first-class mail this 9th day of August, upon the following:

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