No. 11-2328

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DTE ENERGY COMPANY and DETROIT EDISON COMPANY,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Michigan, No. 10-13101 (Hon. Bernard A. Friedman)

BRIEF OF DEFENDANTS-APPELLEES DTE ENERGY COMPANY AND DETROIT EDISON COMPANY

Harry M. Johnson, III
George P. Sibley, III
HUNTON & WILLIAMS LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

Michael J. Solo
DTE ENERGY COMPANY
One Energy Plaza
Detroit, MI 48226
(313) 235-9512

F. William Brownell
Mark B. Bierbower
Makram B. Jaber
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

Brent A. Rosser
HUNTON & WILLIAMS LLP
101 South Tryon Street, Suite 3500
Charlotte, NC 28280
(704) 378-4707

Counsel for DTE Energy Company and Detroit Edison Company

DATED: May 1, 2012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-2328 Case Name: United States v. DTE Energy Co., et al.

Name of counsel: F. William Brownell

Pursuant to 6th Cir. R. 26.1, DTE Energy Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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CERTIFICATE OF SERVICE

I certify that on May 1, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/F. William Brownell

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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FOR THE SIXTH CIRCUIT

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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Parent Corporation/Affiliate Name: DTE Energy Company Relationship with Named Party: Parent

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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GLOSSARY OF TERMS

2002 NSR Reform Rules	EPA, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, Final Rule, 67 Fed. Reg. 80,186 (Dec. 31, 2002)
BACT	Best Available Control Technology
CAA	Clean Air Act
DOJ	U.S. Department of Justice
EPA	U.S. Environmental Protection Agency
FGD	Flue Gas Desulfurization
MDEQ	Michigan Department of Environmental Quality
NAAQS	National Ambient Air Quality Standards
NNSR	Nonattainment New Source Review Program
NO_x	Nitrogen Oxide
NSR	New Source Review
NSR programs	Prevention of Significant Deterioration Program and Nonattainment New Source Review Program
$PM_{2.5}$	Fine Particulate Matter
PSD	Prevention of Significant Deterioration
SCR	Selective Catalytic Reduction
SIPs	State Implementation Plans
SO_2	Sulfur Dioxide
UARG	Utility Air Regulatory Group

CLEAN AIR ACT CODIFICATION GUIDE

Clean Air Act Section	Codified at:
§ 109	42 U.S.C. § 7409
§ 110	42 U.S.C. § 7410
§ 111	42 U.S.C. § 7411
§ 113	42 U.S.C. § 7413
§ 114	42 U.S.C. § 7414
§ 160	42 U.S.C. § 7470
§ 163	42 U.S.C. § 7473
§ 165	42 U.S.C. § 7475
§ 167	42 U.S.C. § 7477
§ 169	42 U.S.C. § 7479
§ 169A	42 U.S.C. § 7491
§ 169B	42 U.S.C. § 7492
§ 171	42 U.S.C. § 7501
§§ 401-416	42 U.S.C. §§ 7651-7651*o*

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellees DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison") request oral argument. The issue presented here is one of first impression in the Courts of Appeals and is an issue of national importance. Detroit Edison submits that the Court would benefit from the full exploration of the issue that oral argument would provide.

STATEMENT OF THE ISSUE

A power plant operator violates the New Source Review (NSR) provisions of the Clean Air Act (CAA) if it constructs a "major modification" at an existing plant without obtaining the appropriate NSR permit. EPA's 2002 NSR Reform Rules explicitly provide that a construction project is a "major modification" if it causes a significant net increase in emissions and is not a major modification if it does not cause a significant emissions increase. 40 C.F.R. § 52.21(a)(2)(iv)(*a*). Did the District Court correctly dismiss EPA's claim that Detroit Edison's routine boiler tube replacements on Unit 2 of its Monroe power plant qualified as a major modification, where the undisputed facts demonstrated that Detroit Edison fully complied with its preconstruction obligations and that the project has not caused any increase in emissions?

PRELIMINARY STATEMENT

Under the CAA's NSR provisions, owners and operators of electric generating units must obtain a permit before constructing a new major source of air pollution or making a "major modification" to an existing source. *See* 42 U.S.C. §§ 7475(a), 7479(2)(C); 40 C.F.R. § 52.21(a)(2)(iv). A "major modification" is a physical change at a plant that causes a "significant increase" in emissions. *See* 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 52.21(a)(2)(iv)(*a*). In this lawsuit, the Government claims that routine boiler tube replacement projects that Detroit Edison performed on Unit 2 of its Monroe power plant in the Spring of 2010 constituted "major modifications" undertaken without an NSR permit.

The Government's NSR enforcement action against Detroit Edison[1] is the first such action governed by NSR Reform Rules that EPA adopted in 2002. 67 Fed. Reg. 80,186 (Dec. 31, 2002) (2002 NSR Reform Rules). These reforms addressed "[p]erhaps the most complicated and frustrating aspect of [NSR]"[2]—the lack of clear guidance specifying how power plant operators like Detroit Edison

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[1] Defendants-Appellees DTE Energy Company and Detroit Edison Company.

[2] Michigan Department of Environmental Quality (MDEQ), *PSD Workbook: A Practical Guide to Prevention of Significant Deterioration* (MDEQ PSD Workbook) at 2-1 (Oct. 2003), *available at* http://www.deq.state.mi.us/aps/downloads/permits/PSD%20Workbook.pdf. MDEQ is the agency with the authority to administer the NSR programs in Michigan.

should determine whether a maintenance project would cause a significant increase in emissions and how that preconstruction determination would be judged after the fact. This uncertainty in the old rules created "disincentives that discourage[d] sources from making the types of changes that improve operating efficiency, implement pollution prevention projects, and result in other environmentally beneficial changes." 67 Fed. Reg. at 80,192.

The new rules fix these problems. They clarify and codify how emissions should be projected before a project and how that projection will be judged after the project. Of central relevance here, the new rules state in the clearest possible terms that a project is a major modification for a regulated pollutant "if it causes both … [a] significant emissions increase [and] [a] significant net emissions increase." MICH. ADMIN. CODE R. 336.2802(4)(a); 40 C.F.R. § 52.21(a)(2)(iv). Conversely, a project "is ***not*** a major modification if it ***does not cause*** a significant emissions increase." *Id.* (emphases added). Preconstruction projections—either the projections showing no increase due to the project actually performed by the operator before construction or post-hoc projections purporting to show such an increase cobbled together by a platoon of Government-retained experts in litigation—do not determine whether a major modification has occurred: "***Regardless of any such preconstruction projections***, a major modification results if the project ***causes*** a significant emissions increase and a significant net

emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*) (emphases added); MICH. ADMIN. CODE R. 336.2802(4)(b).

Emissions at Monroe Unit 2 have not increased after the Spring 2010 projects. Those projects therefore are not major modifications, and Detroit Edison cannot be held liable for constructing them without a permit. Detroit Edison moved for summary judgment on this basis, and the District Court properly granted Detroit Edison's motion.

On appeal, the Government asks this Court to turn the rules upside down. Under the Government's view, an operator should be held liable under NSR for projects that, according to its counsel and litigation-retained "experts," should have been expected before construction to increase emissions, even though no such emissions increase was expected by the operator to occur and ***no such increase actually has occurred***. This view cannot be squared with the plain language of the rules or the sound policy that supports them. As EPA itself has explained outside of the litigation context, where an operator's preconstruction projection shows no increase due to the project, the 2002 NSR Reform Rules "make it clear that a modification project is subject to NSR ***only*** when the post-change ***actual emissions increase*** results in a significant emissions increase from the project and a significant net emissions increase at the source." EPA, *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area*

New Source Review Regulations (EPA's Response to Comments) at I-4-29 (Nov. 2002) (emphases added), *available at* http://www.epa.gov/NSR/actions.html#2002. The Government's litigation position should be rejected, and the District Court's judgment should be affirmed.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background: The CAA and the Role of NSR

Congress enacted the primary provisions of Title I of the CAA in 1970 and adopted major amendments in 1977 and 1990. Pub. L. No. 91-604, 84 Stat. 1676 (Dec. 31, 1970); Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977); Pub. L. No. 101-549, 104 Stat. 2399 (Nov. 15, 1990). Congress in 1970 directed EPA to develop National Ambient Air Quality Standards (NAAQS) to protect public health with an adequate margin of safety. 42 U.S.C. § 7409. The States, in turn, were to develop State implementation plans (SIPs) setting source-by-source emissions limits to meet the NAAQS. *Id.* § 7410. In 1972, a court ordered EPA to require the revision of SIPs to prevent "significant deterioration" of air quality in areas meeting the NAAQS, *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam* 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), which EPA did.

In 1977, Congress amended the CAA to codify the regulatory prevention of significant deterioration (PSD) preconstruction permit program promulgated in 1974 and to create a Nonattainment NSR program (NNSR) (collectively, the "NSR

programs"). These programs apply on a pollutant-by-pollutant basis depending on whether the source is located in a NAAQS attainment area (PSD) or a NAAQS nonattainment area (NNSR) for that pollutant. *See* 42 U.S.C. § 7470 *et seq.* (PSD program requirements); *id.* § 7501 *et seq.* (NNSR program requirements); *see also, e.g., Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 412 n.1 (6th Cir. 2007) (describing the PSD and NNSR programs). Both programs technically apply here, because Monroe County, Michigan, where the Monroe plant is located, is currently designated as in attainment for sulfur dioxide (SO_2) and nitrogen oxides (NO_x) but not so with respect to fine particulate matter ($PM_{2.5}$).[3] EPA, *The Green Book Nonattainment Areas for Criteria Pollutants* (as of Mar. 30, 2012), *available at* http://www.epa.gov/airquality/greenbk. But as relevant here, the programs are indistinguishable as they relate to NSR applicability, so like the Government, we will refer only to the PSD program regulations.

EPA defines the minimum requirements for these programs, which States then implement through SIPs. The EPA regulation defining the minimum

[3] Monroe County is currently meeting standards for $PM_{2.5}$. R. No. 46-2, Declaration of George T. Wolff ¶ 7. But EPA has not yet "re-designated" the area as being in attainment.

requirements for the PSD program is 40 C.F.R. § 52.21.[4] As explained below, § 52.21 was substantially revised by the 2002 NSR Reform Rules, and Michigan revised its SIP in 2006 to incorporate the 2002 revisions to § 52.21.

The CAA regulates new and existing major stationary sources differently. In general, ***new*** sources—i.e., sources that are constructed or that undergo "major modifications" after the effective date of the applicable NSR provisions—must undergo preconstruction review and permitting, and as part of this process may be required to install additional emission controls. Congress chose to impose these obligations on new sources because it determined that new sources could incorporate more cost-effectively and efficiently those types of emissions controls into their designs as they were being built than could existing sources. *See, e.g.*, H.R. REP. NO. 95-294 at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264.

In defining whether a project at an existing source constitutes a "major modification" that triggers NSR permitting, both the CAA itself and EPA's NSR rules focus on actual emissions increases that add to existing pollution above "baseline" levels. *See* 42 U.S.C. §§ 7470(5), 7473, 7479(4). The CAA defines "modification" as "any physical change in, or change in the method of operation

[4] Section 51.166 technically imposes the requirements that SIPs must contain, while section 52.21 sets forth the provisions that apply if an approvable SIP has not been submitted. The substantive provisions relevant here are identical in both sections, so for ease of reference, we refer only to section 52.21.

of, a stationary source which ***increases the amount*** of any air pollutant emitted by such source … ." 42 U.S.C. § 7411(a)(4). And EPA's rules make clear that a physical change must cause a significant increase in emissions to qualify as a "major modification." *See* 40 C.F.R. § 52.21(a)(2)(iv)(*a*), (*b*); *id.* § 52.21(b)(2).

Contrary to the Government's assertions in litigation here, *see, e.g.,* DOJ Br. at 4, NSR is not a mechanism to force the retirement of older units or to otherwise mandate emission reductions. Rather, as EPA itself has explained repeatedly, "[the] [NSR] program's ***limited object is to limit significant emissions increases*** from new and modified sources." EPA, EPA-456/R-03-005, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration* (EPA's Response to Petitions for Reconsideration) at 105 (Oct. 30, 2003) (emphasis added), *available at* http://www.epa.gov/NSR/documents/petitionresponses10-30-03.pdf. *See also* 70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005) ("[T]he primary purpose of the major NSR program is ***not to reduce emissions***, but to balance the need for environmental protection and economic growth … .") (emphasis added). Accordingly, the NSR rules are designed to ensure "that ***only*** changes causing a ***real*** increase in pollution are subject to NSR." Br. for Resp. EPA at 76, *New York v. EPA*, No. 02-1387, 2004 WL 5846388, at *76 (D.C. Cir. Oct. 26, 2004) (emphases added). Other CAA programs and mechanisms—such as SIPs

specifically designed to meet or exceed federal air quality standards, 42 U.S.C. § 7410; visibility protection programs, *id.* §§ 7491-7492; and the Title IV Acid Rain program, *id.* §§ 7651-7651*o*—are the CAA vehicles for achieving emissions ***reductions***. Indeed, notwithstanding the Government's and amici's claims about "grandfathered" and "uncontrolled" sources, these CAA programs have worked well to substantially improve air quality and reduce emissions from the utility sector specifically over the last three decades.[5] *See, e.g.,* EPA, EPA-454/R-12-001, *Our Nation's Air: Status and Trends Through 2010* at 1-2 (Feb. 2012), *available at* http://www.epa.gov/airtrends/2011/report/fullreport.pdf.

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[5] Detroit Edison's experience is illustrative. Over the years, Detroit Edison has substantially decreased its emissions, including emissions of SO_2 and NO_x, and is currently decreasing them at an accelerated pace. R. No. 107-2, Declaration of Skiles W. Boyd (Boyd Decl.) ¶ 6. At the Monroe plant in particular, Detroit Edison has reduced annual SO_2 emissions by about 69% since the early 1990s and annual NO_x emissions by about 79% since the mid-1990s. *Id.* ¶ 7. More recently, Detroit Edison embarked on a $2 billion program to install advanced SO_2 and NO_x controls at the Monroe power plant. In 2005-2006, Detroit Edison installed second generation low-NO_x burners on Monroe Units 1-4 (first generation low-NO_x burners were installed in the mid-1990s). *Id.* ¶ 8. After several years of construction, it started operating Selective Catalytic Reduction (SCR) systems on Monroe Units 1 and 4 in 2003, and on Unit 3 in 2007; and Flue Gas Desulfurization (FGD) systems on Units 3 and 4 in 2009. *Id.* These are the types of control equipment the Government is asking be installed at Monroe Unit 2 in this lawsuit. But construction work has already started on these control devices at Monroe Unit 2, and those devices are expected to be brought on-line in 2014, *id.*, as Detroit Edison told EPA in June 2010. Boyd Decl. Ex. 4 at 4. When Detroit Edison's $2 billion pollution control plan is done, all four Monroe units will have low-NO_x burners, SCR and FGD, creating one of the cleanest and most efficient coal-fired power plants in the country. Boyd Decl. ¶ 9.

II. The Regulatory History of NSR

Today, EPA's NSR rules are relatively straightforward. Those rules, as revised by EPA's 2002 amendments, articulate principles that govern the application of PSD program requirements and clearly specify sources' pre- and post-construction obligations. *See* 40 C.F.R. § 52.21(a)(2)(iv) & (r)(6). In those rules, EPA states in the clearest possible terms: "a project is a major modification for a regulated NSR pollutant if it causes … a significant emissions increase … . The project is not a modification if it does not cause a significant emissions increase." *Id.* § 52.21(a)(2)(iv)(*a*). And in the very next provision, where EPA describes the procedure for preconstruction projections, EPA states: "Regardless of ***any such*** preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." *Id.* § 52.21(a)(2)(iv)(*b*) (emphasis added).

These provisions are centrally important here. They clarify (i) that only projects that cause a significant increase in emissions can be deemed major modifications and (ii) that the validity of preconstruction projections will be measured by actual post-project data. Coupled with new postconstruction recordkeeping and reporting requirements triggered by those construction projects that have a "reasonable possibility" of causing a significant increase in emissions, *id.* § 52.21(r)(6), these provisions return the focus of EPA's NSR program to its

statutory origin as a program designed to evaluate and limit projects that "increase[] the amount" of an emitted air pollutant. 42 U.S.C. § 7411(a)(4).

But the rules were not always so clear. The 2002 NSR Reform Rules did not arise in a vacuum. They instead addressed ambiguities in earlier versions of the rules that spawned a dysfunctional enforcement regime.

A. Earlier Rules Contained Frustrating Ambiguities That Led to an "Abysmal Breakdown in the Administrative Process."

As explained above, NSR is triggered when an existing major source undertakes a "major modification." Although simple in concept, the definition of "major modification" proved difficult to apply.[6] As currently construed by the courts, EPA's original NSR rules promulgated in 1980 contemplated a preconstruction judgment of whether a "change" is "projected" to cause a "significant net increase" in emissions over baseline levels. *See, e.g., United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006).[7] But these rules provided no

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[6] For a thorough description of the regulatory history of NSR and the varying EPA interpretations of the NSR rules leading up to the "NSR enforcement initiative," which EPA launched against the utility industry in 1999, *see United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 634-37 (M.D.N.C. 2003) (describing regulatory history of the routine maintenance, repair, and replacement provision), 641-42, 644-46 (describing regulatory history of the emissions increase provisions), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated in Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

[7] Contrary to the Government's contention, the 1980 Rules did not set forth an "actual-to-potential" test for existing units that the Seventh Circuit held "was improperly stringent for power plants." DOJ Br. at 42-43 (citing *Wis. Elec. Power*

guidance on how to project emissions and imposed no pre- or post-construction recordkeeping requirements. *See, e.g., id.* ("[W]hat is required … is … merely a reasonable estimate of the amount of additional emissions that the change will cause."); *see also Duke Energy*, 549 U.S. at 577 (explaining "the 1980 PSD regulations may be no seamless narrative," but "[w]hat these provisions are getting at is a measure of actual operations averaged over time").

These ambiguities gave rise to wildly inconsistent interpretations by EPA's enforcement arm in a series of cases comprising the Government's "NSR enforcement initiative." One court specifically called out the Government for its "zigs and zags represented by its contradictory … statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice" with respect to the NSR program. *United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1306 (N.D. Ala. 2005) (rejecting Government argument for deference to its interpretation of the NSR rules). That same court characterized EPA's enforcement initiative as a "sport, which is not exactly what one would expect to

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Co. v. Reilly (*WEPCo*), 893 F.2d 901 (7th Cir. 1990). As EPA acknowledged in the 1992 rulemaking (sometimes referred to as the "WEPCo Rule"), the Seventh Circuit found the actual-to-potential test "impermissible" for any existing unit—utility or not—because that test was inconsistent with the plain language of the 1980 Rules. 57 Fed. Reg. 32,314, 32,317 (July 21, 1992) (the 1992 Rules); *see WEPCo*, 893 F.2d at 917-18 (rejecting "actual-to-potential" test for existing units); *see also United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 863 (S.D. Ohio 2003) (same).

find in a national regulatory enforcement program." *Id.* at n.44; *see also Duke Energy, supra*, Order Den. Pl.'s Mot. for Recons., No. 1:00-cv-01262 (M.D.N.C. Feb. 23, 2004) at 3 (noting EPA's propensity to "sp[eak] out of both sides of its mouth" on the issue of NSR applicability). When EPA in 1999 attempted to apply its new NSR positions to TVA in an administrative proceeding before EPA's Environmental Appeals Board, the Eleventh Circuit rejected that effort as a "patent violation of the Due Process Clause" which "lacked the virtues of most agency adjudications." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1245-46, 1258-59 (11th Cir. 2003); *see id.* at 1261 (Barkett, J., specially concurring) ("[C]onstitutional due process cannot be provided on an ad hoc basis under the direction and control of the entity whose decision is being challenged."). The court declared EPA's order to TVA "legally inconsequential" and directed that "TVA is free to ignore [it]." *Id.* at 1239-40.

By 2002, the NSR enforcement initiative had become "an abysmal breakdown in the administrative process." *See Ohio Edison*, 276 F. Supp. 2d at 832. Rather than focusing on ***actual*** emissions resulting from the projects in question, the Government adopted a strategy of hiring a team of "experts" to develop after-the-fact projections to second-guess what emissions the utility ***should have projected*** to occur as a result of the projects. These "experts" used an enforcement-driven emissions methodology that always predicts an increase in

emissions from common maintenance activity and has been rejected as unreliable under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See United States v. Cinergy Corp.*, 623 F.3d 455, 458-61 (7th Cir. 2010); *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250, 1255-60 (N.D. Ala. 2011).

B. EPA's First Round of Reforms in 1992

EPA began fixing the rules in 1992, when EPA revised the 1980 Rules to specify for electric utilities a new emission projection technique, called "the 'representative actual annual emissions' methodology." *See* 57 Fed. Reg. at 32,325. In general, this methodology provided for utilities to project future emissions based on anticipated operations and, after excluding emission increases that are unrelated to the project, to compare those emissions to a baseline period to determine whether an increase was projected to occur. EPA coupled this pre-project emission projection with a "post-construction" PSD monitoring requirement for sources opting to use this new emission projection approach. *Id.* at 32,325. During the rulemaking for these changes, some commenters expressed concern that "utilities could deliberately underestimate future operations (and thus emissions) for the purpose of avoiding review or that even where a forthright estimate is made, the forecast may prove inaccurate." *Id.* EPA explained that this concern was misplaced, because the postconstruction monitoring would "guard against the possibility that significant increases in actual emissions attributable to

the change may occur under this methodology." *Id.* EPA explained further that "NSR applies only where the emissions increase is caused by the change," and "[i]f … the reviewing authority determines [based on post-project data] that the … emissions have in fact increased significantly over baseline … as a result of the change, the source would become subject to NSR requirements ***at that time***." *Id.* (emphasis added).

The 1992 Rules also provided explicit guidance on the "causation" test for determining whether a "change" causes an emissions increase. In projecting future emissions, one must:

> Exclude, in calculating any increase in emissions that results from the particular physical change … at an electric utility steam generating unit, that portion of the unit's emissions following the change that [1] could have been accommodated during the representative baseline period and [2] is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change … .

40 C.F.R. § 52.21(b)(33)(ii)(1992).[8]

[8] In the preamble, EPA explained that for the first prong of the causation analysis (i.e., the "capable of accommodating" prong), a "but for" causation standard applied. 57 Fed. Reg. at 32,326. For the second prong (i.e., "unrelated to the change"), the causation standard is whether the "change" was the "predominant cause" of the increase. *Id.* at 32,327.

C. The 2002 NSR Reform Rules: A Common Sense Approach to NSR Applicability and Enforcement

In 2002, EPA acknowledged that more changes to the rules were necessary. So in December 2002—based on more than 130,000 written comments and multiple public meetings involving more than 100 groups—EPA amended both the 1980 Rules and the 1992 Rules. *See* 67 Fed. Reg. 80,186 (Dec. 31, 2002). The new rules built on the reforms begun in 1992. They established a more detailed "projected emissions" applicability test based on the 1992 rules for electric utilities that would apply to all categories of sources, and they affirmed the 1992 Rules' "causation" requirements. The 2002 NSR Reform Rules also beefed up postconstruction emission monitoring and reporting requirements for certain categories of sources by establishing additional post-change emissions monitoring and reporting requirements for projects as to which there is a "reasonable possibility" of a significant emissions increase caused by the project, even though the source operator's preconstruction projection does not predict that the project will cause a significant emissions increase. These changes, EPA explained, "better ensure[ ] that a project will not be considered a major modification where there will not be a significant emissions increase resulting from the modification project at the source." EPA's Response to Comments at I-5-23.

1. The 2002 NSR Reform Rules Enhance and Clarify a Source's Pre- and Post-Construction Obligations.

The 2002 NSR Reform Rules provide a common sense method that clarifies and codifies how emissions should be projected before a project is commenced and how that projection will be judged after the project is completed. Under the rules, the "procedure for calculating (before beginning actual construction) whether a significant emissions increase ... will occur depends upon the type of emissions units being modified." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). For projects like those at issue here that only involve existing emissions units:

> [a] significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions ... and the baseline actual emissions...for each existing emissions unit, equals or exceeds the significant amount for that pollutant.

Id. § 52.21(a)(2)(iv)(*c*).

"Baseline actual emissions" is defined as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when the owner or operator begins actual construction of the project." 40 C.F.R. § 52.21(b)(48)(i). "Projected actual emissions" is defined as the "maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit" a regulated PSD pollutant "in any one of the 5 years (12-month

period) following the date the unit resumes regular operation after the project." *Id.* § 52.21(b)(41)(i). In determining projected actual emissions before the project, "the owner or operator … [s]hall consider all relevant information," including the "company's own representations," its "expected business activity," and its "filings with the State or Federal regulatory authorities." *Id.* § 52.21(b)(41)(ii)(*a*).

Reflecting the causation requirement of the statute and regulations,[9] the "projected actual emissions" rule requires that the owner/operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project" that the unit "could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions … and that are also unrelated to the particular project, including any increased utilization due to product demand growth." *Id.* § 52.21(b)(41)(ii)(*c*).

Under the 2002 NSR Reform Rules and the "reasonable possibility" rule, which revised and expanded the recordkeeping requirements,[10] the result of this

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[9] 67 Fed. Reg. at 80,203 ("Both the statute and … regulations indicate that there should be a causal link between the proposed change and any post-change increase in emissions.").

[10] 72 Fed. Reg. 72,607 (Dec. 21, 2007). The original 2002 NSR Reform Rules required certain recordkeeping and monitoring requirements for projects that the source determined would not trigger NSR if the projects nonetheless have a "reasonable possibility" of resulting in a significant emissions increase. 67 Fed.

projection will put the project into one of three broad categories and dictate the source's obligations going forward. In the first category are projects projected to cause a significant net emissions increase. For these projects, as always, the operator must get a permit. *See* 40 C.F.R. § 52.21(a)(2)(iii).

In the second category are projects where, even though the analysis shows no significant increase caused by the project, there is nevertheless a "reasonable possibility" that emissions could increase. A project falls into this category in one of two ways: (1) the projection shows an emissions increase of at least 50% of the significant amount before accounting for causation (i.e., before excluding increases in emissions that the unit was capable of accommodating but that are unrelated to the project), *id.* § 52.21(r)(6)(vi)(*b*); or (2) the project is projected to cause an emissions increase for any pollutant of at least 50% of the significant amount (but less than 100% of that amount), *id.* § 52.21(r)(6)(vi)(*a*).[11]

These "reasonable possibility" projects do not require NSR permits but do trigger certain pre- and post-construction recordkeeping and monitoring

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Reg. at 80,279 (codifying 40 C.F.R. § 52.21(r)(6)). On review, the D.C. Circuit largely upheld the emissions increase provisions of the rule, but it remanded the "reasonable possibility" recordkeeping provision for EPA "to provide an acceptable explanation for its 'reasonable possibility' standard or to devise an appropriately supported alternative." *New York v. EPA*, 413 F.3d 3, 35-36 (D.C. Cir. 2005). EPA completed this remand rulemaking in 2007.

[11] The Monroe Unit 2 projects at issue here fall into the § 52.21(r)(6)(vi)(*b*) category. *See infra* at 24 n.13.

requirements. For all such projects, "[b]efore beginning actual construction ..., the owner or operator shall document and maintain a record" that contains the "projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) ... and an explanation for why such amount was excluded," as well as a "description of the project" and an "[i]dentification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project." *Id.* § 52.21(r)(6)(i)(*a*)-(*c*). Additional obligations apply to projects that fall into the "reasonable possibility" category based on § 52.21(r)(6)(vi)(*a*)—i.e., projects that show an increase of greater than 50% of the significant amount even after excluding emissions increases that are unrelated to the projects. As to those projects, "before beginning actual construction, the owner or operator" must also provide its preconstruction analysis to the permitting authority. *Id.* § 52.21(r)(6)(ii). The source is not "require[d] ... to obtain any determination from the Administrator before beginning actual construction." *Id.* § 52.21(r)(6)(ii). Rather, once pre-project analysis and recordkeeping requirements are met (i.e., notification is sent to the permitting authority or records are maintained, as applicable under the rules), the 2002 NSR Reform Rules provide that construction may begin in full compliance with the CAA. And after construction is complete, the operator must calculate and maintain a record of emissions in tons per year of

any NSR-regulated pollutant and (for electric generating units) report those emissions to the relevant regulatory authority annually. *Id.* § 52.21(r)(6)(iii)-(iv).

In the third category are projects that are not projected to cause a significant emissions increase or to create even the reasonable possibility of such an increase. For these projects, the source operator still must conduct the preconstruction analysis to determine whether the project will trigger NSR. And it still must monitor and report emissions as required by other CAA rules. *See generally* 72 Fed. Reg. at 72,612-13 (describing the numerous other monitoring and reporting requirements applicable to emissions sources). But the NSR rules do not independently require the operator to maintain a record of its preconstruction analysis or monitor postconstruction emissions.

2. The 2002 NSR Reform Rules Measure the Validity of the Source's Preconstruction Projection Through Postconstruction Emissions Data.

The 2002 NSR Reform Rules also clarify that preconstruction emissions projections will be judged by actual post-project emissions data. Consistent with the statute, which defines "modification" as a change that "increases the amount" of an emitted air pollutant, the revised rules state unequivocally that a "project is a major modification for a regulated NSR pollutant if it causes … a significant emissions increase … and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). And in the very next sentence, the rules make clear that a

project "is ***not*** a major modification ***if it does not cause a significant emissions increase***." *Id.* (emphases added). So in the absence of evidence showing an actual increase in emissions caused by the project, a source operator cannot be held liable for constructing a major modification without a permit.

The rules reinforce the primacy of postconstruction real emissions data in judging whether a source operator has complied with its NSR requirements by clarifying that such data either confirm or trump preconstruction projections. After describing how an operator should project post-project emissions, EPA makes clear that, "[r]egardless of ***any such*** preconstruction projections, a major modification" depends on whether "the project ***causes a significant emissions increase*** … ." *Id.* § 52.21(a)(2)(iv)(*b*) (emphases added). This provision applies expansively to "any such" projection, whether it is the actual projection performed by the operator or, instead, is a post-hoc projection cobbled together by a team of hired experts in litigation to show that the operator should have projected an increase.

The monitoring and recordkeeping requirements that are imposed on "reasonable possibility" projects underscore the rules' clarification that actual post-project data will determine whether a major modification has occurred. The rules identify those projects that present a greater risk of causing an increase and impose independent monitoring requirements to help determine whether a major

modification has taken place. As EPA previously had explained, this type of post-project monitoring and reporting "provide[s] a reasonable means of determining whether a significant increase … resulting from a proposed change … occurs within the 5 years [or 10 years] following the change." 57 Fed. Reg. at 32,325. So if, despite the pre-project determination of no increase due to the project, the agency "determines that the source's emissions have ***in fact*** increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements ***at that time***." *Id.* (emphases added).[12]

STATEMENT OF FACTS

Like every other electric utility in the country, Detroit Edison regularly performs maintenance, repair and replacement activities to ensure that its units run efficiently and safely, without interruption and without injury to its workforce. Like every other utility in the country, Detroit Edison periodically removes its units from service for up to three months to perform this maintenance work. Boyd

[12] Further confirmation of this feature of the 2002 NSR Reform Rules is EPA's explanation that it is unnecessary to treat pre-project projections as enforceable limits. "The Act provides ample authority to enforce the major NSR requirements if your … change results in a significant net emissions increase." 67 Fed. Reg. at 80,204. Thus, if post-project annual emissions "differ[] from your projection of post-change emissions … then you must report this increase." *Id.* at 80,197. This, EPA said, "[e]nsures [t]hat … [a] project is not a major modification." *Id.*

Decl. ¶ 12. Before starting this type of work, Detroit Edison discusses it with the MDEQ and submits to MDEQ a planned outage notification. *Id.* ¶ 15.

From March to June 2010, Detroit Edison removed Monroe Unit 2 from service to perform a number of routine maintenance projects, including the replacement of three boiler tube components—the economizer, the pendant reheater, and a portion of the waterwall.[13] *Id.* ¶ 17. Consistent with the Company's practice for almost a decade, for this planned outage, Detroit Edison submitted a planned outage notification to MDEQ on March 12, 2010 before commencing work on the projects. That notice (i) addressed each of the information requirements of the Michigan NSR rules, *see* MICH. ADMIN. CODE R. 336.2818(3)(a); (ii) explained why the repairs were projects within the NSR "routine maintenance, repair, and replacement" exclusion; and (iii) explained why, in any event, the projects would not result in any "significant emissions increase."

[13] These types of boiler tube component replacements are common in the utility industry, due to the harsh conditions that exist in the combustion chamber of such boilers. Every utility in the country must do them to maintain the efficiency, reliability, and safety of the nation's electric generating system. *See* R. No. 46-10, Declaration of Jerry L. Golden. For this reason, Detroit Edison contends that these projects are routine maintenance, repair, and replacement under NSR, 40 C.F.R. § 52.21(b)(2)(iii)(a). *See Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, No. 3:01-CV-71, 2010 WL 1291335, *27-34 (E.D. Tenn. Mar. 31, 2010) (finding similar boiler tube component replacements "routine"). This is an independent reason why these projects did not trigger NSR that is not at issue in this appeal.

Id.; Boyd Decl. Ex. 2.[14] MDEQ did not question Detroit Edison's analysis, either then or since. Boyd Decl. ¶ 17. The projects started on March 13, 2010, and concluded on June 20, 2010. *Id.* ¶ 18.

As of the date that Detroit Edison filed its summary judgment motion, less than one year had passed since Monroe Unit 2 resumed operations following the project. At that time, Monroe Unit 2 had not exceeded pre-project emissions on an annualized basis since it resumed operations. R. No. 107-3, Declaration of Gordon P. Usitalo ¶ 3. And although not a part of the record here, Detroit Edison can represent that it submitted to MDEQ a postconstruction annual emissions report pursuant to MICH. ADMIN. CODE R. 336.2818(3)(d) on February 28, 2012, and that report shows no increase in annual emissions at Monroe Unit 2 for the first full calendar year following the project. In fact, that report shows substantially lower emissions from Monroe Unit 2 during 2011 than the unit's emissions before the

[14] The 2010 projects on Monroe Unit 2 triggered the "reasonable possibility" requirements of § 52.21(r)(6)(vi)(*b*) because, before accounting for causation, Detroit Edison's projection showed an increase in emissions of more than 50% of the significance threshold. But after accounting for causation by excluding factors unrelated to the project, the projects were not projected to cause any increase in emissions and therefore were not subject to the more stringent reporting requirements applicable to projects that trigger "reasonable possibility" under § 52.21(r)(6)(vi)(*a*). *See* Boyd Decl. ¶ 15. Nonetheless, consistent with company practice, Detroit Edison treated the projects as if they did trigger the additional reporting requirements and submitted a notice of these projects and its emissions projection analysis to its permitting authority, MDEQ.

projects. These same data are reported to EPA as part of the Acid Rain program and are available at the website for EPA's Clean Air Markets Division.[15] They also are reported to MDEQ in accordance with the terms of the Title V operating permit for the Monroe plant and are publicly-available through Michigan's Freedom of Information Act, MICH. COMP. LAWS §§ 15.231 *et seq.*

The Government filed this lawsuit in August 2010, mere weeks after Monroe Unit 2 resumed operations and well before annual data were available to show whether Monroe Unit 2 had emitted any regulated pollutant at greater-than-baseline levels, much less whether the projects had ***caused*** emissions to increase. In its complaint, the Government asserts two essentially identical claims—that Detroit Edison violated the PSD (Count One) and NNSR (Count Two) programs by constructing a major modification at Monroe Unit 2 without a permit.

Detroit Edison filed its summary judgment motion on June 9, 2011. R. No. 107. The District Court granted the motion on August 23, 2011, R. No. 160, because the Government had no evidence showing that emissions at Monroe Unit 2 increased after the 2010 projects. Indeed, the Government had no intent to make that showing. It instead intended to prove its case by showing, through expert testimony, that Detroit Edison ***should have projected*** that the projects ***would cause***

[15] *See* http://ampd.epa.gov/ampd.

an increase in emissions, regardless of Detroit Edison's projection that no increase would result from the project and regardless of whether actual post-project emissions ever increased above baseline levels (and, indeed, regardless of whether emissions actually decreased, as they did in 2011). By the time the Court granted Detroit Edison's motion, the Government had produced twelve expert reports from six different experts on this topic. Not one of them considered the unit's ***actual*** emissions and performance after the project.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 247-48 (6th Cir. 2005). Summary judgment is appropriate where the movant shows there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

SUMMARY OF ARGUMENT

In this enforcement action, the Government claims that Detroit Edison constructed a "major modification" on Monroe Unit 2 in 2010 without going through NSR permitting. Under EPA's 2002 NSR Reform Rules, to meet its burden on that claim, the Government must establish that the maintenance projects at issue caused a significant increase in emissions of regulated pollutants. "[A] project is a major modification for a regulated NSR pollutant if it causes … a

significant emissions increase … . The project is not a modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). The undisputed evidence shows that emissions from Monroe Unit 2 have not increased after the 2010 projects. The Government therefore cannot meet its burden, and the District Court properly granted summary judgment to Detroit Edison.

The Government argues in this appeal that, contrary to the clear and unambiguous language of the rules, it can meet its burden even if the projects in question did not cause an emissions increase. According to the Government, it can establish liability by showing that the operator should have projected an increase caused by the projects before commencing construction, even if the operator projected no increase in its preconstruction analysis and actual post-project emissions data confirm that the operator's projection was correct. But the new rules make clear that such projections do not dictate whether a major modification has occurred. "***Regardless of any such preconstruction projections***, a major modification results if the project causes" a significant increase. *Id.* § 52.21(a)(2)(iv)(*b*) (emphasis added).

The 2002 NSR Reform Rules incorporated these clarifying provisions to address frustrating ambiguities in the pre-2002 rules. The old rules lacked any clear guidance on how to project whether a maintenance project would cause a significant increase in emissions or how that projection would be judged after the

fact. The 2002 rules fixed these problems by clearly defining pre- and post-construction obligations and specifying that actual post-project data would provide the measuring stick by which preconstruction projections will be judged. The Government would undo these reforms. It prefers an enforcement regime under which litigation experts "second guess" actual data showing decreases in emissions following maintenance projects, and courts are put in the position of officiating a "battle of experts" involving arcane projection methodologies.

The Government cannot square this view with the plain language of EPA's rules or its repeated statements in the rulemaking record that actual data would dictate whether a major modification has occurred. So it relies on decisions involving earlier versions of the NSR rules that do not include the provisions that govern here. The Government also argues that the rules lead to absurd results—for example, they do not require operators to report post-project emissions data for some projects, and operators might curtail operations to ensure that emissions do not increase and thereby thwart enforcement. But EPA itself has explained at length that other CAA programs and normal business practices provide ample emissions data to support an enforcement action. And EPA also explained during the rulemaking that it fully expected conservative operators to conform post-project emissions to preconstruction projections to ensure that emissions do not increase. Indeed, the Government's arguments against the new regime created by

the 2002 rules are little more than warmed-over adverse rulemaking comments that EPA rejected when it promulgated the rules.

The Government finally asks the Court to defer to its interpretation of the rules. But deference is inappropriate where the regulation is unambiguous or where the interpretation directly contradicts the agency's interpretation of the rule at the time it was promulgated. At the end of the day, the Court must apply the rules as EPA wrote them in 2002, not as the Government in litigation wishes they had been written. And those rules make abundantly clear that a project is not a major modification if it does not cause an emissions increase.

Monroe Unit 2's emissions have not increased following the projects. In fact, they have decreased. The District Court properly granted summary judgment to Detroit Edison. Its decision should be affirmed.

ARGUMENT

I. The District Court Correctly Ruled that the Government Could Not Demonstrate that the Monroe Unit 2 Projects Were Major Modifications, Because Emissions Have Not Increased.

Under the 2002 NSR Reform Rules, the Government's burden of proof is plain. To establish liability for constructing a major modification without a permit, EPA must show that an operator like Detroit Edison has undertaken a major modification. The rules unambiguously state that this question does not turn on preconstruction projections, but rather on whether the project actually causes an

emissions increase. A project "is ***not*** a major modification if it ***does not cause*** a significant emissions increase." MICH. ADMIN. CODE R. 336.2802(4)(a); 40 C.F.R. § 52.21(a)(2)(iv)(*a*) (emphases added). Preconstruction projections are not determinative of whether a major modification has occurred. *See* 40 C.F.R. § 52.21(a)(2)(iv)(*b*) ("***Regardless of <u>any</u> <u>such</u> preconstruction projections***, a major modification results if the project ***causes*** a significant emissions increase and a significant net emissions increase.") (emphases added); MICH. ADMIN. CODE R. 336.2802(4)(b) (same).

The undisputed evidence shows that the Government cannot meet this burden. Monroe Unit 2 resumed regular operations following the projects in late summer 2010. Annual emissions have not increased in the time since. (In fact, they have decreased.) These data confirm Detroit Edison's preconstruction projection and demonstrate that "the project is not a major modification … [because] it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*); MICH. ADMIN. CODE R. 336.2802(4)(a)(ii).

If data in future years show an increase caused by the projects, the projects will become subject to NSR—and Detroit Edison could face a future and new enforcement action—at that time. *See* 57 Fed. Reg. at 32,325. But until then, the projects cannot be deemed "major modifications" under the plain language of the 2002 rules, and Detroit Edison is in full compliance with the CAA. As a result,

this action under section 113(b) of the CAA cannot be maintained, because section 113(b) only authorizes enforcement where an owner "has violated" or "is in violation" of a CAA requirement. 42 U.S.C. § 7413(b). Nor can this action be maintained under section 167 because, as explained more fully below in Part II.B., Detroit Edison has fully complied with its preconstruction obligations under the 2002 NSR Reform Rules, so Monroe Unit 2 has not violated any applicable requirement of PSD.

II. EPA's Arguments Against the Plain Language of the Rules Lack Merit.

The Government disputes that the plain language of the 2002 NSR Reform Rules—in particular 40 C.F.R. § 52.21(a)(2)(iv)(*a*)-(*b*)—defines its burden. According to EPA, "[t]he Act allows [the Government] to enforce [PSD permitting] obligations *before or after* construction by using its own emissions projections … to demonstrate that the operator should have projected a PSD-triggering emissions increase." DOJ Br. at 25 (emphasis in original). Thus, the Government argues, it can establish liability at any point in time by "us[ing] its own emissions projection to demonstrate that a proper preconstruction analysis would have shown an emissions increase." *Id.* at 24 (emphasis omitted). In other words, according to the Government, even after construction and data confirm that the operator's projection of no increase due to the project was correct, it can still classify the project as a major modification "by demonstrating that the operator

should have projected that emissions would increase." *Id.* at 29 (emphasis in original).

The Government's theory flies in the face of the plain language of the 2002 NSR Reform Rules and the CAA itself. If accepted, it would mean that a project that does not cause a significant emissions increase could nonetheless be deemed a major modification. This contradicts both the statutory definition of "modification" as a change that "increases the amount" of an emitted air pollutant, 42 U.S.C. § 7411(a)(4), and the principles that EPA codified in explicit regulatory language through its 2002 reforms. *See* 40 C.F.R. § 52.21(a)(2)(iv)(*a*)-(*b*). Nothing in the exhaustive regulatory history of the 2002 rules remotely supports disregarding that language in favor of the Government's litigation-driven theory.

Tellingly, the Government all but ignores the language of § 52.21(a)(2)(iv), waiting until page 50 of a 54-page brief to address it. Instead, the Government (1) argues that the plain language of the rules is inconsistent with EPA's enforcement power under section 167 of the CAA; (2) relies on authorities interpreting earlier versions of EPA's NSR rules that were superseded by the 2002 reforms; (3) argues that the plain language of the rules leads to absurd results, because operators could evade enforcement by deliberately underestimating projected emissions and then voluntarily controlling emissions to ensure no increase occurs; and (4) that its litigation position here is entitled to deference. None of these arguments has merit.

A. EPA Cannot Ignore the Binding Language in Section 52.21(a)(2)(iv).

The key flaw in the Government's theory is that it directly contradicts the language of the rules. *See* 40 C.F.R. § 52.21(a)(2)(iv)(*a*)-(*b*). The Government all but ignores the principles set forth in § 52.21(a)(2)(iv), and when it does engage them, it tries to dismiss them as part of "*another* regulation." DOJ Br. at 50 (emphasis in original). Not so. The provisions of sub-section (a)(2)(iv) are not only part of the 2002 NSR Reform Rules, they are the very principles that govern their application. *See id.* § 52.21(a)(2)(iv) ("The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(*a*) through (*f*) of this section."). To argue that sub-section (a)(2)(iv) is in "another regulation" than sub-section (r)(6)—where the two are not only sub-sections of the ***same*** regulation (40 C.F.R. § 52.21) but also were promulgated in the ***same*** 2002 NSR reform rulemaking—is Orwellian. The Government's reading of these provisions contradicts their plain meaning and is completely unsupported by the voluminous regulatory history of the 2002 rules.

1. The Government's Theory Contradicts the Plain Language and Structure of the Rules.

The Government's reading of the text of § 52.21(a)(2)(iv) is incoherent. It tries to characterize these provisions as merely descriptive of the projection process. DOJ Br. at 52-53 (explaining that the language "describe[s] a test that can

be used to determine *in advance* whether PSD requirements apply to a *planned* project.") (emphasis in original). But section (a)(2)(iv) cannot be read that way.

The Court's interpretation of regulations is guided by the same principles that govern the interpretation of statutes. "'We read statutes and regulations with an eye to their straightforward and commonsense meanings,' and where the regulation's language reveals an 'unambiguous and plain meaning ..., [the] task is at an end.'" *In re Arctic Express Inc.*, 636 F.3d 781, 791 (6th Cir. 2011) (quoting *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000)); *see also Bartlik v. U.S. Dep't of Labor*, 62 F.3d 163, 165-66 (6th Cir. 1995). As part of this task, the court "look[s] to the regulatory scheme, reading the regulation in its entirety to glean its meaning." *Baptist Physician Hosp. Org., Inc. v. Humana Military Healthcare Servs., Inc.*, 481 F.3d 337, 344 (6th Cir. 2007).

Section (a)(2)(iv) states that "[t]he requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(*a*) through (*f*)." The first principle—(a)(2)(iv)(*a*)—does not talk about projections at all. It instead explains what a major modification ***is*** (a project that causes a significant emissions increase and significant net emissions increase) and what a major modification ***is not*** (a project that does not cause a significant emissions increase). Notably absent from this explanation is any reference to projections. If the Government's theory was correct, one would expect to see some use of the

term "projection"—the rule would read, "a project is a major modification … if it ***[could be projected to]*** cause[ ] … a significant emissions increase … and a significant net emissions increase," regardless of whether it in fact caused an increase. That is not what the rule says.

The absence of any reference to projections in (a)(2)(iv)(*a*) is all the more telling given that the other provisions in (a)(2)(iv) discuss projections and their role in the process. Section (a)(2)(iv)(*b*) references the various projection procedures that apply "before beginning actual construction," and explains that these projections do not determine whether a major modification has occurred. Section (a)(2)(iv)(*c*) references the actual-to-projected-actual test, which is defined later in the regulation at section (b)(41), using prospective language to describe how that test can be used to determine if a significant increase "is projected to occur." If, as EPA argues, the language in section (a)(2)(iv)(*a*) describing what a major modification is and is not turned on a post-hoc calculation of projected actual emissions, using a projection methodology that the rules say apply "before beginning actual construction," the provision would actually say that. The absence of any reference to "projected actual emissions" in this context refutes EPA's position. *See Jewish Hosp., Inc. v. Sec'y of Health & Human Servs.*, 19 F.3d 270, 275 (6th Cir. 1994) ("Adjacent provisions utilizing different terms … must connote different meanings."); *see also United States v. Stauffer Chem. Co.*, 684 F.2d 1174,

1186 (6th Cir. 1982) ("Ordinarily, the use of different language creates an inference that Congress meant different things.").

The logic and structure of the entire regulation also refutes the Government's reading of section 52.21(a)(2)(iv) and demonstrates why EPA would not base the determination of whether a major modification has occurred on post-hoc projections. Specifically, the rules themselves acknowledge that projections are inherently variable. The "actual-to-projected-actual" test itself is not a formulaic method that allows only one "correct" outcome. It instead is a totality-of-the-circumstances test that requires operators to consider "all relevant information" without specifying whether any one factor should be given greater weight over another. *See* 40 C.F.R. § 52.21(b)(41)(ii)(*a*).

The monitoring and recordkeeping regime codified in § 52.21(r)(6) addresses this uncertainty. Those provisions contemplate that a projection made by the operator in accordance with the rules that shows no increase caused by a project might nonetheless allow for a "reasonable possibility" that the project will cause an increase. In other words, even for a fully compliant projection, there could be not just "some" possibility of a significant increase, but a "reasonable" possibility. It makes no sense to tie the determination of whether a major modification has definitively occurred to the result of a lengthy "battle of experts"

about a methodology that allows for so wide a range of potential outcomes.[16] In fact, that is the regime that, as applied by EPA's enforcement office in its "enforcement initiative," spawned the dysfunctional system decried as an "abysmal breakdown in the administrative process" and that the 2002 NSR Reform Rules were intended to address. So EPA made clear in the 2002 rules that "[r]egardless of any such preconstruction projections," a project is a major modification where it causes a significant emissions increase. 40 C.F.R. § 52.21(a)(2)(iv)(*b*).

Michigan confirmed this feature of the rules in its "PSD Workbook"—a guidance document that MDEQ published to facilitate compliance by Michigan sources with the revised rules. In that document, MDEQ addresses the very-real possibility that a projection based on uncertain future events will prove inaccurate and makes clear that errors in projection do not trigger liability:

> [These] circumstances … (i.e., actual emissions exceed [baseline actual emissions] by more than the significant threshold and differ from the projection) do not automatically constitute a violation of PSD. There are many legitimate

[16] The battle of experts that the Government sought to engage in this case is not a straightforward dispute that a court could easily adjudicate before the project is completed. Below, EPA proffered no less than twelve expert reports from six different experts on this topic. This is no different than other utility initiative enforcement cases governed by the old rules. In two recent cases, ***more than a decade*** after the Government filed the first wave of its NSR lawsuits (including suits against Cinergy and Alabama Power), the courts rejected the Government's enforcement-driven emissions methodology as unreliable under *Daubert*. *See Cinergy*, 623 F.3d at 458-61; *Ala. Power Co.*, 773 F. Supp. 2d at 1255-60.

> circumstances under which this could occur. The most obvious is that business growth exceeds the projected growth rate. In this case, the fact that business turns out to be better than expected is not a violation of PSD. The growth, ***if it had been accurately projected***, would have resulted in excluded emissions and the conclusions of the original PSD applicability determination would not have changed. The submittal of this report will only trigger an evaluation of the circumstances to determine if a PSD violation may have occurred.

MDEQ PSD Workbook at 4-6 to 4-7 (emphasis added).

2. Nothing in the Exhaustive Regulatory History of the 2002 Rules Contemplates the Government's Litigation Position.

Further evidence that the 2002 NSR Reform Rules' revisions to section (a)(2)(iv)(*a*)-(*b*) mean what they say is the absence of ***any*** mention of EPA's position that it can classify a project as a major modification and establish an operator's liability by showing that the operator "*should have* projected that emissions would increase." DOJ Br. at 29 (emphasis in original). Commenters raised the concern that, under the approach codified in the 2002 rules, operators could understate future emissions and avoid NSR permitting. Never once in responding to these comments did EPA identify "enforcement-by-alternative-projection" as a means to address and deter inaccurate projections. Instead, EPA explained repeatedly that post-project data would provide a check against faulty projections and, more importantly, would determine whether a major modification had actually occurred:

> We believe that most sources should be able to adequately project the emissions increases that will result from the physical and operational changes that they choose to make. If for some reason the projection is not accurate, the required tracking of emissions for 5 years following the changes ***will determine*** whether a significant emissions increase ***has actually occurred***. Where the change is found to be a major modification, despite the projections made by the source, the reviewing authority will be expected to proceed with the process of subjecting the source to the major NSR requirements.

EPA's Response to Comments at I-5-28 (emphases added).

When EPA revised the rules to clarify the trigger for the "reasonable possibility" reporting and recordkeeping requirements in 2007, it reiterated that actual post-project data would be the deterrent to erroneous projections. In *New York*, the D.C. Circuit remanded this portion of the rule and instructed EPA to better explain how it could justify imposing enhanced reporting and recordkeeping requirements only on sources that conclude there is a reasonable possibility of a significant emissions increase. 413 F.3d at 34-36. The court questioned how EPA could enforce NSR as to sources that "believing no reasonable possibility of a significant emissions increase exists, keep no data by which the agency could prove an NSR transgression." *Id.* at 35. On remand, EPA again reiterated that the "reasonable possibility" requirements were included "to respond to concerns that a source's projection could erroneously understate emissions and that the project could result in an emissions increase greater than the significant levels." 72 Fed.

Reg. at 72,609. And, as discussed in greater detail below (*infra* at 49-51), EPA explained how relevant data would still be reported and thus available to assist in enforcement, even where the source operator determined there was no reasonable possibility of an emissions increase. But completely absent from EPA's rulemaking record for the 2007 revisions is any reference to the power the Government claims here to establish that a major modification has occurred through an alternative reality projection, even where the actual data show no increase in emissions.

Unsurprisingly, the Government can cite nothing in the rulemaking record that supports its view that a project that has not caused a significant increase in emissions is nonetheless a major modification if the operator ***should have*** projected an increase. Indeed, the only statement from EPA's exhaustive response to comments that the Government cites actually confirms Detroit Edison's position. The Government notes that EPA in 2002 emphasized that "[t]he main purpose of the annual tracking requirements is to maintain adequate information ***to ascertain whether the source's initial estimate of post-change actual emissions is accurate***." DOJ Br. at 45 (quoting EPA's Response to Comments at I-4-18). This statement confirms that actual data will dictate whether the operator's projection was accurate. It does not say that those projections will be judged through post-

hoc projections conducted by litigation-retained experts, regardless of what actual post-project data show.

3. Detroit Edison's Trade Association Did Not Endorse the Government's Position.

The Government also wrongly argues that "Detroit Edison publicly agreed with EPA's assessment of the 2002 NSR Reform Rules." DOJ Br. at 46. The Government quotes out of context certain statements in the brief filed by various trade associations including the Utility Air Regulatory Group (UARG), a trade association to which Detroit Edison belongs, in litigation over the 2002 rules. *Id.* at 47. In response to arguments that the recordkeeping and reporting requirements of the new rules were vague and insufficiently stringent, UARG correctly noted that this was wrong. *See* Joint Br. of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442, at *16-*19 (D.C. Cir. Oct. 26, 2004). The new rules increased recordkeeping and reporting requirements, and in all events, other programs—the minor source permitting programs, *see* 40 C.F.R. § 51.160; reporting and annual certification requirements under Title V, *see* 40 C.F.R. § 70.7(d)-(e); and EPA's information-gathering capability under CAA section 114—give EPA and State regulators ample information and tools to investigate potential NSR violations. *Id.* at *19. In this way, UARG correctly observed, "[t]he final rules do not change the extensive enforcement tools and opportunities available to EPA and states." *Id.*

Nowhere in that brief did UARG reference, much less endorse, the remarkable litigation position that the Government takes here—i.e., that a project that (a) the operator projects will not cause a significant increase and (b) actually does not result in an increase can nonetheless be considered a major modification based on the Government's counter-factual after-the-fact projections.

B. EPA's Rules Define the PSD Program's Preconstruction Requirements and Are Fully Consistent With the Statute.

The Government argues at length that the plain language of the rules cannot mean what they unambiguously say, because PSD is a preconstruction program, and therefore the Government simply must be able to prove that a project was a major modification—even if it did not cause any increase in emissions—through a litigation-driven post-hoc "preconstruction" projection. This conflicts with the statutory definition of "modification" as a project "which ***increases the amount*** of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4) (emphasis added). But the Government ignores that provision of the statute and instead focuses on an enforcement provision, CAA section 167, which gives EPA the power to "take such measures, including the issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility ***which does not conform to the requirements of this part*** … ." 42 U.S.C. § 7477 (emphasis added).

The plain language of the 2002 rules is entirely consistent with the statute, including section 167. Section 167 is an enforcement tool that only gives the Government the power to stop "construction or modification of a major emitting facility" if it does not conform to PSD requirements. But section 167 does not define the "requirements" of the PSD program. Nor does it purport to define "construction," "modification," or "the requirements of this part."

The "requirements of this part" are reflected in 40 C.F.R. § 52.21. As modified by the 2002 reforms, section 52.21 makes clear that, regardless of any preconstruction projections, a project is a "major modification" only if it causes a significant net increase in emissions; and a project is not a major modification if it does not cause a significant increase in emissions. This language was not in the rules before 2002. Section 52.21 also imposes preconstruction "requirements," such as the obligation to determine whether a significant emissions increase will occur (§ 52.21(a)(2)(iv)(*b*)), and to comply with recordkeeping and reporting requirements as appropriate if there is a "reasonable possibility" of a significant increase in emissions (§ 52.21(r)(6)).

Under this system, an operator that complies with the preconstruction requirements and concludes that its project would not cause a significant increase in emissions can commence construction lawfully under the CAA. Even as to projects where there is a "reasonable possibility" of a significant increase that

would oblige the operator to submit a preconstruction analysis, the rules make clear that construction still can commence without any further action by the regulator. *See* 40 C.F.R. § 52.21(r)(6)(ii). The operator takes the risk that its projection could be wrong, but it still can commence construction consistent with "requirements of this part" as defined by EPA in section 52.21. And where the construction is consistent with these "requirements," section 167 has no role.

The requirements defined by § 52.21 do not render section 167 a dead letter as the Government wrongly suggests. Section 167 applies to the entire PSD program, not just in the context of "major modifications." *See, e.g., Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) (concluding that EPA is authorized to scrutinize State BACT determinations made in the context of PSD permitting). So, for example, if an operator proceeds or proposes to proceed with a project that is a "major modification" after receiving a PSD permit from the State, but for which it did not comply with other preconstruction PSD requirements (e.g., BACT determination is unreasonable; modeling shows increment violation; etc.), EPA could use section 167 to enforce compliance with these preconstruction requirements. Even in the context of "major modifications," EPA still can take action to enforce the preconstruction requirements set forth in section 52.21. For example, if an operator performs no projection at all, EPA could act under section 167 to compel the operator to perform its projection. Or if an operator concludes

that there is a "reasonable possibility" of an emissions increase but does not comply with recordkeeping and reporting requirements specified in section 52.21(r)(6), EPA could bring an action under section 167 to enforce compliance with those requirements. *See* EPA's Response to Emergency Motion for Stay of the New Source Review Rule at 20, *New York v. EPA*, No. 02-1387 (D.C. Cir. Feb. 21, 2003) ("EPA believes that there will be a considerable number of cases in which there will be [a] reasonable possibility that a significant increase will occur. In such cases, where a source does not maintain records, the source will have violated ***the recordkeeping requirements*** of the NSR Rule.") (emphasis added, internal citations omitted). But that would be a very different case from the one presented here. The Government does not claim that Detroit Edison failed to comply with the requirement to conduct a preconstruction projection. The Government, in fact, concedes that Detroit Edison has done so. The Government instead claims that DTE has undertaken a "major modification" without a permit, and section 52.21 makes clear that a project is a major modification only if it causes a significant increase in emissions and is not a major modification if it does not.

EPA promulgated these requirements in 2002 and successfully defended them as fully consistent with the CAA. If the Government now thinks these requirements are insufficiently stringent, it can seek to amend the rules. But the

Court must enforce the rules as written, not as the Government now wishes they had been written. *See Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations.").

C. Decisions Interpreting pre-2002 Versions of the NSR Rules Are Inapposite.

The Government argues that "[e]very court to examine the issue has agreed that EPA can enforce PSD requirements using its own emissions projections even after an operator finishes construction." DOJ Br. at 29. But none of those cases involved projects governed by the 2002 NSR Reform Rules. *See Ohio Edison Co.*, 276 F. Supp. 2d at 864, 869 (applying 1980 Rules with respect to Activities 2, 4-8, 10-11 and 1992 Rules with respect to Activities 1, 3 and 9); *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1277 (S.D. Ind. 2005), *aff'd*, 458 F.3d 705 (7th Cir. 2006) (explaining that it was applying 1980 Rules); *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2010 WL 3023517, at *2 (M.D.N.C. July 28, 2010) (same); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692 C-M/F, 2002 WL 1629817 (S.D. Ind. July 18, 2002) (*SIGECO*) (same). The Government belatedly—and in a footnote, no less—concedes that these cases involved alleged

violations that occurred before the 2002 NSR Reform Rules went into effect. DOJ Br. at 30 n.8.[17]

Each of those decisions relies (either directly or indirectly) on the order of EPA's Environmental Appeals Board in *In re Tennessee Valley Authority*, 9 E.A.D. 357, 2000 WL 1358648 (EAB Sept. 15, 2000)—the same administrative decision that the Eleventh Circuit declared a nullity due to the Government's complete disregard of due process.[18] *Whitman*, 336 F.3d at 1246 ("[The EAB] entirely ignor[ed] the concept of the rule of law."). That decision, issued as part of the Government's misguided enforcement initiative, involved earlier versions of the rules and was the first to adopt the remarkable position that a project that does not cause an increase could nonetheless be deemed a major modification. That reading of the earlier rules is inconsistent with the CAA's definition of

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[17] The Government suggests that the Seventh Circuit in *Cinergy* found the differences between the 2002 rules and earlier versions to be insignificant. *Id.* (citing *Cinergy*, 458 F.3d at 708). The issue the Seventh Circuit considered was whether net emissions increase should be judged based on hourly emissions rate or total annual emissions measured in tons per year. *Cinergy*, 458 F.3d at 708. On that issue, the court correctly observed that there is no difference between the 1992 and 2002 rules. The *Cinergy* Court did not address the question presented here.

[18] The decision in *SIGECO* was issued before the Eleventh Circuit struck down the EAB's decision in *TVA*, and it relies exclusively on *TVA* for this point. *See* 2002 WL 1629817, at *3. The *Ohio Edison* decision relies on *SIGECO*, *see* 276 F. Supp. 2d at 881, and the *Duke Energy* decision relies on *Ohio Edison*, *see* 2010 WL 3023517, at *5. The district court's decision in *Cinergy* was issued by the same judge that decided *SIGECO* and merely affirms that decision. *See* 384 F. Supp. 2d at 1276.

"modification" as a project "which ***increases the amount*** of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4) (emphasis added). In any event, the 2002 NSR Reform Rules reject that reading and restore the statute's focus on an actual increase in emissions as the defining characteristic of major modifications by making clear that a project "is not a major modification if it does not cause a significant emissions increase," and that "[r]egardless of any such preconstruction projections," the occurrence of a major modification depends on whether it "causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*)-(*b*).

D. The Rules Do Not Lead to "Absurd" Results.

The Government argues that it would be "absurd" and "illogical" to determine whether a project is a major modification by whether it causes a significant net emissions increase as the statute and § 52.21(a)(2)(iv) plainly require. This is so, argues the Government, because the post-project reporting requirements do not apply to all sources, only those subject to the "reasonable possibility" reporting requirements, and because some operators can "escape scrutiny" by conforming post-project operations to the pre-project projection. DOJ Br. at 36-40, 32-35. EPA's own words show that both of these arguments lack merit.

1. The Reporting and Recordkeeping Obligations of the 2002 NSR Reform Rules Supplement Reporting Obligations Under Other CAA Programs.

The Government notes correctly that, based on Detroit Edison's projection of post-project emissions, the Monroe Unit 2 projects did not trigger the "reasonable possibility" reporting requirements for post-project emissions,[19] and that Detroit Edison therefore went further than the law requires in reporting those emissions. The Government characterizes this as an "absurdity" because "the regulation would not even require it to collect the very data that it thinks are the only 'measuring stick' for PSD applicability." DOJ Br. at 39. The Government's suggestion is that, without the data reporting requirements mandated by § 52.21(r)(6)(ii)-(v), enforcement authorities would have no way to ascertain whether a project indeed was a major modification.

EPA rejected precisely this position during the rulemaking process. In revising the "reasonable possibility" standard in response to the D.C. Circuit's remand in *New York*, EPA specifically responded to the D.C. Circuit's questions about how other recordkeeping requirements could be used to enforce PSD requirements as to projects that fell below the reasonable possibility reporting threshold. EPA explained that many operators maintain relevant records that

[19] Detroit Edison's projection did, however, trigger certain recordkeeping requirements. *See supra* at 24 n.14.

"collectively, provide information on the baseline actual emissions and projected actual emissions, as well as post-change emissions … . Such records include but are not limited to reports submitted to reviewing authorities pursuant to title V operating permit program requirements of 40 CFR parts 70 and 71, State minor NSR permit application data, business records, and emissions inventory data." 72 Fed. Reg. at 72,612; *see also supra* at 25, 42. After describing all of the various ways that relevant data are generated and reported, EPA concluded:

> Enforcement authorities can use all of these earlier-described information sources to examine whether emissions from particular sources and, in some cases, particular pieces of equipment have increased. Such increases could give an enforcement authority a starting point for further inquiry. Upon inquiring, the enforcement authority could determine whether the source has kept records of changes that caused those emissions increases, and if not, whether the source has an adequate explanation for the emissions increase.

Id. at 72,613.

Moreover, as EPA explained in the rulemaking record, "[g]iven the potentially serious consequences if a source is found to be in non-compliance with the regulation, we agree with commenters who indicate that a source is more likely to adopt a conservative approach and retain more records than required." EPA's Response to Petitions for Reconsideration at 95. Detroit Edison's approach to NSR compliance is a case in point. Even though Detroit Edison's pre-project analysis for the 2010 projects indicated a "reasonable possibility" within 40 C.F.R.

§ 52.21(r)(6)(vi)(*b*)—thus requiring Detroit Edison only to maintain a record of its pre-project analysis—Detroit Edison nonetheless submitted its analysis to MDEQ prior to construction. Indeed, Detroit Edison has proactively and conservatively done so for virtually every large maintenance outage it has undertaken at any of its plants since at least March 2003, when the 2002 NSR Reform Rules took effect in Michigan. Boyd Decl. ¶ 15. And every year, Detroit Edison submits reports of its emissions to MDEQ under a variety of CAA programs, as well as under the 2002 NSR Reform Rules. So Detroit Edison's actions here conformed with—indeed confirmed—EPA's position in the rulemaking (as opposed to Government counsel's contrary post-hoc suppositions).

In sum, EPA's own words show that there is ample data available for the Government to enforce NSR based on actual post-project emissions, even as to projects that do not trigger "reasonable possibility" requirements. The fact that EPA imposed enhanced recordkeeping and reporting requirements on those projects that were closer to the line does not lead to any absurdity. It instead confirms the primacy of actual data in the enforcement process and ensures that, as to the "riskier" projects, those data will be readily available to enforcement authorities.

2. An Operator Conforming Operations to the Projection Is Not Absurd—It Is What EPA Intended.

The Government, in this enforcement action, characterizes as "absurd" the notion that a power plant operator would monitor its post-project emissions and conform its operations to its pre-project projection to ensure compliance with the NSR rules. Although its characterization of Detroit Edison's compliance program is tendentious, the Government is correct in noting that Detroit Edison will take steps to ensure that Monroe Unit 2 will not exceed baseline emissions. In other words, Detroit Edison intends to eliminate any doubt that it is in compliance with NSR by ensuring that there will be no significant emissions increase following the 2010 projects for whatever reason, much less as a result of the projects. This is consistent with the statutory definition of "modification," with EPA's regulations, and with the overarching objective of the PSD program—i.e., that there be no increase in emissions as a result of the Spring 2010 projects.

This is not an outrage, as the Government suggests—it is what EPA expected would happen. During the rulemaking process, interested parties expressed concern that sources that would use the actual-to-projected-actual test would no longer seek enforceable permit conditions to limit emissions to pre-project levels. EPA explained that the environmental benefit of the rules would be preserved, because sources using the actual-to-projected-actual test would conform operations to meet the projection:

> While the actual-to-projected-actual test would reduce the number of sources who would need to take permit limits, we find that the environmental benefit of these permit limits is effectively preserved because ***any source*** projecting no significant actual increase ***must stay within that projection or face NSR***.

EPA, *Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules* at 14 (Nov. 21, 2002) (emphases added), *available at* http://www.epa.gov/nsr/documents/nsr-analysis.pdf; *see also id.* at G-5 ("Under the NSR Improvement rule, this source would not need to agree to the permit limitation, but would still need to effectively adhere to its projection that actual emissions do not increase after the change.").[20]

In other words, EPA recognized that it was creating a strong incentive for sources to control operations to ensure that post-project emissions conform to pre-project projections. Detroit Edison has responded to that incentive and will ensure that there is no increase in emissions from Monroe Unit 2 for any reason, much less due to the projects. Only in the Government's made-for-litigation "through the looking glass" view of NSR is it a bad thing—in a program intended to limit

[20] In this respect, the system EPA envisioned would parallel provisions that have been in EPA's NSR rules from their inception governing the relaxation of enforceable permit limits imposed to prevent a source from operating at levels that would result in a significant increase in emissions over baseline levels. *See* 40 C.F.R. § 52.21(r)(4). If those limitations are relaxed after construction, the operator must go through NSR permitting "at such time." *Id.* In the same manner, under the revised rules, an operator that exceeds its projection as a result of the project becomes subject to NSR "at that time." *See* 57 Fed. Reg. at 32,325.

and evaluate emission increases—for an operator to ensure that post-project emissions do not increase over baseline levels.

The Government argues further that operators that conform emissions to projections—as EPA expected they would—can evade NSR enforcement during the 5- or 10-year reporting period and then "operate … at full potential once the monitoring period ends." DOJ Br. at 33. Again, EPA's own statements during the rulemaking show that appellate counsel's post-hoc argument to this Court is unfounded. First, as explained above, EPA explained in detail that data reported during the monitoring period are not the only source of emissions data that enforcement authorities could use to police NSR. *See supra* 25, 42, 50. So increasing emissions after the monitoring period will not go undetected. Second, EPA recognized that, where an operator truly intends to operate its source at higher levels due to a project, it will do so during the normal business cycle—5 years for EGUs and 10 years for other sources: "[W]here a source does intend to use the added capacity, we believe it is reasonable to assume that the capacity will be utilized within the source's normal business cycle. Sources are not likely to wait more than 10 years to use capacity simply to avoid NSR." EPA Response to Comments at I-5-46.

E. The Government's Litigation Position Is Not Entitled to Deference.

Finally, the Government cannot take refuge in deference under *Auer v. Robbins*, 519 U.S. 452 (1997). An agency's interpretation of its own rules is entitled to deference only where the rules are ambiguous. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). The Court is not required to defer to the Government's interpretation if an "alternative reading is compelled by the regulation's plain language or by other indications of the [the agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). The rules here state unambiguously that a project "is not a major modification if it does not cause a significant emissions increase." MICH. ADMIN. CODE R. 336.2802(4)(a); 40 C.F.R. § 52.21(a)(2)(iv)(*a*). That is the end of the matter. Furthermore, deference does not apply to litigating positions that are no more than post-hoc rationalizations. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988) (deference to an agency's "convenient litigati[on] position" would be "entirely inappropriate" where the agency's position is contrary to the view advocated by the agency in past cases and is not "reasoned and consistent"); *Auer*, 519 U.S. at 462 (contrasting an agency's "post hoc rationalization" with a "fair and considered judgment").

Virtually every argument presented by the Government's appellate counsel here is little more than a recycled rulemaking comment that EPA explicitly

considered, and rejected, in the rulemaking record. The Government's position therefore contradicts EPA's "fair and considered judgment" reflected in its rulemaking comments and is nothing more than a "convenient litigati[on] position" designed to achieve a desired enforcement result. "It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [an agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate' [or absurd]." *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (citing *Serv. v. Dulles*, 354 U.S. 363 (1957)). The Government's interpretation of the rules is not entitled to deference. *See Ala. Power Co.*, 372 F. Supp. 2d at 1306.

CONCLUSION

Detroit Edison's 2010 projects at Monroe Unit 2 have not caused an increase in emissions. Indeed, emissions have decreased. Under the 2002 NSR Reform Rules, these projects are not "major modifications." The Government therefore cannot meet its burden of proof on its claims that the 2010 projects were major modifications constructed without the appropriate NSR permit. The District Court properly granted summary judgment to Detroit Edison. Its decision should be affirmed.

Respectfully submitted,

/s/ F. William Brownell

F. William Brownell
Mark B. Bierbower
Makram B. Jaber
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
bbrownell@hunton.com
mbierbower@hunton.com
mjaber@hunton.com

Brent A. Rosser
HUNTON & WILLIAMS LLP
101 South Tryon Street, Suite 3500
Charlotte, NC 28280
(704) 378-4707
brosser@hunton.com

Harry M. Johnson, III
George P. Sibley, III
HUNTON & WILLIAMS LLP
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200
pjohnson@hunton.com
gsibley@hunton.com

Michael J. Solo
DTE Energy
One Energy Plaza
Detroit, MI 48226
(313) 235-9512

Counsel for DTE Energy Company and Detroit Edison Company

Dated: May 1, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of Defendants-Appellees DTE Energy Company and Detroit Edison Company contains 13,506 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2003 word processing program in 14-point Times New Roman font.

/s/ F. William Brownell

Hunton & Williams LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

Counsel for DTE Energy Company and Detroit Edison Company

Dated: May 1, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 1st day of May, 2012, I served a copy of the foregoing Brief of Defendants-Appellees DTE Energy Company and Detroit Edison Company electronically through the Court's CM/ECF system on the following registered CM/ECF counsel of record:

Sambhav N. Sankar
Thomas A. Benson
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
Washington, D.C. 20026
(202) 514-5442

Jessie J. Rossman
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606

Holly D. Bressett
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105-3459

/s/ F. William Brownell

RELEVANT DISTRICT COURT DOCUMENTS

R. No. 1	Complaint (Aug. 5, 2010)
R. No. 46	Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction (Nov. 4, 2010)
R. No. 46-2	Declaration of George T. Wolff, Ph.D. (Nov. 2, 2010)
R. No. 46-10	Declaration of Jerry L. Golden (Nov. 4, 2010)
R. No. 107	Defendants' Motion for Summary Judgment Based on the 2002 NSR Reform Rules (June 9, 2011)
R. No. 107-2	Declaration of Skiles W. Boyd (Nov. 3, 2010)
R. No. 107-3	Declaration of Gordon P. Usitalo (June 9, 2011)
R. No. 160	Opinion and Order Granting Defendants' Motion for Summary Judgment (Aug. 23, 2011)
R. No. 161	Judgment (Aug. 23, 2011)

STATUTORY AND REGULATORY ADDENDUM

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1. Clean Air Act § 109, 42 U.S.C. § 7409

§7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section

7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

2. Clean Air Act § 110, 42 U.S.C. § 7410

§7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide **(i)** necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), **(ii)** requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and **(iii)** necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the

availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101–549, title I, §101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel

burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) [1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101–549, title I, §101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or

may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101–549, title I, §101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101–549, title I, §101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the

authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101–549, title I, §101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101–549, title I, §101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain

Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A),

the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice

shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(*l*) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990), shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(*o*) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

3. Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4)

§7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

4. Clean Air Act § 113(b), 42 U.S.C. § 7413(b)

§7413. Federal enforcement

* * * * *

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV–A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney

and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

5. Clean Air Act § 160, 42 U.S.C. § 7470

§7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate 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;

(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;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(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.

6. Clean Air Act § 163, 42 U.S.C. § 7473

§7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for

purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. 791a et seq.] over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

7. Clean Air Act § 165(a), 42 U.S.C. § 7475(a)

§7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under

section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

8. Clean Air Act § 167, 42 U.S.C. § 7477

§7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

9. Clean Air Act § 169(2)(C), (4), 42 U.S.C. § 7479(2)(C), (4)

§7479. Definitions

For purposes of this part—

* * * * *

(2) * * * * *

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

* * * * *

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

10. Clean Air Act § 169A, 42 U.S.C. § 7491

§7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for

implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not

or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;

(4) the term "as expeditiously as practicable" means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term "mandatory class I Federal areas" means Federal areas which may not be designated as other than class I under this part;

(6) the terms "visibility impairment" and "impairment of visibility" shall include reduction in visual range and atmospheric discoloration; and

(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

11. Clean Air Act § 169B, 42 U.S.C. § 7492

§7492. Visibility

(a) Studies

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

(C) adaptation of regional air quality models for the assessment of visibility;

(D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection **(a)(1)** of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

(b) Impacts of other provisions

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

(c) Establishment of visibility transport regions and commissions

(1) Authority to establish visibility transport regions

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

(2) Visibility transport commissions

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The Administrator or the Administrator's designee; and

(C) A representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

(3) Ex officio members

All representatives of the Federal Government shall be ex officio members.

(4) Federal Advisory Committee Act

The visibility transport commissions shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C. App.].

(d) Duties of visibility transport commissions

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring "reasonable progress" toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

12. Clean Air Act § 171, 42 U.S.C. § 7501

§7501. Definitions

For the purpose of this part—

(1) Reasonable further progress.—The term "reasonable further progress" means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) Nonattainment area.—The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) Lowest achievable emission rate.—The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) Modifications; modified.—The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

13. 40 C.F.R. § 51.160

§ 51.160 Legally enforceable procedures.

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in--

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if--

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on--

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part

(Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

14. 40 C.F.R. § 52.21(a)(2), (b)(2), (b)(33)(ii), (b)(41)(i)-(ii), (b)(48)(i), (r)(4), (r)(6)

§ 52.21 Prevention of significant deterioration of air quality.

(a) * * * * *

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the

definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*d*) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*e*) [Reserved]

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) For any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with the requirements under paragraph (aa) of this section.

(b) *Definitions*. For the purposes of this section:

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section);

and a significant net emissions increase of that pollutant from the major stationary source.

(ii) Any significant emissions increase (as defined at paragraph (b)(40) of this section) from any emissions units or net emissions increase (as defined in paragraph (b)(3) of this section) at a major stationary source that is significant for volatile organic compounds or NO_X shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (cc) of this section;

NOTE TO PARAGRAPH (b)(2)(iii)(*a*): By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the Federal Register advising the public of the termination of the stay.

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166; or

(*2*) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40

CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.

(*g*) Any change in ownership at a stationary source.

(*h*) [Reserved]

(*i*) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(*1*) The State implementation plan for the State in which the project is located, and

(*2*) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(*j*) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(*k*) The reactivation of a very clean coal-fired electric utility steam generating unit.

(iv) This definition shall not apply with respect to a particular regulated NSR pollutant when the major stationary source is complying with the requirements under paragraph (aa) of this section for a PAL for that pollutant. Instead, the definition at paragraph (aa)(2)(viii) of this section shall apply.

<Text of subsection (b)(2)(v) stayed effective March 30, 2011.>

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

* * * * *

(33) *Replacement unit* means an emissions unit for which all the criteria listed in paragraphs (b)(33)(i) through (iv) of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

* * * * *

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

* * * * *

(41)(i) *Projected actual emissions* means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years (12–month period) following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source.

(ii) In determining the projected actual emissions under paragraph (b)(41)(i) of this section (before beginning actual construction), the owner or operator of the major stationary source:

(*a*) Shall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan; and

(*b*) Shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions; and

(*c*) Shall exclude, in calculating any increase in emissions that results from he particular project, 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 the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

(*d*) In lieu of using the method set out in paragraphs (a)(41)(ii)(a) through (c) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section.

* * * * *

(48) *Baseline actual emissions* means the rate of emissions, in tons per

year, of a regulated NSR pollutant, as determined in accordance with paragraphs (b)(48)(i) through (iv) of this section.

(i) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24–month period selected by the owner or operator within the 5–year period immediately preceding when the owner or operator begins actual construction of the project. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(*b*) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24–month period.

(*c*) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24–month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24–month period can be used For each regulated NSR pollutant.

(*d*) The average rate shall not be based on any consecutive 24–month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by paragraph (b)(48)(i)(b) of this section.

* * * * *

(r) *Source obligation.*

* * * * *

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(6) Except as otherwise provided in paragraph (r)(6)(vi)(b) of this section, the provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)(a) through (c) of this section for calculating projected actual emissions.

(i) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(*a*) A description of the project;

(*b*) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

(*c*) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) of this section and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(ii) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i) of this section to the Administrator. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the Administrator before beginning actual construction.

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(b) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during

the calendar year that preceded submission of the report.

(v) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the Administrator if the annual emissions, in tons per year, from the project identified in paragraph (r)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section), by a significant amount (as defined in paragraph (b)(23) of this section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section. Such report shall be submitted to the Administrator within 60 days after the end of such year. The report shall contain the following:

(*a*) The name, address and telephone number of the major stationary source;

(*b*) The annual emissions as calculated pursuant to paragraph (r)(6)(iii) of this section; and

(*c*) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(vi) A "reasonable possibility" under paragraph (r)(6) of this section occurs when the owner or operator calculates the project to result in either:

(*a*) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(c) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(b) of this section, and not also within the meaning of paragraph (r)(6)(vi)(a) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project.

15. 40 C.F.R. § 52.21(b)(33)(ii)(1992)

§ 52.21 Prevention of significant deterioration of air quality.

(b) * * * * *

(33) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the Administrator determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the Administrator shall:

* * * * *

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

16. 40 C.F.R. § 70.7(d), (e)

§ 70.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(d) *Administrative permit amendments.*

(1) An "administrative permit amendment" is a permit revision that:

(i) Corrects typographical errors;

(ii) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source;

(iii) Requires more frequent monitoring or reporting by the permittee;

(iv) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority;

(v) Incorporates into the part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§ 70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in § 70.6 of this part; or

(vi) Incorporates any other type of change which the Administrator has determined as part of the approved part 70 program to be similar to those in paragraphs (d)(1) (i) through (iv) of this section.

(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(3) *Administrative permit amendment procedures.* An administrative permit amendment may be made by the permitting authority consistent with the following:

(i) The permitting authority shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected States provided that it designates any such permit revisions as having been made pursuant to this paragraph.

(ii) The permitting authority shall submit a copy of the revised permit to the Administrator.

(iii) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.

(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in § 70.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§ 70.6, 70.7, and 70.8 for significant permit modifications.

(e) *Permit modification.* A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(1) *Program description.* The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.

(2) *Minor permit modification procedures* -- (i) *Criteria.* (A) Minor permit modification procedures may be used only for those permit modifications that:

(*1*) Do not violate any applicable requirement;

(*2*) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

(*3*) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(*4*) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(*A*) A federally enforceable emissions cap assumed to

avoid classification as a modification under any provision of title I; and

(*B*) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

(*5*) Are not modifications under any provision of title I of the Act; and

(*6*) Are not required by the State program to be processed as a significant modification.

(B) Notwithstanding paragraphs (e)(2)(i)(A) and (e)(3)(i) of this section, minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.

(ii) *Application.* An application requesting the use of minor permit modification procedures shall meet the requirements of § 70.5(c) of this part and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(B) The source's suggested draft permit;

(C) Certification by a responsible official, consistent with § 70.5(d), that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(D) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8.

(iii) *EPA and affected State notification.* Within 5 working days of receipt of a complete permit modification application, the permitting authority shall meet its obligation under § 70.8(a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modification. The permitting authority promptly shall send any notice required under § 70.8(b)(2) to the Administrator.

(iv) *Timetable for issuance.* The permitting authority may not issue a final permit modification until after EPA's 45–day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, whichever is first, although the permitting authority can approve the permit modification prior to that time. Within 90 days of the permitting authority's receipt of an application under minor permit modification procedures or 15 days after the end of the Administrator's 45–day review period

under § 70.8(c), whichever is later, the permitting authority shall:

(A) Issue the permit modification as proposed;

(B) Deny the permit modification application;

(C) Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(D) Revise the draft permit modification and transmit to the Administrator the new proposed permit modification as required by § 70.8(a) of this part.

(v) *Source's ability to make change.* The State program may allow the source to make the change proposed in its minor permit modification application immediately after it files such application. After the source makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions specified in paragraphs (e)(2)(v) (A) through (C) of this section, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(vi) *Permit shield.* The permit shield under § 70.6(f) of this part may not extend to minor permit modifications.

(3) *Group processing of minor permit modifications*. Consistent with this paragraph, the permitting authority may modify the procedure outlined in paragraph (e)(2) of this section to process groups of a source's applications for certain modifications eligible for minor permit modification processing.

(i) *Criteria.* Group processing of modifications may be used only for those permit modifications:

(A) That meet the criteria for minor permit modification procedures under paragraph (e)(2)(i)(A) of this section; and

(B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (e)(3)(i)(B) (1) and (2) of this section, this threshold shall be 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in § 70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:

(*1*) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that

would be imposed by immediate permit modification review, and

(*2*) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.

(ii) *Application.* An application requesting the use of group processing procedures shall meet the requirements of § 70.5(c) of this part and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.

(B) The source's suggested draft permit.

(C) Certification by a responsible official, consistent with § 70.5(d) of this part, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(3)(i)(B) of this section.

(E) Certification, consistent with § 70.5(d) of this part, that the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.

(F) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8 of this part.

(iii) *EPA and affected State notification.* On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligations under §§ 70.8(a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under § 70.8(b)(2) of this part to the Administrator.

(iv) *Timetable for issuance.* The provisions of paragraph (e)(2)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(2)(iv) (A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45–day review period under § 70.8(c) of this part, whichever is later.

(v) *Source's ability to make change.* The provisions of paragraph (e)(2)(v) of this section shall apply to modifications eligible for

group processing.

(vi) *Permit shield.* The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.

(4) *Significant modification procedures--*

(i) *Criteria.* Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. The State program shall contain criteria for determining whether a change is significant. At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

(ii) The State program shall provide that significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal. The permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.