NATIONAL TRIBAL ENVIRONMENTAL COUNCIL AND

THE FOREST COUNTY POTAWATOMI COMMUNITY

COMMENTS

IN OPPOSITION TO

EPA'S JUNE 6, 2007 NOTICE OF PROPOSED RULEMAKING

REGARDING REFINEMENT OF PSD INCREMENT MODELING PROCEDURES

(DOCKET ID NO. EPA-HQ-OAR-2006-0888)

TABLE OF CONTENTS

EXECUTIVE SUMMARY AND REQUEST FOR MEETING WITH EPA

The National Tribal Environmental Council (NTEC) and the Forest County Potawatomi Community ("FCPC") respectfully submit these comments with respect to the Environmental Protection Agency's ("EPA") Proposed Prevention of Significant Deterioration New Source Review: Refinement of Increment Modeling Procedures; Proposed Rule. 72 Fed. Reg. 31,372-99 (the "Proposed Rule"). FCPC is a federally recognized Indian tribe located in northern Wisconsin and submits these comments on a government-to-government basis. NTEC was formed in 1991 with seven tribes and input from several intertribal organizations, including the Council of Energy Resource Tribes and the Native American Rights Fund. NTEC is a not-for-profit membership organization currently comprising more than 180 member tribes. NTEC's mission is to enhance each tribe's ability to protect, preserve, and promote the wise management of air, land and water for the benefit of current and future generations.

In the Clean Air Act, Congress recognized that Indian tribes have a strong interest in protecting their lands from air pollution. The Act allows tribes to redesignate their lands as Class I airsheds under the prevention of significant deterioration ("PSD") program. 42 U.S.C. § 7474(c). Four tribes have done this and two others have applied for Class I status. In addition, because Class I areas receive much stronger protection against air pollution than the rest of the nation does, Indians who live close to tribal or non-tribal Class I areas benefit from the protected status of those areas. Thus, the PSD program has special importance for Indian tribes. From very early on the United States Supreme Court has mandated that the federal government protect the interests of Indian tribes as a trustee would protect a beneficiary. This trust responsibility applies to EPA in this rulemaking. EPA has accepted this responsibility by promulgating its own Indian Policy, in which it promises to protect tribal interests. Similarly, the government, by executive order, has pledged to avoid actions that create environmental injustice and, furthermore, has pledged to fully consult with Indian tribes regarding proposed actions that might affect them. Therefore, established federal law requires EPA to safeguard tribal lands and refrain from action that would diminish Class I air quality standards.

The Tribes recognize EPA's difficult role in balancing numerous interests affected by the Clean Air Act but are greatly concerned about the procedural shortcomings of this matter. Specifically, the Tribes are extremely troubled by EPA's failure to consider Tribal interests affected by its rulemaking proposal, which will weaken the ("PSD") increment modeling procedures. EPA failed to consult with Tribes regarding this Proposed Rule until after the initial public comment period closed and just before the final comment period, extended for reasons unrelated to the Tribes, closed.[1] EPA is of course aware that four tribes have Class I airsheds, two other tribes have applied for Class I status, and many tribes have lands proximate to Class I areas. As a result, EPA has a legal duty to withdraw the Proposed Rule and to conduct a full consultation with tribes so that there is an investigation of how the Proposed Rule might affect tribal resources and members.

---

[1] The Proposed Rule was published in the Federal Register on June 6, 2007 and the initial comment period closed on August 6, 2007. After strong objections from Congress, unrelated to tribal issues, EPA reopened the comment period on August 29, 2007 to close on September 28, 2007. EPA's first call to discuss this proposed rule with the Tribes was on September 12, 2007.

The Tribes are also greatly concerned about the significant substantive problems with this proposed rule. EPA's Proposed Rulemaking involves significant, substantive changes to EPA rules and long-standing and binding policies regarding the PSD program in Class I areas. These proposals significantly weaken the protections currently afforded Class I areas. In an attempt to support its proposed changes, EPA wrongly interprets the Clean Air Act (the "Act"). 42 U.S.C. §7401 et seq. Specifically, EPA proposes the following changes that are contrary to the clear requirements of the Act:

- Revisions to established modeling requirements with respect to treatment of Federal Land Manager variances that will permit some major sources to be ignored in the calculation of increment consumption for Class I areas;

- Revisions to the emissions that apply to the baseline concentrations for Class I areas that are contrary to the definition for baseline provided in the Act;

- Liberalization of methods for determining emissions that apply to Class I increment consumption by providing a new definition for "actual emissions" that is contrary to Congressional intent; and

- Establishing overly vague standards for data selection and modeling procedures used to calculate increment consumption that will weaken the administrator's enforcement powers and allow inconsistent implementation of the Act.

The Tribes are concerned that this rulemaking foreshadows EPA's abdication of its statutorily-mandated regulatory role in protecting Class I areas. Because the rule proposes vague standards for data selection and permits reviewing authorities wide latitude when conducting increment-consumption analysis, the rule will foster non-uniform application of the PSD program and create very real danger that the states will engage in a "race to the bottom" that EPA and the courts will be powerless to prevent. This issue was specifically contemplated by Congress and guarded against in the Act by requirements for EPA to promulgate uniform and conservative standards for protection of air in Class I areas. Unfortunately, EPA now proposes standards that are neither uniform nor conservative.

EPA's trust responsibility and its obligations under the Environmental Justice Doctrine require it to ensure that the statutory-maximum allowable increase for sulfate, particulate matter, and oxides of nitrogen pollution in Class I are fully protected. EPA must also see that Congress' intent to protect pristine air over Class I areas is fully implemented. Unfortunately, EPA's proposed increment-consumption modeling rule does neither.

The Tribes respectfully submit that in view of procedural deficiencies and substantive concerns as described in these comments, EPA should withdraw the proposal and engage in meaningful consultation with the Tribes to fully evaluate and properly consider the health, environmental, and cultural effects EPA's proposal may have on Tribal lands. To that end, the Tribes formally request a meeting with EPA to discuss these comments.

In addition, EPA states in its preamble to the proposed rule that it is currently contemplating further changes to the PSD program that were suggested by WESTAR. 72 Fed. Reg. 31,378. However, EPA has taken no steps to consult with Tribal Class I authorities on this future rulemaking regarding the PSD program. The Tribes formally request that EPA immediately engage in meaningful consultation with the Tribes on all future PSD rulemaking regarding Class I areas.

I. EPA's failure to consult with Indian Tribes regarding the Proposed Rule is contrary to law.

A. Introduction. Despite the clear potential impact EPA's Proposed Rule could have on tribal Class I areas, and on other Indian communities across the nation that may be redesignated Class I in the future, the EPA failed to consult with any tribes prior to publishing the Proposed Rule in the Federal Register. This violates EPA's duty to consult with tribes. This duty is created by federal caselaw, federal executive orders, and EPA's own policies.

The EPA's duty to consult with tribes is, in part, based on the caselaw that establishes that the federal government has a trust responsibility to tribes. The federal trust responsibility was established by the Supreme Court in the 1830s in the historic *Cherokee* cases. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This doctrine requires the federal government to protect Indian tribes' lands, waters, natural resources and rights of self-government as a trustee would protect the interests of a beneficiary. The Courts have found that the trust responsibility includes a requirement that tribes be consulted by the U.S. government regarding potential actions that could affect them.

More recently, the federal government has bound itself to avoid actions that create environmental injustice. Under the Environmental Justice Doctrine, enunciated by Executive Order 12,898, the federal government has bound itself to ensuring the fair treatment of all minority communities, including Indian tribes. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994). The only way to give this commitment effect with respect to tribes is to consult extensively with them. Because Indian life depends on cultural activities that can be impaired by environmental changes, the government can only determine whether any potential action might create an injustice to tribes by consulting with them to understand tribal culture and how it is interwoven with the natural world. The federal government has also explicitly bound itself, via executive order, to consult with Indian tribes. In addition, the EPA has internal policies that require it to undertake such consultation.

It is clear that in this case, EPA's failure to consult with the tribes and other Indian communities regarding the Proposed Rule ahead of publishing its proposal and before the initial comment period had closed is contrary to law.

B. The Federal Trust Responsibility creates an obligation for the federal government to consult with Tribes prior to taking actions that may affect the Tribes.

1. The origin and scope of the federal trust responsibility. The federal trust responsibility is based on the unique history of the federal-tribal relationship, and the course of dealings between Indian tribes and the United States. The Marshall Court first formulated the

trust responsibility doctrine over 175 years ago in the two *Cherokee* cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation*, the Court held that it lacked original jurisdiction over a suit filed by the Nation to enjoin enforcement of the state statutes because the Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. 30 U.S. (5 Pet.) 1. Chief Justice John Marshall described the Federal-Indian relationship as "perhaps unlike that of any other two people in existence" and "marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 16. The Court agreed with the Cherokee Nation's contention that it was a "state" in the sense of being "a distinct political society . . . capable of managing its own affairs and governing itself." *Id.* But it held that Indian tribes were not "foreign states," but rather were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 17. Chief Justice Marshall concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* Thus, recognition of tribes' sovereign status forms a cornerstone of the trust relationship, which in turn obligates the United States to protect Tribes' rights as sovereigns.

In the second Cherokee case, *Worcester*, the Court invalidated the Georgia statutes because the treaties with the Cherokee and the Federal Trade and Intercourse Acts[2] protected tribal communities as "having territorial boundaries, within which their authority [of self-government] is exclusive. . . ." *Id.* at 557. Chief Justice Marshall in *Worcester* meticulously analyzed the treaties with the Cherokee and emphasized that their right "to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States." *Id.* at 557. The trusteeship reflected in *Cherokee Nation* appears to have been implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust. The Court also analyzed the Trade and Intercourse Acts - which protected Indian land occupancy - as providing an additional source for the immunity of the Cherokee from state jurisdiction and, implicitly, for the trust relationship itself.

Worcester is significant for an additional reason. In *Cherokee Nation*, Justices Johnson and Baldwin had concurred in the dismissal of the case because, they reasoned, the Cherokee Nation was not a "state at all." The two concurring Justices analogized the tribe to a conquered domain, which had not territorial rights save at the pleasure of the conqueror. Justice Johnson considered the Nation a sort of tenant-by-sufferance on the lands secured by the treaties, from which it could be dispossessed at will. *Cherokee Nation,* 30 U.S. at 27. In *Worcester*, Chief Justice Marshall took considerable pains to refute this conception. He did this by a detailed analysis of the treaties themselves, showing that they confirm the right of self-government in the Nation. The specific holding of the *Cherokee* cases was that federal power over Indian affairs was exclusive vis-à-vis the states. In modern terms, state power was preempted. Chief Justice Marshall showed this was the intent of the framers of the Constitution by contrasting the constitutional provisions dealing with Indians with comparable ones in the Articles of Confederation it replaced.

---

[2] Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, *codified* at 25 U.S.C. § 177

But the analysis of the Court went beyond the holding, establishing that tribes are sovereign under federal law and formulating the trust relationship as imposing an obligation on the United States to protect the governmental and other rights of the tribes from the broad and exclusive federal power over Indian affairs, as well as from state legislation. In these landmark opinions, the Court set out the principles that govern the United States' governmental relationships with Indian tribes, and avoided two of the alternatives before it – recognizing the tribes as foreign nations, or as entities without any legal protection for their rights. Chief Justice Marshall's conclusions from the *Cherokee* cases have been reaffirmed by nearly two centuries of Supreme Court jurisprudence.[3]

Settled law confirms that federal agencies must strictly adhere to the duties of a private fiduciary when their actions impact Indian rights. Over sixty-five years ago, the Supreme Court looked to the common law of trusts when it decided *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942). The Court there held that the conduct of the United States, as trustee for the Indians should "be judged by the most exacting fiduciary standards. 'Not honesty alone, but the punctilio of an honor the most sensitive.'" *Id.* at 297 & n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)). Moreover, the United States is bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448 (1924). This continues to be the law today. *Covelo Indian Community v. FERC*, 895 F. 2d 581, 586 (9th Cir. 1990) ("the same trust principles that govern private fiduciaries determine the scope of FERC's obligations to the [Indian] Community"); *accord Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986) (applying "the same trust principles that govern the conduct of private fiduciaries" to Department's authority over mineral royalties); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapahoe Tribes v. United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18-19 (1944); *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct. Cl. 1966).

Applying this standard, the courts have restricted federal agencies' ability to permit actions that would interfere with Indian tribes' treaty rights. *See, e.g., Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520-22 (W.D. Wash. 1996); *Muckleshoot*

---

[3] *See, Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 654-55 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300-05 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 47 (1946); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-16 (W.D. Wash. 1988). Moreover, as the Court held in *Northwest Sea Farms*, the trust responsibility is not limited to the protection of treaty rights, reservation lands, and other property held in trust for Indian tribes. *Northwest Sea Farms, Inc.*, 931 F. Supp. at 1520. Rather, the trust responsibility applies to all actions of the federal government that may affect Indians and extends to all rights, resources and interests of Indian tribes that are recognized by treaty, statute, executive order or the common law. 931 F. Supp. at 1520. As the Ninth Circuit concluded in *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981), "[i]t is fairly clear that *any Federal government action* is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Id.* at 711 (emphasis added).

At the heart of the rights protected by the trust responsibility are tribal rights to the lands, waters and natural environment of the reservation. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963) (water rights are reserved despite silence in treaties, statutes and executive orders creating reservations); *United States v Shoshone Tribe*, 304 U.S. 111 (1938) (same for minerals and timber). Tribes are entitled to sufficient water and other resources "to make the reservation livable" and "to maintain . . . their way of life." *Arizona*, 373 U.S. at 599. Indian tribes also hold rights to hunt, fish, and gather on reservation lands and waters. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (natural resource harvesting rights held on reservation whether mentioned in the enactment creating the reservation or not); *see also Arizona*, 373 U.S. at 598-99 (concluding Indians are entitled to sufficient "water necessary to sustain life" on their reservations and observing that "water from the [Colorado River] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."). Simply stated, as trustee for Indian tribes, the United States "has a responsibility to protect their rights and resources." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000). These tribal rights to the environment and natural resources of the reservation are also the very rights protected by Class I status.

The trust responsibility also applies to tribal cultural resources and practices, which Class I status helps to protect. Congress has specifically recognized the applicability of the trust responsibility in this area: numerous federal laws protect tribal historic and cultural resources. *See, e.g.,* National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6; Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm; Antiquities Act of 1906, 16 U.S.C. §§ 431-433; Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); Exec. Order No. 11,593, *reprinted in* 16 U.S.C. § 470 note. In addition, the American Indian Religious Freedom Act, 42 U.S.C. §§ 1996, 1996a, recognizes and protects the tribes' right to practice traditional religions pursuant to the First Amendment to the United States Constitution. *See also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

2. The trust responsibility creates a duty to consult with tribes. The courts have found that the trust responsibility also includes a duty to consult with Indian tribes concerning federal actions that may affect their interests. *See, e.g., Klamath Tribes v. U.S. Forest Service*, 1996 WL 924509 (D. Or. 1996). As the *Klamath Tribes* Court explained, "[i]n practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources." *Id.* at 8. These principles of U.S. law are well settled. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (denial of general assistance benefits to Indians living near the reservation

held to be "inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'" (quoting *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942)); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies") (quoting Felix S. Cohen's *Handbook of Federal Indian Law* 225 (1982)); *Midwater Trawlers Coop. v. U.S. Dep't of Commerce,* 139 F. Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (consultation grounded in the trust relationship) *aff'd in part and rev'd in part*, 282 F.3d 710 (9th Cir. 2002).

C. A duty to consult tribes is also created by the Environmental Justice Doctrine.

1. The federal government has committed itself to prevent environmental injustice to Indian tribes by Executive Order. Executive Order 12,898 established the Environmental Justice Doctrine, amid growing concern that minority populations, low-income populations, and Indian tribes bear a disproportionate amount of adverse health and environmental effects. Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb 16, 1994), (E.O. 12,898), mandates that:

> [E]ach federal agency shall make achieving environmental justice part of its mission by *identifying* and *addressing*, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

E.O. 12,898 (Section 1-101) (emphasis added).

Executive Order 12,898 expressly confirms that its provisions apply to federal programs, policies and activities involving Native Americans. 59 Fed. Reg. at 7,632. In addition, guidance released by the Council on Environmental Quality expressly incorporates Indian tribes into the definition of low-income populations and minority populations.[4] This E.O. 12,898 is directly applicable to EPA's Proposed Rule on Class I increment modeling in that EPA's proposal is a federal program that, if promulgated, will directly impact Indian Tribes that have or will in the future designate their lands as Class I air areas or whose environment is protected by proximity to current Class I areas.

2. EPA has affirmed its responsibility to prevent environmental injustice to Indian tribes under Executive Order 12,898. As it had done previously, on November 4, 2005 the current EPA Administrator confirmed the Agency's commitment to environmental justice and endorsed E.O. 12,898. In a memorandum[5] sent to the leadership of the agency, the EPA Administrator stated:

---

[4] Exhibit A, *Environmental Justice: Guidance Under the National Environmental Policy Act*, Council on Environmental Quality (Dec. 10, 1997) available at http://www.epa.gov/Compliance/resources/policies/ej/ej_guidance_nepa_ceq1297.pdf.

[5] Exhibit B, Memorandum from EPA Administrator Stephen L. Johnson, *Reaffirming the U.S. Environmental Protection Agency's Commitment to Environmental Justice* 1 (Nov. 4, 2005), available at http://www.epa.gov/compliance/resources/policies/ej/admin-ej-commit-letter-110305.pdf ("2005 Memo").

> Ensuring environmental justice means not only protecting human health and the environment for everyone, but also ensuring that all people are treated fairly and are given the opportunity to participate meaningfully in the development, implementation, and enforcement of environmental laws, regulations, and policies. This memorandum reaffirms EPA's commitment to environmental justice and directs EPA to more fully and effectively integrate environmental justice considerations into its programs, policies, and activities.

2005 Memo at 1.

The 2005 Memo also notes that "minority and/or low-income communities frequently may be exposed disproportionately to environmental harms and risks," and that, because of this, "EPA works to protect these and other burdened communities from adverse human health and environmental effects of its programs, consistent with existing environmental and civil rights laws, and their implementing regulations, as well as Executive Order 12,898." *Id.*

In 2007, Granta Nakayama, the EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance testified before Congress regarding EPA's continued adherence to E.O. 12,898. Mr. Nakayama repeated the statement in the 2005 Memo that environmental justice requires that affected communities must be "given the opportunity to *participate meaningfully* in the *development*, implementation, and enforcement of environmental laws, regulations, and policies."[6] (emphasis added). In this case, where a complex modeling rule is being proposed, it is especially important that tribes that might be impacted by the rule be provided the opportunity to participate meaningfully in the development of the rule before it is promulgated for public comment.

3. EPA must consult with tribes to understand what environmental resources are important to tribal culture and existence in order to comply with Executive Order 12,898 and the Environmental Justice Doctrine. Executive Order 12,898 and the Environmental Justice Doctrine have direct relevance to the promulgation of environmental regulations that could affect Indian tribes -- as the 2005 Memo explicitly recognizes. What may be less apparent is how disproportionately high and adverse environmental effects on tribal individuals and/or communities can be properly assessed. In fact, tribal individuals and communities often experience environmental impacts differently from and more intensely than both the general population and other minority populations. As Professor Dean Suagee explains:

> [I]f you look closely you are bound to find impacts that affect tribal people differently from the way they affect other groups. Any activity that affects the environment has the potential to cause impacts on a tribal community that are different from the impacts suffered by other communities because of the ways in which the natural world is important to tribes for cultural and religious reasons. [This] kind of disproportionate impact reflects a basic difference between tribes and other minority groups in this

[6] Exhibit C, Testimony of Granta Y. Nakayama, before the Subcommittee on Environment and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 4, 2007) available at http://www.epa.gov/Compliance/resources/policies/ej/ej-testimony-10-4-07.pdf.

country. This distinction applies both within and beyond reservation boundaries. . . . Some tribes, and some people within any given tribe, are more dependent than others on traditional cultural practices for their basic survival needs. Traditional religions have more practitioners in some tribes than in others. But for all American Indian and Alaska Native people, traditional cultural and religious practices are an important aspect of tribal identity. Impacts on culturally important biological communities or sacred places are bound to affect tribal communities differently.[7]

The Tribes are a primary source of knowledge and information regarding the lands, waters, natural resources, and historic and cultural resources in the area that may be impacted by the Proposed Rule. Indeed, because the protection of historic and cultural resources often depends on maintaining the confidentiality of information about such resources, the Tribes and other potentially affected tribes are likely to be the only source of certain information. The only practical and appropriate way for EPA to access this information is for agency staff to consult with tribes. In order to "protect human health and the environment for everyone," *2005 Memo*, the EPA must undertake consultation with the tribes to properly evaluate potential impacts to tribal rights, resources and interests from the Proposed Rule and fulfill its trust obligations. Because these impacts may be different, both quantitatively and qualitatively, than impacts to other populations, these impacts may require EPA to significantly alter the Proposed Rule, even if it otherwise was suitable for non-tribal Class I areas.

D. Executive Order 13,175 explicitly creates a duty for federal agencies to consult with Indian Tribes before taking actions that may affect them. As noted above, the federal trust responsibility and the Environmental Justice Doctrine require EPA to consult with the Tribes and other potentially affected tribes while considering the impact of the Proposed Rule on their rights, resources and interests. Such consultation is specifically required by Executive Order 13,175, entitled *Consultation and Coordination with Indian Tribal Governments*. 65 Fed. Reg. 67,249 (Nov. 9, 2000). Executive Order 13,175 was reaffirmed by the current administration in 2002. *See* Letter to the Honorable Frank Pallone, Jr. from Alberto R. Gonzales, Counsel to the President (Jun. 19, 2002.)[8] Executive Order 13,175 requires that "[e]ach agency shall have an effective process to permit . . . Indian tribal governments to provide *meaningful and timely input in the development* of regulatory policies on matters that significantly or uniquely affect their communities." 65 Fed. Reg. at 27,655 (emphasis added). Thus, Executive Order 13,175 requires meaningful consultation during the development of draft policies and rules, not just the ability to meet and comment after the proposals have been promulgated and released to the general public.

E. EPA as a matter of policy has bound itself to consult with Indian Tribes and this creates a separate legal obligation that requires the agency to consult with Tribes. EPA's Indian Policy was established in 1984 and predates Executive Order 12,898, the Environmental Justice Doctrine, and Executive Order 13,175, Consultation with Tribes. EPA's Indian Policy draws on

---

[7] Exhibit D, Dean B. Suagee, *Dimensions of Environmental Justice in Indian Country and Native Alaska* 7 in SECOND NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT RESOURCE PAPER SERIES (2002), available at http://www.rocky.edu/rocky-pdf/americanIndianAffairs/Dimensions_of_EJ_in_Indian_Country.pdf

[8] Exhibit E, reprinted at http://www.thepeoplespaths.net/News2002/0207/PalloneJr020716BushFavors.htm.

the federal trust responsibility and commits the Agency to work with Indian tribes, including involving them in EPA decision making regarding decisions that will affect Indian resources and individuals. This cannot be done effectively without consulting with tribes during the development of draft policies and rules.

Subsequent EPA documents confirm that EPA has committed itself to consulting with tribes independent of the requirements of Executive Order 13,175. By adopting these policies to consult with tribes, EPA has created a binding duty to undertake such consultation before proposing rules that will affect tribal lands. *See Ruiz*, 415 U.S. at 235 (BIA policy created legal obligation to beneficiaries of policy); *Lincoln v. Vigil*, 508 U.S. 182, 199 (1993).

1. EPA's Indian Policy commits the agency to consult with Indian Tribes. EPA's Indian Policy was promulgated in 1984.[9] The 1984 Policy mandates that EPA "recognize that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian law." The Policy continues: "In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations." The Policy also confirms that the EPA will stand ready to "work directly with Indian tribal governments on a one-to-one basis (the 'government-to-government' relationship), rather than as subdivisions of other governments."

Particularly relevant here, the Policy stresses the importance of consultation with tribes. In circumstances where EPA has not transferred regulatory and program management responsibilities to tribes (though the Policy expresses a preference for such transfers), the Policy requires that EPA "encourage [tribes] to *participate in policy-making*" and other appropriate roles in the management of reservation programs. Similarly, the Policy describes as the "keynote of this effort" the need "to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."

In 2005 the EPA reaffirmed its Indian Policy.[10] In reaffirming this Policy, the EPA Administrator concluded:

> EPA is recognizing that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, Executive Orders, and court decisions. This relationship includes recognition of the right of Tribes as sovereign governments to self-determination, and an acknowledgment of the federal government's trust responsibility to Tribes. EPA works with Tribes on a government-to government basis to protect the land, air, and water in Indian country. Indian Policy Memo.

---

[9] Exhibit F, William D. Ruckelshaus, *EPA Policy for the Administration of Environmental programs on Indian Reservations* (Nov. 8, 1984), available at http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf.

[10] Exhibit G, Memorandum from Stephen L. Johnson, EPA Administrator to all EPA employees, *EPA Indian Policy*, (Sept. 26, 2005) available at http://www.epa.gov/tribalportal/pdf/reaffirmation-indian-policy.pdf ("Indian Policy Memo").

The commitment embodied by EPA's Indian Policy and its reaffirmation of that policy is consistent with the Agency's obligations under settled law regarding the trust responsibility of the United States to Indian tribes. Executive Order 13,175 and EPA's Indian Policy recognize that the trust responsibility includes the duty to consult with tribes and Indians to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions.

2. EPA's policy of consulting with tribes is independent of Executive Order 13,175 and requires consultation "as early as possible" in rule development process. As a confirmation that EPA recognizes its duty to consult with tribes under the Executive Order 13,175 and EPA's Indian Policy, EPA is in the process of finalizing a guidance document that explains how the Agency must comply with this Executive Order. *Review of Environmental Protection Agency Draft Guidance for Implementing Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*, 71 Fed. Reg. 20,314 (Apr. 18, 2006). In the preamble discussion in the Federal Register, EPA is clear that it is already bound by Executive Order 13,175. *Id.* Indeed, the draft guidance urges EPA employees to consult with tribes even if the EPA employee does not believe they are compelled to do so by Executive Order 13,175. 71 Fed. Reg. at 20,318. The draft guidance acknowledges EPA's Indian Policy and explains that this policy requires the Agency to consult with tribes. *Id.* Similarly, EPA's Office of Air Quality Planning and Standards (OAQPS) is in the process of drafting its own guidance for consulting with Indian tribes.[11] The draft OAQPS guidance notes that, "[t]his document refers to consultation with federally-recognized Indian Tribes that OAQPS undertakes generally, as a matter of policy." In other words, it is already OAQPS policy to consult with tribes.

In the Proposed Rule, the EPA concedes that the rule "may have tribal implications." 72 Fed. Reg. at 31,396. However, EPA asserts that consulting with tribes after proposing the rule "will provide an opportunity for meaningful and timely involvement in this action." *Id.* This is at odds with EPA's own internal advice regarding consulting Tribes. The draft OAQPS guidance notes that, "[c]onsultation with Tribal Leaders would generally occur *no later than at the point an action is ready to be proposed, but it is best to conduct consultation as early as possible* in the policy, guidance, or rule development process." *Id.* at 5 (underline emphasis in original and italics added). Thus, the draft OAQPS guidance makes clear that consultation, unlike general notice and comment procedures, is to occur prior to the promulgation of the proposed action and, in fact, as soon as possible in the proposed action's development.

3. EPA's internal policy requiring consultation with Indian Tribes is legally binding upon the agency. When an agency creates policies and procedures, it confers rights upon the interests those policies and procedures are intended to protect. Specifically, the federal courts have found that agencies are bound by their own policies to consult with Indian tribes. Therefore, EPA's commitment to consult with Indian tribes, as set forth in its Indian Policy and outlined in other Agency documents, creates a legal obligation that courts will enforce.

---

[11] Exhibit H, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, CONSULTING WITH INDIAN TRIBAL GOVERNMENTS, (July 27, 2007) Draft Report available at http://epa.gov/air/tribal/pdfs/Consultation%20Policy_July27a.pdf ("Draft OAQPS Guidance")

A leading case involving this requirement is *Morton v. Ruiz*. 415 U.S. 199. *Ruiz* involved a husband and wife who resided off reservation who, the court found, were eligible for a federal assistance program. 415 U.S. at 238. The court also found that the failure of the Bureau of Indian Affairs (BIA) to publish eligibility requirements for this assistance program was contrary to the Bureau's own policies. *Id.* at 234. "The BIA, by its Manual, has declared that all directives that inform the public of privileges and benefits available are among those to be published." *Id.* at 235 (internal quotations omitted). The court concluded, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Id.*

A recent case following the rule of *Ruiz* is *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D. 2006). In that case, the District of South Dakota issued a preliminary injunction to prevent the closure of several offices operated by the agency. 442 F. Supp. 2d at 778. The District Court found that "the explicit language of these statutes, regulations, and policies indicate an intent to confer important procedural benefits upon tribes in the face of agency discretion and thus the agency action is subject to judicial review." *Id.* at 783 (citing *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Services*, 869 F. Supp. 760, 765 (D.S.D. 1994)). Referring to prior federal case law, the court then indicated that when the BIA establishes a policy requiring prior consultation with a tribe, it creates a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, and that such an opportunity must be subsequently given. *Id.* at 783 (citing *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399 (D.S.D. 1995)).

Just as the federal courts have held that the BIA and the Department of Health and Human Services can be bound by its internal policies, so too the EPA is bound by its own internal policies – including its Indian Policy. As described in the OAQPS draft guidance, EPA's internal policy dictates that it consult with tribes "as early as possible" in the process of developing a policy change such as a rulemaking. Therefore, EPA is required to consult with the Tribes and other affected tribes not only by Executive Order 12,898 (environmental justice) and Executive Order 13,175 (duty to consult with tribes), but also by its own Indian Policy, and by the OAQPS internal policy (based on the EPA Indian Policy) of consulting with tribes described in the OAQPS draft guidance. Furthermore, this policy that EPA is bound by is that it must consult with tribes "as early as possible."

F. EPA failed to adequately consult with Tribes regarding its Proposed Rule on Class I Increment Consumption Analysis contrary to its trust responsibility, the Environmental Justice Doctrine and Executive Order, Executive Order 13,175, and EPA's own internal policies that mandate consultation. To fulfill its trust duties, the Environmental Justice Doctrine and Executive Order, Executive Order 13,175, and EPA's own internal policies, the EPA was required to engage in meaningful consultation with the potentially affected tribes concerning the impacts of its Proposed Rule on Class I increment consumption modeling.

The EPA is fully aware that four tribes have Class I airsheds, two other tribes have applied for Class I status, and many tribes have lands proximate to Class I areas. EPA is also aware of its duty to consult with tribes that will be affected by its actions. To fulfill this duty, EPA was required to consult with the tribes "as early as possible" to identify what types of tribal environmental resources could be affected by the changes they were considering as part of the potential rulemaking.

As noted above, tribal people have a special relationship with the natural world. Water and plants and animals are important to Indians not just for food or recreation. These resources typically have great cultural value. Water collected in a special place may be used for a religious purpose or for healing. Animals and plants similarly figure in ritual and medicine. The cultural calendar for a tribe is usually shaped by the seasons and availability of such resources from the environment. When pollution threatens these resources tribal culture and religious practices are also threatened.

To determine whether a rule, like the Proposed Rule, might have an impact on Indians, EPA must consult with tribes. EPA lawyers and scientists can debate the merits of competing air dispersion modeling approaches but have no way of knowing what increased concentrations of air pollutants on an Indian reservation will mean to the tribal members living there.

To properly consult with tribes regarding the proposed rule, EPA should have begun outreach to tribes as soon as it decided a policy change (such as a rulemaking) was a potential solution to the issues raised by states and state regulators regarding the PSD program—or "as early as possible" in the words of the draft OAQPS guidance. The administrative record of this rulemaking should be full of information about tribal resources that might be affected by allowing increased pollution on tribal and non-tribal Class I areas. Instead, the record contains nothing of the sort. Adequate consultation could have led EPA to consider or at least request comment on alternative approaches to tribal Class I areas. Nothing in EPA's approach shows recognition of EPA's trust responsibility to Indians, let alone EPA's own Indian Policy—which has the federal trust responsibility to Indians as its cornerstone.

The Environmental Justice Doctrine compels exactly the same result as the trust responsibility, EPA's Indian Policy and related policies, and Executive Order 13,175: EPA cannot know if its Proposed Rule would create environmental injustice unless it conducts adequate investigation – via consultation with tribes "as early as possible" – to determine the answer.[12]

The EPA failed to consult with the Class I Tribes and other potentially affected tribes regarding the Proposed Rule until after its public initial comment had closed and only one week before the final comment period had closed. When the Proposed Rule was published in the Federal Register on June 6, 2007, that was the first opportunity tribes had to learn about the Proposed Rule. The initial comment period closed on August 6, 2007. After strong objections from Congress, unrelated to tribal issues, EPA reopened the comment period on August 29, 2007. When the second comment period was about to close, EPA had a conference call with the tribes with Class I airsheds or with a well-established interest in Class I issues on

[12] In the preamble to the Proposed Rule EPA asserts there would be no environmental injustice because there would be no change to the "level of protection provided to human health or the environment." 72 Fed. Reg. 31396. According to EPA, the Proposed Rule would only change how increment consumption analysis is conducted. *Id.* These comments demonstrate below that this assertion is false. Simply put, by changing how the analysis is done the Proposed Rule will allow more pollution. This could allow more pollution to enter tribal Class I areas as well as non-tribal Class I areas that benefit Indian people living nearby. The preamble to the Proposed Rule concludes that the rule will "not have disproportionately high and adverse human health or environmental effects on minority or low-income populations." *Id.*

September 12, 2007, three weeks before the second comment period closed on September 28, 2007. In October 2007, EPA began what it referred to as an "outreach plan" for contacting tribes.[13] This culminated in a consultation meeting held in Salt Lake City on February 22, 2008.

The Proposed Rule is very complex and to adequately prepare comments requires much more time than one week even for experienced environmental advocates. EPA is acutely aware that Tribal environmental programs are small and tribal environmental employees have many issues to cover. As a result, it is understandable why few tribes were aware of the Proposed Rule weeks and even months after the Proposed Rule appeared in the Federal Register. It is also understandable why, after only being consulted on the Proposed Rule one week before the closing of the second comment period, no tribes were able to submit comment on the Proposed Rule until after the comment period had closed.

While the record shows that EPA did not consult with the tribes "as early as possible" or at least before the rule was proposed, EPA did consult with many others. In early 2007, the EPA shared a version of the Proposed Rule with the Department of the Interior as the agency responsible for federal Class I areas covering the nation's national parks.[14] Further, it is apparent from the preamble to the rule, that the proposal is the end of a long process of consultation with the Western States Air Resources Council (WESTAR) that has been on-going since at least 2005.[15] Ominously, EPA also states in its preamble that it is currently contemplating further changes to the PSD program.[16]

In contrast, nothing in the administrative record suggests that EPA has taken any steps even to investigate the potential impacts the Proposed Rule might have on Indian people and Indian lands with Class I status, much less actively consult with tribes. Neither has EPA taken any steps to include Tribal Class I authorities in any future rulemaking regarding the PSD program that it is currently contemplating.

Not only were the tribes not properly consulted, but the consultation process has been extremely burdensome on the tribes. Rather than consult with tribal leaders and environmental staff early on in the investigation of issues that lead to the Proposed Rule, EPA chose to consult with the tribes after the proposal was published in the Federal Register. The Tribes and other affected tribes are left with no option besides reacting to a lengthy complex rule and to attempt to investigate the potential impacts of this Proposed Rule on tribal resources and culture. The Tribes have had to scramble to present their findings to EPA that seems very far along in its

---

[13] Letter from William Harnett, Director EPA Air Quality Policy Division to Tribal Leaders (Oct. 5, 2007), Docket # EPA-HQ-OAR-2006-0888-1287.

[14] Letter from Willie R. Taylor, U.S. Dept. Interior to Amy E. Flynn, Office Mgmt. & Budget (Mar. 2, 2007), Docket # EPA-HQ-OAR-2006-0888-1195.

[15] Letter to Jeffrey Holmstead, Director OAR/USEPA from Stuart A. Clark, President WESTAR Council regarding *Recommendations for Improving the Prevention of Significant Deterioration Program* (May 19, 2005), Docket # EPA-HQ-OAR-2006-0888-0002.

[16] "While the purpose of today's notice is focused on refining increment analysis procedures, we are considering broader changes to the program as a separate rulemaking to address additional concerns that WESTAR and others have raised." 72 FR at 31,378.

decision making process. This underscores why consultation, to be meaningful, should take place early in the development of proposed actions that may affect tribes.

G. Conclusion regarding EPA's failure to consult with Indian Tribes regarding the Proposed Rule. The Proposed Rule had long been published in the Federal Register before the news made its way to a few tribal environmental employees who then began asking questions and spreading the word. And only after these tribal employees began questioning EPA about the Proposed Rule did EPA begin discussing it with tribes. Such eleventh hour consultation-as-an-afterthought is not consistent with the trust responsibility, Executive Order 12,898, Executive Order 13,175, EPA's Indian Policy or its other internal policies requiring consultation with tribes. EPA's consultation has certainly not been the "as early as possible" consultation outlined in the OAQPS draft guidance, which restates EPA's pre-existing internal policy (the EPA Indian Policy).

EPA has a legal duty to withdraw the Proposed Rule and to conduct a full consultation with tribes that includes an EPA investigation of how the Proposed Rule might affect tribal resources and individuals.

II. PSD Sources that are issued Federal Land Manager ("FLM") Variances must be counted against the Class I Increment.

EPA is proposing to allow the emissions from PSD sources that are issued an FLM variance authorizing construction of the facility pursuant to Section 165(d) to be excluded from subsequent Class I area increment analyses. *See* 72 Fed. Reg. at 31,381. EPA's proposal is contrary to the requirements of the Act.

A. Section 163(a) requires that the SIP protect the increment and EPA cannot propose to override that section of the Act. EPA's proposal is contrary to the clear requirements of the Act. In particular, PSD increments, including the Class I increments, must be met notwithstanding the Act's variance provisions.

In Section 163, Congress sets forth "Increments and Ceilings" for SO_2 and particulate matter that must not be exceeded. In particular, Section 163(b)(1) states:

> For any Class I area, the maximum allowable increase in concentration of sulfur dioxide and particulate matter over the baseline concentration of such pollutants *shall not exceed* the following amounts:

Pollutant	Maximum allowable increase (in micrograms) per cubic meter
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur Dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

42 U.S.C. §7273(b)(1) (emphasis added) *see also* 40 C.F.R. §51.166(c) (providing that allowable increases "shall be limited" to the specified increments), §52.21(c).

Section 163(a) then requires each SIP ("SIP") to "contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded." Likewise, Section 165(a)(2) prohibits construction of any major emitting facility unless the owner or operator shows that emissions "will not cause, or contribute to air pollution in excess of any. . .maximum allowable increase."

1. Congress only allowed limited, specific exemptions from Section 163 increment protection. The Act allows only two limited exceptions to compliance with the Class I increments:

(1) for averaging periods other than an annual averaging period, the "maximum allowable increase [can] be exceeded during one such period per year." Section 163(a); 40 C.F.R. §51.166(c), §52.21(c); and

(2) a state's governor can adopt SIP provisions allowing for specific emissions to be excluded when determining compliance with maximum allowable increases. Section 163(c)(1); *see also* 40 C.F.R. §51.166(f)(i)-(iv). However, this exemption is temporary and the exemption cannot apply for more than five years. Section 163(c)(2); *see also* 42 U.S.C. 7473.

Thus, Congress provided two specific and limited exemptions from increment compliance. These specific and limited exceptions show that Congress carefully considered its clear requirement that Class I increments must not be exceeded, and choose to only allow for two narrowly-defined exceptions. Because of this, EPA is without any authority to create new exemptions not specified by Congress. Yet, this is exactly what EPA's proposal would do. It would allow statutory Class I increments to be exceeded by whatever amount of increase is caused by a source receiving a Section 165(d) variance.

2. The Section 165 variance procedures do not and cannot override the requirements of Section 163. EPA attempts to rely on the variance provisions in Section 165 to override the clear requirements of Section 163 regarding increment protection. However, nothing in Section 165 supports EPA's position. EPA attempts to argue that Section 165(d)(2), which addresses variances, creates ambiguity which supports EPA's proposal. First, it is important to

note that the mere possibility of ambiguity in Section 165(d)(2) does nothing to affect the clear requirements in Section 163 to protect against increment exceedance.

Second, even if ambiguity in Section 165(d)(2) could somehow affect the requirements in Section 163, there is no ambiguity in Section 165(d)(2). EPA asserts that there is ambiguity in Section 165(d)(2) because that section has differing requirements that apply to sources that receive an FLM variance from sources that receive a gubernatorial or Presidential variance. EPA relies on these differences to assert that a gubernatorial or Presidential variance requires continued compliance with Class I increments, while an FLM variance may not. However, it is critical to note that the requirements applicable to both an FLM and a gubernatorial or Presidential variance apply to the individual permitted facility, not the Class I area generally.

Both the FLM variance and gubernatorial or Presidential variance provisions make clear that they apply to the particular facility receiving the variance, and not to other facilities that may affect the Class I area. Section 165(d)(2)(C)(iv) provides that if a facility is granted an FLM variance "*such facility* shall comply with such emission limitations under *such permit* as may be necessary to assure that emissions of sulfur oxides and particulates from *such facility* will not. . ." Likewise, Section 165(d)(2)(D)(iii) provides that if a facility is granted a gubernatorial or Presidential variance, "*such facility* shall comply with such emission limitations under *such permit* as may be necessary to assure that emissions of sulfur oxides from *such facility* will not. . ." (emphasis added).

EPA notes that Section 165(d)(2)(D)(iii) contains a requirement that the emissions from the facility receiving the gubernatorial or Presidential variance must be limited, so they "assure that such emissions will not cause or contribute to concentrations that exceed the otherwise applicable maximum allowable increases for periods of exposure of 24-hours or less on more than 18 days during any annual period." EPA then uses this requirement for gubernatorial or Presidential variances to assert that the Class I increments do not apply to FLM variance facilities, since Section 165(d)(2)(C)(iv) does not contain similar language that the emissions from that facility be limited to exceedances on a specified number of days or that "otherwise applicable maximum allowable increases" apply.

However, this difference between Section 165(d)(2)(C)(iv) and Section 165(d)(2)(D)(iii) provides no support for EPA's statement that SIPs do not need to account for the increment effect of FLM variance facilities. The requirements in both Section 165(d)(2)(C)(iv) and Section 165(d)(2)(D)(iii) relate specifically to the facilities granted the variance and the emissions limitations in the permits for those specific facilities. This is made clear both by the clear reference in both sections to the permit issued to the specific facility given the variance and the emission limitations under that permit that apply to that specific facility. The specific requirements in the permits for the variance facilities (including the requirement that the emissions from a gubernatorial or Presidential variance facility not cause or contribute to more than 18 days of short-term increment exceedances) apply on their face to the variance facilities, not the overall protection of Class I increment.

EPA is attempting, whenever a source is granted an FLM variance, to override the clear statutory requirement for increment protection. As noted above, nothing in the Act supports this proposal. Consistent with the Act's requirements, EPA has long held that the issuance of a

permit that may allow an increment to be exceeded does not relieve the state from its obligation to protect the increment through other means. One such other means is modifying the SIP to protect increment by reducing emissions from one or more existing sources if a permit is issued for a proposed new source. This long-held policy has been supported by the federal courts. *See e.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 362-63, (D.C. Cir., 1979).

3. EPA's variance proposal for Class I increments is contrary to the D.C. Circuit's holding in *Alabama Power*. The D.C. Circuit in *Alabama Power* has already made clear that the requirements in Section 163 must be met in addition to any requirements in Section 165. 636 F.2d at 361-63. In *Alabama Power*, the industry petitioners claimed that the provision currently codified in 40 C.F.R. 51.166(a)(3), which requires that a SIP be revised once it is determined that an applicable increment is being violated or that the plan is substantially inadequate to prevent significant deterioration of air quality, was not authorized by the Act. *Id.* at 363. Industry petitioners argued that the preconstruction permitting requirements in Section 165 provide the exclusive means of protecting increments. *Id.* at 362.

The D.C. Circuit rejected this argument. *Id.* In rejecting the argument, the Court made clear that Section 161 of the Act requires that State SIPs include measures that ensure the maximum allowable increases over baseline in Section 163 are not exceeded. The provisions in Section 163 "establish the thresholds as *limitations that are not to be exceeded. . . .*" *Id.* (emphasis added).

In this ruling, the Court noted that the legislative history of the Act made clear that Congress intended for SIPs to contain measures to ensure prevention of significant deterioration of air quality in addition to Section 165 permitting requirements. The Court found that the preconstruction review process should limit the steps needed under a SIP for post-construction control measures but not eliminate the requirement for intervention through the SIP.[17]

When industry petitioners relied on the variance provisions of Section 165(d) of the Act to support their claim that the PSD increments are only to be implemented via the preconstruction review program, the D.C. Circuit disagreed with this reading of the variance (also known as waiver) provisions. 636 F.2d at 363. The Court held that the provisions of Section 163 protect the increment notwithstanding the issuance of variances to individual sources. *Id.* Specifically, the Court stated:

> The waiver has vitality and recognition in that facilities granted special consideration under these provisions are, in effect, treated as facilities operating in compliance with the provisions of the Act. But the totality of facilities in compliance, as a group, may be

[17] The Court cited two statements from the House report and noted that "[i]mplicit in each statement is a contemplation that measures under the Act include more than the pre-construction process." First, that "[t]his preconstruction review process should help minimize the need for enforcement or other actions under the SIP requiring additional post construction control measures on the permitted plants." 636 F.2d 363 (citing H.Rep.No.95-294, 95th Cong., 1st Sess. 145(1977), LHA at 1615, U.S.Code Cong. & Admin. News, p. 1224.) Second, that "States would not be required to apply the permit process to smaller new sources, although the State plan would still be required to contain such measures as are necessary to prevent significant deterioration." *Id.* (citing H.Rep.No.95-294, 95th Cong., 1st Sess. 171(1977), LHA at 1641, U.S.Code Cong. & Admin. News, p. 1250; as cited at 636 F.2d 362-3).

> subject to measures necessary to cope with a condition of pollutants exceeding the PSD maximum.

636 F.2d at 363. *See also* 72 Fed. Reg. at 31,383.

Further, the Court held that the SIP must be revised to correct increment problems that may arise because of the permitting of the source receiving the variance. In particular, the Court stated:

> The regulations provide that once it is determined that a SIP is "substantially inadequate to prevent significant deterioration or that an applicable increment is being violated," then the SIP must "be revised to correct the inadequacy or the violation." [Citation to what is now 40 C.F.R. § 51.166(a)(3).]

636 F.2d 323, 361.

The Court observed that, in certain limited circumstances, a new or modified major emitting facility would be allowed to be constructed despite the fact that the source would cause or contribute to a Class I increment violation, but the variance provides the state the opportunity to correct the increment violation in the manner it sees fit. *Id.* at 362-63. In other words, the emission reductions to comply with the increment do not have to come from the individual source that obtained the variance; rather one or more of the existing sources contributing to the violation can be considered for reductions.

4. EPA's present proposal contradicts its own findings regarding Sections 163 and 165. EPA acknowledges that it previously interpreted the variances in accordance with the above-described clear statutory requirements and the Court's holding in *Alabama Power*. This interpretation allowed for the issuance of a permit under a variance but did not remove the requirement for the revision of the SIP for additional controls to existing sources in order to protect the Class I increment. 72 Fed. Reg. at 31,383; *see also* Letter from John Seitz, Director EPA/OAQPS, to Francis Schwindt, Chief Environmental Health Section/North Dakota Department of Health (Dec. 10, 2001), Docket # EPA-HQ-OAR-2006-0888-0010.

B. EPA is incorrect in asserting that the FLM variance provisions are meaningless unless they allow for an overriding of Section 163's clear requirement to protect against increment exceedance. In support of its proposal to exclude FLM variance sources from Section 163 Class I increment protection, EPA asserts that unless FLM variance sources are excluded from Section 163 increment protection, FLM variances would be meaningless. This argument, however, fails to recognize the difference between variances for particular sources under Section 165 and Section 163's clear requirement that increment cannot be exceeded for a Class I area.

1. EPA's arguments are contrary to the Act and ignore the statutory regime intended by Congress. EPA's arguments are contrary to the plain language of Sections 161, 163, and 165(a). These Sections make clear that PSD increments, including the Class I increments, must not be exceeded and that both provisions in SIPs and individual permit requirements are available to protect the increment. Contrary to the Act's clear requirements, EPA is attempting

to substitute the statutory variance for a specific source (allowed under Section 165(d)) with an overall waiver of the Section 163 increment (clearly not allowed by the statute).

The AQRV provisions of Section 165(d)(2)(C) allow a specific source that receives an FLM variance to be permitted, notwithstanding that the source may cause or contribute to a Class I increment exceedance. Thus, with an FLM variance, a state can choose to let construction of a source proceed. However, the clear requirements of Section 163 still remain. Accordingly, if an FLM variance is granted, the construction of the facility can go forward, but the state (as opposed to the variance facility) must assume responsibility for achieving any offsets necessary to protect the Class I increment from one or more existing sources.

Thus, contrary to EPA's argument, requiring continued enforcement of the Class I increment does not render the variance provisions meaningless. Rather, the variance shifts the burden from the source to the state to require emission reductions or other actions necessary to protect the increment.

2. EPA's hypothetical of a single source consuming all available increment is highly unlikely and does not support its proposal to disregard the clear requirements of Section 163. EPA states that the hypothetical situation where one source alone causes an increment violation demonstrates that increment is meaningless when an FLM variance has been allowed. EPA's hypothetical of a single source that consumes the entire increment is seriously flawed in at least two ways.

First, according to air experts at the National Park Service, this situation is extremely unlikely to occur, and in fact, has not occurred in the thirty years of the PSD program.[18] Thus, EPA's hypothetical presents no real world concern that needs to be addressed by disregarding the requirements of Section 163 and converting an FLM variance into an end-run around Class I increment protection.

Second, even if the unlikely event EPA references were to occur, it would not call for EPA's proposed action. To the extent a single source would in fact be responsible for consuming the entirety of an increment, nothing precludes the state from revising its SIP to reduce baseline emissions to offset the increase. Thus, the emissions from such a hypothetical single source could be accommodated under the increment in accordance with Section 163.

C. EPA improperly asserts that only AQRVs, and not increment, must be protected. EPA's proposal misreads the Act with respect to AQRV protection. Specifically, EPA states "we interpret the Act to establish AQRVs, rather than the Class I increment, as the controlling standard in Class I areas." 72 Fed. Reg. at 31,382. This statement is incorrect. As discussed above, the Act, its legislative history, judicial interpretation, and long-standing EPA construction, clearly provide that increments must not be exceeded.

---

[18] E-mail from John Bunyak, U.S. National Parks Service, Policy, Chief Planning & Permit Review Branch, PSD/New Source Review in Exhibit I, Letter from Herbert Frost to Timothy Ballo regarding response to Freedom of Information Request (Nov. 6, 2007).

1. Increments and AQRVs serve different purposes. Increments protect against increases in specific pollutants of concern, such as SO_2 and particulate matter. This protection against increases in key pollutants is critical to maintaining strict air quality in Class I areas. However, increments do not protect against other air quality-related impacts that are important to preserving the special characteristics of Class I areas so deserving a level of special protection under the Act. For this reason, the Act also protects against impacts to AQRVs. Thus, there is no reason to attempt to interpret the Act as providing an either/or protection. It protects against increment exceedance regarding certain specific contaminants *and* protects against AQRV impacts with respect to various air emissions.

2. Congress never intended to allow AQRVs to supplant Class I increments such that Class II increment applies. Nothing in the statute says that AQRVs are "controlling" or more important than compliance with the numeric increments. To the contrary, Congress mandated protection of both – not just one or the other.

EPA's proposal would allow states to effectively redesignate mandatory Class I areas to a level of protection more akin to Class II, something that Congress flatly prohibited in Section 162(a) of the Act. In Section 162(a), Congress specifically designated four categories of national parks in existence on August 7, 1977 as Class I areas that "may not be redesignated." EPA does not have the authority to override Section 162(a)'s clear prohibition. But, this Proposed Rulemaking would do just that, by removing absolute Class I increment protection from these parks.

With respect to national parks established after August 7, 1977, Section 164(a) provides a specific mechanism for redesignation as Class II areas. EPA's proposal would effectively redesignate these Class I areas without following the procedures mandated by Congress.

3. EPA's Proposed Rulemaking would reverse its long-standing application of the Act to require protection of both AQRVs and increments. EPA's proposal is undermined by its own statements regarding proper construction and application of the Act. For example, in its 2005 PSD rulemaking for NO_2, the agency repeatedly stated that FLM review of proposed permits for protection of AQRVs *supplemented* (rather than replaced) the NO_2 increments. *Prevention of Significant Deterioration for Nitrogen Oxides; Final Rule*, 70 Fed. Reg. 59,582, 59,597-99 (Oct. 12, 2005). In that rulemaking, EPA also specifically stated that protection of AQRVs must occur "*in conjunction with*" compliance with increments and other requirements. *Id.* at 59,598 (emphasis added).

III. EPA's Proposal to reverse its longstanding policy and authorize the selection of any two, nonconsecutive years that the applicant believes is representative of normal operations for constructing baseline emissions, invites mischief and is contrary to the Act.

For the past 30 years of implementing the PSD program, EPA has required emissions at the time of the baseline date to be determined based on emissions from the two years preceding the baseline date. *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule*, 67 Fed. Reg. 80,186, 80,188 (Dec. 31, 2002). EPA has usually only allowed the use of a different time period in calculating actual emissions as

of the baseline date in cases where the preceding two years were atypical of the source's emissions. *Id.* at 80,192 n.153. Without reasoned justification and contrary to the Act, EPA is now proposing to allow sources to select a different 24-month period from the prior 10-years. EPA then goes even further by allowing the selection of any two non-consecutive 12 months during the 10-year time frame. In addition, EPA provides only vague and unenforceable standards for selecting a period other than the two years preceding the baseline date, which standards prevent EPA from meeting its statutory obligation to protect the increment for a Class I area.

For the same reasons, EPA's proposal to allow the inclusion of post-baseline emissions in the baseline determination cannot be properly promulgated.

A. EPA's proposal to allow sources to look back up to ten years to establish the baseline concentration is contrary to the Act, arbitrary and capricious, and vague.

1. Contrary to the Act, EPA proposes to allow a source to look back up to ten years to determine the baseline concentration. EPA supports its proposal to allow a ten-year look back period for determination of baseline concentrations in part because of its prior interpretation of "actual emissions" in the context of determining PSD applicability. But the reasons for the ten-year look back period for PSD applicability do not apply to the determination of baseline concentrations. In fact, application of a ten-year look back period for determining baseline concentrations is clearly contrary to the requirements of the Act.

In *New York v. EPA*, the D.C. Circuit Court held that EPA's rule allowing a source to select any 24-month period from the 10-years prior to a modification of the source as its baseline was a valid exercise of agency discretion in the context of PSD applicability. 413 F.3d 3, 21-22 (D.C. Cir. 2005). The Court held that the definition of "modification" in the Act was ambiguous in that the statute contains no definition of "increase" and was silent on how to calculate "baseline" in this context. *Id.* In the absence of a definition, EPA's 10-year look back period was a "permissible construction of the ambiguous term 'increases.'" *Id.*

However, in the context of PSD increment calculation the statute is not silent and there is no ambiguity for the definition of baseline. Baseline concentration is clearly defined as the "ambient concentration levels which exist *at the time* of the first application for a permit in an area." 42 USC §7479(4) (emphasis added).[19] This is not ambiguous. The statute clearly requires that ambient concentration levels are to be calculated as they exist at the time of the first application in the area. Thus, there is no room under the statute for EPA to allow the use of any two year period over the prior ten years to determine baseline.

[19] The Act then establishes two narrow exceptions to this clear rule: 1) for major stationary sources that commenced construction before January 6, 1975 but that were not yet operating as of the baseline date, the Act *includes* such sources' that allowable emissions in the baseline concentration; and 2) for major stationary sources which commenced construction after January 6, 1975, the Act *excludes* such sources' SO_2 and particulate matter emissions from baseline concentrations. *Id. See also* 40 C.F.R. §51.166(b)(13) and §52.21(b)(13). Neither of these exceptions is applicable to EPA's proposed rule changes.

2. EPA's proposed change to its long-standing policy to require use of the two-years preceding the baseline date would be arbitrary and capricious. It has been EPA's long-standing policy to require sources to use the two-years prior to the baseline date for estimating baseline concentrations. 72 Fed. Reg. at 31,386-87. As discussed later in detail in Section XII of these comments, when an agency proposes to change its long standing policy its decision will undergo an increased level of judicial scrutiny. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). Generally, the agency must provide a reasoned explanation for the change in policy. *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 408 (D.C. Cir., 1991). For the reasons discussed in this section, EPA's arguments for allowing a 10-year look back period is contrary to the Act and are therefore flawed. Without reasoned argument, EPA's actions in promulgating the Proposed Rule as will be arbitrary and capricious.

3. EPA's proposal to change its long-standing and clear policy to a rule based on vague and poorly-defined terms is illegal and prevents EPA from meeting its statutory obligation to protect the Class I increment. EPA's long-standing policy to require sources to use the two-years prior to the baseline date for estimating baseline concentrations provides a clear standard for measuring compliance with PSD increments. In contrast, EPA's Proposed Rule provides only vague and poorly defined standards for selecting a period other than the two years preceding the baseline date that will prevent EPA from meeting its statutory obligation to protect the increment for a Class I area.

In its Proposed Rule, EPA includes vague terms that are not defined. For example, a different time period other than the 24 months preceding the baseline date can be used based on information that operations during the 24 months were "not typical" of operations as of the particular baseline date. *See proposed* 40 C.F.R. 51.166(f)(1)(iv) and 52.21(f)(1)(iv), 72 Fed. Reg. at 31,397-98. Similarly, EPA supposedly limits the use of alternative periods of emissions by stating that "increases in emissions that are not attributable to the *normal variability* of source operations at a particular time are actual increases that should be counted as consuming increment." 72 Fed. Reg. at 31,389 (emphasis added). However, EPA provides no concrete explanation of how to determine what is "typical" nor how to define "normal variability" in source operations.

The vague and undefined nature of EPA's proposal violates the basic prohibition under administrative law against arbitrary and capricious administrative action. *See* 5 U.S.C. §706(2)(A); 42 U.S.C. §7607(d)(9). Agencies cannot base their actions on vague or undefined standards. *See Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (arbitrary and capricious for agency to use "significant scientific agreement" as standard for decision without explaining meaning of that phrase); *Amoco Production Co. v. FERC*, 158 F.3d 593, 596 (D.C. Cir. 1998) (remanding agency decision that revenues were not "significant," where agency failed to explain how much revenue should be regarded as significant); *City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) (agency must explain threshold for "enough" evidence to establish a prima facie case, and cannot rely on a "know-it-when-we-see-it" approach).

Here, EPA's proposal is so vague that it does not provide a basis for consistent, rational decision making. An agency cannot evade its duty to adopt meaningful rules by deferring key details to later interpretation. *Paralyzed Veterans of America v. D.C. Arena*, L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) (A substantive regulation must have sufficient content and definitiveness as

to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate vague rules and then give it concrete form only through subsequent less formal "interpretations.")

The vague terms and standards EPA is proposing will prevent it from meeting its statutory obligation to protect the increment for a Class I area. EPA's proposal would serve to foster mischief in affording wide discretion for calculating baselines in Class I areas. Since baseline calculations are the starting point for determining available increments, EPA's proposal would serve to undercut the protection of air quality of areas of truly remarkable natural and cultural significance. For these reasons, EPA cannot promulgate the Proposed Rule.

B. Contrary to the requirements of the Act, EPA proposes to allow emission increases after the baseline date to be included in the baseline. EPA is proposing to allow *post-baseline date emissions* to be included in determining emissions *as of the baseline date. See* 72 Fed. Reg. at 31,388. In particular, EPA is proposing to allow increased hours of operation or increased capacity utilization that occurs after the baseline date to be considered part of the baseline concentration. EPA may also be providing for later increases in sulfur content of fuel to be considered as part of emissions as of the baseline date. 72 Fed. Reg. at 31,389. Because EPA's Proposed Rule changes are inconsistent with the Act, they cannot be properly adopted.

1. The Act does not allow EPA to count increased emissions after the baseline date toward the baseline. As noted above, the Act defines "baseline concentration" as "the ambient concentration levels which *exist at the time of the first application* for a permit in an area." 42 U.S.C. 7479(4) (emphasis added). Thus, the Act clearly defines this "baseline concentration" to be limited to the ambient concentration levels existing as of the baseline date. Accordingly, EPA cannot include in the baseline concentration increased emissions due to activities that occur after the baseline date. If adopted, this proposal would be contrary to the clear language of the Act.

2. Federal Courts have found that the Act prevents inclusion of emissions after the baseline date in the baseline concentration. The D.C. Circuit held that emissions after the baseline date cannot count in the baseline concentration. The court in *Alabama Power* makes clear that increases after the baseline date from existing sources, even those that result from increased capacity utilization, cannot count toward the baseline concentration, but instead must count against the allowable increment. 636 F.2d at 376-81.

In the context of voluntary fuel switching after the baseline date, the court held that EPA's refusal to grandfather emissions resulting from changes in capacity utilization was a "well-supported interpretation of congressional intent." *Id.* at 381. Analyzing the legislative history of the Act, the court found that both the House and Senate bills in their original form included provisions that would have allowed calculation of baseline emissions based on capacity in existence at the time of the baseline date rather than actual emissions. *Id* at 380 (citing H.R. 6161, 95th Cong., 1st Sess. § 108 (1977) and H.R. 10498, 94th Cong. 2d Sess. § 108 (1976)). However, both these provisions were withdrawn from the final bill and the Court therefore held that the plain meaning of the final statute was for baseline to include actual emissions. *Id.* at 381.

For similar reasons, EPA's proposal to allow increased hours of operation or other forms of increased capacity utilization that occur after the baseline date to be considered part of the baseline concentration is inconsistent with the plain language of the Act. Thus, EPA cannot properly include in the baseline concentration emissions from existing sources that occurred after the baseline date.

IV. EPA's proposal to reverse its longstanding policy and allow sources to calculate short-term increment consumption using annual averages is contrary to Congressional intent of the Act, arbitrary and capricious, and vague.

EPA proposes to allow sources to use annual average emissions data in evaluating consumption of short-term average increments (i.e., 24-hour or 3-hour average increment). Specifically EPA would allow a source to calculate short-term average rates by "dividing an annual rate by the number of hours the unit was actually operating over the annual period." *See* proposed 40 C.F.R. §51.166(f)(1)(iii) at 72 Fed. Reg. at 31,397 and proposed §52.21(f)(1)(iii) at 72 Fed. Reg. at 31,399.

This proposal is contrary to Congressional intent of the Act, which was clearly for the short-term increments to protect against "spikes" in air pollution during short-term peak emissions periods. This proposal is also a significant change from EPA's longstanding interpretation of the statute, which is to use the maximum actual emissions rate over the time period of the standard. 72 Fed. Reg. at 31,389. EPA also does not provide a rational basis for its significant change in policy. Its proposal is, therefore, arbitrary and capricious.

A. EPA's proposal to use annual average emissions for short-term increments is contrary to Congress' clear intent. Congress chose to require compliance with 3-hour and 24-hour increments as well as annual average increments for SO_2 and particulate matter. 42 USC §7473(a). Congress specifically rejected the idea that 24-and 3-hour increments be based on annual averages when it rejected the Garn-Hatch Amendment that would have allowed a variance from the short-term increment. EPA cannot now promulgate a rule contrary to the clear will of Congress.

Determining Congress' intent regarding the short-term increments does not require any parsing of the statute. During debate on the Garn Hatch Amendment, Congress clearly stated its understanding that annual average data cannot be used to prevent short-term pollution spikes. For example, the House Interstate and Foreign Commerce Committee Report accompanying the House version of the 1977 Clean Air Act Amendments stated that "[a]n annual average is nothing more than the sum of a year's daily pollution readings. As averages, they can hide a multitude of very high air pollution concentrations with almost no perceptible effect on the annual average." Exhibit J, H.R. Rep. No. 95-294, at 169 (May 12, 1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1248. The Committee reasoned that "[e]liminating the short-term (3-hour and 24-hour) standards from the bill would completely undermine the capability to protect any of these public health and welfare values from chronic low levels of pollution or from repeated short-term peaks of pollution at levels below the minimum Federal standards." *Id.*

The House Report cautioned against eliminating the short-term increments from the draft legislation, explaining that such a move would have negative consequences for both the

environment and the economy. The House reports stated that for "the tourist unable to see across the Grand Canyon because of uncontrolled industrial pollution, it will be no consolation that the 'annual average' for pollution has not increased nearly as much as the 3-hour or 24-hour pollution levels have increased." *Id.* The House also recognized the critical enforcement role that the short-term increments have. The House report states that "[e]liminating the short-term standards from the bill would undermine the capability to control emissions from major pollution sources such as power plants and, therefore, would eliminate the bill's protection against significant deterioration of air quality." *Id.* at 170, 1977 U.S.C.C.A.N. at 1249.

B. Congress was aware of the concerns that EPA now expresses when Congress rejected any long-term averaging of short-term increment levels. The Senate was acutely aware of the various difficulties that would accompany implementation of short-term increments, but retained those increments in its version of the amendments. Senator Domenici (R-NM) stated during debate on the failed Garn-Hatch Amendment that would have allowed a variance from the short-term increment, "[d]o [people] wait until the end of the year and say, 'It is as clean at the end of the year as it was at the first,' or do they live during all of those days?" Exhibit J, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 900 (1979).

Congress was aware at the time of the potential difficulties of requiring short-term data to enforce the increments. When this debate was going on, continuous emission monitoring systems (CEMS) were not commonly used. Contemporary modeling was often based on estimates of emissions using emission factors or stack test data and the expected or maximum operating factors. Congress knew full-well that compliance with short-term increments would be based on such data and yet chose to include short-term increments in the statute.

The debate surrounding rejection of the Garn-Hatch Amendment makes clear Congressional intent for the short-term increments not to be based on annual averages. EPA cannot impose its judgment over that of Congress simply because it perceives that implementation of short-term increments using short-term data may be difficult to implement or unfair on some sources.

C. Real world examples demonstrate that EPA's proposal to allow use of "annual average" rates for short-term emission periods will underestimate actual emissions for long periods of time and prevent EPA from meeting its statutory obligation to protect the Class I increment. EPA cannot assure that a permitted facility will not cause or contribute to exceedence of an increment if, for much of the year, the emission data used in modeling that forms the basis of the permit underestimates the actual emissions. This is the case when average data is used in place of allowable emissions for the 3-hour and 24-hour average increments. Average data, by definition, both overestimates at times and underestimates at others. For the 3-hour and 24-hour average increments, when the model uses data that underestimates the actual emissions, the short term increment consumption will be underestimated and exceedences will be missed. Thus, using average data for short-term periods, EPA cannot determine whether a proposed source will cause or contribute to an exceedence of the increment. Conversely, use of allowable emissions for all sources in an inventory assures that a proposed source will not violate the increment. Average data is therefore not a reasonable substitute for short-term allowable emissions.

A recent modeling analysis conducted as part of the permit process for the proposed Gascoyne Generating Station (Gascoyne), North Dakota demonstrates that use of average data consistently underestimates actual emissions and therefore is not a reasonable substitute for allowable emissions. As part of the modeling, both North Dakota Department of Health ("NDDH") and the Department of Interior ("DOI") evaluated the impacts on the Theodore Roosevelt National Park Class I Area. *See, Responses to Recurring Issue Related to North Dakota's Computer Modeling of Sulfur Dioxide in CAA PSD Class I Areas*, North Dakota Dept. Health (Aug. 3, 2007) ("NDDH Model")[20] and Letter from David Verhay, DOI to Terry O'Clair, N. Dakota Department of Health (Feb. 29, 2008) ("DOI Letter").[21] The baseline emissions inventory for this modeling exercise included emissions from six boilers all of which impact the Class I area. DOI Letter at 3, n.2. Both the calculations by NDDH and those by the DOI determined that actual short-term emissions consistently exceeded the average emissions values used in NDDH's model. *See* NDDH Model at Section 4.3 and Figure A4; DOI Letter at 3 and attached figures. In fact, NDDH determined that for the 2000 and 2001 baseline years, "the hourly sums of concurrent hourly CEMS emission rates for all power plant sources for each hour exceed the sum of respective source actual emission rates about 26% of all hours" where NDDH "actual emissions" are based on annual averages. NDDH Model at Section 4.3. The DOI determined that between 2003 and 2006 the 3-hr and 24-hr average emissions from the 6 boilers consistently exceeded the average used in NDDH's model. DOI Letter at 3. The DOI concluded that "[t]his means that NDDH's approach will consistently under-predict increment consumption."

NDDH's approach using annual average emission data for short-term increment consumption calculation is substantively the same as that proposed by EPA. Therefore, this real-world example demonstrates that EPA's proposal will likely underestimate short-term increment consumption. Therefore, EPA's proposal is contrary to the Act in that EPA cannot meet its statutory obligation to protect the Class I increment if it allows average data to be used in place of short-term allowable emissions in determining short-term increment consumption for a proposed source.

EPA must not deviate from its longstanding policy of requiring reviewing authorities and permit applicants to evaluate maximum 3-hour and 24-hour emission rates from each emission unit when evaluating compliance with the 3-hour and 24-hour average increments. Allowing use of "average" emission rates fails to reflect the peak emission rates that actually affect 3-hour and 24-hour average pollutant concentrations. We believe EPA's concerns over lack of data are unjustified because there are sufficient methods that can be used to estimate maximum short-term average emission rates. Further, we believe EPA's concerns of lack of data and unfair bias against those sources with CEMS data are not only unfounded, but cannot in any case override the statutory requirement that the PSD increments must not be exceeded.

D. It is arbitrary and capricious for EPA to change its long-standing policy that short-term increments be calculated using short-term data because EPA provides no rational

[20] Available at Docket # EPA-HQ-OAR-2006-0888-0590.

[21] Exhibit K, available at http://www.health.state.nd.us/AQ/Dockets/Gascoyne%20500/Public%20Comments%20Received/DOI/NPS%20Comments.pdf.

justification for changing its policy. EPA's proposal is a significant change from its longstanding interpretation of the statute (i.e., use of the maximum actual emissions rate over the averaging time of the standard in question). 72 Fed. Reg. at 31,389; New Source Review Workshop Manual (the "NSR Manual") at C.49, Docket # EPA-HQ-OAR-2006-0888-0007. As discussed in detail in Section XII of these Comments, when an agency proposes to change its long-standing policy its decision will undergo an increased level of judicial scrutiny. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29. Generally, the agency must provide a reasoned explanation for the change in policy. *Rainbow Broadcasting Co.*, 949 F.2d at 408. For the reasons discussed in this section, EPA's proposal is contrary to the Act and its justification for changing policy is flawed. This proposal is therefore arbitrary and capricious.

1. EPA's argument that it is using "administrative good sense" is flawed because EPA misstates the context of the Alabama Power holding. In support of its change in policy, EPA cites a statement by the D.C. Circuit in *Alabama Power* that Congress intended EPA to use "administrative good sense in establishing the baseline and calculating exceedances." 72 Fed. Reg. at 31,390 (quoting *Alabama Power*, 636 F.2d at 380). EPA misstates the context of the Court's holding.

The Court was stating that it would not amount to "good sense" for EPA or a reviewing authority to take a "snapshot" approach to determining baseline concentration by looking only at emissions on a single day that is likely to significantly understate the baseline concentration. *Alabama Power*, 636 F.2d at 380. In particular, the court noted that it did not make good sense to take a snapshot picture of the baseline concentration on a "Sunday or a holiday, or when wind conditions are particularly favorable - - then the baseline concentration will be set so low that full operation at existing facilities on an average day will lead to increment exceedances. . . " *Id.*

EPA has already addressed the snapshot issue raised by the court by allowing the modeling of the maximum 3-hour or 24-hour emission rate over a two-year period prior to the baseline date. In contrast, EPA's present proposal - - to use long-term averages for short-term standards - - clearly does not make administrative good sense.

2. EPA's argument is flawed because it fails to provide a sound technical basis for use of annual average data for assessing short-term increments. To justify its proposal to use annual average data, EPA makes a number of claims that cannot be supported.

(a) Historical data is not as difficult to obtain as EPA suggests.

EPA states that short-term increment analysis would normally require CEMS and that such data is not available for all sources or available at the time of the applicable baseline date. 72 Fed. Reg. at 31,389-90. However, finding historical data upon which to calculate emission rates is not problematic as EPA suggests. Most states have had emissions reporting requirements for some time, and also have other historical records such as state operating permits that can be used to calculate maximum short-term average emission rates. With data such as this and AP-42 emission factors, maximum short-term average emission rates can be estimated. Or, if a source currently has data indicating peak short-term average emission rates such as CEMS data, one could apply its current "peak-to-mean" ratio to its annual emissions as of the baseline date to estimate its maximum short-term emission rates at that time. This is the approach that EPA has

used in the past. Further, baseline dates for many areas and/or pollutants may be fairly recent, so that CEMS data would be available for most sources.

(b) EPA's argument regarding fairness to sources using CEMS data is not warranted.

EPA's other primary justification for this policy change is fairness to sources operating CEMS and its intent to continue to encourage CEMS. 72 Fed. Reg. at 31,390. EPA states that the results of an increment consumption analysis using maximum short-term emission rates may unfairly bias against sources that have CEMS data and will discourage the use of CEMS. This argument misses a basic premise of the Act in that Congress intended a conservative approach to protecting Class I areas be used. *See, e.g.*, Exhibit J, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 324 (1979); *Alabama Power*, 636 F.2d at 387 (reasoning that EPA's conservative approach to modeling is in response to the "continuous responsibility" to protect increments and "not a casual goal to be assured only on typical days"). Thus, when CEMS data are not available the reviewing authority is required by the Act to use conservative assumptions and the best information available to estimate maximum 3-hour and 24-hour average emission rates. This approach, required by the Act, should already encourage sources to use CEMS.

(c) Ignoring the best available data (i.e., CEMS) for the sake of fairness or consistency cannot be justified.

CEMS data is the best data available. It measures what a source is actually emitting on an hourly basis, continually. No other emissions measurement or calculation option reflects actual emissions as accurately as CEMS data. EPA is proposing to ignore this best source for actual emissions data simply for fairness. This is not sound reasoning and detracts from EPA's mandated regulatory duties. The language of the Act expressly requires compliance with the short-term increments. There is no exception or provision for less than full compliance merely because it may be "unfair" to one or more sources. For these reasons, EPA's argument not to use CEMS data is inconsistent with the plain requirements of the Act and without merit.

(d) EPA provides no justification for the statement that all sources are unlikely to be operating at the same time.

EPA states that use of maximum short-term emission rates from all contributing sources is unjustified because not all sources will be emitting at maximum emission rates concurrently. EPA provides no basis for this assumption. Although in some instances, it may be rare for all sources in an area to emit at maximum actual 3-hour or 24-hour emission rates, there is no legally binding prohibition against such an occurrence. Moreover, such emissions could likely occur simultaneously at various points throughout the life of a source. This is especially true for areas where there are a number of coal-fired or other generation sources that likely may run at or close to peak capacity at the same time during peak electric usage time periods. Thus, for EPA to base its Proposed Rule on an unsubstantiated assumption (that all sources essentially never be emitting at maximum rates concurrently), is arbitrary and capricious.

E. EPA's proposal to overturn its long-standing approach of using actual maximum short-term average emission rates is vague and prevents EPA from meeting its statutory obligation to protect the Class I increment. Parallel to its proposal to use annual average data for short-term emissions, EPA proposes to limit the use of actual short-term average data for determining increment-affecting emissions for 3-hour and 24-hour increments. *See proposed* 40 C.F.R. §51.166(f)(1)(iii), 72 Fed. Reg. at 31,397 and proposed §52.21(f)(1)(iii), 72 Fed. Reg. at 31,399. EPA's rationale for limiting use of such data is vague. EPA proposes that actual short-term average data only be used when the "sufficient data are available to produce a consistent, reliable, and representative analysis." EPA provides no standard to measure what "sufficient, consistent and reliable" data is. Depending how its terms are construed, the quoted language could prohibit the state from using actual emissions from CEMS data unless all sources in the increment analysis have CEMS.

In conclusion, EPA's proposal to allow annual averaging to determine 24-hour and 3-day maximum baselines constitutes an attempt to change the Act. As such, it will fail in an eventual legal challenge. For this reason, EPA should reconsider its proposal on this important legislative weapon for defense against short-term, but nonetheless significant, impacts to Class I air sheds.

V. EPA's proposal to allow modeling of projected actual emissions is contrary to the Act and arbitrary and capricious.

EPA proposes to allow modified sources to use projected actual emissions in PSD increment consumption analyses. *See proposed* 40 C.F.R. §51.166(f)(1)(vi) at 72 Fed. Reg. at 31,397 and proposed rule 40 C.F.R. §52.21(f)(1)(vi) at 72 Fed. Reg. at 31,399. EPA justifies this change in policy simply by stating that "[f]or the same reasons discussed in [the December 31, 2002 New Source Review] rulemaking, we propose to adopt revised language for purposes of increment consumption assessment that requires use of projected actual emissions for modified sources." 72 Fed. Reg. at 31,391.

A. EPA's proposed action will prevent it from meeting its statutory obligation to protect the increment because projected actual emissions are speculative and unenforceable. The Act requires that EPA and the States protect the increment. 44 U.S.C. §7573(a) ("each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations . . . shall not be exceeded"). The projection of actual emissions is speculative, since there is no guarantee that the modified source will not emit above the level of projected actual emissions. *See e.g., New York*, 413 F.3d 3 (projecting actual emissions requires sources to predict uncertain future events). Therefore in permitting construction of a source based on its projection of actual emissions, EPA and the reviewing authorities will not be complying with their statutory mandate to protect increment unless the projected actual emissions are included in the source's permit as enforceable limits that cannot be exceeded.

In its current proposal, EPA does not indicate that it intends to include projections of actual emissions as enforceable limits. Instead, EPA relies on its 2002 new source review ruling to explain its proposed actions. This ruling does not provide a justification for EPA's presently proposed action. Although the D.C. Circuit upheld parts of EPA's 2002 rule in *New York*, the Court rejected its record-keeping component, noting that it thwarted "EPA's ability to enforce

the NSR provisions." *Id.* at 35. Similarly, permitting sources based on projected emissions that are not enforceable, thwarts EPA's ability to enforce the PSD increment.

B. Contrary to its assertions, EPA's 2002 NSR justifications for using projected actual emissions do not apply in the context of PSD compliance and do not provide a basis for its proposed action. EPA's only explanation to support using projected actual emissions in modeling PSD increment consumption is a reference to the justification for allowing the use of projected actual emissions in its December 31, 2002 new source review rulemaking. 67 Fed. Reg. 80,186. This 2002 NSR rulemaking on projected actual emissions was established for the sole purpose of determining whether a modification of a source triggers NSR review and does not provide a reasonable basis for its present proposal to allow projected actual emissions to be used for calculating a source's potential increment consumption.

Projected actual emissions as defined in EPA's 2002 rulemaking simply do not work for PSD increment analysis. Increment consumption analysis, unlike NSR applicability analysis, requires a review of both annual and short-term impacts. The definition of "projected actual emissions" from the 2002 NSR rule only reflects the projected maximum annual rate of emissions from a modified source. In the context of NSR applicability, there is no requirement to determine a source's projected 3-hour or 24-hour maximum emission rates. Thus, EPA's current proposal to rely on its 2002 ruling cannot be used to evaluate the short-term average PSD increment consumption. In addition, EPA provides no explanation of how a reviewing authority can use projected actual emissions to determine compliance with short-term increments, when projected actual emissions focus on annual, rather than short-term, emissions. The proposal is, therefore, vague and unenforceable.

EPA recognized that its proposal to allow projected actual emissions to determine source applicability could not be applied to a sources impact PSD increment consumption. In its 2002 NSR ruling EPA noted that "[t]he [2002] rule does not affect the way in which a source's ambient air impacts are evaluated." 67 Fed. Reg. at 80,192. EPA also stated that when determining a source's compliance with the PSD increments following a major modification, the source "must still use the *allowable* [as opposed to actual] emissions from each unit that is modified, or is affected by the modification." 67 Fed. Reg. at 80,196 (emphasis added).

For these reasons, EPA's proposal to change PSD rules cannot be justified by EPA's reliance on its 2002 ruling.

VI. Under the Act, EPA cannot promulgate a rule that authorizes a wide variation of PSD increment consumption analyses without adequate standards for the exercise of such discretion.

EPA is proposing to add a provision to the PSD regulations that would allow a reviewing authority extensive discretion to use its "best professional judgment" in determining actual emissions as of the baseline date and for current emissions when conducting a PSD increment consumption analysis. Specifically, EPA proposes the following regulatory language:

> Actual emissions shall be calculated based on information that, *in the judgment of the reviewing authority*, provides the most reliable, consistent, and representative indication

> of the emissions from a unit or group of units in an increment consumption analysis as of the baseline data and on subsequent dates. In general, actual emissions for a specific unit should be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. However, where records of actual operating hours, production rates, and composition of materials are not available or are incomplete, the reviewing authority shall use its *best professional judgment to estimate* these parameters from available information in accordance with the criteria in this paragraph. When available and consistent with the criteria in this paragraph, data from continuous emissions monitoring systems may be used.

Proposed 40 C.F.R. §51.166(f)(1)(i) at 72 Fed Reg. at 31,397 (emphasis added).

This language is in contrast to the current definition of actual emissions, which requires that "actual emissions *shall be calculated* using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." 40 C.F.R. §§ 51.166(b)(21) & §52.21(b)(21) (emphasis added).

EPA's proposal to imbue the individual reviewing authorities with broad discretion for the selection of data and methods for calculating PSD increment consumption is contrary to the Act. This is especially true when EPA's proposal is viewed in combination with its proposed adoption of a new definition for "Actual Emissions" and its apparent intent to adopt WESTAR's non-hierarchical list of "approved" data sources. These proposals open the door to inconsistent approaches to PSD increment consumption analysis between the states and unfortunately a "race to the bottom" for air quality protection that Congress intended to avoid.

For these reasons EPA cannot adopt this Proposed Rule. Rather EPA should adopt clear and consistent guidance on how to calculate PSD increments, such as is provided in the NSR Manual. This guidance should ensure national consistency and allow EPA to maintain regulatory control over states permitting decisions.

A. EPA's proposal to relax the standard for data used in increment consumption models is contrary to the Act.

1. Congress did not indicate in the Act that the calculation of increments should be less precise than the calculation of NAAQS. EPA justifies its Proposed Rule change (to allow reviewing authorities latitude to ignore the most precise data available when modeling consumption of a Class I increment) by stating that Congress did not intend for reviewing authorities to be as precise in this area of the law as in other sections of the Act. Specifically, EPA states that "[w]e do not necessarily read the Act to call for the same degree of precision in the increment consumption analysis as a determination of compliance with the NAAQS." 72 Fed. Reg. 31,385-86. EPA is wrong to interpret the Act this way.

First, the Act does not contain language indicating that Congress meant to allow less protective or accurate application of increments than afforded the calculation necessary for determining compliance with the NAAQS. Rather, the statute explicitly demands accuracy for both PSD increment calculations and NAAQS compliance. Indeed, the Act uses the same language requiring compliance with the NAAQS and the increment. Section 163(a) provides

stringent requirements for the Class I increments that "shall not" be exceeded. Similarly, section 163(b)(4) provides that, notwithstanding the increments, the maximum allowable concentration of a pollutant in a PSD area "shall not" exceed the NAAQS. Thus, for PSD areas, the statute makes no distinction between the standard of compliance with the PSD increment and the NAAQS.

EPA also focuses on the provision in the Act for adjustment to the baseline. However, this authorized adjustment does not indicate that Congress intended to provide less precision for increment calculations compared to NAAQS compliance. Congress *also* provided for adjustments in NAAQS attainment demonstrations, where, for example, the State demonstrates a SIP would be adequate to provide for timely attainment but for emissions from a foreign country. Section 179B(a).

2. The D.C.Circuit Court has made clear that increment modeling must be precise. The D.C. Circuit has made clear that Congress meant for increment modeling to be as precise as NAAQS compliance determinations. In Alabama Power, the court noted that Congress knew that modeling, even with its potential imperfections, would be used to determine compliance with the increments. 636 F.2d at 387. Nonetheless, the court noted that Congress did not, as a result, enact more general increments reflective only of the relative magnitude of deterioration of air quality in an area. Rather, the Alabama Power court stated that "the [modeling] guideline points out why models embrace rather conservative assumptions." Id. at 386. In particular, the court noted:

> "Congress did not direct the use of any particular diffusion models; rather, *it expected EPA to develop and utilize the most accurate and feasible modeling techniques available.* It also set largely *inflexible increments* for sulfur dioxide and particulates, thus *commanding the use of conservative assumptions on* weather and *other data input.*"

636 F.2d at 387 (emphasis added).

Thus, the D.C. Circuit clearly found Congress to intend for modeling increment consumption to be precise and conservative. In contrast, EPA's proposal, imbuing state reviewing authorities with broad discretion to arrive at increment calculations, violates the court's mandate for precision and conservativeness in increment calculation.

3. EPA's proposal is contrary to the Act's requirement for EPA to specify models and methods used to calculate the PSD increments. EPA's proposal to allow each permitting authority the discretion to decide how it prefers to conduct increment consumption analyses is contrary to the express terms of the Act. Section 165(e)(3)(D) of the Act directs that EPA "*shall specify with reasonable particularity* each air quality model or models to be used *under specified sets of conditions* for purposes of this part." (Emphasis added). Thus, EPA's rules must specify not only the models to be used for purposes of increment consumption analyses, but the "specified sets of conditions" under which those models are to be used.

Thus, Congress did not intend to leave to each individual permitting authority the discretion to develop its own methods for evaluating increment consumption – including the modeling and supporting baseline calculations. Rather, Congress required that EPA must specify

with particularity the models to be used and the specific sets of conditions under which those models are to be applied. Accordingly, EPA cannot leave to each permitting authority the discretion to pick and choose whatever conditions it prefers for increment consumption analyses based on each authority's "best professional judgment." Rather, EPA's PSD rules must set out with particularity the models to be employed and the inputs to be used in those models.

B. EPA's proposal to allow individual reviewing authorities latitude to select data used in increment consumption models will result in inconsistent application of PSD regulations and is contrary to the Act.

1. The statute requires national uniformity in application of the Clean Air Act. Section 301(a)(2) of the Act requires EPA to adopt regulations to "assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act," to set up policies and procedures for dealing with inconsistent or varying criteria being employed by EPA region offices, and to assure "an adequate quality audit of each State's performance an adherence to the requirements of [the Clean Air Act]. . .particularly in the review of new sources. . ."

EPA adopted such regulations in 1980 that are promulgated at 40 C.F.R. Part 56. 45 Fed. Reg. 85,400 (Dec. 24, 1980). As part of these requirements, EPA is required to

> (a). . .include, as necessary, with any rule or regulation proposed or promulgated under parts 51 and 58 of this chapter mechanisms to assure that the rule or *regulation is implemented and enforced fairly and uniformly* by the Regional Offices. 40 C.F.R. §56.4(a).

EPA's proposed regulation at 40 C.F.R. §51.166(f) (72 Fed. Reg. 31,397), which would allow for each reviewing authority to make their own judgment as to the "most reliable, consistent, and representative indication" of actual emissions to be used in PSD increment analyses, directly contradicts the uniformity requirements contained in 40 C.F.R. §56.4(a). EPA cannot assure uniform implementation of the Act if each reviewing authority may make their own judgment.

2. The statute requires national uniformity for the PSD program to prevent disputes between the States. EPA's proposal to imbue state and local permitting authorities with professional judgment discretion to determine baseline and current actual emissions in an increment analysis is also inconsistent with another basic statutory mandate of the PSD program - - assuring emissions in one state do not adversely impact air quality in a neighboring state.

Section 160(4) of the Act states one of the purposes of the PSD program is "[t]o assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State." Congress also included provisions to prevent states from adversely impacting their neighbors as a result of inconstant SIP provisions. Section 110(a)(2)(D)(i)(II) of the Act mandates that SIPs contain adequate provisions prohibiting "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will. . . (II) interfere with measures

required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality. . ."

To meet its mandate that a source permitted in one state will not adversely effect a Class I area in another state, EPA must establish a system for increment consumption calculations designed to reach the same conclusion in each state performing the calculation. If states are allowed to select different data for calculating emissions, EPA cannot carry out this statutory mandate to protect Class I air quality against adverse impacts caused by interstate transport from emission sources.

3. Congress intended a uniform system to prevent states from engaging in a "race-to-the-bottom" for air quality protection. The Act's legislative history makes clear that Congress wanted EPA to specify uniform and consistent methods by which all permitting authorities would conduct increment consumption and other PSD analyses. The House Report for the 1977 Clean Air Act Amendments observed that nationally consistent rules and requirements are essential to prevent a race to the bottom in terms of air quality protection:

> Without national guidelines for the prevention of significant deterioration, a State deciding to protect its clean air resources will face a double threat. *The prospect is very real that such a protective, air quality state would lose existing industrial plants to states that exercise their version of "professional judgment" in such a way to encourage siting of industrial sources for economic reasons.* A very real danger exists that the protective, air quality state could become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls. *The legislative history envisions this danger and for that reason indicated the importance of uniform standards that would apply for protecting air quality in Class I areas.*

Exhibit J, H. R. Rep. No. 95-294, p. 134 (1977). Indeed, it is important to note that the legislative history of the Act makes clear Congress' fear of the very same "professional judgment" standard that EPA is now proposing.

The House Report further observed that "a community that sets and enforces strict standards may still find its air polluted from sources in another community or another State." *Id.*, at 135 (quoting 116 Cong. Rec. 32909 (1970)). Sections 110, 160, 163, and 165 of the Act grew out of this debate that evidences the concern to avoid a race to the bottom between states and Congressional intent to avoid such a situation. In formulating the Act, Congress clearly intended a nationally consistent program composed of states developing individual SIPs based on consistent national standards. EPA's present proposal - - to leave it up to the states to determine what data to use in modeling increment consumption and thereby allow the "economic-environmental blackmail" feared by Congress - - is contrary to the Act.

4. EPA's proposal is contrary to its present rules requiring national uniformity. For many years, EPA has been striving to ensure national uniformity in implementing the PSD regulations and other requirements of the Act. For example, in its 2005 PSD rulemaking for NO_2, EPA stated its view that Congress meant for increments to allow air quality in attainment areas with the same classification "to 'deteriorate' by the same amount for each subject pollutant.

. ." 70 Fed. Reg. at 59,601. The agency stated that the level of increase allowed by an increment should apply "uniformly to all areas in the nation with that particular classification." EPA said that such an approach was "necessary for EPA to ensure equitable treatment by allowing similar levels of emissions growth for all regions of the country that a State elects to classify in a particular manner." *Id.* "Congress did not intend," the agency stated, "for the increments it established to impose a disproportionate impact on particular areas." 70 Fed. Reg. at 59,602. *See also* 70 Fed. Reg. at 59,600; *Prevention of Significant Deterioration for Nitrogen Oxides; Proposed Rule*, 70 Fed. Reg. 8880, 8899 (Feb 23, 2005).

C. EPA's proposed approach will change a clear requirement into a vague provision and is unlawful and arbitrary. The vague and undefined nature of EPA's proposal – leaving to states the key decisions without meaningful governing criteria – violates the basic prohibition under administrative law against arbitrary and capricious administrative action. *See*, 5 U.S.C. §706(2)(A); 42 U.S.C. §7607(d)(9). Agencies cannot base their actions on vague or undefined standards. *See*, *Pearson*, 164 F.3d at 660 (arbitrary and capricious for agency to use "significant scientific agreement" as standard for decision without explaining meaning of that phrase); *Amoco Production Co.*, 158 F.3d at 596 (remanding agency decision that revenues were not "significant," where agency failed to explain how much revenue should be regarded as significant); *City of Vernon*, 845 F.2d at 1048 (agency must explain threshold for "enough" evidence to establish a prima facie case, and cannot rely on a "know-it-when-we-see-it" approach). This principle is rooted in part in an agency's duty to "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Here, EPA's proposal is so vague that it does not provide a basis for consistent, rational decision making. An agency cannot evade its duty to adopt meaningful rules by deferring key details to later interpretation. *Paralyzed Veterans of America*, 117 F.3d at 584 (A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal "interpretations.")

In its Proposed Rule, EPA is planning to regulate PSD increment consumption using a vague "best professional judgment" standard for the critical decisions on what data will be used in the models that calculate the baseline and the increment consumed. This is akin to the "significant scientific agreement" standard denied to the EPA by the D.C. Circuit in *Pearson*. 164 F.3d at 660. EPA provides no threshold for what the minimum "best professional judgment" is that it will approve. Taken in conjunction with the indication that EPA will allow selection of data types and methods from WESTAR's non-hierarchal smorgasbord, this amounts to a "know-it-when-we-see-it" approach that the Court disallowed in *City of Vernon*, 845 F.2d at 1048, and amounts to a considerable relaxation of the existing rule.

D. EPA's argument on accuracy and reliability is unsupported. EPA justifies this proposed regulation in part by stating that the experience of EPA and many states "has shown that the accuracy and reliability of the available data may be questionable or may vary significantly over the time period of the emissions estimate." 72 Fed. Reg. at 31,385. EPA does not provide a factual record in this rule-making proceeding to support this assertion. In addition, EPA fails to identify the specific accuracy or reliability problems it seeks to remedy with its proposal. Also, EPA does not demonstrate or explain how giving states more discretion will

result in more accurate and reliable emissions estimates and baseline calculations than the current rules. In fact, the Act currently mandates sources obtain accurate and reliable data for current emissions, while its Proposed Rule would not. Finally, there is no adequate support in this record for the assertion by EPA that it is difficult to determine past emissions for baseline purposes. For these reasons, EPA has not provided a rational argument to change its current rule mandating specific data sources be used to calculate increment consumption, 40 C.F.R. §§ 51.166(b)(21) & 52.21(b)(21), and therefore its Proposed Rule is arbitrary and capricious.

1. The Act mandates that current data be accurate and reliable. The issue of accuracy and reliability of data is limited to estimating the emissions of those sources that existed at the time of the baseline concentration date. For recent and present day emission rates, obtaining reliable information is not only readily achievable, but is mandated by the Act. Section 165(a)(7) expressly requires the applicant for a PSD permit to conduct such monitoring as may be necessary to determine the effect that emissions from the proposed facility may have or is having on air quality in any areas that may be affected. For purposes of determining whether emissions will exceed increments, §165(e)(2) requires continuous air quality monitoring data gathered over a period of at least one calendar year preceding the date of application. These provisions mandate whatever emissions monitoring is necessary to accurately characterize the impact of existing and proposed facilities on increment consumption.

2. It is not difficult to determine past emissions rates. EPA's current requirements for such data are specified in the NSR Manual. It has not typically been difficult to find data reflective of annual average emissions because most states have had annual emission reporting requirements in place for many years. It is also not difficult to estimate maximum short-term average emission rates with consistent and reliable approaches from available source data on maximum short-term capacity, historical fuel characteristics, stack test data, and/or emission factors.

VII. The WESTAR recommendations do not ensure prevention of significant deterioration of air quality.

In addition to its proposed regulatory changes discussed above, EPA is requesting comment on WESTAR's recommendations for determining increment-affecting emissions. WESTAR identified several principles that it recommended should govern the reviewing authority's selection of the appropriate emissions estimating method. We support WESTAR's first two principles, that is: (1) to "maximize the accuracy of the method(s) in reflecting the actual status of air quality during each time period associated with applicable standards" and, (2) to "conform to the Clean Air Act, federal PSD rule, and other applicable laws and rules."

However, EPA cannot promulgate rules or establish policy that allows sources or reviewing authorities to select whatever data they want from WESTAR's menu of data options, with no intended hierarchy of choices. Such an approach will not enable EPA to meet its mandate to protect the Class I increment and, contrary to EPA's assertions, will result in decreased use of CEMS and inconsistent approaches to PSD implementation throughout the nation, contrary to the intent of the Act.

A. WESTAR's approach provides reviewing authorities unbridled discretion and therefore prevents EPA from meeting its statutory obligation to protect increment. WESTAR's approach would allow reviewing authorities to select whatever data and method they wish from a broad list. Some of the methods on the list utilize accurate and precise data or are appropriately conservative and therefore protective of the environment (e.g., use of short-term maximum emissions or actual emissions derived from CEMS data). But several are not (e.g., average 2-years of actual annual emissions and divide by operating hours to derive short-term emissions data). The WESTAR approach provides no requirements for using the more conservative or likely accurate methods. Instead, full discretion is left to the reviewing authorities to choose whatever method they wish, even if there are other more accurate or more appropriately conservative methods that could be easily applied.

Under the WESTAR approach, EPA abdicates its role of protecting the increment and instead leaves that role completely to the reviewing authorities. Although these are governmental entities, it is critical to remember that their focus is ensuring that their state's air quality requirements are met, not the increment requirements of Class I areas. Thus, WESTAR's approach, which treats equally all of its listed methods of increment analysis and includes several that are likely to understate increment effects, makes it likely that increment will be exceeded. This is contrary to the clear requirements of the Act.

B. EPA's stated desire for consistency cannot override its statutory obligation to protect increment. EPA's desire for consistency in data used for determining emissions does not override the Act's requirement for accuracy in reflecting actual changes to air pollutant concentrations. The Act does not allow the reviewing authorities to discard accurate and precise data. As discussed in Section VI of these Comments, the Act reflects Congress's intent for equal precision in determining compliance with the increment as the NAAQS and requires a conservative approach to modeling. Discarding the best available data for the sake of consistency is contrary to both these purposes of the Act.

C. Use of the WESTAR approach is contrary to EPA's stated objective to encourage the use of CEMS. WESTAR lists as a principle that the methodologies for estimating increment-impacting emissions should encourage the use of CEMS. While we agree with this general principle, the WESTAR approach, by discarding EPA's present policies, discourages the use of CEMS. EPA's current policy of requiring 3-hour and 24-hour emissions to be based on the maximum actual 3-hour and 24-hour emission rates encourages the use of CEMS, since without CEMS data the reviewing authority may need to use AP-42 emission factors or assume worse-case operating conditions. Faced with these conservative assumptions, sources are encouraged to use CEMS to ensure the reviewing authority does not overestimate increment-affecting emissions.

D. WESTAR's proposal for a non-hierarchical menu of data sources will prevent consistency and lead to a race to the bottom. WESTAR recommends a menu of data options for use by reviewing authorities as they see fit. Providing such a non-prioritized menu of options will prevent development of a consistent national approach to assessing compliance with PSD standards. For reasons discussed in Section VI of these Comments, national consistency in applying the PSD program is required by the Act. Use of WESTAR's proposed data menu

would establish an framework for arbitrary decisions by reviewing authorities in implementing the PSD program.

Just as EPA set consistent standards for emission estimates used in NAAQS analyses in the Guideline for Air Quality Models, EPA must also set consistent standards for emission estimates used in increment analyses. Increment consumption cannot be accurately determined through air quality monitoring alone. It is therefore essential for EPA to set consistent standards for determining increment-affecting emissions as EPA has done for NAAQS compliance demonstrations. Such standards for determining increment-affecting emissions must err on the side of protecting the increment to reflect Congress' intent for a conservative approach to implementing the Act. In addition, as is discussed in Section VI of these Comments, the non-hierarchal approach will promote a race to the bottom between states that Congress specifically sought to avoid.

VIII. EPA's Proposal to Allow Use of Proprietary Meteorological Data and Proprietary Models in PSD Modeling Analyses that are not accessible to the general public is overly vague and contrary to the Act

A. The Act requires EPA to Allow public Access to the Meteorological Data and Models used to support a PSD Permit application. In proposing to allow reviewing authorities to rely on proprietary data and models, EPA wrongly determined that the public does not require access to the modeling methods or data used to model air quality. In regard to proprietary meteorological data, EPA states that it does not "believe it is necessary to require such proprietary data to be made available to the general public or to wholly preclude reliance on the data in regulatory modeling applications." 72 Fed. Reg. at 31,394. This proposal is contrary to the Act.

The Act requires emissions data input to models used to calculate ambient concentrations of pollutants submitted for PSD compliance to be available to the public. 42 USC 7414(c). Further, the PSD permitting provisions of the Act explicitly provide for public review and opportunity for interested persons to submit oral or written presentations on the air quality impact of a proposed PSD source. 42 USC 7475(a)(2). In order for interested persons to have a proper opportunity to review and comment on the air quality impact of a PSD source, the modeling analysis including all data used in the modeling analysis must be made available to the public. Without access to the underlying data, interested persons cannot provide meaningful comment on the proposed permit and will not have the ability fully review the modeling used for an application. Therefore, disallowing public access to data used in evaluating a source's contribution to increment consumption will negate meaningful public review and is contrary to the public review requirements of the Act. 42 USC 7475(a)(2).

B. EPA's proposal to limit access to proprietary meteorological data and models used to support a PSD Permit application is vague and improper in that it is not clear whether Tribal Land Managers will have access to data. EPA proposes to allow reviewing authorities to rely on proprietary data and software in modeling subject to EPA's rules on non-disclosure of confidential business information ("CBI"). 40 CFR part 2. Under EPA's CBI rules, an FLM may have access to such confidential information through interagency agreement. However, there is no provision allowing the Tribal Land Manager (TLM) similar access. Thus, contrary to

the Act, tribal authorities may be prevented from conducting a complete review of the potential for sources to impact increment and AQRVs in a Tribal Class I Area.

For the purposes of understanding a source's impact on AQRVs, EPA is required to provide the FLM with "all information relevant to the permit application" at least 60 days prior to any public hearing. 40 CFR § 52.21(p). As a federal agency, the FLM for a Federal Class I area may access any proprietary data used to support the permit application through interagency agreement. 40 CFR 2.209(c). However, 40 CFR part 2 does not provide a similar provision that would allow a Tribal Authority to gain access to proprietary data for the purposes of PD permit review. Thus, under EPA's proposal may have access to the data needed to assess a source's impact on AQRVs of a tribal Class I area.

IX. EPA cannot allow reviewing authorities to implement any of its proposed changes until it promulgates a final rule and formally approves relevant SIP revisions.

EPA states that "SIP changes would not necessarily be required in order for reviewing authorities to begin conducting PSD increment analyses consistent with these regulations because EPA's prior recommendations have not been binding on States." 72 Fed. Reg. at 31,394. This is incorrect. First, as discussed in Section XII of these Comments, EPA's prior statements, some of which are existing rules, are binding on the states. Second, the law is clear that any changes that affect SIPs require formal SIP revision and approval by EPA.

A. EPA's proposals would change rules and long-standing policies that are binding on the states. As discussed in detail in Section I of these Comments, EPA is wrong in asserting that its prior statements regarding implementation of PSD regulations are not binding. The NSR Manual and the policy it represents became binding through EPA's repeated and long-standing treatment of them as an authoritative interpretation of the Act. Thus, states are bound to follow EPA's longstanding policy as it is reflected in the NSR Manual.

In addition, it is important to note that EPA's proposals include revisions to existing rules. For example, EPA proposes to change the regulatory definition of "actual emissions" as it applies to PSD increment analysis. 40 C.F.R. §§ 51.166(b)(21) & §52.21(b)(21). This is a proposed change to currently binding regulations and therefore cannot be implemented without full and proper rule-making procedures.

B. States cannot implement EPA's proposed changes without EPA-approved changes to SIPs. The law is clear. Changes to an approved SIP are ineffective until that SIP is formally revised and approved by EPA. *See*, e.g., *General Motors Corp. v. U.S.*, 496 U.S. 530, 540 (1990) (approved SIP remains the applicable implementation plan for the state unless and until a revision thereto is approved by EPA).

The need for formal SIP revision and approval is particularly great in this case, since the proposed policy and rule changes have far-reaching consequences on the ability of SIPs to fulfill key requirements of the Act. As discussed elsewhere in these Comments, the changes proposed by EPA could allow substantially more pollution in Class I areas than under present rules and policies. Such significant changes require careful evaluation and implementation by the states

and EPA via the SIP revision process. *See e.g.*, CAA §110(l); *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001).

In addition to the above legal concerns, allowing states to implement the kinds of changes proposed by EPA without formal SIP revision would violate the public's right to notice and hearing procedures mandated by the Act for SIP changes. Clean Air Act §110(a).

X. Significant Impact Levels.

Twelve years ago, EPA proposed the use of Significant Impact Levels ("SILs") for PSD increment consumption analysis but has not yet promulgated their use in a rule. *Prevention of Significant Deterioration and Nonattainment New Source Review; Proposed Rule*, 61 Fed. Reg. 38,250, 38,291-93 (Jul. 23, 1996). In its current proposal, EPA is not proposing to promulgate its 1996 SILs proposal. Accordingly, EPA cannot properly issue a final rule regarding SILs based on this current proposal. But EPA does refer to SILs and, because SILs are an integral component in Class I increment consumption analysis, we briefly comment on them here.

A. SILs that are too high will be contrary to the Act. In 1996, EPA proposed to adopt SILs to apply to Class I areas. 61 Fed. Reg. at 38,291-93. Under that proposal, sources that impact an area below the SIL would not be included in increment consumption analysis. Omitting truly *de minimis* sources from increment analysis may make some sense. But if the SIL is set too high, it will prevent the analysis of sources that may cause or contribute to an increment exceedence. This is contrary to the clear requirement of the Act to protect against exceedences of the increment. 42 USC §7473.

EPA's 1996 proposal lists two sets of values for SILs proposed for Class I areas - - those proposed by EPA and those recommended by the FLMs. The SILs proposed by EPA are significantly higher than the levels recommended by FLMs. For example EPA's proposed SILs for SO_2 in Class I areas are 0.1μg/m3 for annual average impact and 0.2μg/m3 for 24-hour average. 61 Fed. Reg. at 38,292. In contrast, FLMs proposed that SILs for SO_2 in a Class I area should be 0.03μg/m3 for annual average impact and 0.07μg/m3 for the 24-hour average. *Id.*

If and when EPA decides to promulgate SILs, it should adopt the values proposed by the FLMs. The FLMs are in the best position to decide what is the *de minimis* level for the National Parks. Otherwise, EPA may likely implement SILs that improperly prevent the FLMs' duty to protect against increment exceedences in federal Class I areas. Similarly, EPA should consult with TLMs if it plans to adopt any SILs related to tribal Class I.

B. EPA should confirm that SILs do not exempt a source from AQRV analysis. In its 1996 proposal for Class I Area SILs, EPA appropriately stated that the SILs are not to be considered as thresholds for determining the need for AQRV analysis. 61 Fed. Reg. at 38,292. SILs are inappropriate for AQRV analysis because AQRV impacts depend on the sensitivities of the particular Class I area and the specific protected value. Accordingly, generic thresholds such as SILs are inappropriate for AQRV analysis and, in any future rulemaking regarding SILs, EPA must clarify that SILs should not be used to exempt sources from AQRV analysis.

XI. EPA's proposals will create a virtual impossible task for tribes to conduct their review of permit applications under applicable Class I procedures.

EPA's new proposals not only represent a significant departure from long-standing policies, but also create an additional, significant burden on Class I Tribes to assess the reliability of projected impacts on Class I increments as well as AQRVs. The Class I Tribe will find it virtually impossible to challenge a state or applicant in the limited time afforded the Tribe for review.

A. The Clean Air Act and EPA's implementing regulations afford Class I Tribes a very limited time within which to review and prepare comments on the adequacy of the permit applicant's Class I analysis. It is not uncommon for permit applicants to begin negotiating and consulting with state permit authorities months and sometimes years before a final permit application is filed for a PSD permit. This is especially true when the zone of impact of a proposed new source or a modification of an existing source includes a Class I area. However, the EPA's permitting regulations afford only a very limited time for a Federal Land Manager (including a Class I Tribe) to review and comment on information that is finally provided to the State and then to the relevant EPA Region.

The EPA is only required to distribute to a Class I Tribe information regarding the permit application within 30 days of the EPA's receipt and only 60 days prior to any public hearing that is scheduled for the application for a construction permit.

In particular, 40 CFR sec. 52.21(p) provides in relevant part as follows:

> The Administrator shall provide written notice of any permit application for a proposed major stationary source or major modification, the emissions from which may affect a Class I area, to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within any such area. Such notification shall include a copy of all information relevant to the permit application and shall be given within 30 days of receipt and at least 60 days prior to any public hearing on the application for a permit to construct. . .

Id.

It is conceivable that a Class I Tribe may not receive the voluminous information that supports the applicant's analysis of the source's anticipated impacts on the Tribe's Class I area any earlier than two months before the public hearing. Of course, the public hearing represents the sole opportunity for the Tribe to make a record of its legal, technical and factual position on the applicant's proposal and potential impact on its Class I area.

It is within the context of this very limited time for Class I Tribes to review and comment on a proposed PSD permit that the fairness and reasonableness of EPA's proposals must be weighed in this rule-making docket.

B. EPA's proposals will increase the level of scrutiny by Class I Tribes necessary to assess the reasonableness of the Class I impact analysis by states and permit applicants during the already limited time period for review and comment, thereby making such review virtually

impossible for Class I Tribes. In virtually every instance, EPA's proposals that are at the core of the Class I Tribe's objections will increase the scrutiny required by Class I Tribes in the review of PSD applications and their impacts on Class I Areas. Given the limited resources of Class I Tribes and the limited time afforded for such review under the EPA rules, the EPA proposals will almost guaranty an ineffective opportunity for any meaningful comment and review in such application process. One needs only to conduct a cursory analysis of each of the EPA's proposals to understand this impact on Class I Tribes.

1. EPA's proposal to authorize the selection of any two, nonconsecutive years that an applicant believes are representative of normal operations for determining baseline emissions will require the Class I Tribe to conduct and exhaustive review of available emission data. This will be virtually impossible in the limited time available for review and comment by Class I Tribes.

2. EPA's annual average emission proposal for short-term increments will force Tribes to review and analyze voluminous records that are not readily available. Again, imagine the challenges facing Class I Tribes with limited resources and time to conduct the type of detailed review required to challenge an applicant's analysis if this proposal is adopted.

3. The proposal to allow PSD applicants to model projected actual emissions rather than maximum potential to emit will open up a whole new area of necessary inquiry for Class I Tribes. Suddenly, a Class I tribe will need to have access not only to all the underlying data used by the applicant for actual emission projections but it will also be necessary to retrieve other data not used to conduct the Tribe's analysis under this new proposal.

4. The "best professional judgment" standard and the WESTAR analysis proposed for state permitting authorities invites mischief by economic-development motivated states. These proposed standards will almost certainly require a whole new level of inquiry that is difficult to predict precisely but easy to imagine. In particular, the ability to shield weather modeling from public scrutiny will only complicate the analysis performed by Class I Tribes.

These new standards embodied in this proposal will mean one thing for Class I Tribe: more demand for Tribal scrutiny with inadequate time and money for the resulting analyses required by this proposal.

For all of these reasons, the EPA proposals are unfair and fail to meet the standard of reasonableness. These standards of fairness and reasonableness are critical to the high level of assurance required to protect areas deserving of Class I protection.

XII. EPA's longstanding interpretation of the Clean Air Act is reflected in the New Source Review Workshop Manual and is binding policy that cannot be changed without providing a reasoned analysis.

In its Proposed Rule, EPA is proposing a number of "clarifications" to the way that PSD increment consumption is modeled. In doing so, EPA asserts that its past statements on this issue do not amount to binding policy and therefore EPA is free to establish new policy as it sees fit. For example, EPA states that the NSR Manual and the PSD guidance contained in it is "not a binding regulation and does not by itself establish final EPA policy or authoritative

interpretations of EPA regulations under the New Source Review Program." 72 Fed. Reg. at 31,379. EPA justifies this by stating that the workshop manual was never finalized (i.e., is labeled "draft") and that EPA "never intended for the manual to establish final agency policy or authoritative interpretations of EPA's NSR regulations." 72 Fed. Reg. at 31,379-80. EPA also claims, for similar reasons, that its "prior recommendations have not been binding on States." 72 Fed. Reg. at 31,394.

EPA is incorrect in its statement that prior statements do not constitute binding policy. EPA may state that it never intended that the NSR Manual establish agency policy; however, the NSR Manual itself and EPA's actions since publishing the NSR Manual have made this guidance published in 1990 effectively binding as policy. The NSR Manual states that it is EPA's interpretation of the Act. For 18 years it has been relied on by EPA, permitting authorities, permittees and the judiciary as EPA's definitive guidance on new source review permitting. It is only now - - when the procedures in the manual are apparently inconvenient - - that they are being discarded.

An agency's actions are arbitrary and capricious when it deviates from longstanding policy without reasoned argument. EPA's proposals often part contrary to the Act , and EPA provides mostly flawed arguments for changing from its longstanding policy as reflected in the NSR Manual. Therefore, its actions are arbitrary and capricious. *See, e.g., Rainbow Broadcasting Co.,* 949 F.2d at 408.

A. An agency guidance document such as the NSR Manual becomes binding when the agency treats it as an authoritative interpretation of the regulations. A guidance document acquires a binding effect if an agency acts as if a document issued at headquarters is controlling in the field, bases enforcement actions on the policies or interpretations formulated in the document, or leads private parties or state permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document. *Appalachian Power*, 208 F.3d 1015, 1020-21 (DC Cir., 2000) (citing *Robert A. Anthony, Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public*?, 41 Duke L.J. 1311, 1328-29 (1992)).

The NSR Manual is authoritative and "binding" in a practical sense because it meets all the requirements for the *Appalachian Power* definition of a binding document. EPA has treated the NSR Manual as authoritative in the field regarding PSD implementation by relying on it in appellate court briefs and decisions by the Environmental Appeals Board. EPA has based enforcement and permitting decisions on the NSR Manual by citing to the manual in probably hundreds of letters to state and local permitting authorities when commenting on proposed new source review permits. EPA has led reviewing authorities and permittees to believe the NSR Manual is authoritative by using the manual to train numerous federal, state and local permitting authorities.

B. EPA has treated the NSR Manual as an authoritative interpretation of the regulations and it is therefore binding.

1. The text of the NSR Manual makes clear that EPA intended the NSR Manual to be EPA's interpretation of the PSD regulations. EPA wrote the manual to reflect EPA's policies

and interpretations of the Federal new source review and prevention of significant deterioration regulations that existed in October 1990. According to its preface, the NSR Manual is designed to: "describe in general terms, and illustrate by examples, the *requirements of the new source review regulations and existing policies* interpreting those regulations." (Emphasis added).

This text demonstrates that the NSR Manual reflected EPA's interpretation of the new source review permitting regulations as the regulations and statutory requirements existed in October of 1990.

2. The EPA has treated the NSR Manual as if it is an authoritative interpretation of NSR regulations, and EPA and the federal courts have long and often relied on the NSR Manual.

(a) EPA has relied on the NSR Manual to support its arguments in briefs to Federal appellate courts.

In briefs to the 1st and 9th Circuit Courts of Appeals, EPA cites to the NSR Manual as addressing the "extent of required analysis" under the PSD increment consumption requirements contained in 40 C.F.R. § 52.21(k). *See e.g.*, Exhibit L, EPA's respondents' brief in *Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443 (1st Cir., 2000); Exhibit M, EPA's respondents' brief in *Santa Teresa Citizen Action Group v. E.P.A.*, 2002 WL 31654825, (9th Cir., 2002) (unpublished opinion).

(b) EPA's Environmental Appeals Board relies on the NSR Manual.

The Environmental Appeals Board (the "Board") has "consistently" held that compliance with PSD increments is a "core" component of the PSD regulations. Exhibit N, *In re: Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 677 (EAB 2002). When permitting authorities deviate from the NSR Manual, the Board expects "an analysis that is at least as detailed as that contemplated by the NSR Manual." Exhibit O, *In re: Indeck-Elwood, LLC*, PSD Appeal No. 03-04 (Sept., 2006).

The Board has been equally consistent in citing to the NSR Manual dozens of times between 1992 to the present, as representing EPA's position on application of PSD regulations. *See e.g.*, *In re: Hawaiian Commercial & Sugar Company*, PSD Appeal No. 92-1 (July, 1992) ("This [NSR Manual] was developed for use in conjunction with new source review workshops and training, and to guide permitting officials. As such, it has been widely circulated and represents the Office of Air Program's current thinking in this regard."); *See also*, *In re: Inter-Power of New York, Inc.*, PSD Appeal Nos. 92-8 and 92-9, at 135 (EAB, March 16, 1994); *In re: Christian County Generation, LLC*, PSD Appeal No. 07-01 (Jan., 2008).

The Board's reliance on the NSR Manual means that for federal PSD permits the NSR Manual is the de facto standard.

(c) Federal Courts rely on the NSR Manual.

In *Alaska Dept. of Environmental Conservation v. EPA*, the U.S. Supreme Court relied on the PSD provisions in the NSR Manual relating to BACT. 540 U.S. 461, 476 (2004). The Court noted that although "[n]othing in the Act or its implementing regulations mandates top-down

analysis . . . EPA [in its brief] represents that permitting authorities 'commonly' use top-down methodology" as it is described in the Manual. *Id.* at 476, n7.

Other federal courts have followed briefs from EPA and opposing parties in relying on the NSR Manual. *See e.g.*, *Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443 (1st Cir., 2000); *LaFleur v. Whitman*, 300 F.3d 256 (2nd Cir. 2002); *Alaska, Dept. of Environmental Conservation v. U.S. E.P.A.*, 298 F.3d 814 (9th Cir. 2002); and *U.S. v. East KY Power Com'n*, Slip Copy, 2007 WL 1035017, E.D. KY., 2007.

3. Since its publication EPA relied extensively on the NSR Manual in commenting on numerous permit applications. EPA has cited to the NSR Manual in probably hundreds of letters to state and local permitting authorities when commenting on proposed new source review permits and/or in answering questions about the program. Similarly, state and local permitting authorities have likely cited to the NSR Manual in comment letters on new source review permit applications to industrial sources.

4. Since its publication EPA relied extensively on the NSR Manual in training permitting authorities and enforcing PSD regulations and lead States and private parties to believe it is authoritative. EPA has used the NSR Manual to train numerous federal, state and local permitting authorities on its view of the proper approaches to implement the federal new source review permitting requirements. *In Re: Christian County Generation, LLC*, PSD Appeal No. 07-01 (Jan., 2008). The NSR Manual states that it is authoritative. The NSR Manual states that it is designed to describe the "requirements of the new source review regulations and existing policies interpreting those regulations." EPA has published the NSR Manual, featured it prominently on the agency's web site, and relied on it extensively in decisions throughout its regional offices.

5. The "draft" label does not negate the NSR Manual's status as EPA's longstanding authoritative interpretation of the PSD provisions. EPA's reliance on the NSR Manual has established it as EPA's authoritative interpretation of NSR regulations. This authoritative status is not overcome by the "draft" label on the manual or statements in its preface that it is not intended to establish binding requirements. *See Appalachian Power*, 208 F.3d at 1022-23 (finding guidance document to be authoritative in fact despite language in its text asserting that it is non-binding).

6. At the time of the 1990 amendments to the Act ,Congress knew and tacitly approved of EPA's interpretation of the Act. Congress passed the 1990 amendments to the Act after the NSR Manual was published and established. EPA's interpretation of the Act is reflected in the NSR Manual and was available at the time of the 1990 amendments. Although Congress amended portions of the Act's PSD and NSR provisions in the 1990 amendments, it chose not to change or clarify the statutes in any way contrary to the NSR Manual. In choosing not to change or clarify issues addressed by the NSR Manual, Congress tacitly ratified EPA's interpretation of the existing statute.

7. EPA's stated reason of promoting clarity has no basis because EPA is not clear or specific regarding which sections of the NSR Manual will remain as policy and which will not;

thereby causing confusion rather than clarity. EPA asserts that its proposal will promote greater clarity when in fact it will have the opposite effect. For example, EPA states that:

> [t]o the extent such policies or interpretations [of the NSR Manual] are reflected in other actions or documents that were issued in a final form (such as rulemakings, guidance memorandum, or adjudications by the Administrator or the Environmental Appeals Board), EPA will continue to follow them unless the Agency has otherwise indicated that it no longer adheres to such policies or interpretations.

72 Fed. Reg. at 31,380.

Except for its statements that the top-down best available control technology (BACT) review process has been reflected in other actions and documents, 72 Fed. Reg. at 31,380, EPA does not to indicate in its Proposed Rulemaking what other aspects of the NSR Manual have been reflected in other actions. Thus, EPA's proposed "clarification" is only going to cause significant confusion with respect to what aspects of the NSR Manual EPA considers final policy for permitting authorities and permittees. The failure to provide adequate and clear notice of the intended policy change in this rule-making proceeding violates the very basic tenets of adequate notice to the regulated community; a principle that serves as a basic underpinning of the Administrative Procedures Act.

C. EPA's proposal to discard the NSR Manual as policy is arbitrary and capricious because EPA has not provided a reasoned analysis for its proposal to change its policy. As discussed above, long established and consistently followed actions of an agency may become binding policy regardless of the agency's stated intent. *Appalachian Power*, 208 F.3d at 1020-21. When an agency proposes to change its longstanding, binding policy, its decision will undergo an increased level of judicial scrutiny. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29. Generally, the agency must provide a reasoned explanation for the change in policy. *Rainbow Broadcasting Co.*, 949 F.2d at 408.

In the preamble to its Proposed Rulemaking, EPA provides argument and purported justification for its substantial change in its policy for implementing PSD increment consumption modeling. However, much of that argument is flawed. As is outlined in the comments above, EPA's purported justifications are often contrary to the statute and Congressional intent; and in some instances contrary to holdings of federal appellate courts. Such policy changes obviously cannot go forward. In addition, EPA generally fails to provide "reasoned explanation[s]" for its policy changes. Because of this, much of the proposed policy change would be held to be arbitrary and capricious. Administrative Procedures Act, 5 U.S.C.A. §§ 551-552 (2007). Therefore, the proposed policies changes will not survive judicial scrutiny if they are promulgated.

CONCLUSION.

Based upon the foregoing Comments, the Participating Tribes respectfully request that the United States Environmental Protection Agency take the following action in this rule-making proceeding: (1) withdraw the Proposed Rule and revised Guidance that is the subject of the June 6, 2007 Federal Register Notice; (2) provide Consultation with the Tribes in accordance

with the Agency's Federal Trust Responsibility, Executive Order 13175 and the Environmental Justice Doctrine on the subject of these Comments; (3) after Consultation, publish a Proposed Rule that is consistent with these Comments; and (4) provide an opportunity for further public comment on the revised, Proposed Rule.

Respectfully submitted,

Robert Gruenig
Senior Policy Analyst
National Tribal Environmental Council

Philip Shopadock,
Chairman of the Forest County Potawatomi Community

Jeffrey Crawford,
Attorney General, Forest County Potawatomi Community

3016093_2