

No. 05-848

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**In the  
Supreme Court of the United States**

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ENVIRONMENTAL DEFENSE, ET AL.,  
*Petitioners,*

v.

DUKE ENERGY CORPORATION, ET AL.,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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**BRIEF OF THE STATES OF ALABAMA, ALASKA,  
COLORADO, INDIANA, KANSAS, NEBRASKA,  
SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, AND  
WYOMING, AND THE STATE OF WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION, AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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September 15, 2006

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## QUESTIONS PRESENTED

1. Whether the Clean Air Act's provision for expedited judicial review of "final action" promulgated by EPA, 42 U.S.C. §7607(b), stripped the courts below of authority to consider a new interpretation of EPA's 1980 New Source Review rules that was developed and imposed in an enforcement action initiated in 1999; and

2. Whether EPA unlawfully interpreted its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" as that term has been defined and used for decades under those rules and under the Act.

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Maryland Department of the Environment,  
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## INTEREST OF AMICI

In the Clean Air Act, Congress assigned to the States the primary responsibility for the day-to-day regulation of air pollution. “In the proper discharge of their responsibilities to implement the [Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies.” *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., dissenting). These state environmental regulators are committed public servants who “take pride in their own resourcefulness, expertise, and commitment to the law ....” *Id.*

The amici States oppose EPA’s sweeping, enforcement-inspired interpretation of the Clean Air Act’s NSR/PSD provisions for three reasons, all of which relate to the States’ role as the principal front-line enforcers of the Act’s requirements. Specifically, EPA’s current reading –

- Contradicts EPA’s earlier interpretations and, indeed, EPA’s past guidance to state regulators;
- Envisions a breathtaking transfer of enforcement authority from the States to the federal government and thus undermines the Clean Air Act’s federalism-respecting foundations; and
- Risks needlessly overwhelming the limited resources available to state environmental agencies.

This Court should reject EPA’s current interpretation-qua-litigating-position. Doing so will encourage principled agency decisionmaking, preserve the state-federal balance, and ensure a robust, yet manageable, NSR/PSD program.

## SUMMARY OF THE ARGUMENT

EPA’s current litigating position concerning the Clean Air Act’s NSR/PSD rules (1) flatly contradicts its own earlier interpretations and guidance to States, (2) violates the fundamental principles of federalism that underlie the Act, (3) risks needlessly overwhelming the state regulators who

are responsible for the Act's day-to-day implementation, and (4) entails hidden pitfalls even as a matter of environmental policy. The Court should reject it.

1. EPA's litigating position (which, with respect, is all it is) is not entitled to deference, for two reasons. First, EPA has consistently blessed state environmental regulators' NSR/PSD interpretations contrary to the one it now urges. The Alabama Department of Environmental Management's experience is illustrative: Consistent with express EPA guidance, ADEM initially interpreted - and has since then consistently interpreted - its own NSR/PSD rule to require an increase in a unit's hourly emission rate as a prerequisite to "major modification" analysis. Despite its constant supervision of ADEM's program (right down to its review of individual NSR/PSD permits), EPA has never once suggested that ADEM misunderstands the rules' text or purpose. Second, and more generally, EPA's own approach to the rules here at issue has been frightfully inconsistent. Indeed, during the last 25 years, EPA has at seven different junctures offered at least three different and mutually exclusive interpretations of those rules.

2. On two grounds, EPA's enforcement-inspired interpretation undermines the Clean Air Act's carefully calibrated state-federal enforcement scheme, which charges the States with primary enforcement responsibility. First, because under it, nearly *every* change made to *every* component of *every* sub-par unit would trigger application of stringent new NSR/PSD emission-limit requirements, EPA's sweeping reading would cause the exception of federal intervention to swallow the rule of state control. Second, there is a straightforward - and federalism-respecting - solution for States that want tougher new-source controls: they should simply enact them as a matter of state law. The Clean Air Act establishes a baseline of protection sufficient to safeguard human health and safety, but by its own terms it also expressly invites States to tighten requirements as they see fit and thus act as Brandeisian "laboratories."

3. EPA's litigating position – which, again, would make nearly every tweak to an existing plant the occasion for rigorous pre-construction review – is also wildly impractical. Our chief concern here is the overwhelming burden with which EPA's current interpretation would saddle the state regulators tasked with the ground-level enforcement of Clean Air Act requirements. If on top of their existing duties – developing and implementing SIPs and processing NSR and PSD applications under current law – state regulators had to deal with the flood of new requests that EPA's current view would unleash, the burden would overwhelm existing resources, leading either to an administrative breakdown, a bureaucratic explosion, or both.

4. Important public-policy considerations counsel against EPA's litigating position, as well. First, of course, there is the sheer expense (*i.e.*, the permitting process itself plus the required retrofits) that EPA's current view would entail. Our concern here is less with industry costs as such than with the near-certainty that industry would simply pass its own increased costs on to consumers in the form of rate hikes. That concern is particularly acute where, as here, the affected consumers are utility rate-payers, whose interests state Attorneys General are statutorily obliged to protect. Second, there are good clean-air reasons to oppose EPA's enforcement position. The cost – in money, time, and labor – of EPA's enforcement initiative will create what EPA itself has called a “perverse” incentive for industry to eschew upgrades in favor of limping by on old, deteriorating, and environmentally-unfriendly equipment.

5. Petitioners' jurisdictional argument clearly misses the mark. Section 307(b) encompasses only challenges to “promulgat[ions]” of “nationally applicable regulations” and other EPA “final action[s].” This case, which concerns the propriety of EPA's application of its NSR/PSD rules in the context of an ongoing enforcement action, involves no such challenge. Moreover, it simply cannot be the law that when EPA itself initiates an enforcement proceeding in district court, the target is faced with the choice of either (1)

declining to defend and accepting an adverse judgment or (2) instituting a duplicative proceeding in the D.C. Circuit.

## ARGUMENT

This brief is no apology for industry. In a perfect world, with blank statute books and unlimited resources, the amici States might opt for the type of enforcement agenda EPA is pursuing here. Our disagreement with EPA (with one notable exception) is less about environmental policy than about the legality and real-world practicality of EPA's current enforcement initiative. As matters now stand, EPA's actions are both illegal and wildly impractical.

### **I. EPA's Current Litigating Position Is Not Entitled to Deference, Particularly Given EPA's Consistent Endorsement of State Agencies' Longstanding PSD Interpretations to the Contrary.**

We start with the question of legality. The notion that there is only one plausible reading of the Clean Air Act's 1980 PSD rule,<sup>1</sup> requiring intensive pre-construction review based solely upon a projected increase in a plant's hours of operation (Pet. Br. 2, 25, 34, 49; EPA Br. 13, 19-20; NY Br. 7), is, as we will explain, plainly wrong. So, too, is the related suggestion that EPA has had anything like a "longstanding" interpretation (Pet. Br. i; NY Br. 1; NJ Br. 2) to that effect.<sup>2</sup>

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<sup>1</sup> 45 Fed. Reg. 52,676 (Aug. 7, 1980) (codified at 40 C.F.R. §51.166 (1987)).

<sup>2</sup> To its credit, EPA *itself* does not even claim here to have had a longstanding position concerning the meaning of the 1980 PSD rule. And with good reason; as we will show, EPA's own reading of the rule has been anything but consistent. *See infra* at 10-14. Indeed, even its brief in this Court seems more than a bit schizophrenic. At one point, for instance, EPA asserts that "[t]he *only reasonable construction* of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'" EPA Br. 20 (emphasis added). A bit later, EPA says, quite differently, that "it would have been *permissible* for EPA to" construe the term "modification" for PSD purposes the way it is used in the NSPS program, *i.e.*, to require an increase in the hourly rate of emissions. *Id.* at 35.

Duke itself has made the textual case against EPA's current reading of the 1980 PSD rule (Duke Br. 33-36), and there is no point in replowing that ground here. Our purpose is to demonstrate that EPA's current hours-of-operation-based litigating position does not warrant deference (1) because the agency has consistently blessed state environmental regulators' interpretations to the contrary; and (2) more generally, because it is just the latest in a bob-and-weave succession of contradictory agency pronouncements.

**A. EPA Has Consistently Blessed State-Agency PSD Interpretations Contrary to the One It Now Advances.**

As Justice Kennedy recently observed, "[i]n the proper discharge of their responsibilities to implement the [Clean Air Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies." *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting). "These state employees, who no doubt take pride in their own resourcefulness, expertise, and commitment to the law, are the officials directed by Congress to make case-by-case, site-specific, determinations under the Act." *Id.* In the State of Alabama – whose experience is described below merely for purposes of illustration – the agency to which Justice Kennedy's observation refers is the Alabama Department of Environmental Management ("ADEM").

From the very beginning, ADEM has understood that PSD "major modification" review is triggered only by activity that causes an increase in a plant's hourly rate of emissions and not, importantly, by a recovery or extension of the plant's hours of operation. ADEM first promulgated PSD regulations in January 1981. Later that same year, those regulations were expressly "approv[ed]" by EPA as "comply[ing] with the latest guidance issued by EPA to assist States in preparing State implementation plan (SIP) revisions for PSD." 46 Fed. Reg. 55,517 (Dec. 10, 1981) (codified at 40

C.F.R. §52.50). As both ADEM's current Air Division chief (since 1996) and his predecessor (chief from 1982 to 1996) have testified, ADEM's EPA-approved PSD regulation has always "focused on the maximum hourly rate of emissions," such that "[o]nly if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements." Decl. of Richard E. Grusnick, Former Chief, ADEM Air Division ("Grusnick Decl."), ¶9, in *United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005) (App. A to this brief). In other words, ADEM has at all times read its PSD regulation to mean that "major modification" review is triggered only by "those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis," and, equally importantly, not by "a project or activity that is followed by an increase in the availability or utilization of a facility." Decl. of Ronald W. Gore, Chief, AEDM Air Division ("Gore Decl."), ¶¶5, 7, in *Alabama Power*, 372 F. Supp. 2d 1283 (App. B to this brief).

Notably, ADEM's understanding and application of the term "major modification" - *i.e.*, to focus exclusively on activity that results in an hourly-rate increase - "has not changed substantively since [the PSD rule's] original adoption in 1981." Grusnick Decl. ¶10. Indeed, ADEM's interpretation of the PSD regulation has been a model of consistency. Only three individuals have headed ADEM's Air Division since the PSD program came onto the scene in 1980. Under their principled leadership - and through the tenures of seven different Governors (four Democrats and three Republicans) and six different Attorneys General (three of each party) - ADEM has persisted in its hourly-rate-based understanding of the "major modification" analysis.

ADEM has interpreted its EPA-approved PSD regulation to focus on hourly-rate increases and to exclude hours-of-operation increases not only because that is the most sensible reading of the regulation's language but also, and more significantly for present purposes, because *that is how EPA itself said to interpret it*. In January 1981, and then again in

June of that same year – just about the time ADEM was requesting and obtaining EPA’s blessing for its own PSD regulations – EPA’s Director of Stationary Source Enforcement, Edward Reich, confirmed in two separate memoranda that PSD applicability “is determined by evaluating any change in [hourly] emissions rates caused by” a physical or operational change. JA 28. The reason, Reich explained, was that, otherwise, “[a]ctual emissions could increase only if there is an increase in the production rate or hours or operation, both of which are specifically exempt from PSD review.” *Id.* (citing 40 C.F.R. §52.21(b)(2)(iii)(f)); accord JA 35 (“[I]n the absence of any SIP or permit limitations,” the “increase in hours of operation at the power plant” would not “be considered a modification.”) (citing 40 C.F.R. §52.21(b)(2)(iii)(e) and (f)).<sup>3</sup>

To precisely the same effect, just a year later, EPA’s regional chief of the Air & Waste Management Division, James Wilburn, issued a report “to all state and local agency directors” – *i.e.*, to agencies like ADEM – one purpose of which was to alert state regulators to “interpretations of EPA regulations.” U.S. EPA, Region IV, Memorandum No. 4AW-AM, at 1 (July 12, 1982) (App. C to this brief). The report addressed the very question presented here, and answered it decisively in favor of ADEM’s understanding:

*Question:* A source to be modified will be subject to PSD due to a significant increase in SO<sub>2</sub> emissions. After the modification there will be no increase in the hourly particulate emissions. The source presently operates at 4,000 hours per year. If the PSD permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions,

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<sup>3</sup> The concerted efforts to marginalize Mr. Reich as just some guy – or, worse, a rogue bureaucrat – are disingenuous. See EPA Br. 13 (“mid-level EPA official”); NY Br. 18 (“single agency employee”). Mr. Reich was not just some guy, he was *the* guy – the director of the very EPA division whose responsibility it was to speak to the correct interpretation of the PSD regulations.

and cause the source to be subject to PSD for particulate?

*Answer:* No. Since the modification does not *cause* any increase in [the referenced hourly particulate] emissions, no increase in annual emissions should be calculated.

*Id.* at 2. Notably, North and South Carolina, like Alabama, are in EPA “Region IV”; accordingly, the state regulators whose permitting decisions are being second-guessed in this enforcement action presumably received Mr. Wilburn’s directive, as well. What is more, North and South Carolina, like Alabama, adopted their own PSD rules (and obtained EPA approval) during the Reich-Wilburn era. *See* 47 Fed. Reg. 7836 (Feb. 23, 1982) (North Carolina); 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina).

It should be enough that agencies like ADEM acted against the backdrop of EPA’s own programmatic advice in crafting and implementing state PSD regulations. But there is much more. Having initially approved ADEM’s PSD rules as in “compl[iance] with the latest guidance issued by EPA” concerning the PSD program and codified those rules into federal law (*supra* at 5), EPA has during the last 25 years repeatedly blessed ADEM’s hourly-rate-based understanding of its PSD regulation. Initially, and most generically, as an exercise of its “oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act,” EPA “would periodically issue policy memoranda which would provide EPA’s guidance on major air program policy issues.” Grusnick Decl. ¶16. None of those documents, however, ever “communicate[d] to ADEM the interpretations of PSD preconstruction permitting requirements that [EPA] advances” in the present enforcement initiative. *Id.*

More specifically, “EPA had numerous, regular opportunities to identify ADEM’s policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation.” *Id.* ¶17. First, EPA conducted “annual on-site audit[s] of ADEM’s Air Program”; these audits “generally included a

mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records.” *Id.* Second, as part of the “federal grant process” there was an “annual negotiation of commitments between EPA and the state” during which EPA could identify topics of “high priority” and leverage “commitments from ADEM.” *Id.* Third, and separately, EPA and ADEM negotiated annual Clean Air Act enforcement agreements covering all aspects of compliance and enforcement, including, the PSD program. Significantly here, these agreements stressed the importance of EPA and ADEM “resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instance[s] of non-compliance.”<sup>4</sup> The agreements also provided that EPA and ADEM would “conduct monthly conference calls” as a means of ensuring a coordinated enforcement strategy.<sup>5</sup> Tellingly, “[n]o audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA’s current interpretation.” Grusnick Decl. ¶18.

Finally, and more specifically still, as part of what this Court has called its “sweeping” “surveillance,” “oversight,” “supervisory,” and “checking” responsibilities, *see Alaska*, 540 U.S. at 469, 484, 485, 486, 487, 488, 490, 492, 496, 502, EPA routinely reviewed individual PSD permits issued by ADEM. To facilitate that review, the Clean Air Act itself required ADEM to inform EPA specifically of “‘every action’ taken in the course of the permit approval process” and further guaranteed EPA the right to submit comments concerning proposed permits. *Id.* at 508 (Kennedy, J., dissenting) (quoting 42 U.S.C. §7475(d)). Moreover, as illustrated by the *Alaska* decision itself – the central premise of which is that EPA can and should look over state agen-

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<sup>4</sup> Alabama/EPA Compliance Assurance Agreement 2 (1996) (emphasis added) (Appendix D to this brief).

<sup>5</sup> *Id.* ADEM’s files contain similar agreements for 1986, 1989, and 1990.

cies' shoulders to ensure the proper administration of the PSD program – EPA could always have vetoed ADEM's issuance of a permit or otherwise moved to block a change authorized by ADEM. *See id.* at 473-74, 480-81 (majority opinion). Tellingly, it never did.

The point here is simply this: Knowing full well ADEM's hourly-rate-based understanding of the PSD modification rule (and, indeed, having counseled ADEM to embrace that understanding to begin with), it was incumbent upon EPA to speak up if it thought ADEM's understanding or application of that rule was out of whack. Despite hundreds of opportunities, EPA never did so. Of course, if EPA believed ADEM was way off track (and there is, to be sure, a *huge* practical difference between ADEM's consistent interpretation and the one that EPA urges in this litigation), it could have issued a "SIP call" requiring ADEM either to change its ways or to forfeit its permitting authority altogether. *See* 42 U.S.C. §7410(c)(1), (k)(5). But ADEM never received so much as a tap on the shoulder. By now pulling the rug out from underneath ADEM 20 years after the fact, EPA has "indulge[d]" in precisely the "inequitable conduct" this Court implicitly forbade in *Alaska*, 540 U.S. at 495. *See also id.* (emphasizing that it is essential for EPA "to act on a timely basis" if it is going to second-guess state regulators); *id.* at 513 (Kennedy, J., dissenting) (recognizing the "need for finality in state permitting decisions" and that "a post hoc veto procedure" upsets "reliance and expectation interests").

**B. EPA's Own Pronouncements Concerning the PSD Rule Have Been Frightfully Inconsistent.**

Alabama's interpretation of the PSD rule's modification provisions – *i.e.*, to hold hours of operation constant and to require as a prerequisite to "major modification" analysis an increase in the hourly emission rate – is thus not only EPA-blessed but also truly longstanding and consistent. EPA itself cannot make a similar claim. It has, with respect, been all over the map. Presently, of course – by which we mean

currently in the life of this particular enforcement proceeding – EPA advances a so-called “actual-to-projected-actual” understanding of the 1980 PSD rule. Pursuant to *that* interpretation, an increase in annual emissions may be triggered by an increase in a source’s hours of operation standing alone, that is, even absent an increase in the source’s hourly emission rate or, indeed, despite a decrease in that rate. *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 (M.D.N.C. 2003) (describing EPA’s position).

That has not always been EPA’s view. In fact, since its adoption in 1980, EPA has advanced *at least three different and mutually exclusive interpretations* of the PSD rule. Tracing the evolution can be a dizzying exercise:

**Take One:** Initially, in 1981, EPA endorsed the so-called “actual-to-actual” test (used, *e.g.*, by ADEM), pursuant to which a “major modification” occurs only where activity increases a unit’s hourly emission rate. *See supra* at 5-8.

**Take Two:** Then, in its 1988 “WEPCo determination,” EPA asserted that the “actual-to-potential” test, pursuant to which post-change emissions are theorized by multiplying a unit’s maximum emission rate by the total number of hours in an entire year, was the *only* permissible way to measure PSD modifications. In so asserting, EPA stated categorically that the 1980 PSD regulations “provide no support for” the actual-to-projected-actual test that it now urges. JA 256 n.7.

**Take Three:** In the wake of the Seventh Circuit’s rejection of its actual-to-potential test, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) – and, seemingly, that court’s instruction to apply an actual-to-actual test using “present hours and conditions,” *id.* at 918 n.14 – EPA went back to the drawing board. It did not, however, return to its actual-to-actual interpretation but, instead, embraced the very actual-to-projected-actual test it had earlier insisted had “no support” in the regulation. JA 66-72.

**Take Four:** In its 1992 “WEPCo Rule,” EPA formally adopted the once-rejected actual-to-projected-actual test for measuring emissions but, curiously, made it optional and available only to utilities. *See* 40 C.F.R. §51.166(b)(21) & (b)(32) (1993).

**Take Five:** Then, in 1998, EPA asserted in a proposed rule that the actual-to-potential test (abandoned after *WEPCo*) was and had always been the sole means of measuring emissions increases for PSD purposes – at least for non-utility sources. *See* 63 Fed. Reg. 39,857, 39,859 n.4 (July 24, 1998).

**Take Six:** In 2002, EPA promulgated a new, mandatory actual-to-projected-actual methodology for all existing sources (not just utilities) and, in so doing, reiterated its view that the actual-to-potential test remained the governing standard under the preexisting 1980 PSD rule. *See* 67 Fed. Reg. 80,186, 80,191-92, 80,199 (Dec. 31, 2002).

**Take Seven:** Finally, in litigating this very case, EPA initially invoked the actual-to-potential test as the appropriate means of measuring increases under the 1980 rule, but appears to have settled, at last, on a version of the actual-to-projected actual analysis. *See Duke Energy*, 278 F. Supp. 2d at 640 & n.17.

In the words of its own former general counsel, EPA’s current “multi-billion dollar” NSR/PSD enforcement initiative rests “on the premise that the same words in the law meant one thing in 1985, another thing in 1992, still another in 1996, yet another in 1998, and will someday mean something still different in the future.” *Joint Hearing on NSR Issues Before the Senate Environment and Public Works Comm. and the Senate Judiciary Comm.*, 107th Cong., pp. 2-3 (July 16, 2002) (statement of E. Donald Elliott) (“Elliott NSR Test.”). It is a dubious premise.

As a *practical* matter, New Jersey is exactly right when it says that “[t]he States’ ability to plan for and meet their obligations under the CAA depends on the stability of

nationwide regulations.” NJ Br. 8. The problem is that EPA’s approach to the NSR/PSD rules has been anything but “stab[le].” Quite the contrary, EPA’s “many changing interpretations of NSR over the years have created a legal mess of baffling complexity ....” Elliott NSR Test. at 1.

More importantly, as a *legal* matter, EPA’s “zigs and zags represented by its contradictory post-WEPCO statements and rules” and its failure to speak “with one voice, or a consistent voice, or even a clear voice, on this issue,” *Alabama Power*, 372 F. Supp. 2d at 1306, fatally undermine its claim to deference. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). That is particularly true where, as here, the agency’s interpretation has “fluctuated” even “as [the] case has progressed.” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 n.29 (1982).

It is true, of course, that “[a]n initial agency construction is not instantly carved in stone.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863 (1984). But it is equally true that “[o]nce an agency gives its regulation an interpretation” – which, the case law reflects, it may do either through regional guidance determinations (*e.g.*, the Wilburn memo) or, a fortiori, through formal, central-office guidance (*e.g.*, the Reich memos) – “it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)) (finding that FAA had unlawfully changed an interpretation earlier adopted by its Alaskan Region); *accord, e.g., Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, J.). Given that its current, enforcement-inspired interpretation of the 1980 PSD rule contradicts its earlier view (or *views*, as the case may be), EPA’s position here can be understood only as a “convenient litigating position,” to which no deference is due. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

\* \* \*

It is worth pausing briefly to take stock of the story that EPA's present enforcement initiative - and the newfound view of the NSR/PSD rules that underlies it - requires the Court to believe. The current batch of enforcement actions alleges rampant, if not near-universal, non-compliance with NSR/PSD rules stretching back some 20 years. How, on EPA's retelling, did we get to this point? *First*, we must assume that nearly every major utility-industry player (and, more particularly, every major player's lawyers) either fundamentally misunderstood or blatantly ignored EPA guidance on the meaning of the term "major modification." *Second*, and worse, we must assume that the state environmental agencies that reviewed and approved the hundreds of building projects now under challenge (ADEM in Alabama Power's case, the North Carolina Department of Environment and Natural Resources in Duke's) likewise either misunderstood or ignored EPA guidance. *Finally*, and most bizarrely, we must assume that the EPA regulators themselves, whose very business it was to look over the States' shoulders, were (at best) asleep at the wheel. EPA's story here is either an elaborate conspiracy theory or a monument to bureaucratic incompetence. Occam's Razor suggests a different explanation: EPA's current litigating position just wasn't the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative's launch in 1999.

## **II. EPA's Litigating Position Undermines the Clean Air Act's Carefully Calibrated State-Federal Enforcement Scheme.**

Congress enacted the Clean Air Act with federalism firmly in mind. There are two important federalism-related points worth making here, neither of which the state amici supporting petitioners seem to have come to grips with. First, whereas the Act makes States primarily responsible for regulating air pollution, and carves out NSR/PSD as a narrow exception to that general rule of state control, the

position advocated by petitioners and their state amici would reverse matters entirely. It would make almost every tweak to an existing source the occasion for intrusive federal review and intervention. Second, by its very terms, the Clean Air Act establishes only a regulatory baseline; States with the desire and the gumption can *always* enact tougher environmental controls. States that have declined to do so have no standing to complain.

**A. Under EPA’s Litigating Position, the Exception of Federal Intervention Would Swallow the Rule of State Control.**

It is a well-recognized fact, as the state amici supporting petitioners seem to appreciate, that the Clean Air Act “relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives.” *Alaska*, 540 U.S. at 518 (Kennedy, J., dissenting). In the cooperative scheme established under the Act, States do not play “the role of mere provinces or political corporations” but, “instead, of coequal sovereigns entitled to the same dignity and respect.” *Id.* Indeed, the Act’s language itself makes clear that “air pollution prevention ... and air pollution control at its source is the *primary* responsibility of States and local governments.” 42 U.S.C. §7401(a)(3) (emphasis added); *see also id.* §7407(a) (States have “primary responsibility”).

Pursuant to the scheme that Congress established, EPA initially sets national ambient air quality standards (“NAAQS”) to protect public health and welfare, 42 U.S.C. §7409, and States, in turn, develop detailed state implementation plans (“SIPs”) that specify schedules, compliance timetables, and emission limitations for specific sources, including electric utility plants, *id.* §7410(a). States must include in their SIPs a program for pre-construction review of construction activity that creates new pollution, the aim being to ensure that pollution *not* originally accounted for under a SIP is reviewed and regulated to protect the NAAQS before it is emitted. *Id.* §7410(a)(2)(D). EPA must approve a SIP if it meets the criteria specified in §7410(a).

See *Train v. NRDC*, 421 U.S. 60, 78-79 (1975).

As a result of the state-federal balance that Congress struck, EPA is generally forbidden to micromanage state emission-control policies with respect to existing sources. Rather, while EPA is “plainly charged by the Act with the responsibility for setting” the NAAQS, “[j]ust as plainly ... it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.” *Id.* at 79. Congress gave EPA “no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards” of §7410(a). *Id.* Rather, so long as the “ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air,” a State is “at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.” *Id.*; see also *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (“Congress plainly left with the States, so long as the national standards were met, the power to determine which [existing] sources would be burdened by regulation and to what extent.”).

The NSR/PSD rules at issue here constitute a narrow exception to the general rule under the Act that States have primary responsibility to determine whether and how to regulate pollution sources. Indeed, in *Train*, this Court specifically referred to the emission limits imposed by the Act’s New Source Performance Standards (“NSPS”) provisions, see 42 U.S.C. §7411, as an “[e]xception[]” to EPA’s decidedly “secondary role” in “the process of determining and enforcing the specific, source-by-source emission limitations.” 421 U.S. at 78 & n.16. When enacting the NSPS program, Congress considered a more sweeping program that would have subjected existing sources, as well as new, to federally-established limits. Significantly, though, noting cost considerations and the difficulty of retrofitting existing sources, Congress opted not to pursue that course, see S. Rep. No. 91-1196, at 15-16 (1970); instead, while requiring

new sources to install the latest control technologies, Congress left existing sources subject to state-established SIP limits. See 116 Cong. Rec. 42,520 (1970). The *Train* Court's emphasis on NSPS exceptionalism, of course, carries over jot-for-jot to the NSR/PSD program at issue here, for the simple reason that the NSR program defines the term "modification" - which for present purposes is what triggers new NSR-driven emission limits and thus displaces traditional state control - by reference to the NSPS program's use of the same term. See 42 U.S.C. §§7479(2)(C), 7501(4). See also *Alaska*, 540 U.S. at 491 (even the PSD program "places primary responsibilities and authority with the States, backed by the Federal Government").

EPA's position here turns the Clean Air Act on its head and causes the exception of federal intervention to swallow the rule of state control. Under EPA's current regulatory interpretation, the rigorous NSR/PSD permitting process (and the establishment of new emission limits) would be triggered by any physical or operational change to an existing source that facilitated any increase in hours of operation and thereby increased annual emissions - even without a corresponding hourly-rate increase or, for that matter, despite an hourly-rate decrease. But of course nearly *every* repair or replacement of damaged, deteriorating, or malfunctioning equipment will result in an hours-of-operation increase (that being the point of the repair) and thereby - assuming constant, or even marginally reduced, rates of emission - result in an increase in actual emissions. Accordingly, under EPA's view, nearly *every* physical change made to *every* component of *every* sub-par unit would trigger application of new NSR/PSD requirements. (Indeed, when wearing its rulemaking hat, EPA has recently and candidly conceded that its position "in briefs in various enforcement-related cases" - presumably a reference to

cases like this one – would make “virtually all changes, even trivial ones,” subject to NSR requirements.<sup>6</sup>)

The risk is not hypothetical. Take, as just one example, a 1996 enforcement proceeding brought by EPA against the Georgia-Pacific Corporation. There, EPA alleged that Georgia-Pacific had, at a number of its plants (two of which were in Alabama), engaged in “construction” or “major modification” activity without the required PSD permits. See Consent Decree at 1, *United States v. Georgia-Pacific Corp.*, No. 1 96-CV-1818-FMH (N.D. Ga. July 18, 1996). That enforcement proceeding was resolved pursuant to a consent decree, which constituted “full settlement” for, among other things, the PSD “modifications” listed in an appendix to the decree. *Id.* at 35-36. The catalogue of charged “modifications” spans 54 pages, numbers 994 individual items, and stretches back some 19 years. *Id.* Schedule C. Many of the items on the list – e.g., “Resin/glue reformulation,” “Auxiliary feed screw installed,” “Single head sander,” “patch-line,” “Ramp for loading mulch” – hardly seem like the sorts of changes Congress had in mind when used the term “modification” as the statutory trigger for rigorous federal PSD review. *Id.* Schedule C at 1, 3, 9, 11, 14.<sup>7</sup>

The point here is not, as a policy matter, that more or less stringent controls are preferable. Rather, the point is that in the light of the Clean Air Act’s federalism-respecting underpinnings, this Court should be slow to assume that Congress could possibly have intended to permit such a wholesale

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<sup>6</sup> 68 Fed. Reg. 61,272 (Oct. 27, 2003), *vacated*, *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

<sup>7</sup> Importantly, under petitioners’ and EPA’s view of the law (as articulated in the lower courts), these changes likely would *not* be exempt from PSD review under 40 C.F.R. §51.166(b)(2)(a)(iii)’s “routine maintenance, repair and replacement” exclusion. And therein lies the practical problem with petitioners’ and EPA’s arguments: They would make PSD applicable “to virtually any capitalized maintenance or repair project that prevented enough downtime to breach the emissions increase thresholds.” *Alabama Power*, 372 F. Supp. 2d at 1297.

transfer of regulatory responsibility from the States to the federal government.

**B. There Is a True Federalism-Respecting Solution Here: If a State Wants Stricter New-Source Controls, It Should Simply Enact Them.**

The amici States backing petitioners and the EPA here invoke the value of federalism to support their positions. *See, e.g.*, NJ Br. 1, 5, 10; NY Br. 1. It is not, with respect, a notion of “federalism” with which we are familiar. It is, as we will show, federalism-in-reverse.

The genius of federalism, properly understood, is perhaps best captured by Justice Brandeis’ famous “laboratory” metaphor: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *accord, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). In other words, federalism leaves States free to make tough social-policy decisions *for themselves*. As we will explain, the Clean Air Act accommodates – indeed, encourages – Brandeisian, laboratory-style federalism. But New York, New Jersey, *et al.*, seem to have a far more ambitious program in mind. Rather than making decisions *for themselves*, they want to upload their own notions of good environmental policy into federal law and thereby export them to *everyone else*. Whatever kind of solution that may be, it is not one that can be squared with – indeed, it is one that subverts – traditional federalism principles.

Petitioners’ state amici’s mistake, moreover, is not just one of terminology. New York’s brief opens with a warning about the “dire ramifications” of emissions from “uncontrolled plants,” which, it says, “kill tens of thousands of Americans annually and sicken hundreds of thousands of others.” NY Br. 3. But that argument, with respect, is a straw man, as is any suggestion that affirmance here would

allow plants to “proceed without any scrutiny by the States.” NY Br. 2. By its own express terms, the Clean Air Act sets only a *baseline* of protection. That is, it imposes *minimum* compliance requirements and explicitly invites States to tighten them as they see fit. As relevant here, §116 of the Clean Air Act unambiguously provides that –

nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. §7416. The message is clear: States may of their own accord adopt emissions limitations (here, PSD requirements) that are more rigorous than those established by federal law (here, the Clean Air Act’s own PSD rules). See *Union Elec.*, 427 U.S. at 256-57 (Clean Air Act “subject[s] the States to strict minimum compliance requirements”).

The point is simply that if any State at any time wants lower emissions caps or tighter permitting requirements, *it need only convince its Legislature to enact them and its Governor to sign them*. A few “courageous” States, see *New State Ice*, 285 U.S. at 311, of course, have had done just that. In 2002, North Carolina enacted its own “Clean Smokestacks Act,” which requires coal-fired power plants to reduce emissions of NO<sub>x</sub> and SO<sub>2</sub> far more aggressively than federal law – by roughly three-quarters over a 10-year period. N.C. Gen. Stat. §143-215.107D(b)-(d). In addition, the Act specifies that the State’s largest utilities “must achieve these emissions through actual reductions at their 14 power plants in the state – not by buying or trading emissions credits from utilities in other states, as allowed under federal regula-

tions.” Sec. William G. Ross, Jr., N.C. Dep’t of Env’t and Nat. Resources, North Carolina’s Clean Smokestacks Act, [www.ncair.org/news/leg/cleanstacks.shtml](http://www.ncair.org/news/leg/cleanstacks.shtml). The North Carolina law is thus tougher than federal law on two counts and, indeed, is touted as going “beyond the requirements of the EPA’s SIP call.” *Id.*

More recently, Maryland, too, enacted a “Healthy Air Act.” Md. Code. Ann. §2-1001 *et seq.* Over the course of the next decade, the Maryland law will reduce NOx emissions by 85%, SO<sub>2</sub> by 80%, and mercury by 90%. *See id.* §2-1002; Maryland Department of the Environment, Maryland Clean Power Rule: Frequently Asked Questions, [www.mde.state.md.us/Air/md\\_cpr.asp](http://www.mde.state.md.us/Air/md_cpr.asp). Like North Carolina’s, Maryland’s law prohibits “power plants from acquiring out-of-state emissions allowances (trading credits) in lieu of adding pollution controls locally.” *Id.* Thus, like North Carolina’s, Maryland’s law is in two respects “stronger than current federal plans.” *Id.* It means, so its proponents claim, “cleaner air in Maryland.” *Id.*

Federalism, therefore, is working just the way the Framers – both of the Constitution and of the Clean Air Act -- intended. If New York, for instance, wants to ensure that its own “efforts to prevent air quality from deteriorating” are not “undermine[d]” (NY Br. 1), it should simply redouble them. There are, to be sure, administrative and political costs to enacting tough environmental controls – they are, for better or worse, part of the calculus. What petitioners’ state amici cannot do, consistent with the notion of federalism embodied in Clean Air Act §116 (or with any other meaningful notion of federalism, for that matter), is to seek to externalize those costs by free-riding a dubious interpretation of a federal regulation to their preferred policy outcome.<sup>8</sup>

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<sup>8</sup> Finally, if New York (or any other State) believes that emissions from sources in *other* States are contributing to a violation of its own air-quality

### **III. EPA's Litigating Position Has No Basis in the Real-World Practicalities of Clean-Air Enforcement.**

EPA's interpretation of the applicable PSD rule is, as we have said, not only illegal but also wildly impractical. We want to focus briefly on practicalities.

Again, according to EPA, the rigorous PSD permitting process is activated by any change to an existing source that recovers lost productivity and thereby (even without a corresponding emissions-rate increase or, indeed, despite an emissions-rate decrease) increases annual emissions. The problem, as we have explained, is that on EPA's view, nearly every change, however minor, qualifies, for the simple reason that nearly every repair of a damaged or deteriorating part will allow for an hours-of-operation increase and thereby - assuming constant, or even marginally reduced, rates of emission - result in an increase in annual emissions. Not only would that interpretation result in a breathtaking transfer of regulatory authority from the States to the federal government, but it would also impose a crippling burden both on industry and on the state regulators who would be tasked with its ground-level implementation.

Industry, of course, can speak for itself here. It is enough for our purposes to point out the obvious. Most plants have many units, and most units have many parts. Parts will go down - and thus require repair or replacement - at different and often unpredictable times. If, as our discussion of the Georgia-Pacific consent decree shows (*see supra* at 18), even relatively minor repair-and-replacement activities trigger the PSD review process, that process will go on ad infinitum. Imagine, for instance, that a section of tubes on hypothetical Boiler No. 1 goes down. PSD review is activated. Just as that section is set to emerge from the PSD process, a section on Boiler No. 2 (or perhaps even a different component part on No. 1) goes down, activating a new round of PSD review.

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standards, Clean Air Act §126 provides a specific statutory remedy. *See* 42 U.S.C. §7426.

Given the sheer number of moving parts in the typical plant (*see, e.g.*, the 994 “modifications” cited in Georgia-Pacific’s case) and the amount of time it takes to conduct a proper PSD review and to issue a permit, *see, e.g., Alaska*, 540 U.S. at 516-17 (Kennedy, J., dissenting) (“[F]or a complex project, the time for approval can take from five to seven years.”), it is easy to see that the reviews would in many instances overlap interminably, leaving plant operators in an inescapable regulatory Charybdis. (The problem would be exacerbated, of course, by the fact that PSD entails a *pre*-construction permit process; so the plant operator wouldn’t even be able to begin fixing broken part No. 1 before it got the final green light from regulators, by which point there would probably be a broken part No. 2.)

Of greater and more immediate concern to us is the overwhelming burden with which EPA’s interpretation would saddle state environmental regulators. Put simply, state agencies like ADEM would inevitably find themselves unable to keep up. The backdrop here, of course, is everything that state regulators already do. First, there is the development of the initial SIP, which must include (among other things) an EPA-approved PSD provision. *See* 42 U.S.C. §7475(a)(1). SIP development, as New Jersey quite correctly points out, is an “arduous” task. NJ Br. 6. After SIP development comes SIP implementation, which includes, among other things, the issuance to individual facilities of operating permits that specify those facilities’ emission limitations and other compliance obligations. Then, there are the individual PSD applications that regulators process under the prevailing understanding of PSD requirements. Even on its less aggressive reading of the PSD rules, for instance, ADEM received, on average, 14 applications per year between 1997 and 2002 – each of which, as we have said, likely took quite some time to process. *See* Presentation: PSD Permit Applications Received by Region 4 (Calendar Year), Annual Joint EPA/State Enforcement Conference (Atlanta 2002).

Add to that the regulatory crush of EPA’s sweeping PSD interpretation and the burden would become unsustainable.

Even after managing to educate themselves on the specifics of the new PSD standards, state environmental regulators would face a barrage of new permit applications concerning, among other things, glue reformulations and ramp additions. *See supra* at 18. They would then scramble, on the front end, to initiate dozens upon dozens of new reviews and then, on the back end, to prosecute each and every instance of noncompliance. Given their very limited resources, it is almost inconceivable that many States would be able to do the job, and, in any event, the explosion of bureaucracy would be mind-boggling.<sup>9</sup>

The point is that this case is *not* about increasing permitting loads at the margins. If Georgia-Pacific, for instance, had been obliged to undergo pre-construction review for each of its 994 alleged “modifications,” the burden would have overwhelmed both the company and state regulators. The Clean Air Act, again, assigns front-line management responsibility to the States, and the PSD program particularly, given its complexity, indicates Congress’ intent to structure an enforcement scheme that is sensitive to the needs and capabilities of state regulators. EPA’s reading of the PSD rules is anything but. On its view, primary state control of Clean Air Act regulation would cease to be a “get to” and would become, instead, a “have to.”

#### **IV. EPA’s Litigating Position Has Fundamental Drawbacks Even as a Matter of Environmental Policy.**

We said at the outset that our disagreement with EPA here principally concerns the legality and practicality of its enforcement program, not the environmental policy underlying it. While that is true for the most part, there is an important caveat.

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<sup>9</sup> EPA itself has recognized that the very aggressive NSR/PSD interpretation that it is pursuing in these enforcement proceedings risks overtaxing the “scarce resources” of “State and local reviewing authorities” and that an hourly-rate-based reading would “reduce[] the reviewing authorities’ compliance and enforcement burden.” 70 Fed. Reg. 61,094 (Oct. 20, 2005).

This case, we should emphasize, does not pit white-knight clean-air advocates against greedy polluters. It's just not that simple. In fact, there are important countervailing consumer-related considerations to weigh against EPA's aggressive reading of the PSD rules, and, indeed, there are very good clean-air reasons to oppose that reading.

1. Initially, and perhaps most obviously, there is the issue of cost. There are two costs worth mentioning here. One, as Justice Kennedy has quite rightly recognized, "is the [permitting] process itself," which, he notes, can require an applicant to "spend up to \$500,000." *Alaska*, 540 U.S. at 515-16 (Kennedy, J., dissenting). Another cost, far more significant in dollar terms, is the technology itself. Under the Clean Air Act's PSD provisions, a newly "constructed" (or "modified," see 42 U.S.C. §7479(2)(C)) source must ultimately be equipped with "best available control technology," or "BACT." 42 U.S.C. §7475(a)(4). BACT is, as its name implies, the latest and greatest. The price tag can run into the hundreds of millions of dollars per plant.

We have good reason to be concerned about cost, and it's not just because industry would have to spend more. Rather, we are concerned that industry will pass on its own increased costs to consumers in the form of higher, and in all probability *significantly* higher, product prices, monthly bills, and service fees.<sup>10</sup> Of course, as a generic matter, States have an interest in ensuring that their citizen-consumers can afford basic goods and services. Thus, we worry that if, for instance, even *non*-utility sources like saw, paper, and textile mills had to be retrofitted with BACT, the prices for the commodities those mills produce could skyrocket.

The States' interest here is even more acute because this case, like so many major PSD enforcement actions, involves

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<sup>10</sup> Alabama's PSC, for example, has authorized Alabama Power "to adjust monthly billings to recover" costs associated with "compliance with environmental laws, regulations, or other such mandates." Alabama Power Co. Petition for Adjustment of Rate CNP, *Order* at 1, Docket Nos. 18117, 18416 (Nov. 1, 2004).

a *utility*. That fact is significant in two related respects. First, utilities have a statutory duty to provide the consuming public with reliable service. *See, e.g.*, Ala. Code §37-1-49 (“Every utility shall maintain its plant, facilities and equipment in good operating condition .... Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve.”). In order to meet that responsibility, utilities *must* from time to time repair and replace deteriorating parts. Second, state Attorneys General have a statutory obligation to protect the interests of utility rate-payers. *See, e.g.*, Ala. Code §37-1-16(a) (Attorney General has authority to “intervene[e] in proceedings” before the PSC “on behalf of the using and consuming public” in matters pertaining to, among others, “rate applications, rate changes and curtailments of service”).<sup>11</sup> The States’ interest, in sum, is in ensuring that their citizens have access to utility services that are both *reliable* and *affordable*.

Accordingly, while clean air is a good, to be sure, it is not a good that can, consistent with competing notions of consumer protection, be pursued at all costs. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (“[N]o legislation pursues its purposes at all costs.”). Particularly given the multitude of *other* federal programs aimed at ensuring cleaner air (NSR/PSD, as the EPA seems to acknowledge here, is hardly the linchpin of the Clean Air Act’s regulatory apparatus<sup>12</sup>), we think it quite likely that the harm brought

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<sup>11</sup> State Attorneys General take this obligation seriously and intervene on behalf of rate-payers routinely. *See, e.g.*, Alabama Power Co. Petition for Revised Rate ECR Factor, *Order* at 1, Docket No. 18148 (Dec. 15, 2005) (Attorney General intervened “to ensure that any rate increases are fair and equitable to the consumer”).

<sup>12</sup> EPA Br. 12 n.3 (listing, among the “new programs that improve air quality,” the Acid Rain Program, the NO<sub>x</sub> SIP Call, and the Clean Air Interstate Rule (“CAIR”). These new pollution-control programs, EPA has said, “are more efficient than major NSR” and will more than offset

on by EPA's enforcement-inspired reading of the PSD rules – particularly for low- and middle-income families, who may find themselves unable to afford next month's power bill – significantly outweighs the benefits.

2. More fundamentally, there are very good clean-air reasons to oppose EPA's position here. The sheer cost – in money, time, and labor – of such an expansive pre-construction permitting process, not to mention the installation of BACT at the culmination of that process, would create an irresistible incentive for industry simply to avoid repairs and replacements whenever and wherever possible, and to continue running plants on old, deteriorating, and *environmentally-unfriendly* components. Almost everyone has been down this road at least once: Your old car emits blue smoke, burns a quart of oil a month, and desperately needs its piston rings replaced. Your mechanic tells you that the job will run you \$1800 and that, in any event, he can't do it for two weeks. What do you do? You just keep on driving, of course (and the blue smoke just keeps on pumping). It's simpler, and cheaper, to keep pouring oil into the car. So, too, here, rather than fixing broken parts – which under EPA's litigating position will trigger crippling expenses and production delays – industry players will just keep their plants running on inefficient, environmentally-unfriendly parts.

EPA itself has acknowledged that running plants on deteriorating parts is an invitation to environmental trouble. Indeed, *the whole point* of EPA's recent NSR-reform rulemaking initiative – part of which, of course, is to adopt prospectively the very position we advance here – has been to avoid encouraging plant owners to forego repairs in favor of continued operation using sub-par equipment. See 70 Fed. Reg. 61,083 (Oct. 20, 2005) (proposed rule adopting actual-to-actual emission test); 68 Fed. Reg. 61,248 (Oct. 27, 2003) (rule

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any marginal increase in emissions that might result from an hourly-rate-based reading of the NSR modification rules. 70 Fed. Reg. 61,088.

amending “routine maintenance” exclusion), *vacated*, *New York*, 443 F.3d 880. The reason, EPA has said, is that worn-out parts often lead to “periods of startup, shutdown, and malfunction,” which themselves “usually” entail “increased emissions.” *Id.* at 61,251. As EPA has explained the problem, because the NSR/PSD permitting process is “time-consuming and expensive” and “will likely result in a requirement to retrofit an existing plant with state-of-the-art pollution controls, which often is very costly and can present significant technical challenges,” there is a very real risk that a plant owner “may forego or curtail replacements that would enhance the safe, reliable, or efficient operation of its plant.” *Id.* at 61,250; 70 Fed. Reg. 61,093 (same verbatim). According to EPA, the solution – the sound environmental solution, that is – is to remove the “perverse” incentive for plant operators to limp by on deteriorating equipment. 68 Fed. Reg. 61,255; *accord* 70 Fed. Reg. 61,094 (object to “remove disincentives” to making changes that could, among other things, enhance “environmental performance”).

The logic is compelling, and it applies precisely here. It is impossible to square with the very different, max-PSD policy that EPA is pursuing in these proceedings.

**V. Section 307(b) Does Not Preclude Enforcement-Proceeding Targets From Defending by Challenging EPA’s Application of Clean Air Act Rules.**

For two reasons, it seems to us clear that Section 307(b)’s jurisdictional provision has no application here.

1. First, there is the plain text of the statute. Section 307(b)(1) requires that “petition[s] for review” challenging (1) “promulgat[ions]” of “nationally applicable regulations” and (2) other “final action[s]” of EPA be filed in the D.C. Circuit. 42 U.S.C. §7607(b)(1); *accord id.* §7607(e) (§307(b) pertains to “regulations,” “orders of the Administrator”). Section 307(b)(2) then states that any action “with respect to which review could have been obtained” in a §307(b)(1) petition for review shall not be subject to “judicial review” in an enforcement proceeding. *Id.* §7607(b)(2). The question,

therefore, is whether Duke's defensive argument that EPA had misapplied the preexisting 1980 PSD rule would have been proper under §307(b)(1).

It would not have been. A civil enforcement proceeding, of course, is not a "petition for review" within the meaning of §307(b)(1). No "promulgat[ion]" of any "regulation" is being questioned here; the pertinent "regulation" here was "promulgated" in 1980. Nor can EPA's current interpretation (qua DOJ litigating position) concerning the 1980 regulation appropriately be considered a "final action." Final agency action, of course, has a stylized meaning in the administrative-law context; to qualify, an agency's pronouncement must, at a minimum, "mark the consummation of [its] decisionmaking process." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Particularly given EPA's flip-flopping interpretations of the 1980 PSD rule, its current litigating position surely does not make the grade.

Petitioners' and their amici's jurisdictional analysis is, with respect, based on a caricature of §307(b) rather than on a careful reading of its language. New Jersey, for instance, asserts at one point that Congress "demand[ed]" in §307(b) that "the federal minimum requirements" be reviewed exclusively via petition for review in the D.C. Circuit. NJ Br. 8. But that is not at all what §307(b) says; it speaks, instead, solely in terms of "promulgat[ions]," "regulation[s]," and "final action[s]." Edging closer to §307(b)'s text, EPA and other amici stake their argument on the assertion that the Fourth Circuit's decision here "effectively invalidates the PSD regulations" themselves and thus triggers §307(b). EPA Br. 29, 31 (emphasis added); *see also, e.g.*, NY Br. 4 ("effectively invalidates"). That argument saddles the adverb with more than it can bear. It depends on the premise that there is only one reading of the PSD regulation that is even plausible – namely, to require PSD review based solely on activity that causes an hours-of-operation increase – and concludes that any disagreement with *that* reading renders the regulation itself a dead letter. As we have shown, however, any

current assertion that the rule *must* be understood to incorporate an hours-of-operation trigger is in the teeth of EPA's own vacillation on the issue. At the end of the day, the fact remains that Duke's argument here comes in defense to an enforcement action that EPA itself initiated in North Carolina. Duke's defense entails only a challenge to EPA's application of the 1980 PSD rule to it, not a frontal assault on the validity of the 1980 rule itself. This is not a §307(b) case.

2. Plain language aside, petitioners' and EPA's reading of §307(b) would beget either grave unfairness, judicial chaos, or both. It simply cannot be the law that where, as here, EPA institutes a civil-enforcement proceeding in a local district court, the targeted defendant is left with the Hobson's choice of either (1) rolling over, not defending itself, and accepting an adverse judgment or (2) instituting an entirely separate and parallel action in the D.C. Circuit. Surely, instead, when EPA itself decides to bring suit against a plant operator in Alabama, for instance, that operator is entitled to defend itself in Alabama, without cluttering the court system with a duplicate action in Washington, D.C. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (§307(b) does not prevent criminal-enforcement target from defending itself, so long as court does not invalidate EPA's "promulgat[ion]" or the "regulation" itself).

The point is that any anti-forum-shopping policy that might underlie §307(b), *see* EPA Br. 18, has absolutely no application to an enforcement-action *target* like Duke. Here, by contrast, the shoe is on the other foot. Recently, in *Alaska*, this Court emphasized that EPA may *not* seek to "achieve an unfair advantage through its choice of litigation forum." 540 U.S. at 493. Petitioners' and EPA's casual reading of §307(b) - which allows EPA to sue but forbids the target to defend - would encourage EPA to do just that.

## CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' judgment.

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Respectfully submitted,

Troy King  
*Attorney General*

Kevin C. Newsom  
*Solicitor General*  
Counsel of Record \*

Robert D. Tambling  
*Chief, Environmental Division*

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September 15, 2006

## APPENDIX A

[The following declaration was filed in *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005).]

**DECLARATION OF RICHARD E. GRUSNICK**

1. My name is Richard E. Grusnick. I am over 21 years old, am competent to testify, and have personal knowledge of the facts set forth in this declaration. In connection with making this declaration, I have reviewed a number of documents from the Alabama Department of Environmental Management (“ADEM”) and the U.S. Environmental Protection Agency (“EPA”) to refresh my recollection. These are documents that were generated in the ordinary course of these agencies’ work and it was the practice and procedure of the agencies to retain these documents. The ones I found most relevant to my testimony are attached. I also have reviewed the complaint and other filings in United States v. Alabama Power, as well as the opinions and filings in other recent EPA litigations involving similar issues.

2. I was employed by the agency responsible for air pollution control in Alabama for 28 years, from June 1970 through September of 1998, when I retired. I served as the Deputy Director of ADEM from 1996 to 1998. In that capacity, I assisted the ADEM Director in managing the state’s efforts for implementing air, water, and waste management programs. From 1982 to 1996, I was the Chief of ADEM’s Air Division. In that capacity, I directed the state’s efforts to manage air quality within Alabama. These efforts included oversight of the processing of permit applications; development and implementation of new regulatory requirements; interpretation of all ADEM air regulations; enforcement actions; and complaint investigations. The Air Division assumed the responsibilities of the Alabama Air Pollution Control Commission (“AAPCC”) in 1982. At that time, I was Director of AAPCC, having been appointed to that position in the same year. From 1974 to 1982, I was Assistant Director of AAPCC, and from 1970 to 1974, I served as an environmental engineer with the AAPCC. (From this

point forward, my references to "ADEM" should be understood to include AAPCC for matters predating ADEM's creation.)

3. My work at ADEM was closely associated with Alabama's program to regulate air pollution from the program's inception until my retirement in 1998. ADEM first adopted regulations to implement a state-wide air pollution control program in Alabama in January of 1972, and I took part in developing those regulations. EPA approved Alabama's initial State Implementation Plan ("SIP") on May 31, 1972. ADEM adopted additional state air regulations that became a part of the SIP after that time, including Alabama regulations implementing the 1977 Clean Air Act's Prevention of Significant Deterioration ("PSD") program and the Non-Attainment New Source Review program (collectively called the "NSR programs"). I participated in and supervised ADEM's efforts to seek and obtain EPA approval for these regulations, including direct participation through personal communications and meetings with EPA staff. Further, I participated in and supervised the issuance of permits pursuant to the NSR programs, and I participated in and supervised ADEM's enforcement of those permits.

4. Alabama followed state rulemaking procedures to adopt state PSD regulations rather than accept delegated authority from EPA to implement and enforce the federal regulations. The principal reason for taking this approach was the desire to retain primacy over efforts to manage air quality within the state. It was my belief and understanding that using state-adopted regulations, which were subsequently approved by EPA for inclusion in the SIP, would provide greater flexibility and deference to the state's interpretation of the requirements than if the state were to operate a delegated program. A memorandum dated June 11, 1984, from EPA Assistant Administrator for Air and Radiation to the EPA Regional Administrator (Attachment 1) confirms my understanding of the deference extended by EPA to the state in the interpretation of the state's own regulations.

5. ADEM adopted state regulations to implement the state's PSD permitting program on January 27, 1981. These regulations became the basis for implementing the PSD program in Alabama. Effective December 10, 1981, EPA approved these regulations.

6. Under Alabama's PSD program, major sources of air admissions in areas with air quality better than standards ("attainment areas") must obtain a PSD permit prior to certain construction activities. This requirement applies to the construction of a new source as well as to construction of a major modification at an existing source.

7. ADEM did not require the owner or operator of a source to seek an "applicability determination."

8. ADEM interpreted the phrase "major modification" in its regulations such that the PSD permitting requirement applied only to a project or activity intended to make the existing unit or facility physically bigger, that is, one that would increase unit capacity. A project or activity intended to fix the components and parts of an existing source was not considered by ADEM to be a major modification. Replacing deteriorated or malfunctioning parts to restore or return an existing unit or facility back to its normal or permitted operations was not considered a major modification.

9. Existing sources were generally permitted at a certain hourly capacity and/or set of operating conditions. Either way, ADEM did not view upkeep or repairs which promoted the expected operations at these sources as major modifications. Rather, ADEM focused on the maximum hourly rate of emissions. Only if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements. This was how ADEM applied the production rate and hours of operations exclusion in the state's regulations. Only activities which caused an increase in the maximum hourly emission rate would have then triggered as evaluation of the routine maintenance, repair and replacement exclusion or the evaluation of the net emissions at the plant as a whole.

10. The definition of “major modification” in Alabama’s PSD regulations has not changed substantively since its original adoption in 1981.

11. ADEM did not interpret the Alabama PSD rules in way that would require PSD preconstruction permitting for projects or activities on the basis of increased availability or utilization of a facility, rather than first determining if there was an increase in the maximum hourly rate of emissions.

12. I do not recall any suggestion from any EPA official that the exclusion for routine maintenance, repair and replacement should be determined with reference to what is routine at a specific unit, plant or facility. I can recall no EPA directive or guidance from my time of service at ADEM indicating a policy of applying such a standard rather than an industry-wide standard. I recall no EPA directive or guidance from my time at ADEM suggesting that “major modification” or the exclusion for routine maintenance, repair, or replacement should be determined with reference to the absolute cost of the project, the accounting treatment of project costs (for example, as capital costs or expenses), or the employment status of personnel carrying out the project (for example, as employees or contractors).

13. ADEM utilized many techniques to insure that the requirements of its regulations were satisfied, including inspections, review of plant records, requiring periodic reports from the regulated community, and direct personal communications between ADEM staff and representatives of the plant. An on-site inspection of each major plant in the state was conducted at least once per year. During these inspections, maintenance, repair, and replacement activities often would be observed.

14. ADEM was aware that Alabama Power and other sources undertook projects similar or comparable to those named in the complaint and even some of those very projects. In my preparation for this declaration, I identified documentation of the following specific examples:

- a. Attachment 2 includes reports of two unannounced inspection for Alabama Power Company's E.C. Gaston Stem Plant which indicate that Unit 5 was out of service for scheduled maintenance during the course of inspections. The report, dated April 15, 1991, concerns an inspection conducted on April 8, 1991, which appears to be during the time of one of the Gaston projects which is the subject of this litigation.
- b. Alabama Power Company approached ADEM in February of 1984 to discuss alternative opacity monitoring procedures to be used while converting Unit 10 to a balanced draft system. Attachment 3 includes a memorandum of the meeting and follow-up correspondence regarding this issue. The Unit 10 conversion appears to be one of the projects which are the subject of this litigation. It is clear that Alabama Power was not attempting to hide this conversion.

15. Based on my experience, industrial facilities in this state, including electric utilities, are continuously performing maintenance, repairing or replacing components that wear out, and otherwise undertaking the steps necessary to maintain their operations. ADEM did not view these actions as triggering a PSD review, not did EPA ever suggest otherwise while I was at ADEM.

16. EPA had oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act. EPA would periodically issue policy memoranda which would provide EPA's guidance on major air program policy issues. These were internal EPA documents which underwent no public notice but were intended to influence how state programs would be implemented. Several of these memoranda dealt with the PSD program. However, EPA did not communicate to ADEM the interpretations of PSD preconstruction permitting requirements that it advances in its NSR cases against other utilities and, apparently, against Alabama Power. To the contrary, contemporaneous EPA guidance documents offered no hint of these interpretations, in spite of numerous opportunities to do so.

Among the documents issued by EPA over the years are the following:

- a. EPA periodically made efforts to influence implementation of the PSD program. One of the more comprehensive efforts was undertaken by Craig Potter, EPA's Assistant Administrator for Air and Radiation. He created a New Source Review task force on June 27, 1986, which prepared a Final Draft Report in December of 1986 (Attachment 4). This report addresses numerous problems in the implementation of the NSR programs, but it does not promote the interpretations suggested by EPA.
- b. Based on the findings of the task force, Mr. Potter issued a memorandum to the EPA Regional Administrators on December 1, 1987, entitled "Improving New Source Review (NSR) Implementation" (Attachment 5). The stated purpose of the memo was to establish "certain program initiatives designed to improve the timeliness, certainty, and effectiveness of these programs." The memorandum dealt with threshold applicability issues as well as implementation of the requirements once it was clear PSD applied. Among other things, the memorandum set up a system for EPA oversight of PSD permits, created a new method for determining best available control technology (top down BACT) for sources subject to the requirement, promised to improve training, and promised to improve guidance development and distribution. The memorandum also encouraged the Regional offices to "review minor permit actions which exempt an otherwise major source or modification from a major review (e.g., 'synthetic' minor sources)." This minor source permit issue was a threshold applicability question. Specifically, sources could avoid a PSD review if they accepted emission limits which were less than the thresholds established by the regulations. EPA apparently had developed concerns that this approach for avoiding a

PSD review had not been properly implemented. Neither the report nor the memorandum made any mention of sources improperly avoiding PSD reviews for modifications.

- c. EPA issued a lengthy New Source Review Workshop Manual in October of 1990. Despite extensive guidance comprising over 300 pages on such issues as BACT, synthetic minor sources, and emission netting, the Manual devotes less than two pages to the implementation of the exclusions from “physical change” (such as routine maintenance, repair, and replacement), and it offers not suggestion of EPA’s current positions on this subject.

17. EPA had numerous, regular opportunities to identify ADEM’s policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation. During my tenure as Chief of the Air Division, EPA would usually conduct an annual on-site audit of ADEM’s Air Program. The audits generally included a mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records. Further, EPA had a mechanism to strongly encourage ADEM agreement with or acquiescence to its established policies. The federal grant process included an annual negotiation of commitments between EPA and the state. EPA would routinely identify the outputs or topics it considered high priority (often based on EPA headquarters’ guidance) and negotiate commitments from ADEM. Over the years, EPA identified several PSD related outputs that it wished included in ADEM’s grant commitments. These included commitments to implement top down BACT and to provide EPA copies of synthetic minor source permits.

18. No audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA’s current interpretation as set forth in EPA’s other NSR enforcement cases or this case, and I do not recall this topic ever being an issue identified during an audit.

19. ADEM's non-NSR air permitting requirements generally were not applied to projects at major sources if they did not trigger an NSR review.

20. I have been retained as a consultant in this case. I am being compensated for my consulting time at my standard rate of \$150 per hour.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

[/s/ Richard E. Grusnick 10/7/04]

Richard E. Grusnick

## **APPENDIX B**

[The following declaration was filed in *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005).]

### **DECLARATION OF RONALD W. GORE**

1. My name is Ronald W. Gore. I am over 21 years of age, I am competent to testify, and I have personal knowledge of the facts set forth in this affidavit. I have reviewed the complaint and other pleadings filed in the case of United States of America v. Alabama Power Company. I have also reviewed a declaration signed by Mr. Richard Grusnick relating to this case and to certain provisions of the Alabama SIP, and I find it consistent with my own views.

2. I am the current Chief of the Air Division of the Alabama Department of Environmental Management ("ADEM"). I have served in that position from 1996 to the present time. From 1976 to 1996, I served as the Chief of the Air Division's Engineering Services Branch. As Air Division Chief, I am responsible for managing and overseeing Alabama's air quality program. This position is the highest-ranking state official dealing exclusively with air quality. I report directly to the ADEM Director, and I am responsible for developing air quality regulations and policies, interpreting ADEM's air regulations, and permitting and enforcement.

3. ADEM's air quality regulations include those that implement the prevention of Significant Deterioration ("PSD") program in Alabama. ADEM's PSD regulations have been in effect since January 27, 1981, and were approved by the United States Environmental Protection Agency ("EPA") on December 10, 1981. Since that time, ADEM has operated the PSD program in Alabama in lieu of the federal PSD program, as provided under the Clean Air Act. The interpretations of ADEM's PSD preconstruction permitting regulations, discussed below, were the interpretations of the agency at the time of the projects identified in the complaint.

4. Under Alabama's PSD program, major sources of air emissions in attainment areas must obtain a PSD permit prior to the construction of a major modification.

5. For purposes of this PSD permitting requirement, ADEM interprets "major modification" to include only those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis. However, not every project that increases the unit's or facility's hourly emissions rate will trigger PSD. For example, the source may still be able to net out of PSD applicability. This interpretation is based on the exclusions contained in the Alabama regulations and on the Clean Air Act. Under ADEM's interpretation, repairing or replacing like-kind parts or components at an existing source is not a major modification, nor is a project that is intended to restore the unit or facility to its normal or expected level of operations.

6. The Alabama PSD regulations contain an exclusion for routine maintenance, repair, and replacement activities. This exclusion was intended to make clear that repair, replacement and maintenance activities that are ordinary practice for facilities in the relevant industrial category, such as the replacement of worn-out equipment with like-kind or comparable components, are not considered modifications.

7. The Alabama PSD regulations contain exclusions for increases in hours of operation and for increases in production rate. These exclusions were intended to make clear that a project or activity that is followed by an increase in the availability or utilization of a facility is not considered a modification on that basis, rather than on the basis of an increase in the maximum hourly rate of emissions.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the forgoing is true and correct.

[/s/ Ronald W. Gore 10/8/04]

Ronald W. Gore

Chief, Air Division

Alabama Department of

Environmental Management

## APPENDIX C

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY  
REGION IV  
345 Courtland Street  
Atlanta, Georgia 30365

[JUL 12, 1982]

[JULY 15, 1982 RECEIVED AIR POLLUTION]

REF: 4AW-AM

TO ALL STATE AND LOCAL AGENCY DIRECTORS:

During the recent mid-year audits of the State air agencies, it was suggested that EPA Region IV prepare a quarterly summary of items of interest to State and local new source review staff, and distribute it to air pollution control agencies in Region IV. Such a summary would include recent policy decisions, interpretations of EPA regulations, BACT determinations of special interest, and any other items which would be of interest to new source review personnel.

This letter is the first such summary. Future summaries will be sent to you approximately each quarter. If you have any questions regarding this letter, please notify Roger Pfaff directly.

I. CMA Agreement:

When EPA promulgated changes to the EPA PSD and nonattainment regulations (8/7/80) in response to the Alabama Power court decision, it was sued by several industrial groups. The suit is referred to as the CMA suit (Chemical Manufacturers Association). On February 22, 1980, EPA and the litigants reached an agreement on all the issues. Under separate cover, each state agency is

being sent a copy of the agreement. EPA agreed to propose two sets of revisions to the EPA new source review regulations. Some of the major proposals will be:

- 1) No fugitive emissions will count in determining applicability to the regulation.
- 2) Limitations do not have to be federally enforceable to count as restrictions.
- 3) The netting baseline for modifications will be either the actual emissions (the present rule) or potential emissions, whichever is more favorable to the source, except that if potential is used, it must be the hourly potential, not the yearly potential. This change would allow a source whose potential is higher than is actual to build new units and increase actual emissions without being subject.
- 4) For nonattainment review, the offset baseline will be either actual or potential emissions, as described above, so long as RFP is met.

## II. Capable of Accommodating Definition

Fuel switches at boilers are exempted from PSD if the source (i.e., plant) is “capable of accommodating” the new fuel. EPA’s policy regarding whether an individual boiler is capable of accommodating a fuel is somewhat well established, but whether an entire plant is capable of accommodating is open to interpretation. For example, if an oil fired boiler can burn coal, but no coal handling equipment is in place, is the entire plant capable of accommodating coal? Region IV has requested an official policy determination on this issue from EPA Headquarters. Based on a previous policy determination, un-

der the 1978 PSD regulations, one could conclude that the increased emissions from a coal-accommodative boiler would not trigger review, but if the increased emissions from the coal handling equipment were significant (25TPY TSP at a major source) the coal handling equipment would be subject to PSD. (See PSD determination 84 in EPA's "Summary of PSD Determinations" from Edward E. Reich).

As soon as we receive an updated answer on this question, we will let you know.

### III. BACT/LAER Clearinghouse

You may be aware that EPA's Office of Air Quality Planning and Standards has been reworking the format of the BACT/LAER Clearinghouse to provide for a computerized output. That project is now complete, and each participating State and Local Agency should have received the first copy of the computerized Clearinghouse report. Success of future issues depends upon your submittal of future determinations, so please make a continued effort to keep the Clearinghouse up-to-date.

### IV. Questions and Answers

Question: Do 52.21(k) and (o) apply to pollutants emitted in less than significant amounts?

Answer: Yes.

Question: Some pollutants were not regulated by PSD before March 1978. In counting contemporaneous increases as decreases, do emissions before that date count?

Answer: Yes. Any pollutant now regulated by the Act is treated equally, even if the pollutant was only recently regulated.

Question: A source to be modified will be subject to PSD due to a significant increase in SO<sub>2</sub> emissions. After the modification there will be no increase in the hourly particulate emissions. The source presently operates at 4,000 hours per year. If the PSD permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions, and cause the source to be subject to PSD for particulate?

Answer: No. Since the modification does not cause any increase in emissions, no increase in annual emissions should be calculated.

Question: A source obtained a PSD permit for a new oil-fired boiler in 1977. The boiler is operating now. The owner wishes to convert the boiler to coal. There will be less than a significant increase in actual emissions of each pollutant. Is the conversion subject to PSD?

Answer: No. The conversion would be treated just like a replacement. The fact that the boiler is subject to PSD permit is presently immaterial. But, the new emission limits must be made federally enforceable and represent a less than significant increase over present actual emissions. Also, do not overlook NO<sub>x</sub>, CO, lead, Hg, Be.

Question: An existing major source replaces a kiln with an identical new kiln. At the same time, a new boiler is added. If the new kiln is proposed to emit the same rates of pollutants as the existing kiln, but the boiler emits significant amounts of those pollutants, is the new kiln subject to BACT?

Answer: Yes. If the actions are taken at the same time, BACT would apply to both units, since a net increase would result at each unit. [52.21(j)(3)]

Sincerely yours,

[/s/ for]

James T. Wilburn, Chief  
Air Management Branch  
Air & Waste Management Division

## APPENDIX D

**ALABAMA**  
**DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

April 8, 1996

Mr. Winston Smith, Director  
Air Pesticides & Toxics  
Management Division  
EPA Region IV  
345 Courtland Street, N.E.  
Atlanta, GA 30365

Dear Mr. Smith:

Please find enclosed a signed copy of the Alabama/EPA Compliance Assurance Agreement. A copy with your signature was sent to us in a letter from you dated March 20, 1996.

I appreciate your staff's cooperation in making this agreement a workable document.

If you have any questions, please give me a call at (334) 271-7861.

Sincerely,

[/s/ Richard E. Grusnick]  
Richard E. Grusnick, Chief  
Air Division

REG:pkb

Enclosure

ALABAMA/EPA COMPLIANCE ASSURANCE  
AGREEMENT

I. INTRODUCTION

The purpose of this agreement is to enhance the effectiveness of the combined state and EPA Air Compliance and Enforcement Program. This agreement presents by reference and/or attachment hereto, the guidance which serves as the basis for implementation of the air enforcement/compliance program in Alabama. The state or local basis may vary for different state and local agencies (S/Ls); however, the EPA basis is consistent throughout the S/Ls. This agreement supports the enforcement efforts of the Alabama Department of Environmental Management (ADEM), while strengthening the enforcement partnership with EPA.

This Agreement will be reviewed annually and updated as necessary.

II. STATE/EPA COMMITMENTS

The state and EPA will implement the Clean Air Act (CAA), and related state or federal regulations in a consistent manner throughout the regulated community.

This agreement serves as the EPA and state guide to ensure that their collective enforcement efforts pursue similar goals and results. We will seek continuous environmental improvement and consistent compliance within the regulated community. To ensure our success, we will coordinate our effort as follows:

- A. Share inspection plans and procedures for preparation of the plans; seek to resolve any conflicts prior to implementation of the plans; coordinate any changes to the plans.
- B. Take joint state/EPA actions, particularly where a state is moving to correct a violation but does not have necessary authorities or resources.
- C. EPA will discuss with the state and consider sharing credit in cases where national issues dictate EPA as

lead agency, or when the state and EPA jointly determine that for exceptional reasons EPA should be the lead agency. This sharing of credit may be accomplished by issuance of joint press releases.

- D. The state and EPA will establish a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instance of non-compliance.
- E. ADEM and EPA will begin again to conduct monthly conference calls as means of ensuring that we maximize effectiveness by sharing information regarding ongoing and planned enforcement activities. The calls shall focus on priority cases. The first call will occur in late February 1996 and will focus on the status of priority cases as of January 31, 1996. EPA will insure that the appropriate level of personnel will participate in the calls, that the information ADEM sent in the monthly package has been reviewed, and that information on the status of cases EPA is involved in or is considering being involved in is up-to-date. By the last day of each month, EPA will mail to ADEM a copy of its case-tracking print-out, updated to the end of the previous month.
- F. The state and EPA will rely on existing guidance and practices for establishing time frames to ensure that there is timely and appropriate enforcement response to violations. Time frames established by existing guidance will be considered as trigger points and not as absolute deadlines. The time frames will be viewed as key milestones to be used to manage the program by providing general targets to strive for in good program performance; trigger review of progress in enforcement cases; and a presumption of where EPA may take direct enforcement action after consultation with the state.
- G. The state will inform EPA of proposed penalty levels though the monthly submittal and the conference call as soon as a proposed amount has been arrived at

within ADEM. Any input into ADEM's planned response to a violation should be provided as soon as possible after EPA becomes aware of the circumstances. EPA will use EPA's BEN model to determine reasonableness of penalties sought through EPA, state or joint EPA/state enforcement actions. When the state and EPA cannot arrive at a mutual penalty, the disputes resolution process established in E., above will be adhered to. If resolution of the penalty amount cannot be reached, EPA retains the right and responsibility to overfile.

- H. EPA will continue to perform inspections in the state, averaging between one to three percent of the major sources in the state on an annual basis. The frequency and number of inspections may be reduced or increased pending the development of criteria and measures for defining good program performance or success. EPA will also continue to perform multimedia inspections. The frequency and number of these inspections will be predicted on an annual basis. The "lead" agency in resolving federally-enforceable violations discovered during these inspections will be discussed with the state, and a determination made as to which agency is better suited to resolve said violations. If a determination cannot be made, EPA and the state mutually agree to apply the dispute resolution process as identified in E., above.

COMPLIANCE ASSURANCE AGREEMENT

Region 4, U.S. Environmental Protection Agency, Air, Pesticides and Toxics Management Division and the Alabama Department of Environmental Management, agree to the following operating criteria for enforcement of federally-delegated air regulations. This agreement applies beginning with the latest signature date below, until October 1, 1996, or until such time as the parties agree to revisions of this agreement. By agreeing to the criteria set forth in this agreement, the signatory parties confirm the significance of enforcement of environmental laws and regulations and the need to cooperate effectively and efficiently in their implementation.

[/s/ Richard E. Grusnick]  
Richard E. Grusnick, Chief  
Air Quality Division  
Alabama Department of Environmental  
Management

[4/8/96]  
Date

[/s/ for]  
Winston A. Smith, Director  
Air, Pesticides and Toxics  
Management Division  
U.S. Environmental Protection  
Agency - Region 4

[March 20, 1996]  
Date