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Nos. 09-1405 & 10-2123

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB,

Petitioners,

v.

LISA JACKSON, in her official capacity as Administrator of the United States Environmental Protection Agency,

Respondent.

Petition for Review of EPA Action

FINAL BRIEF OF RESPONDENT LISA JACKSON, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF FACTS 2

I. Statutory and Regulatory Background 2

A. The Clean Air Act and the NSR Program 2

B. The 2002 Rule 4

II. *New York v. EPA*.....6

III. Wisconsin's Proposed Revisions to its SIP 8

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. Standard of Review.....12

II. The Revisions to the Wisconsin SIP Are Not Unlawful Backslides.....14

A. Petitioners' Attempt to Re-Litigate *New York v. EPA* by Challenging the Wisconsin SIP Revisions as "Backslides" Is Inconsistent With That Decision 17

1. The provisions challenged as unlawful "backslides" here were previously challenged on similar grounds and upheld.....18

2. In declining to reach a backsliding claim, the D.C. Circuit did not leave the door open for the type of facial challenge to the 2002 Rule provisions made by Petitioners here, unsupported by record evidence of actual backsliding.....24

3. It was not arbitrary or capricious for EPA to approve the SIP revisions without developing a fuller record including more specific comparative emissions data 26

B. The Record Does Not Support Petitioners' Backsliding Claims 29

1. The Record Supports EPA's Conclusion that the Wisconsin SIP Revisions Will Have a Neutral-to-Positive Impact 29

i. EPA's national-level analysis and data support its conclusion 30

ii. EPA's Wisconsin-specific data and analysis support its conclusion 37

2. NRDC and Sierra Club Have Not Shown That EPA's Conclusion Is Wrong or Unreasonable 43

3. Because the Record Supports EPA's Conclusion Regarding the Impact of the NSR Reform Provisions, Petitioners' CAA section 193 and section 110(l) Claims Both Fail 48

i. Petitioners' CAA section 193 claim fails because EPA has reasonably concluded that the revisions to the Wisconsin SIP insure equivalent or greater emissions reductions 48

ii. Petitioners' CAA section 110(l) claim fails because Petitioners have not shown that the SIP revisions will worsen air quality 50

III. No Additional Rounds of Notice & Comment Were Required Before EPA Approved the Wisconsin SIP Revisions 54

IV. Wisconsin's Definition of "Major Modification" Was Not Before EPA in this Rulemaking and So Cannot Be Challenged Here 62

CONCLUSION 63

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

TABLE OF AUTHORITIES

FEDERAL CASES

Aaron v. Mahl,
550 F.3d 659 (7th Cir. 2008) 24

American Medical Ass'n v. United States,
887 F.2d 760 (7th Cir. 1989) 58, 59, 60, 61

Association of Battery Recyclers, Inc. v. EPA,
208 F.3d 1047 (D.C. Cir. 2000) 59

Auer v. Robbins,
519 U.S. 452 (1997) 14

Baltimore Gas & Electric Co. v. NRDC,
462 U.S. 87 (1983) 12

Chevron U.S.A. Inc. v. NRDC,
467 U.S. 837 (1984) 13, 19

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 12

Community Nutrition Inst. v. Block,
749 F.2d 50 (D.C. Cir. 1984) 61

Entergy Corp. v. Riverkeeper, Inc.,
129 S. Ct. 1498 (2009) 13

Fertilizer Institute v. EPA,
935 F.2d 1303 (D.C. Cir. 1991) 59, 60

Galveston-Houston Ass'n for Smog Prevention (GHASP) v. EPA,
No. 06-61030, 2008 WL 3471872 (5th Cir. Aug. 13, 2008) 51, 53

Hall v. EPA,
273 F.3d 1146 (9th Cir. 2001) 52

International Harvester Co. v. Ruckelshaus,
478 F.2d 615 (D.C. Cir. 1973) 60

Kentucky Resource Council, Inc. v. EPA,
467 F.3d 986 (6th Cir. 2006).....51, 53, 54

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,
463 U.S. 29 (1983) 36

New York v. EPA,
413 F.3d 3 (D.C. Cir. 2005) 2, 6, 7, 9, 10, 15- 23, 25- 28, 34- 37, 40, 43

Northwest Tissue Center v. Shalala,
1 F.3d 522 (7th Cir. 1993).....59

Personal Watercraft Industrial Ass'n v. Department of Commerce,
48 F.3d 540 (D.C. Cir. 1995) 61

Sierra Club v. Marita,
46 F.3d 606 (7th Cir. 1995).....25

Simon v. Allstate Employee Group Medical Plan,
263 F.3d 656 (7th Cir. 2001).....24

Southwest Pa. Growth Alliance v. Browner,
121 F.3d 106 (3d Cir. 1997).....12

United States v. Mead Corp.,
533 U.S. 218 (2001) 13

FEDERAL STATUTES

Administrative Procedure Act,

5 U.S.C. § 553(b) 56

5 U.S.C. § 553(b)(3).....59

5 U.S.C. § 553(c) 57

US EPA ARCHIVE DOCUMENT

5 U.S.C. § 706(2)(A) 12, 43

Clean Air Act, 42 U.S.C. §§ 7401 – 7671q:

Sections 109-110, 42 U.S.C. §§ 7409-7410 2

Section 110(a), 42 U.S.C. § 7410(a) 43

Section 110(c), 42 U.S.C. § 7410(c) 43

Section 110(k)(3), 42 U.S.C. § 7410(k)(3) 2

Section 110(l), 42 U.S.C. § 7410(l) 12, 14, 16, 51, 53, 54

Title I, Part C, 42 U.S.C. §§ 7470-7492 2

Section 165, 42 U.S.C. § 7475 4

Section 165(a)(4), 2 U.S.C. § 7475(a)(4) 3

Sections 165, 169, 42 U.S.C. §§ 7475, 7479 3

Section 169(2)(C), 42 U.S.C. § 7479(2)(C) 4

Title 1, Part D, 42 U.S.C. §§ 7501-7515 3

Sections 171, 173, 42 U.S.C. §§ 7501, 7503 4

Sections 171(3), 173(c), 42 U.S.C. §§ 7501(3), 7503(c) 4

Section 193, 42 U.S.C. § 7515 ..... 7, 10, 12, 14, 16, 48, 50, 53

Section 307(b), 42 U.S.C. § 7607(b) 23

Section 307(b)(1), 42 U.S.C. § 7607(b)(1) 63

Section 307(d), 42 U.S.C. § 7607(d) 55

Section 307(d)(1), 42 U.S.C. § 7607(d)(1) 43

US EPA ARCHIVE DOCUMENT

Section 307(d)(1)(B), 42 U.S.C. § 7607(d)(1)(B) 55

Section 307(d)(9), 42 U.S.C. § 7607(d)(9) 43, 55

REGULATIONS

40 C.F.R. § 51.165 .....3, 14

40 C.F.R. § 51.165(a)(i)(A) 4

40 C.F.R. § 51.166 .....3, 14

40 C.F.R. § 51.166 & 52.21 .....3, 14

40 C.F.R. § 51.166(a)(7)(iv)(c),(b)(40)(i) & (r)(6)(i) 30

40 C.F.R. § 51.166(b) 41

40 C.F.R. § 51.166(b)(2) 3

40 C.F.R. § 51.166(b)(2)(i) 4

40 C.F.R. § 51.166(k)-(l) 41

40 C.F.R. § 51.166(r)(6) 42

40 C.F.R. § 51.166(r)(6)(v) 31

40 C.F.R. § 52.21(b)(2) 3, 4

STATE ADMINISTRATIVE CODE

Wis. Admin. Code § NR 405.02(21)(b) 62

Wis. Admin. Code § NR 405.16(3) 42

Wis. Admin. Code § NR 405.16(3)(f) 31

Wis. Admin. Code § NR 406.04(1f) & (1k) 40, 41

US EPA ARCHIVE DOCUMENT

Wis. Admin. Code § NR 406.04(1k) 52

Wis. Admin. Code § NR 406.07(3) 41

Wis. Admin. Code § NR 408.02(20) 62

FEDERAL REGISTER

60 Fed. Reg. 3538 (Jan. 18, 1995) 63

64 Fed. Reg. 28,745 (May 27, 1999) 63

64 Fed. Reg. at 28,746 63

67 Fed. Reg. 80,186 (Dec. 31, 2002) 4, 5

67 Fed. Reg. at 80,192 19

67 Fed. Reg. at 80,219 22

67 Fed. Reg. at 80,278 .....32, 33

72 Fed. Reg. 19,829-31 (Apr. 20, 2007) 8

72 Fed. Reg. at 19,829 .....8, 9, 56

72 Fed. Reg. at 19,829-34 54

72 Fed. Reg. at 19,831-34 57

72 Fed. Reg. at 19,834 .....40, 56

73 Fed. Reg. 76,560-67 (Dec. 17, 2008) 9

73 Fed. Reg. at 76,560-61 8

73 Fed. Reg. at 76,561 .....8, 42

73 Fed Reg. at 76,561-66 9

US EPA ARCHIVE DOCUMENT

73 Fed. Reg. at 76,562 .....30, 34, 40, 52

73 Fed. Reg. at 76,562-63 33

73 Fed. Reg. at 76,562-66 55

73 Fed. Reg. at 76,563 .....31, 32, 43, 45, 49

73 Fed. Reg. at 76,564 ..... 32, 33, 34, 35, 38, 39

73 Fed. Reg. at 76,565 .....8, 29, 48, 49, 50, 52

73 Fed. Reg. at 76,566 .....62, 63

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in Petitioners Natural Resources Defense Council ("NRDC") and Sierra Club's opening brief is correct and complete.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether NRDC and Sierra Club may challenge the core provisions of a 2002 EPA rule that was previously challenged on similar grounds and upheld by the D.C. Circuit now that Wisconsin seeks to incorporate those provisions into its State Implementation Plan ("SIP");

2. Whether EPA's conclusion that the implementation of the provisions of the 2002 rule in Wisconsin will have a neutral-to-positive impact on emissions, and therefore those provisions are not impermissible "backslides," is entitled to deference, given that Petitioners make no showing to the contrary;

3. Whether NRDC and Sierra Club were entitled to a second opportunity to comment on the proposed rule approving the revisions to the Wisconsin SIP because EPA provided additional analysis of the rule in addressing Sierra Club's first round of comments when it promulgated the final rule; and

4. Whether EPA's approval of the revisions to Wisconsin's SIP was unlawful because the prior version of the SIP contained an error, and the revisions to the SIP did not address that error.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The Clean Air Act and the NSR Program

The Clean Air Act ("CAA") Amendments of 1970 established the basic statutory framework of the CAA as it exists today. They set out a "two-step process" for achieving overall improvements in air quality: EPA will develop National Ambient Air Quality Standards ("NAAQS") for various pollutants, and states will then develop State Implementation Plans ("SIPs") to ensure that those standards are met. *New York v. EPA*, 413 F.3d 3, 11 (D.C. Cir. 2005) (citing 42 U.S.C. §§ 7409-7410). EPA is required to approve a state SIP submitted to it so long as it meets the applicable CAA requirements. *See* 42 U.S.C. § 7410(k)(3) (EPA "shall approve" SIPs that meet applicable CAA requirements).

Part C of Title I of the CAA, 42 U.S.C. §§ 7470-7492, establishes specific provisions applicable to the construction and modification of

US EPA ARCHIVE DOCUMENT

sources located in areas that have attained the NAAQS, commonly called "attainment areas." These provisions and their implementing regulations (found at 40 C.F.R. §§ 51.166 & 52.21) are known as the Prevention of Significant Deterioration ("PSD") program, and prohibit the construction of new "major stationary sources" and "major modifications"[1] to major stationary sources without a PSD permit. *See* 42 U.S.C. §§ 7475, 7479; 40 C.F.R. § 51.166. The PSD permit requires, among other things, the use of "Best Available Control Technology" or "BACT" to control emissions of air pollutants that are regulated under the CAA. 42 U.S.C. § 7475(a)(4).

Part D of Title 1 of the CAA, 42 U.S.C. §§ 7501-7515, sets analogous requirements for sources in areas that have not attained the NAAQS, or "nonattainment areas." These provisions and their implementing regulations at 40 C.F.R. § 51.165 are referred to as "nonattainment New Source Review." New major stationary sources or existing sources making "major modifications" in nonattainment areas must, among other things, apply the "Lowest Achievable Emissions Rate" or "LAER,"

[1] "Major modification" is defined in EPA's regulations at 40 C.F.R. §§ 51.166(b)(2) and 52.21(b)(2).

US EPA ARCHIVE DOCUMENT

which is the rate of emissions reflecting the "most stringent emission limitation" set forth in an implementation plan, or the most stringent limitation achieved in practice, for that class or category of source, and must also "offset" any increases in emissions that result from the construction by obtaining decreases in emissions elsewhere in that nonattainment area. *See* 42 U.S.C. §§ 7501(3),7503(c).

The statutory and regulatory requirements governing permit applications for the construction of major sources and "major modifications" to stationary sources in both attainment and nonattainment areas are collectively called New Source Review ("NSR"). If a facility makes a change that does not qualify as a "major modification," it is not subject to NSR and therefore need not obtain a major source construction permit. *See* 42 U.S.C. §§ 7475, 7479(2)(C), 7501, & 7503; 40 C.F.R. §§ 52.21(b)(2), 51.166(b)(2)(i) & 51.165(a)(i)(A).

B. The 2002 Rule

On December 31, 2002, EPA promulgated a rule that modified the NSR applicability provisions, as set forth in the CAA implementing regulations. *See* 67 Fed. Reg. 80,186 ("Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR):

US EPA ARCHIVE DOCUMENT

Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects") (hereinafter the "2002 Rule") [JA236].

The 2002 Rule was the result of over ten years of review, analysis, and communications with stakeholders designed to evaluate the NSR program in light of EPA's experience in administering NSR and the states' experience in implementing the NSR program. EPA also considered, in promulgating the 2002 Rule, the effects of NSR on the regulated community. The product of this long-term project was NSR Reform, which addressed many of the problems that had become apparent under the prior rules. As EPA explained:

> The [2002 Rule is] intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection.

67 Fed. Reg. 80,186/2 [JA236]. Among other things, the 2002 Rule re-interpreted the statutory term "modification" by revising the way facilities measure past emissions and the way they calculate whether a change will "increase" emissions over those past emissions. *New York*

US EPA ARCHIVE DOCUMENT

v. EPA, 413 F.3d at 10. It also gave facilities the option of adopting a plant-wide emissions limit, or "PAL." *Id.*

II. *New York v. EPA*

The 2002 Rule was challenged broadly by state, industry, and environmental petitioners in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). Industry petitioners argued that it "interpret[ed] 'modification' too broadly, while state and environmental petitioners argue[d] that the rule's interpretation [was] too narrow." *Id.* at 10. After reviewing the arguments from both sides, the D.C. Circuit upheld most of the core provisions of the 2002 Rule, including:

- the use of past and projected "actual" emissions, as opposed to "potential" emissions, to measure emissions increases;
- the use of a ten-year "lookback period" (as opposed to a shorter period) as the window from which sources can select a two-year baseline period to measure past emissions; and
- the Plantwide Applicability Limitations ("PAL") program, whereby a source can opt to have an plant-wide emissions limit incorporated into its permit, which then allows it to make changes without triggering NSR so long as it stays within that limit.

US EPA ARCHIVE DOCUMENT

Id. at 10, 17, 22-33, 36-38.

The court did strike down two provisions of the 2002 Rule: the "Clean Units" program, pursuant to which a qualifying source could measure whether emissions had increased by looking to whether emissions limitations had changed, rather than measuring actual emissions, and the exemption from NSR of "Pollution Control Projects" that decreased emissions of some pollutants but caused collateral increases in the emission of others. *Id.* at 10-11.

The court also found that certain challenges to the 2002 Rule were unripe, including the claim that the 2002 Rule violated section 193 of the CAA, 42 U.S.C. § 7415, known as the "anti-backsliding" provision, which states that EPA may not relax certain preexisting requirements in SIPs. 413 F.3d at 42-44. However, the court held that the anti-backsliding challenge was "at best unripe" because the record was unclear as to the overall effect of the remaining provisions of the 2002 Rule, and suggested that it might become ripe when "an adequate factual record is developed, as might occur in the course of a state's quest for approval of a SIP meeting the old criteria." *Id.* at 44.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

III. Wisconsin's Proposed Revisions to its SIP

Wisconsin adopted changes to its CAA construction permitting program corresponding to the remaining provisions of the 2002 Rule in early 2006. *See* WDNR Rule AM-06-04; 73 Fed. Reg. 76,560-61 (Dec. 17, 2008) (final rule adopting Wisconsin's proposed changes to its permit program) [JA007]. These changes tracked the core elements of the 2002 Rule upheld in *New York v. EPA*: the ten-year lookback period; the actual-to-projected-actual method of measuring emissions increases; and the PAL program. *See* 72 Fed. Reg. 19,829-31 (April 20, 2007) (explaining that the Wisconsin SIP revisions tracked the elements of the 2002 Rule upheld in *New York v. EPA*) [JA001 – JA003]. Moreover, whereas the prior construction permitting program did not require sources subject to NSR in non-attainment areas to make "offsets" (i.e., to obtain decreases in emission from other units or sources in the same area to make up for any increases in emissions at that source), the Wisconsin SIP revisions include that CAA requirement. *See* 73 Fed. Reg. at 76,565 [JA012].

Wisconsin submitted the proposed revisions to EPA for incorporation into its SIP on May 25, 2006. 72 Fed. Reg. at 19,829 [JA001]; 73 Fed.

Reg. 76,561 [JA008]. EPA proposed a rule approving Wisconsin's proposed SIP revisions on April 20, 2007. 72 Fed. Reg. at 19,829 [JA001]. EPA received comments on the proposed revisions from Petitioner Sierra Club, among others, which argued that the revisions constituted unlawful backsliding from existing CAA protections in Wisconsin. *See* Comments of the Sierra Club (May 25, 2007) at 1-4 [JA083 –JA086].

EPA approved the proposed revisions to Wisconsin's SIP on December 17, 2008. 73 Fed. Reg. at 76,560-67 [JA007 – JA014]. EPA explained that the revisions to the Wisconsin SIP mirrored the 2002 Rule, which had already survived judicial scrutiny, discussed the application of the analysis supporting the 2002 Rule to Wisconsin, and responded to petitioner Sierra Club's comments. *Id.* at 76,561-66 [JA008 – JA013].

SUMMARY OF ARGUMENT

NRDC and Sierra Club attempt to re-litigate *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), wherein the D.C. Circuit upheld three core provisions of NSR Reform set forth in the 2002 Rule, making many of the same arguments here that were previously rejected by the court in

US EPA ARCHIVE DOCUMENT

that case. As their premise for revisiting those provisions, NRDC and Sierra Club point to the D.C Circuit's holding that the claim that the 2002 Rule violated section 193 of the CAA, 42 U.S.C. § 7515 – an "anti-backsliding" provision – was unripe. *See* Pet. Br. 17-18. But when it declined to reach the "backsliding" claim in *New York v. EPA*, the D.C. Circuit was not inviting NRDC and Sierra Club to re-challenge the provisions of the 2002 Rule that it had upheld, based on the same arguments it had previously rejected, every time those provisions are implemented by a state. *See* 413 F.3d at 42.

Moreover, the D.C. Circuit did not suggest that EPA could not approve a state's adoption of the 2002 Rule provisions based on its prior analysis of those provisions and its application of that analysis to the state, or that EPA had to develop further emissions data before taking such action, as Petitioners argue (Pet. Br. 37-41). Rather, the court confirmed that EPA could use its expertise and experience to make a "predictive judgment" as to the impacts of the 2002 Rule provisions in a particular state based on the data before it, *see* 413 F.3d at 30-31, which is what EPA has done here.

US EPA ARCHIVE DOCUMENT

In any event, Petitioners' challenge to the approval of the Wisconsin SIP revisions must fail. The record is sufficient to support EPA's conclusion that Wisconsin's revisions to its NSR rule will have a neutral-to-beneficial impact on emissions, and therefore those revisions are not impermissible "backslides." NRDC and Sierra Club have pointed to no information that proves otherwise.

NRDC and Sierra Club also attempt to impose notice and comment requirements on EPA that go well beyond the requirements set forth in the Administrative Procedure Act ("APA"), arguing that they should have been given the opportunity to comment on EPA's responses to their comments before the Final Rule was promulgated. *See* Pet. Br. 56-59. However, NRDC and Sierra Club's view of the notice and comment process is at odds with the text of the APA, and the case law NRDC and Sierra Club cite does not support their position. NRDC and Sierra Club had full opportunity to provide their views on the proposed revisions to the Wisconsin SIP – at both the state and federal levels – and no additional process is due.

Finally, while NRDC and Sierra Club are correct that the Wisconsin SIP contains a slightly inaccurate definition of the term "major

US EPA ARCHIVE DOCUMENT

modification," in that it could be interpreted to exempt a category of changes from NSR that are not exempt under the federal regulations, that definition was not before EPA in this rulemaking, and so cannot be challenged here.

ARGUMENT

I. Standard of Review

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, under which agency action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). This narrow standard is met so long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 111 (3d Cir. 1997) (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983)). Thus, insofar as NRDC and Sierra Club argue that EPA's approval of the revisions to the Wisconsin SIP is unlawful because it runs afoul of

US EPA ARCHIVE DOCUMENT

sections 193 and 110(l) of the Clean Air Act, 42 U.S.C. §§ 7515 & 7410(l), EPA's conclusion that those revisions will have neutral-to-positive impacts on emissions, and thus are not "backslides" prohibited by those sections, is entitled to considerable deference.

Furthermore, judicial deference extends to EPA's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). In reviewing an agency's statutory interpretation, the Court must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Where "Congress has explicitly left a gap" to be filled, the agency's regulation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. EPA's interpretation governs so long as it is "reasonable" – even if it is "not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009) (citing *Chevron*, 467 U.S. at 843-44). Thus, insofar as NRDC and Sierra Club are again challenging EPA's interpretation of the statutory term "modification" in

US EPA ARCHIVE DOCUMENT

the 2002 Rule, which Wisconsin now seeks to implement, that interpretation is to be given deference so long as it is reasonable.

Finally, EPA's interpretation of its own regulations is entitled to even more deference. Specifically, an agency's interpretation of its own regulations is to be given "controlling" weight unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Thus, EPA's decision to approve the revisions to the Wisconsin SIP because they are consistent with the 2002 Rule – wherein EPA made changes to the NSR program by revising its NSR regulations (*see* 40 C.F.R. §§ 51.165, 51.166 & 52.21) – must be granted considerable deference.

II. The Revisions to the Wisconsin SIP Are Not Unlawful Backslides.

NRDC and Sierra Club argue that EPA's approval of the Wisconsin SIP revisions violates sections 193 and 110(l) of the CAA, 42 U.S.C. §§ 7515 & 7410(l). CAA section 193, 42 U.S.C. § 7515, provides:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

US EPA ARCHIVE DOCUMENT

CAA section 110, 42 U.S.C. § 7410(l), provides:

> The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter.

NRDC and Sierra Club characterize these provisions as prohibiting "backsliding" (Pet. Br. 28 & 52), and argue that each of the three core elements of the Wisconsin SIP revisions – the use of a two-year interval from a ten year lookback period to calculate past actual emissions, the PAL provision, and the actual-to-projected-actual emissions calculation methodology – constitute "backslides" because fewer sources will be subject to NSR requirements (Pet. Br. 31-35). But Petitioners' challenges to these provisions are essentially challenges to the corresponding portions of the 2002 Rule, which were previously challenged by these petitioners and others, but upheld by the D.C. Circuit, in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

The D.C. Circuit did decline to reach a "backsliding" claim in that case; however, in doing so, it at most left the door open for a future petitioner to show, based on a factual record supporting such a showing, that the application of the rule in a specific setting would, in fact, result

US EPA ARCHIVE DOCUMENT

in "backsliding." *Id.* at 42-44. It did not suggest that the same facial challenges to the 2002 Rule rejected in *New York v. EPA* could succeed in the context of a state's adoption of the 2002 Rule, or that EPA had to develop specific emissions data disproving Petitioners' general claims of backsliding, rather than projecting the impact of the SIP revisions based on its analysis of the 2002 Rule and its application of that analysis to the state. *See id.*

Here, EPA projected that the 2002 Rule provisions, if adopted in Wisconsin, would have a neutral-to-beneficial impact on emissions, and therefore concluded that the Wisconsin SIP revisions (a) ensure "equivalent or greater emissions reductions" as required by CAA section 193, 42 U.S.C. § 7515, and (b) will not make air quality worse in violation of CAA section 110(l), 42 U.S.C. § 7410(l). Those conclusions are supported by both EPA's national-level analysis and data, developed in connection with the 2002 Rule itself, and its Wisconsin-specific analysis and data, and Petitioners make no showing to the contrary. Therefore, EPA's conclusions are entitled to deference, *see New York*, 413 F.3d at 30 ("To the extent that EPA's predictive judgment is

US EPA ARCHIVE DOCUMENT

supported by substantial evidence in the record, it is entitled to deference . . . ."), and NRDC and Sierra Club's "backsliding" claims fail.

A. Petitioners' Attempt to Re-Litigate *New York v. EPA* by Challenging the Wisconsin SIP Revisions as "Backslides" Is Inconsistent With That Decision.

In challenging the provisions of the 2002 Rule that Wisconsin seeks to adopt as unlawful "backslides," NRDC and Sierra Club seek to re-litigate much of *New York v. EPA*. In that case, the D.C. Circuit held that the three core provisions of the 2002 Rule that Wisconsin seeks to adopt were lawful, rejecting the same arguments that NRDC and Sierra Club raise again here. 413 F.3d at 21-38. While the court held that the "backsliding" claim brought in *New York v. EPA* was "at best unripe," it did not suggest that such a claim could succeed in the context of a state's adoption of NSR Reform based on the same general arguments rejected in that case rather than a factual showing of actual "backsliding." *See id.* at 42-44. The court also did not suggest that EPA had to develop a fuller factual record with more specific comparative emissions data than exists here to support the approval of a state's adoption of NSR Reform. *See id.*

US EPA ARCHIVE DOCUMENT

1. The provisions challenged as unlawful "backslides" here were previously challenged on similar grounds and upheld

Each of the new Wisconsin SIP provisions that NRDC and Sierra Club challenge here – the two-in-ten baseline provision, the PAL provision, and the actual-to-projected actual test – was previously challenged and upheld in *New York v. EPA*. And not only were the same provisions challenged and upheld in that case, they were challenged on nearly identical grounds, rendering NRDC and Sierra Club' attempts to challenge them again here in the guise of a "backsliding" claim particularly inappropriate.

First, NRDC and Sierra Club's challenge to the two-in-ten baseline provision as an unlawful backslide repeats, in substance, the challenge to that provision that was rejected in *New York v. EPA*. There, government and environmental petitioners argued that the ten-year lookback period was unlawful because it allowed sources to increase emissions from the levels immediately preceding the change without triggering NSR. 413 F.3d at 22, 28. Here, NRDC and Sierra Club again argue that allowing regulated sources to choose a two-year interval from a ten-year lookback period is unlawful because a change

US EPA ARCHIVE DOCUMENT

may be exempt from NSR even if "post-change emissions significantly increase over recent levels," and it "results in fewer projected increases that would trigger NSR." Pet. Br. 32.

The D.C. Circuit rejected this broad-brush argument in *New York v. EPA*, concluding that EPA's choice of a ten-year lookback period corresponding to the typical business cycle of most major emitting industries (as opposed to a shorter period with a process by which sources could seek exceptions, as was the case before) was reasonable. 413 F.3d at 24-25. The court accepted EPA's "detailed and reasoned" analysis, based on its "experience and expertise," that the ten-year lookback period would promote growth and administrative efficiency while "eliminating the regulatory disincentive" to make changes that would ultimately reduce emission rates. 413 F.3d at 24-25 (citing *Chevron*, 467 U.S. at 865). Furthermore, the court pointed out that, while "EPA acknowledges that fewer changes will trigger NSR under the 2002 rule," it believed that, because the provision would eliminate regulatory disincentives to making physical or operational changes that improve efficiency and reduce emissions rates, "'the environment will not be adversely affected' by the ten-year lookback period 'and in some

US EPA ARCHIVE DOCUMENT

respects will benefit' from it." *Id.* at 28-29 (quoting 67 Fed. Reg. at 80,192). Finally, while the court agreed that the data before EPA was incomplete and thus EPA could not fully predict how sources would respond to the rule, it held that EPA's "predictive judgment" that the ten-year lookback period would have no significant impact on the overall net benefits EPA anticipated would result from the 2002 Rule as a whole was "entitled to deference," as EPA had "explained the available evidence and offered a 'rational connection between the facts found and the choice made,'" while the petitioners had failed to provide a basis for the court to conclude otherwise. *Id.* at 30-31 (citation omitted). Thus, the D.C. Circuit has previously addressed and rejected the arguments proffered by NRDC and Sierra Club here in regard to the two-in-ten baseline provision.

Second, NRDC and Sierra Club's challenge to the PAL provision from the 2002 Rule is also repetitive of the challenges to that provision made and rejected in *New York v. EPA*. In that case, the petitioners' challenges to the PALs were closely linked to their challenges to the two-in-ten baseline provision. They argued that, "like the ten-year lookback period, the PAL provision is arbitrary and capricious because

US EPA ARCHIVE DOCUMENT

it allows sources to increase their emissions beyond their most recent levels without triggering NSR," given that the PAL could be calculated using any two-year period in the previous ten years. *Id.* at 36. Here, NRDC and Sierra Club similarly argue that the PALs are a backslide because they are set using "baseline emissions calculated using the two-in-ten baseline methodology," plus an additional margin, and therefore will be set at levels higher than the sources to which they apply have emitted in the last decade, resulting in fewer projects subject to NSR. Pet. Br. 34.

Addressing this line of argument regarding the PAL program, the D.C. Circuit held that the petitioners' arguments failed for the same reasons that their closely-related challenges to the two-in-ten baseline provisions failed. 413 F.3d at 36. The court also deferred to EPA's "assessment of the environmental benefits of PALs," which was based on data collected from PAL pilot projects, noting that the petitioners had failed to refute that assessment and instead simply contended that emissions would necessarily increase based on the structure of the rule. *Id.* at 38. Futhermore, the court found that it was reasonable for EPA to choose a ten-year term for PALs "in an effort to balance the need for

US EPA ARCHIVE DOCUMENT

regulatory certainty, the administrative burden, and a desire to align the PAL renewal with the title V permit renewal." *Id.* at 37 (quoting 67 Fed. Reg. at 80,219). Thus, as with the two-in-ten baseline provision, the D.C. Circuit previously considered and rejected the challenge to the PAL program raised by NRDC and Sierra Club here.

Finally, the grounds for NRDC and Sierra Club's challenge to the actual-to-projected-actual emissions calculation method were also previously rejected by the D.C. Circuit in *New York v. EPA*. Here, NRDC and Sierra Club argue that, by allowing facilities to compare projected future "actual" emissions to past emissions (i.e., to project that the facility will operate at less than full capacity), instead of comparing the level of emissions that would result if the facility were to operate at full capacity after the change to past emissions, the actual-to-projected-actual calculations methodology will result in fewer sources being subjected to NSR. Pet. Br. 35-36. They also argue that this calculation methodology improperly allows facilities to ignore emissions increases that are the result of product demand growth. *Id.* at 35.

Yet again, these arguments have already been rejected by the court in *New York v. EPA*. There, while the petitioners did not explicitly

US EPA ARCHIVE DOCUMENT

argue that the use of future projected "actual" emissions instead of "potential" emissions was unlawful, the court plainly rejected such an interpretation of the statutory term "modification," stating:

> If Congress had intended for "increases" in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to "potential to emit" or "emission limitations." The absence of such a reference must be given effect. . . . [T]he plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions . . . .

413 F.3d at 40 (citations omitted). Furthermore, Petitioners in *New York v. EPA* did directly challenge the exclusion of emissions increases resulting solely from product demand growth from the actual-to-projected-actual calculation, but the court concluded that the exclusion was supported by the record and consistent with the statutory definition of modification. 413 F.3d at 32-33.

Thus, the three core elements of the 2002 Rule that NRDC and Sierra Club challenge here were challenged, on substantially similar grounds, and ultimately upheld in *New York v. EPA*. Accordingly, these challenges were subject to the D.C. Circuit's exclusive jurisdiction under the time-limited judicial review provision of CAA section 307(b),

US EPA ARCHIVE DOCUMENT

42 U.S.C. § 7607(b), were decided on their merits by that court, and may not be raised anew here. Moreover, separate and apart from the preclusive effect of Section 307(b), NRDC and Sierra Club are precluded under traditional principles of collateral estoppel from re-litigating any issues that were decided by the D.C. Circuit, *see Aaron v. Mahl*, 550 F.3d 659, 665 n.5 (7th Cir. 2008), and are barred by *res judicata* from raising any claims challenging the 2002 rule that they could have raised in the D.C. Circuit litigation that were ripe at the time, whether they actually did so or not, *see Simon v. Allstate Employee Group Med. Plan,* 263 F.3d 656, 658 (7th Cir. 2001).

2. In declining to reach a backsliding claim, the D.C. Circuit did not leave the door open for the type of facial challenge to the 2002 Rule provisions made by Petitioners here, unsupported by record evidence of actual backsliding.

Nonetheless, NRDC and Sierra Club now seek to take another bite at the same apple by casting their substantially identical challenges to the elements of the 2002 Rule as "backsliding" claims. In support of this attempt, they point to the D.C. Circuit's holding that petitioners' argument that the provisions of the 2002 Rule were "backslides" prohibited by section 193 of the CAA was not ripe for review at the

US EPA ARCHIVE DOCUMENT

time. Pet. Br. 39-40. But the heart of the D.C. Circuit's decision on that issue was to *reject* the type of very general argument presented again by Petitioners here in support of their backsliding claim: that "because the new rules in some respects diminish the likelihood of NSR" they must, *per se*, cause "backsliding." 413 F.3d at 43.

The Court explained that, based on the record before it, it believed the practical implications of the rule as it might play out in any particular state were somewhat "ambiguous" since some of the NSR changes could result in added pollution reductions by encouraging the use of more modern facilities, even if the rule reduced the scope of NSR review in some respects. *Id.* Thus, by dismissing Petitioners' anti-backsliding arguments as "at best unripe," the D.C. Circuit was, at most, leaving the door open to a petitioner to show, based on an "adequate factual record," why it believed the *application* of the rule in a specific setting might cause backsliding. *Id.* at 43-44; *see also Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995) (party asserting an APA challenge bears the burden of demonstrating that the agency's actions were arbitrary or capricious). The court did *not* leave the door open to the sort of general facial challenge to the 2002 Rule presented

US EPA ARCHIVE DOCUMENT

by the petitioners therein, and largely repeated by Petitioners here, which the court found unpersuasive. *See* 413 F.3d at 43-44.

Therefore, while EPA does not argue that NRDC & Sierra Club's backsliding claims are premature (as this is the only appropriate time for Petitioners to challenge EPA's approval of these SIP revisions), or that they are again "unripe" (given that EPA did specifically find, when approving the Wisconsin SIP revisions, that adopting the 2002 Rule provisions in Wisconsin would not violate the "backsliding" provisions of the CAA), EPA does assert that Petitioners have failed to carry their burden of demonstrating any impermissible "backsliding," since they rely only on the same generalized legal and policy arguments already deemed insufficient to support such a claim by the D.C. Circuit, rather than on any concrete record evidence demonstrating how the application of the 2002 Rule to Wisconsin causes "backsliding."

3. It was not arbitrary or capricious for EPA to approve the SIP revisions without developing a fuller record including more specific comparative emissions data.

Apparently recognizing the lack of evidence in the record supporting their general backsliding claims, NRDC and Sierra Club argue that EPA's failure to develop a fuller factual record with more specific

US EPA ARCHIVE DOCUMENT

comparative emissions data – which they believe would support their backsliding claims – is arbitrary and capricious. Pet. Br. 39-40. NRDC and Sierra Club point to language from *New York v. EPA* that they characterize as constituting a mandate for EPA to develop a fuller factual record for "any future approval of a state SIP." *Id.* That characterization is incorrect.

In the section of the opinion that Petitioners rely on to suggest that EPA had a duty to more fully develop the record before approving a SIP implementing the 2002 Rule, the D.C. Circuit addressed the petitioners' argument that the ten-year lookback provision would increase emissions and thus have a negative impact on the environment. *New York*, 413 F.3d at 30. The court noted that EPA believed, based on the available data and its reasoned predictions, that the 2002 Rule would reduce pollution overall to some degree, but also that both EPA and the GAO had recognized that the data on which EPA based that prediction was not yet fully comprehensive, and that GAO had accordingly recommended that EPA monitor the impacts of the rule as it was implemented. *Id.* The court therefore opined that, particularly given that it was vacating certain parts of the 2002 Rule, there was a

US EPA ARCHIVE DOCUMENT

"heightened need for EPA to have sufficient data" to confirm that the portions of the 2002 Rule being upheld do not "result in increased emissions that harm air quality and public health." *Id.* at 31. However, the court concluded, "EPA's predictive judgment is entitled to deference," as EPA had "explained the available evidence and offered a 'rational connection between the facts found and the choice made.'" *Id.* (citation omitted).

Thus, the language that NRDC and Sierra Club would make into a mandate for the development of a fuller record – the lack of which NRDC and Sierra Club suggest renders the approval of a SIP incorporating the 2002 Rule arbitrary and capricious (*see* Pet. Br. 37) – only counsels that EPA should, both here and in any instance where it makes a policy choice based on its predictive judgments, monitor the impacts of the rule *once it is implemented*. Otherwise, it confirms that EPA is entitled to make a "predictive judgment" using its "expertise" based on the facts before it, as EPA did in regard to the 2002 Rule itself and as it has done in approving Wisconsin's adoption of the 2002 Rule provisions. As discussed below in section II, the record before EPA here was more than ample to support the approval of Wisconsin's

US EPA ARCHIVE DOCUMENT

proposed SIP under the applicable backsliding provisions of the CAA. Therefore, Petitioners' "backsliding" claims fail.

B. The Record Does Not Support Petitioners' Backsliding Claims.

Even setting aside the fact that NRDC and Sierra Club's backsliding claims are, in essence, an inappropriate attempt to re-raise arguments previously rejected in *New York v. EPA* without pointing to any new factual support for those arguments in this record, their claims fail on the merits. EPA has concluded that the "net effect" of the changes to the Wisconsin SIP will be "neutral to environmentally beneficial," 73 Fed. Reg. at 76,565 [JA012], the record supports that conclusion, and NRDC and Sierra Club have failed to provide this Court with any basis to reject that conclusion as unreasonable. Therefore, because EPA has reasonably concluded that the impact of the revisions to the Wisconsin SIP on emissions in Wisconsin will be neutral-to-positive, they do not constitute impermissible "backslides."

1. The Record Supports EPA's Conclusion that the Wisconsin SIP Revisions Will Have a Neutral-to-Positive Impact.

Contrary to NRDC and Sierra Club's suggestions, EPA has developed and relied on a record sufficient to support its conclusion. This record

US EPA ARCHIVE DOCUMENT

not only includes the national-level analysis and data developed to support the 2002 Rule, but also a Wisconsin-specific analysis and data developed for this rulemaking.

i. EPA's national-level analysis and data support its conclusion.

In developing the record for the 2002 Rule, EPA made findings supporting the three core provisions of that rule at issue here: the actual-to-projected-actual calculation methodology for determining whether there has been an "increase" in emission; the ten-year lookback period for identifying a two-year past emissions "baseline," sometimes called the "two-in-ten provision"; and the PAL program. Those findings support its approval of the adoption of these provisions in Wisconsin.

In regard to the actual-to-projected-actual calculation methodology, EPA found that "while the . . . test would reduce the number of sources that would need to take permit limits, the environmental benefit of these permit limits is preserved, because any source projecting no significant net emissions increase must stay within that projection or comply with NSR." 73 Fed. Reg. at 76,562 [JA009]; *see also* 40 C.F.R. § 51.166(a)(7)(iv)(c), (b)(40)(i) & (r)(6)(i). In other words, if a source

US EPA ARCHIVE DOCUMENT

underestimates its projected actual emissions when calculating whether there will be an emissions increase, and does not obtain a permit on that basis, but then operates in excess of its projections, it has violated the NSR provisions of the Act and is subject to enforcement action. And this potential for enforcement action is real in that both the Wisconsin rule and the federal regulations require notification if the source's annual emissions exceed the baseline actual emissions by a "significant" amount. *See* 40 C.F.R. § 51.166(r)(6)(v); Wis. Admin. Code § NR 405.16(3)(f).

In regard to the ten-year lookback period, EPA concluded that the ten-year lookback period would only affect a small percentage of sources. 73 Fed. Reg. at 76,563 [JA010]; *see generally* EPA, New Source Review (NSR) Improvements: Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules (Nov. 2002) ("Environmental Impact Analysis"), App. F [JA039]. This is because there are a number of circumstances in which a source would not, in fact, be able to select a two-year baseline period from farther back in that time frame with higher associated emissions than a more recent two-year period. For example, a source can only use a particular

US EPA ARCHIVE DOCUMENT

two-year period to set its baseline emissions if it has adequate information to calculate its average annual emissions rate for that entire time frame. *See* 73 Fed. Reg. at 76,563-64 [JA010 - JA011]; 67 Fed. Reg. at 80,278 [JA279]. As a further example, the recent emissions of the source may well be higher than emissions from several years ago, in which case the source would be expected to choose a more recent period in order to have a higher baseline. 73 Fed. Reg. at 76,563-64 [JA010 - JA011]. Or the source may well have had fairly consistent emissions over the entirety of the ten-year lookback period, in which case the longer lookback period will again have no effect on its emissions calculations. *Id.* at 76,564 [JA011]. In fact, EPA estimated that 90% of all of the benefits of the NSR program come from new sources, the modification of electric utilities (to which this lookback provision does not apply), or sources where emissions have either been highest in recent years or relatively stable for the past ten years. Environmental Impact Analysis, App. F at 3-6 [JA042 - JA045]. This supports EPA's conclusion that the ten-year lookback period will have very little impact, in either direction, on actual emissions.

US EPA ARCHIVE DOCUMENT

Moreover, sources may not use the ten-year lookback provision to select a two-year baseline period that includes non-compliant emissions, and they must adjust their baseline downward to reflect any emissions limitations or operating restrictions that have been imposed since the baseline period. 73 Fed. Reg. at 76,562-63 [JA009 – JA010]; 67 Fed. Reg. at 80,278 [JA279]. Indeed, EPA estimated that, of the remaining 10% of all sources where emissions have actually been lower in recent years (and thus the sources might, under the ten-year lookback provision, be able to select a baseline period from longer ago to set a higher emissions baseline than they could have under the pre-2002 rules), 70% are subject to emissions limitations that will prevent them from claiming higher baselines under the 2002 Rule. Environmental Impact Analysis, App. F at 4-6 [JA043 - JA045].

Finally, states had the flexibility to allow a different baseline period under the prior version of the NSR regulations. 73 Fed. Reg. at 76,564 [JA011]. Thus, EPA concluded that the ten-year lookback period was not going to change the way a large number of sources calculate their past emissions, and the D.C. Circuit cited EPA's analysis and

US EPA ARCHIVE DOCUMENT

conclusion regarding the impacts of this provision approvingly when upholding it. *See New York*, 413 F.3d at 29-30.

In regard to the PAL program, EPA found that PALs encourage sources to reduce their emissions voluntarily so that they have more leeway to expand in the future. 73 Fed. Reg. at 76,562 [JA009]. To reach this conclusion, EPA looked at the results of pilot projects that implemented flexible permits similar to PALs, finding that the participants had reduced their emissions *below* their PAL by between twenty-seven and eighty-three percent. *Id.* [JA009]; Environmental Impact Analysis, App. B. at 2 [JA035]. EPA also analyzed the likely reduction of one particular pollutant, volatile organic compounds ("VOCs"), in three industries determined to be more likely to adopt PALs. 73 Fed. Reg. at 76,564 [JA011]; Environmental Impact Analysis at 3, App. B. at 4 [JA020, JA037]. EPA determined that 50% to 75% of facilities in those industries were likely to seek a PAL; projected that each facility to do so would reduce its emissions by between 10% and 33%; and calculated that this would result in a net reduction of between 70.1 and 364.2 tons of VOCs annually. 73 Fed. Reg. at 76,564 [JA011]; Environmental Impact Analysis, App B at 3-4 [JA036 - JA037].

US EPA ARCHIVE DOCUMENT

Thus, EPA's national-level analysis supports its conclusion that implementing the 2002 Rule will be "environmentally beneficial," given the projected neutral effect of the actual-to-projected-actual methodology and the ten-year lookback provision, and the projected positive effect of the PAL program. 73 Fed. Reg. at 76,564 [JA011].

NRDC and Sierra Club argue that EPA's national-level analysis of these provisions was "flawed from inception" in that the Government Accounting Office was "critical" of EPA's analysis and conclusions, and EPA itself admitted that it could not "quantify with specificity" the emissions changes that would result from the implementation of the 2002 Rule or identify exactly where those changes would be. Pet. Br. 40 (citing Environmental Impact Analysis at 4). But in *New York v. EPA*, the court held that the same "flaws" were insufficient to show that EPA's analysis and conclusions were not entitled to deference. 413 F.3d at 31-32. The court explained that, while GAO had noted that the full impacts of the rule on emissions were uncertain, "GAO did not conclude that the 2002 Rule lacked adequate evidentiary support," just that EPA should monitor the impacts of the rule once it was implemented. 413 F.3d at 30. The court explained:

US EPA ARCHIVE DOCUMENT

> Incomplete data does not neccesarily render an agency decision arbitrary and capricious, for "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.

413 F.3d at 31 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Rather, because EPA had "explained the available evidence and offered a 'rational connection between the facts found and the choice made,'" its analysis and conclusions were entitled to deference. *Id.* (citation omitted).

NRDC and Sierra Club also argue that the EPA's national-level analysis and conclusion cannot be credited here because they were "premised on all five components in the NSR Reform Rule being implemented," whereas only three were upheld in *New York v. EPA* and are now being implemented here. As an initial point, EPA did not rely on the national level analysis' overall conclusion with respect to the five original NSR Reform components, but on the portions of the national level analysis that looked at each of the three specific components, as is clear from the discussion above. Moreover, NRDC and Sierra Club fail to explain how the non-existence of the two provisions vacated, which

US EPA ARCHIVE DOCUMENT

exempted "Clean Units" and "Pollution Control Projects" from certain NSR requirements, might turn the overall impact of the Rule from neutral-to-beneficial to negative. *See* 413 F.3d at 38-42. And while the D.C. Circuit did note that the need for EPA to gather data on the impacts of the 2002 Rule was "heightened" by its vacatur of those provisions, the court was plainly referring to its statement immediately prior wherein the court simply agreed with GAO that EPA should, generally speaking, monitor the impacts of the rule once it was implemented. *See* 413 F.3d at 30-31.

Thus, EPA's national-level analysis of the portions of the 2002 Rule to be implemented in Wisconsin supports its conclusion that those provisions will have a neutral-to-positive impact.

ii. EPA's Wisconsin-specific data and analysis support its conclusion.

In addition to relying on its national-level analysis of the 2002 Rule to support its conclusion that, if implemented in Wisconsin, the provisions of the 2002 Rule would not constitute "backslides," EPA conducted a Wisconsin-specific analysis of the effects of implementing

US EPA ARCHIVE DOCUMENT

the 2002 Rule, which further supports its conclusion that the net impact of the Wisconsin SIP revisions will be neutral-to-beneficial.

First, EPA applied the quantitative analysis it had done in regard to the PAL program at the national level to Wisconsin. Specifically, it identified those facilities in Wisconsin that belonged to the three industries that EPA had previously concluded were more likely to adopt PALs (a total of seven facilities), and projected the annual decrease in emissions that would result assuming that roughly the same percentage of those facilities applied for PALs as had been predicted at the national level. 73 Fed. Reg. at 76,564 [JA011]. EPA also reasoned that facilities in the paper industry (a major industry in Wisconsin, consisting of around seventy-three sources) would have an incentive to apply for PALs given that they frequently seek permits to modify their facilities. *Id.* EPA calculated that if even "a conservative 10% of these sources were to take a PAL for a conservative decrease in emissions between 10% and 33%," there would be a total decrease in VOC emissions of between 83.5 and 275.8 tons per year. *Id.* Thus, EPA's analysis predicts that Wisconsin is particularly likely to benefit from the PAL program, given that the program would be appealing to a major

US EPA ARCHIVE DOCUMENT

industry in Wisconsin, which further supports EPA's conclusion that the adoption of the 2002 Rule provisions in Wisconsin would have neutral-to-positive impacts.

NRDC and Sierra Club argue that EPA's Wisconsin-specific analysis of the impacts of the PAL program only addresses one pollutant (VOC), and only suggests that seven facilities might opt to take part in the PAL program. To begin with, the latter argument is simply wrong in that it completely ignores EPA's additional analysis and findings concerning the seventy-three facilities in the Wisconsin paper industry that would have an incentive to participate in the PAL program. *See* 73 Fed. Reg. at 76,564 [JA011]. Moreover, NRDC and Sierra Club have provided no factual basis for suggesting that using VOC emissions as a surrogate for a broader range of emissions leads to inappropriate results. And while EPA's Wisconsin-specific analysis may only encompass one major pollutant and several industries, there is no support for NRDC and Sierra Club's implicit suggestion that EPA may not derive a conclusion from less than a complete analysis of how the program will affect every pollutant and every regulated source. To the contrary, the D.C. Circuit reminded the petitioners in *New York v. EPA* that EPA was entitled to

US EPA ARCHIVE DOCUMENT

make a "predictive judgment" based on subsets of data and facts, to which deference is due. 413 F.3d at 31. Thus, it was reasonable for EPA to conclude that the PAL program would have a positive overall impact on emissions and air quality in Wisconsin, and rely on that conclusion in analyzing the overall impact of the 2002 Rule provisions in Wisconsin.

Furthermore, in reaching its conclusion regarding the overall impact of implementing the 2002 Rule provisions in Wisconsin, EPA relied on the fact that, under Wisconsin's new minor source NSR program (revised at the same time as the major source NSR program), if a change does *not* trigger NSR review, the source must still ensure that it does not cause an exceedance of an applicable air quality standard. 73 Fed. Reg. at 76,562 [JA009]. Wisconsin specifically revised its minor source program "to include changes to implement the new elements of the federal 'NSR reform' rules for sources that are exempt from major NSR permitting requirements" – in other words, to catch and regulate any sources that can avoid NSR under the 2002 Rule. 72 Fed. Reg. 19,834 [JA006]. Wisconsin rules NR 406.04(1f) and (1k), which apply to sources that avoid NSR by implementing a PAL and using the actual-

US EPA ARCHIVE DOCUMENT

to-projected actual test for NSR, respectively, require that a modification "not cause or exacerbate an exceedance of an ambient air quality increment or standard."[2] Wis. Admin. Code §§ NR 406.04(1f) and (1k). In order to assure that this requirement is met, the source must perform an ambient air quality review, which is conducted by modeling to determine whether the impact from the new source or modification will result in a violation of the NAAQS (for attainment areas) or an increment, which is the applicable maximum allowable increase over the baseline concentration in any area. *See* 40 C.F.R. § 51.166(k)-(l).

Although federal regulations require this analysis for "major stationary sources" and "major modifications" (*see* 40 C.F.R. § 51.166(b)), federal regulations contain no such requirement for minor sources. Thus, Wisconsin's minor source program goes beyond what is required by the federal regulations, and lends further support to EPA's conclusion that the adoption of the 2002 Rule provisions in Wisconsin will not increase emissions or worsen air quality. *See id.*

[2] *See also* Wis. Admin. Code § NR 406.07(3) (applying other CAA requirements to minor sources).

US EPA ARCHIVE DOCUMENT

Finally, EPA noted that, in Wisconsin, *any* facility using the actual-to-projected-actual calculation method must keep records of its emissions, whereas federal regulations require that records be kept only when the projected increase in emissions equals or exceeds 50 percent of the CAA's NSR significance levels for any pollutant. 73 Fed. Reg. at 76,561 [JA008]; *compare* Wis. Admin. Code § NR 405.16(3) *with* 40 C.F.R. § 51.166(r)(6). Thus, in Wisconsin sources have an additional incentive not to underestimate their projected emissions when using the actual-to-projected-actual calculation methodology or relying on the two-in-ten baseline to calculate past emissions, and thereby improperly avoid NSR.

Therefore, while the record relied on by EPA in support of its approval of the Wisconsin SIP revisions may not include data showing how each provision of the 2002 Rule will affect the emissions of each regulated pollutant at every source in the state, it is sufficient to support EPA's predictive judgment that the Wisconsin SIP revisions will not increase emissions or worsen air quality in Wisconsin. Accordingly, that conclusion is reasonable.

US EPA ARCHIVE DOCUMENT

2. NRDC and Sierra Club Have Not Shown That EPA's Conclusion Is Wrong or Unreasonable.

As in *New York v. EPA*, "Petitioners do not provide a basis for the court to conclude that EPA's choice . . . is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 413 F.3d at 31 (quoting 42 U.S.C. § 7607(d)(9)).[3] NRDC and Sierra Club rely almost entirely on one document in their attempt to undermine EPA's conclusion that the Wisconsin SIP revisions will have neutral-to-positive impacts: a 2003 "study" by the Wisconsin Department of Natural Resources ("WDNR") that they claim "concluded unequivocally that the NSR Reform Rule would increase emissions in Wisconsin." Pet. Br. 45; *see also* Pet. Br. 32-34 & 54 (relying on the 2003 study). But there are a number of problems with Petitioners' reliance on this document.

First, as explained by EPA in the preamble to the rule approving the Wisconsin SIP revisions, 73 Fed. Reg. at 76,563 [JA010], the only

[3] Because the action challenged is the approval of a state's revision of its SIP pursuant to 42 U.S.C. § 7410(a), as opposed to the revision of the federal implementation plan pursuant to 42 U.S.C. § 7410(c) or one of the other types of action identified in CAA section 307(d)(1), 42 U.S.C. § 7607(d)(1), the standard of review set forth in section 307(d)(9), 42 U.S.C. § 7607(d)(9), does not govern here. However, that standard is the same as the standard of review applicable to administrative action under the APA. *See* 5 U.S.C. § 706(2)(A).

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

document that Sierra Club submitted with its comments was a WDNR power-point presentation that did not contain an explanation of the conclusions set forth in that document, or provide any underlying data; rather, it contained conclusory talking points such as "sources can cherry-pick highest baselines" and "benefits dirty facilities," with no explanation of how those conclusions were reached. *See* Comments of Sierra Club, Attach. [JA109, JA114]. Sierra Club stated in its Comments that this 2003 study was based on a review of 24 existing permits, *see* Comments of Sierra Club at 3 [JA085], but no analysis of those permits was provided. While Petitioners later provided another powerpoint document with their Petition for Reconsideration, which purported to provide further information about WDNR's permit analysis, this presentation also consisted of extremely conclusory statements regarding the impacts of the 2002 Rule provisions (this time on specific types of projects at permitted sources), with no underlying data that would have allowed EPA to test the conclusions set forth. *See* NRDC Pet. for Recons. of EPA Approval of Wis. NSR Reform Provisions, Attach. ("Review of Previous Permits") [JA120].[4] Thus, it was

[4] For example, one slide states: "Printing Facility: BACT Control; RACT Applies;

eminently reasonable for EPA to not reverse its conclusion that implementing the 2002 Rule in Wisconsin would have neutral-to-positive impacts on the basis of the 2003 WDNR study alone.

EPA's treatment of the 2003 WDNR study was particularly reasonable given that, when attempting to locate the underlying analysis and data, EPA found a 2006 report submitted by WDNR to the Wisconsin legislature that questioned the conclusions set forth in the 2003 study. *See* 73 Fed. Reg. at 76,563 [JA010]. WDNR explained that it had determined that the 2003 study was flawed in that "this analysis did not examine other changes that might occur at a facility that could reduce allowable emission rates, such as the plant-wide applicability limit." Report to Legislature, Incorporation of federal changes to the air permitting program (Mar. 10, 2006), Attach. A at 2 [JA155]. Additionally, the report noted that the State of Michigan, which has historically issued similar numbers of NSR permits and had similar numbers of sources subject to the NSR program, had observed no

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PAL Possibilities; Difference of 78 TPY." NRDC Petition for Recons. of EPA Approval of Wis. NSR Reform Provisions, Attach. ("Review of Previous Permits") at 5 [JA143]. There is no explanation of how the author concluded that there would be a 78 ton per year difference in emissions at the facility in question (assuming that is, in fact, what that slide is suggesting). *See id.*

US EPA ARCHIVE DOCUMENT

decreases in preconstruction permit applications since it had implemented the 2002 Rule in 2003. *See id.* [JA155] ("Michigan has not recognized a significant decrease in NSR permit activity nor have significant increases in emissions resulting in new nonattainment areas occurred. As a result, Michigan's practicable experience has brought the validity of any analysis conducted on the issue of environmental impact brought on by fewer projects being required to undergo a NSR permit reviews into question.").

Given that WDNR not only explicitly questioned the conclusions of the 2003 study on which Petitioners rely so heavily, but in doing so identified additional data *supporting EPA's conclusion* that the implementation of the 2002 Rule would not have a negative impact on emissions, in that it would not result in any decrease in participation in the NSR program, it was eminently reasonable for EPA to decline to reverse its conclusion concerning the impacts of implementing the 2002 Rule in Wisconsin based solely on the 2003 WDNR study.

NRDC and Sierra Club offer only one other affirmative piece of information in support of their assertion that the Wisconsin SIP revisions are "backslides." Specifically, they inform the court that, as of

US EPA ARCHIVE DOCUMENT

September 2010, none of the seven facilities that EPA had identified as likely to participate in the PAL program in Wisconsin has applied to participate in the PAL program, suggesting that this shows that EPA's conclusion that the PAL program would likely have a positive impact on emissions was arbitrary and capricious. Pet. Br. 45-46.

In addition to the fact that, as Petitioners admit, this information was obviously not part of the record before EPA when approving the incorporation of the PAL program and the other provisions of the 2002 Rule into the Wisconsin SIP, *see* Pet. Br. 45, n.9, it does not undermine EPA's conclusion. The fact that none of those sources has applied for a PAL is much more likely a reflection of the fact that the revisions to the Wisconsin SIP have only been in place for a little over a year and a half – and that they are currently being challenged – than evidence that EPA's conclusions about the PAL program are wrong. [5]

Therefore, because NRDC and Sierra Club provide no basis for the Court to conclude that EPA's assessment of the impacts of

[5] Indeed, the number of Wisconsin industrial entities and organizations that have intervened in this case demonstrates that the outcome is of great interest to, and being closely scrutinized by, regulated sources in Wisconsin. This, in turn, raises the possibility that some of those regulated sources will modify their behavior or take some action once this challenge has been resolved.

US EPA ARCHIVE DOCUMENT

implementing the 2002 Rule in Wisconsin was unreasonable, the Court should uphold EPA's action.

3. Because the Record Supports EPA's Conclusion Regarding the Impact of the NSR Reform Provisions, Petitioners' CAA section 193 and section 110(l) Claims Both Fail.

EPA's unrebutted conclusion that the Wisconsin SIP revisions will have a neutral-to-positive impact on emissions necessarily means that NRDC and Sierra Club's "backsliding" claims fail.

i. Petitioners' CAA section 193 claim fails because EPA has reasonably concluded that the revisions to the Wisconsin SIP insure equivalent or greater emissions reductions.

EPA explicitly found that, for "the reasons discussed above" (i.e. the federal and state-specific analyses and findings), "the net effect of these changes [to the Wisconsin SIP] will be neutral to environmentally beneficial." 73 Fed. Reg. at 76,565 [JA012]. This is sufficient to support EPA's conclusion that the SIP revisions insure "equivalent or greater emissions reductions" than the preexisting SIP, as required by CAA section 193, 42 U.S.C. § 7515. *See id.* And while EPA's finding regarding the net effect of the Wisconsin SIP revisions is predictive in nature, it has been borne out by the State of Michigan's experience, in that no decrease in PSD permit applications or significant increases in

US EPA ARCHIVE DOCUMENT

emissions have been observed since the NSR Reform provisions were implemented in Michigan in early 2003. *See* 73 Fed. Reg. at 76,563 [JA010]; Report to Legislature, Incorporation of federal changes to the air permitting program (Mar. 10, 2006), Attach. A at 2 [JA155].

EPA's conclusion that the Wisconsin SIP revisions insure equivalent or greater emissions reductions than the prior SIP is further supported by the fact that the prior Wisconsin SIP did not require sources subject to NSR in non-attainment areas to obtain emissions offsets (i.e., emissions reductions from other units or sources in the area), whereas the SIP revisions do require such offsets. 73 Fed. Reg. at 76,565 [JA012]. NRDC and Sierra Club are correct that, in addition to the offset requirement for sources subject to NSR in non-attainment areas, the LAER and BACT technology standards applicable to all sources subject to NSR also result in decreases in emissions. *See* Pet. Br. 48. But because the prior Wisconsin SIP did not require any offsets at all, whereas, pursuant to the SIP revisions, sources subject to NSR in non-attainment areas will be required to obtain offsets in addition to meeting the applicable technology standard, EPA correctly found that the revised Wisconsin SIP will require at least some emissions

US EPA ARCHIVE DOCUMENT

reductions not required under the old SIP. *See* 73 Fed. Reg. at 76,565 [JA012]. EPA is accordingly justified in relying on this aspect of the SIP revisions as further support for its conclusion – otherwise based on its national and state-specific analyses – that those revisions insure equivalent or greater emissions reductions than the preexisting SIP.

Thus, EPA's conclusion that the changes to the Wisconsin SIP will insure emissions reductions equal to or greater than the old SIP and therefore meet the requirements of CAA section 193, 42 U.S.C. § 7515, is supported by the record. NRDC and Sierra Club have failed to provide any basis for the court to reject that conclusion. Therefore, EPA's conclusion is reasonable and should be upheld.

ii. Petitioners' CAA section 110(l) claim fails because Petitioners have not shown that the SIP revisions will worsen air quality.

Because EPA's conclusion that the Wisconsin SIP revisions will have neutral-to-positive impacts on emissions in Wisconsin was reasonable and supported, and NRDC and Sierra Club failed to show otherwise, EPA's approval of the SIP also does not violate section 110(l) of the CAA. That section, which NRDC and Sierra Club characterize as a "companion anti-backsliding" provision (Pet. Br. 52), states that EPA

US EPA ARCHIVE DOCUMENT

may not approve a SIP revision if it would "interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter." 42 U.S.C. § 7410(l).

The Fifth and Sixth Circuits have held that EPA's interpretation of section 110(l) as allowing it to approve a SIP revision "unless the agency finds it will make the air quality worse" is permissible. *Galveston-Houston Ass'n for Smog Prevention (GHASP) v. EPA*, No. 06-61030, 2008 WL 3471872, at *7 (5th Cir. Aug. 13, 2008) (internal quotation omitted); *Kentucky Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006).[6] And where EPA has made a determination to the contrary (i.e., that the SIP revisions will not make air quality worse), the only question for the court is whether EPA's determination is arbitrary or capricious under the "most deferential" standard of review. *Kentucky Res. Council,* 467 F.3d at 996 ("The only remaining questions concern

[6] Indeed, the Sixth Circuit stated that "[i]n rejecting" a prior interpretation of section 110(*l*) "in favor of one that allows Kentucky more flexibility, the EPA does service to a fundamental premise underlying the Clean Air Act scheme, which is that the states have the primary responsibility for ensuring that the NAAQS are met . . . . In light of this widely held understanding of the role of the states in the statutory scheme, EPA's interpretation of section 110(l) seems all the more reasonable." 467 F.3d at 996.

US EPA ARCHIVE DOCUMENT

the agency's conclusions that the [SIP revisions as a whole] were indeed adequate to maintain the status quo of air quality in Northern Kentucky. These questions involve actual scientific findings of the EPA, and as they concern matters within the specialized expertise of the agency, as stated above, this Court must be at 'its most deferential.'") (citation omitted).[7]

Here, EPA explicitly found that the Wisconsin SIP revisions would "provide somewhere between a neutral and modest contribution to reasonable further progress" and thus "will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA." 73 Fed. Reg. at 76,565 [JA012]. As discussed in section B(1) above, EPA's conclusion

[7] Petitioners rely instead on *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001), an earlier Ninth Circuit case where the Ninth Circuit held that to approve a revision under section 110(l) "the EPA must be able to conclude that the particular plan revision before it is consistent with the *development* of an overall plan capable of meeting the Act's attainment requirements." *Id.* at 1160. Here, EPA noted, in response Sierra Club's comments arguing that the SIP revisions were backslides, that another aspect of the Wisconsin preconstruction permit program – Wisconsin Admin. Code § NR 406.04(1k), the "minor source rule" – requires facilities not subject to NSR "to ensure that the modifications do not cause or exacerbate an air quality increment or air quality standard." 73 Fed. Reg. at 76,562. Thus, even under the approach taken in *Hall*, EPA has satisfied the requirements of section 110(l) because it determined that "the particular plan revision before it is consistent with the *development* of an overall plan capable of meeting the Act's attainment requirements." 273 F.3d at 1160.

US EPA ARCHIVE DOCUMENT

is supported by the record from the promulgation of the 2002 Rule and the additional analysis done by EPA regarding the likely results of implementing the PAL program in Wisconsin.

Furthermore, as discussed in section B(2) above, NRDC and Sierra Club have not shown that the proposed revisions to the Wisconsin SIP were not "adequate to maintain the status quo of air quality" in Wisconsin. *Kentucky Res. Council*, 467 F.3d at 996. They rely instead on the content of the changes alone, arguing that they necessarily "narrow[] the applicability of the NSR program and increase emissions." Pet. Br. 53. In *GHASP*, however, the court specifically rejected this line of argument, explaining: "changes to a SIP . . . are not by themselves sufficient to prove interference. Rather, one must show that the substitute measures are not at least equivalent to the previous measures in achieving attainment." 2008 WL 3471872, at *7. Where – as here – the petitioners "offer[] nothing to contradict the EPA's conclusion,"[8] that conclusion is "entitled to deference." *Id.* at *8. This is

[8] Indeed, unlike the language of CAA section 193, which suggests that EPA must make an affirmative finding (*see* 42 U.S.C. § 7515 ("[n]o control requirement . . . may be modified . . . unless the modification ensures . . . .")), the language of CAA section 110(l) suggests that EPA may approve a SIP revision so long as no showing has been made that it would interfere with attainment of, or progress towards

US EPA ARCHIVE DOCUMENT

particularly true here because EPA's conclusion is based on its technical judgment and concerns matters within the specialized expertise of the Agency, and so review of EPA's conclusion "must be at its most deferential." *Kentucky Res. Council*, 467 F.3d at 996.

Therefore, in addition to being consistent with CAA section 193, EPA's approval of the SIP revisions is also consistent with CAA section 110(*l*), and so both of NRDC & Sierra Club's "backsliding" claims fail.

III. No Additional Rounds of Notice & Comment Were Required Before EPA Approved the Wisconsin SIP Revisions.

When EPA published the proposed rule approving the revisions to the Wisconsin SIP in the Federal Register, it fully set forth the substance of those revisions and explained that they tracked the 2002 Rule. *See* 72 Fed. Reg. 19,829-34 [JA001-JA006]. Petitioner Sierra Club then made a number of comments on the proposed rule. Comments of Sierra Club, Record Item 19 [JA083]. Accordingly, when it promulgated the final rule approving the SIP revisions – which was

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attainment of, NAAQS or other air quality standards (*see* 42 U.S.C. § 7410(l) (EPA shall not approve a revision "if the revision would interfere")) – i.e., that, for their section 110(l) challenge to succeed, NRDC and Sierra Club would have had to show that the changes will make air quality worse. Regardless of where the burden lies, however, here Petitioners have not shown and EPA has not found that the Wisconsin SIP revisions will have a negative impact on air quality, and so the challenge fails.

US EPA ARCHIVE DOCUMENT

identical in terms and substance to the proposed rule – EPA responded to Sierra Club's comments, providing further analysis and discussion of the rule and its impacts in the preamble. *See* 73 Fed. Reg. 76,562-66 [JA009 - JA013].

NRDC and Sierra Club now argue that the public did not have adequate notice and opportunity to comment because EPA did not set forth the "basis for [its] decision," or the "information the agency identifie[d] as relevant to its decision" when it published the proposed rule, but rather only when it promulgated the final rule. Pet. Br. 57. "The notice and comment procedure is not met," NRDC and Sierra Club argue, "where new information is added to the record after the public's comment opportunity." *Id.* at 58.

NRDC and Sierra Club's novel take on the notice and comment process is not supported by the text of the APA[9] or the case law they cite. The APA requires only that:

> General notice of proposed rule making shall be published in the Federal Register . . . . The notice shall include--

[9] Since, as discussed in n.3 *supra*, CAA section 307(d), 42 U.S.C. § 7607(d), does not apply here, the more specific rulemaking requirements set forth in that section also do not apply. *See* 42 U.S.C. § 7607(d)(1)(B).

US EPA ARCHIVE DOCUMENT

> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b).

EPA fully complied with these requirements here. In the Federal Register, it identified the time, place and nature of the rulemaking at issue. *See* 72 Fed. Reg. 19,829 ("EPA is proposing to approve certain revisions to Wisconsin's prevention of significant deterioration (PSD) and non-attainment new source review (NSR) construction permit programs submitted on May 25, 2006." "The Wisconsin Department of Natural Resources (WDNR) is seeking approval of rule AM-06-04 to implement the NSR Reform Provisions that have not been vacated by the June 24, 2005 D.C. Circuit decision.") [JA001]. It also identified the legal authority for the proposed rule. *Id.* (discussing the relationship between the proposed rule, the 2002 Rule, and *New York v. EPA*); *id.* at 19,834 ("In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act") [JA006]. Finally, the Federal Register notice set forth the terms and

US EPA ARCHIVE DOCUMENT

substance of the proposed rule, identifying each provision or definition in the SIP to be altered, and the exact changes to the language in question. *Id.* at 19,831-34 [JA003 - JA006].[10]

Section 553(b) of the APA does not require that the agency go beyond identifying the terms and substance of the proposed rule and provide its "basis" for the rule or the "information [it] has identified as relevant" to the proposed rule, as Petitioners argue. *See* Pet. Br. 57. In fact, the APA states that a "general statement of [the rule's] basis and purpose" is to be incorporated into the "rule[] adopted" – i.e., the final rule, not the proposed rule – "*after* consideration" of the comments and views submitted by interested persons. 5 U.S.C. § 553(c) (emphasis added). Thus, EPA did nothing wrong when it responded to comments by providing additional analysis and discussion in the preamble to the final rule that was not included with proposed rule; rather, that is exactly what the APA mandates.

[10] Moreover, Petitioners had, and Petitioner Sierra Club took advantage of, the opportunity to comment on the changes to the Wisconsin permitting program when those changes were proposed at the state level. *See* State's Submittal of NSR Reform Rules, Attach. G (Background Memos and Response to Comments) at 2-10 [JA070-JA078] (identifying Sierra Club as having commented on the proposed changes and addressing comments raised). Thus, the additional round of notice and comment that Petitioners demand here would, in fact, be their third such opportunity to participate in the promulgation of the Wisconsin SIP revisions.

US EPA ARCHIVE DOCUMENT

Furthermore, while the case law cited by NRDC and Sierra Club (see Pet. Br. 57-59) supports the proposition that notice and comment may be inadequate where the final rule differs markedly from the proposed rule, it does not support the proposition that the agency must provide a full analysis along with the proposed rule, or that the public must be given the chance to respond to EPA's analysis of the comments received before the final rule is promulgated.

The language from *American Medical Ass'n v. United States*, 887 F.2d 760 (7th Cir. 1989), on which NRDC and Sierra Club rely – the statement that the agency must "apprise[] interested parties of the issues to be addressed . . . with sufficient clarity and specificity to allow them to participate . . . in a meaningful and informed manner." (Pet. Br. 57 & 59) – simply explains the well-established principle that, even if the final rule differs from the proposed rule, notice and comment was adequate so long as the final rule is a "logical outgrowth" of the proposed rule. 887 F.2d at 767 ("Stated another way, a final rule is not invalid for lack of adequate notice if the rule finally adopted is 'a logical outgrowth' of the original proposal."). The Court further explained that either of "[t]wo types of notice" are allowed by the APA: "notice which

US EPA ARCHIVE DOCUMENT

specifies the 'terms or substance' of the contemplated regulation or notice which merely identifies the 'subjects and issues involved.'" *Id.* (quoting 5 U.S.C. § 553(b)(3)). Thus, a notice "need not identify every precise proposal which the agency may ultimately adopt," so long as it identifies the issues to be decided. *Id.*

Here, however, there is no question that EPA's notice was sufficient, as it did not just identify the "issues" to be decided, but the precise "terms or substance" of the rule – and the terms of the final rule did not differ *at all* from the terms of the proposed rule. Therefore, the notice and comment issue addressed by the Court in *American Medical Ass'n* is simply not present here. The language quoted by Petitioners from *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 528 n.7 (7th Cir. 1993), and *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-59 (D.C. Cir. 2000), Pet. Br. 58, similarly addressed the "logical outgrowth" issue.[11] And in *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991), the court's statement that "EPA's notice was not sufficient to advise interested parties that comments directed to the

[11] The larger notice and comment issue addressed in *Northwest Tissue Center*, which the Court analogized to the "logical outgrowth" issue, was whether the agency had promulgated a "back door amendment" to its regulations with no notice at all. 1 F.3d at 527. Obviously, that issue is not present here either.

US EPA ARCHIVE DOCUMENT

creation of administrative exemptions should be made" was again provoked by the difference between the proposed rule and the final rule – it does not, as Petitioners would interpret it (Pet. Br. 59), mean that, when EPA proposes a rule, it must provide the public with its reasoning and rationale for that rule.

Moreover, this Court ultimately held in *American Medical Ass'n* that notice and comment *had* been adequate, even though the final rule "worked a substantial change" to the proposed rule based on the comments received. 887 F.2d at 767, 769. In so holding, the Court cautioned:

> [T]he requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions. . . . A contrary rule would lead to the absurdity that in rulemaking under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.

Id. at 767-68 (quoting *Int'l Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973)). The notice and comment requirements of the APA thus "should not be construed to place administrative agencies in the dilemma of either ignoring comments (in which case a final rule

US EPA ARCHIVE DOCUMENT

may be invalidated due to the agency's intransigence) or modifying its proposals in response to comments, thus triggering another round of notice and commentary." *Id.* at 768 n.7.

That is exactly what NRDC and Sierra Club's construction of the notice and comment requirements of the APA would do here – force the agency to decide between declining to address comments raised, or engaging in potentially endless rounds of comment. *See Personal Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995) ("Rulemaking proceedings would never end if the agency's response to comments must always be made the subject of additional comments.") (quoting *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984)).

Therefore, EPA fulfilled the requirements of the APA by providing notice of the exact terms of the proposed rule and the opportunity for the public to comment – an opportunity of which Petitioner Sierra Club fully availed itself – and it was not required to provide a further opportunity for comments simply because it chose to respond to Sierra Club's comments in the preamble to the final rule.

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IV. Wisconsin's Definition of "Major Modification" Was Not Before EPA in this Rulemaking and So Cannot Be Challenged Here.

Finally, NRDC and Sierra Club argue that, in approving the Wisconsin SIP revisions, EPA unlawfully approved a "deficient" definition of the term "major modification." Pet. Br. 59-62. As noted in the preamble to the final rule approving the revisions to Wisconsin's SIP, EPA agrees that the definition of "major modification" set forth in the Wisconsin SIP is inconsistent with the federal regulations in that it does not encompass certain types of fuel changes that are not exempted from NSR under the federal regulations. *See* 73 Fed. Reg. at 76,566 [JA013]. However, this "deficient" definition was not before EPA in this rulemaking, but in a prior rulemaking, and so it cannot be challenged here, nor can it serve as a basis for overturning EPA's approval of the SIP revisions at issue here.

This flawed definition of "major modification" formed part of the Wisconsin SIP well prior to the latest round of revisions, and was not impacted by the revisions approved by EPA here. Specifically, that definition, set forth at Wisconsin Admin. Code §§ NR 408.02(20) and NR 405.02(21)(b), was approved into Wisconsin's non-attainment NSR

program on January 18,1995, and into Wisconsin's PSD program on May 27, 1999. *See* 60 Fed. Reg. 3538 [JA211]; 64 Fed. Reg. 28,745 [JA229]. Accordingly, the 60-day window for challenging the incorporation of that language into the Wisconsin SIP has long passed, *see* 42 U.S.C. § 7607(b)(1), and EPA has not taken any further action regarding that portion of the Wisconsin SIP. Moreover, Petitioners did not comment on the proposed rule approving this portion of the Wisconsin SIP, *see* 64 Fed. Reg. at 28,746 [JA230], and thus would also have been barred from challenging it then. Therefore, NRDC and Sierra Club's attempt to challenge the approval of the Wisconsin SIP revisions on this unrelated ground must fail.[12]

CONCLUSION

For all these reasons, this Court should deny NRDC and Sierra Club's petition for review of EPA's approval of the revisions to the Wisconsin SIP.

[12] In any event, Wisconsin has never actually interpreted its definition of "major modification" as not encompassing the fuel changes in question. Moreover, EPA voluntarily raised this issue with WDNR when Sierra Club brought it to EPA's attention, *see* 73 Fed. Reg. 76,566 [JA013], and WDNR agreed to fix this language in its next major rulemaking. Thus, the issue will shortly become moot, if it is not already.

US EPA ARCHIVE DOCUMENT

Respectfully submitted,

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Dated: February 8, 2011

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CERTIFICATION OF COMPLIANCE WITH FRAP 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify:

1. that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,070 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) because this brief has been prepared in Microsoft Office Word 2007 in Century 14 pt. font, with footnotes in 12 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman

February 8, 2011

CERTIFICATION OF COMPLIANCE WITH Rule 31(e)

Pursuant to Circuit Rule 31(e), I hereby certify that a non-scanned copy of the brief in Portable Document Format (PDF) has been submitted to the Court via the ECF filing system.

/s/ Amanda Shafer Berman
Amanda Shafer Berman

February 8, 2011

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CERTIFICATE OF SERVICE

I, AMANDA SHAFER BERMAN, counsel for Respondent, do hereby certify that on February 8, 2011, I sent the original and fifteen copies of the foregoing Final Brief of Respondent Lisa Jackson, Administrator of the United States Environmental Protection Agency, to the Clerk of the Court by a third party carrier (FedEx) for delivery in accordance with Fed. R. App. P. 25(a)(2)(B)(ii). I further certify that I have served all counsel of record for Petitioners and Intervenors by sending, via FedEx, two copies of Respondent's Brief to the following addresses, in addition to emailing an electronic copy of the brief to the persons below in accordance with Circuit Rule 31(e):

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