State of West Virginia
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Michael S. Regan
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, 1101A
Washington, D.C. 20004

Submitted Electronically via Regulations.gov

Re: Comments on Proposed Rulemaking Titled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting" by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming (Docket No. [EPA-HQ-OAR-2022-0381])

Dear Administrator Regan:

We appreciate the opportunity to comment on the Environmental Protection Agency's proposed rule introducing changes to the New Source Review (NSR) program permitting regulations under the Clean Air Act (CAA). *See Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting*, 89 Fed. Reg. 36,870 (May 3, 2024). NSR permitting is a key part of environmental regulation. And these regulations are especially important to the States because the CAA establishes a cooperative state-federal system for NSR permitting.

Unfortunately, the Proposed Rule is poorly thought out and potentially unlawful. Its requirements fail to consider important aspects of NSR permitting, sometimes including the statutory backdrop. EPA also fails to accurately weigh the real-world implications of the Proposed Rule, going so far as to exclude any effort at calculating the costs and benefits of the rule. Altogether, it's not clear how these changes would significantly advance the CAA's objectives.

The current system of NSR permitting works as intended—it does not need to be reconfigured just a few short years after the last effort. We hope that EPA will reconsider its position and put aside the Proposed Rule.

BACKGROUND

A. New Source Review.

CAA Section 111(d) creates "a joint state and federal program for regulating the nation's air quality." *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1224 (D.C. Cir. 2007) (cleaned up). Under this program, the federal government—through EPA—is tasked with formulating national ambient air quality standards (NAAQS) that specify the limits on designated air pollutants. 42 U.S.C. § 7409(b). Once these standards are set, the States must develop EPA-approved State Implementation Plans (SIPs) describing how they will meet the NAAQS. *See id.* § 7410. These SIPs are the driving force behind the CAA. And "[s]o long as a SIP satisfies the 'applicable requirements' of the Act … EPA 'shall approve' it within 18 months of its submission." *Ohio v. EPA*, No. 23A349, 2024 WL 3197768 at *3 (U.S. June 27, 2024) (quoting 42 U.S.C. § 7410(k)(3)). When "a SIP falls short" and the State fails to "correct[] the deficiencies in its SIP," only then may EPA "issue a Federal Implementation Plan … for the noncompliant State." *Id.* This scheme ensures that "air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments," not the federal government. 42 U.S.C. § 7401(a)(3).

The Act's NSR provisions apply to "major" stationary sources and facilities that directly emit, or have the potential to emit, at least one hundred tons per year of any listed air pollutant. *See* 42 U.S.C. §§ 7602(j), 7479(1). NSR "require[s] new and *modified* major stationary sources of air pollution to obtain preconstruction permits and to install pollution control technology in order to protect and enhance air quality." *New York v. EPA*, 413 F.3d 3, 21 (D.C. Cir. 2005) (cleaned up) (emphasis added).

An existing source triggers NSR when it makes a major "modification." 42 U.S.C. § 7411(a)(4). A modification is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* But only "major" modifications trigger NSR compliance. Determining whether some change constitutes a major modification involves a two-step analysis. In Step 1, the source must determine whether the modification will result in a "significant emissions increase." *See* 40 C.F.R. § 52.21(a)(2)(iv). If it does produce such an increase, then the source moves to Step 2. There, it calculates whether a "significant net emissions increase" of a regulated pollutant results from *all* projects within a five-year contemporaneous period. *Id.* § 52.21(a)(2)(iv), (b)(3)(ii). NSR procedures kick in only if both increases are present.

If a modification does trigger NSR, then the "specific pollution control requirements depend[] upon the geographic location of the source." *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006). For areas that meet the NAAQS, the Prevention of Significant Deterioration (PSD) provisions apply. *See* 42 U.S.C. §§ 7470-7479. Meanwhile, in areas that do not meet the NAAQS, the more stringent Nonattainment (NNSR) provisions apply. *See id.* §§ 7501-7515.

Routine maintenance, repairs, and replacements do not trigger NSR. *See* 40 C.F.R. § 52.21(b)(2)(iii)(a). Still, States must administer programs to regulate "the modification and construction of any stationary source … as necessary to assure that [NAAQS] are achieved." 42 U.S.C. § 7410(a)(2)(C). Thus, "[m]odifications not subject to PSD or NNSR requirements may nonetheless be subject to these 'minor NSR' requirements." *New Jersey v. EPA*, 989 F.3d 1038, 1043 (D.C. Cir. 2021).

B. Project Emissions Accounting.

In 2018, EPA issued a guidance memorandum about the NSR calculations for modified sources. *See* EPA, PROJECT EMISSIONS ACCOUNTING UNDER THE NEW SOURCE REVIEW PRECONSTRUCTION PERMITTING PROGRAM (Mar. 13, 2018). Specifically, the memorandum confirmed that post-2002 NSR regulations allow sources to factor in "emissions *decreases* as well as increases" during the Step 1 analysis. *Id.* at 1 (emphasis added). This holistic method of calculation is referred to as Project Emissions Accounting (PEA). *Id.* at 2. In line with the CAA's goals, PEA enables sources to "tak[e] account of the true emissions impacts of the project itself." *Id.*

Two years later, in 2020, EPA followed up the PEA memorandum with a PEA Rule that formally revised NSR regulations. *See Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting*, 85 Fed. Reg. 74,890 (Nov. 24, 2020). As with the memorandum, the PEA Rule promoted positive environmental outcomes while being mindful of the regulatory burden NSR imposes. Namely, the PEA Rule explicitly enabled sources to consider "both emissions increases and decreases … in Step 1 of the NSR major modification applicability test." *Id.* at 74,895. Thus, the PEA Rule echoed the previous memorandum.

The PEA Rule also applied the "project aggregation" policy to the Step 1 analysis. 85 Fed. Reg. at 74,895. That policy assists sources in determining the scope of a project and seeks to "avoid the over aggregation or under aggregation of activities" in "an effort to circumvent the NSR program." *Id.* To strike this balance, "project aggregation" "calls for sources to aggregate emissions from nominally separate activities when there is an apparent technical or economical interconnection between those activities." *Id.* Additionally, there is a "rebuttable presumption that activities that occur outside a 3-year period are not related." *Id.*

Finally, the PEA Rule determined that existing regulations "are adequate to ensure sufficient monitoring, recordkeeping and reporting of emissions for projects determined not to trigger major NSR." 85 Fed. Reg. at 74,895. For instance, EPA found it unnecessary to adopt new requirements for projects that had considered emissions increases and decreases at Step 1. Instead, it stuck with the agency's established standards enhanced recordkeeping only when a "reasonable possibility" exists that a project "could still result in a significant emissions increase." *Id.*

In 2021, various petitioners sought reconsideration of the PEA Rule and the withdrawal of the preceding memorandum, arguing that the policies they advanced were insufficient to ensure

compliance with NSR and guarantee emissions reductions. *See* Environmental Defense Fund, *et al.*, Petition for Reconsideration of "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 85 Fed. Reg. 74,890 (Nov. 24, 2020), Docket ID No. EPA–HQ–OAR–2018–0048 and for Withdrawal of Guidance Memorandum titled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program" (Mar. 13, 2018) (Jan. 22, 2021), https://tinyurl.com/2njmpc56. EPA denied that petition for failing to meet statutory review requirements. EPA, *Letter Denying the Petition* 10 (Oct. 12, 2021), https://tinyurl.com/4th32x4y. But in doing so, EPA also noted that it "plan[ned] to initiate … a rulemaking process to consider revisions to the NSR regulations to address the concerns raised by the petition." *Id.* at 10-11. That rulemaking process culminated in the Proposed Rule.

DISCUSSION

The Proposed Rule primarily does three things. First, it redefines what qualifies as a "project" for NSR purposes by allowing only aggregation of changes that are "substantially related to each other." 89 Fed. Reg. at 36,877. Second, it mandates that any Step 1 emissions decreases used to determine NSR applicability must be "legally and practicably enforceable." *Id.* at 36,880. Third, it requires all sources "crediting a decrease at Step 1" to maintain enhanced records and reporting. *Id.* at 36,881. These changes are ill-advised, and they may be vulnerable to legal challenge under the Administrative Procedure Act (APA).

Although each of these new requirements are problematic on their own, the Proposed Rule has another problem: its cost-benefit analysis is lacking. EPA fails to account for major costs and is vague in describing the Proposed Rule's benefits. This cost-benefit failure is yet another reason to reverse course and get back on track with prior rulemaking.

I. The Proposed Rule's New Requirements Are Arbitrary, Capricious, and Impractical, and They Should Be Abandoned.

The APA "requires agencies to engage in reasoned decisionmaking and directs that agency actions be set aside if they are arbitrary or capricious." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2019) (cleaned up). For the Proposed Rule to survive such review, EPA would need to show that it "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *Dep't of Com. v. New York*, 588 U.S. 752, 773 (2019) (cleaned up). It is unlikely the agency could make that showing as to the Proposed Rule. And even if these requirements could weather arbitrary-and-capriciousness review, they should still be reconsidered because of their impractical effects.

A. The Proposed Rule Should Not Formally Redefine "Project" For NSR Purposes.

Under existing regulations, a "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R. § 52.21(b)(52). This definition mirrors CAA Section 111, which defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air

pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Moving away from the statutory text, EPA plans to change this understanding by formally redefining "project" to mean:

> a discrete physical change in, or a change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are *substantially related to each other*. Such changes are substantially related if they are dependent on each other to be economically or technically viable.

89 Fed. Reg. at 36,877 (emphasis added). The Proposed Rule's attempt to "revise the existing definition of 'project' in the major NSR regulations" is problematic for several reasons. *Id.*

To begin, EPA's new formal definition arbitrarily and capriciously narrows the definition of "project" by implying that changes must be linked in a tighter way than the statute demands. Although prior guidance embraced the notion of a "substantially related" test, reviewing authorities like States might've still applied a different and more appropriate standard under the prior regime (lacking binding guidance). Thus, EPA did not require a one-size-fits-all approach. Rather, the agency's previous rules left critical flexibility in the NSR process by "acknowledging the case-specific nature of a project aggregation determination." *Prevention of Signification Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, 83 Fed. Reg. 57,324, 57,326 (Nov. 15, 2018).

EPA's past guidance on when changes were substantially related "was intended to encompass principles for aggregating projects." 83 Fed. Reg. at 57,326. Back then, the agency was clear that a "prescriptive[]" approach—like EPA now proposes—was unwarranted "because of the difficulty of developing a bright line for determining when activities should be aggregated." *Id.* Yet now—without any new evidence of necessity—EPA says that "some line must be drawn" 89 Fed. Reg. at 36,877. But judging by the Proposed Rule, EPA no longer believes that line needs to be a bright one.

The Proposed Rule's definition of "project" tells sources and permitting authorities that changes can only be aggregated if they are "dependent on each other to be economically or technically viable," but EPA leaves regulated parties in the dark as to what that means. 89 Fed. Reg. at 36,877. For instance, does economic viability mean a source can aggregate when one change makes another significantly cheaper? Or does the cost effect need to be a binary one in which changes are only "dependent" on each other if it would be financially *impossible* to afford them absent one another? Similar questions arise for "technical viability." Are changes that operate in tandem with another for efficiency "dependent" on each if there are other, less efficient ways to operate them independently? Such questions abound under the new definition. If EPA's goal really is to "provide greater clarity regarding the activities included within the scope of a project," *id.*, then the agency should decline to inject *more* ambiguous definitions—and their accompanying confusion—into the NSR permitting process.

The better approach would be to leave the "substantially related" standard as guidance for interpreting what really matters: the statutory definition of "modification." In truth, we fail to see how the statutory text leaves room for EPA's new *mandatory* definitional revision; the text says what it says. Though direction on what a "modification" is under the CAA can certainly be useful, EPA cannot change that definition entirely or mandate a new one. In that way, the CAA's definition is "the source and ceiling of EPA's authority," not a "difficulty to be overcome." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 526 (2014) (Scalia, J., dissenting). Only two things are required to meet the definition: (1) "a physical or operational change" that (2) "causes the facility to emit more of any air pollutant." *Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 309 (2014). As it has previously done, EPA is free to "offer[] examples of what it means to be substantially related," 83 Fed. Reg. at 57,326, as guidance for when something meets the statutory definition of "modification." But it cannot "develop new guidelines … in a manner inconsistent with the statute" by declaring the CAA's definition obsolete in favor of its own. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002).

Our belief that *guidance* should be preferred over *mandates* is confirmed by the "defining feature" of the CAA: its "cooperative federalism structure." *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 516 (3d Cir. 2013) (cleaned up). Remember that "air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added). Thus, the CAA gives "states the initiative and a broad responsibility regarding the means to achieve" the NAAQS. *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). So by giving the States the lead, Congress made it the statutory default to *not* federalize most aspects of SIPs, including their NSR provisions. *See Bond v. United States*, 572 U.S. 844, 858 (2014) (explaining that in areas of "state responsibility" ambiguity should be resolved in favor of the States). Simply put, if a State's approach "meets the *statutory* criteria of the CAA, then the EPA must approve it." *Texas v. EPA*, 690 F.3d 670, 676 (5th Cir. 2012) (emphasis added).

Further, EPA is wrong to lament that "nothing in" its previous rules "required states to use the 'substantially related' test." 89 Fed. Reg. at 36,877. The rules never needed to do that. After all, "[s]o long as the [NAAQS] are met, the State[s] may select whatever mix of control devices [they] desire[]," including in the operation of their "[NSR] scheme[s]." *Union Elec. Co. v. EPA*, 427 U.S. 246, 265 n.14 & 266 (1976). Thus, if States are complying with the NAAQS in the operation of their NSR programs, EPA should not be concerned that the substantially related test "is, in some instances, not being applied by reviewing authorities." 89 Fed. Reg. at 36,879. And indeed, EPA does not demonstrate that the use of State-managed standards is causing increased emissions *anywhere* in the country. Without such evidence, EPA should allow States to do their job and reconsider its insulting skepticism that the States are somehow complicit in sources evading NSR.

We also worry that a purportedly comprehensive extra-statutory definition of "project" will only lead to more confusion and difficulty given the many disparate sources that are subject to potential NSR requirements. And this across-the-board definition is not even consistent with the CAA's purpose, which seeks only to "prevent significant deterioration of air quality" and avoid "increased air pollution." 42 U.S.C. § 7470(4)-(5). In 2020, EPA made the right choice by allowing parties to employ project accounting and consider emissions decreases at Step 1, but

unduly narrowing the definition of "project" in all contexts threatens to undo the benefits of that change.

In support of its present change, EPA refers vaguely to "concerns raised" by various environmental groups against the previous definition. 89 Fed. Reg. at 36,877. In short, the groups seem concerned with over-aggregation that in turn allows inappropriate project accounting at Step 1. EPA "agrees" with those groups and thinks this new "definition of project would provide greater clarity regarding the activities included within the scope of a project" when determining NSR applicability. *Id.* But this definition is not a clarification; it is a codification designed to "guard against circumvention of the NSR applicability process." *Id.*

As best we can tell, fears about sources over-aggregating activities to benefit from Step 1 netting are unsubstantiated. "Reasoned decision making … necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent." *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). Thus, EPA needs to show why this overhaul was necessary. EPA has not identified any real problems around over-aggregation. To be sure, it raises some concerns about *under*-aggregation. 89 Fed. Reg. at 36,878. But EPA does not make the inverse claim of finding evidence of over-aggregation, instead relying generally on "the potential for NSR circumvention." *Id.* at 36,879. With the evidence cited against its new, limiting definition, EPA has failed to articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up).

In any case, the lack of an adequate explanation is unsurprising given that EPA's previous practice worked as intended under the CAA. By design, the Act allows for consideration of less directly related contemporaneous emissions decreases and increases when applying project emissions accounting. The statute's references to "increases" are better understood to allow regulators to "look at any change proposed for a plant, and decide whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant." *Ala. Power Co. v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979). This approach "encourage[es] source owners to seek out ways of decreasing emissions so that valuable projects may proceed without the cost and delays of permitting." Carroll McGuffey, *Reforming New Source Review What Project Emissions Accounting Really Means, and Why It Should Survive*, 35 NAT. RESOURCES & ENV'T 37, 44 (2020). The alternative reading of "increase"—involving "inspect[ing] the individual units of a plant" to "determine whether any of [them] will consequently emit more of a pollutant"—is "unreasonable and contrary to the expressed purposes" of the Act. *Ala. Power Co.*, 636 F.2d at 401.

Allowing sources to consider projects in the context of their whole emissions profile "is precisely suited to preserv[ing] air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Ala. Power Co.*, 636 F.2d at 402 After all, NSR permitting is intended to apply "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.* at 401. The Proposed Rule's new rigid new definition (as opposed to the flexibility of the 2018 Guidance) is contrary to that intention and thus would arbitrarily and capriciously stymie the innovation that is supposed to be encouraged under NSR permitting. *See Vill. of*

Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 660 (D.C. Cir. 2011) (noting that an agency must show that "its interpretation is rationally related to the goals of the statute" (cleaned up)). In fact, because "requiring a net increase is thus consistent with the purposes of the" CAA, while looking at individual unit increases "is not," the Proposed Rule's definition may well be outside EPA's statutory authority. *Ala. Power Co.*, 636 F.2d at 401.

Finally, the new definition presents practical difficulties as well. Figuring out whether all the activities in a project are "substantially related to each other" will be a daunting task. 89 Fed. Reg. at 36,877. "Projects depend upon a myriad of technical and economic details." *EPA Proposes Sweeping NSR Changes*, NSR LAW BLOG, https://tinyurl.com/4dzxh32y (last visited June 24, 2024). These details are contingent and "can easily be upset by external forces." *Id.* "Determining whether projects are substantially related is challenging" even "for counsel with years of experience." *Id.* And it would be an "unreasonable burden to thrust upon" state regulators. *Id.* Prior practice left room to seriously consider the reasonable judgments of the regulated sources and other experts in the field. The Proposed Rule does not. Thus, the Proposed Rule's definition is unworkable.

For these reasons, the definition should not be included in the Proposed Rule. By purportedly codifying a clearer definition that instead introduces only more confusion and ambiguity, EPA deprives States of necessary flexibility and sources of the clarity they need to avoid endless litigation and wrangling over under- and over-inclusiveness.

B. Step 1 Reductions Need Not Be Legally And Practically Enforceable.

EPA next proposes a requirement "that decreases associated with a project under the Step 1 significant emissions increase determination be legally and practicably enforceable." 89 Fed. Reg. at 36,880. In other words, EPA says, those decreases must be "enforceable as a practical matter." *Id.* This change is supposedly a "safeguard to ensure that emissions decreases that are accounted for in the NSR applicability process will occur and be maintained." *Id.* Unfortunately, EPA has failed to fully consider this proposal.

The most obvious failure of this proposed enforceability provision is that EPA bases it on an incorrect understanding of the CAA. According to EPA, making counterbalancing emissions decreases enforceable is "consistent with the requirement under CAA section 110 that 'each implementation plan submitted by a State include enforceable emission limitations.'" 89 Fed. Reg. at 36,880. But the CAA requires "enforceable emission limitations" only "*as may be necessary or appropriate* to meet the applicable requirements of this chapter." 42 U.S.C. § 7410(a)(2)(A) (emphasis added). "Indeed, the plain terms of section 7410(a)(2)(A) specifically allow for inclusion in a SIP of measures other than enforceable emission limitations," such as "other control measures, means or techniques." *Env't Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. EPA*, 94 F.4th 77, 100 (D.C. Cir. 2024) (quoting 42 U.S.C. § 7410(a)(2)(A)) (cleaned up). As a result, EPA "lack[s] authority" to reject a SIP's "measure solely on the ground that it fails to meet the statutory definition of an '[enforceable] emission limitation'" because the plan "did not need to satisfy" that definition in all respects in the first place. *Id.*

To make enforceable reductions mandatory, EPA would have to make a "'necessary or appropriate' determination" that enforceable emissions are required to ensure States "*meet the NAAQS*"—not to ensure State NSR schemes are all structured the exact same way. *Env't Comm. of Fla. Elec.*, 94 F.4th at 101 (emphasis in original). Nowhere does EPA make or even attempt this showing. The agency's plan to enforce emissions decreases thus rests on a flawed understanding of the CAA and must be dropped.

Further, the enforceability provision is not practically viable. In the real world of source modification, projects do not always get completed exactly as planned. For many projects, "permitting often precedes formal commitment of capital expenditure to support the project." *EPA Proposes Sweeping NSR Changes*, *supra*. So a source might end up making emissions decreases commitments "on existing equipment when it is uncertain that the project will ever occur." *Id.* And "[i]f the project fails, the source is saddled with those restrictions and no benefit." *Id.*

The fluidity of actual projects highlights another problem with the Proposed Rule: it does not account for the fact that emissions estimates are just as likely to be inaccurately *low* as well. Just as projects might result in greater emissions than they anticipated, so too might they result in lower emissions. The Proposed Rule does not account for this possibility at all, despite EPA recognizing that "inaccuracies in projections, in either case, may result in improper applicability conclusions." 89 Fed. Reg. at 36,881. Despite recognizing the problem, EPA does not address it and instead hopes that commenters will bail them out by telling the agency how it can "justify [this] distinction with respect to enforceability requirements." *Id.* The answer is simple: it can't. By rigidly mandating enforcement of projected emissions decreases without any corollary consideration for increases, EPA once again undermines the CAA's "framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Ala. Power*, 636 F.2d at 402.

Regardless of the new mechanism's deficiencies, EPA does not even need emissions decreases to be enforceable, as existing provisions already ensure that emissions decreases are not based on dubious data. Under those provisions, if a SIP relies on non-reliable or inconsistent data—including overcounted emissions decreases—then the agency already has the power to "disapprove[]" that SIP. *See* 42 U.S.C. § 7410(c). EPA is therefore wrong to assert that there is "no recourse" for overestimated emissions increases. 89 Fed. Reg. at 36,881. And the agency's "failure to analyze the efficiency of the existing" regulatory regime "renders arbitrary and capricious [its] judgment" that the Proposed Rule's overlapping requirements are necessary. *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010).

If the Proposed Rule's requirement stands, before sources consider upgrading equipment, "careful thought" will be required to "determin[e] how to structure NSR applicability calculations for complex projects." Amy Marshall, *Proposed Changes to Project Emissions Accounting (PEA) Regulations*, ALL4 (Mar. 4, 2024), https://tinyurl.com/3cc77msw. The heightened risk of error under this regime would deter innovation and replacement of obsolete machinery, "likely resulting in higher pollution per unit of production over time." *EPA Proposes Sweeping NSR Changes, supra*. Once again, the Proposed Rule arbitrarily and capriciously makes an ill-considered choice that flies in the face of the NSR's innovation-advancing structure.

C. "Reasonable Possibility" Reporting Should Not Be Expanded.

The last concerning change in the Proposed Rule is the "strengthening" of "Reasonable Possibility" recordkeeping and reporting requirements. 89 Fed. Reg. at 36,881. Currently, EPA's regulations mandate compliance with certain recordkeeping and reporting requirements if a "reasonable possibility" arises that the modification would result in a "significant emissions increase." 40 C.F.R. § 52.21(r)(6). A "reasonable possibility" exists if a source "calculates [a] project to result in either" (1) an "actual emissions increase of at least 50 percent of the amount that is a 'significant emissions increase,'" or (2) an "actual emissions increase that, added to the amount of emissions excluded under [other regulations] … sums to at least 50 percent of the amount that is a 'significant emissions increase.'" *Id.* § 52.21(r)(6)(vi)(a)-(b).

The Proposed Rule would expand these recordkeeping requirements beyond these two scenarios to include "all sources crediting a decrease at Step 1," regardless of whether a reasonable possibility exists for the project. 89 Fed. Reg. at 36,881. EPA says this is necessary "to balance compliance assurance with recordkeeping and reporting burdens." *Id.* at 36,883. Specifically, the agency reasons that new burdens are justified because they "ensure that decreases that a source accounts for are appropriately considered as part of the project being evaluated" and "provide a means to determine whether such decrease(s) actually occur." *Id.*

This expansion has a threshold problem: it has no threshold for its requirements. All projects crediting a Step 1 decrease would be required to follow the strict recordkeeping and reporting requirements no matter what. As a result, the Proposed Rule would sweep in replacement projects and other simple projects that have no chance of increasing emission because they credited an obvious decrease at Step 1. EPA "entirely fail[s] to consider" this key implication of its new requirements, thereby rendering them arbitrary and capricious. *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606 (D.C. Cir. 2016). Indeed, an outside observer might conclude that EPA imposed this requirement as a punitive measure designed to dissuade projects from taking advantage of counterbalancing emissions at Step 1.

Even without this problem, broadening reasonable possibility reporting is redundant at best. Current provisions already require sources to report when anticipated emissions exceed the "baseline actual emissions … by a significant amount" and the "emissions differ from the preconstruction projection." 40 C.F.R. § 52.21(r)(6)(v). These existing provisions guarantee that emissions remain below the significance rate following a project's completion. Indeed, if an emissions decrease turns out to be less than anticipated, then the provision would require reporting unless the emissions increase is proportionally less as well, thereby resulting in no significant emissions increase.

In this way, the current process ensures that no significant emission increases occur. It is unnecessary and duplicative to pile on more reporting requirements that will do the same. And EPA recognizes this duplication too, saying that the proposal would yield records that sources "are already required to produce and, in some cases, maintain on-site." 89 Fed. Reg. at 36,887. Despite this admission, the agency fails to "adequately address the probability the [reporting expansion] will be of no net benefit as applied to" sources that are already under extensive, largely overlapping

recordkeeping requirements. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 1990). This failure reveals the expanded recordkeeping and reporting requirements as arbitrary and capricious.

II. The Proposed Rule's Cost-Benefit Analysis Is Insufficient.

"[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Hom Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). As it stands, the Proposed Rule is riddled with such flaws. In fact, by EPA's own admission, the agency makes no effort to calculate either the Proposed Rule's costs or benefits at all. Instead, in the "absence of a quantitative analysis," the agency provides only a "qualitative assessment of the *potential* benefits and costs" of the rule. 89 Fed. Reg. at 36,886 (emphasis added). Yet "arbitrary and capricious reasoning can crash an agency's cost/benefit analysis." *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 254 (D.C. Cir. 2013). And courts will not "tolerate rules based on arbitrary and capricious cost-benefit analyses." *City of Portland, Or. v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007). Thus, should EPA ignore the Proposed Rule's shortcomings and forge ahead anyway, the agency must do so only if it remedies the problems plaguing its cost-benefit analysis.

As mentioned, the most obvious concern with the Proposed Rule's cost-benefit analysis is the total lack of both costs and benefits. EPA cannot excuse this failure by simply noting that it "lacks data" necessary for a quantitative analysis. 89 Fed. Reg. at 36,886. EPA does not claim that it could not get the data, instead claiming only that it would be difficult because of "numerous challenges to quantifying potential cost and emissions impacts of the proposal." *Id.* Unfortunately for EPA, arbitrary-and-capricious review does not provide for an exception from performing an adequate cost-benefit analysis because the agency didn't feel like gathering data. In it cost-benefit analysis, EPA "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Until it does so, the Proposed Rule is arbitrary and capricious.

But even taking EPA's deficient cost-benefit analysis on face value, it is apparent EPA overvalues the Proposed Rule's benefits and underestimates its burdens.

For instance, "EPA expects the proposed revisions to the regulatory definition of 'project' will not impose additional direct regulatory costs." 89 Fed. Reg. at 36,886. But regulated entities will have to spend more time and manpower carefully considering what should be treated as a single project. They are also likely to make costly and economically inefficient choices for fear of EPA's retribution should it aggregate in a way the agency disapproves. And on the permitting side, permitting authorities will have to invest substantial time into becoming "experts in the [permit-seeking source's] technology and economics" to understand whether project activities are indeed substantially related as the Proposed Rule would require. *EPA Proposes Sweeping NSR Changes, supra*. By ignoring cost entirely, EPA's cost-benefit analysis impermissibly fails to "consider[] … the relevant factors" for redefining project. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Likewise, EPA anticipates that its expansion of reasonable possibility reporting and recordkeeping will "not result in a substantial increase in costs." 89 Fed. Reg. at 36,887. It reasons that the Proposed Rule "would only require that sources submit records they are already required to produce and, in some cases, maintain on-site." *Id.* This explanation has two major flaws. First, as previously discussed, it buries the lede in that EPA is conceding the expanded recordkeeping has no benefit; it would do nothing that is not already covered by existing regulations. And second, it ignores relevant external costs; for instance, reporting like this would "make it easier for third party groups to sue state and local permitting authorities." *EPA's Revisions to Project Emissions Accounting Published*, NSR LAW BLOG, https://tinyurl.com/24kxbr2m (last visited June 24, 2024).

To the agency's credit, EPA seems to recognize its analysis is insufficient when it comes to the costs of making Step 1 decreases enforceable. On that question, "EPA is requesting information on the costs to reviewing authorities and to sources." 89 Fed. Reg. at 36,886. Although we applaud EPA for not just guessing at benefits or pretending no costs result in that narrow instance, we also hope that EPA appropriately considers the data it receives and proceeds accordingly.

With little to no benefits shown and costs unaccounted for, EPA should set aside the Proposed Rule until it is able to estimate what its effects will be.

* * *

The Proposed Rule is an answer in search of a problem. It imposes unnecessary and illogical burdens on a process that has shown no deficiencies. Worse still, EPA launches this campaign without even an attempted showing of concrete benefits. Couple all that with the agency's decision to underestimate or outright ignore numerous relevant costs, and the Proposed Rule is a mistake.

We urge EPA to drop the Proposed Rule and keep NSR permitting in its current, appropriate state.

Sincerely,



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