BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY

Reconsideration of Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR) Rules Promulgated on December 31, 2002 and March 10, 2003, 68 Federal Register 44620 (July 30, 2003)	)	E-Docket ID No. OAR-2001-0004 Legacy Docket ID No. A-90-37

COMMENTS OF:
NATURAL RESOURCES DEFENSE COUNCIL (NRDC), AMERICAN LUNG ASSOCIATION, COMMUNITIES FOR A BETTER ENVIRONMENT (CBE), ENVIRONMENTAL DEFENSE, SIERRA CLUB, ALABAMA ENVIRONMENTAL COUNCIL, SOUTHERN ALLIANCE FOR CLEAN ENERGY, MICHIGAN ENVIRONMENTAL COUNCIL, THE OHIO ENVIRONMENTAL COUNCIL, SCENIC HUDSON

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INTRODUCTION

In its reconsideration notice, EPA solicits "comment on all aspects of the environmental impact of the final rule." 68 Fed. Reg. 44620, 44625/2 (July 30, 2003). As set forth below, EPA's conclusion that the final rule changes will not harm air quality fails to take into consideration important factors, including the substantial emission reductions that have been achieved by EPA's ongoing NSR enforcement initiative, and the additional reductions that would be achieved if EPA continued to apply and enforce the pre-existing rules governing modifications. EPA's assumption that sources will voluntarily reduce their emissions once NSR requirements are weakened is illogical and finds no support in the administrative record for this action. EPA's failure to offer a reasoned analysis for why the rule changes are consistent with the Clean Air Act's purpose to protect public health and the environment from harmful air pollution renders the final rule unlawful and arbitrary.

EPA also solicits comment on five specific substantive provisions of the final rule. As set forth in detail below, each of these aspects of the final rule violate the plain language and purpose of the Clean Air Act. Moreover, EPA fails to offer a reasoned basis for its promulgation of these rule changes. EPA's final action is therefore unlawful, arbitrary and capricious.

In addition, EPA has unlawfully and arbitrarily failed to grant reconsideration on—or to address—the other objections raised by our petitions for reconsideration. Those petitions, as well as all other documents cited in the present comments, are hereby incorporated by reference.

DISCUSSION

I. STANDARDS GOVERNING AGENCY RULEMAKING

Statutory Issues. If Congress "had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, USA v. NRDC*, 467 U.S. 837, 843 n.9 (1984). "If the intent of Congress is clear, 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." *Id.* 842-43. "An agency is given no deference at all on the question whether a statute is ambiguous." *Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (emphasis added).

If Congress has not expressed a clear intention on the question at hand, and if Congress has delegated interpretational authority to the agency, the agency may adopt an interpretation -- but only if it is "reasonable." *See Chevron*, 467 U.S. at 845; *United States v. Mead Corp.*, 533 U.S. 218 (2001). An agency interpretation is unreasonable if it is substantively inconsistent with the applicable statute,[1] or unaccompanied by a reasoned explanation.[2]

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[1] *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 481-86 (2001) (under *Chevron* Step Two, Court rejected EPA Clean Air Act interpretation that "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"); *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (under *Chevron* Step Two, Court rejected agency interpretation that "diverges from any realistic meaning" of the statute).

Arbitrary and Capricious Action. Agency action will be held arbitrary and capricious if the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996); if it has relied on irrelevant factors, or failed to consider relevant factors, *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), *Fox Television Stations v. FCC*, 280 F.3d 1027, 1050-51, 1052 (D.C. Cir. 2002); if it has reached a conclusion that is unsupported by substantial evidence, or runs counter to the record, *Assn. of Data Processing Service Orgs. v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984), *MVMA*, 463 U.S. at 43; or if it has failed to explain a connection between the facts and its conclusions. *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995).

II. COMMENTS ON "ALL ASPECTS OF THE ENVIRONMENTAL IMPACT OF THE FINAL RULE

The statutory interpretation underlying EPA's December 2002 rule contravenes Congressional intent embodied in the plain meaning of the Act. However, assuming *arguendo* that there was some apparent ambiguity in the Act, examination of the Act's air quality purposes -- and the impact of EPA's rule on those purposes -- would be a necessary component of the statutory analysis.

Under Step One of *Chevron*, 467 U.S. at 843 n.9 (1984), agencies and courts must respect the intent of Congress ascertained through "traditional tools of statutory construction." Among those tools are the statutory context. *See, e.g., Pilon v. USDOJ*, 73 F.3d 1111, 1122 n.9 (D.C. Cir. 1996) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citation and internal quotations omitted). And of course, a key component of context is statutory purpose. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998) ("[w]e are not quite as sanguine as the district court that, in applying the first prong of *Chevron*, it suffices to look only at the plain language of the statute. In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (emphasis added; brackets, citation and internal quotations omitted); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (under *Chevron* Step One, Court rejected EPA interpretation that would "subvert the purposes of the [Clean Air] Act" by allowing delay in pollution control deadlines).

Likewise, where a statute is ambiguous, consideration of statutory purpose is crucial to resolution of that ambiguity. Under *Chevron* Step Two, EPA's resolution of ambiguity must be

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[2] *See, e.g., Rettig v. Pension Benefit Guarantee Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) (under *Chevron* Step Two, court must determine *inter alia* "whether the agency considered the matter in a detailed and reasoned fashion.") (citation and internal quotations omitted); *Kidney Center v. Shalala*, 133 F.3d 78, 87-88 (D.C. Cir. 1994) (vacating and remanding under *Chevron* Step Two where agency's explanation was inadequate).

"reasonable." 467 U.S. at 845. EPA cannot possibly gauge the reasonableness of an interpretation without assessing its impact on the statutory purpose. *See, e.g., Chao v. Mallard Bay Drilling*, 122 S. Ct. 738, 744 n.9 (2002) (Court rejected interpretation that would narrow the protective reach of a regulatory statute: "Such large gaps in the regulation of occupational health and safety would be plainly inconsistent with the purpose of the OSH Act."); *USA v. Braxtenbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("[T]he court must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available."); *US Airways v. Barnett*, 122 S. Ct. 1516, 1521 (2002) (rejecting reading under which statutory provision "could not accomplish its intended objective"); *U.S.A. v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002) ("A statute should ordinarily be read to effectuate its purposes rather than frustrate them.") (internal quotations and citation omitted); *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748, 756 n.6 (2003) (rejecting interpretation that would "thwart the statute's object"); *U.S. v. Navajo Nation*, 123 S. Ct. 1079, 1092 (2003) (rejecting reading that was "out of line with one of the statute's principal purposes"); *Norfolk & Western Rwy. Co. v. Ayers*, 123 S. Ct. 1210, 1225, 1228 (2003) (rejecting reading "inconsistent with the Act's overall recovery facilitating thrust" in favor of one that "accords with the [Act]'s overarching purpose").

Protecting and enhancing air quality are crucial purposes of new source review. *See, e.g., Chevron*, 467 U.S. at 851 (objectives of NSR include "the environmental interest in improving air quality"). In nonattainment areas, NSR serves as a key component of the statutory program for attaining health-based air quality standards -- an objective the Supreme Court has described as the "heart" of, and "central" to, the Act. Train v. Natural Resources Defense Council, 421 U.S. 60, 66 (1975); Union Electric Co. v. EPA, 427 U.S. 246, 258 (1976). In PSD areas, NSR is "the principal mechanism for monitoring consumption of allowable increments and for preventing significant deterioration," *Alabama Power Co. v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1979)(emphasis added), thus facilitating achievement of PSD's goals, which -- as repeatedly emphasized by Congress in the Act itself -- encompass air quality:

> The purposes of th[e PSD] part are as follows:
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> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards;
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> (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
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> (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
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> (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

> (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

§ 160 (emphasis added).

Construing other Clean Air Act provisions, that listed air quality as one among several factors, the D.C. Circuit has indicated that air quality properly dominates the task of interpretation. *Husqvarna AB v. EPA*, 254 F.3d 195, 200 (D.C. Cir. 2001) (construing § 213, Court holds: "The EPA did not deviate from its statutory mandate or frustrate congressional will by placing primary significance on the 'greatest degree of emission reduction achievable' and by considering cost, noise, energy and safety factors as important but secondary factors. The overriding goal of the section is air quality and the other listed considerations, while significant, are subordinate to that goal.") (emphasis added). *Accord*, *American Petroleum Institute v. USEPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995)(even though § 211(k)(1) authorizes EPA to consider non-air-quality issues such as "cost" and "energy requirements," Court held: "The overriding goal is air quality, and the other listed considerations are subordinate to that goal.") (emphasis added).

There is no reason to conclude that air quality should receive any less weight for NSR purposes than in construing these other provisions. In any event, whether air quality is the dominant factor, it clearly is an important one. In either case, EPA simply cannot perform its task of statutory interpretation without evaluating air quality implications and factoring them into its decisionmaking.

A. EPA Failed to Take Into Account Emission Reductions That Have Been Achieved by NSR Enforcement Actions Under the Pre-Existing Rule, and That Would Be Achieved if EPA Continued to Enforce the Pre-Existing Rule

EPA's discussion of environmental effects from its NSR revisions omits a centrally relevant factor: the enforcement initiatives addressing NSR, and the information yielded by those initiatives. EPA has extensively investigated and documented noncompliance with NSR by a large number of facilities. *See, e.g.*, "Enforcement Alert: Compliance with Permitting Critical to Clean Air Act Goals" (EPA OECA Jan. 1999), at 2 ("When EPA looks closely at an industry sector, usually it discovers a high rate of noncompliance. For example, in its Wood Products Initiative, EPA found NSR violations at approximately 70-80 percent of the facilities investigated. Moreover, EPA continues to find high rates of noncompliance despite several successful enforcement actions."). The agency -- as well as state and citizen plaintiffs -- have initiated several proceedings to enforce NSR requirements.

As compiled by Clean Air Trust from EPA's own press releases, cases for which EPA has announced settlements promise reductions of 1.3 million tons annually of various pollutants:

EPA Press Releases Announcing
New Source Review Settlements

Company	Industry	Date	Expected Annual

			Emission Reductions from NSR
Tampa Electric	electric power	2/29/00	120,000+ tons[2]
PSEG Fossil LLG	electric power	1/24/02	54,000 tons
VEPCO	electric power	4/21/03	237,000 tons[3]
Cinergy	electric power	12/21/00	500,000 tons[4]
Koch Petroleum	refining	12/22/00	5,200 tons
BP Amoco	refining	1/19/01	50,000+ tons[5]
Motiva/Equilon and Deer Park	refining	3/21/01	60,000+tons
Marathon Ashland	refining	5/11/01	23,000 tons
Premcor	refining	7/12/01	5,600 tons
Premcor	refining	4/1/02	not stated
Murphy Oil	refining	1/24/02	not stated
Conoco Inc.	refining	12/20/01	8,000 tons
Navajo Refining Co./Montana Refining Co.	refining	12/20/01	2,800 tons
Lion Oil	refining	3/11/03	1,380 tons
Williamette Industries	wood products	7/20/00	27,000 tons
Boise Cascade	wood products	3/13/02	2,166 tons
Nucor Corp.	steel	12/19/00	9,400 tons
Alcoa Inc.	aluminum	4/9/03	68,000 tons
Ferro Corp.	chemicals	3/18/02	not stated
Morton International Inc.	chemicals	10/26/00	not stated
Iowa Beef Packers, Inc.	meatpacker	10/12/01	not stated
Archer Daniels Midland	ethanol	4/9/03	63,000 tons
Agra Resources	ethanol	10/2/02	5,280+ tons
Agri-Energy	ethanol	10/2/02	5,280+ tons
Al-Corn	ethanol	10/2/02	5,280+tons
Central Minn. Ethanol Coop.	ethanol	10/2/02	5,280+tons

Chippewa Valley Ethanol Co.	ethanol	10/2/02	5,280+tons
Corn Plus	ethanol	10/2/02	5,280+tons
Diversified Energy	ethanol	10/2/02	5,280+tons
Ethanol 2000	ethanol	10/2/02	5,280+tons
Gopher State	ethanol	10/2/02	5,280+tons
Heartland Corn Products	ethanol	10/2/02	5,280+tons
Minnesota Energy	ethanol	10/2/02	5,280+tons
Pro-Corn LLC	ethanol	10/2/02	5,280+tons
Total Annual Emissions Reduced by NSR Settlements:			1.3 million tons

"Clean Air Trust to EPA's Jeffrey Holmstead: Read Your Own EPA Press Releases!" (April 23, 2003) (footnotes omitted), http://www.cleanairtrust.org/release.042303.html. Additional actions are pending, promising further large reductions. Moreover, EPA's own recognition of widespread noncompliance indicates that more actions could be brought. Surrendering the ability to bring such actions against future conduct, combined with EPA's apparent intent not to bring further actions against facilities violating the previous rules,[3] represent serious casualties of EPA's NSR "reform".

Nowhere in the Supplemental Analysis (or other rulemaking documents) has EPA accounted for this serious adverse consequence of its revisions.[4] Indeed, EPA has not even considered or analyzed whether the above reductions could have occurred under the NSR revisions promulgated in December, or what those revisions' impact will be on the ability to obtain additional reductions in the future. Given the size of the reductions to date, this is a highly relevant inquiry, and one whose omission renders the analysis hopelessly flawed.

EPA's analysis of environmental impact must also account for the cumulative impact of the December final rule in tandem with the RMRR provisions -- which were developed along with the December rule to serve a common objective, were proposed in December, and have recently been signed by the Administrator as final rules. The adverse impact of both rules together on control of emissions is likely to be substantially larger than that of either one individually. In any event, EPA must carefully analyze this highly relevant issue, taking account of the impact on enforcement.

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[3] *See* "Administration Adopts Rule on Antipollution Exemption" (New York Times Aug. 28, 2003) (Acting Administrator Horinko "said it was unlikely that the administration would bring new suits under the old rule").

[4] To the contrary, EPA calculates NSR benefits by reference to facilities that have applied for permits, *see, e.g.*, Supp. Analysis at F-3 n.4, ignoring the large emission reductions available from sources that improperly fail to apply for permits.

B. EPA Arbitrarily Assumes That Polluters Will Undertake Environmentally Beneficial Activities if NSR Requirements are Lifted

Underlying EPA's analysis is an untenable assumption about the behavior of polluters: that they would undertake environmentally beneficial activities, if the regulatory mandates constraining them were lifted. This assumption flies in the face of the most basic tenets of environmental economics. The very nature of air pollution is that it is an externality, and that polluters benefit from the activity that produces the pollution, while others suffer the health and environmental consequences of the pollution. By assuming that polluters will voluntarily undertake to internalize their externalities, EPA's analysis denies this fundamental reality -- and ignores the repeated history of polluters' failure to undertake meaningful cleanup on their own, absent outside constraint in the form of regulation.

EPA likewise places great emphasis on the eagerness of sources to avoid new source review, and the associated time and expense. However, that very eagerness undermines EPA's efforts to weaken NSR applicability thresholds. When thresholds are strong, sources eager to avoid NSR can do so by controlling their emissions tightly so as not to trigger the permit requirement. Weakening NSR applicability thresholds allows these NSR-averse emitters to pollute more while still evading review.

Moreover, NSR-averse emitters who unlawfully exceed tight thresholds without seeking a permit are susceptible to enforcement actions -- such as the various proceedings initiated by EPA, states and citizens in recent years. By relaxing the thresholds, EPA simply ratifies some or all of the additional pollution added by these facilities' non-reviewed physical and operational changes -- and also avoids opportunities to reduce pollution through applying controls such as LAER, BACT and offsets to as-yet uncontrolled or poorly controlled violators.

C. EPA's Evaluation of the Environmental Impacts of Specific Rule Provisions Was Arbitrary

1. Any-Two-in-Ten Baseline Calculation

EPA contends that the prior NSR rules "require[d] many changes made to existing equipment to go through major NSR, without taking into account operating history, even when such changes will not result in increased pollution to the environment." 67 Fed. Reg. at 80192/1. According to EPA, allowing sources to select any two years from the past decade for the purpose of establishing their baseline emissions (the "any-two-in-ten" test) "respond[s] to industry concerns . . . without compromising air quality." 67 Fed. Reg. at 80191/3. Contrary to EPA's assertion, logic and substantial evidence demonstrate that the "any-two-in-ten" methodology will allow substantial increases in harmful air pollution.

Under the prior rule, a reviewing authority was to assume that emission levels that occurred during the two years prior to a proposed change were representative of normal source operations and would serve as the baseline from which to measure an emissions increase resulting from a change. A different 2-year period could be used only if the permit applicant

demonstrated to the satisfaction of the reviewing authority that a different 2 year period was "more representative of normal source operations." Under the new final rule, a source can select as its baseline the two-year period from the past decade during which the source's emissions were the highest. There is no requirement that the source demonstrate that the selected two-year period reflects normal source operations.

Though the pre-existing rule allowed a permitting authority to approve a different two-year period as more representative of normal source operations, there is no indication that permitting authorities commonly granted such requests. Moreover, it is unlikely that many sources, if any, could demonstrate that a higher emissions level reached nearly a decade earlier is representative of current source operations. Though EPA appears to believe that any emissions level reached by a source over the course of its "business cycle" is representative of normal source operations (*see* 67 Fed. Reg. at 80199/1)—a concept that we dispute—EPA's own study reveals that the business cycle of many industries is much shorter than ten years. Eastern Research Group, *Business Cycles in Major Emitting Source Industries* (Sept. 25, 1997). Indeed, EPA's business cycle study fails to identify a single industry with a ten-year business cycle. *Id.*

By granting a source unfettered discretion to select as its baseline any two year period over the past ten years, the final rule allows sources to make changes that dramatically increase their emissions without undergoing NSR. *See* Environmental Integrity Project (EIP) and Council of State Governments/Eastern Regional Conference (CSG/ERC), *Reform or Rollback? How EPA's Changes to New Source Review Affect Air Pollution in 12 States: Summary Report* (DRAFT) (Updated Aug. 18, 2003).

EPA also disingenuously asserts that though it has abandoned the two-year period preceding a planned change as the basis for establishing pre-change emissions, "[t]he new rule also does not affect the way in which a source's ambient air quality impacts are evaluated." 67 Fed. Reg. at 80192/3. Though it is true that the ambient impacts analysis required by NSR will still consider the amount that emissions increase above the source's actual emissions during the two years immediately preceding the change, the "any-two-in-ten" test will allow large numbers of sources to escape NSR altogether. The inescapable conclusion is that the "any-two-in-ten" test will dramatically affect the evaluation of ambient air quality impacts resulting from source changes—by eliminating the impacts analysis requirement.

2. Actual-to-Projected-Actual Test, Generally

EPA claims that the portion of the rule setting forth an "actual-to-projected-actual applicability test" (hereinafter referred to as "new test") will have a "net environmental benefit."[5] The agency bases its claim on four assertions, none of which finds any support in either the rulemaking record or the Supplemental Analysis.

a. *First Assertion*

[5] 68 Fed. Reg. at 44625/1.

EPA asserts that the new test will remove "barriers to projects that will reduce emissions."[6] The full universe of EPA's claimed support for this assertion is found in Appendix G of the Supplemental Analysis. The only information presented in Appendix G to support the two assertions are unsubstantiated industry-supplied anecdotes that are not even included in the docket of this rulemaking. In report GAO-03-947, the General Accounting Office ("GAO") has just concluded that these unverified and self-serving anecdotes were just that, and that they carried no statistical validity.[7] The GAO went on to question whether the anecdotes can serve as the basis for EPA's assertion about removing barriers to environmentally beneficial projects:

> Because EPA based its conclusion that NSR discouraged some energy efficiency projects on anecdotal information rather than a comprehensive survey or representative sample of industries subject to the program, its findings are not necessarily representative of the program's effect on energy efficiency projects throughout the industries subject to the program. In addition, EPA's findings that some foregone energy efficiency projects would have reduced air emissions was based on the assumption that facilities would not increase their production levels after performing the projects. However, facilities' future levels of production and emissions are uncertain because they may fluctuate in response to economic conditions, and other factors.[8]

EPA is thus unable to offer any valid support for its assertion that the old rule presented barriers to projects that would reduce emissions.

b. ***Second Assertion***

EPA also asserts that the new test will remove "[i]ncentives to keep actual emissions high before making a change."[9] Again, the full universe of EPA's claimed support for this assertion is found in Appendix G of the Supplemental Analysis. That appendix devotes just one paragraph to this particular assertion.[10] The paragraph makes reference to a single industry-supplied anecdote. Notably, EPA's recitation of the anecdote reveals that the company in question did not even assert that any of the PSD/NNSR requirements created any incentive – in the recounted

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6 Id. at 44625/2.

7 General Accounting Office Report No. GAO-03-947, "EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program," August 2003.

8 GAO Report at

9 68 Fed. Reg. at 44625/2.

10 Supplemental Analysis at G-3.

incident or any other –for the company in question or any other company to raise emissions prior to a planned physical or operational change. Indeed, EPA does not even assert that the rules at the time actually gave the company any incentive strong enough to ever cause it actually to inflate its emissions. In fact, it appears from EPA's account that the source did not avail itself of its supposed ability to inflate its emissions.[11] Therefore, the solitary, unsubstantiated, industry-supplied anecdote that EPA cites for its assertion does not actually provide any support whatsoever.

c. *Third Assertion*

Next, EPA asserts that the new test will not result in higher emissions levels at electric utilities.[12] The agency bases this assertion solely on the fact that it has applied an actual-to-projected-actual test to utilities since 1992. But the 1992 rule is itself illegal, and indeed is under court challenge. In any event, the 2002 rule has changed the test that applies to utilities in several significant ways.[13] The agency has not posed the question, much less investigated, what the impact of these changes will be on emissions levels at utilities.[14] It offers nothing, then, to support its assertion that the new test will not cause those levels to rise. As we demonstrated in our administrative comments and our reconsideration petition, the ways in which the rule has changed the test for utilities increase the likelihood that significant emissions increases at utilities will not be detected by permitting authorities prior to construction (or at all, for that matter). In actuality, then, all the information in the rulemaking record points to the conclusion that the new test will result in higher emissions levels at utilities.

d. *Fourth Assertion*

Finally, EPA asserts that the new test will not result in higher emissions levels than the preexisting test in any case in which, as a matter of fact, a significant emissions increase does result from a physical or operational change to a source.[15] This is assertion is based on EPA's assumption that a significant emissions increase will never result from a change after the source owner has reached a negative applicability determination using the new test. As its sole support for this assumption, EPA cites two requirements imposed by the new rule. First, EPA cites the

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11 Id.

12 68 Fed. Reg. at 44625/2.

13 See id. at 44627-28 (identifying some of the ways in which the 2002 rule changes the actual-to-projected-actual test that has applied to utilities since 1992).

14 See Supplemental Analysis at 14 ("Appendix G describes the environmental impacts of switching to an actual-to-projected-actual test for sources *other than electric utility steam generating units*.").

15 68 Fed. Reg. at 44625/2.

requirement that a source report any post-change emissions increases that exceed the projections on which the negative applicability determination was based. Second, EPA cites the requirement that a source send regular post-change emissions reports to the permitting authority if the source perceives a "reasonable possibility" that its projection of post-change emissions is wrong.

The two requirements that EPA cites fail to provide any support for the agency's assumption that a significant emissions increase will never result from a change after the source owner has reached a negative applicability determination using the new test. First, neither of the requirements EPA cites prevents emissions from increasing significantly. Rather, they just require the source owner to monitor, record, and report emissions under certain circumstances. If the source owner monitors, records, and reports a significant post-change emissions increase, at best it could be compelled to then adopt best available pollution controls (though the rule nowhere so states), but that will not alter the fact that a significantly increased amount of pollution has been released into the atmosphere over some period of time. What is more, a projection of post-change emissions, especially one that is made by a source without the knowledge or supervision of a permitting authority, is much more likely to be wrong than the calculation of post-change emissions potential, which is what the preexisting rule required. Post-change potential to emit is ascertainable to a high degree of certainty prior to occurrence of the change. The accuracy of the pre-change calculation is assured to an even higher degree of certainty where, as frequently happened under the preexisting rule, the source's potential to emit is codified as a synthetic minor permit limit.

EPA concedes in its Supplemental Analysis that "the actual-to-projected actual test would reduce the number of sources who would need to take permit limits." It claims that "environmental benefit of these permit limits is effectively preserved," however, claiming that, under the new rule, "any source projecting no significant actual increase must stay within that projection or face NSR."[16] This is specious. Even if the source's projection of post-change emissions happens to be the same number as would have appeared, under the old rule, in a synthetic minor permit, the consequences for emitting higher than the projection under the new rule are much less severe than the consequences of emitting higher than the limit in a synthetic minor permit under the old rule. Consequently, the probability of a source emitting at a higher level than its pre-change projection is significantly higher than the probability would have been, under the old rule, of that source emitting at a higher level than the limit in its synthetic minor permit.

In sum, comparing what happens under the new rule to what happens under the old rule reveals that, for two reasons, a significant emissions increase is much more likely under the former than under the latter. First, a source's emissions are much more likely to exceed an emissions projection made pre-change than they are to exceed a emissions potential calculated pre-change. Second, a source owner is much more likely to ignore a pre-change emissions projection under the new rule than it would be to ignore a synthetic minor permit limit under the old rule. EPA offers nothing whatsoever to refute the results of this comparison. The fact that a significant emissions increase is much more likely under the new rule than under the old belies

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16 Supplemental Analysis at 14.

EPA's assertion that the new test will not result in higher emissions levels than the preexisting test in any case in which, as a matter of fact, a significant emissions increase does result from a physical or operational change to a source.

3. Plantwide Applicability Limitations

EPA claims that the plantwide applicability limitations ("PAL") portion of the 2002 rule will help carry out a purpose of the Clean Air Act by reducing the amount of air pollution that major industrial sources emit in this country.[17] The agency bases its claim on three assertions, none of which finds any support in either the rulemaking record or the Supplemental Analysis. Two of the assertions would not support EPA's claim even if they were corroborated.

a. *First Assertion*

EPA asserts that, in the absence of the 2002 rule, sources may subvert the purposes of the Act's NSR provisions by undertaking serial emissions-increasing changes that, while too small to trigger the NSR requirements, nevertheless add up to significant emissions increases over time. According to EPA, the PALs portion of the rule will prohibit these serial increases.[18] The agency cites nothing in the rulemaking record or the Supplemental analysis to support either part of this assertion. Moreover, the language of the Clean Air Act disproves the first part, and the language of the new rule disproves the second.

In 1980, EPA promulgated a rule whereby a physical or operational change to a source "increases the amount of any air pollutant emitted," as that phrase is used in the Act's definition of "modification,"[19] only if the change causes the amount of pollution emitted to rise by forty tons-per-year or more.[20] In justifying this *de minimis* emissions level, EPA stated: "Two factors had an important influence on the choice of de minimis emissions levels within the resulting range of annual emissions rates. The primary one was the cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increase[.]" 45 Fed. Reg. 52707 (August 7, 1980). If EPA believes that serial emission increases below level that it established as *de minimis* are actually harming air quality, EPA must correct this error in its statutory interpretation by revising the rule to decrease the *de minimis* level. EPA cannot rely on this infirmity in its prior determination regarding what constitutes a *de minimis* emissions increase exempt from NSR to justify the PAL provisions. In any case, as

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17 67 Fed. Reg. at 80189/3 ("We believe that the added flexibility provided under a PAL will facilitate your ability to respond rapidly to changing market conditions while enhancing the environmental protection afforded under the program.").

18 Id. at 80206/3, 80215/3.

19 42 U.S.C. § 7411(a)(4).

20 40 C.F.R. §§ 51.165(a)(1)(x); 51.166(b)(23)(i), 52.21(b)(23)(i).

demonstrated in our administrative comments and reconsideration petition, rather than remedying any existing regulatory subversion of Congressional intent, the rule commits a new, more extreme subversion by exempting even larger emissions increases from NSR.

The new regulatory language belies EPA's contention that the rule will prohibit serial emissions increases. As our administrative comments, our reconsideration petition, and the recent study by the Environmental Integrity Project[21] demonstrate, the PAL establishment and renewal provisions in the rule ensure that a facility's PAL will be much higher than the facility's actual aggregate emissions. The inflated level of the PAL will allow a facility to avoid the NSR requirements even if it makes serial changes that individually increase source-wide emissions by far more than forty tons-per year and that, in the aggregate, increase source-wide emissions by massive amounts. Far from prohibiting serial "small" emissions increases, the new rule exempts serial large emissions increases, and, for that matter, simultaneous large increases.

b. *Second Assertion*

Next, EPA asserts that the owner of a facility subject to a PAL established under the new rule will have an incentive to control emissions from existing and new units at the facility so that it may have flexibility to increase emissions at other units.[22] First, it bears noting that this assertion does nothing to substantiate EPA's claim that the new rule will lead to emissions reductions. To the extent a facility-wide emission limit gives the facility owner an incentive to lower emissions at certain units, the incentive is, as EPA acknowledges, that the decrease will enable the owner to bring about an equivalent emissions increase at other units. Therefore, EPA's assertion about the incentive that the rule supposedly creates does nothing to advance the agency's claim that the rule will reduce industrial air pollution.

Second, the agency cites nothing in the rulemaking record to support the assertion that the owner of a facility covered by a PAL established under this rule would have any incentive to control emissions at any of the facility's units. The Supplemental Analysis claims that information outside of the rulemaking record – namely, the experience of six facilities that have been subject to plant-wide emissions limits – supports EPA's assertion about incentives. What the agency fails to mention, however, is that the requirements placed on those facilities were dramatically different from the provisions of EPA's rule. The Secretary of New Jersey's Department of Environmental Protection, Nicholas DiPasquale, told former Administrator Whitman as much in a July 15, 2002 letter that is included in the rulemaking record:

> The success of the Daimler-Chrysler PAL is inherent in its design which is significantly different than the PAL concept EPA is proposing. These fundamental differences in Delaware's

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21 Environmental Integrity Project (EIP) and Council of State Governments/Eastern Regional Conference (CSG/ERC), *Reform or Rollback? How EPA's Changes to New Source Review Affect Air Pollution in 12 States: Summary Report* (DRAFT) (Updated Aug. 18, 2003).

22 67 Fed. Reg. at 80206/3. –07/3, -21/1.

approach vs. EPA's apparent proposal make the use of our permit to support your proposal inappropriate. For instance, Daimler-Chrysler's facility was required to go through control upgrades prior to establishing the PAL. The EPA proposed PAL can be based on an emission level from 10 years ago plus "an amount that is less than the significance level" (bonus) and remain at that level for 10 more years without triggering NSR for any changes, modifications, additions or reconstruction that does not cause the PAL to be exceeded. In addition, there is no requirement to add pollution abatement controls when modifying a major source under a PAL or when new abatement technology becomes available. For 10 years, a major source's emission limit will remain unchanged and use outdated pollution control technology. Upon renewal, the PAL may be revised, but there appears to be no hard and fast requirement that it be done.

Delaware's PAL is of shorter duration than the EPA proposal and permits a "look back" of only 5 years, thus providing a more current character to the facility in terms of pollution abatement technology. Also, the baseline period was carefully examined to insure appropriate downward adjustments were made in developing the PAL that reflected regulatory emission reductions since the baseline period and emission offsets for planned expansions. It is not clear that the EPA proposal would require these adjustments to baseline period emissions in arriving at the PAL.

Although the EPA proposal essentially allows a source under a PAL to avoid NSR/PSD as does our permit, the Delaware approach ensures use of state-of-the-art pollution control technology and lower emissions per emission unit, than would otherwise be attained. Delaware believes this level of commitment from a source is needed in order to insure those obtaining a PAL are truly environmental leaders and are capable of complying with a permit that offers streamlined regulatory requirements, and flexibility along with the responsibility of self-regulation.

EPA's comments on the Delaware's Daimler-Chrysler permit since its issuance have been nothing but complimentary. It is surprising now to learn that EPA intends to propose a package of reforms that would preclude Delaware from repeating the success. I am also disappointed to learn that EPA intends to force states to issue PALs despite our repeated comments to the contrary. On this point, we believe the use of the PALs should be guided by specific

> criteria that takes into account a number of factors, including the applicant's compliance history.[23]

The differences identified by Mr. DiPasquale also distinguish the other five examples cited by EPA from the PAL provisions of the new rule. Notwithstanding that fact, EPA has never attempted to rebut the letter's conclusion: that past experience provides no support for EPA's assertions about the radical and unprecedented PALs that will be established under its new rule. The agency cannot contend, then, that the experience of the six facilities cited in the Supplemental Analysis provides any support for its assertion about the impact of the new rule. [24]

The language of the new rule itself belies EPA's assertion that the owner of a facility covered by a PAL will have an incentive to control emissions at some of the facility's units. As our administrative comments and reconsideration petition demonstrate, the PAL establishment and renewal provisions in the rule ensure that a facility's PAL will be set much higher than the facility's actual aggregate emissions, such that the owner will be able to increase emissions at multiple units by dramatic amounts without having to lower emissions at other units by any amount whatsoever. There is no support, then, for EPA's assertion that the establishment of a PAL under the new rule will give a facility owner any measurable new incentive to control emissions from existing or new units.

c. *Third Assertion*

Finally, EPA asserts that the PAL portion of the new rule "assures that the environment sees no significant increases in emissions compared to the baseline actual emissions existing before the PAL is established."[25] First, to say that the environment will see no significant increase above "baseline actual emissions" is not to say that the environment will see no significant increase above today's emissions levels. As our administrative comments and petition for reconsideration demonstrate, the rule defines "baseline actual emissions" such that the term normally will refer to a source emissions level that is substantially higher than the level of the source's emissions at the time the calculation is made. So EPA's assertion does nothing to substantiate its claim that the new rule will not lead to more air pollution, much less its claim that the rule will lead to less air pollution.

Moreover, a mere glance at the language of the new rule reveals that EPA's assertion is not even true. The rule plainly allows the level of the PAL to be raised dramatically higher than

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[23] Letter from Nicholas DiPasquale to Christine Whitman, July 15, 2002.

[24] For the same reason, EPA cannot cite the experience of the six facilities as support for its assertion, in the reconsideration notice, that "[t]he PAL provisions will result in tens of thousands of tons per year (tpy) of volatile organic compounds (VOC) reductions from just three industrial categories where PALs are likely to be used most often." 68 Fed. Reg. at 44625/1. See also Supplemental Analysis at 7. The agency cites no other support for that assertion.

[25] 67 Fed. Reg. at 80218/3.

"baseline actual emissions existing before the PAL is established" whenever a new unit is added to the facility.[26] Therefore, this third assertion, like the first two, is wholly unsupported.

4. Clean Unit Exemption

Concerning the Clean Unit exemption, EPA claims that "once [a source has] installed state-of-the-art emissions control, an additional major NSR review will generally not result in any additional emissions controls for a period of years after the original control technology determination is made. In such cases, the major NSR permitting requirements impose a paperwork burden with little to no additional environmental benefit. The Clean Unit applicability test eliminates this unnecessary administrative action." 68 Fed. Reg. 80222. This analysis must be rejected.

First, EPA's analysis assumes that the comparison will always be between the same standard -- *e.g.*, BACT to BACT, or LAER to LAER. Under EPA's rule, however, sources that become Clean Units in attainment areas (thus adopting controls at BACT level or weaker) can retain that designation even when their area is redesignated to nonattainment, thus evading LAER. EPA has not and cannot show that there is no significant difference between BACT and LAER.

Second, EPA does not and cannot deny that advances -- indeed, major advances -- in pollution control technology have occurred on numerous occasions over the last several decades. Under EPA's approach, a Clean Unit exemption issued in the years preceding any of these significant innovations would have guessed wrong -- *i.e.*, it would have forfeited in advance an opportunity for a major upgrade in the protectiveness of pollution control. EPA lacks any reasoned basis for concluding that substantial technological innovation will not occur during any particular future period -- especially an entire decade. Indeed, Congress has repeatedly enacted Clean Air Act amendments premised on the expectation that technological progress can and will occur in a shorter period of time than a decade -- going back at least as far as the 1970 Amendments, which established a three-year deadline for attainment of NAAQS. *See, e.g.*, *Union Electric*, 427 U.S. at 256-60. Likewise, EPA has repeatedly promulgated technology-based standards with lead-time of substantially less than ten years, thus reflecting the agency's conclusion that technological progress can occur in a shorter time. In short, EPA lacks a reasoned basis to enshrine its technologically pessimistic Clean Unit exemption into law.

In any event, even on its face EPA's assertion is simply that significant technological progress "generally" will not occur for a period of years following a Clean Unit determination. As this formulation makes clear, even EPA recognizes that its exemption will result in at least some sources being allowed to escape application of substantially more protective emission controls. By allowing such evasion, EPA's exemption will impose upon communities near and downwind of those sources a pollution burden that could have been avoided through technologically available BACT or LAER controls. EPA has not and could not show that

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[26] Id. at 80257/3-58/1, 80272/3, 80287/2 (40 C.F.R. §§ 51.165(f)(11)(i)(A), 51.166(w)(11)(i)(a), 52.21(aa)(11)(i)(a)).

protecting breathers in those circumstances "yield[s] a gain of trivial or no value." *See Alabama Power*, 636 F.2d at 361. Nor can EPA justify foregoing real pollution control benefits at such sources by invoking the prospect that comparable technological progress may not be achievable at other sources. *Id.* (implied exemption authority "is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs").[27]

Finally, for nonattainment areas, EPA's Clean Unit exemption foregoes a real pollution control benefit in the form of statutorily mandated offsets. CAA § 173(a)(1). Absent EPA's exemption, this benefit would apply, regardless of whether technology has improved in the last several years. In particular, even if there has been no technological improvement, the source would still have to arrange for offsets to compensate for the pollution that it is adding. Indeed, in many instances the source would have to offset more pollution than it is adding. *See, e.g.*, § 182 (requiring offset ratios exceeding 1-to-1, with higher ratios in more polluted areas). Thus, even where there has been no recent technological innovation, nonattainment NSR will necessarily avoid emissions in at least the amount being added by the source -- an amount that, in turn, necessarily exceeds the levels defined as significant under EPA's regulation. (If the amount being added by the source did not exceed the significance level, it would not be subject to NSR anyway under EPA's regulations.)[28]

5. Pollution Control Project Exclusion

EPA's pollution control project (PCP) exemption will harm the environment by exempting from NSR pollution increases (characterized by EPA as "collateral" increases) that exceed the levels defined by EPA's rules as significant. Without NSR, these increases will be unconstrained by NSR protections such as BACT, LAER, and offsets. The result will be more pollution in affected communities than without the exemption -- significantly more, because the exemption comes into play only where pollution increases would otherwise trigger NSR (*i.e.*, where they exceed EPA's significance levels).

EPA attempts to minimize the importance of these increases, claiming that "any overall consequences would be negligible." Supp. Analysis at 14. The key hedge word here is "overall." Whether or not EPA thinks the statistics look impressive when aggregated nationally, the result of the PCP exemption will be more exposure to so-called "collateral" pollution in the communities near and downwind of the exempted sources than would occur without the exemption. Because this pollution exceeds EPA's own significance levels, EPA has not and

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[27] Likewise, EPA does not and could not demonstrate -- for Clean Units or any other aspect of the December rule -- that the agency's divergence from the statute is compelled by administrative necessity -- *i.e.*, that "practical considerations make it impossible for the agency to carry out its mandate." *Alabama Power*, 636 F.2d at 359 (emphasis added). EPA may not believe that NSR is worthwhile, but does not and could claim that it is infeasible to administer the program.

[28] Responses to other assertions made in the Environmental Analysis concerning Clean Units can be found *infra* in the section discussing that issue.

could not demonstrate that protecting the public from it "yield[s] a gain of trivial or no value." *See Alabama Power*, 636 F.2d at 361.

EPA argues that the harm of "collateral" pollution is counterbalanced by environmentally beneficial aspects of PCPs. But, to the extent those benefits are real,[29] EPA has not shown they would not occur anyway. To the contrary, EPA expressly allows mandatory pollution control projects -- *i.e.*, ones that would have occurred anyway -- to qualify as PCPs. Supp. Analysis at E-2 n.3. Even as to non-mandatory PCPs, EPA has not shown they would not occur anyway, even absent the exemption. Certainly a few anecdotes do not constitute such proof.

In any event, the statutorily mandated NSR permit requirement produces gains of real value in controlling so-called "collateral" increases, and EPA lacks authority to surrender those gains by administrative fiat based on its policy conclusion that they are outweighed by drawbacks. *Alabama Power*, 636 F.2d at 316 (implied exemption authority "is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs").

Finally, EPA cannot justify its exemption -- or its minimization of the exemption's impacts -- by citing a previous regulation and guidance document. *See* Supp. Analysis at E-1. A guidance document does not constitute law, and both it and the regulation act unlawfully in purporting to authorize a PCP exemption. Thus, these documents do not constitute a valid baseline for EPA's analysis.

III. COMMENTS ON SPECIFIC PROVISIONS OF THE FINAL RULE THAT ARE UNDER RECONSIDERATION

A. Plantwide Applicability Limitations

The portions of the 2002 rule that provide for the establishment of plantwide applicability limitations ("PALs") violate the Act by relieving facility owners of the obligation to obtain NSR permits before undertaking physical and operational changes that will result in significant increases in the amounts of air pollutants emitted by the facilities. In its reconsideration notice, EPA solicits comment on two of the PAL provisions that independently violate the Act.

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[29] EPA concludes that PCPs will in fact be beneficial simply because the exemption says they must be. Supp. Analysis at E-2. This circular argument must fail: EPA cannot possibly know in advance how authorities will implement the exemption, and thus cannot be confident that exempted projects will be environmentally beneficial. Moreover, EPA has promulgated a list of presumptively beneficial projects, which will not even undergo a case-by-case determination of net benefit. EPA cannot know that each project on the presumptive list will produce net benefits in each and every instance.

1. Requiring That the PAL Include the Potential Emissions of All Units Built After the Close of the Two-Year Period Selected by the Facility Owner

The final rule declares that once the any-two-in-ten method is used to calculate an emissions baseline for an entire facility,[30] "[e]missions from units on which actual construction began after the 24-month period must be added to the PAL level in an amount equal to the potential to emit of the units."[31] (emphasis added). This provision is unlawful and arbitrary and must be removed from the rule.

Allowing a PAL to be based even in part on *potential* rather than *actual* emissions violates CAA § 111(a)(4). Specifically, including potential emissions in a PAL enables the source to undertake a physical or operational change that increases actual emissions without undergoing NSR, by offsetting its actual emissions increase with a fictitious (non-actual) emission reduction. This contravenes the principle – underlying the Alabama Power decision and stated explicitly by EPA in the preamble to its 1980 PSD regulations – that NSR applicability is based on actual emissions. Moreover, this would allow a source to create offsets by reducing only its potential to emit, in violation of Clean Air Act requirements specifying that offsets must be actual emissions. CAA § 173(c).

EPA does not claim that a "new" unit will ever actually emit at its potential. To the contrary, EPA recognizes in other parts of the preamble to the final rule that sources typically emit well below their potential. *See, e.g.,* 67 Fed. Reg. at 80199/2 (Pointing to public comments stating that "most emissions units are operating at an activity level much lower than the allowed activity level."). EPA's argument that a "new" unit may "have undergone major or minor NSR review" and may have been required "to comply with the recent control technology requirements and other emission limitations that are representative of how [it] intend[s] to actually operate the emissions unit," (68 Fed. Reg. at 44626/2-3) offers no support for its decision to calculate baseline emissions for such a unit based on its potential emissions. Regardless of the preconstruction requirements that apply to a unit when it is installed, EPA offers no basis for a conclusion that the unit, once operational, will emit at its full potential.

The concern expressed by EPA that a "new" unit's recent actual emissions "may not be representative of intended operations" (68 Fed. Reg. at 44626/2) is insufficient to overcome the unlawfulness of including potential emissions in a source's NSR baseline. Moreover, EPA fails to offer a reasoned explanation for why a source's potential emissions would be any more representative of the source's intended future operations than the source's actual historical emissions. With respect to those "new" units that have already been operating for two years or

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30 The rule declares that the any-two-in-ten method for calculating "baseline actual emissions" shall be the basis for setting a PAL. 40 C.F.R. §§ 51.165(f)(6), 51.166(w)(6), 52.21(aa)(6).

31 40 C.F.R. §§ 51.165(f)(6), 51.166(w)(6), 52.21(aa)(6).

more,[32] EPA admits in other NSR contexts that it is possible to calculate an accurate measure of a unit's actual emissions once the unit has been operating for two years. With respect to units that have been operating for less than two years, EPA could have adopted an alternative approach that would have avoided the statutory violation and arbitrariness caused by incorporation of potential emissions into a PAL. For example, EPA could have decided to include new units into the PAL based on a realistic projection of future actual emissions.[33] If EPA is unable to identify a lawful approach to incorporating new emission units into a PAL, EPA should either limit the PAL option to facilities that have no new units, or eliminate the PAL option altogether.

2. Exempting From Permitting Review Activities That Are Unquestionably Physical or Operational Changes and That Have Actually Increased Source Emissions by Significant Amounts

In some instances in which the permitting authority and the owner/operator of a source agree that an activity proposed by the latter would be a "physical change in, or change in the method of operation of, [the] stationary source,"[34] the operating permit is supplemented with a provision prohibiting the source from emitting above a certain level.[35] The level of this so-called "synthetic minor limit" is set just below the point that – if projected to be the source's post-change emissions level – would necessitate the conclusion that the physical or operational change "increases the amount of any air pollutant emitted by such source."[36] If, after the change takes place, the operating permit is amended to raise the level above which the source may not emit, then the amendment immediately subjects the owner/operator to an obligation to satisfy the PSD/NNSR requirements for the physical or operational change, as if that change had not already occurred.[37] This occurs because the amendment necessitates the conclusion that the

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[32] The scope of the regulatory provision is not limited to a unit that began operating only a very short time before establishment of the PAL. Rather, it applies to a unit that began operating any time after the close of the two-year baseline calculation period selected by the owner. Since a source can select any two year period within the past ten years as its baseline, a so-called "new" unit could have been operating for up to eight years prior to establishment of the PAL.

[33] This suggestion of a possible alternative should in no way be interpreted as an endorsement of the unlawful and arbitrary actual-to-projected-actual test for determining NSR applicability promulgated by EPA in the final rule, which utterly fails to ensure that sources will not make changes that increase actual emissions without undergoing NSR.

[34] Id. § 7411(a)(4).

[35] See 68 Fed. Reg. at 44626/2.

[36] 42 U.S.C. § 7411(a)(4); see also 68 Fed. Reg. at 44626/2.

[37] 40 C.F.R. §§ 51.165(a)(5)(ii); 51.166(r)(2); 52.21(r)(4).

earlier activity, which was determined to be a "physical change in, or change in the method of operation of, [the] stationary source," in fact "increases the amount of any air pollutant emitted by [the] source."[38]

The final rule declares that a source that has avoided the NSR requirements for a physical or operational change by accepting a synthetic minor limit must be excused from those requirements when the source becomes subject to a PAL.[39] If, for instance, the synthetic minor limit has been set for the facility as a whole,[40] and a PAL is then established for the facility at a level higher than the synthetic minor limit (something that the rule's PAL calculation method renders not only possible, but also likely), then, under the final rule, neither the establishment of the PAL nor any subsequent amendment of the operating permit to incorporate the PAL triggers the NSR requirements. This is the case under the rule even though the establishment of the PAL necessitates a projection that the facility's emissions will exceed the level of the facility's synthetic minor limit.[41] When the facility then takes advantage of the PAL and actually raises its emissions level above the level of the synthetic minor limit, that event does not trigger the NSR requirements either.[42] In other words, the rule purports to exempt from the preconstruction permitting requirements physical and operational source changes that must be projected to increase source emissions, and that ultimately do, in fact, increase source emissions. Because the Clean Air Act mandates a preconstruction permit for *any* physical or operational change at a source that increases source emissions, the rule is "not in accordance with" the Act.[43]

EPA provides no explanation whatsoever in the reconsideration notice for its decision to mandate that the establishment of a PAL erase a facility-wide synthetic minor limit. In the

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38 42 U.S.C. § 7411(a)(4).

39 67 Fed. Reg. at 80210/3. *See also id.* at 80255/1, 80270/1, 80284/3 (40 C.F.R. §§ 51.165(f)(1)(iii)(C), 51.166(w)(1)(ii)(C), 52.21(aa)(1)(ii)(c)).

40 68 Fed. Reg. at 44626/2 ("A synthetic minor limit is a limit that is included in a permit by a reviewing authority at the request of a source to reduce the potential to emit (PTE) of a *facility or emissions unit* below a level that would otherwise subject the *facility or emissions unit* to some regulatory requirement.") (emphasis added).

41 "Should you request a PAL, today's revised regulations allow the PAL to eliminate annual emissions or operational limits that you previously took at your stationary source to avoid major NSR for the PAL pollutant. This means that you may relax or remove these limits without triggering major NSR when the PAL becomes effective." 67 Fed. Reg. at 80210/3.

42 Id.

43 Id. § 7607(d)(9)(A).

absence of an explanation, the rule is not only in conflict with clear statutory language, but also "arbitrary [and] capricious."[44]

The final rule's carte blanche elimination of synthetic minor limits is unlawful for another reason as well: many, if not most, such limits are included in federally-enforceable permits issued by States pursuant to the requirements of their state implementation plans (SIPs). *See U.S. EPA, Guidance on Limiting Potential to Emit in New Source Permitting*, June 13, 1989, **http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/lmitpotl.pdf**. Once incorporated into a SIP permit, a synthetic minor limit becomes federally enforceable under the SIP. *Id.* EPA cannot eliminate an emission limitation from a SIP unless it does so by (1) approving a SIP revision "submitted by a State" pursuant to CAA § 110(l), or (2) promulgating a federal implementation plan (FIP) pursuant to CAA § 110(c)(1). No State submitted such a proposed SIP revision to EPA, and EPA had no authority to unilaterally eliminate SIP requirements through the NSR rulemaking. Nor does the NSR rulemaking constitute promulgation of a FIP under CAA § 110(c)(1). In any case, the statutory prerequisites for promulgation of a FIP have not been met. Thus, it was unlawful for EPA to include a provision in the final NSR rule eliminating synthetic minor limits applicable to sources that choose to accept a PAL.

Even if EPA possessed authority to unilaterally eliminate SIP limits through the NSR rulemaking, elimination of limits applicable to sources in non-attainment areas would be unlawful under the Act's General Savings Clause, which states: "No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insure equivalent or greater emission reductions of such air pollutant." CAA § 193. Even if a PAL limit would ensure equal or greater emission reductions—which it would not—EPA's elimination of synthetic minor limits would be unlawful because even after expiration of a PAL the synthetic minor limits are not reinstated. *See* 67 Fed. Reg. at 80208/2.

Finally, some states establish synthetic minor limits under state-only permits, (i.e., permits that are not federally enforceable). Thus, EPA's purported elimination of all synthetic minor limits that apply to PAL sources violates CAA § 116, which preserves State authority to adopt more stringent air pollution limitations than those adopted by the federal government. *See* § 116 ("[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control of abatement of air pollution . . .").

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[44] 42 U.S.C. § 7607(d)(9)(A).

B. Actual-to-Projected-Actual Test

1. Allowing Use of the Actual-To-Projected-Actual Test For Replacement Units

EPA's decision to allow sources to use the actual-to-projected-actual test for the purpose of determining whether a replaced or reconstructed emissions unit will result in an increase in emissions is arbitrary and capricious because EPA fails to offer a reasoned explanation for how a source could accurately project post-change emissions for such emission units. When EPA proposed the WEPCO rule in 1991, EPA stated: "Since there is no relevant operating history for ... replaced units, it is not possible to reasonably project post-change utilization for these units, and hence, their future level of 'representative annual actual emissions.'" 56 Fed. Reg. 27630, 27636/2 (June 14, 1991). EPA offers no explanation for its changed position other than to make the unsupported assertion that "a source replacing a unit should be able to adequately project and track emissions for the replacement unit based, in part, on the operating history of the replaced unit." 67 Fed. Reg. at 80194/3 (emphasis added). In light of EPA's (1) failure to rebut its prior conclusion that it is not possible to reasonably project post-change utilization for a replacement unit based on the operating history of the pre-existing unit, and (2) current admission that the operating history of the replaced unit can only partially serve as the basis for a projection of post-change emissions, EPA's decision to allow sources to apply the actual-to-projected-actual test in determining whether the replacement of an emissions unit triggers NSR is arbitrary and capricious.[45]

2. Exemption From Post-Change Recordkeeping and Reporting Based on Source Determination That There is no "Reasonable Possibility" That Post-Change Emissions will Exceed Source Projections

The post-change reporting and recordkeeping requirements set forth in the final rule[46] only apply to a source "if there is a 'reasonable possibility' that the project will result in a significant emissions increase." 68 Fed. Reg. at 44627/2 The final rule leaves the determination as to whether there is a "reasonable possibility" that a change will result in a significant emissions increase entirely up to the source. *See* 40 C.F.R. § 52.21(r)(6). For the reasons set forth below, EPA's adoption of this "reasonable possibility" test is unlawful and arbitrary.

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[45] In an apparent attempt to support its decision to allow the actual-to-projected-test for replacement units, EPA's refers to its 1980 decision "against applying PSD to 'reconstruction,' even of entire sources, on the grounds that, as to existing sources that would not otherwise be subjected to PSD review as a major modification(i.e. such source would not cause a significant new emissions increase), changes that had no emission consequences should not be subject to PSD regardless of their magnitude." 67 Fed. Reg. at 80194/2 (emphasis added). That 1980 decision has no relevance to EPA's decision to allow a source to apply the actual-to-projected-actual test in determining whether a replacement unit will result in an increase in emissions, thereby triggering NSR as a modification under CAA § 111(a)(4).

[46] EPA's authority to require sources to maintain and submit records for the purpose of assuring that post-change emissions do not exceed the NSR applicability threshold is derived from CAA § 114(a), 42 U.S.C. § 7414(a).

The "Reasonable Possibility" Test is Impermissibly Vague. Neither the final rule nor the accompanying preamble identify the factors that a source must take into consideration in determining whether there is a "reasonably possibility" that post-change emissions may exceed the NSR significance level. This vagueness is compounded by EPA's decision to require a source to exclude consideration of future emissions that the source believes will be attributable solely to "demand growth." *See* 40 C.F.R. § 52.21(b)(41)(ii)(c)(source must exclude from its calculation "that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth."). As EPA stated in its 1998 proposal, "there is no plausible distinction between emissions increases due solely to demand growth as an independent factor and those changes at a source that respond to, or create new, demand growth which then results in increases capacity utilization." 63 Fed. Reg. at 39861/3. Nonetheless, EPA included the demand growth exclusion in the final rule without explaining how a source is to distinguish between emission increases due to demand growth and those resulting from a physical or operational change. Given the ambiguity regarding how a source is to determine which emission increases result from a change, it is arbitrary for EPA to exempt a source from post-change record-keeping and reporting based on the source's unreviewed determination that there is no reasonable possibility of a significant post-change emissions increase.

EPA's Reliance on the Reasonable Possibility Test to Assure NSR Compliance Arbitrarily Ignores Difficulties in Enforcement. EPA's decision to exempt a source from recordkeeping and reporting based on the source's independent projection of post-change emissions also arbitrarily runs counter to evidence before the agency demonstrating that sources cannot be relied upon to self-police NSR compliance.

In its 1996 proposal, EPA described the annual reporting requirement as a "safeguard" that would "guard against the possibility that significant unreviewed increases in actual emissions would occur" by "guarantee[ing] the accuracy of the projection for at least 5 years." 61 Fed. Reg. at 38267-38268. By 1998, EPA lacked confidence that even mandatory annual reporting would be adequate to assure source compliance. EPA explained that "since the issuance of the WEPCO rules, it appears that although there are a substantial number of changes to existing units, as well as an increase in the amount of electricity being generated for use outside of the local service district, change to utility units as well as post-change emissions estimates are not being reported to permitting agencies." 63 Fed. Reg. at 39860/1. Subsequently, EPA concluded following an extensive investigation that "[e]vidence suggests that violations of the major NSR requirements are widespread." *See Enforcement Alert: Compliance With Permitting Critical to Clean Air Act Goals* (Jan. 1999)(available online at http://www.epa.gov/Compliance/resources/newsletters/civil/enfalert/newsource.pdf). EPA reported that when it "looks closely at an industry sector, usually it discovers a high rate of noncompliance. For example, in its Wood Products Initiative, EPA found NSR violations at approximately 70-80 percent of the facilities investigated. Moreover, EPA continues to find high rates of noncompliance despite several successful enforcement actions." *Id.*

In light of evidence before that agency indicating that (1) utilities subject to the actual-to-projected-actual test under the WEPCO rule were often failing to submit required post-change emission reports and (2) large numbers of sources in all industry sectors are violating NSR, EPA should have *strengthened* recordkeeping and reporting requirements.[47] EPA utterly fails to offer a reasoned explanation for why, despite evidence of widespread noncompliance with NSR requirements, the final rules exempt a source from post-change recordkeeping and reporting based on nothing more than the source's unreviewed conclusion that there is no reasonable possibility of a significant post-change emissions increase.

Post-Change Recordkeeping and Reporting is Not Duplicative, Unnecessary, or Overly Burdensome. None of the justifications that EPA offers for the "reasonable possibility" test have merit. First, there is no support in the record for the assertions made by some commenters (*see* 68 Fed. Reg. at 44627) that similar information is already available in Title V reports and state emission inventories. Indeed, EPA never states that it agrees that post-change recordkeeping and reporting requirements would be duplicative of requirements under other CAA programs, but merely explains that some public comments made this assertion. *See, id.*

In any case, there is no reason to believe that data provided for the purpose of emission inventories or in Title V reports would enable a permitting authority to determine whether any particular physical or operational change results in an emissions increase. Emission inventory data is frequently based on estimates, not on measurements of actual source emissions. *See* http://www.epa.gov/oar/oaqps/efactors.html. Moreover, emission inventories typically focus on emissions from entire plants rather than from individual emission units, and thus are of little use for assessing whether post-change emissions from an individual emissions unit trigger NSR. Likewise, the Title V program only requires recordkeeping and reporting sufficient to assure compliance with applicable requirements included in a source's operating permit. *See* CAA § 502(b)(5)(A)(an approved Title V program must ensure that the permitting authority has adequate authority to "assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation, or requirement under this chapter."(emphasis added), CAA § 504(a)("Each permit issued under this subchapter shall include . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter.")(emphasis added), CAA § 504(c)("Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with permit terms and conditions.")(emphasis added). If a source concludes that NSR is inapplicable, NSR requirements are not included in the source's

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[47] EPA's claim that the recordkeeping and reporting requirements in the final rule are stronger in some respects than the requirements of the pre-existing rule (*see* 68 Fed. Reg. at 44627/3) is baseless. Under the pre-existing rules, a source was not required to submit emissions reports so long as it determined that there is no potential for a significant emissions increase (applying the actual-to-potential test). Under the new final rule, a source can still avoid reporting requirements by applying the actual-to-potential test, but can also avoid reporting requirements by applying the actual-to-projected-actual test and concluding that there is no "reasonable possibility" that emissions will increase significantly as a result of a change. Thus, the final rule plainly exempts more sources from recordkeeping and reporting than the pre-existing rule.

operating permit. Thus, there is no reason to conclude that recordkeeping and reporting requirements set forth in the source's operating permit would be sufficient to alert the permitting authority if the source's post-change emissions exceed the NSR applicability threshold.

EPA's concern "that without some qualifier on when [a source] need[s] to retain records and report, our rules would encompass any physical or operational change . . . no matter how inconsequential and unlikely that an emissions increase would result" (*see* 68 Fed. Reg. at 44627/3) is unfounded. Under the final rules a source can choose to project post-change emissions on the basis of each unit's PTE instead of on projected actual emissions. *See* 67 Fed. Reg. at 80194/2. If a source concludes that it is not subject to NSR based on post-change PTE, the source is not required to track or report post-change emissions. *Id.* Thus, contrary to EPA's assertion, the recordkeeping and reporting rules would not apply to "any physical or operational change" but only to changes that could potentially lead to an increase in actual emissions. Requiring a source to document post-change emissions under circumstances where a change could result in a significant increase in emissions serves NSR's air quality purposes (discussed earlier in these comments) It is unlawful and arbitrary for the Administrator to defer to a *source's* judgment regarding whether recordkeeping and reporting is necessary to guard against unpermitted increases in actual emissions following a physical or operational change.

Finally, though EPA asserts in the reconsideration notice that the "reasonable possibility test" is designed to "balance the need for information to determine compliance" with the "associated burden of recordkeeping and reporting," (*see* 68 Fed. Reg. at 44627), EPA offers no evidence or analysis suggesting that requiring sources to submit post-change reports is overly burdensome on either sources or permitting authorities. To the contrary, EPA acknowledges that "[i]n general, commenters were supportive of a 5-year recordkeeping requirement." *Id.* Moreover, though EPA states that some commenters argued that post-change reporting would be overly burdensome, (*see* 68 Fed. Reg. at 44627), EPA does not itself conclude that this is true. Thus, EPA has failed to offer a reasoned explanation for why it is necessary to reduce the burden posed by post-change recordkeeping and reporting by adopting the "reasonable possibility" test.

C. "Clean" Units

EPA's July 30 notice solicits comment on one aspect of our petition for reconsideration -- specifically, whether a facility designated as a Clean Unit can retain that designation when the area where it is located is redesignated to nonattainment. 68 Fed. Reg. 44628. However, the July 30 notice unlawfully and arbitrarily fails to grant reconsideration on -- or to address -- the other objections raised by our petition for reconsideration on the Clean Unit issue. *See* Pet. Recon. at 92-110.

On the one issue the notice does address -- application of the Clean Unit exemption to redesignated nonattainment areas -- the agency's defense of its approach is meritless. As indicated in our petition, the Clean Unit provision violates the Act, which provides that NSR is triggered by "any" physical or operational change at a major source that increases emissions. §§ 111(a)(4), 171(4), 179(2)(C). EPA lacks authority to narrow this mandate by excluding emissions increases at some major sources (*i.e.*, those designated as "Clean Units"). *See, e.g.*,

Sierra Club v. USEPA, 129 F.3d 137, 140 (D.C. Cir. 1997) ("this court has consistently struck down administrative narrowing of clear statutory mandates").

This statutory violation is especially egregious in the case of areas redesignated to nonattainment. In the Clean Air Act, Congress prescribed a carefully calibrated series of requirements governing nonattainment areas, designated to produce expeditious progress towards attainment by statutory deadlines. For example, the level of technology-based control is to be the lowest achievable emissions rate; the tonnage thresholds defining major sources vary depending on how polluted the area is; and pollution increases must be offset, in ratios that vary depending on how polluted the area is. *See, e.g.*, §§ 173, 182. EPA lacks authority to shunt aside this statutory program and substitute an alternate one of its choosing. That is all the more true here, where EPA is substituting weaker anti-pollution measures for those required for by the Act -- for example, by allowing use of controls at the level of BACT or even weaker (for example, controls deemed "comparable" to BACT).

EPA's attempts to justify this approach are meritless.

Retroactivity. EPA argues that "[a]s a general rule, permitting decisions are not *per se* invalid, or retroactively changed by virtue of a change in an area's attainment status. For example, we do not require sources that have applied BACT to upgrade controls to comply with LAER or obtain offsets when an area's designation changes." 68 Fed. Reg. 44628. However, once an area is designated to nonattainment, applying the applicable nonattainment requirements (including NSR) prospectively to subsequently occurring physical and operational changes does not constitute "retroactiv[e]" regulation. Whether or not such application disappoints expectations of source owners, such disappointment about the prospective application of a regulation falls far short of retroactivity. *See, e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 & n.4 (1994) ("[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law"; "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.") (citation, internal parentheses and quotations omitted).

This is especially true here, where any expectations that may arise will be the product of EPA's regulation (1) adopting a Clean Unit exemption, and (2) providing that the exemption can be retained upon redesignation to nonattainment. EPA can avoid creating such expectations in the first place by revising its regulations to eliminate the exemption, or to provide that the exemption ceases to govern upon redesignation to nonattainment. With industry on notice upfront about the applicable ground rules, the expectations cited by EPA would never come into existence, and thus would never be disappointed.

EPA's analogy to "sources that have applied BACT" (68 Fed. Reg. 44628) is inapt. Whatever one might conclude concerning the appropriate applicability of nonattainment NSR to

a source that undertook a physical and operational change before redesignation, that fact pattern in no way justifies exempting sources that undertake such changes after redesignation.

The D.C. Circuit has expressly confirmed that application of Clean Air Act nonattainment requirements in areas redesignated to nonattainment raises no retroactivity concerns. In *Sierra Club*, the Court overturned EPA's attempt to establish a one-year exemption from conformity requirements in newly designated nonattainment areas, holding that "this case involves an administrative agency's authority to limit the prospective, rather than retroactive, application of regulations implementing a statutory mandate."129 F.3d at 142 (emphasis in original). Indeed, EPA's argument that it was allowed to shield those who had placed reliance in the pre-redesignation legal framework was "ridiculous" and "absurd[]." *Id.* 142-43. The Court concluded that, "[a]bsent a showing of retroactivity, the challenged exemptions must be treated no differently than any other administrative exemption from a categorical statutory mandate." *Id.* 143 (emphasis added).[48]

In short, EPA's Clean Unit exemption -- a more brazen departure from the Act than the exemption struck down in *Sierra Club*[49] -- cannot be salvaged through meritless arguments about retroactivity and reliance. Moreover, even assuming *arguendo* that the exemption were not contrary to clear congressional intent, EPA's reliance on spurious retroactivity and reliance arguments to support it renders the agency's rule unreasonable under *Chevron* Step Two as well as arbitrary and capricious.

Compliance with Clean Air Act. EPA argues that its approach "is consistent with the Clean Air Act. The requirements of section 173 of the Act, including the requirements to apply LAER and obtain offsets, apply only if a project will result in an emissions increase. As long as an emissions unit maintains its status as a Clean Unit, it has not increased emissions." 68 Fed.

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[48] Congress's subsequent decision in 2000 to enact a one-year conformity grace period (§ 176(c)(6)) in no way diminishes the validity of the D.C. Circuit's analysis concluding that EPA lacked authority under the pre-2000 Act to create such a grace period by administrative fiat. *See Sierra Club*, 129 F.3d at 143 ("Although it is certainly within Congress's power to provide such grandfathering provisions, neither administrative agencies nor courts may do so in the absence [of] clear statutory authority.") (emphasis added). *See also West Virginia Univ. Hospitals v. Casey*, 499 U.S. 83, 101-02 n.7 (1991) (rejecting dissenter's argument "that today's holding will be proved wrong if Congress amends the law to conform with his dissent"). Far from supporting EPA's exemption, § 176(c)(6) undermines the exemption by showing that Congress knew how to carve out exemptions from nonattainment requirements when it wished to do so.

[49] In *Sierra Club*, the Court held: "The Government's argument that the line drawn between retrospective and prospective laws can be disregarded where, as here, the exemption from the conformity requirements -- termed 'grandfathering' by the Government -- is limited to a one-year period, is without merit." 129 F.3d at 143 (emphasis added; citation omitted). *A fortiori* EPA's attempt to establish a multi-year exemption from nonattainment NSR requirements must be rejected.

Reg. 44628. EPA does not and could not explain how merely applying the appellation "Clean Unit" to a pollution increase stops it from being one. A given quantity of increased emissions represents the same pollution burden, with the same harm to public health and the environment, regardless of whether the emitting facility enjoys the appellation "Clean Unit."

EPA recognized as much in its proposal, characterizing the Clean Unit provision as an "exclusion." 61 Fed. Reg. 38255-58. Its subsequent attempt to respin the provision as a method of computing pollution increases (67 Fed. Reg. 80228-29) unlawfully ignores the actual increases in emissions associated with the exemption. *See, e.g., id.* 80205 ("We agree that a potential-to-potential test for major NSR applicability could lead to unreviewed increases in emissions that would be detrimental to air quality and could make it difficult to implement the statutory requirements for state-of-the-art controls.") (emphasis added). EPA's attempt to exempt such increases from NSR violates § 111(a)(4)'s express provision that a modification encompasses "any" physical or operational change that increases emissions.

Moreover, as shown above, statutory interpretation -- whether under *Chevron* Step One or Step Two -- must reflect statutory context and purposes. Thus, even where the Act is ambiguous, EPA has been reversed where it adopted an interpretation that strayed beyond the scope of the ambiguity and defeated the portions of the Act that are clear. *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 481-86 (2001) (Court struck down EPA's approach to implementing the 1997 ozone NAAQS: while the Act had "gaps" that rendered it "ambiguous" on the precise issue before the Court, EPA had adopted an "unreasonable" and thus "unlawful" resolution of that ambiguity, by "go[ing] beyond the limits of what is ambiguous and contradict[ing] what in our view is quite clear"). That is just what EPA has done here. It has adopted a Clean Unit exemption premised on the notion that BACT-level (or weaker) controls are good enough for nonattainment areas. Congress, however, has rejected that notion by expressly providing for BACT in attainment areas, § 165(a)(4), and LAER plus offsets in nonattainment areas. § 173(a)(2). EPA may disagree with that approach, but is not free to override it.

Incentive. EPA argues that "a fundamental premise in creating the Clean Unit Test is to provide you with an incentive to install better emissions control technologies even when there is no State, local or Federal regulation requiring this level of control. We believe that this incentive will be undermined if you are unable to know with certainty that the added flexibility will be available to you for the full 10-year period." 68 Fed. Reg. 44628. EPA has no authority to sweep aside the Act's mandates -- including nonattainment NSR -- in quest of an "incentive" program of the agency's choosing. Even if that were not the case, EPA's unexplained and uncorroborated "belie[f]" falls far short of a reasoned explanation, supported by substantial evidence, that the Clean Unit exemption is warranted at all on incentive grounds, much less that it should be applied in areas redesignated to nonattainment. ***See supra* at __ (citing cases).**

Indeed, far from offering support for EPA's incentive argument, the record refutes it. According to EPA's own Supplemental Analysis, "EPA expects that the most frequent applicants for the Clean Unit Test will be those who have already installed, or will otherwise be installing, state-of-the-art controls, and who are now seeking Clean Unit Designation in order to avoid the administrative burden of potential duplicative review for changes at the already well-controlled

unit." Supp. Analysis at 10. As, EPA recognizes, "[i]n this case the environmental benefits of the air pollution control have already been realized." *Id.* (emphasis added). Thus, by EPA's own analysis, the preponderant effect of the Clean Unit exemption will not be to create an incentive to clean up pollution, but rather to use pollution control actions already taken or decided upon as an excuse to avoid further air quality analysis and pollution control.

Even in those cases where the Clean Unit exemption does create an incentive, EPA has not and could not establish that the incentive is an appropriate one concordant with the Act's objectives. To the contrary, under EPA's approach, facilities who become aware that an area is likely to be redesignated to nonattainment (a common occurrence given the advance availability of monitoring data) could deliberately evade LAER by assuming Clean Unit status before the redesignation is actually made. Under EPA's misguided and unlawful rule, that conduct would be rewarded by locking in controls at BACT (or worse), without offsets, even for modifications occurring after the area has been redesignated to nonattainment.

In short, EPA's policy argument, in addition to being precluded by the Act, is unexplained, uncorroborated, contradicted by EPA's own statements, and fundamentally misguided.

Impact on State SIP development. EPA argues that "because States will have established the Clean Units either through the major NSR permitting process or another permitting process, the State will be aware of which emissions units qualify as Clean Units at the time an area is redesignated. Thus, States that are concerned that Clean Units may have adverse impact on their attainment demonstrations if the full effect of their potential emissions is realized are able to make appropriate adjustments in their attainment demonstrations to account for these permitted emissions. In this respect, we believe that the Clean Unit Test provides States with a better planning tool than may otherwise exist in the absence of the Clean Unit Test." 68 Fed. Reg. 44628. EPA has not and could not offer a reasoned explanation as to how the key statutory requirement of expeditious attainment is served by allowing emissions increases to occur, and then expecting the states to compensate for them in attainment SIPs. Application of NSR will prevent those increases, thus reducing the burden on states to come up with compensating reductions. In any event, EPA's arguments about SIPs are an insufficient basis for exempting emissions increases from statutorily prescribed NSR requirements.