BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
Final Rule to Implement the 8-Hour	)	
Ozone National Ambient Air Quality	)	RIN 2060-AJ99
Standard – Phase 2	)	Air Docket #OAR-2003-0079
	)	

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), Natural Resources Defense Council petitions the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 70 Fed. Reg. 71612 (November 29, 2005)("NFRM" or "final rule"). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

INTRODUCTION

This petition raises objections to the final rule captioned above. Each objection is "of central relevance to the outcome of the rule," 42 U.S.C. § 7607(d)(7)(B), in that it demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 7607(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the NFRM published on November 29, 2005. 70 Fed. Reg. 71612-705. Federal Register notices soliciting comment on the rule were published on July 23, 1996 (61 Fed. Reg. 38250), June 2, 2003, (68 Fed. Reg. 32802), and August 6, 2003 (68 Fed. Reg. 46536). The public comment period on the July 23, 1996 notice closed on October 21, 1996. 61 Fed. Reg. 38250, 38318 (July 23, 1996). The public comment period on the preamble to June 2, 2003 notice closed on August 1, 2003; the public comment period on the regulatory text (announced in the August 6, 2003 notice) closed on September 5, 2003; and the comment period on certain classification approaches closed on November 5, 2003. 68 Fed. Reg. 32802, 32802/2 (June 2, 2003); 68 Fed. Reg. 46536, 46536/1 (August 6, 2003); 68 Fed. Reg. 60054 (October 21, 2003). The grounds for the objections raised in this petition thus "arose after the period for public comment." 42 U.S.C. § 7607(d)(7)(B). Because judicial review of the rule is available by the filing of a petition for review "by January 30, 2006," 70 Fed. Reg. at 71695, the grounds for the objections arose "within the time specified for judicial review." 42 U.S.C. § 7607(d)(7)(B).

OBJECTIONS

I. Clean Air Interstate Rule as RACT

The final rule unlawfully and arbitrarily: a) determines that electric generating units (EGUs) complying with requirements of EPA's Clean Air Interstate Rule (CAIR) meet ozone NOx RACT requirements in all states where CAIR reductions are achieved from EGUs only; and b) that such states need not perform or submit RACT analyses for sources subject to CAIR that are in compliance with a SIP that has been approved as meeting CAIR. The effect of these determinations (hereinafter, collectively, "CAIR-RACT determination") is to unlawfully and arbitrarily waive the Act's RACT requirements for individual EGU sources in ozone nonattainment areas.

The CAIR-RACT determination and accompanying rationales were added to the rule after the close of the public comment period. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core procedural and substantive validity of the RACT provisions of the rule -- including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Determination that CAIR Satisfies NOx RACT Requirements

EPA unlawfully failed to present the CAIR-RACT determination and accompanying rationales to the public for comment. Under § 307(d) (which EPA has found applicable to this proceeding), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. EPA's CAIR-RACT determination and accompanying rationales are not a logical outgrowth of the proposal.

First, they did not appear in the notices or proposed rulemaking, nor did EPA otherwise present them to the public for comment. Indeed, at the time of the relevant notices of proposed rulemaking herein, EPA had not yet even proposed to adopt the CAIR rule, much less proposed to determine that the CAIR rule would suffice as RACT for any sources. For the same reasons, EPA's CAIR-RACT determination was not a logical outgrowth of the relevant proposals.

EPA's June 2, 2003 notice did propose to find that sources subject to the NOx SIP call cap-and-trade program meet NOx RACT, and that states need not perform or submit

NOx RACT analyses or SIP provisions for such sources. The NOx SIP call program, however, is not the same as the CAIR program. 70 Fed. Reg. 25162, 25176 (2005). Among other things, the CAIR program contains different requirements, covers a different universe of sources, and provides for implementation over different time frames than the NOx SIP call. The assumptions, technical analyses and findings underlying the CAIR program also differ in material respects from those relied on in development of the NOx SIP call. EPA's proposed RACT findings with respect to sources covered by the NOx SIP call did not apprise the public that the agency intended to make similar RACT findings with respect to EGUs covered by CAIR, nor did the proposal apprise the public of (or provide opportunity to comment on) all the technical and analytical grounds the agency intended to rely on in its CAIR-RACT determination. See, e.g., 70 Fed. Reg. at 71656-58 (stating various grounds for EPA's CAIR-RACT determination, none of which appeared in the proposal notices or underlying documents).

For all the foregoing reasons, EPA committed a procedural violation (*see* § 307(d)(9)(D)) by failing to solicit public comment on its CAIR-RACT determination. That procedural violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). The agency has purported to make a blanket RACT determination for certain EGU sources covered by a program that had not even been proposed at the time of public notice and comment, and that differs materially from the pre-existing regulatory regime. Yet the agency has not deigned to seek the public's views on that determination.

Second, via the present petition, petitioner have satisfied the requirements of § 307(d). *See* § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8), *cited in* § 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some small aspect of the challenged provisions. Rather, it failed to seek comment on the fundamental approach they embody -- an approach that has the effect of exempting a large category of major sources from installing additional pollution controls mandated by the Act. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below -- objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

B. EPA's CAIR-RACT Determinations Are Unlawful and Arbitrary.

EPA's CAIR-RACT determinations violated the Act and fundamental standards of reasoned agency decision-making

(1). EPA's Action Illegally Abrogates the Act's RACT Requirements

EPA's CAIR-RACT determination illegally substitutes controls on sources outside of ozone nonattainment areas for controls that the Act requires on sources within each nonattainment area. Section 172(c)(2) of the Act requires the SIP for each ozone nonattainment area to "provide for . . . such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT]." Likewise, §182(b)(2) requires each moderate and above ozone nonattainment area to require RACT for specified sources "in the area" and "[a]ll other major stationary sources of VOCs [and, pursuant to §182(f), NOx] that are located in the area." Thus, the statute unambiguously requires application of RACT to sources located "*in the area*." As EPA concedes, CAIR allows existing major EGU sources located in a nonattainment area to avoid adopting *any* controls as long as they can purchase the requisite number of allowances. There is no requirement that such allowances come from emission reductions in the same nonattainment area or even a nearby one. Indeed, under CAIR, such allowances can be generated by emission reductions by a source a thousand miles downwind from the nonattainment area in question. EPA is completely without authority to abrogate the Act's RACT requirements in this manner. Because EPA's CAIR-RACT determinations allow existing sources within a nonattainment area to avoid adoption of RACT controls, those determinations violate the express terms of the Act, including §§172(c)(2) and 182(b)(2).

(2) EPA's CAIR-RACT Determinations Are Unlawful and Arbitrary

EPA has long defined RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." 44 Fed. Reg. 53762 (9/17/79). At the time Congress adopted the 1990 Clean Air Act Amendments, this definition of RACT was well-established. Thus, RACT requires a source-specific inquiry into the lowest emission limitation that a "particular source" is capable of meeting. EPA's CAIR-RACT determination is unlawful and arbitrary because it is not based on such a source-specific inquiry, and because EPA has neither found nor demonstrated that participation in the CAIR program will require each covered source to achieve the lowest emission limitation it is capable of meeting. To the contrary, under EPA's approach, a specific CAIR-covered source need not install any control technology at all, let alone achieve the lowest emission limitation it is capable of meeting, as long as it holds enough allowances.

For example, EPA itself has projected that significant portions of the total capacity of EGUs burning coal will lack advanced pollution controls in 2010, 2015 and 2020. In a CAIR presentation to the 98th annual conference of the A&WMA on June 23, 2005, an EPA speaker admitted that 163 GW out of 244 GW total coal capacity in the CAIR region would lack FGD or SCR for SO2 and NOx, respectively, in the year 2010. By 2015, 129 GW out of 242 GW total coal capacity in the CAIR region would lack FGD or SCR for SO2 and NOx, respectively. And by 2020, 108 GW out of 252 GW total coal capacity in the CAIR region still would lack FGD or SCR for SO2 and NOx, respectively. See attachment for specific breakdown of coal capacity with and without advanced technology.

Examining EPA's IPM data that accompanied CAIR, one learns that under CAIR in 2015, approximately 440 coal-fired EGUs lack advanced pollution controls out of a total of about 1,175 such units. And under CAIR in 2020, about 500 coal-fired EGUs lack advanced pollution controls out of a total of about 1,200 such units.

Many of these units are either in areas that presently are in nonattainment with the 8-hour ozone standard or areas that could fall into nonattainment with the 8-hour standard. And these units are among those that will purchase allowances rather than adopt pollution controls to comply with CAIR. By allowing any of these units to avoid "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility," EPA's CAIR-RACT determination is arbitrary and unlawful.

EPA's claim that CAIR alone will achieve greater overall reductions than RACT is both legally irrelevant and factually incorrect. The Act does not give EPA the option of requiring CAIR or some other strategy in lieu of RACT. Rather, as discussed above, the Act mandates RACT "at a minimum" in nonattainment areas regardless of what other strategies may be employed. Further, EPA's claim that CAIR will achieve greater overall reductions is based on total regional reductions under CAIR – not on reductions within a given nonattainment area where a source is being allowed to forego RACT. The Act does not give EPA the option of foregoing mandated reductions within one nonattainment area on the grounds that greater reductions will be achieved somewhere else.

Even if it were legally relevant, the claim that CAIR will achieve greater reductions without RACT is unsupportable. RACT will plainly provide additional reductions from sources that install no (or less-than-RACT) controls under CAIR. EPA's assertion to the contrary is based on the use of regional (rather than local) reductions as the basis for comparison, and on the presumption that RACT reductions could be used by sources for CAIR allowances. As discussed above, however, the requirement for RACT reductions in a given nonattainment area cannot be offset or negated by reductions elsewhere. Even if it could, EPA can (and indeed, as discussed above, must) require RACT reductions on top of CAIR reductions. To the extent that the RACT requirement complicates EPA's implementation of CAIR, that is a problem of EPA's own making that must be addressed within the context of CAIR. Requiring both CAIR and RACT would further effectuate the different purposes served by the two programs: CAIR is designed to prevent states from significantly contributing to nonattainment in other states, while RACT is required to reduce emissions *within* individual nonattainment areas. Furthermore, EPA concedes that CAIR alone will not be sufficient to produce attainment in all nonattainment areas. The agency cannot lawfully or rationally declare that CAIR constitutes RACT when CAIR allows sources to go without controls that would otherwise be required under RACT in nonattainment areas that will or may continue to violate standards after CAIR is implemented. EPA's action also unlawfully and arbitrarily ignores the possibility that requiring both RACT and CAIR will produce faster RFP and earlier attainment than CAIR alone.

To the extent that EPA is claiming that the test for establishing the CAIR level of control is equivalent to or more stringent than RACT, EPA is also mistaken. The CAIR level of control is based on EPA's assessment of controls that are "highly cost effective" in reducing significant contribution to downwind nonattainment. The RACT level of control is based on the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. As shown above, the two tests are not equivalent. Nor has EPA conducted any analyses demonstrating that CAIR-level control is more stringent on a source-by-source basis. EPA offers nothing but speculation that source-specific RACT "could result in more costly emission reductions on a per ton basis." 70 Fed. Reg. at 71657. EPA bases this speculation on more speculation – i.e., that if States chose to require smaller emitting sources in nonattainment areas to meet source-specific RACT by 2009, they would likely use labor and other resources that would otherwise be used for control on larger sources where the cost per ton of reductions would allegedly be cheaper due to economies of scale. Id. EPA cites no data or analyses supporting any of these musings, and they defy common sense.[1] There is no reason to expect that states would focus mainly on smaller sources for RACT requirements: Indeed, the sources at issue here are the very same ones covered by CAIR – major EGUs that emit significant quantities of NOx. States would have every incentive to focus on the largest sources where RACT would produce the most benefit and where RACT would be most cost effective. Moreover, there is no evidence that labor and resources would be diverted from control on larger sources.

Indeed, contrary to EPA's assertions, the evidence shows that standards for RACT-level control are more stringent than provided by CAIR According to EPA, the estimated average costs of region wide ozone season NOx control under CAIR are $1,800 per ton in 2015 and $900 per ton in 2009 [in 1999 dollars]." 70 FR 25212/2. EPA further believes that actual costs of CAIR controls will be lower than these figures. Id. Moreover, the "highly cost effective controls" that are the benchmark for CAIR reflect the lower end of average and marginal cost ranges for SO2 and NOx control. Id. 25203. In contrast, states have adopted RACT requirements for ozone precursors with costs per ton well in excess of these so-called "highly cost effective controls" under CAIR. For example, well over a decade ago New Jersey adopted NOx RACT requirements (NJAC 7:27-19) with costs as high $4,500 per ton; adjusted for inflation, such costs would be even higher in today's dollars and for the future years when RACT requirements apply. In other instances, RACT reflects controls costing $8,000 to $10,000 per ton. See, e.g., Metropolitan Washington Council of Governments, Plan to Improve Air Quality in the Washington DC-MD-VA Region (Feb. 19, 2004) at 8-3, http://www.mwcog.org/uploads/committee-documents/ylZbVw20040217115150.pdf (copy attached hereto). Thus, RACT requires sources to put more into pollution controls than required for the "highly cost effective" control level ostensibly provided by CAIR.

As to EGUs specifically, the final CAIR rule chose to forego highly cost-effective controls with per-ton costs well below the RACT figures just cited, in order to avoid

[1] EPA itself concedes that local emission reductions may be more cost effective in some ozone nonattainment areas. See 70 Fed. Reg. at 25193.

additional emissions reductions from the electric utility sector beyond what the President's "Clear Skies" legislation would achieve. In adopting the final CAIR rule, EPA was well aware that states already were resorting to NOx control strategies well in excess of the $900 per ton and $1,800 per ton that EPA determined region wide ozone season NOx controls would cost EGUs in 2009 and 2015, respectively. See 70 FR 25208/3 (table shows average annual costs in 1999 dollars up to $2,800 per ton, except for the Texas emission reduction grants, which cost up to $12,700 per ton). Indeed, CAIR itself departed downward from the highly cost-effective control precedent established in the NOx SIP Call rulemaking, where the agency determined that NOx controls were highly cost-effective when the cost of ozone season NOx emissions removed were $2,500 per ton in 1999 dollars. See 63 FR 57399/3.

By deeming CAIR controls to be equivalent to RACT, EPA is unlawfully and arbitrarily seeking to insulate uncontrolled or poorly controlled EGUs in current or future nonattainment areas from still cost-effective controls that would qualify as RACT, yet exceed the "highly cost effective control" costs under CAIR. This EPA may not do. As the foregoing discussion shows, EPA's unlawful enterprise would have the perverse effect of forcing states to seek more costly, less cost-effective controls from other polluting sectors to come into attainment, while continuing to impose more costly existing control measures as RACT on non-EGUs.

EPA's final phase II ozone rule seeks to deflect criticism over this perverse and unlawful outcome by flatly misrepresenting the prevailing state of RACT control costs. Pointing to 12 and 14 year old agency guidance documents, EPA suggests that it is appropriate for states to consider in their NOx RACT determinations technologies that fall within the guidance's cost range of $160-1300 per ton of NOx removed. 70 FR at 71654/2. The agency states its belief that new RACT determinations under the 8-hour standard should result in the same or similar control technologies costing no more than $160-$1300 per ton of NOx removed. Id. 71654/3.

This is absurd and renders EPA's RACT approach even more arbitrary and unlawful. The 1992 and 1994 agency guidance in question are hopelessly outdated and wildly inconsistent with RACT control costs that states are imposing today. Tellingly, EPA's preambular discussion does not even pretend to claim that the $160-$1300 cost range is consistent with state RACT costs, whether average or upper end costs. Nor does EPA explain why the agency failed to examine a representative sample of state RACT costs, or project what such costs would be over the period corresponding to the 8-hour ozone attainment statutory deadlines. Finally, the agency does not even bother to explain why it is reasonable to rely upon 12 and 14 year old guidance that the agency has never updated – to reflect inflation, to reflect actual RACT control costs, or to reflect the advancement of technology consistent with the statutory RACT definition. Instead, the agency woodenly responds that its "current guidance" "assume[s]" RACT costs to be within $160-$1300 per ton. This is arbitrary.

By the same token, it is arbitrary and unlawful for EPA to take the position that "VOC RACT guidance, including CTGs and ACTs, may continue to be used by States in

making RACT determinations with respect to the 8-hour ozone standards." 70 FR 71655/2. Such guidance are static and therefore outdated, making them inappropriate for reliance by states in reaching RACT determinations that depend upon the current and future availability of technically and economically available controls – not controls that EPA deemed acceptable in the late 1970s through mid-1990s when the agency issued the guidance. At best, such guidance documents reflect floor levels of control below which states can never go: They do not and cannot reflect a presumptive ceiling for present-day RACT control levels, nor can they relieve states of the obligation to conduct up-to-date RACT evaluations for each source or source category to ensure that each source is in fact subject to the lowest emission limitation that the source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility

Finally, CAIR controls are also not equivalent to RACT because the schedule for fully implementing CAIR controls is far more protracted than the RACT schedule mandated in the Act. According to EPA, almost half of the ozone season CAIR NOx reductions will not occur until 2015. See EPA, Projected Seasonal NOx Emissions from Power Plants with the Final Clean Air Interstate Rule (p3) (http://www.epa.gov/cair/charts_files/cair_emissions_costs.pdf). In contrast, the Act and EPA's own rules require full implementation of RACT in moderate and above areas by the 2009 ozone season.

II. Relaxation of NSR Requirements

The final rule makes several changes in requirements governing nonattainment new source review, including: a) a change that allows NSR permit applicants to claim offset credit from preapplication shutdowns or curtailments, even in areas that lack approved attainment demonstrations; and b) a change that allows EPA to waive NSR requirements for a new or modified source in certain circumstances where EPA makes a source specific finding that the attainment date has not yet passed, the source meets applicable SIP emission limits, and the source will not interfere with timely attainment.

As further discussed below, portions of the above-referenced NSR rule changes were significantly modified after the close of the public comment period in ways that did not reflect logical outgrowths of the proposal. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core procedural and substantive validity of the NSR provisions of the rule -- including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. Offset Credit for Preapplication Shutdowns and Curtailments

(1). EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Provisions Allowing Offset Credit for Preapplication Shutdowns and Curtailments

EPA unlawfully failed to present portions of the rule's shutdown-curtailment offset provisions (hereinafter, collectively, "SCO rule") and accompanying rationales to the public for comment. Under § 307(d) (which EPA has found applicable to this proceeding), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. EPA's SCO rule and accompanying rationale are not logical outgrowths of the proposal.

First, the final SCO rule changes the circumstances under which emission reductions from pre-application shutdowns or curtailments can be used as offsets in the absence of an approved attainment demonstration. Under the proposed rule, such emission reductions could be used as offsets only if they occurred "after the last day of the baseline year of the most recent base year emission inventory used (or to be used) in the plan." Under the final rule, such emission reductions can be used as offsets if they occur after "the last day of the base year for the SIP planning process." 70 Fed. Reg. 71676. The change is material because it allows offsets from pre-application shutdowns and curtailments even in the absence of an emissions inventory for the attainment plan. Although petitioner contends that both the proposed and final versions of the SCO rule violate the Act (for reasons further discussed below), the final version expands the scope of the proposal's unlawful exemption. Under the proposal: a) emission reductions from pre-application shutdowns and curtailments could not be used as offsets in the absence of a baseline emission inventory for the area; and b) the shutdown or curtailment would represent a real reduction from the emission inventory levels that have been or will be relied on in the area's attainment demonstration. The final rule drops these key requirements. Moreover, because EPA did not propose the less protective SCO rule that was finally adopted, its final rule was not a logical outgrowth of the proposal.

Second, the final SCO rule allows a reviewing authority to deem a prior shutdown or curtailment to have occurred "after the last day of the base year if the projected emission inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emissions unit." Id. This new provision did not appear in the proposed rule, nor was it suggested by the proposed rule. The new provision is a significant change because it could allow *pre*-baseline reductions from shutdowns or curtailments to be used as post-baseline offsets: something not allowed under the proposed rule. The new provision would arguably allow such a result as along as the state explicitly included emissions from the prior shutdown or curtailment in the attainment demonstration inventory. The new provision is not a logical outgrowth of the proposal, which contained none of these provisions and which limited offset credit to reductions occurring after the baseline year.

For all the foregoing reasons, EPA committed a procedural violation (*see* § 307(d)(9)(D)) by failing to solicit public comment on the above-described provisions of

the final SCO rule. That procedural violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). The agency has purported to markedly change the criteria for granting offset credit to reductions from pre-application curtailment/shutdown reductions in ways that had not even been proposed at the time of public notice and comment, and that differ materially from the pre-existing regulatory regime. Yet the agency has not deigned to seek the public's views on that determination.

Second, via the present petition, petitioner have satisfied the requirements of § 307(d). *See* § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8), *cited in* § 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some small aspect of the challenged provisions. Rather, it failed to seek comment on the fundamental approach they embody -- an approach that has the effect of abrogating the Act's express mandate for offsets for new and modified major sources. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below -- objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

(2) The Final Rule's Provisions Allowing Offset Credit for Preapplication Shutdowns and Curtailments are Unlawful and Arbitrary

EPA has no authority to allow the use of emission reductions from pre-application shutdowns or curtailments as offsets under the Act's NSR provisions. The Act plainly provides that NSR offsets must represent additional reductions achieved *after* the NSR permit application. CAA § 173(a)(1)(A)(requiring offsets to ensure that total allowable emissions will be sufficiently less than total emissions "prior to the [NSR permit] application" to ensure RFP). See also CAA §173(c)(1) (requiring that increased emissions from a new or modified major source "shall be offset" by an equal or greater reduction). EPA's SCO rule violates the Act because it allows a new source to claim offsets from reductions that occurred long before the source's NSR permit application. Indeed, EPA's final SCO rule allows use of such pre-application offsets before the state even knows the degree of emission reductions needed to assure RFP, and before the state has even developed a baseline emission inventory.

The final rule further violates the Act to the extent that it allows a source to claim offsets from reductions that occurred prior to the baseline year for the attainment demonstration. The Act does not allow such old reductions to qualify as offsets, for reasons set forth above, and the violation is not cured by adding the emissions from the prior shutdown or curtailment to the attainment demonstration inventory. The Act requires an offset in "actual emissions," §173(c)(1), so that total emissions are actually reduced. The offset requirement is not met by manipulating the emission inventory

and/or attainment demonstration to reflect fictional emissions and then claiming that these fictional emissions are offset. Nor can EPA claim that adding emissions from the prior shutdown or curtailment to the attainment inventory somehow cures the lack of post-application offsets: The statute does not give EPA the option of waiving real offsets and real emission reductions merely because emissions from the curtailed or shutdown activity are "accounted for in attainment planning." EPA's approach is also arbitrary and capricious, because EPA has failed to show how allowing offset credit for pre-application reductions in the manner provided by the SCO rule will assure compliance with the above-cited provisions of §173 of the act.

B. Waiver of NSR Requirements in Certain Nonattainment Areas

(1) EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Provisions Allowing Waiver of NSR Requirements in Certain Nonattainment Areas

EPA unlawfully failed to present the final rule's approach to applicability of Appendix S and the transitional NSR program, and accompanying rationales, to the public for comment. Under § 307(d), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. As further explained below, the final rule and accompanying rationale are not logical outgrowths of the proposal.

EPA's June 2, 2003 notice proposed a subpart S "transitional" NSR program for 8-hour ozone nonattainment areas for which states do not have approved SIP NSR programs. This program would be available only to 8-hour nonattainment areas governed by subpart 1. In addition, to be eligible for the transitional option, by the date EPA published the 8-hour designations, a subpart 1 area would have to: 1) Be attaining the 1-hour ozone standard; 2) have submitted an attainment plan that demonstrates attainment within 3 years after designation, and include measures required by the NOx SIP call; 3) have submitted an attainment plan containing any additional local control measures needed for attainment of the 8-hour standard. 68 Fed. Reg. 32486-87. SIPs for such areas would have to commit the State to implement, by December 31, 2007, all measures necessary to bring the area into attainment by 2007. Requirements for offsets and possibly LAER would be relaxed in areas qualifying for transitional status. Id. 32847. Transitional status would end at the earlier of 6 months after the submission of an attainment demonstration with a maintenance plan (due by the attainment date in 2007) or upon EPA approval of such a plan. Id. 32848.

EPA's final rule (promulgated November 29, 2005) took a markedly different approach from the proposal. In the final rule, EPA took the position that the existing language of section VI of Appendix S, as amended by language that did not appear in the proposal, would authorize case-by-case EPA waiver of NSR requirements in any newly designated or redesignated nonattainment area lacking an approved Part D program for a new or revised NAAQS. 70 Fed. Reg. 71679, 71704. The final rule did not impose any

of the proposed restrictions (described above) on eligibility of nonattainment areas for relaxed NSR requirements. Furthermore, EPA established no absolute end date (other than the attainment date) for the transitional period during which these relaxed NSR requirements could apply. Nowhere did EPA propose such an approach. Although the agency proposed a variety of options for a transitional NSR program, none of them came close to the approach finally adopted, under which NSR requirements can be waived indefinitely without any of the proposed restrictions on such waiver authority, save that the waiver not interfere with attainment. Nor did the proposed rule contain any of the language added by EPA in the final rule providing for case-by-case NSR waivers. 70 Fed. Reg. 71704. Thus, the final rule is not a logical outgrowth of the proposal.

For all the foregoing reasons, EPA committed a procedural violation (*see* § 307(d)(9)(D)) by failing to solicit public comment on the above-described approach taken in the final rule. That procedural violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). The final rule takes an approach to NSR waivers that was not proposed at the time of public notice and comment, and that differs materially from the proposed alternatives. Yet the agency has not deigned to seek the public's views on that approach.

Second, via the present petition, petitioner have satisfied the requirements of § 307(d). *See* § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8), *cited in* § 307(d)(9)(D)(iii). EPA failed to seek comment on an approach that abrogates the Act's express mandate for new source review in nonattainment areas, for a potentially indefinite period. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below -- objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

(2) The Final Rule's Provisions Allowing Waiver of NSR Requirements in Certain Nonattainment Areas are Unlawful and Arbitrary

Comments by petitioner and other environmental groups on the proposed rule explained why EPA has no authority to waive NSR requirements in areas designated nonattainment under the Act. Comments of Clean Air Task Force, *et al*., on EPA Docket No. OAR 2003-0079 (August 1, 2003) at 72-79; and Comments of Clean Air Task Force, *et al*., on EPA Docket No. OAR 2003-0079 (September 5, 2003) at 11-13. Those comments are incorporated herein by reference. The final rule is unlawful and arbitrary not only for the reasons stated in our prior comments, but also for additional reasons.

First, EPA justified the final rule's transitional NSR program as a gap filler: The agency took the position that "the SIP development period provided for in section 172(b)

leaves a gap in part D major NSR permitting" and "that this gap is to be filled with an interim major NSR program that is substantially similar to the requirements of part D," including requirements for LAER and offsets. 70 Fed. Reg. 71678. EPA further stated that this gap filling program was supported by §§101(b)(1), 110(a)(2)(C), and 301(a) of the Act. Id. Petitioner agrees that EPA can and must ensure that NSR requirements apply in all nonattainment areas where the state has not yet adopted an NSR program of its own that meets Part D requirements. The agency's logic, however, does not support allowing EPA or a state to then waive NSR requirements on a case-by-case basis as part of a transitional program. None of the Act's provisions establishing NSR permitting requirements provide for or allow such waivers. CAA§§ 110(a)(2)(C), 173, 182(a)(2)(C). Contrary to EPA's suggestion, §110(a)(2)(C) does not imply authority to waive NSR requirements, but rather expressly requires each SIP to include "a permit program as required in parts C and D," and part D does not allow for waiver of NSR permitting requirements in nonattainment areas. EPA's rationale in support of the final rule is therefore not only contrary to the Act, but also inconsistent with the Agency's stated intent of providing a gap-filling NSR program that is "substantially similar to the requirements of part D" (which do not allow such waivers).

Second, even if EPA could justify allowing NSR waivers as part of a gap filling program, the agency has offered no rationale (and none exists) for allowing such waivers after the statutory deadline for completion of the state's Part D SIP development process. According to EPA itself, the "gap" is over after that deadline: But the final rule appears to allow continued issuance of NSR waivers even if the state has failed to timely submit a part D SIP. Again, the final rule is arbitrary and capricious because it allows NSR waivers even after EPA's stated justification for allowing such waivers no longer exists.

Conclusion

EPA must reconsider the final rule for all the reasons set forth above.

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/s/ *David S. Baron*_____
David S. Baron
Earthjustice
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel for Petitioner