

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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| In the Matter of the Final Rule:         | ) |                       |
|  | ) |                       |
| Approval and Promulgation of Air Quality | ) | EPA-R05-OAR-2006-0609 |
| Implementation Plans; Wisconsin; NSR     | ) |                       |
| Reform Regulations                       | ) |                       |
|  | ) |                       |

**OBJECTION TO PETITION FOR RECONSIDERATION BY THE AMERICAN COKE  
AND COAL CHEMICALS INSTITUTE, THE AMERICAN CHEMISTRY COUNCIL,  
AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN IRON AND  
STEEL INSTITUTE, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL  
ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL OILSEED  
PROCESSORS ASSOCIATION**

**Introduction and Summary**

On December 31, 2002 the Environmental Protection Agency (EPA) published in the Federal Register revisions to its Clean Air Act "new source review" program. These revisions are commonly called the NSR Reform Rules.

Soon after these rules were issued, the State of Wisconsin began an extensive rulemaking, in which all interest groups had a full opportunity to take part, to consider whether and how to adopt the NSR Reform Rules into its State Implementation Plan (SIP). In 2007 Wisconsin did adopt them. EPA then approved those revisions. See 72 Fed. Reg. 19829 (April 20, 2007)(proposed approval); 73 Fed. Reg. 76560 (December 17, 2008)(final approval).

Now the Natural Resources Defense Council and the Sierra Club (NRDC/Sierra) have challenged that approval in court, and have filed an administrative petition (the Petition) with EPA to withdraw its approval. The Petition argues that adopting these revisions will lead to emissions increases that will violate the "antibacksliding" provisions of the Clean Air Act.

The trade associations listed above urge EPA to reject the Petition for multiple reasons.<sup>1</sup>

Specifically:

- Wisconsin concluded after full consideration that adopting these rules would **not** increase emissions and EPA after full consideration agreed. These conclusions are entitled to deference. The Petition's arguments to the contrary are misleading, incomplete, and deserve no weight.
- NRDC/Sierra had every opportunity to raise any issues of concern during the rulemaking proceedings and, in fact, did so.
- Far less is at stake here than the Petition contends. Although it argues for a complete suspension and reversal of EPA's approval, its arguments cannot conceivably lead to that result. The antibacksliding provisions on which it relies apply only in nonattainment areas. Only a few counties in Wisconsin are nonattainment. Moreover, it is overwhelmingly likely that no further actions would be required by these regulatory provisions even in those counties.
- The Petition can also be read as a collateral attack on the NSR Reform Rules. EPA adopted the NSR Reform Rules seven years ago to fix long-standing problems with the NSR program. Maintaining those reforms will continue to encourage energy efficiency and reductions in greenhouse gases.
- All the regulatory provisions at issue here have survived judicial review. The Petition's arguments that the D.C. Circuit somehow found the rules suspect, and that the rules will lead to emissions increases, are unsupported and misleading. There is no reason for EPA

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<sup>1</sup> Appendix A gives a description of each trade association and its membership.

to give such a long-established rule a grudging application, or to re-examine it at this time.

Our discussion follows. We will focus first on Wisconsin issues, and then on the Reform Rules.

### **Wisconsin Issues**

#### **Both Wisconsin and EPA Properly Concluded that Adopting the NSR Reform Rules Would Not Increase Wisconsin Emissions**

The Petition claims that a "Wisconsin state study" found that adopting the NSR Reform Rules would increase emissions, and that the study was ignored throughout the rulemaking proceeding.

Here are the facts. In 2003 an employee of Wisconsin DNR conducted a "back of the envelope" evaluation of the possible effect of the NSR Reform Rules on fourteen permit projects that had been undertaken at Wisconsin stationary sources in 2002. That assessment was based largely on a study submitted to EPA by critics of the Reform Rules which EPA subsequently rejected. See Environmental Integrity Project *Reform or Rollback? How EPA's Changes to NSR Affect Air Pollution in 12 States* (2002). The Wisconsin employee's cursory analysis consisted of a page of emissions calculations and a Power Point briefing without supporting detail.

This study was reviewed by a public-private Technical Advisory Group ("TAG") charged with helping Wisconsin implement the NSR Reform Rules. The Sierra Club was invited to participate in the TAG but declined.

The TAG reviewed numerous studies and comments explaining in detail the analytical and factual deficiencies of the 2003 assessment, and a more thorough report concluded that after correcting these defects, objective analysis showed that adopting the NSR Reform Rules would

decrease emissions. See, e.g. Environmental Resources Management *Peer Review of EIP and WDNR Estimated Emission Impacts Resulting from the New NSR Rule* (2005).

As a result, both the State of Wisconsin and EPA agreed that adopting the NSR Reform Rules would reduce emissions in Wisconsin.

### **NRDC /Sierra Have Had Every Opportunity to Raise Their Issues and in Fact Have Already Raised Them**

The Petition relies for its factual and analytic case almost entirely on documents already submitted to, evaluated, and rejected by either EPA or the court or both in connection with the NSR Reform Rules. Thirty-two out of the thirty-five documents listed in the Attachments section of the Petition fit this description. Major sections of the Petition's argument –see, for example, pp 6-7, 10, 13-14- rely entirely on those documents. There is no need – and no justification – for EPA to consider these documents yet again.

The remaining three documents in the Attachments relate to the preliminary assessment by Wisconsin DNR staff referred to above, which Sierra Club submitted as part of its comments on EPA's proposed SIP approval. Sierra Club presented this document to EPA as though it were new to the Sierra Club and new to the rulemaking process. As we have explained, it was neither.

### **The Issues Raised by this Petition are Far Narrower than the Petition Suggests**

The Petition asks EPA to completely stay and then completely reverse its approval of the NSR Reform Rules in Wisconsin. But there is no way the legal arguments in the Petition can support that result.

At bottom, the Petition argues that approving the Reform Rules in Wisconsin will lead to emissions increases that violate the antibacksliding requirements of CAA §§193 and 110(l).

But these provisions by their plain language only apply in nonattainment areas. Only ten of Wisconsin's 72 counties are nonattainment. See

<http://dnr.wi.gov/air/aq/ozone/nonattainment.htm#maps> (visited June 17, 2009)

The Petition has not offered any reason to disturb EPA's approval in the remaining 62 counties.

Moreover, §193 at its furthest reach only forbids relaxing control requirements that were required by the Clean Air Act as it existed before the 1990 amendments – almost twenty years ago. At that time the CAA rules for nonattainment areas were far weaker than they are now.

Section 110(l) forbids EPA to approve any plan revision that would interfere with efforts to make progress toward or attain air quality standards, or with any other applicable requirement of the Clean Air Act. This provision expresses a truism – namely, that changes in implementation plans must conform to the statute they implement – that is hardly favorable to a reading that would aggressively extract new duties from it.

Moreover, as EPA's approval notes, even changes at a Wisconsin source that are not subject to Federal NSR will be subject to State NSR designed precisely to make sure that no air quality damage will result. 68 Fed. Reg. 76562.

As with §193, the Petitions factual showing is far too weak and unsubstantiated to trigger §110(l).

### **Reform Rules Issues**

#### **EPA Adopted the NSR Reform Rules to Address Pressing Problems with the Clean Air Act**

The Petition seeks to portray the Reform Rules as poorly considered and suspect regulations that EPA should implement reluctantly if at all. This is the reverse of the truth.

The NSR provisions of the Clean Air Act require any "major source" of air pollution to get a preconstruction permit and install controls whenever it makes a "physical change or change in the method of operation" that would increase its emissions by a "significant" amount.

Before 2002, EPA generally decided whether a change would increase emissions significantly by subtracting the emissions of the affected unit during a "baseline" period defined as the most recent two years from its "potential emissions." A unit's potential emissions are the maximum it could physically emit in a year without violating the law.

In fact, sources never emit at "potential emissions" levels for anything like a full year. Beyond that, emissions in the most recent two years often do not reflect the full range of a source's operations over a business cycle. For these reasons, under this accounting system quite literally **any** physical or operational change at any sizeable emissions unit would trigger NSR simply because of the apples to oranges nature of the accounting rules, regardless of its real emissions consequences. That in turn discouraged all such changes, and most notably discouraged changes to improve energy efficiency.

To correct these problems, the NSR Reform Rules, after full notice and comment proceedings:

1. Allowed sources to use a longer baseline period to determine past emissions while tightening other elements of the algorithm for determining past emissions; and
2. Made clear that computations of future emissions should consist of a projection of actual future emissions rather than a simple assumption that the source would emit as much as it physically and legally could.

The NSR Reform Rules also established a special accounting system for sources that accepted an overall "cap" on their emissions, called a "Plantwide Applicability Limit" or PAL. It found that

PALs would both reduce emissions and simplify the compliance process for the sources that had them.

EPA accompanied the NSR Reform Rules with a supporting evaluation of their emissions consequences. "Supplemental Analysis of the Environmental Impact of the 2002 NSR Reform Rules" (the Supplemental Analysis).

EPA reconsidered and reaffirmed these provisions and the Supplemental Analysis in response to requests from NRDC/Sierra among others. See, 68 Fed. Reg. 63021(November 7, 2003). Four years ago the D.C. Circuit upheld these rule provisions. *New York v. EPA*, 413 F.3d. 3.

In short, the NSR Reform Rules were adopted and judicially affirmed after full consideration to address pressing problems with the old NSR system, most notably the discouraging of energy efficiency projects. The Petition in no way suggests these problems were not real. For these reasons, EPA should leave the NSR Reform Rule in place, and allow States to rely on it, in order to preserve the improvements it made including the greenhouse gas reductions that come from energy efficiency projects.

### **The Petition Offers No Reason to Believe that the NSR Reform Rules Will Lead to Emissions Increases**

The Petition insinuates repeatedly that the NSR Reform Rules will lead to emissions increases in general and that therefore it will lead to emissions increases in Wisconsin. Almost all of the material put forward in support of this contention was previously presented to – and rejected by – EPA or the D.C. Circuit or both and deserves no additional response now.

We will, however, address two points that are new in this Petition.

## **The Invalidation of the Clean Unit and Pollution Control Project Exclusions**

The D.C. Circuit rejected two elements of the NSR Reform Rules that are not at issue in this proceeding. These elements exempted emissions due to pollution control projects from NSR, and established special NSR accounting rules for "clean units". The court suggested that EPA might want to reassess its projections of the NSR Reform Rules' emissions consequences in light of these changed circumstances. *New York v. EPA* at 44.

NRDC/Sierra have made this statement a central element of their Petition, referring to it four times. (See, Petition pp. 7, 9, 10,11). However, they leave out two things.

First, EPA has **already** responded to this specific concern. The NSR Reform Rules had five major elements, three of which the court upheld and two of which it did not. The Agency's Supplementary Analysis assessed the emissions consequences of each of these five elements separately, even though the Petition claims flatly it did not. Petition p. 9<sup>2</sup>. The Supplementary Analysis found that **each** of the five elements would reduce emissions, and **none** of them would increase emissions.

Second, it is disingenuous at best for NRDC/Sierra to claim that the NSR Reform Rules are more likely to increase emissions without the pollution control and clean unit provisions than with them. The Wisconsin assessment on which their Petition centrally relies reached exactly the opposite conclusion. It attributed an important share of the emissions increases it foresaw precisely to these two provisions. However, the Petition makes no reference to this contradiction.

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<sup>2</sup> The Petition also claims falsely that the two provisions struck down were those predicted to have the greatest environmental benefit. In fact EPA projected each of them to have only a small benefit, and found that the provision for emissions caps on individual sources – which remains in place – would produce far greater emissions reductions. *See* 68 Fed. Reg. 44625.

## **The D.C. Circuit's Suggestion that EPA Stand Ready to Reassess the NSR Reform Rules in the Light of Experience in No Way Supports the Petition or Undermines the Reform Rules**

The D.C. Circuit found the elements of the Reform Rules at issue here fully supported by the record and by EPA's analysis. The court also suggested that EPA should stand ready to reassess that support in the light of actual experience with the rule. *New York v. EPA* at 30-31.

That, however, does not undermine the validity of the predictive judgments themselves. Indeed, the court introduced and followed this discussion with two separate statements upholding EPA's decisions as reasonable. *Id.*

Instead, this passage follows many other decisions in advising agencies to examine how their rules work in practice and be ready to amend them if experience so recommends. We agree with that principle.

Nothing in the court's discussion suggests that EPA should be any more reluctant to implement the NSR Reform Rules than it should be to implement any other fully considered and judicially approved regulation. Nothing in that passage even remotely hints that EPA must or should make each individual state adoption of the NSR Reform Rules a vehicle for comprehensively reexamining the NSR Reform Rules themselves. On the contrary, the court refers repeatedly to reconsideration as a generic review of the impacts of the rules as a whole, not as multiple piecemeal assessments of each individual circumstance in which it might be applied.

Nothing in the Petition presents the kind of new data based on experience that the court envisioned. On the contrary, the Petition attacks Wisconsin for relying in its analysis on actual experience from Michigan. Indeed, the entire intent of the Petition is to **prevent** EPA from gathering that experience and that information. The Petition's case for that prevention rests entirely on predictions of the future impact of adopting the Reform Rules. Unlike the predictions

on which EPA relied, these assertions have been repeatedly rejected by the regulatory authorities and the courts.

**The Reform Rule Remains Presumptively Valid and Should be Implemented Accordingly**

NRDC/Sierra attempt to overcome the weakness of their factual case by converting the burden they bear to justify their petition into an EPA obligation to show that it has **not** erred – in other words, into an obligation to prove a negative. The Petition attempts to do this in various ways. Sometimes it cites an EPA conclusion that a given element of the Rules will reduce emissions, though some uncertainty exists, and then asserts that EPA must dispel those uncertainties before it can approve the Wisconsin rule.<sup>3</sup> In other cases, NRDC/Sierra simply cite their previously rejected advocacy documents as conclusive proof that the NSR Reform Rules will increase emissions.<sup>4</sup>

As amply demonstrated above, such an indirect approach does not improve an argument that was inadequate to begin with. But beyond that, the suggestion that the NSR Reform Rules should be implemented grudgingly in response to these insinuations misapprehends the nature of that document. EPA adopted the NSR Reform Rules precisely to make it easy for States to address the defects in their NSR programs that we have previously described. To accomplish that goal, States must be free to adopt and rely on the NSR Reform Rules. Certainly, they should be free to rely on these Rules if the only arguments to the contrary are as weak as those put forward in the Petition.

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<sup>3</sup> See, for example, Petition p. 10, which accepts EPA's conclusion that its changes to the NSR accounting system would result in a "slight national environmental benefit", adds that this "does not rule out the possibility of substantial emissions increases in Wisconsin" and leaps from there to the conclusion that EPA must reject the Wisconsin rule unless it can refute this factually unsupported possibility. See also p. 6.

<sup>4</sup> See, e.g. Petition pp. 5-6, 10, 13-14.

## **Conclusion**

In short, the Petition fails to raise any new, compelling evidence and asks for rule changes that would represent both bad law and bad policy. EPA should deny it.

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Respectfully Submitted,

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On Behalf of Listed Trade Associations

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## Appendix A

This Appendix provides a fuller identification of the trade associations filing this Objection. Each trade association has numerous members who own and operate numerous stationary sources subject to the new source review provisions of the Clean Air Act. Accordingly, each trade association has a vital interest in this proceeding.

The **American Iron and Steel Institute (AISI)** represents approximately 28 member iron and steel companies, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. These members operate and hold ownership interests in various steel manufacturing and related operations across the United States and its producer, associate and/or affiliate members supply various customers and projects in the United States.

The **American Chemistry Council (ACC)** represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care<sup>®</sup>, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$664 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development.

The **American Coke and Coal Chemicals Institute (ACCI)** is a trade association representing approximately 80% of the U.S. production of metallurgical coke, by both merchant coke producers and integrated steel companies with coke production capacity, and 100% of the U.S. manufacture of coal chemicals produced from coke byproducts.

The **American Forest & Paper Association (AF&PA)** is the national trade association of the forest products industry, representing pulp, paper, packaging, and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 6 percent of the total U.S. manufacturing GDP, putting it on par with the automotive and plastics industries. Industry companies produce \$200 billion in products annually and employ more than 1 million people earning \$54 billion in annual payroll. The industry is among the top 10 manufacturing sector employers in 48 states

The **American Petroleum Institute (API)** is a non-profit, nationwide trade association representing more than 400 member companies involved in all aspects of the petroleum and natural gas industry.

The **National Association of Manufacturers (NAM)** is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

The **National Oilseed Processors Association (NOPA)** is a national trade association comprised of 16 companies engaged in the production of vegetable meals and oils from oilseeds

including soybeans. NOPA's 16 member companies process more than 1.6 billion bushels of oilseeds annually at 66 plants located throughout the country, including 61 plants which process soybeans.