

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:	)	
	)	
Final Clean Air Fine Particle	)	RIN 2060-AK74
Implementation Rule	)	Air Docket #OAR-2003-0062
	)	

**PETITION FOR RECONSIDERATION**

Pursuant to Section 307(d)(7)(B) of the Clean Air Act (CAA or Act), American Lung Association, Medical Advocates for Healthy Air, Natural Resources Defense Council, and Sierra Club petition the Administrator of the Environmental Protection Agency (EPA or Agency) to reconsider the final rule captioned above and published at 72 Fed. Reg. 20586 (April 25, 2007) (“final rule”). The grounds for the objections raised in this petition arose after the period for public comment, and are of central relevance to the outcome of the rule. The Administrator must therefore “convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.” CAA § 307(d)(7)(B).

**INTRODUCTION**

This petition raises objections to the final rule captioned above. Each objection is “of central relevance to the outcome of the rule,” CAA § 307(d)(7)(B), in that it demonstrates that the rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 307(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for

the first time in the final rule published on April 25, 2007. EPA published a Federal Register notice soliciting comment on November 1, 2005. 70 Fed. Reg. 65984. The public comment period on the November 1, 2005 notice closed on January 31, 2006. 70 Fed. Reg. 69302 (Nov. 15, 2005) (extending comment period). The grounds for the objections raised in this petition thus “arose after the period for public comment.” CAA § 307(d)(7)(B). Because judicial review of the rule is available by the filing of a petition for review “by June 25, 2007,” 72 Fed. Reg. at 20663, the grounds for the objections arose “within the time specified for judicial review.” CAA § 307(d)(7)(B).

## **OBJECTIONS**

### **I. Compliance with the Clean Air Interstate Rule (CAIR) Cannot be Presumed to Satisfy Reasonably Available Control Technology (RACT) Requirements**

The final rule unlawfully and arbitrarily includes new “presumptions” that electric generating units (EGUs) complying with requirements of EPA’s CAIR program satisfy the fine particulate (PM<sub>2.5</sub>) RACT requirements for oxides of nitrogen (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) in all States where CAIR reductions are achieved from EGUs only. 72 Fed. Reg. at 20623-28. As a result, EPA claims that “States can rely on EPA’s presumption that compliance with a CAIR [state or federal implementation plan], meeting certain requirements, will satisfy the RACT/RACM requirement for certain EGU sources.” *Id.* at 20626. The effect of this presumption (hereinafter the “CAIR-RACT presumption”) is to unlawfully and arbitrarily waive the Act’s RACT requirements for individual EGU sources in PM<sub>2.5</sub> nonattainment areas.

The CAIR-RACT presumption and its accompanying rationale were added to the rule after the close of the public comment period. Thus, the grounds for our objections

arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. See CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, see id., because they go to the core procedural and substantive validity of the RACT provisions of the rule – including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

**A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Determination that CAIR Satisfies NO<sub>x</sub> RACT Requirements**

EPA unlawfully failed to present the CAIR-RACT presumption and accompanying rationale to the public for comment. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment “the major legal interpretations and policy considerations underlying the proposed rule.” CAA § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act (APA). 5 U.S.C. § 553. EPA's CAIR-RACT presumption and accompanying rationale are not a logical outgrowth of the proposal.

First, they did not appear in the notice of proposed rulemaking, nor did EPA otherwise present them to the public for comment. In the notice of proposed rulemaking, EPA proposed to find that the CAIR rule would suffice as RACT for EGUs. 70 Fed. Reg. at 66024. The proposal included no option for creating a “presumption” that States could rely upon to demonstrate compliance with the Clean Air Act. There is no discussion of the authority EPA might use in creating such a presumption or the rationale for why more stringent controls at EGUs could be presumed by the States to be

unreasonable. While EPA appropriately abandoned its proposal to make a definitive determination that compliance with the CAIR rule would satisfy the RACT requirement, there was no basis in the proposed rule for this new attempt to circumvent the Clean Air Act using a “presumption” instead. EPA’s CAIR-RACT presumption, thus, cannot be treated as a logical outgrowth of the relevant proposal.

EPA therefore committed a procedural violation by failing to solicit public comment on its new CAIR-RACT presumption. See CAA § 307(d)(9)(D)) That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. Id.

First, EPA's procedural dereliction is arbitrary and capricious. See CAA § 307(d)(9)(D)(i). The Agency, after abandoning its illegal attempt to establish a blanket RACT determination for certain EGU sources, now offers a new “presumption” approach to achieve that same illegal end. EPA, however, offered this new scheme in the final rule without any public notice and comment.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). See CAA § 307(d)(9)(D)(ii).

Third, the challenged 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.” See CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some small aspect of the challenged provisions. Rather, it failed to seek comment on the fundamental approach they embody – an approach that has the effect of exempting a large category of major sources from installing additional pollution controls mandated by

the Act. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provisions, and those provisions’ inconsistency with fundamental principles of reasoned agency decision-making.

**B. EPA’s CAIR-RACT Presumption Is Unlawful and Arbitrary.**

**(1) EPA Lacks Authority to Establish a Presumption on What Satisfies RACT**

EPA points to no authority allowing it to establish a presumption that compliance with a CAIR implementation plan will satisfy the RACT requirement for certain EGU sources. Nothing in the Act allows EPA to create a presumption on RACT that States may rely upon in order to avoid evaluating additional control measures. EPA suggests this approach is “similar” to the practice of issuing control technology guidance, 72 Fed. Reg. at 20626, and that “[t]he establishment of recommended levels for RACT/RACM is an area Congress delegated to the specific expertise of the Agency.” *Id.* at 20627. While the Act recognizes EPA’s ability to compile and distribute information on control technologies, CAA § 108, and in certain cases to establish minimum levels of control, nothing in the Act allows EPA to establish a presumptive ceiling on the level of control constituting RACT. This new approach to demonstrating RACT, announced for the first time in the final rule, has no statutory basis and ignores EPA’s own guidance on how to demonstrate RACT.

EPA acknowledges that its announcement in the final rule is not the issuance of control technology guidance for EGUs. This acknowledgement is appropriate as EPA has made no attempt to follow the process outlined in Clean Air Act section 108, which

directs EPA to consult with appropriate advisory committees, federal departments, and agencies before issuing specified control technique information and data to States. CAA § 108(b). EPA points to no other authority for issuing something “similar” to control technology guidance that has any statutory weight. Basic canons of statutory construction dictate that where Congress has provided specific requirements for agency action, the agency may not presume some general authority to take “similar” actions.

Moreover, even if EPA’s action could be characterized as the issuance of control technology guidance, there is nothing that then allows EPA to establish, or States to rely upon, a presumption that compliance with such guidance satisfies RACT. EPA tortures the Clean Air Act to claim that implementation of the PM<sub>2.5</sub> standards is governed only by the subpart 1 provisions of part D of the Act. Subpart 1, however, contains nothing allowing for compliance with control technique guidance to satisfy RACT. The closest requirement is, ironically, in subpart 4, section 190, which directs EPA, “in the same manner and according to the same procedure as guidance issued under section 108(c),” to issue guidance on controls for specified fugitive dust sources. EPA has explained that even this guidance does not substitute for the control measures analysis otherwise required by the Act. See 57 Fed. Reg. 13498, 13540 (April 16, 1992) (explaining that such guidance is the “suggested starting point” for listing available control measures).

The new idea EPA offers in the final rule that something “similar” to a control technique guidance might replace, even presumptively, the analysis of RACT otherwise required by the Act, is even inconsistent with other portions of the very same preamble. In describing how States should determine RACT, EPA explains, “Existing EPA guidance on control technologies can be used to inform RACT decisions. However, EPA

believes it may not be sufficient for a State to rely on technology guidance that is several years old and issued to provide recommendations on control measures and levels for a different NAAQS in evaluating RACT for PM<sub>2.5</sub>.” 72 Fed. Reg. at 20630. EPA repeatedly notes that there can be no cutoff date for claiming that a prior determination regarding the limit of reasonable controls can substitute for a new demonstration: “EPA recognizes that for most source categories, new technology continues to be developed, and new information continues to be generated. Thus, even recent RACT determinations for a given source may be outdated.” Id. at 20631. EPA concludes, “We do not believe there is any specific date or age that could be identified after which States could ensure that no technology advances or decreases in control cost will have occurred.” Id.

Yet EPA’s new presumptive RACT for EGU’s would allow States to do exactly what EPA has concluded is unreasonable. EPA’s CAIR rulemaking was finalized in 2005. The cost and technology findings, which were never intended to satisfy the Clean Air Act requirements for RACT, will be over three years old by the time the first PM<sub>2.5</sub> plans are due. Such staleness will only grow with subsequent submittals and for areas that might become nonattainment in the future.

There is no precedent in the Clean Air Act or EPA’s prior implementation of the Act for establishing a presumption on the most stringent measures that can be considered reasonable. EPA has no authority for its new presumption and States may not rely on it to avoid the statutory requirement to analyze available controls. EPA must remove this determination from the final rule and require States to evaluate RACT for EGUs in the same manner as any other source of PM<sub>2.5</sub> or its precursors.

**(2) EPA’s Conclusion that CAIR can be Presumed to Satisfy RACT is Arbitrary and Capricious.**

The analysis and argument that EPA uses to claim that CAIR can be presumed to satisfy RACT would never be accepted as an adequate RACT determination if offered by a State as part of its implementation plan. First, it allows States to take credit for emission reductions at sources not within the nonattainment area. Section 172(c)(2) of the Act requires the SIP for each nonattainment area to “provide for . . . such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT].” EPA’s reference to the use of “bubbles” to comply with RACT, 72 Fed. Reg. at 20626, is unavailing. Such guidance contemplates bubbles within the nonattainment area and cannot be extended to violate the plain language of the Act. See, e.g., EPA, Office of Air and Radiation, “Improving Air Quality with Economic Incentive Programs,” at 264 (Jan. 2001) (“Trading of other criteria pollutants and their precursors (other than ozone) is limited to the same non-attainment, attainment, or maintenance area.”) (emphasis omitted). The statute unambiguously requires application of RACT to sources located “*in the area.*” CAIR allows existing major EGU sources located in a nonattainment area to avoid adopting *any* controls as long as they can purchase the requisite number of allowances. There is no requirement that such allowances come from emission reductions in the same nonattainment area or even a nearby one. Indeed, under CAIR, such allowances can be generated by emission reductions by a source a thousand miles downwind from the nonattainment area in question. EPA is completely without authority to abrogate the Act’s RACT requirements in this manner, and would never allow States to claim



compliance with RACT based on reductions occurring at sources outside the nonattainment area and that may have no effect on ambient concentrations.

Second, EPA never even examines what other controls might be considered reasonably available. EPA has determined that the CAIR program “represents highly cost-effective controls” but it does not claim, not could it, that these controls represent “the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility,” the long-established definition of RACT. 44 Fed. Reg. 53762 (Sept. 17, 1979). To the contrary, under EPA’s approach, a specific CAIR-covered source need not install any control technology at all, let alone achieve the lowest emission limitation it is capable of meeting. Even if one were to look at total emission reductions across covered sources, there is no demonstration that the reductions achieved by CAIR represent the limit of what can be achieved through reasonably available technology – this simply was never the standard used to establish the CAIR limits.

In an effort to compensate for this failure to actually analyze the feasibility of various options, as would be required of any State RACT analysis, EPA offers a number of unsupported “beliefs” to try to claim that additional controls would not be reasonable. EPA claims that only a limited number of EGUs can be retrofitted with controls because of limitations in the labor pool and vendor/equipment availability. 72 Fed. Reg. at 20624. EPA cites no data or analyses supporting any of these musings, and they defy common sense. First, there is no reason to expect that States would focus mainly on smaller sources for RACT requirements. Indeed, the sources at issue here are likely the very same ones covered by CAIR – major EGUs that emit significant quantities of NO<sub>x</sub>.

States would have every incentive to focus on the largest sources where RACT would produce the most benefit and where RACT would be most cost effective.

Second, such considerations of the allocation of labor and vendors across areas of the U.S. have no precedent as a factor for rejecting controls as RACT. EPA also appears to overstate its claim. It is not that there is some actual limit to what can be done; at most such increased demand may drive up the cost of installing controls. Without an analysis of how these costs will be affected, however, EPA has no basis for claiming that more aggressive controls or timing would be unreasonable.

EPA's argument also presupposes the timing of CAIR as the only option for RACT requirements. There is nothing that limits the States to mirroring the same 2010 and 2015 compliance dates. To the contrary, RACT compliance for most areas will need to be before the 2010 attainment date. Thus to the extent timelines are shifted and the specific sources to be controlled are altered, EPA's analysis on what is possible from a labor or vendor perspective for specific EGUs in 2010 and 2015 is entirely irrelevant. EPA's conjecture on what "could" happen if projects and timing ended up differing from EPA's predictions for CAIR has no record support and does not supply the kind of analysis required for a RACT determination.

Likewise, EPA's claim that disturbing its delicate plan for the distribution and timing of emission reductions under the CAIR program would not affect total emissions or could result in forgoing greater transported emissions, *id.* at 20624, again is circular and assumes that CAIR is the limit of what might be allowed. First, EPA's claim that CAIR will achieve greater overall reductions is based on total regional reductions under CAIR – not on reductions within a given nonattainment area where a source is being

allowed to forego RACT. The Act does not give EPA the option of foregoing mandated reductions within one nonattainment area on the grounds that greater reductions will be achieved somewhere else.

More fundamentally, EPA's claim is unsupported and runs counter to the available evidence as well as common sense. If RACT requires controls on both large and small units in all nonattainment areas at levels that are more stringent than those required by CAIR, EPA cannot claim that emissions would not be reduced beyond those predicted in EPA's weak trading program. For example, EPA itself has projected that significant portions of the total capacity of EGUs burning coal will lack advanced pollution controls in 2010, 2015 and 2020. In a CAIR presentation to the 98<sup>th</sup> annual conference of the Air and Waste Management Association on June 23, 2005, an EPA speaker admitted that 163 gigawatts (GW) out of 244 GW of total coal capacity in the CAIR region would lack flue gas desulfurization (FGD) or selective catalytic reduction (SCR) for SO<sub>2</sub> and NO<sub>x</sub>, respectively, in the year 2010. By 2015, 129 GW out of 242 GW total coal capacity in the CAIR region would lack FGD or SCR. And by 2020, 108 GW out of 252 GW total coal capacity in the CAIR region still would lack these controls. Examining EPA's Integrated Planning Model data that accompanied the CAIR rulemaking, one learns that under CAIR in 2015, approximately 440 coal-fired EGUs lack advanced pollution controls out of a total of about 1,175 such units. And under CAIR in 2020, about 500 coal-fired EGUs lack advanced pollution controls out of a total of about 1,200 such units. Given the limited coverage predicted under the CAIR program, it is hard to imagine that a rigorous RACT program in all nonattainment areas could not do better.

Moreover, the evidence shows that standards for RACT-level control are more stringent than provided by CAIR. According to EPA, the estimated average costs of regionwide ozone season NO<sub>x</sub> control under CAIR are \$1,800 per ton in 2015 and \$900 per ton in 2009 (in 1999 dollars). 70 Fed. Reg. 25162, 25212 (May 12, 2005) (noting that the cost per ton of annual NO<sub>x</sub> controls would be even lower because the capital costs of installing controls would largely be identical and reductions would be greater). EPA further believes that actual costs of CAIR controls will be lower than these figures. *Id.* Indeed, the “highly cost effective controls” that are the benchmark for CAIR reflect the lower end of average and marginal cost ranges for SO<sub>2</sub> and NO<sub>x</sub> control. *Id.* 25203.

By contrast, States have adopted RACT requirements for NO<sub>x</sub> with costs per ton well in excess of these so-called “highly cost effective controls” under CAIR. For example, well over a decade ago New Jersey adopted NO<sub>x</sub> RACT requirements (NJAC 7:27-19) with costs as high \$4,500 per ton; adjusted for inflation, such costs would be even higher in today’s dollars and for the future years when RACT requirements apply. In other instances, RACT reflects controls costing \$8,000 to \$10,000 per ton. *See, e.g.*, Metropolitan Washington Council of Governments, Plan to Improve Air Quality in the Washington DC-MD-VA Region (Feb. 19, 2004) at 8-3, <http://www.mwcog.org/uploads/committee-documents/ylZbVw20040217115150.pdf> . Thus, RACT requires sources to put more into pollution controls than required for the “highly cost effective” control level ostensibly provided by CAIR.

As to EGUs specifically, the final CAIR rule chose to forego highly cost-effective controls with per-ton costs well below the RACT figures just cited, in order to avoid additional emissions reductions from the electric utility sector beyond what the

President's "Clear Skies" legislation would achieve. In adopting the final CAIR rule, EPA was well aware that States already were resorting to NO<sub>x</sub> control strategies well in excess of EPA's \$900 per ton and \$1,800 per ton estimates for CAIR. See 70 Fed. Reg. at 25208 (table shows average annual costs in 1999 dollars up to \$2,800 per ton, except for the Texas emission reduction grants, which cost up to \$12,700 per ton). Indeed, CAIR itself departed downward from the highly cost-effective control precedent established in the NO<sub>x</sub> SIP Call rulemaking, where the Agency determined that NO<sub>x</sub> controls were highly cost-effective when the cost of ozone season NO<sub>x</sub> emissions removed were \$2,500 per ton in 1999 dollars. See 63 Fed. Reg. 57356, 57399 (Oct. 27, 1998).

EPA has not conducted anything that would come close to being called a RACT analysis. As a result, it is unreasonable to suggest that States can rely on EPA's conclusions on what qualifies as RACT for EGUs. CAIR was never intended to be a demonstration of RACT and EPA cannot turn it into one based on unsupported concerns that additional controls would upset the predicted outcome of its trading program. To the extent the RACT requirement complicates EPA's implementation of CAIR, that is a problem of EPA's own making that must be addressed within the context of CAIR.

### **(3) EPA Fails to Define Scope or Rebuttability of Presumption**

Even if a CAIR-RACT presumption were otherwise permissible, the final rule would be arbitrary and unlawful because it fails to explain if or how the presumption can be rebutted. The Agency does not explain whether the presumption shifts the burden of production or burden of proof to others, or what sort of showing would be sufficient to rebut the presumption. Such vague and standardless rules are the hallmark of arbitrary

agency decisionmaking. See Pearson v. Shalala, 164 F.3d 650, 660, reh'g, reh'g en banc denied, 172 F.3d 73 (D.C. Cir. 1999); Amoco Production Co. v. FERC, 158 F.3d 593, 596 (D.C. Cir. 1998); City of Vernon v. FERC, 845 F.2d 1042, 1048 (D.C. Cir. 1988). See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). A regulation “must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations’ . . . . That technique would circumvent section 553, the notice and comment procedures of the APA.” Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579, 584 (D.C. Cir. 1997). EPA’s “presumption” here is the very sort of “mush” warned against in the above-quoted decision. Moreover, EPA’s failure to define the grounds for rebutting the presumption simply underscores the arbitrariness of the presumption itself.

## **II. EPA Cannot Invent a Transition Period to Delay Emission Limits for Condensable PM**

The final rule unlawfully and arbitrarily includes a new “transition period” allowing States to delay establishing emission limits for condensable PM until January 1, 2011. 72 Fed. Reg. at 20652 (codified at 40 CFR § 51.1002(c)). The effect of this new provision is to unlawfully and arbitrarily waive the Act’s requirements for expeditious attainment and implementation of RACT. This “transition period” and its accompanying rationale were added to the rule after the close of the public comment period. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. See CAA

§ 307(d)(7)(B). Those objections are of central relevance to the rule, see id., because they go to the core procedural and substantive validity of the attainment demonstration and RACT provisions of the rule – including the public’s opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

**A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Postponement of Emission Limits on Condensable PM**

EPA unlawfully failed to present the “transition period” and accompanying rationale to the public for comment. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment “the major legal interpretations and policy considerations underlying the proposed rule.” CAA § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. EPA's decision to allow States to put off setting limits on condensable PM emissions and the accompanying rationale are not a logical outgrowth of the proposal.

First, they did not appear in the notice of proposed rulemaking, nor did EPA otherwise present them to the public for comment. In the notice of proposed rulemaking, EPA proposed that RACT and RFP demonstrations would be due within three years of designation, at the same time as the attainment demonstration due in April 2008. 70 Fed. Reg. at 66012 and 66022. The final rule admits that the proposal anticipated that “any stationary source emission limits developed to implement RACT or RACM would reflect control and measurement of condensable PM.” 72 Fed. Reg. at 20652. The proposed

rule discussed the possibility of revising emission limits to reflect improvements in test methods, but did not indicate the possibility that emission limits on condensable PM could be delayed pending those improvements. Id. at 66022. The proposal explained the limitations of the various methods for measuring total PM<sub>2.5</sub>, but did not suggest that measuring total emissions was not possible or that the weaknesses in the available test methods warranted postponing any effort to establish limits. Id. at 66049-66052. To the contrary, EPA advised that, “Of the methods mentioned previously, the most reliable measurement of total direct PM<sub>2.5</sub> would combine the use of Conditional Method 40 with EPA Method 202.” Id. at 66050.

Given the failure to raise the possibility of a “transition period” postponing emission limits for condensable PM, it should be no surprise that there is also no discussion of the authority EPA might use to allow States to delay emission limits otherwise required under the Clean Air Act. EPA’s creation of a “transition period” in the final rule, thus, cannot be treated as a logical outgrowth of the relevant proposal.

EPA therefore committed a procedural violation by failing to solicit public comment on its new transition period delaying deadlines for emission limits on condensable PM. See CAA § 307(d)(9)(D). That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. Id.

First, EPA's procedural dereliction is arbitrary and capricious. See CAA § 307(d)(9)(D)(i). The Agency attempts to postpone controls on condensable PM, which is a significant portion of total PM<sub>2.5</sub> emissions. As such, the postponement could have significant implications on the stringency of controls and the ability of many areas to



attain the national ambient air quality standards (NAAQS) for PM<sub>2.5</sub>. Yet EPA has not deigned to seek the public's views on this new decision.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). CAA § 307(d)(9)(D)(ii).

Third, the challenged 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.” See CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA failed to seek comment on a fundamental decision that affects the timing of SIP submittals required under the Act as well as the ability of areas to expeditiously attain the PM<sub>2.5</sub> NAAQS as required by the Act. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provision, and that provision's inconsistency with fundamental principles of reasoned agency decision-making.

**B. EPA's “Transition Period” Delaying Limits on Condensable PM Emissions Is Unlawful and Arbitrary.**

**(1) EPA Lacks Authority to Postpone Statutory Deadlines for Setting Emission Limits for Condensable PM**

EPA's final rule allows States to delay setting emission limits for sources of condensable PM<sub>2.5</sub> until January 1, 2011. 40 CFR § 51.1002(c). This delay flies in the face of numerous Clean Air Act requirements. First it undermines and cannot be reconciled with the requirement for expeditious attainment. CAA §§ 172(a)(2)(A) and 188(c). EPA admits that most PM<sub>2.5</sub> emissions may be in a condensable state. Based on

an analysis of particle size distribution, EPA estimated that “about 78 percent of the total PM<sub>2.5</sub> emissions would be condensable PM.” 70 Fed. Reg. at 66051. EPA adds that because controls to date have reduced the filterable portion of PM<sub>2.5</sub> emissions but not the condensable portion, “the significance of the condensable emissions as a proportion of direct PM<sub>2.5</sub> emissions may be greater than indicated.” Id. EPA further acknowledges that certain areas will need to address direct PM<sub>2.5</sub> emissions from stationary sources in order to demonstrate attainment and that measurements and controls that only address the filterable portion of these direct emissions “would limit the control measures available for developing cost effective strategies to achieve attainment of the PM<sub>2.5</sub> NAAQS.” Id. at 66049. Even if EPA had not made any of these admissions on the importance of controlling condensable PM<sub>2.5</sub> emissions for attainment, there can be no argument that allowing States to ignore controls on any portion of stationary source emissions violates the overriding Clean Air Act requirement for expeditious attainment.

The decision to allow States until 2011 to establish emission limits for condensable PM is particularly astounding since it pushes control beyond the outside attainment deadline of 2010, thereby illegally flouting the statutory mandate that implementation plans provide for attainment as expeditiously as practicable, and no later than the outside attainment date. CAA §§ 172(a)(2)(A), (c)(1), (c)(6), 188(c), and 189. This delay also violates the statutory deadline for submitting and implementing RACM/RACT. Such measures must be submitted as expeditiously as practicable but no later than three years from date of designation as nonattainment, i.e., April 2008. Id. §§ 172(b) and (c)(1). The SIP must provide for implementation of such measures as expeditiously as practicable. Id. § 172(c)(1). EPA itself has read the Act as requiring

implementation of RACT no later than the beginning of 2009 for areas with 2010 attainment dates. 72 Fed. Reg. at 20628. Under subpart 4, RACM must be submitted within 18 months of designation, and implemented within 4 years of designation. Id. § 189(a)(1)(C). EPA offers no explanation, nor could it, as to how it can allow States to violate all of these statutory deadlines. EPA's "transition period" is a creation with no legal basis and is in direct conflict with multiple nondiscretionary deadlines of the Act. EPA must therefore remove this delay from the final rule and require States to include emission limits on condensable PM with the April 2008 SIP submittal as needed to satisfy RACT and to demonstrate attainment as expeditiously as practicable.

**(2) EPA's Decision to Postpone Statutory Deadlines for Setting Emission Limits for Condensable PM is Arbitrary and Capricious**

As noted above, EPA admits that condensable PM likely represents the bulk of direct PM<sub>2.5</sub> emissions from stationary sources and that controls on these sources may be important for several areas to attain the PM<sub>2.5</sub> NAAQS. EPA also admits that methods exist for measuring condensable PM and that States have established emission limits or emission testing requirements that include the measurement of condensable PM. 70 Fed. Reg. 66050; 72 Fed. Reg. 20652. Specifically, EPA describes the use of Conditional Method 40 with EPA method 202 as the most reliable measurement of total direct PM<sub>2.5</sub> and added that "Conditional Method 40 has been used at several facilities in the U.S. and the hardware required to implement this method has been readily available since the mid-1980's." 70 Fed. Reg. at 66050. EPA is also aware through comments on the proposed rule that EPA Method 202 has been widely used to measure condensable PM including in recent permits issued to the Longview, Thoroughbred, Oak Creek and Weston coal-fired

EGUs. Comments Prepared by Clean Air Task Force, Earthjustice and Environmental Defense on Proposed Rule to Implement the Fine Particle NAAQS, at 32 (Jan. 31, 2006) [Available in Docket at EPA-HQ-OAR-2003-0062-0108.1]. These comments also describe the various controls available and already in use to reduce condensable PM emissions, including scrubbers, wet electrostatic precipitators, and sorbent injection. Id. Finally, EPA admits that the information on condensable PM emissions is adequate for use in inventories and attainment demonstrations. 72 Fed. Reg. at 20652.

Given this record, there is no reasonable basis for claiming that emission limits on condensable PM cannot be established by the April 2008 RACT deadline. Nor does EPA attempt to provide a basis. EPA's only claim is that under certain circumstances the available methods may include a bias in the condensable PM measurements. 72 Fed. Reg. at 20653. EPA does not quantify this bias or explain why it is any more significant than the limitations or biases in other methods currently allowed for use. EPA also fails to explain why it is reasonable in the face of these limitations in the available methods to forgo controls altogether until 2011. To the contrary, EPA, fully aware of these limitations and of the future plans to improve these methods, proposed only that new data could enable States to make mid-course revisions to attainment strategies as needed. 70 Fed. Reg. at 66052.

States face many uncertainties in quantifying and measuring emissions, and yet they still must act in accordance with the deadlines and requirements of the Clean Air Act. EPA can offer no explanation as to why the particular issues surrounding measurement of condensable PM rise to some new level of difficulty that precludes moving forward with the best available information and tools. Even if EPA had some

claim for ignoring the statutory deadlines for adopting and implementing controls on emissions of condensable PM, it has offered no reasonable basis for doing so. As such, the adoption of a transition period is arbitrary and capricious and must be removed from the final rule.

### **III. EPA Cannot Rewrite Well-Established Criteria for Analyzing the Economic Feasibility of Reasonably Available Controls**

The final rule unlawfully and arbitrarily replaces the well-established criteria used to determine the economic feasibility of controls being considered for RACT. 72 Fed. Reg. at 20619-20. The effect of this last minute change to the analysis required for RACT is to rewrite over 15 years of EPA policy in order to provide more discretion to avoid requiring reasonable controls. This new approach is in direct contradiction with the approach included in the proposed rule and was added to the rule after the close of the public comment period. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. See CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, see id., because they go to the stringency and validity of the RACT provisions of the rule – including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

**A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Postponement of Emission Limits on Condensable PM**

EPA unlawfully failed to present the new criteria for economic feasibility to the public for comment. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment “the major legal interpretations and policy considerations underlying the proposed rule.” CAA § 307(d)(3)(C). The same requirement would apply under the APA. 5 U.S.C. § 553. EPA’s new announcement that there is no presumption that a given source must bear a cost similar to other sources and that factors such as “equity” and “profit margins” may be used to determine whether a given level of control is appropriate is in direct conflict with the proposal and cannot be claimed to be a logical outgrowth of the proposal.

These conclusion on economic feasibility did not appear in the notice of proposed rulemaking, nor did EPA otherwise present them to the public for comment. To the contrary, in the notice of proposed rulemaking, EPA explained, “Absent other indications, EPA presumes it is reasonable for similar sources to bear similar costs of emission reductions.” 70 Fed. Reg. at 66021. EPA has held this same position for at least 15 years. See, e.g., 57 Fed. Reg. 18070, 18074 (April 28, 1992). There was no indication in the proposal that EPA was preparing to depart from this long-held view on what constitutes an economically feasible control measure. EPA’s abrupt reversal of this long-held position in the final rule cannot be treated as a logical outgrowth of the relevant proposal. See Environmental Integrity Project v. EPA, 425 F.3d 992, 998 (D.C. Cir. 2005) (“Whatever a ‘logical outgrowth’ of this proposal may include, it certainly does not

include the Agency's decision to repudiate its proposed interpretation and adopt the inverse."").

EPA therefore committed a procedural violation by failing to solicit public comment on its new criteria for evaluating economic feasibility for RACT. See CAA § 307(d)(9)(D). That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. Id.

First, EPA's procedural dereliction is arbitrary and capricious. See CAA § 307(d)(9)(D)(i). The Agency attempts to radically change the approach States are to use to evaluate the economic feasibility of RACT and make it easier for sources to avoid implementing controls that would traditionally be considered reasonable. As such, the new criteria could have significant implications on the stringency of controls and the ability of many areas to attain expeditiously the NAAQS for PM<sub>2.5</sub>. Yet, once again, EPA has not deigned to seek the public's views on this new decision.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). See CAA § 307(d)(9)(D)(ii).

Third, the challenged 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." See CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). This change in the criteria used to assess economic feasibility goes to the fundamental determination affecting the stringency of controls, which in turn affects the ability of areas to expeditiously attain the PM<sub>2.5</sub> NAAQS as required by the Act. Had EPA obeyed the law by soliciting public comment, it would have learned of the

serious substantive objections detailed below regarding the decision's inconsistency with fundamental principles of reasoned agency decision-making.

**B. The New Criteria for Determining Economic Feasibility is Unlawful and Arbitrary**

EPA has rewritten years of EPA policy interpreting economic feasibility without any explanation of the legal or policy arguments in support of this new interpretation and without even an acknowledgement of the departure. Among the new pronouncements in the final rule, EPA has declared: (1) economic feasibility encompasses consideration of whether the cost of a measures is reasonable to bear in light of the benefits; (2) there is no presumption that a given source must bear a similar cost to other similar sources; and (3) States may evaluate equity considerations in weighing economic feasibility. 70 Fed. Reg. at 20619. None of these statements is offered with citations to precedent in the law or EPA's prior policy. To the contrary courts and EPA have consistently rejected these sorts of assertions.

Economic feasibility is not a cost-benefit analysis. Congress has spoken on the balance of costs and benefits. Congress has specified that areas must attain the NAAQS as expeditiously as possible. States are not in a position to delay expeditious attainment through considerations of the costs and benefits of controlling air pollution. See, e.g., American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 519-20 (1981) (noting that Congress understands the difference between "feasible" and "cost-beneficial" and that the use of the former reflects a decision to impose the costs of control as a cost of doing business in order to protect public health). In American Textile, the Supreme Court upheld the Occupational Health and Safety Administration's ("OSHA")



determination that its cotton dust workplace standard was “economically feasible” based on OSHA’s finding that it was “within the financial capability of the covered industry.” 452 U.S. at 531 n.55. OSHA based this finding on its conclusion that the industry as a whole would not be threatened, although some marginal businesses may close as a result of adopting the standard. *Id.* at 531; see also United Steelworkers of America v. Marshall, 647 F.2d 1189, 1272 (D.C. Cir. 1980) (noting that a rule may be economically feasible “even if it does portend disaster for some marginal firms.”).

EPA has used similar rationale to explain that, contrary to the assertion in the final rule, the Agency does presume that similar sources should bear similar costs. As EPA explained:

EPA presumes that it is reasonable for similar sources to bear similar costs of emission reductions. Economic feasibility rests very little on the ability of a particular source to “afford” to reduce emissions to the level of similar sources. Less efficient sources would be rewarded by having to bear lower emission reduction costs if affordability were given high consideration. Rather economic feasibility for RACT purposes is largely determined by evidence that other sources in a source category have in fact applied the control technology in question.

57 Fed. Reg. at 18074. The new criteria added to the final rule reverses EPA reasoned conclusion without any explanation as to why less efficient sources should now be rewarded or why marginal sources should now be protected in determining what controls are reasonable.

The final rule’s new pronouncement that States should evaluate “equity considerations” lacks any definition and is at odds with the pronouncement that similar sources need not bear similar costs. Certainly those sources that have made the investment to implement more stringent controls would consider it inequitable for EPA or

the States not to require their competitors to bear similar control responsibilities. As such, this new “factor” for States to consider is arbitrary on its face.

Any change to EPA’s interpretation regarding the criteria that States should apply to determine the economic feasibility of controls under RACT must go through notice and comment rulemaking and must be supported by a rational basis. Paralyzed Veterans, 117 F.3d at 586. In offering any such rational basis, the proposed change must address the legal and policy underpinnings of the long-held interpretation that “economic feasibility is largely determined by evidence that other sources in a source category have in fact applied the control technology or process change in question.” 70 Fed. Reg. at 66021; see also 57 Fed. Reg. at 18074. The final rule does none of this.

By weakening the pre-existing RACT requirement for particulate matter nonattainment areas, the final rule further violates sections 172(e) and 193 of the Clean Air Act.

#### **IV. EPA Cannot Adopt a New Standardless Approach for Including Sources Outside the Nonattainment Area in the Reasonable Further Progress Demonstration**

In the final rule EPA “revised” its approach for considering regional emissions in reasonable further progress (RFP) inventories. 70 Fed. Reg. at 20636. The revision appropriately rejected the proposal to allow States to include select sources located outside of the nonattainment area in the RFP inventories. EPA recognized that such an approach would be unlawful and unreasonable. The final rule instead provides, “If the state justifies consideration of precursor emissions for an area outside the nonattainment area, EPA will expect state RFP assessments to reflect emission changes from all sources

in this area.” Id. The problem with this new approach is that it lacks any standard for defining the boundary of “this area” and, as a result, is just as unlawful and arbitrary as the proposed approach EPA rejected. Because EPA only announced this new approach for expanding the area covered by the RFP inventory in the final rule, there was no opportunity for the public to raise these objections during the public comment period. See CAA § 307(d)(7)(B). These objections are of central relevance to the rule, see id., because they go to the ability of an area to demonstrate reasonable progress toward attainment – including the public's opportunity to comment on how this demonstration must be made, and the consistency of this approach with the Act and with fundamental standards of reasoned agency decision-making.

**A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Provision for Crediting Emission Reductions Outside the Nonattainment Area**

EPA unlawfully failed to present this new approach for expanding the area to be included in RFP inventories to the public for comment. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment “the major legal interpretations and policy considerations underlying the proposed rule.” CAA § 307(d)(3)(C). The same requirement would apply under the APA. 5 U.S.C. § 553. While the approach in EPA’s final rule is in response to comments explaining why it is inappropriate to allow selected sources outside of the nonattainment area to be included in the RFP inventory unless all of the sources outside the nonattainment area are also included, commenters could not have anticipated that EPA would allow States an open-ended invitation to include the additional sources in

whatever expanded area the State might choose to justify. Thus, the new approach in the final rule cannot be claimed to be a logical outgrowth of the proposal.

EPA therefore committed a procedural violation by failing to solicit public comment on its new approach for expanding the area to be covered by the RFP inventory. See CAA § 307(d)(9)(D). That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. Id.

First, EPA's procedural dereliction is arbitrary and capricious. See CAA § 307(d)(9)(D)(i). The Agency attempts to allow States to pick and choose what sources should be included in the RFP inventory by allowing them the flexibility to define whatever geographic area they choose. This unrestrained discretion allows States to cherry pick areas outside the nonattainment area where a net reduction in emissions can be claimed in order to support demonstrations of RFP. As such, the new approach could have significant implications on whether areas are in fact making reasonable progress toward attainment and attaining the NAAQS for PM<sub>2.5</sub> as expeditiously as practicable. Despite the importance of this decision, EPA has not sought the public's views on it.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). See CAA § 307(d)(9)(D)(ii).

Third, the challenged 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.” See CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA admits that the proposed approach that would have allowed States to include selective sources in the RFP inventory was not reasonable because it “gives an inaccurate assessment of the progress that an area is making.” 70 Fed. Reg. at

20637. Yet the standardless fix adopted in the final rule allows for the same inaccurate assessment to be offered. EPA requires only that emissions from the area have a substantial impact on ambient concentrations in the nonattainment area. There is no definition of “substantial impact” or a requirement that “all” such areas be included. As a result, States are free to make the same arbitrary selections that EPA rejected from the proposal. The ability to game the demonstration undermines compliance with Clean Air Act sections 171(1), 172(c)(2) and 189(c). Thus, EPA has failed to seek comment on a fundamental decision that affects compliance with the RFP provisions of Act as well as the ability of areas to expeditiously attain the PM<sub>2.5</sub> NAAQS as required by the Act. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections regarding the new approach’s inconsistency with fundamental principles of reasoned agency decision-making.

**B. The New Provision for Crediting Outside Reductions is Unlawful and Arbitrary**

As noted above, EPA acknowledges that States should not be allowed to pick and choose selective sources outside the nonattainment area to be included in the RFP inventory because such an approach would give an inaccurate assessment of the actual progress being made to reduce emissions. EPA explains, “if a state took credit for emission reductions at Source A but ignored equal emission increases at Source B, the state would claim emission reductions in its RFP plan when in fact no net emission reductions had occurred.” 70 Fed. Reg. at 20637. EPA properly rejects this as unreasonable and inconsistent with the statutory requirement for RFP. EPA, however, adopts the new approach in the final rule that allows States to pick and choose selective

geographic areas outside the nonattainment area without explaining the criteria that will govern and circumscribe that choice.

EPA limits the surrounding area that can be included to a doughnut around the nonattainment area of up to 200 kilometers. 70 Fed. Reg. 20636. The approach in the final rule, however, allows the States to choose any slice or hole in that surrounding doughnut for purposes of the RFP calculation. The State need only show that emissions in the area selected substantially impact ambient concentrations in the nonattainment area. There is no stated requirement that all areas substantially impacting the nonattainment area be included. Again, as with the proposal, the rule does not prevent States from defining whatever area they choose – theoretically even the block on which the selected source sits – for inclusion in the RFP inventory. This approach is just as arbitrary and unlawful as the proposed source selection approach.

EPA cannot allow States such limitless discretion. As noted above, such vague and standardless requirements have repeatedly been rejected as arbitrary. See Pearson, 164 F.3d at 660; Amoco Production Co., 158 F.3d at 596; City of Vernon, 845 F.2d at 1048. See also Paralyzed Veterans of America, 117 F.3d at 584 (“It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations’ . . . . That technique would circumvent section 553, the notice and comment procedures of the APA.”). At a minimum, EPA needs to reconsider this final approach for expanding the area to be included in RFP inventories in order to identify the factors that States must address in any justification for defining the proper boundaries of the area outside the nonattainment area.

## CONCLUSION

EPA must reconsider the final rule for all the reasons set forth above.

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