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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 88-3264
89-1339

WISCONSIN ELECTRIC POWER COMPANY,
Petitioner,

v.

WILLIAM K. REILLY, Administrator,
United States Environmental
Protection Agency, *et al.*,
Respondents.

ON PETITIONS TO REVIEW FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF OF PETITIONER WISCONSIN ELECTRIC POWER COMPANY

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August 4, 1989

(Final Form)

REPLY BRIEF OF PETITIONER
WISCONSIN ELECTRIC POWER COMPANY

In simplest terms, this case involves a project not to change, but to repair, an industrial plant through like-kind replacement of two types of deteriorated equipment -- air heaters and steam drums. As discussed below, EPA's attempt to bring this type of activity under the new source performance standards (NSPS) and prevention of significant deterioration (PSD) modification rules is simply an attempt to expand those rules to cover activities not identified when those rules were adopted.

Initially, while EPA counsel persistently characterize the Port Washington project as a "massive" and "unprecedented" in nature, EPA Brief at 30-31, the record shows otherwise. Units 1 and 4 at Wisconsin Electric Power Company's (WEPCo's) Port Washington power plant have recently experienced deterioration of their air heaters, which prevents them from operating up to their design capacity, as they had in the past. Unit 5 has experienced deterioration in another part of its boiler, the rear steam drum. Because WEPCo's engineering consultant raised safety concerns, WEPCo voluntarily shut down the unit in 1985 as a conservative safety measure pending steam drum replacement. The Unit 5 deterioration has no effect on achievable generating capacity. Initial Brief at 12-13.

Less serious deterioration has taken place in the air heaters on Units 2 and 3, and the rear steam drums on Units 2, 3, and 4. Since this deterioration is not severe, it has not precluded operation of these units up to design capacity. WEPCo,

however, plans to replace the air heaters on Units 2 and 3 and the rear steam drums on Units 2, 3, and 4 in conjunction with the other work described above, in order to prevent future disruptions in operations. Id.

As a result, the key equipment affecting unit operations is (1) the air heaters at Units 1 and 4 and (2) the rear steam drum at Unit 5. With like-kind replacement of this equipment alone, all five Port Washington units would be able to operate safely up to full capacity. All other work, at most, will enable the units to operate more efficiently or more reliably.

Contrary to EPA's characterization, EPA Brief at 30-31, therefore, the Port Washington project is far from "massive" or "unprecedented" in its proportions. The record shows that the replacement work affecting the plant's ability to return to past operating levels will cost only about six percent of the cost of a comparable new facility -- not a large expenditure in terms of an electric utility generating station. See Initial Brief at 46. Overall, including all of the work planned, the Port Washington project would cost about $200 per kilowatt -- the average repair and replacement cost that EPA assumes will take place at every 30 year old utility plant.[1/]

The true focus of EPA's concern is not that the project involves a "massive" capital expenditure (which clearly it does

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1/ See Letter from K.A. Schweers, ICF, to R.A. Beck, EEI, at 2 (July 26, 1989), Attachment A to this Brief (hereinafter "ICF Letter").

not). Rather, EPA's concern is that the proposed project will allow an industrial facility to operate beyond the date on which EPA believes that it should cease operations unless the source owner is prepared to meet stringent new source standards. This bias is reflected throughout the EPA brief.

In addressing Port Washington, EPA counsel characterize the "expected useful lifetime of fossil-fuel power plants . . . [as] 30 to 40 years," EPA Brief at 17, even though EPA has consistently assumed throughout the 1980s, in analyzing the impacts of acid deposition legislation, that such plants will typically operate for 45 to 65 years.[2/] For older plants like Port Washington, according to EPA counsel, like-kind replacement is not a "true 'like-kind replacement'" unless deteriorated equipment is replaced with deteriorated equipment. EPA Brief at 43 n.20. In short, according to EPA counsel, EPA's rules contemplate that older facilities be maintained in a manner that perpetuates deteriorated capacity, efficiency and availability and hastens retirement. Id. at 48.

EPA counsel's line-drawing and regulatory definitions defy common sense and reason, and have never been the subject of any EPA rulemaking. As discussed in Petitioner's Initial Brief and below, there is no basis for EPA's decision in this proceeding. If EPA believes it has the authority, and perceives a need, to

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2/ ICF Letter at 1 (Attachment A); see also Letter from J.W. Boston to G. McCutchen at 2-3 (April 22, 1988), J.A. at 255-56.

regulate like-kind replacement of deteriorated equipment, it must first undertake notice and comment rulemaking.

ARGUMENT

I. EPA'S IMPLEMENTATION OF THE MODIFICATION PROVISIONS IN THIS CASE IS INCONSISTENT WITH THE ACT, CONGRESSIONAL INTENT, THE AGENCY'S RULES AND PAST AGENCY DECISIONS.

The central premise of EPA's argument, with which the Company disagrees, is that Congress in the Clean Air Act[3/] provided that like-kind replacement activity would be covered by the new source programs. According to EPA counsel, the statutory definition of "modification" treats all equipment replacements at an industrial facility as a "physical change" that triggers new source requirements, unless EPA adopts a specific regulatory "exemption" from the assertedly broad statutory definition -- an exemption that must be narrowly construed. EPA Brief at 7-8, 50. This is the result, according to EPA counsel, even if the physical activity results in no change to the source's original design and historical operations. EPA counsel's view of the Act makes no sense, and is contradicted by the Agency's past interpretations of the Act.

A. Congressional Intent

The Act defines "modification" as a physical or operational "change" that "increases" emissions or "results in" emissions of

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3/ 42 U.S.C. § 7401 et seq. (1982). (For convenience, all citations will be to sections of the Clean Air Act (CAA). Parallel citations to the U.S. Code are provided in the Table of Authorities).

a pollutant not previously emitted. CAA § 111(a)(4) (emphasis added); id. § 169(2)(C). As discussed in WEPCo's Initial Brief (pp. 32-34), the plain meanings of "modification," "change," and "increase" signal activity that transforms an existing facility and its emissions into something new and different. Like-kind replacement of components can hardly be considered a "change" in an existing facility.[4/]

EPA counsel respond that since the Act talks of "any physical change," the Act must cover all physical activity including like-kind replacement. EPA Brief at 7. This argument does not respond to the basic issue: whether physical activity that does not change the design of an existing facility is a "physical change," and whether physical activity that does not result in greater emissions than have occurred in the past is an activity that "increases" emissions under the "modification"

4/ There is no indication in the legislative history, and EPA points to none, that Congress desired existing sources to become "new sources" every time they undertake capital projects to repair or replace equipment as needed to restore them to non-deteriorated operations. While EPA counsel assert a congressional intent "to focus pollution control efforts at an efficient or logical point: the making of substantial capital investments in new or modified pollution-generating facilities," EPA Brief at 31, EPA counsel provide no reference for this purported congressional intent. Moreover, even this statement of counsel misses the point; it says nothing about whether Congress intended that like-kind replacement would make a facility "new" or "modified." To the contrary, congressional intent was to avoid imposition of expensive controls on existing sources unless they are fundamentally changed in a way that creates "new" pollution. See Initial Brief at 32-34; H.R. Rep. No. 1146, 91st Cong., 2d Sess. 2-3, reprinted in 1970 U.S. Code Cong. & Admin. News 5358.

definition. The word "any" has no bearing on the meaning of this language.

B. EPA's Rules and Past Agency Interpretation

EPA's regulatory implementation of the Act's modification provision is inconsistent with the arguments of EPA counsel here. The Agency has always viewed the statutory modification provision as narrow in scope, bringing existing sources into the new source program only where there is a change that increases the capacity of those facilities to emit pollution above past maximum operating levels.

1. The Modification/Reconstruction Regulations

Counsel's characterization of the modification rules as encompassing all physical activity except where the Agency has established regulatory "exemptions" that must be narrowly construed[5/] is inconsistent with EPA's contemporaneous explanation of its intent. As the D.C. Circuit noted in ASARCO v. EPA, in litigation challenging EPA's 1975 modification rules:

> . . . EPA candidly admits that it intended "to develop a modification regulation . . . which minimizes that impact [i.e., application of stringent new source requirements] on existing sources."[6/]

Thus, EPA in implementing the modification provision did not

5/ EPA Brief at 7-8, 50. If, as EPA counsel contend, all physical activity is a physical change under the Act's modification provision, then it is not apparent why or how EPA would have authority to create such "exemptions."

6/ 578 F.2d 319, 327 n.24 (D.C. Cir. 1978) (emphasis added).

sweep broadly, but rather narrowly. It did not create regulatory exemptions but rather, consistent with the plain language of this provision and the Agency's intent, identified examples of activity that would not constitute a "modification."[7/]

That the basic modification rule is narrow and does not cover all physical activity is borne out by the regulatory history. In 1975, EPA promulgated rules that covered as part of one package the concepts of "modification" and "reconstruction."[8/] EPA characterized the reconstruction rule as addressing "perpetuation of a facility['s]" life, making clear that that rule, not the modification rule, would govern any project directed at "life extension."[9/]

In providing that sources could undertake replacements which cost even more than fifty percent of the cost of a comparable new facility without automatically being subject to new source standards,[10/] the reconstruction rule reflects EPA's understanding that substantial replacements of plant components would not constitute a physical "change" that "increases the amount" of emissions under the modification rule. If one were to

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7/ 40 C.F.R. § 60.14(e) (1988).

8/ 40 Fed. Reg. 58416 (1975).

9/ 39 Fed. Reg. 36948 col. 2 (1974).

10/ 40 C.F.R. § 60.15(b) (1988). Under the reconstruction rule, satisfying the fifty percent test does not mean that NSPS apply. Rather, the Administrator can decide not to apply NSPS depending upon the facts and circumstances. Id. at §§ 60.15(b)(2), (e), (f).

accept EPA counsel's view that all physical activity is covered by the modification provision, the reconstruction rule would be superfluous.[11/]

2. The Basis for the NSPS Rule

As WEPCo pointed out in its Initial Brief, when the Agency promulgated the NSPS in 1979 for new electric utility sources, EPA explained in its Background Document that like-kind replacements (e.g., replacement of coal pulverizers) are not modifications under its rule. EPA counsel now argue that statements in Background Documents for final rules have no bearing on the meaning of those rules. EPA Brief at 43 n.20. This argument is absurd. Those documents provide notice to the public of the scope and basis of those rules and are used by the courts to determine the meaning of those rules.[12/]

11/ Under EPA counsel's view, for there to be a "reconstruction" but no "modification," replacements which cost in excess of fifty percent of the cost of a comparable new facility (the threshold reconstruction test) would all need to be "routine." Yet, it is inconceivable that such extensive replacement would be undertaken at a facility that had experienced no deterioration in operations and it is inconceivable that EPA, under the interpretation advanced here, would find replacements on the order of fifty percent of the cost of a comparable new facility to be routine. See infra pp. 17-21. In fact, WEPCo's replacements needed to restore past operating capacity are only about six percent of the cost of a comparable new facility, see Initial Brief at 46, and EPA says they are not routine, in part because of their cost.

12/ See 43 Fed. Reg. 42171 col. 3 (1978); Sierra Club v. Costle, 657 F.2d 298, 374 n.311 (D.C. Cir. 1981) (citing the same Background Document that WEPCo relies on here as the basis for EPA's final NSPS rule).

EPA counsel also argue that the coal pulverizer example does not support WEPCo's argument because the

> crucial fact [in distinguishing the NSPS Background Document from the WEPCo case] is that the existing components [to be replaced by WEPCo] are deteriorated. Thus, there is no true "like-kind replacement" at those units.

Id. (emphasis in original). In other words, Agency counsel now argue that replacements are "like-kind" only if non-deteriorated equipment is replaced, or deteriorated equipment is replaced with equally deteriorated equipment.

This argument is equally absurd. The Agency's Background Document does not suggest that a utility would replace a coal pulverizer in good working condition. Moreover, because a deteriorated coal pulverizer will constrain an existing unit from operating at its past maximum capacity, a utility would never replace a deteriorated pulverizer with an equally deteriorated pulverizer. Rather, the Agency's example plainly indicates that replacement of a worn-out pulverizer with a similar one in good working condition would not be a modification.[13/] On the other hand, the example states that if the replacement pulverizer is redesigned (i.e., is not "like-kind") so as to increase emissions, there might be a modification. Initial Brief at 10, 35.

13/ EPA, in this case, has stood the adage -- "If it ain't broke, don't fix it" -- on its head. The message that EPA's decision sends to American industry is: "If it ain't broke, fix it; but, if it's broke, fix it only with something that's broke."

3. Prior EPA Applicability Determinations

EPA's past applicability decisions are consistent with the plain meaning of the Act described above. As the following discussion shows, EPA counsel's attempts to argue otherwise are disingenuous.

For example, EPA counsel argue that the 1973 memorandum from James to Farmer is distinguishable because, in their view, "significant physical changes would be made to the [Port Washington] facility." EPA Brief at 48. To the contrary, since the like-kind replacements at Port Washington will change "neither the source's physical structure nor its method of operation . . . from its condition under previous operation," the project falls squarely within the finding of that memorandum that "steps necessary to return [the] plant to its former operating condition" are not a modification.[14/]

Likewise, in the 1980 Reich memorandum, which "was prepared with the concurrence of the Office of General Counsel," the Agency recites that the steps needed before re-startup of an incinerator were "the addition of a baffle wall and the rebricking of a furnace" -- physical activities that could be needed only for one reason, to correct deterioration that adversely affected operations.[15/] Despite these replacements,

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14/ Memorandum from Michael James to Jack Farmer at 2 (February 14, 1973), J.A. at 91.

15/ Memorandum from Reich to Sawyer at 2 (September 16, 1980), J.A. at 107.

the Agency again noted that, consistent with its long-standing view, there is no modification because the source owner "is merely taking those steps necessary to return the plant to its former operating condition."[16/]

Finally, the Agency completely ignores WEPCo's discussion of a contemporaneous applicability determination issued in 1976, the year after the NSPS modification regulation was promulgated in its current form. See Initial Brief at 36-37. In this determination, which involved reinstallation of an oleum tower and replacement of corroded components at a sulfuric acid plant, EPA outlined its contemporaneous interpretation of the modification provision:

> EPA has previously interpreted Section 111 of the Clean Air Act, and the implementing regulations found in 40 C.F.R. Part 60, to exclude from their operation those facilities which meet the following conditions:
>
> 1. They were constructed before the effective date of a New Source Performance Standard.
>
> 2. They were closed or moved to a different location.
>
> 3. They were later operated in the same manner as they had been previously designed to operate.
>
> 4. They emitted no more of the specified pollutants than the original facility had.[17/]

16/ Id. (emphasis added). EPA counsel suggest that the Agency found these steps to be "routine." EPA Brief at 48. However, there is no indication of this in the memorandum.

17/ Letter from O.W. Lively, Acting Director, EPA Enforcement Division, to Gary D. Whaley, Ozark-Mahoning Company, at 2

(Footnote cont'd.)

Under these criteria, EPA found no modification of the sulfuric acid plant following like-kind replacement of major components -- the oleum tower and corroded components.[18/]

In sum, EPA counsel's new interpretation of the "modification" provision of the Act is inconsistent with the statutory language and the Agency's past interpretations of this provision. WEPCo's repair and replacement project is simply not the type of project that Congress or EPA intended to reach when the modification provision became law.[19/]

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(October 1, 1976), J.A. at 430 (emphasis added), listed as Document A-29, J.A. at 421.

18/ Similarly, under these criteria, the Port Washington project is not a modification. The units in question have a lengthy operating history demonstrating their historical maximum design capacity. The equipment deterioration that has led to a period of operation with restricted capacity is a relatively recent and brief interruption in this lengthy operating history. Much of this period has been consumed by WEPCo's attempts to gain regulatory approval for its project. The like-kind replacement of deteriorated equipment at these units is simply a "step necessary to return the units to their former operating condition," and the units will emit "no more of the specified pollutants than the original facility had." See supra note 17.

19/ See also M. Levin, et al., "Expanding 'Reconstruction': EPA's 'WEPCo' Decisions Change Course on Plant Repairs," Paper Presented at Air & Waste Management Ass'n 82nd Annual Meeting (No. 89-72.6) (June 1989). EPA counsel are wrong in alleging that WEPCo is challenging the modification rules. EPA Brief at 64-65. Rather, WEPCo is challenging EPA's applicability determinations purportedly based upon those rules. See Harrison v. PPG Industries, 446 U.S. 578 (1988). Moreover, contrary to EPA counsel's assertion, EPA Brief at 33-34, no deference is due the Agency's decisions in this case. As in Doe v. Reivitz, 830 F.2d 1441, 1446 (7th Cir. 1987), "the documents at issue in this

(Footnote cont'd.)

II. TO COVER A NEW TYPE OF ACTIVITY UNDER THE MODIFICATION RULE, EPA MUST ENGAGE IN RULEMAKING.

To justify the Agency's decisions in this case, EPA counsel characterize WEPCo's project as a "new form of plant renewal" that in the future will be covered under the new source programs. EPA Brief at 30-31. According to EPA counsel, this "new form of plant renewal" has

> three core elements . . . (i) a planned program of capital investment; (ii) to restore and/or maintain original generating capacity at acceptable levels of efficiency and availability; (iii) for an extended period of time, usually 20 years or more, beyond original design life or currently planned retirement date.

EPA Brief at 19. EPA counsel's attempt to define a new category of facilities to be covered by the new source programs is action that EPA may take under the Clean Air Act only by rulemaking.

The Act defines "new source" as "any stationary source, the construction or modification of which is commenced after the publication of [proposed] regulations . . . which will be applicable to such source." CAA § 111(a)(2). Facilities to which new source programs will be made applicable therefore must be identified when the applicable regulations are proposed, so that potentially affected persons receive adequate notice and

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case are interpretative rather than legislative in nature" and, in light of their inconsistency with the Act and with the Agency's long-standing and contemporaneous interpretation of the modification/reconstruction rules, are due no deference. Id. at 1447.

facility owners can conform their planning to the requirements of those regulations. See Initial Brief at 5, 33. Similarly, an "existing source" is defined in § 111(a)(6) as "any stationary source other than a new source" -- i.e., any source not identified by regulation as subject to new source standards. Congress also provided that the PSD program would be implemented based on emissions limits "and such other measures, as determined under regulations promulgated under this part." CAA § 161 (emphasis added).

In short, Congress clearly directed that EPA define, through notice and comment rulemaking, the activities that might subject source owners to new source programs. Since, as the Agency has conceded, so-called "life extension" projects have never before been regulated under new source programs (with the exception of the reconstruction rule), see Initial Brief at 28-29, EPA must undertake notice and comment rulemaking before extending the coverage of these programs to those facilities.[20/]

Examination of EPA counsel's "rules" for defining a "life extension" project illustrates why rulemaking is critical. For example, the first two criteria that EPA counsel mention (i.e.,

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20/ EPA suggests that it need not undertake rulemaking to regulate "life extension" projects because it may create law through adjudication rather than rulemaking. EPA Brief at 37. However, Congress took away this option in the NSPS and PSD programs of the Act. CAA §§ 111(a)(2), (b)(1); 161. Moreover, the Agency contradicts itself by arguing elsewhere that it is not bound by the results of its prior adjudications. EPA Brief at 55 n.24. The Agency cannot have it both ways.

(1) a "planned program of capital investment" that will (2) "restore and/or maintain" original production capacity at "acceptable levels of efficiency and availability") encompass activity that has been going on for decades at all industrial facilities. If a "planned program of capital investment" triggers new source requirements, industry will be discouraged from accumulating repairs and replacements so they can be performed at one time and will be encouraged to repair and replace equipment on an ad hoc basis. Such a signal has serious economic and reliability implications for industry. As to the second criterion, discouraging projects directed at assuring "acceptable levels of efficiency and availability" will undermine industry's ability to provide a reliable flow of goods and services and will damage our competitive positions in world markets.[21/] None of these consequences have been evaluated by EPA; nor has the public had any opportunity to comment on such regressive policies.

Finally, the assertions of EPA counsel regarding typical "plant lives"[22/] and the "unprecedented" nature of the Port

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21/ See Brief of Amici Alabama Power Co., et al., at 1-3.

22/ EPA counsel's third criterion is that the project add "an extended period," defined as "20 years or more," to the "original design life or currently planned retirement date." EPA Brief at 19. The whole notion of a set "design life" or "retirement date" is a fiction. As made clear in the amicus brief filed by the Wisconsin Utilities Association (pp. 6-7), the forecast retirement dates that the Public Service Commission of Wisconsin (PSCW) requires to be included in Advance Plan filings are simply

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Washington project cannot be reconciled with the Agency's position elsewhere. In modeling the impact of proposed acid rain legislation since the early 1980s, the Agency has assumed typical power plant lives of 45 to 65 years, not 30 to 40 years as EPA counsel now assert.[23/] In more recent analyses, EPA has assumed that all units reaching 30 years of age by the year 2010 (50 percent of the capacity in that year) will make capital expenditures similar to those in the case of Port Washington (i.e., about $200 per kilowatt), in order to maintain efficiency and availability for 25 to 35 years of additional operation, and that these expenditures will not trigger new source requirements.[24/]

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for long-range planning, and may change with every new plan that the utilities submit. Curiously, even if one applied EPA's "20-year rule" in this case, it would mean that there would be no "life extension," because the project would result in only eleven to eighteen years of "additional" life. EPA Brief at 21.

23/ EPA Brief at 17; ICF Letter at 1 (Attachment A).

24/ ICF Letter at 2 (Attachment A). EPA counsel rely heavily on reports produced by EPRI, an independent research group funded by the utility industry, to support its assertion that utilities have always realized that "life extension" projects may lead to new source requirements. See, e.g., EPA Brief at 42 n.18. However, EPRI says nothing surprising when it announces that certain refurbishment projects may trigger new source requirements. For example, if a refurbishment project allows more coal to be burned at a plant than that plant has ever been able to burn, there may well be a "change" to that plant that "increases" emissions, thereby triggering new source requirements. Since the proposed Port Washington work is intended only to restore the plant to original design capacity, EPA's citation of EPRI documents proves nothing in this case.

In sum, if EPA believes additional regulation of like-kind replacement projects is needed, it must proceed by notice and comment rulemaking after full evaluation of the policy implications of that action.

III. EPA'S INTERPRETATION OF "ROUTINE MAINTENANCE, REPAIR, AND REPLACEMENT" IS ARBITRARY AND CAPRICIOUS.

The NSPS and PSD modification rules, respectively, provide that "routine" maintenance, repair and replacement are examples of activities that are not a "modification" or a "physical change." Repair and replacement decisions are driven by economic considerations, not by the frequency of equipment failure. Where the cost to replace defective parts is less than the cost of lost capacity, efficiency, or reliability associated with operations in a deteriorated state, it is "routine" business practice to replace the parts regardless of whether it is a "once in a lifetime" replacement or an annual replacement.[25/]

25/ Similarly, where the cost to replace a defective transmission is less than the cost to replace an otherwise fit automobile, it is "routine" for car owners to replace the transmission rather than discard the automobile. EPA counsel assert otherwise. EPA Brief at 51. This no doubt is surprising news to the millions of Americans that have replaced transmissions, and the industry that has developed to handle that service (e.g., "double A--MCO").

EPA also suggests that replacement of a car's engine would be routine under WEPCo's argument. This is a misstatement of WEPCo's position. Replacement of an entire engine is analogous to replacement of an entire boiler at a power plant, and WEPCo has never maintained that such a replacement should be deemed "routine." In any event, this hypothetical is not close to the facts of this case, since WEPCo has proposed to replace only two relatively small portions of its boilers -- analogous, for example, to replacing the radiator and carburetor in an engine.

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In their brief, EPA counsel explain that "[e]lectric utilities continually undertake planning measures to meet the future demand for electricity." EPA Brief at 17. Given that the "economic risks associated with building new plants have increased," EPA counsel also explain that programs to replace deteriorated equipment (i.e., "life extension" programs) "may be the most cost-effective choice to meet future demand" as a result of that planning process. Id. at 18-19. That like-kind replacement of deteriorated equipment is the product of a "continual[] . . . planning" process that selects "the most cost-effective [alternative] . . . to meet future demand" means that such work is a customary business practice, and therefore "routine," in today's economic setting.

Nevertheless, EPA counsel attempt to draw lines characterizing such customary work as non-routine in this case.[26/] Thus, EPA counsel argue that "replacement of a steam

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EPA also suggests that only activity such as an oil change or replacing a spark plug should be considered "routine." This activity would clearly fall within the scope of routine "maintenance." EPA's rules, however, also address routine "replacement," which includes activity other than periodic maintenance. Again using EPA's automobile example, anyone who owns a car will have had experience replacing important engine components that do not fail on a frequent basis (such as a fuel pump, ignition system, or fuel injectors), and which are not the subject of periodic maintenance. When such engine components fail, however, it is routine to replace them.

26/ EPA counsel contend that "[w]hile some replacement of deteriorated equipment may be customary and regular, and

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drum that failed during initial testing at a new facility would probably be viewed as routine if the alternative was to abandon the facility," but that "replacement of steam drums at an aged and deteriorated plant is not routine." EPA Brief at 47 (emphasis added).

This example shows just how irrational and arbitrary EPA's decision is. It makes as little economic sense to abandon a plant that has an established track record that can be restored with a replacement that costs a small fraction of a new plant, as it does to abandon a new plant following deterioration in one component of the plant that costs a small fraction of that plant. Both like-kind replacements will be the "routine" response of the source owner.

EPA counsel further argue that the proposed like-kind replacement is not routine in this case because "no steam drums or plate-type air heaters had ever been replaced at a U.S. utility." EPA Brief at 45. That a piece of equipment has not been replaced at another facility is irrelevant, however, if it

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therefore routine, it does not follow that all replacements are . . . routine." EPA Brief at 45. However, WEPCo has not argued that all replacements would be routine. For example, using EPA's coal pulverizer example, see supra p. 9, replacement of a deteriorated component with a substantially redesigned component that enabled more fuel to be burned than possible with the original, non-deteriorated component might not be a routine replacement. Rather, such a replacement might go beyond what is customary business practice. For these reasons, WEPCo's reading of the "routine replacement" provision would not, as EPA counsel suggest, "swallow" the modification rule.

would be the normal business decision to replace that equipment if it did deteriorate.[27/]

Finally, EPA counsel argue that the replacements would not be routine because of the large cost of this project. EPA Brief at 46. This is curious, since the overall project will cost only about $200 per kilowatt -- the typical amount that EPA has assumed any 30 year old utility plant will have to spend to continue non-deteriorated, reliable operations.[28/] Moreover, EPA counsel's cost characterization misrepresents the proposed project by aggregating the work for the entire project, instead of focusing only on the replacements relevant to restoration of lost capacity.[29/]

27/ EPA counsel also mischaracterize the record in this case. WEPCo documented forty cases of replacement of "direct heat transfer" air heaters like those that WEPCo wishes to replace. EPA contends that these other air heaters are of slightly different design and therefore do not support WEPCo's argument. However, as WEPCo pointed out (and EPA did not dispute), all air heaters perform the same function. EPA's response that this "is not enough," EPA Brief at 46, is the hallmark of arbitrary and capricious action.

As to the rear steam drum replacement, a steam drum is simply a pipe for collecting steam from other pipes, and therefore is a type of "header." Memorandum from Hunton & Williams to WEPCo at 13 (July 29, 1988), J.A. at 333. Header corrosion and cracking at boilers is a common problem that often demands repair and replacement work. The only reason that replacement of the type of header called a "rear" steam drum is not common is that most boiler designs do not include "rear" steam drums. As with the air heaters, that the Port Washington unit design does not mirror the design of other power plants does not mean that header work at this plant is not routine.

28/ ICF Letter at 2 (Attachment 1).

29/ EPA Brief at 30-31, 43. The only work that is needed to restore capacity is the replacement of the Unit 5 rear steam drum

(Footnote cont'd.)

In sum, like-kind replacements that are economic for a plant to restore non-deteriorated operations are customary in industry and therefore "routine." Initial Brief at 41-45.

IV. EPA'S INTERPRETATION OF ITS NSPS MODIFICATION RULE IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

A. For NSPS Purposes, Emissions At Past Maximum Achieved Capacity Must Be Compared With Emissions After A Change.

EPA counsel vehemently disagree with WEPCo that, in determining whether a "physical change" will "result in" new pollution, EPA must look at the emission rate associated with non-deteriorated maximum capacity of the existing facility. EPA Brief at 56. According to EPA, the emissions increase calculation must be based on comparison of an emission rate characteristic of broken equipment (for Unit 5, a zero emission rate), and the rate achievable after replacement of the broken equipment. Id. at 58. According to EPA counsel,

> EPA explicitly rejected [the use of] original design capacity [in calculating emissions increases] in favor of current [i.e., deteriorated] operating capacity as the baseline for gauging emissions increases
> . . . .

Id. at 56 (citation omitted).

(Footnote cont'd. from previous pg.)

and the Units 1 & 4 air heaters -- work that would cost only about six percent of the cost of a comparable new boiler. EPA counsel's aggregation even includes work that will not even take place on the NSPS "facility," which is the boiler. 40 C.F.R. §§ 60.2, 60.41a (1988). Including this work is clearly contrary to EPA's NSPS rules.

The regulatory history of the modification rule does not support EPA counsel's assertion. EPA's original 1971 modification rule, reflecting EPA's contemporaneous interpretation of the Act, allowed increases up to operating "design capacity."[30/] The rule was revised in 1974 to address situations where this capacity had not been "defined."[31/] An objective test was added to determine whether a production level above the "defined" (i.e., past) level was within the "operating design capacity," i.e., whether that new production rate could be achieved "without . . . major capital expenditures."[32/] This regulatory history rejects the notion that the capital expenditure rule was intended to abandon "design capacity" in favor of "current" (i.e., deteriorated) capacity in establishing the baseline for NSPS emission increases.[33/]

30/ See 36 Fed. Reg. 24876 col. 1 (1971) ("Increases in production rates up to design capacity will not be considered a modification . . . .").

31/ 39 Fed. Reg. 36948 (1974).

32/ Id.

33/ Under the rule, if a production level has been achieved in the past without a "capital expenditure," this level is within the source's "design capacity" and can be used to calculate baseline emissions. If a production level above that past maximum level could only be achieved following a "capital expenditure," that new higher level is not within the "design capacity" of the source, and the past maximum level would be used to calculate baseline emissions. Thus, contrary to EPA counsel's argument, the capital expenditure rule has no application where a capital expenditure is made on a like-kind replacement to return a plant to a production level that has been achieved in the past. Since "design capacity" means what the facility could achieve

(Footnote cont'd.)

EPA counsel also suggest, somewhat inconsistently, that operations with broken equipment are indeed "normal" for Port Washington, and thus representative. EPA Brief at 49, 58. There is no support for this argument in the record, and EPA counsel cite none. Moreover, this post hoc rationalization of counsel is inconsistent with EPA's emissions analysis under the PSD rule, where EPA found that current operations with broken equipment are not representative of normal source operation. Since EPA counsel fully recognize the common basis of the NSPS and PSD modification provisions, EPA Brief at 6, their divergent interpretation of those provisions must be rejected. Instead, EPA must use the emission rate associated with past maximum achieved capacity in the emissions increase calculation.

B. The Act Does Not Prohibit The Use Of Fuel Switching To Avoid Emissions Increases That Would Trigger Application Of NSPS.

Even assuming EPA's NSPS emissions increase analysis is correct, which it is not, WEPCo has indicated that it would be

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(Footnote cont'd. from previous pg.)

when new, EPA counsel's view is contrary to EPA's intent to maintain the "design capacity" concept in the modification rule. 39 Fed. Reg. 36948 (1974).

EPA counsel also claim that WEPCo "concedes" that EPA correctly interpreted and applied the capital expenditure rule under NSPS since WEPCo did not challenge that finding. WEPCo did not challenge that finding because of space limitations in its brief and because the "capital expenditure" provision only applies to this case if the Court accepts EPA's argument that returning to past production levels is an "increase" in production rate. WEPCo had to choose between briefing primary issues and secondary ones. WEPCo did not "concede" anything.

willing to preclude any possibility of an emissions rate increase by accepting, before the replacement work is undertaken, a federally enforceable permit condition requiring that it permanently burn a lower polluting fuel. Initial Brief at 50-53. In response, EPA argues that "WEPCo misreads Section 111's plain language," which "requires" the use of control technology if an existing source is to avoid an emissions increase under the modification rule. EPA Brief at 58-59.[34/]

EPA counsel do not quote any language from § 111 in support of their claim that the "plain language" of § 111 "requires" existing sources to install control technology, rather than switch to cleaner fuels, to avoid emissions increases under the modification rule. Indeed, the modification definition of § 111 was not amended in 1977 to so provide. The only statutory language amending § 111 in 1977 cited by EPA counsel is § 111(a)(1)(A)(ii), which only applies after an existing source has become a "new source" because it has been "modified." Since WEPCo's proposed solution will prevent the units from ever becoming "new sources" under the modification provision, this language has no relevance here.

In any event, § 111(a)(1)(A)(ii) is not self-executing.

34/ It should be recalled that the Agency's contemporaneous interpretation of this statutory language, as reflected in NSPS promulgated after the 1977 Amendments to § 111 relied on by counsel here, was that § 111 as amended did not require the use of control technology in all instances. See Initial Brief at 52. EPA ignores this point in its Brief.

Initial Brief at 53. Just as EPA had to engage in rulemaking to revise its NSPS to incorporate the percentage reduction requirement before it could be applied to new sources,[35/] EPA would have to engage in rulemaking before it could apply to existing sources the alleged congressional intent that they be barred from switching fuels to avoid an emissions increase under the modification rule. EPA has never engaged in such a rulemaking, and EPA counsel never respond to this argument.

EPA's interpretation of the modification provision regarding fuel switching must be rejected.

V. EPA'S INTERPRETATION OF THE PSD MODIFICATION RULE HAS NO BASIS IN THE STATUTE, THE REGULATIONS, OR THE RECORD OF THIS CASE.

Under the PSD modification rule, there must be a physical or operational change that "results in" a significant net increase in annual emissions.[36/] Notwithstanding the "results in" language, EPA counsel assert that the Agency is under no obligation to show a causal connection between a physical change and increased emissions.

Thus, while EPA determined that the Port Washington repairs will not increase the capacity of the units to emit pollution from past levels, EPA asserts that the project will "result in" an increase because EPA makes the wholly unrealistic assumption that the units will operate 100 percent of the time at 100

35/ See 44 Fed. Reg. 33580 (1979).

36/ 40 C.F.R. § 52.21(b)(2) (1988).

percent capacity after like-kind replacement. See Initial Brief at 54; EPA Brief at 61. EPA also asserts that this presumed increase in hours of operation and production rate is not covered by 40 C.F.R. § 52.21(b)(2)(iii)(f) since the increase would be preceded by an assertedly "non-routine" physical change. EPA Brief at 52-54.

For the reasons discussed below, EPA's decisions are arbitrary and capricious and contrary to law.

A. There Is No Support For EPA's Emissions Increase Finding.

EPA counsel argue that the PSD rules compel the Agency, in the case of like-kind replacement at an existing facility, to compare "actual" emissions before a change with "potential to emit" afterwards.[37/] The provision defining "actual emissions"

37/ Potential emissions are maximum achievable emissions assuming operations all day, every day, all year. 40 C.F.R. §§ 52.21(b)(4), (21)(ii) (1988). As EPA counsel concede, a comparison of representative "actual" emissions before a change and "potential to emit" after a change will always show an emissions increase for a source that has not historically operated at 100 percent capacity all year long (which is true for any industrial facility), regardless of the causal links provided for in the Act. EPA Brief at 61. To avoid this result, EPA explains that a source can agree to a permit limit that establishes its potential to emit at a level equal to past actual emissions. Id.

The implications of EPA's new reading of this rule are extreme, and were never considered by the Agency in its development of PSD rules. Under EPA's new approach, each time equipment breaks down or deteriorates at a power plant (or other industrial facility) that has not operated at full capacity all year long, PSD review will be triggered unless the plant's generating capacity is artificially capped for the future by means of a time-consuming permit proceeding. Any increases in

(Footnote cont'd.)

to be "potential to emit", however, applies only where the unit has not begun "normal operations."[38/] Applying this provision to units like Port Washington where a project does not increase emission rates, see Initial Brief at 54, would render meaningless the regulatory and statutory requirement for a causal link between a physical change and an emissions increase.

Only where the emission rate of an existing unit is increased (e.g., by enlarging the unit to create new emissions), or where a new unit producing new emissions is added to an existing source, would the modified or new unit not have commenced "normal operation," so that past "actual emissions" (if any) would be compared to future "potential to emit" to determine whether there is a net emission increase.[39/] Where physical

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(Footnote cont'd. from previous pg.)

consumer demand for the product (be it electricity or some other product) will then need to be met by building new plants. EPA has never before represented that its PSD rules would impose such severe constraints on the ability of industrial facilities to meet demand. To the contrary, EPA (as opposed to its counsel) has emphasized that its rules would allow facilities the flexibility to adjust operations up to design capacity, to meet new market conditions. 45 Fed. Reg. 52704 col. 2 (1980).

38/ Id. at § 52.21(b)(21)(iv) (1988). EPA argues that the "potential to emit" portion of the "actual" emissions rule applies here because there have been no "normal operations" of the "modified" units. EPA Brief at 61. This argument is circular. That is, to reach this conclusion, EPA has assumed that there will be modified units, when the purpose of the emissions comparison is to determine whether the units will be modified.

39/ This, in fact, was the case for the applicability determination relied on by EPA counsel in support of its

(Footnote cont'd.)

activity does not "result in" an increase in the emission rate of an existing unit that has begun "normal operations," as is the case here, a comparison of past actual and future potential emissions is not required. In such a case, no comparison is needed because future actual emissions will exceed past actual emissions only if market conditions lead to an increase in annual operations -- an increase that is not within the modification rule.40/

For the foregoing reasons, EPA's decision that emissions would increase at Port Washington must be rejected.

B. Increases In Production Rate And Hours Of Operation Are Not Modifications, Even Where There Is A "Physical Change."

Under EPA's PSD rule, "a physical change or change in the

(Footnote cont'd. from previous pg.)

argument. EPA Brief at 62 n.28; J.A. at 130 ("addition of [an] oxygen enrichment plant" at a smelter). It was in this respect (i.e., the addition of a new unit or the redesign of an existing unit) that certain industry petitioners (not including WEPCo) challenged EPA's modification rule in 1980, and not as applied to sources like Port Washington that have engaged only in like-kind replacement. As a result, EPA counsel are incorrect when they suggest that Amici Alabama Power Co., et al. in 1980 understood the Agency's rule to apply to like-kind replacement projects. EPA Brief at 61. Moreover, as the signature page of that 1980 brief shows (which EPA counsel have misleadingly omitted over Amici's objection), Alabama Power Co., et al., did not join in that brief. See Attachment B to this Reply.

40/ 40 C.F.R. § 52.21(b)(2)(iii)(f) (1988). This analysis is consistent with a 1981 Agency decision interpreting the 1980 PSD rules. Initial Brief at 64. Recognizing that this contemporaneous interpretation of the PSD rules is inconsistent with the interpretation advanced here, EPA counsel simply repudiate the precedent. EPA Brief at 55 n.24.

method of operation shall not include . . . [a]n increase in the hours of operation or in the production rate," unless prohibited by a federally enforceable permit condition.[41/] As EPA concedes, it is an assumed increase in future production rate and hours of operation (i.e., to respond to increases in the demand for electricity) that are the bases for the emissions increase finding here.[42/] Because the like-kind replacement proposed here will do no more than permit reliable operation of this power plant consistent with facility design, the production rate increase provision squarely applies.[43/]

EPA counsel argue that the production rate increase rule does not apply because the preamble states that the rule does not apply to changes that "disturb a prior assessment of environmental impact," EPA Brief at 53, a preamble statement that describes the "federally enforceable" permit restriction language

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41/ 40 C.F.R. § 52.21(b)(2)(iii). All parties agree that there is no permit condition applicable to the Port Washington plant.

42/ Initial Brief at 54; EPA Brief at 52.

43/ EPA counsel recognize that the Agency did not intend the PSD rules to "hamper the ability of any company to take advantage of favorable market conditions." EPA Brief at 53, citing 45 Fed. Reg. 52704. EPA counsel argue, however, that EPA "strongly implied" that this concern was relevant only where there was no "new construction activity" (i.e., no like-kind replacement or repair). Id. Any such "implication" did not find its way into the rules, which require a "physical change" that "results in" an emissions increase, and which provide that "a physical change or change in the method of operation shall not include . . . [a]n increase in the hours of operation or the production rate." 40 C.F.R. § 52.21(b)(2)(iii). Moreover, this "implication" is not apparent on the face of the preamble language cited by EPA counsel.

in the PSD regulations. See Initial Brief at 61 n.167. While there is no federally enforceable restriction on the hours of operation or production rate of the Port Washington units, EPA counsel nevertheless assert that this statement applies and that the State of Wisconsin has "assumed retirement of the Port Washington units in the near future." EPA Brief at 55. This assertion is outrageous. The State of Wisconsin has never assumed in any air quality impact assessment that the Port Washington units will retire on a specific date. There is nothing in the record (or outside the record) that supports such a statement,[44/] and EPA counsel cite nothing.

For these reasons, EPA's decision must be rejected.

CONCLUSION

For the foregoing reasons and those in Petitioner's Initial Brief, EPA's decision should be set aside.

Respectfully submitted,

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Dated: August 4, 1989

44/ The only date in the record is the planning date used by the PSCW for long range electricity forecasts. This date has no relevance to any environmental assessment, and is nonbinding even with respect to the PSCW. See supra note 22.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1989, I caused a copy of the foregoing Reply Brief of Petitioner Wisconsin Electric Power Company (Final Form) to be served by U.S. first class mail, postage prepaid, upon the following:

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July 26, 1989

Mr. Robert A. Beck
Director
Clean Air, Fossil Fuels and Natural Resources
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Beck:

In your letter of July 12, 1989, you raised a number of questions regarding the assumptions used in the 1989 Base Case analyses performed by ICF Resources for EPA. We are happy in this letter to respond to these questions. In addition, we have enclosed a copy of the report *1989 EPA Base Case Forecasts* for your use and review.

The 1989 EPA Base Case analyses were conducted by ICF for EPA's Office of Policy, Planning and Evaluation to reassess future utility air emission trends using up-to-date sets of assumptions. In the Base Case analyses, EPA had us examine two cases — a "High" case and "Low" case — so as to present a reasonable possible range of future utility emissions. To achieve this result, these cases incorporated different sets of assumptions that would respectively result in higher and lower utility SO_2 emissions trends.

Fossil powerplant lifetime assumptions were among the important differences in assumptions between the two cases: 55 years was assumed for all large (i.e., larger than 50 megawatt) fossil steam generating units in the Low case, while 65 years was assumed for all large fossil steam units in the High case. This difference in assumptions obviously has an important effect on utility emission trends, as demonstrated in the ICF analysis. Before 1984, EPA had assumed that all fossil-fueled powerplants had a physical, useful operating lifetime of 45 years for all of the analyses performed by ICF for EPA. This assumption was subsequently revised to 60 years for the 1984 Interim EPA Base Case and all following analyses as it became obvious that existing powerplants were being operated for periods longer than 45 years.

For both of the cases evaluated for the 1989 EPA Base Case forecasts, it was assumed that all large oil- and coal-fired powerplant units at 30 years of age would engage in refurbishment activities sufficient to achieve the above-noted powerplant lifetime assumptions. Those units explicitly assumed to repower using a "generic clean coal" technology were not included as part of this universe of "life extended" powerplants. About 350 gigawatts of capacity (about half of all fossil fuel-fired capacity expected to be on line by 2010) will undertake life extension activities by 2010 under these specific assumptions.

Consistent with previous ICF modeling efforts, it was assumed that net dependable capacity and reliability of existing powerplants would be maintained at design levels for their entire 55 to 65 year lifetime. However, unit heat rates were assumed to increase by 0.25% per year to reflect powerplant aging (i.e., to reflect progressive deterioration in

potential power output), combined with a one-time 5% decrease in heat rates assumed to occur at the time of refurbishment (to reflect the restoration of the powerplant to something close to its original design operating efficiency as a result of refurbishment). These assumptions have been included in all of the EPA analyses by ICF since the 1985 EPA Base Case assessments began in 1984.

Two additional issues related to powerplant refurbishment that were raised either directly or implicitly in your letter include the following:

- The powerplant lifetime/refurbishment assumptions in the 1987 Interim EPA Base Case included an assumed average cost of $200 per kilowatt in early 1986 dollars for all refurbished units. No assumptions regarding the costs of refurbishment were explicitly made in the more recent analyses, however, because the costs of life extension were assumed to be sufficiently low (at $200 per kilowatt in early 1986 dollars or less) that all units would be refurbished and their lives extended under all the environmental regulatory scenarios evaluated. Since these refurbishment costs will be incurred in all cases, they do not affect the analysis of different environmental regulatory scenarios.

- As stated on page 29 of the enclosed report, "it was assumed by EPA that the recent WEPCo decision would not result in any significant number of powerplants having to comply with NSPS upon refurbishment." It was also assumed that refurbishment would not result in more stringent emission requirements under PSD. Thus, for purposes of the recent EPA forecasts, the act of refurbishment, (which, for the purposes of the EPA Base Case, means efficiency improvements and other maintenance designed to enable an additional 25-35 years of acceptable operation up to design capacity) was not assumed by EPA to require any refurbished plant to meet tighter new source emission controls.

We hope that this information is useful to you and adequately addresses your questions. Please call should you have any further questions.

Sincerely,

Kenneth A. Schweers
President
ICF Resources Incorporated

EDISON ELECTRIC INSTITUTE The association of electric companies

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Washington, D.C. 20036-3691
Tel: (202) 778-6400

July 12, 1989

Mr. Kenneth A. Schweers
ICF Resources Incorporated
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Dear Mr. Schweers:

I read with interest a recent article in Inside EPA entitled "EPA Predicts Less Dramatic Decline of SO_2 Emissions, Reaching Consensus," a copy of which is enclosed. The article states that your company prepared, on behalf of EPA, forecasts "through the year 2000 [of] trends in utility air emissions, utility capacity and generation levels, utility fuel consumption and regional coal production." The article states that ICF prepared two base cases which utilized plant retirement dates of 55 and 65 years. I understand that these forecasts are being used to support the Administration's Clean Air Act bill.

I am interested in learning more about the assumptions that EPA had you use in these forecasts. Specifically,

1. What assumptions, if any, were made concerning deterioration and restoration of unit capacity as the units aged?

2. What assumptions were made concerning the amount and timing of investments in programs that would be necessary to operate plants reliably to 55 or 65 years?

3. What assumptions were made concerning the applicability of new source performance standards and the prevention of significant deterioration program with regard to investments made in programs to restore capacity and to maintain acceptable levels of reliability and availability during a 55 to 65 year life?

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4. When did EPA first have you assume that source owners would undertake programs to restore capacity and to enable reliable operations for 55 or 65 years?

5. In the most recent EPA studies, how many units were assumed to undertake programs directed at restoring capacity, availability, and reliability during the 55-65 year facility life?

Thank you for your help in clarifying the assumptions used in these EPA analyses. Please call me if you have any questions concerning this request.

Sincerely,

Robert A. Beck
Director
Clean Air, Fossil Fuels
and Natural Resources

Enclosure

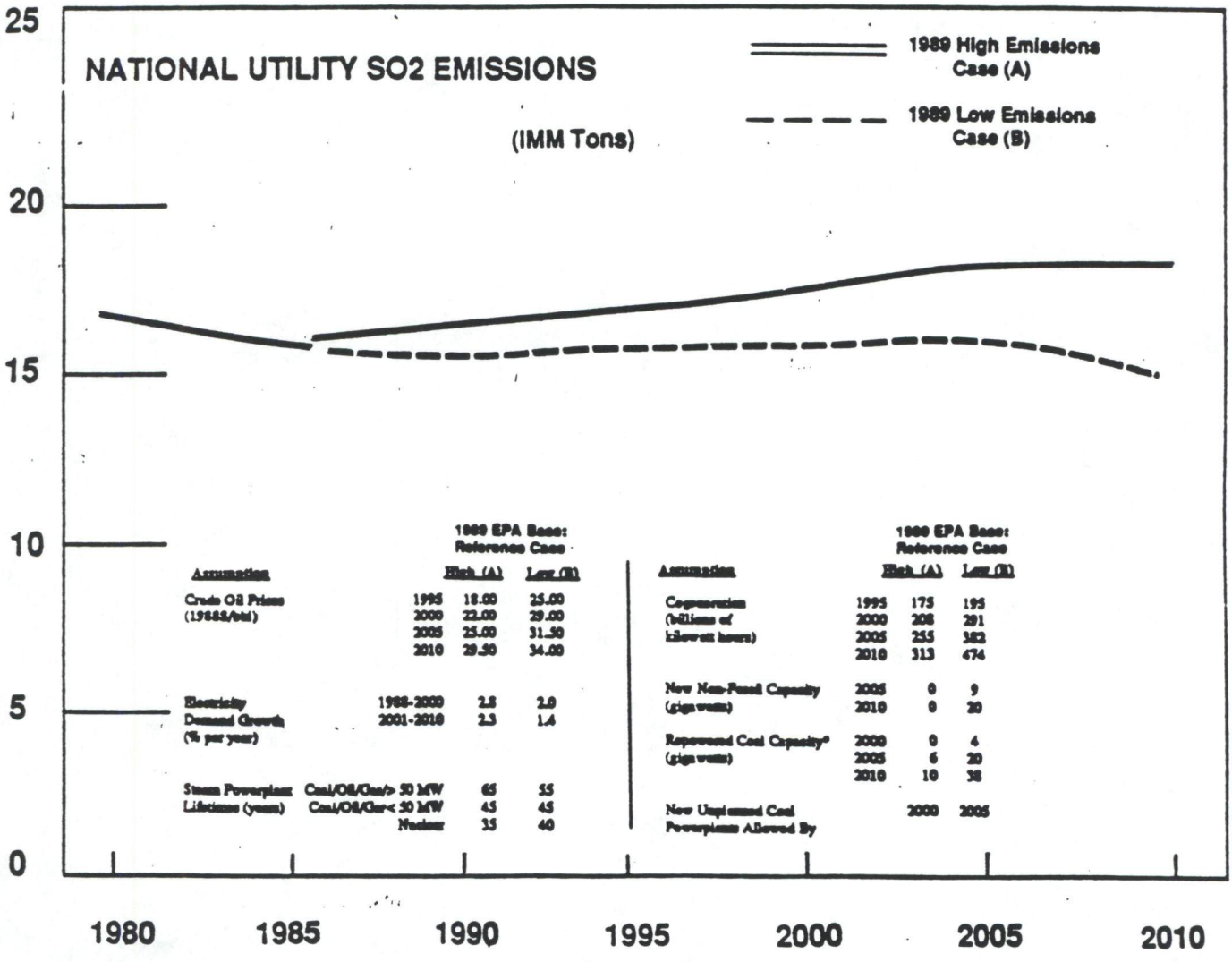
EPA PREDICTS LESS DRAMATIC DECLINE OF SO2 EMISSIONS, REACHING CONSENSUS

EPA's Office of Policy, Planning & Evaluation has revised its base for predicting future emissions of sulfur dioxide, from an earlier draft version yielding a continual rise in emissions to a final version, showing a less drastic decline. The minor revisions were made in response to harsh criticisms levied by EPA's Air Office, which argued that the assumptions in the draft used to yield a significant new decline in emissions after the year 2000 were unrealistic (Inside EPA, March 10, p1). OPPE in the draft had devised a "high" and "low" emissions scenario, with the low case supporting industry assertions that emissions will not rise quickly and will ultimately decline without regulation (Inside EPA, March 10, p4). The most recent base case departed somewhat from EPA's 1987 "interim" base case -- the predecessor to the draft base case -- which showed SO2 emissions increasing at a faster rate.

The final *1989 Base case forecasts*, prepared by ICF, Incorporated for EPA, forecast through the year 2010 future trends in utility air emissions, utility capacity and generation levels, utility fuel consumption and regional coal production. The document is designed to update EPA's 1987 "interim base case," to provide more recent analyses that will serve as a basis for analyzing economic and emissions impacts of various clean air proposals. The final plan, like the draft, uses two base cases, a high case A and a low case B, to present a "reasonable possible range" of electric utility air emissions over the next two decades. The Air Office had primarily attacked assumptions used to derive the low emissions scenario and OPPE has

continued on next page

EPA's NEWEST FORECAST ON SO2 EMISSIONS



Assumption		1989 EPA Base: Reference Case High (A)	Low (B)
Crude Oil Prices (1988$/bbl)	1995	18.00	25.00
	2000	22.00	29.00
	2005	25.00	31.50
	2010	29.50	34.00
Electricity Demand Growth (% per year)	1988-2000	2.8	2.0
	2001-2010	2.3	1.4
Steam Powerplant Lifetimes (years)	Coal/Oil/Gas > 50 MW	65	55
	Coal/Oil/Gas < 50 MW	45	45
	Nuclear	35	40

Assumption		1989 EPA Base: Reference Case High (A)	Low (B)
Cogeneration (billions of kilowatt hours)	1995	175	195
	2000	208	291
	2005	255	382
	2010	313	474
New Non-Fossil Capacity (gigawatts)	2005	0	9
	2010	0	20
Repowered Coal Capacity* (gigawatts)	2000	0	4
	2005	6	20
	2010	10	38
New Unplanned Coal Powerplants Allowed By		2000	2005

*Includes 50% increase in capacity due to repowering

Figure 1. Near-term utility S02 emissions are similar, but High Case emissions grow steadily after 2000, while Low Case emissions decline slightly.

EPA's DRAFT BASE CASE FOR SO2 EMISSIONS

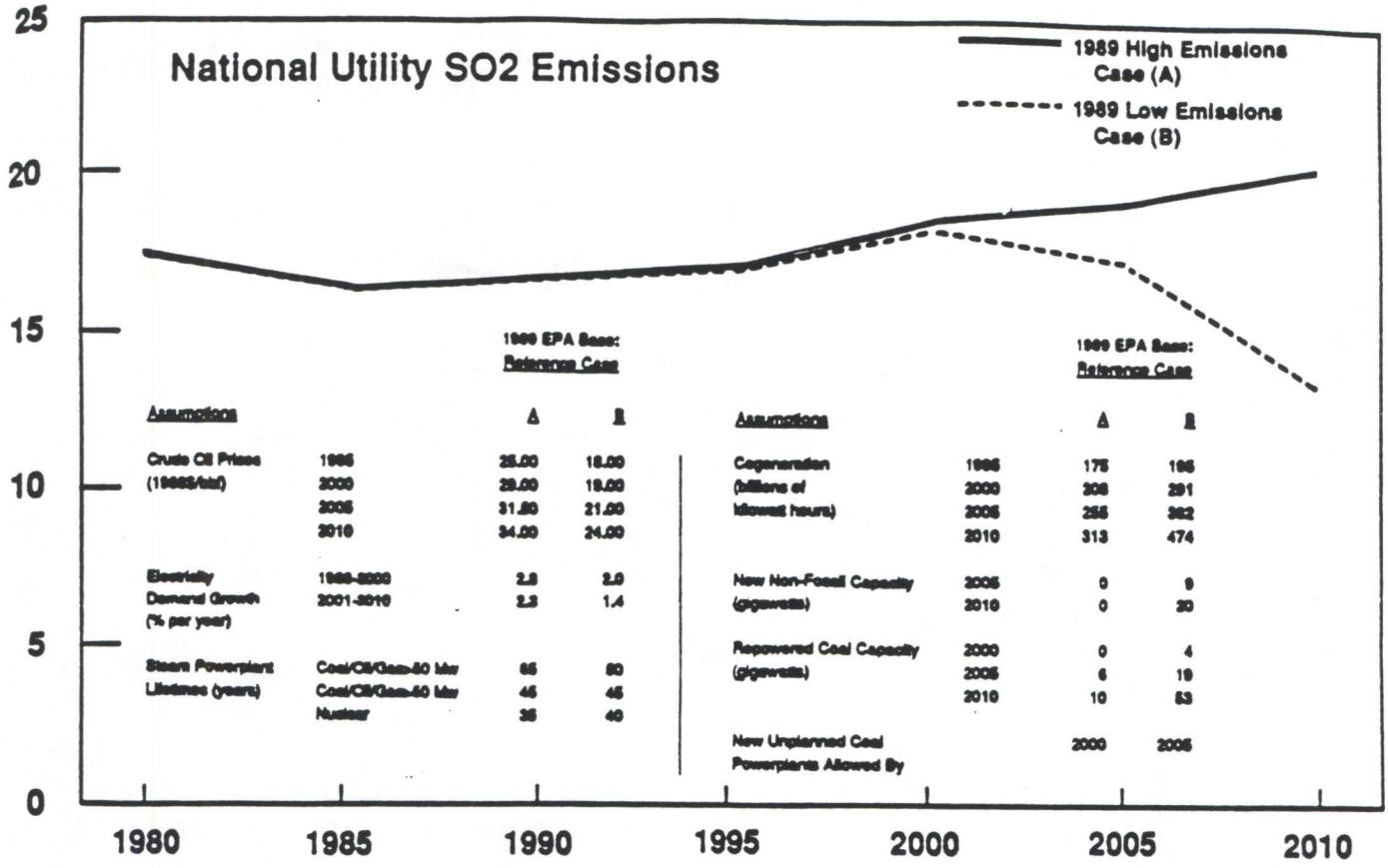


Figure 1: Near-term SO2 emissions are similar, but Case A emissions grow steadily after 2000, while Case B emissions decline.

responded by revising some of those figures in the final document. "This has been a long process, but we believe we have successfully developed two plausible scenarios of future emissions; one scenario resembling our previous 1987 interim base case and the other reflecting reasonable alternative assumptions resulting in lower emissions," says a memo from EPA to base case reviewers, who received the revised document this week.

The high emissions case shows that SO2 and NOx emissions will rise moderately in the near-term and grow in the long-term, while the low emissions case remains constant in the near-term, rises slightly in the year 2000, declines and then plateaus after that point *(see chart.)* An agency source explains that cases A and B reveal lower increases in SO2 than EPA had predicted in its 1987 interim base case, but fails to show the "drop off" in emissions forecasted in OPPE's earlier draft version.

The most significant change in assumption from the draft that OPPE made involved the year at which plants are likely to retire. If the older, more inefficient plants with less sophisticated pollution controls are predicted to retire earlier, the result will be a lower emissions forecast. "The plant life issue drives the way emission trends look in the future," says one agency source. Another explains the difficulty in predicting power plant life: "There's no good estimates on this. No one knows when these will cease to be useful boilers." Responding to concerns that it had overestimated the retirement rate, OPPE changed -- from the draft to the final version -- the age at which plants retire in the low emissions case from 50 to 55 and from 60 to 65 in the high emissions case.

The assumptions governing the degree to which plants will switch to more efficient and cleaner coal capacity through repowering were also "tightened," says one agency source, to assume less repowering in the low emissions case. The Air Office said that OPPE had significantly overestimated the amount of repowering that would occur in case B.

NEW ASSOCIATION FORMED TO ADDRESS BIOTREATMENT. The Washington, D.C. Applied Biotreatment Assn. plans to explore the issue, which involves the use of bacteria to decompose waste. The core group of the newly organized association consists of 10 member companies, who will recommend different treatment technologies and interface between environmental services groups and waste-generating industries.

Attachment B

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July 18, 1989

FILE NO 31531.350001

DIRECT DIAL NO 202 955 1558

BY HAND

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Assistant Chief of the Environmental
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U.S. Department of Justice
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Washington, D.C. 20026

Dear Mike:

As we discussed last week, when you revise your brief in the WEPCo case to conform with the Seventh Circuit's page limitation requirements, we would appreciate it if you would correct the inaccurate statement that now appears on page 66 of the brief. The first full paragraph on that page now states that among the petitioners in the CMA v. EPA case in the D.C. Circuit

> were several of the amici in this case, including Alabama Power Co., et al. These petitioners asserted that EPA's establishment of an actual emissions baseline is contrary to the CAA and that EPA should have instead determined emissions increases based on potential to emit, i.e., design capacity as limited by legal restrictions on operations.

This implies that Alabama Power Co., et al. opposed EPA's establishment of an actual emissions baseline. While some of the petitioners in that case did make such an argument, Alabama Power Co. did not. In case you did not have at your disposal the materials necessary to demonstrate this, I am enclosing copies of the Cover Pages and Signature Pages of the briefs filed in that case. You will see from these enclosures that Alabama Power Co. entered into only two of all the briefs filed: the brief challenging EPA's dual definition of source and the one

addressing the federal enforceability issue. Alabama Power Co. did not join in the Fuller & Henry-drafted brief on the actual vs. allowable emissions issue.

In sum, only those petitioners signing a brief joined in that brief. Different petitioners joined in different briefs. This practice was first introduced in the Alabama Power PSD case (where we were lead counsel for industry petitioners) and was followed in the Duquesne Light § 120 case as well as in CMA v. EPA. This process allowed a petitioner to participate in only those challenges it supported and not to endorse arguments with which it disagreed.

There are numerous issues in the WEPCo case that we do not agree on. I hope, though, that this matter is one that can be resolved by your looking at the enclosed materials and making the necessary changes in your revised brief.

If you or anyone at EPA has any questions about this matter, please call me (202/955-1558).

Sincerely,

Andrea Bear Field

Andrea Bear Field

ABF:pbc
Enclosures
cc: Gregory B. Foote, Esq.
Michael S. Winer, Esq.
Robert Martineau, Esq.

4-2
4-3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1112
And Consolidated Cases

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review Of Regulations Of The
Environmental Protection Agency

BRIEF FOR INDUSTRY PETITIONERS ON EPA'S DUAL DEFINITION OF "SOURCE" IN NONATTAINMENT AREAS

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February 12, 1981

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 79-1112 and Consolidated Cases

MANUFACTURING CHEMISTS ASSOCIATION, ET AL.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review
of Regulations of the
Environmental Protection Agency

PETITIONERS BRIEF ON FUGITIVE EMISSIONS AND CERTAIN OTHER ISSUES

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IN THE
UNITED STATES COURT OF APPEALS
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No. 79-1112
And Consolidated Cases

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review Of Regulations Of The
Environmental Protection Agency

BRIEF FOR INDUSTRY PETITIONERS ON ACTUAL EMISSIONS DEFINITION OF NET INCREASE

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February 12, 1981

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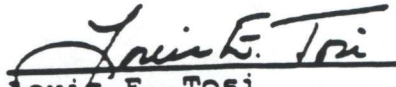
CONCLUSION

By defining net increase with reference to changes in actual emissions, EPA has cut back on many significant benefits of the bubble approach. EPA's actions are outside its statutory authority and give rise to numerous inconsistencies and practical problems. As such, EPA's rules should be set aside with direction to EPA to define net increase in terms of potential emissions.

In addition, EPA has modified one of the most important components to its New Source Review program without benefit of public participation as required by law. Regardless of EPA's authority, the result of this procedural defect is a rule that is largely unworkable. At a minimum, this court should vacate the rule and remand it to EPA with instructions to allow for public comment.

Respectfully submitted,



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
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APR - 4 1991

Mr. James B. MacRae, Jr.
Acting Administrator
Office of Management and Budget
New Executive Office Building
Room 3236
Washington, D.C. 20503

Dear Mr. MacRae:

At the March 7, 1991 meeting on the Wisconsin Electric Power Company (WEPCO) Interpretative Rule, the content and timing of a notice and comment rulemaking on best available control technology was discussed. It was agreed that the Environmental Protection Agency (EPA) was to prepare for review an outline of such a rulemaking. In response, my staff have prepared the enclosed draft.

Please note that this draft material has not been reviewed by EPA's senior management.

Sincerely,

William G. Rosenberg
Assistant Administrator
for Air and Radiation

Enclosure

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A. Fraas
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NOTE: This version reflects necessary format revisions made since the April 4, 1991, version.

----STAFF DRAFT----
DO NOT CITE OR QUOTE

AGENCY: ENVIRONMENTAL PROTECTION AGENCY (EPA)

ACTION: PROPOSED RULE

SUMMARY: To improve the effectiveness of the prevention of significant air quality deterioration program required by Title I, Part C of the Clean Air Act (Act), EPA proposes today to amend its rules to clarify the regulatory definition of best available control technology (BACT) by adding language that elucidates the legal requirements for a BACT analysis. The new language specifies that a BACT analysis must contain the following two core requirements:

1) the available control systems for the source must be considered in the determination, including those that provide the maximum degree of emissions reduction, and

2) Selection of a control system providing a lesser degree of emissions reduction must be justified by a well-documented rationale, in terms of the statutory criteria and supported by the record, for rejecting the control system(s) providing a greater degree of control.

In addition, EPA proposes to amend the regulations defining BACT to reflect the change made by § 403(d) of Title IV of the Act Amendments of 1990 to the statutory definition of BACT.

The EPA is soliciting public comment on the proposed changes to the regulatory definition of BACT.

DATES: Comments may be submitted to EPA at the address below on or before [30 days from date of publication].

ADDRESSES: Comments on this proposal should be sent to:

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION

I. Background

Major stationary sources and major modifications are subject to the prevention of significant deterioration (PSD) review requirements of the Act. A covered facility may not be constructed without a permit that meets the requirements of § 165 of the Act. The current PSD program is represent by two sets of regulations. The first set of regulations, 40 CFR 51.166, specifies the minimum requirements that a PSD air quality permit program under Part C of the Act must contain in order to obtain approval by EPA as a revision to a State implementation plan (SIP). The second set, 40 CFR 52.21, delineates the Federal PSD permit program, which currently applies as part of the SIP for States that have not submitted a PSD program meeting the requirements of 40 CFR 51.166. Roughly two-thirds of the States are implementing their own PSD program which has been approved by EPA under 40 CFR 51.166. The 40 CFR 52.21 applies in the remaining States, most of which have been delegated the authority to implement the Federal PSD program. Among other substantive requirements, the facility must apply BACT § 165(a)(4) [see also 40 CFR 52.21(j) (Federal regulations), 40 CFR 51.166(j) (regulations setting forth the requirements for State implementation plan (SIP) approval of a State PSD program),

and 40 CFR Part 52, Subpart A - Subpart FFF (various SIP requirements)].[1]

Emissions limitations reflecting the application of BACT must be set forth in the PSD permit § 165(a)(1). To obtain a PSD permit, an applicant must, among other requirements, conduct an analysis in accordance with EPA regulations to ensure the application of the BACT to each new or modified emissions unit [Act § 165(a)(2, 4)]. The required analysis must address "the degree of continuous emissions reduction which could be achieved by such facility," § 165(e)(3)(B) [see, e.g., 40 CFR 52.21(n)(1)(3)].

The term "best available control technology" is defined in the Act as:

> an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under the Clean Air Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990.

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[1]Under the Clean Air Act Amendments of 1990, in certain circumstances BACT is also a requirement for obtaining a permit under Part D of the Act.

[The CAA § 169(3), as amended by § 403(d) of the Clean Air Acts Amendments of 1990].

During each BACT analysis, which is done on a case-by-case basis, the reviewing authority evaluates the energy, environmental, and economic impacts and other costs associated with each available control technology. The reviewing authority then specifies an emissions limitation for the source that reflects the maximum degree of reduction achievable for each pollutant regulated under the Act, considering the factors enumerated in the definition quoted above. In no event may a technology be selected that would not meet any applicable standard of performance under 40 CFR Parts 60 (new source performance standards) or 61 (national emission standards for hazardous air pollutants).

In addition, if the reviewing authority determines that there is no economically-reasonable or technologically-feasible way to accurately measure the emissions, and hence to impose an enforceable emissions standard, it may require the source to use design, alternative equipment, work practices or operational standards to reduce emissions of the pollutant to the maximum extent [40 CFR 52.21(b)(12); 40 CFR 51.166(b)(12)].[2]

In January 1979, EPA issued "Guidance for Determining BACT under PSD," and in October 1980 issued a "PSD Workshop Manual" (EPA 450/2-80-081). These documents outlined an approach to the BACT analysis in which the applicant was to propose a base case as BACT,

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[2]For example, if a coal storage pile emits coal dust to the atmosphere, it would make little sense to impose an emissions standard, since measuring the amount of coal dust rising off the pile may be nearly impossible. A much more direct approach to controlling emissions is, for example, requiring the owner to wet the coal pile periodically or to totally enclose it. This type of operational standard or work practice would be equivalent to an emissions limitation for the purpose of the BACT requirement.

present more stringent control alternatives, and defend its BACT selection "demonstrating that each alternative control system... would cause unreasonable adverse energy, environmental, or economic impacts" (see "Guidance for Determining BACT under PSD," January 4, 1979, at 5-6).

In June 1986, EPA established a New Source Review Task Force to address growing concerns about the effectiveness of the new source review (NSR) programs in meeting the statutory requirements, and to recommend actions to improve EPA's exercise of its oversight and enforcement responsibilities in implementing the NSR program. The Task Force found, based on a comprehensive review of numerous PSD permits issued during the previous several years, that PSD applicants and States frequently were conducting inadequate BACT determinations using the method outlined in the 1979 guidance and the 1980 workshop manual. In numerous instances, applicants would propose an emissions limitation at or near an applicable new source performance standard (NSPS) under
§ 111 of the Act as the base case, and provide little or no consideration of the more stringent control options before settling on the proposed level as BACT. States typically would accept these determinations with little or no independent analysis, thereby failing to fulfill their responsibilities under the Act. The Task Force pointed out two basic solutions to the problem of inadequate BACT analysis. One was to focus on improving implementation of the existing method so that, in practice as well as in theory, the statutory requirements would be fulfilled. The other option was to call for an alternate approach to the BACT analyses in the expectation that its internal dynamics would, in practice, achieve more effective implementation of the BACT requirements [see generally "New Source Review Task Force Report," Final Draft, December 1986, at 25-28].

In the meantime, in an adjudicative decision on appeal of a PSD permit for a municipal waste combustor (MWC), the Administrator held that a PSD applicant has the "burden of demonstrating that significant technical defects, or substantial local economic, energy, or environmental factors or other costs warrant a control technology less efficient than [the most stringent technology available]." Honolulu Resource Recovery Facility ("H-Power"), PSD Appeal No. 86-8, at 7 (Remand Order, June 22, 1987). Shortly thereafter, EPA issued guidance calling for application of the H-Power holding to all BACT determinations for MWC's ["Operational Guidance on Control Technology for New and Modified Municipal Waste Combustors," June 26, 1987].

In light of these events, EPA decided that as a matter of Agency policy it would adopt what has come to be known as a "top-down" BACT method for all categories of PSD sources. In brief, the top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent--or "top"--alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts or other costs, justify a conclusion that the most stringent technology is not "achievable" in that case. If the most stringent technology is eliminated in this fashion, then the next most stringent alternative is considered, and so on.

In a December 1, 1987 memorandum, EPA Headquarters requested its Regional Offices to use a top-down method in their own BACT determinations, and to strongly encourage State and local PSD permitting authorities to do so as well [see December 1, 1987 memorandum from Craig Potter, Assistant Administrator for Air and

Radiation, entitled "Improving New Source Review"]. The memorandum further directed Regional Offices to conduct timely reviews of PSD applications, and to comment adversely on proposed PSD permits that failed to adequately consider the more stringent control options, as would be required as a matter of course in any acceptable method of determining BACT. If final State and local permits still failed to reflect adequate consideration of the relevant BACT factors, the Regions were to consider such permits deficient; and were to consider appropriate enforcement action under §§ 113 and 167 (in the case of State-issued permits) or appeals to the Administrator under 40 CFR 124.19 (in the case of Federal permits) to remedy such deficiencies. An additional point related to the top-down process is that it should, in practice, lessen administrative burdens in the conduct of BACT determinations because it does not require a full analysis of all control alternatives that are more stringent than the NSPS or other base case, as would be required under the 1979 guidance. In the spring of 1990, EPA made available to the public a draft document, entitled "Top-down Best Available Control Technology Guidance Document," detailing the top-down BACT method.

In calling for use of the top-down approach, EPA did not change the existing PSD regulations, nor did it alter the BACT requirements for any source. The definition of BACT in the statute, EPA regulations, and SIP's remained the same. The top-down approach simply clarified the procedures for carrying out the existing statutory and regulatory requirements in order to assure that they would be fully effectuated.

On March 29, 1989 (supplemented on May 3 and 10, 1989), the American Paper Institute and the National Forest Products Association (collectively "API") petitioned EPA to rescind the top-down policy and initiate a rulemaking on BACT determinations. The EPA denied this request on May 12, 1989 (supplemented on

June 13, 1989), explaining that the top-down approach was not at variance with, nor a revision of, the PSD regulations, and that no rulemaking was required. Subsequently, API filed suit in the D.C. Circuit and in the U.S. District Court for D.C. API v. Reilly, D.C. Cir. No. 89-1428 (filed 7/10/89);
API v. Reilly, D.D.C. Cir. No. 89-2030 (filed 7/18/89). A consortium of utilities also filed a petition for review of EPA's actions, Alabama Power Co. v. EPA, D.C. Cir. No. 89-1429 (filed 7/11/89), and the case was consolidated with the API case. The same consortium filed an administrative petition with EPA on February 1, 1990. Finally, API also challenged the 1990 EPA draft guidance document on top-down BACT, API v. Reilly, D.D.C. No. 90-1364 (filed 7/13/90). Settlement negotiations currently are underway regarding these cases. The EPA has decided as a matter of policy to conduct this proposed rulemaking to facilitate greater public participation concerning these issues, notwithstanding EPA's position that it is not legally required to do so.

II. Legal Requirements for a PSD Analysis

In adopting the PSD program, Congress emphasized the importance of thorough and public analyses in PSD decisionmaking, by stating that one of the purposes of PSD is to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process. As noted above, § 165 specifies, and EPA regulations reflect, the requirement to conduct a BACT analysis. The statutory emphasis on procedural rigor is accompanied by expressions of congressional intent that States have wide discretion in setting final emissions limits reflecting BACT. The legislative history on BACT makes clear that Congress meant the

State to make the final substantive decision on the appropriate level of technology. The key passages of the Senate report show that the State has broad flexibility to exercise its judgment in implementing BACT. The report states:

> The decision regarding the actual implementation of best available control technology is a key one, and the committee places this responsibility with the State, to be determined in a case-by-case judgement. It is to be recognized that the phrase has broad flexibility in how it should and can be interpreted, depending on site.
>
> In making this key decision on the technology to be used, the State is to take into account energy, environmental, and economic impacts and other costs of the application of best available control technology. The weight assigned to such factors is to be determined by the State. Such a flexible approach allows the adoption of improvements in technology to become widespread far more rapidly than would occur with a uniform Federal standard (emphasis added).

[S Rep. No. 95-217, 95th Cong., 1st Sess. 31 (1977) (emphasis added).]

At the same time, the Senate Report places limits on State discretion in two respects. First, it is clear that Congress intended one of the advantages of State flexibility to be to speed up the adoption of advances in control technology.[3] Second, it is

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[3][See also statement of Senator Muskie, 123 Cong. Rec. S9171 (June 8, 1977)]. This construction was reinforced in H-Power and in later PSD appeal decisions, [see, e.g., Pennsauken County, New Jersey Resource Recovery Facility, PSD Appeal No. 88-8 (Remand

also clear that in adopting BACT, Congress intended PSD permitting authorities to exercise informed discretion to weigh energy, environmental, and economic impacts in determining BACT for a particular source.

These statutory goals can be fulfilled by more than one method of determining BACT. Regardless of the specific methodology used for determining BACT, be it top-down, the method embodied in the 1979 guidance, or otherwise, EPA has consistently interpreted the relevant Act provisions as embodying two core legal criteria that must be satisfied in any BACT analysis. First, the permit applicant must consider available control technologies, i.e., those that "provide the maximum degree of emissions reduction."[4] Second, any decision to require less than the maximum degree of emissions reduction must be justified by a

---

Order, Nov. 10, 1988)]. In these cases, the Administrator interpreted the BACT definition as requiring the PSD applicant to demonstrate to the permitting authority why the most stringent control technology "available" was not "achievable."

[4] Whether a technology is "available" for purposes of BACT is a practical, factual determination, using conventional notions of whether the technology can be put into use. See Pennsauken County, New Jersy Resource Recovery Facility, PSD Appeal No. 88-8 (Remand Order, Nov. 10, 1988) at 8.

Each type of available control system (e.g., a baghouse, an electrostatic precipitator, a dry scrubber, a wet scrubber, a carbon absorber) or combination of control systems should be analyzed at the maximum level of control achievable for the control system or combination of control systems as it would be applied at the proposed facility in question. Major alternatives within a given type of control system should also be considered (e.g., electrostatic precipitators that can achieve 96%, 98%, and 99.5% control efficiency, respectively). However, analyses of numerous minor variations in control systems or combinations thereof is not required.

reasoned analysis of "energy, environmental and economic impacts and other costs" contained in the record, and the permitting authority must exercise its informed judgment before accepting that justification.

These two core criteria have been singled out in the administrative appeals decisions subsequent to the H-Power decision as being the essential requirements of a BACT analysis. Thus, in Union County Resource Recovery Facility, PSD Appeal No. 90-1 (11/28/90) at 8, the Administrator cited compliance with the two core criteria in upholding a BACT determination for a resource recovery facility. The Administrator relied on the same two core criteria in upholding a permit determination in Mecklenburg Cogeneration Limited Partnership, Clarksville, VA, PSD Appeal No. 90-7 (12/21/90) at 6.

Although EPA believes that the current statutory and regulatory definitions of BACT in effect require the consideration of these two core criteria as fundamental to any adequate BACT determination, the EPA is today proposing to make this requirement explicit by inserting into the regulatory definition of BACT the following two core requirements for a BACT analysis:

1) the available control systems for the source must be considered in the determination, including those that provide the maximum degree of emissions reduction, and

2) Selection of a control system providing a lesser degree of emissions reduction must be justified by a rationale, documented in terms of the statutory criteria and supported by the record, for rejecting those control system(s) providing a greater degree of control.

III. Purpose of the Proposed Change

To date, the 1979 and top-down approach have only been considered as guidance by EPA in conducting an appropriate BACT analysis based on the definition of BACT in the Act and in EPA's regulations. They have not established binding regulatory requirements. Such requirements are contained in the Federal regulations and SIP's. Instead, EPA's BACT guidance was intended to guide permitting officials in those areas subject to the Federal PSD regulations at 40 CFR 52.21.

Rather than specifying a precise approach to the BACT analysis, and evaluating the adequacy of a BACT determination against that approach, EPA is proposing today to clarify the two core legal requirements necessary for an adequate BACT analysis. Thus, adherence to a top-down approach is not required. In reviewing new or revised State PSD rules submitted for SIP approval, the Agency will deem the program to be adequate if it provides for compliance with these two requirements necessary for an adequate BACT analysis. Likewise, in fulfilling its oversight and enforcement responsibilities, the Agency will continue its policy of reviewing specific permitting actions for conformity with the core criteria. So long as the State follows the procedural norms embodied in the core criteria and does not violate any objective standards that may apply (such as NSPS or SIP limits), EPA will consider a State's BACT analysis to be adequate and will not second-guess the State's substantive BACT decision. Conversely, permits containing BACT determinations that do not conform to the PSD requirements of the Act, EPA regulations, and applicable SIP's, as reflected in the core criteria, will be considered deficient by EPA. Instances of procedural irregularities or arbitrary decisionmaking will remain grounds for enforcement action or permit appeals, as appropriate.

The EPA is today soliciting comment on the proposed change to the BACT definition for the purpose of clarifying and delineating the regulatory standard by which the adequacy of a BACT determination should be judged. EPA continues to believe that the top-down method is an efficient and highly reliable method of conducting a BACT analysis in conformity with the statutory BACT definition. Therefore, both applicants and reviewing agencies are encouraged to consider continuing use of the approach as described in the March 1990 draft document for the purpose of permits issued under 40 CFR 52.21. As noted above, however, EPA acknowledges that the top-down method is not the only permissible method of determining BACT. Applicants and State permitting authorities remain free today to apply the core legal criteria without reference to the top-down method in making BACT determinations that satisfy the Clean Air Act.

IV. Clean Fuels

The definition of BACT in § 169(c) of the Act is changed by § 403(d) of the 1990 Amendments. To maintain conformity with the statutory definition, EPA proposes to amend the regulatory definition of BACT at 40 CFR 52.21(b)(12) and 51.166(b)(12) by inserting "clean fuels" after "including fuel cleaning, and by adding the following at the end thereof: "Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Act Amendments of 1990."

Proposed change to BACT definition in regulatory language at 51.166(b)(12) and 52.21(b)(23)

"Best Available Control Technology" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Clean Air Act which would be emitted from any proposed major stationary source or major modification which the Administrator,[5] on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant. Two criteria must be satisfied in any BACT analysis: 1) the available control systems for the source must be considered in the determination, including those that provide the maximum degree of emissions reduction, and 2) selection of a control system providing a lesser degree of emissions reduction must be justified by a rationale, documented in terms of the statutory criteria and supported by the record, for rejecting the control system(s) providing a greater degree of control. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for

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[5]The term "reviewing authority" will be used for definition of BACT at 51.166(b)(12)

the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments 1990.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS

Date: 5/9/91

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OFC OF WH COUNSEL

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FAX number of sender: 202-395-6947

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Number of pages, including cover sheet: 4

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Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

Open on Expiration of PRA
(Document Follows)
By CoP (NLGB) on 4/29/06

Date Closed:	7/2/2002	**OA/ID Number:**	45144-005
FOIA/SYS Case #:	2001-1865-F		
Re-review Case #:			
P-2/P-5 Review Case #:			
MR Case #:		**Appeal Case #:**	
MR Disposition:		**Appeal Disposition:**	
Disposition Date:		**Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
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P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

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COUNCIL OF ECONOMIC ADVISERS
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

MEMBER OF THE COUNCIL

May 8, 1991
URGENT

MEMORANDUM FOR BILL ROSENBERG

FROM: DICK SCHMALENSEE RS/mc

SUBJECT: WEPCO

I appreciate EPA's recent efforts in providing drafts of both an interpretative rule and a legislative rule addressing WEPCO matters, as well as earlier efforts to deliver on the Administrator's commitment to provide draft interpretative language on WEPCO issues. At this juncture, we must proceed to adopt the Administration's policy on WEPCO through regulatory and administrative actions in areas that remain subject to interpretation under the Clean Air Act.

Based on my personal review of the drafts provided at the beginning of this week, interagency staff-level review, the realities of the calendar, and my understanding of DOJ's view that the substantial overlap between the latest draft interpretative and legislative rules would be mutually destructive in sustaining our positions, I have concluded that both policy and resource concerns strongly favor the issuance of only one WEPCO rule. Therefore, from this point forward, all efforts should focus on issuance of a single rule incorporating both interpretative and notice-and-comment provisions by June 1.

Content of a Single WEPCO Rule

Given the clarity of the Administration position as spelled out in my letter to Senator Ford on July 23, 1990 and the agency's intention to adopt as a basis for regulatory and administrative actions (on those issues that remain subject to interpretation) the position reached by the Administration during last year's deliberations, the content of a single WEPCO rule should not be a matter of substantial controversy.

I had been led to believe that EPA would use the Administration's legislative proposal as the basis for crafting its WEPCO rule, subject, of course, to legal findings regarding what positions could be implemented through administrative and rulemaking actions. I was therefore surprised to find that the recent draft legislative rule does not implement many of the Administration proposals that counsel have determined to be implementable through administrative or regulatory means. A summary of the major discrepancies between the legislative rule

draft and the Administration position is provided in the attached table.

Given that only three weeks remain until June 1, EPA should prepare, by c.o.b. next Wednesday at the latest, a revised legislative rule that implements the Administration's WEPCO policy to the extent counsel have found defensible. The attached table indicates where and how the current draft must be modified in order to achieve this. As I have discussed with you and Linda Stuntz (to whom a copy of this memo is being sent), if either of you feel that any of these changes are inconsistent with established Administration policy, the three of us (only!) should meet in my office today at 5:00 to discuss our differences. After I review the draft rule that I receive on or before next Wednesday, I will decide how to proceed.

cc: Linda Stuntz

Attachment

SENT BY:Xerox Telecopier 7020 ; 5- 9-91 ; 2:51PM ; 2023956947→ 4567929;# 4

May 9, 1991

WEPCO Policy, Legal Constraints, and Draft Legislative Rule

Administration Proposal (7/23/90)	EPA Memo (2/91)	EPA Draft Legislative Rule (5/3/91)
(a) Exempt from NSPS (Sect. 111) if max hourly emissions of any regulated pollutant not above that achievable during prior 5 years.	Yes	Incorporated, except additional "which is representative" language on page 4 should be deleted.
(b)(1) Pure pollution control projects exempt from PSD for any pollutant if max hourly emissions of that pollutant not increased.	Yes	Replaced by no review if not "not environmentally beneficial," but undefined term provides minimal guidance. Must provide same relief and utility ability to self-determine as Admin policy.
(b)(2) Mixed pollution control projects, defined by 20% safe harbor, exempt from PSD if satisfy (b)(1) test and accelerate NOx compliance.	Yes (except accelerated NOx)	No safe harbor provision; "impure" pollution control projects fall under (c). Minor contemporaneous modifications could be considered as a separate project triggering NSR.
(b)(3) If max hourly emissions of any regulated pollutant increase, source is subject to (c) for that pollutant.	Not mentioned	Implicit?
(c) Any other project exempt from C (D) if no significant increase in representative actual emissions of any regulated (criteria) pollutant.	Yes	"Like kind replacements" subject to actual to actual under C; all others, including some "impure" pollution control, subject to actual to potential. Action deferred (p. 22) on nonattainment (D). Doesn't implement Admin policy.
(d) System-wide netting.	No	Not attempted
(e) No violations of NAAQS, etc.; Modeling for pollution control only if representative actuals for criteria pollutant will exceed levels used in most recent reliable Title I air quality impact analysis.	Not visible	Not addressed (but should be)
(f) BACT for NOx.	Presumption only	Not addressed (but should be)
(g)(1) Pollution control is defined to include technology, fuel-switching, and CCT demonstration projects.	-	Definition OK; implements statute for CCT demos, repowering.
(g)(2) Representative actual emissions: (A) the 2 years prior or a more representative 2 years in previous 5; (B) the 2 years after or a more representative 2 years in coming 10, with demand growth exclusion.	Yes; demand growth via causation test	(A) included; (B) causation seems OK, but "highest projected use" in any 2-year period used without 10 year bound or "representative" language. Problematic treatment of efficiency improvements.
(h) EPA will issue guidance on when refurbishment projects are nonroutine within 24 months of passage (11/92).	Yes	Vague (no date) indication of intention to issue guidance on p. 22.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo with Attachment	From Linda G. Stuntz to Bill Rosenberg, EPA Assistant Administrator for Air and Radiation RE: Objection to Issuing Draft WEPCo Interpretative Rule; DOE Proposal for Resolving WEPCo Problems (9 pp.)	n.d.	P-5	

Collection:

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Department of Energy
Washington, DC 20585

MEMORANDUM TO: Bill Rosenberg
Assistant Administrator for Air and Radiation
Environmental Protection Agency

FROM: Linda G. Stuntz LGS

SUBJECT: Objection to Issuing Draft WEPCo Interpretative Rule; DOE Proposal for Resolving WEPCo Problems

The purpose of this memorandum is to provide DOE's comments explaining why we strenuously object to the issuance of an inadequate WEPCo interpretative rule like the April 18 draft. DOE acknowledges EPA's recent concern about the need to respond quickly to industry's concerns about WEPCo. However, this concern was not evident to us during the 6-month period between Bill Reilly's letter to Mike Boskin last year and the first draft interpretative rule made available to us that had been reviewed by EPA management.

We are also providing comments on EPA's excerpt from a legislative rule that addresses pollution controls. Finally, we are offering a proposal that should lead to a quick and satisfactory resolution of WEPCo through the forthcoming legislative rule.

Draft Interpretative Rule

DOE continues to believe that it is critical for the Administration to issue only a good and comprehensive WEPCo fix by June 1. Therefore, we strenuously object to releasing the April 18 draft interpretative rule because of its failure, once again, to resolve certain key issues. (See enclosed memorandum.) One example is EPA's insistence on tying pollution control relief to the rebuttable presumption. Note that last September, the Administration told Senator Ford the rebuttable presumption would be easily rebutted, thus triggering WEPCo. (See enclosure, "A Brief History of the Rebuttable Presumption.")

Contrary to EPA's April 26 memorandum, we do not believe the draft interpretative rule is responsive to the needs of the electric utility industry. The recent letter from the trade associations representing the electric utility industry makes clear that a "partial fix" would not be responsive to their WEPCo problems. We believe a comprehensive legislative rule which includes a good preamble is the only way to be fully responsive to the utilities' WEPCo concerns.

Pollution Control Excerpt

DOE staff met with EPA staff last week to seek clarification of parts of the draft excerpt. Both parties agreed to consider questions raised by the other. Our detailed comments reflect those questions. (See enclosed memorandum.)

In some respects, the differences between EPA and DOE over pollution control projects have narrowed. However, our major concerns include limiting the pollution control PSD exclusion to electric utilities only, tying the rebuttable presumption to pollution controls in nonattainment areas, and the need to exclude demand growth from future-actual emissions for pollution control projects in nonattainment areas.

DOE Proposal

Because the draft rule continues to reflect an approach that has yielded very little progress, DOE is proposing a somewhat different approach to the legislative rule. This approach should help to resolve our differences in a more expeditious and mutually satisfactory manner.

Specifically, we propose that the legislative rule, to be issued by June 1, contain a preamble that presents a reasonable interpretation of EPA's current rules and, of course, propose new regulatory language as needed. Such a preamble would obviate the need for an interpretative rule. The proposed rule would have the following elements:

1. For pollution control projects, an exclusion from new source review. Utility projects would be presumed to be environmentally beneficial, with that term broadly construed.

2. For non-pollution control projects, changes to EPA rules to implement the 1984 settlement agreement between the Chemical Manufactures Association and EPA. (The terms of the agreement allow a source to use either a potential-to-potential or an actual-to-actual emissions test to determine whether a modification has occurred.) At the March 26 meeting of the WEPCo Group, EPA indicated its long-standing commitment to implement the CMA settlement agreement. Implementing that agreement now as part of the WEPCo legislative rule would resolve the differences between us concerning non-pollution control activities and allow EPA to meet its obligations to the D.C. Court of Appeals.

We look forward to discussing this proposal at our Tuesday meeting. Its adoption by EPA would ensure that a good WEPCo fix is proposed by the June deadline.

cc: Richard Schmalensee, CEA
Don Elliot, EPA
Barry Hartman, Justice
Art Fraas, OMB
Teresa Gorman, White House
Jeff Holmstead, White House
Lydia Wegman, EPA-OAQPS

MEMORANDUM

SUBJECT: DOE Review of the Interpretive Rule and DOE Recommendations on How to Proceed

DATE: April 29, 1991

I. Background

The Administration has insisted that EPA abandon its current WEPCo policies, in order to ensure orderly implementation of the Clean Air Act Amendments of 1990, to encourage pollution control projects, and to promote repairs and replacements needed for efficient reliable operation of electric generating units. In October 1990, Administrator Reilly agreed to reverse course on WEPCo and return to policies that would allow pollution control projects and needed repairs and replacements to move forward without the uncertainty and delay associated with new source review.

Prior to the Administrator's commitment to fix WEPCo, EPA submitted to OMB a draft interpretative rule, that addressed the "like kind replacement" concept and "pollution control" projects. Among other things, this draft interpretive rule provided that pollution control projects would not be exempt from new source review, if annual utilization of the associated facility were to increase after the project was installed. While the draft rule would have created a "rebuttable presumption" that pollution control projects would not be followed by an increase in annual utilization, this presumption could easily have been rebutted, leading to uncertainty regarding whether such projects could be undertaken at all. For this and other reasons, the draft rule was rejected as not providing an adequate pollution control exemption from new source review.

In March 1991, EPA submitted a new version of the draft interpretive rule -- a version that had grown to 74 pages. This version provided even less relief than the first version. It imposed new WEPCo restrictions on pollution control projects, and still contained the "rebuttable presumption" as the centerpiece of the pollution control fix. Bill Rosenberg and Don Elliott stated that they had not reviewed this draft before its circulation, and agreed to revise the draft to make it conform with the Administration's position on pollution control projects.

On April 18, 1991, EPA circulated the latest draft interpretive rule. The principle difference between this draft and earlier drafts is that this draft is only 18 pages long. It reflects no change in overall results.

II. Discussion of the Problems with the EPA's April Draft

Utilities should be allowed to undertake projects to reduce emissions, utilizing certain kinds of technologies that EPA is quite familiar with,[1/] without triggering the new source review process. Moreover, any system ought to be susceptible of a prompt and certain application, so that an average utility would know in advance whether its planned pollution control activities are going to be exempt from new source review. Unfortunately, in our view, judged by these standards, EPA's interpretive rule remains completely unacceptable.

Specifically, like the first and second drafts, the April draft still adheres to the "actual annual increase" standard for pollution control projects, albeit with a "rebuttable presumption." In other words, EPA proposed again the approach that had been rejected earlier and refused again to return to the 1983 Pedersen PSD interpretation regarding pollution control projects -- an interpretation that would provide clear-cut relief for such projects. In sum, EPA has simply submitted a shorter version of its previously unacceptable interpretive rule.

In addition, the latest draft rule contains elements of prior drafts that are unacceptable -- e.g., the qualifier on "like kind replacements" that the replacement cannot "fundamentally alter the method of operation of a source," and the failure of the rule to recognize that certain other repairs (e.g., addition of soot blowers) do not transform a unit that has "begun normal operations" into one that has not. The "fundamental change" criteria create the prospect of endless and time consuming EPA reviews whenever an older piece of equipment is replaced with one of a newer design, or with one that allows a source to return to prior operating levels. Considering only replacements and ignoring all repairs creates an arbitrary line that cannot be squared with the regulatory language, which focuses on whether a unit has or has not "begun normal operations."

Like previous versions of its interpretative rule, EPA has added new requirements to the "actual emissions" calculation formula that, like earlier versions, "take away with one hand what it has

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1/ These include scrubbers, low-NOX burners, precipitators, fabric filters, sorbent injection systems, etc.

given with the other." The newest interpretive rule is particularly ingenious in this regard.

One section of the draft grudgingly implements the "causal link" requirement in the Administration's legislative proposal.[2/] But the section immediately preceding the "casual link" section makes clear that projected emissions (as adjusted in accordance with the "causal link" section) will not be used by EPA to represent future actual annual emissions when they are "less than the source's highest past utilization rate . . . ." (Pg. 10, emphasis added.) The effect of this requirement is to eliminate virtually all relief that would be provided by the "causal link" aspect of the ruling, and to read the "causal link" requirement out of the rules for most cases.

Under the April draft, the only time when PSD review would clearly not be triggered is when past representative emissions equal the source's highest past utilization rate. In every case where past representative utilization is less than the past maximum levels, PSD will be triggered (even in cases where future utilization is projected to decrease below past representative levels). Among other things, this new requirement will arbitrarily target for new source review smaller, higher emitting facilities that have been reducing utilization and plan to reduce utilization further to meet acid rain requirements.

Finally, the draft interpretative rule is expressed in terms that make it particularly vulnerable to litigation by opponents to the rule. Among other things, there is no logical or legal basis for distinguishing utilities from non-utilities with respect to pollution control projects and "like kind" replacements. While distinctions may be made as to what constitutes a pollution control project, it seems to us that as a matter of sound administrative law, EPA cannot declare pollution controls undertaken by utilities as being exempt under the PSD rules and controls undertaken by other industries as triggering PSD review.

In this regard, release of the interpretative rule in its present form would signal to all other industries that EPA would view control projects as triggering an "actual to potential" comparison. This would mean that new source review would have to precede commencement of construction of any pollution control project by any other industry. This would substantially inhibit the voluntary control program under Title III of the 1990

[2/] The draft fails to state explicitly that changes in loading order of units due to economic or environmental reasons must be discounted. Also, by imposing a burden of proof on utilities undertaking efficiency improvements, EPA will discourage projects that are critical to achieving the Administration's energy and environmental policies, including "global warming" concerns.

Amendments and could wreak havoc on Title I nonattainment control programs. An interpretation of current rules that returned to the 1983 Pedersen interpretation would avoid these problems.

In conclusion, the draft interpretative rule does not solve "90 percent" of the problem, as suggested by EPA at our last meeting. It merely reiterates the Agency's prior position and imposes new restrictions that create additional problems, making this draft even less acceptable than the prior attempts.

III. DOE Recommendation

The draft interpretative rule should not be released because it does not fulfill Administrator Reilly's commitment. Simple editing will not transform it into an acceptable response. What is needed is a legislative rule with an explanation of current law that removes the WEPCo cloud over pollution control projects and over legitimate repair and replacement activities at utility units. We believe that the industry would be perfectly content to wait a little bit longer, so as to get needed WEPCo relief. The legislative rule should also include, as Don Elliott has promised, proposed changes to implement the CMA settlement.

We believe the preamble to such a legislative rule (which, to the extent it described current law, would also be an "interpretative rule" that source owners could rely upon) should accomplish the following:

1. Make clear that current rules contain an implicit pollution control exclusion (i.e., a return to the Pedersen interpretation), which EPA is proposing to make explicit;

2. Describe the "causal link" requirement and make clear that increased utilization due to changes in loading order or demand growth must be discounted;

3. Implement the CMA settlement by proposing a change in the new source applicability rules to allow an election between "potential-to-potential" and "actual-to-actual";

4. Until the CMA rule is finalized, make clear that units that have begun normal operations (including all units undertaking like-kind replacements) are subject to an actual-to-actual comparison;

5. Implement the NSPS fix in the Administration proposal, making clear that, in the interim, the emission rate immediately before a change will not be used where that rate reflects temporary conditions that are unrepresentative of past operations.

A BRIEF HISTORY OF THE "REBUTTABLE PRESUMPTION"

1990

- o March 8
  EPA letter to NIPSCO re CCT demo project
  Includes **rebuttable presumption** (p.2)

- o July 13
  EPA draft IR
  Includes **rebuttable presumption** (p.21)

- o September 11
  Response to Senator Ford
  Rebuttable presumption is easily rebutted (question #2)

1991

- o March 3
  EPA draft IR
  Includes **rebuttable presumption** (p.40)

- o April 18
  EPA draft IR
  Includes **rebuttable presumption** (p.13)

- o April 22
  EPA draft exclusion for pollution control projects (legislative rule)
  Includes **rebuttable presumption** (p.3)

MEMORANDUM

SUBJECT: WEPCo -- DOE Comments on Draft Excerpt Concerning Pollution Controls

DATE: April 29, 1991

EPA's draft language is an excerpt from a forthcoming legislative rule on WEPCo. The excerpt is limited to addressing the applicability of new source review to utility pollution control projects (PCPs). Therefore, additional comments may be necessary after reviewing the PCP provisions within the overall context of the entire legislative rule. For the present time, DOE's comments are provided below.

- The PCP exclusion should not be limited to electric utilities. We believe that denying the exclusion to other sources could undermine the exclusion for utilities. If EPA believes it is necessary to distinguish between utility PCPs and the pollution control measures of other sources, this can be done through the application of the "environmentally beneficial" criterion. Because of their nature, utility PCPs should be presumed to be environmentally beneficial. PCPs for other sources would have to demonstrate that they satisfy this criterion.

- The draft excludes PCPs from PSD if they (1) do not reduce the efficiency of any other pollution controls at the source and (2) are determined to be "environmentally beneficial." DOE staff sought clarification of both criteria at a meeting last week.

  Based on that discussion, we believe the first criterion is unnecessary because the source would still be required to "comply with all applicable SIP limits and requirements, permit conditions and applicable NAAQS or PSD increment limits" (page 3 of the draft excerpt) which DOE agrees with. Maintaining compliance with its SIP emission limits and other requirements (expressed in pounds per million BTU) for regulated pollutants (e.g., particulate matter) assures that control efficiencies are not reduced.

  EPA staff advised DOE that the term "environmentally beneficial" does not have the same meaning as in earlier EPA proposals. (The term required, among other things, an evaluation of the environmental and health effects of any increased emissions of unregulated air toxics.) Rather, as we understand it, the term is meant to allow EPA to deny an exclusion to a PCP where a dramatic emissions increase somehow resulted from the project. Because questions will be asked by permitting agencies and sources about the

meaning of the term, it should be defined in the legislative rule. In addition, utility PCPs should be presumed to be environmentally beneficial.

- The excerpt language does not mention demand growth. Increased utilization in response to demand growth should be excluded from the projection of future-actual emissions for PCPs. This is appropriate because the installation of pollution controls or fuel switching are not causally linked to satisfying future demand growth.

- Once again, we object to a rebuttable presumption being tied to pollution control projects. As we all know, the allowance trading system encourages a high level of utilization of the best-controlled powerplants. Therefore, increased utilization due to environmental/economic dispatch should be excluded. Otherwise, the rebuttable presumption will be rebutted and WEPCo will be triggered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1112 and Consolidated Cases

CHEMICAL MANUFACTURERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

SETTLEMENT AGREEMENT

Industry petitioners and respondents United States Environmental Protection Agency, et al., ("EPA") intending to be bound by this document, hereby stipulate and agree as follows:

1. This agreement is intended to act as a settlement of all of the issues raised by industry petitioners in these consolidated cases.

2. The "dual definition of source" and "reconstruction" issues are moot, because of the publication of final regulations deleting those requirements. 46 Fed. Reg. 50766 (October 14, 1981).

3. EPA has proposed to delete the "vessel emissions" requirements and stayed them pending final action on the proposal. 46 Fed. Reg. 61612, 61613 (December 17, 1981).

cure a violation of an increment for particulate matter, if the state requests such a postponement.

b. Under any basic permit program that consists of the requirements outlined by 40 C.F.R. 51.18(a)-(i), and hence no requirement relating to PSD increments, the permitting authority may issue a permit even if the modeling shows that the project in question would cause or contribute to a violation of a PSD increment for particulate matter.

c. In revising the Emissions Offset Interpretative Ruling in January 1979 and in providing guidance to the states for the preparation of SIP revisions to meet the requirements of Section 173 of the Act, EPA stated that "in determining the lowest achievable emission rate (LAER), the reviewing authority may consider transfer of technology from one source type to another where such technology is applicable." 44 Fed. Reg. 3280 (January 16, 1979); 44 Fed. Reg. 20379 (April 4, 1979). EPA interprets that statement to mean merely that the Agency would not disapprove a SIP revision which required technology transfer for LAER determinations. The statement does not mean that EPA would approve a SIP revision which sought to incorporate the Section 173 requirements only if the revision required technology transfer. To the contrary, an express prohibition against technology transfer in the revision would not be grounds for disapproval.

8. As expeditiously as practicable, EPA shall (a) propose in the Federal Register the regulatory amendments which appear in Exhibit B to this agreement (the "Exhibit B amendments"), or such amendments as would have substantially the same effect as the Exhibit B amendments, and (b) take final action on the proposed amendments. In addition, EPA shall not extend the period for initial comment on the proposed amendments beyond 60 days.

9. EPA shall hold a meeting in the first week of April 1982 to report on its progress in preparing the Federal Register

EXHIBIT B

A. Requirements for State PSD Plans

Section 51.24 of Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended as follows:

1. By adding a new subparagraph (b)(2)(v) to read as follows: "(v) A major modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.";

2. By deleting "actual" wherever it appears in paragraph (b)(3), except in subparagraph (b)(3)(vi)(b);

3. By adding a new subparagraph (b)(3)(ix) to read as follows: "(ix) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.";

4. By deleting the second sentence, and the word "two-year" in the first sentence, of subparagraph (b)(21)(ii);

5. By adding a new subparagraph (b)(23)(ii) to read as follows: "(ii) A net emissions increase in a source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in subparagraph (i) above.".

B. New Source Review for PSD Purposes

Section 52.21 of Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended as follows:

1. By adding a new subparagraph (b)(2)(v) to read as follows "(v) A major modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.";

2. By deleting "actual" wherever it appears in paragraph (b)(3), except in subparagraph (b)(3)(vi)(b);

3. By adding a new subparagraph (b)(3)(ix) to read as follows: "(ix) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pound of pollutant emitted per hour) or in its actual emissions.";

4. By deleting the second sentence, and the word "two-year" in the first sentence, of subparagraph (b)(21)(ii);

5. By adding a new subparagraph (b)(23)(ii) to read as follows: "(ii) A net emissions increase in a source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in subparagraph (i) above.".

C. Emission Offset Interpretative Ruling

Appendix S of Part 51 of Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended as follows:

1. By adding a new subparagraph II.A.5(v) to read as follows: "(v) A major modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.";

2. By deleting "actual" wherever it appears in paragraph II.A.6, except in subparagraph II.A.6(v)(b);

3. By adding a new subparagraph II.A.6(viii) to read as follows: "(viii) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.'

4. By adding a new subparagraph II.A.10(ii) to read as follows: "(ii) A net emissions increase in a source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in subparagraph (i) above.";

5. By deleting the second sentence, and the word "two-year" in the first sentence, of subparagraph II.A.13(ii).

6. By revising so much of subsection IV.C. as precedes paragraph IV.C.1. to read as follows: "C. Baseline for determining credit for emission and air quality offsets. The baseline for determining credit for emission and air quality offsets will be either the potential to emit (as calculated in terms of pounds

of pollutant emitted per hour) or the actual emissions of the source from which offset credit is to be obtained.";

7. By deleting paragraph IV.C.1., IV.C.2, IV.C.5., and IV.C.6 and renumbering the remaining paragraphs accordingly.

D. State Plans for New Source Review for Nonattainment Purposes

Section 51.18 of Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended as follows:

1. By adding a new subparagraph (j)(1)(v)(e) to read as follows: "(e) A modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.";

2. By deleting "actual" wherever it appears in subparagraph (j)(1)(vi), except in subparagraph (j)(1)(vi)(e)(2);

3. By adding a new subparagraph (j)(1)(vi)(h) to read as follows: "(h) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.";

4. By inserting an "(a)" just before "'Significant'" in subparagraph (j)(1)(x) and adding a new subparagraph (j)(1)(x)(b) to read as follows: "(b) A net emissions increase in a source' potential to emit (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in (a) above.";

5. By deleting the second sentence, and the word "two-year" in the first sentence, of subparagraph (j)(1)(xii)(b);

6. By revising subparagraph (j)(3)(i) to read as follows: "(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection, the baseline for determining credit for emissions reductions is either (a) the potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or (b) the actual emissions of the source from which offset credit is to be obtained.";

7. By deleting subparagraphs (j)(3)(ii)(a) and (b) and renumbering the remaining subparagraphs accordingly;

8. By adding a new subparagraph (j)(3)(ii)(f) to read as follows: "(f) By the time the source is to commence operation, offsetting emissions shall be sufficient so as to represent (when considered together with the plan provisions required under Section 172 of the Act) reasonable further progress (as defined in the plan provisions required under Section 172 of the Act).".

E. Restrictions on Construction for Nonattainment Areas

Section 52.24 of Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended as follows:

1. By adding a new subparagraph (b)(5)(v) to read as follows: "(v) A modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's potential to emit (as calculated in terms of pounds

of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.";

2. By deleting "actual" wherever it appears in paragraph (b)(6), except in subparagraph (b)(6)(v)(b);

3. By adding a new subparagraph (b)(6)(viii) to read as follows: "(viii) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.";

4. By inserting an "(i)" just before "'Significant'" in paragraph (b)(10) and adding a new subparagraph (b)(10)(ii) to read as follows: "(ii) A net emissions increase in a source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in subparagraph (i) above.";

5. By deleting the second sentence, and the word "two-year" in the first sentence, of subparagraph (b)(13)(ii).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 19 1991

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA Administrative Implementation of WEPCO Legislative Program

FROM: E. Donald Elliott ED Elliott
Assistant Administrator
and General Counsel

TO: See Below

You will remember that at our meeting on WEPCO I committed to having the EPA Office of General Counsel draft a memorandum on the WEPCO legal issues. Attached is a copy of that memorandum for your use. If you have serious problems with something in the memorandum, please give me a call or write me a note. Should I find that there is a sufficiently weighty issue remaining, I will set up a meeting for us all to discuss it.

Attachment

Addressees:

Richard Stewart, Department of Justice
Jeff Holmstead, White House
David Rivkin, Depart of Energy
Steve Aitken, Office of Management and Budget

March 26, 1991

EPA/OGC POSITION ON EXCLUSION OF DEMAND GROWTH

CAUSALITY REQUIREMENT

Both the statutory and regulatory definitions of "modification" require a causal link between the physical or operational change and the emissions increase.

Any emissions increase attributable to a physical or operational change must, therefore, be included in the post-change emissions calculation.

Conversely, where emissions increases from increased operations in response to demand growth could reasonably be anticipated to occur even in the absence of the physical or operational change, such increases do not result from the change, and may be excluded from the emissions calculation.

This position may be expressed through an interpretative ruling.

CAVEAT:

The plant must have been able to physically and legally accommodate anticipated demand growth immediately before the change. Increased operations that could not physically and legally be accommodated but for the changes will be deemed to be causally linked to any projected increase in actual emissions.

MEMORANDUM OF CALL

Previous editions usable

TO:

☐ YOU WERE CALLED BY– ☐ YOU WERE VISITED BY–

OF (Organization)

☐ PLEASE PHONE ▶ ☐ FTS ☐ AUTOVON

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

← Alabama Power 636 F.2d 323

← WEPCO 893 F.2d 901

← Puerto Rican Cement 889 F.2d 292

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63-110 NSN 7540-00-634-4018 **STANDARD FORM 63** (Rev. 8-81)
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FPMR (41 CFR) 101-11.6

• US GPO 1990 — 262-080

Department of Energy
Washington, DC 20585

Facsimile Cover Sheet
for
The Office of Policy, Planning and Analysis

Date: 3/27/91

To: Jeff Holmstead

Organization: _____

Phone/(Fax) Number: 456-7929

From: Linda G. Shuntz

Subject/Comments:

This fax contains 2 pages, including this cover. If you did not receive all of the pages or if illegible, please phone

Leslie Coleman at (202) 586-5316.

Department of Energy
Washington, DC 20585

MEMORANDUM FOR DICK SCHMALENSEE

FROM: Linda G. Stuntz LGS

DATE: March 27, 1991

RE: WEPCo

Upon reflection, it seems to me that it does not make sense for DOE to spend time commenting on the original proposed interpretive rule, as we think it will be changed by EPA based on the agreements we think were made yesterday.

I believe a more efficient way to proceed would be for EPA to redraft the rule based on our agreements on the legal issues. After EPA's General Counsel has reviewed it, DOE will be happy to provide comments. In the meantime, DOE will prepare for submission to EPA a definition of "pollution control" project, as we agreed at yesterday's meeting.

I tried to reach Don Elliot this morning. He is out of the office today. Bill Rosenberg is in North Carolina, but I hope to discuss this with him today.

Please let me know whether this makes sense to you.

cc: Bill Rosenberg
Don Elliot
Teresa Gorman
Jeff Holmstead
Art Fraas
Barry Hartman

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Stephen A. Wakefield, DOE General Counsel to Linda G. Stuntz RE: EPA's WEPCo Proposal (3 pp.)	03/21/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

Open on Expiration of PRA
(Document Follows)
By Cop (NLGB) on 4/24/06

Date Closed:	7/2/2002	**OA/ID Number:**	45144-005
FOIA/SYS Case #:	2001-1865-F		
Re-review Case #:			
P-2/P-5 Review Case #:			
MR Case #:		**Appeal Case #:**	
MR Disposition:		**Appeal Disposition:**	
Disposition Date:		**Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
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P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
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(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Department of Energy
Washington, DC 20585

March 21, 1991

MEMORANDUM FOR LINDA G. STUNTZ

FROM: Stephen A. Wakefield
General Counsel

RE: EPA's WEPCo Proposal

As you know, David Rivkin and I met with Don Elliott on Monday to discuss the current state of play on WEPCo-related legal issues. This meeting was at his request, and did not involve any of EPA's staff attorneys. Subsequently, David has informed me that this matter also came up on Tuesday, at the White House Clean Air Act implementation meeting, chaired by Al Hubbard.

The purpose of this memorandum is to give you our recommendations on how to respond to Don's offer. Specifically, he proposed the following:

- He is prepared to state that, as a legal matter, one can read EPA's current PSD regulations to require that a "physical or operational change" of a unit must be shown to "result in" an increase in annual emissions. This language of the PSD regulations clearly contemplates a causal link between the change and the projected emissions increase. Stated differently, where projected increases are due to other factors, such as demand growth, they can be excluded from the computation of the future projected emissions. To be sure, Don was not prepared to argue that this reading is compelled by the existing language of the PSD regulations. However, he would go as far as stating that it was legally permissible. He also was prepared to agree in principle that an increase in the utilization of a unit, caused by changes in the economic or environmental ordering of units in the utility dispatch system, can be subtracted from the computation of the future projected emissions, that follow a modification. To nail down this issue, he suggested that we call several of Bill Rosenberg's

people in North Carolina to see whether they approve of his proposal. Their reaction was lukewarm, to say the least. They argued that they saw no practical way to exclude that portion of emission increases that is not properly attributable to the modification involved. Don, however, prevailed upon them to accept his recommendation in principle. This, of course, is contingent upon our willingness to recede on other WEPCo related issues, discussed in greater detail below.

- Don spent most of the meeting arguing, rather emotionally, that we should not take to OLC the issue of whether the "actual to-potential" comparison is limited to like-kind replacements -- as EPA believes, based on their reading of WEPCo and Puerto Rican Cement cases -- or whether -- as we believe, based on our reading of the very same cases -- the actual-to-potential test is appropriate only for new "green field" units or units that enlarge their production capacity or increase their potential to emit. Our preferred position is, of course, that where the production capacity of a unit increased (i.e., in the case of a utility boiler, increasing the amount of fuel that can be burned) or the "potential to emit" of a unit is increased, the enlarged unit is a "new unit," unless the change is covered by the PSD exception for "routine" repairs, or for fuel switching, or for pollution control projects. You should know that Don was not so much contesting the merits of our legal arguments -- indeed, he acknowledged that we had good arguments -- as was pleading for moderation on our part. Specifically, he asserted that, for EPA, this issue that goes to the very heart of WEPCo, and has almost theological overtones. He also noted that, even if we prevailed with OLC, this would "humiliate" EPA and would cause a long term impairment of relations between EPA and DOE.

  Having finished describing the "sticks," Don also offered some "carrots." In that regard, he promised that, as a legal matter, he was prepared to support a very broad and generous definition of "like-kind" replacement. This, according to him, would take care of ninety percent of DOE's concerns. Don also promised that, by late summer, EPA would come with a long-awaited "potential to potential" rule.

- He was not prepared to talk about any matters pertaining to the interpretive rule, dealing with pollution control projects, or about the five year/maximum achievable hourly emissions baseline for

the NSPS purposes. His reasons were both the lack of familiarity with these issues -- for example, he has not seen the interpretive rule -- and the feeling that we should settle his two major issues now, and deal with the NSPS baseline and pollution control issues separately.

We feel that Don's willingness to compromise on the demand growth issue is encouraging. However, in matters like these details make all the difference. Thus, it is essential to obtain the precise language on the demand growth and the load switching from Bill Rosenberg's people. Without such language, Don's offer does not do much for DOE and the industry. The same holds true on the "like-kind" replacement issue. It is certainly true that one could come with a definition here that would cover most repairs of utility equipment. If that is the case, I think that we do not have to stick to our guns on the more technical issues of how to interpret WEPCo/Puerto Rican Cement cases. However, we must see the language that has been accepted by both Don and Bill Rosenberg. In fact, we can come up with the language ourselves; all EPA has to do is to sign off on it. Last, but not least, I think that any deal with EPA must include the pollution control and NSPS baseline issues. If EPA is not prepared to go that far, I believe we should press forward and go to OLC. I think our arguments have merit and we have a good chance of prevailing.

I'll be out of town for the rest of the week, but can be reached by phone if you want to discuss any of these matters further. David is also available to brief you once you review this memorandum.

Steve

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04. Memo	From Linda G. Stuntz, DOE Deputy Under Secretary to Dr. Richard Schmalensee, Council of Economic Advisors RE: WEPCo Interpretive Rule (2 pp.)	03/11/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

Open on Expiration of PRA
(Document Follows)
By Cap (NLGB) on 4/24/06

Date Closed:	7/2/2002	**OA/ID Number:**	45144-005
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Re-review Case #:			
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(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Department of Energy
Washington, DC 20585

MEMORANDUM

TO: Dr. Richard Schmalensee
Member
Council of Economic Advisors

FROM: Linda G. Stuntz LGS
Deputy Under Secretary
for Policy, Planning and Analysis

RE: WEPCo Interpretive Rule

DATE: March 11, 1991

You should know that, from the DOE standpoint, the draft interpretive rule on WEPCo circulated by the EPA at our meeting last week does not come close to meeting Administrator Reilly's commitment to Chairman Boskin. Indeed, the recent draft is much more restrictive than the earlier (and unacceptable) EPA draft interpretive rule. It is critical to note that the latest draft makes it practically inevitable that pollution control projects and like-kind replacements will trigger WEPCo. In addition, this draft expands EPA's WEPCo interpretation in a way that would give EPA unprecedented power to review a utility's pollution control project.

To begin with, we strongly object to the way EPA is using the term "modification." Their draft interpretive rule is predicated on the assumption that virtually any change by a source is a "modification." Having defined all changes as modifications, EPA proceeds to craft various exemptions. As you may recall, our General Counsel has taken issue with this approach. Moreover, I believe that Don Elliott has indicated some receptivity to our position on demand growth and other issues that are important to DOE.

Among other things, the draft interpretive rule would prevent a utility from installing controls without EPA review and approval of the project. This review requires a source to undertake extensive air quality analyses, certain of which go far beyond the analyses that would be required if the source simply underwent new source review (e.g., modeling "unregulated air toxics"). The interpretive rule is so broad that it seems to contemplate case-by-case EPA review of each pollution control project.

For the utility industry, the draft rule means micromanagement by EPA staff of utility acid rain control programs. It would have

potentially devastating effects on Phase I acid rain compliance, since control commitments have to be made immediately to meet the January 1, 1995 compliance deadline. We are also concerned about EPA's language on the applicability of this rule; it seems to leave some utilities out.

For other industries, the draft rule would mean automatic application of new source review to each and every control project (i.e., for other industries, EPA will continue to calculate future emissions based on "potential" emissions). This would undermine the early reduction program under Title III (§ 112 (h)(5)) and would delay for one to two years any control program to meet non-attainment requirements under Title I.

The rebuttable presumption language is totally useless to the industry. It clearly suggests that the source, having installed pollution control equipment, cannot increase its hours of operation. In virtually all cases, the presumption will be rebutted. In addition to the rebuttable presumption, other requirements of the draft rule would further increase the likelihood, to the point of certainty, that non-routine changes trigger WEPCo. These other provisions include no exclusion for demand growth and the use by EPA of "maximum future-actual emissions."

This is not a good faith response to Administrator Reilly's commitment. It does not solve the problem. Rather, it vastly expands the problem.

We will make our concerns known to EPA and try to work things out, but based on this draft, I am less than optimistic. If you and Howard disagree with our assessment that EPA is going backwards, not forwards, please let me know.

cc: Teresa Gorman
Jeff Holmstead

Withdrawal/Redaction Sheet
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Memo	From Michael A. McCord, Jennifer A. Haverkamp, Jonathan B. Wiener to Richard B. Stewart RE: WEPCO- Implementing the Administration's Proposals Regarding PSD and New Source Review for Electric Utilities (16 pp.)	03/05/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
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WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

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By Cap (NLGB) on 10/28/05

Date Closed: 7/2/2002	**OA/ID Number:** 45144-005
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Re-review Case #:	
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Memorandum

PRIVILEGED & CONFIDENTIAL--ATTORNEY/CLIENT & DELIBERATIVE PROCESS
DRAFT March 5, 1991

Subject	Date
WEPCO: Implementing the Administration's Proposals Regarding PSD and New Source Review for Electric Utilities	March 5, 1991

To

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division

From

Michael A. McCord
Assistant Chief
Environmental Defense Section

Jennifer A. Haverkamp
Policy, Legislation, & Special Litigation Section

Jonathan B. Wiener
Special Assistant to the AAG

This memorandum addresses the EPA Office of General Counsel staff memorandum of February 19, 1991, sent to you by Don Elliott, which discusses the legal bases for various procedural options in implementing solutions to the "WEPCO" issues -- solutions proposed to the Congress in a letter from Dick Schmalensee (CEA) last year. We believe that the memorandum does a balanced job of presenting the pros and cons of proceeding through interpretative rules versus legislative rules. At the same time, we have some concerns as to the conclusions reached on particular proposals.

We also discuss in this memorandum a draft memorandum responding to EPA's analysis prepared by the Department of Energy's Office of General Counsel. In summary, we believe the DOE memo contains two significant flaws: 1) in advocating use of interpretative rules it does not consider fully the distinctions, articulated in case law, between legislative and interpretative rules; and 2) it relies on reading some of the existing regulations to allow or support interpretative constructions which do not seem plausible and are contrary to recent agency interpretations. Nevertheless, the DOE memo is in agreement with the EPA memo as to most of the items proposed for administrative action.

PRIVILEGED & CONFIDENTIAL--ATTORNEY/CLIENT & DELIBERATIVE PROCESS
DRAFT March 5, 1991

SUMMARY OF CONCLUSIONS

There appears to be significant disagreement over the method of implementation for only 3 of the 10 WEPCO "fixes" discussed in EPA's memo (see attached chart): (1) We agree with EPA that a demand growth exemption for post-modification projections would require legislation, while DOE believes it may be done by interpretative rule. (2) DOE also would use an interpretative rule for implementing an actual to actual methodology for all modifications, while we and EPA would limit such a rule to like-kind replacements. (3) We (but not DOE) question EPA's conclusion that interpretative rules could be used to implement part of the PSD Exclusion for Pollution Control Projects, but agree that notice and comment would be necessary to implement the rest of that exclusion (shifting from annual to maximum hourly emissions). Neither we nor DOE dispute EPA's conclusion that interpretative rulemaking is inappropriate for four other fixes: NSPS Baseline, Safe Harbor, Potential to Potential, and System-Wide Netting. All agree that "routine" refurbishment may be defined through either interpretative or notice and comment rulemaking; that an interpretative rule is appropriate for actual to actual baseline; and that a generic NOx BACT would require legislation but that a presumption could be established by interpretative or legislative rule.

Even for those proposals for which we concede interpretative rules might be defensible, however, we recommend that EPA first invite public notice and comment before issuing a final rule, in order to guard against subsequent legal challenges that would thwart expeditious implementation of the proposals and that would invite adverse D.C. Circuit case law that would affect agency rulemakings throughout the Executive Branch.

I. INTERPRETATIVE VERSUS LEGISLATIVE RULES GENERALLY

A. Options for Issuing the Rules

EPA's memorandum presents the choice for rule promulgation as between "interpretative" rules and "notice and comment" rulemaking. In fact, interpretative rules could either be proposed for public comment, followed by issuance of a final rule, or issued initially as final rules with no opportunity for public comment. Legislative rulemaking would, of course, require public comment. Moreover, if some of the Schmalensee proposals can validly be issued as interpretative rules while others must be legislative rules, the two sets could be announced together or separately.

As an initial matter, we would like to qualify an apparent assumption underlying this policy debate that implementing the WEPCO fixes by final interpretative rule is necessarily superior to notice and comment legislative rulemaking, and that EPA should, therefore, wherever plausible, forego notice and comment. Although issuing an immediately final interpretative rule covering all points would seem to give industry immediate legal authority to proceed in reliance on all aspects of the rule, legal challenge to some of these elements could delay and frustrate the success of this blanket approach well beyond the time it would require to seek public comment and issue a final rule. Although there are some reasonable arguments as to why some of the measures could be promulgated as final interpretative rules, it is, of course, very likely that those rules would be challenged as procedurally deficient. We should not unnecessarily run the risk of letting the D.C. Circuit make bad law on notice and comment questions and adversely affect future litigation unless there is a compelling reason why notice and comment procedures could not be utilized. (As discussed below, the District of Columbia Circuit, which would review these rules, takes a narrow view of interpretative rules.) And if the desire is to save time, using the format of a final interpretative rule (without offering the opportunity for comment) may be counterproductive, for if the interpretative rule is remanded for lack of notice and comment, the desired regulatory relief may be delayed unnecessarily.[1]

In addition to these considerations, an interpretative rule is generally considered a weaker policy instrument because there is a risk that its validity will be challenged in subsequent applications, and because courts may decline to accept

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[1] Of course, the issuance of legislative rules may also be challenged, e.g., on grounds that the legislative rule exceeds (or conflicts with) the agency's statutory authority. Or a party could argue that the agency has failed to adequately explain its basis for changing its substantive views. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 42 (1983) (an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). Development of any legislative rules must take care to avoid these problems. In any event, public notice and comment often flushes out such objections and gives the agency an opportunity to respond in the final rule, thus strengthening the chances of surviving judicial review.

the agency's interpretation. Generally speaking, an interpretative rule is not binding and may be challenged at any time (if final and ripe), Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980). Although this principle is somewhat counterindicated by Section 307 of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which requires challenges to final agency action to be brought within 60 days of the final action, this issue remains open: in General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 984 n. 30 (D.C. Cir. 1983), vacated on other grounds, 742 F.2d 1561 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985), the court observed that "[A] court is not required to give effect to an interpretative regulation", quoting Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). A legislative rule, in contrast, is considered legally binding by the courts if no one challenges it within the 60 day window or the D.C. Circuit upholds it following such a challenge. In other words, the final word on a legislative rule's defensibility may come much sooner, and its authoritativeness may be more solid, than for an interpretative rule.

One means of implementing the WEPCO proposals promptly might be simultaneous issuance of interpretative rules covering some of the proposals and proposed legislative rules covering others. Provided the proposals were appropriately divided between the two types of rules, this approach would likely be effective. A variant on this suggestion would be to put some of the proposals in both types of rules simultaneously (for example, where a proposal seems on the fence between interpretative and legislative status). This approach, however, may graphically focus the court's attention on the weakness of the interpretative approach; it could therefore pose serious litigation risks for the interpretative rule, and could elicit judicial opinion adversely affecting all administrative agencies.

The objectives of prompt promulgation, and of giving industry an immediate signal of the government's overall policy direction, could perhaps be achieved by initially issuing a proposed rule seeking public comment on all items. This proposed rule could be labeled "interpretative" or legislative" or remain silent as to its character. The fact that a proper interpretative rule has been voluntarily issued as a proposed rule, and subjected to public comment, does not alter its character as an interpretative rule. United Technologies Corp. v. EPA, 821 F.2d 714, 719 (D.C. Cir. 1987). Therefore, the agency could initially issue a proposed rule with a request for public comment, and then finalize certain provisions as interpretative rules very quickly after proposing them, i.e., without responding to all significant comments. At the same

time, those elements for which public comment indicated a legislative rule was more appropriate could be finalized accordingly (with a required record of public comment and response). An advantage of this approach is that once the set of initiatives were proposed as a full package, industry would see their full design and be able to make investment decisions -- and to comment -- more intelligently.

B. District of Columbia Circuit Law Regarding Interpretative Versus Legislative Rulemakings

It may be helpful to review the distinctions that the D.C. Circuit, the court that would review the WEPCO rulemakings, makes between interpretative and legislative rulemakings and the need for notice and comment.

While the Administrative Procedure Act exempts "interpretative rules" from its notice and comment procedures, 5 U.S.C. § 553(b)(A), the distinction between such rules and legislative rules that require notice and comment has aptly been described in one of our prior cases as "enshrouded in considerable smog." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984)(en banc)(quoting American Bus Ass'n v. ICC, 627 F.2d 525, 529 (D.C.Cir. 1980)(McGowan, J.)). While the District of Columbia Circuit has rejected the broad proposition that every rule with a "substantial impact" requires notice and comment, see Citizens to Save Spencer County v. EPA, 600 F.2d 844 (D.C. Cir. 1979), the court has "consistently afforded a narrow cast to the exceptions to section 553, permitting an agency to forego notice and comment only when the subject matter or circumstances divest the public of any legitimate stake in influencing the outcome." Air Transport Ass'n v. Bowen, 900 F.2d 369, 375 (D.C.Cir. 1990); cf. American Hospital Ass'n v. Bowen, 834 F.2d 1317, [] (D.C. Cir. 1987)(valid interpretative rule may have "substantial impact").

The hallmarks that the D.C. Circuit now attributes to an interpretative rule should suffice to establish that notice and comment would be advisable for most if not all of the proposed WEPCO fixes, even if we choose to defer labelling such rules as "interpretative" or "legislative" until after the notice and comment period. The law also raises the question whether notice and comment would be preferable to the affected utilities, since a comment period would include them more fully in the rule development process and provide more certainty as to the rule's binding effect (an important investment consideration). An interpretative rule is one that merely "states what the administrative agency thinks the statute or regulation means and

only reminds citizens of existing duties," General Motors, 742 F.2d at 1565, and so has no "present-day binding effect." Community Nutrition Inst. v. Young, 818 F.2d 942, 946 (D.C. Cir. 1987)(quoting American Bus Ass'n, 627 F.2d at 529). Such a rule cannot "conclusively affect the rights of private parties," American Hospital, 834 F.2d at 1045(quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980), and must "leave the agency and its decisionmakers free to exercise discretion." Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 536 (D.C. Cir. 1988); accord Community Nutrition Inst., 818 F.2d at 946. An agency cannot dispense with notice and comment, by contrast, if it intends "to establish a 'substantive' rule ... which creates or modifies rights that can be enforced against the agency." National Latino Media Coalition v. FCC, 816 F.2d 785, 788 n.2 (D.C. Cir. 1987) (Media Coalition). Such a rule is deemed legislative unless it does no more than "restate[] a consistent practice of the agency." General Motors, 742 F.2d at 1565. An interpretative rule, therefore, is not binding on the agency, third parties, or courts, and will receive only such deference "as its inherent persuasiveness commands." Batterton, 648 F.2d at 702 (footnotes omitted).

The court makes these distinctions according to specific, intelligible criteria, looking first to the label an agency attaches to its action. That label receives some deference, "but the degree [of deference] accorded to the agency on a point such as this is not overwhelming." Brock v. Cathedral Bluffs Shale Oil Corp., 796 F.2d 533, 537 (D.C. Cir. 1986)(Scalia, J.)(reviewing general statement of policy); accord Community Nutrition, 818 F.2d at 946 n.5 (same criterion as applied to interpretative rules). Courts give "far greater weight to the language actually used by the agency," Community Nutrition, 818 F.2d at 946: interpretative rules are identified only with precatory language, while "mandatory, definitive language" -- words such as "must," "shall," or "will" -- "is a powerful, even potentially dispositive factor in [the] court's determination" that a rule is legislative. McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); Community Nutrition Inst., 818 F.2d at 947. Such language necessarily denotes an agency action that "encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior," and consequently requires the notice and comment process. American Hospital Ass'n, 834 F.2d at 1034.

There is no doubt that for rules that cannot be deemed interpretative, "Congress specified that notice and an opportunity for comment are to precede rulemaking." New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980)(emphasis in original);

see also American Bus Ass'n, 627 F.2d at 599. The D.C. Circuit "strictly enforce[s] this requirement because [the court] recognize[s] that an agency is not likely to be receptive to suggested changes once they have made a 'final' determination." Air Transport Ass'n, 900 F.2d at 379. The court has suggested that there might be cases in which post hoc notice and comment would be permitted, "but only upon a compelling showing that the agency's mind remained open enough at the later stage." McLouth, 838 F.2d at 1317; accord Air Transport Ass'n, 900 F.2d at 379. Here, where the proposed interpretative rule would be incorporating the Administration's previously proferred legislative proposal, a court might be skeptical of the agency's openmindedness.

C. Assumptions in DOE Draft Memo

The DOE draft memo argues strongly in favor of interpretative rulemakings in several instances where EPA has concluded that legislative rulemaking or legislation is required. The DOE memo does not consider fully the distinctions, articulated in case law, between legislative and interpretative rules. Rather than assessing all of the indicia of a legislative rule -- in particular whether a rule changes the substantive norms to be followed by the agency and regulated public -- the memo argues only that if an existing legislative rule is subject to an interpretation (using that word in its general and broad meaning), that interpretation need not go through notice and comment rulemaking. We do not think the government could succeed in convincing the D.C. Circuit on judicial review that this is the hallmark of an interpretative rule. While some interpretations of existing regulations may properly be set forth in interpretative rules, a court will still look behind that interpretation to see what its effect is upon the regulated public. (See Part C above for a synopsis of D.C. Circuit precedent.)

DOE bases its vigorous insistence on an immediately effective set of interpretative rules on energy policy concerns. In short, DOE maintains that needed capital investment in energy facilities is being impeded by the WEPCO "cloud". We are not in a position to judge the merits of this contention. However, as pointed out above, there are other countervailing policies to consider, including the possible government-wide ramifications from adverse judicial precedent on as fundamental an administrative law issue as the respective roles of different forms of rulemaking; and there are other administrative options

for removing such a "cloud" without issuing an interpretative rule for every item.

II. COMMENTS ON SPECIFIC PROPOSALS

A. Proposals Not In Controversy

Neither we nor DOE dispute EPA's conclusion that the following proposals may not appropriately be implemented by interpretative rule:

EPA Point A (New Source Performance Standard Baseline) (Schmalensee Proposal Subsection (a));

EPA Point C (Safe Harbor Provisions) (Schmalensee Proposal Subsection (b)(2));

EPA Point D (Potential to Potential Emissions Comparison) (Schmalensee Proposal Subsection (b)(1) & (2)); and

EPA Point F (System-Wide Netting) (Schmalensee Proposal Subsection (d)).

With regard to Points A (NSPS Baseline), C (Safe Harbor), D (Potential to Potential), and F (System-Wide Netting), we agree with EPA's analysis and conclusions that legislative, notice and comment rulemaking (or for F, legislation) would legally be required. Each of those proposals would involve significant changes to the current regulatory system and could not likely be justified as a mere interpretation of an existing regulation.

The Department of Energy memo shares the view that an interpretative rule is not appropriate for Points A (NSPS Baseline), C (Safe Harbor), and F (System-Wide Netting). Similarly DOE does not appear to dispute the conclusion that Point D (Potential to Potential) would require notice and comment, though it opines that this fix would be unnecessary if EPA developed a sufficiently broad interpretative rule exempting pollution control projects (discussed next below).

B. EPA Point B (PSD Exclusion for Pollution Control Projects) (Schmalensee Proposal Subsection (b)(1)).

With regard to Point B (exclusion from the PSD

definition of "modification" of pollution control projects[2] that do not increase maximum hourly emissions), we have reservations regarding EPA's conclusion that this exclusion may be implemented by interpretative rule without notice and comment. A narrowly drawn exemption along the lines of EPA's earlier draft rule might be sustainable as an interpretative rule; however, it would depend upon how pollution control project was defined. Also, it is unclear to us what protection such a rule might provide that is not already available under the existing law. PSD rules define a "modification" to be a change which significantly increases net emissions; if a "pollution control project" means what it seems to mean,[3] it would presumably reduce emissions and therefore not constitute a "modification." In that sense, an interpretation of EPA's rules to clarify that a pollution-limiting change is not a "modification" would not be a new exemption and should not trigger notice and comment requirements.

On the other hand, the creation of an apparent exemption from PSD requirements, even if narrow, is the type of action which arguably triggers notice and comment rulemaking requirements. Alaska v. United States Dept. of Transportation, 868 F.2d 441, 446 (D.C. Cir. 1989). Note too the precedent that pollution control systems were explicitly exempted from the definition of "modification" for NSPS by promulgation of a legislative rule. See 40 C.F.R. § 60.14.(e)(5). At the same time, EPA has successfully argued in the past that a plant change that reduces emissions per unit output, but that also reduces operating costs per unit output, thus increasing consumers' utilization of the plant and hence predictably increasing total annual emissions, is subject to PSD review.[4] See Puerto Rican

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[2] We assume here that "pollution control project" is defined as indicated in the Schmalensee proposal ((g)(1)), to include changes in process design and raw materials inputs as well as "end-of-pipe" control installations."

[3] That is, if it indeed reduces pollution from current levels or baseline projections.

[4] A similar analysis has been applied in other contexts, e.g. to rebut claimed pollution advantages of proposals for higher CAFE standards: although the engineering changes induced by higher CAFE standards would increase fuel efficiency per mile traveled, they would also reduce the vehicle's operating cost per mile, hence inducing increased vehicle miles traveled and possibly increasing total emissions on net.

Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989). Since the PSD provisions currently require comparisons to be based on annual emissions, 40 C.F.R. part 52.21(B)(23), EPA could probably not switch to calculating "increase in net emissions" on an hourly basis without using a legislative rule (a point EPA acknowledges in its discussion of Point D (Potential to Potential). This implies that some amount of empirical forecasting and debate will still occur for some pollution control projects even under the Point B exemption; but pollution control projects that plainly reduce annual emissions (e.g., those that reduce pollution per unit output and increase cost per unit output) would not fall within the definition of "modification" under PSD.

C. EPA Point C (Safe Harbor Provision) (Schmalensee Proposal Subsection (b)(2)).

The "safe harbor" proposal (Point C) is, with one addition, essentially the same PSD exemption for pollution control projects as Point B, and to that extent the above analysis applies (including the need, which EPA recognizes, for notice and comment rulemaking before shifting from comparing annual emissions to maximum hourly rates). The rather significant addition is to allow an investment of up to 20% of the cost of the pollution control project in "contemporaneous physical or operational changes" at the plant without triggering PSD review. Since the additional 20% investment could significantly increase net emissions (depending on the use of the funds), it could trigger PSD review under current regulations, and we agree with EPA that it would be hard to interpret its current rules to allow a blanket safe harbor for such changes.[5]

Perhaps the problem is definitional: if the additional 20% investment is part of, or closely related to, or in support of, the pollution control project, EPA might clarify by

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[5] Indeed, the 20% expenditure test seems to bear little relation to the congressional goal of preventing ambient air quality deterioration. Perhaps, if there is a policy preference for allowing utilities installing pollution control devices to engage in contemporaneous additional modifications that could by themselves increase emissions, an emissions-based safe harbor test would be better than this dollar-based test, e.g. a test that allows a source to undertake a contemporaneous set of changes that adds emissions constituting no more than X% of the emissions reduction that would have been achieved by the pollution control project (where X is presumably less than 100).

interpretative rule that the contemporaneous changes (covering the 20% extra) need not undergo separate PSD review so long as the entire project as a whole does not significantly increase net emissions. But if the additional 20% investment is unrelated to the pollution control project but simply coincides in time, EPA could not likely use interpretative rulemaking to allow the 20% investment to cause an unreviewed increase in emissions; such an exemption would be in conflict with current regulations. See, e.g., General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 878-79 (D.C. Cir. 1979).[6]

We do not understand the comment in the DOE memo that "EPA is attempting to use this proposal to further restrict legitimate projects at existing units. EPA should not implement the 'safe harbor'." (p. 29.)

D. EPA Point E (Actual to Actual Emissions Comparison) (Schmalensee Proposal Subsection (a); see also Subsection (g)(2));

With regard to Point E (Actual to Actual), portions of the EPA memorandum are a bit difficult to follow. Most of the discussion actually deals with subsection (g)(2) of the Schmalensee proposal (defining "representative actual annual emissions" pre- and post-modification), which exempts "demand growth" from future capacity utilization when calculating future "actual" emissions.

1. EPA Point E.1 (Actual to Actual Baseline). Schmalensee Proposal Subsections (c) & (g)(2)(A) would allow EPA, for purposes of determining prior "representative actual annual emissions", to select any two year period out of the preceding

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[6] Moreover, if, as seems possible, a major purpose of the safe harbor provision is to allow utilities to engage in life extension modifications at old plants in conjunction with adding scrubbers, there would appear to be a skewing of market forces in favor of scrubbers where other acid rain pollution reduction methods might otherwise be more attractive economically. This proposal thus appears to endorse a policy decision that utilities should be encouraged to extend the life of old plants rather than meet electricity demand by other, perhaps more environmentally beneficial, methods.

five years that the Administrator considers representative of "normal operations".

We agree with EPA that a sustainable interpretative rule for this proposal appears possible. The regulations do give EPA wide discretion in determining the representative period for calculation purposes. However, we disagree with a portion of the first full paragraph on page 7 of the EPA memorandum. There the memorandum states that "a textual analysis of the regulations suggests that a source owner has complete discretion to name any two year period as the actual emissions baseline." (Emphasis added.) In fact, the text of 40 C.F.R. 52.21(b)(21)(ii) suggests that this is EPA's choice, not the source owner's; the regulation provides that EPA may "allow" a different two-year period. Perhaps EPA could issue an interpretative rule expressly "allowing" owners to choose from a range of two-year periods, such as any two consecutive years of the past five.

2. EPA Point E.2 (Post-Modification Projection). Subsection (g)(2)(B) of the Schmalensee proposal sets the time for determining "representative actual annual emissions" post-modification as the two year period following modification unless the Administrator determines that some other period within the first 10 years is more representative of normal operations. It allows the Administrator to consider projected capacity utilization in defining the emissions, but excludes from consideration increases "due to factors unrelated to the physical or operational change, including an increase in projected capacity utilization equal to the rate of electricity demand growth for the utility system as a whole."

EPA concluded that an interpretative rule was possible except for the demand growth exemption, which it said would require legislation. Like EPA, we believe an interpretative rule for most of Point E.2 is possible. Regarding the demand growth exemption, we believe EPA is generally correct in saying legislation is necessary, but this could hinge on how EPA would define the causal connection between the modifications (changes in physical plant or process) and the emissions increase. If the proposal would exempt modifications (physical changes) that are motivated by or somehow arise from anticipated demand growth, certainly EPA is correct that a legislative change would be needed. This change seems contrary to congressional intent in enacting Part C, and contrary to the plain requirement that any modification (for whatever reason) that increases emissions would

trigger review.[7] The Schmalensee proposal would exempt post-modification increases "due to factors unrelated to the physical or operational change", which might be consistent with existing law except for the fact that post-modification emissions increases must still be calculated using projections made at the time the modification is contemplated, not thereafter (since permits and offsets must be obtained in advance of the modification), so that it could be extremely difficult to distinguish modifications undertaken to accommodate projected demand growth from those simply incident to it.

Of course, a proposal limited to simply exempting increases in emissions that come from increasing utilization rates as demand grows, without any accompanying change in physical plant or process, would not require legislation, because such increases in emissions are not "modifications" and do not now trigger PSD.

DOE's memo maintains that a "demand growth exclusion" for post-change projections can be provided by an interpretative rule, contrary to EPA's conclusion that legislation would be required. Although DOE makes a policy argument for such an exclusion, the exclusion seems contrary to the PSD program as a whole[8] and inconsistent with the proposition that after the PSD review process the PSD permit issuer is to retain discretion regarding how increments are to be consumed. As noted above,

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[7] Section 111 of the Act defines modification for purposes of both NSPS and PSD as

> ". . . any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

42 U.S.C. § 7411(a)(4). The pertinent question seems to be whether emission increases have "resulted from" a plant modification where that modification is what allowed a utility to continue operating an aged plant into a period of increased demand growth, and the utility responded by operating the facility at higher capacity, thereby increasing emissions. To date EPA has generally recognized a causal connection, and the Schmalensee proposal appears to reject one.

[8] See, e.g., Section 160(3) and (5) of the Clean Air Act, 42 U.S.C. §§ 7470(3) & (5).

DOE's argument for handling this by interpretative rule fails to fully acknowledge the D.C. Circuit's legal constraints on interpretative rulemakings.

EPA Point E.3 (Modifications to Which Actual to Actual May Apply) is more difficult, but we believe that for this, too, a narrowly drafted interpretative rule for like-kind replacements might be upheld. EPA's theory is that, based in part on the decision in WEPCO v. Reilly, 893 F.2d 901, 913 (7th Cir.1990), an interpretative rule would draw a distinction between like-kind replacements and other modifications for purposes of using an actual to actual approach. While we agree that EPA might be able to draw such a distinction in an interpretative rule, we do not think WEPCO provides the justification, since we do not read that decision as drawing such a distinction -- it simply rejected EPA's approach for like-kind replacements in that case. Although the court in Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 296-97 (1st Cir. 1989), upheld EPA's approach in a case not involving like-kind replacements, neither decision states that this distinction was the basis for each court's conclusion.

EPA believes that, for types of modifications to existing units other than like-kind replacements (such as those in the WEPCO case itself), the existing regulations require an actual to potential approach. See pp. 8-9 of the EPA memo and 40 C.F.R. 52.21(b)(21)(4), which provides that "[f]or any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date."

The DOE memorandum on this point (modifications subject to the actual to actual approach) contends that EPA reads its regulations too restrictively in maintaining that this approach applies only to "like-kind" replacements. DOE is mistaken in concluding that the language of the above regulation applies only to totally new units as opposed to units which have been modified. The regulations contain no such distinction: they apply as well to an existing unit that ceases "normal operations" during a modification (e.g., is temporarily shut down), and is scheduled to resume normal operations in the future but has not yet done so. DOE errs in contending that EPA has consistently taken positions contrary to WEPCO in the past. See Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 298-99 (1st Cir. 1989) (explicitly rejecting arguments similar to those made by DOE in its memorandum). DOE's references to prior EPA rulings supporting DOE's reading of the regulations do not justify the use of an interpretative rule. There are numerous decisions which

support EPA's current reading of its regulations, and, while EPA may not have always followed its regulations, such an inconsistency does not authorize the agency to put forth an interpretative rule contrary to those regulations. General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc) (rule is legislative unless it does no more than "restate[] a consistent practice of the agency"). Moreover, where, as in WEPCO, the Agency has argued in court in favor of a particular interpretation which that court subsequently endorses in a legal opinion, prudence counsels the agency against deviating from that position without notice and comment. Moreover, DOE misreads the decision in Puerto Rican Cement Co. v. EPA, supra, in arguing that the above regulation applies only to totally new units. Contrary to DOE's assertion, that case did involve modifications (in the form of a process change) to an existing unit rather than construction of a new unit. Although the court at one point referred to the kiln as a "new" unit, the opinion later makes clear in several places that an existing kiln was simply being converted to a different production process. The parties agreed that the case involved modification of an existing unit, and the court clearly understood that to be the situation. See, e.g., 889 F.2d at 296, 297.

E. EPA Point G (Generic NOx BACT Determinations) (Schmalensee Proposal Subsection (f)).

With regard to Point G (NOx BACT), the EPA memorandum and Schmalensee proposal are somewhat difficult to follow. The text of the proposal appears designed to lock the PSD program's definition of BACT for electric utilities to the same low NOx burner technology that the acid rain title will require of utilities as part of its Section 407 NOx emissions reduction program. Under Section 407, utility boilers must employ low NOx burner technology to attain specified emissions rates, but if a source cannot achieve those rates by using low NOx burners, then the source may be excused from having to employ a more stringent technology. In other words, the proposal would guarantee that utilities could not be required under the PSD program to install more stringent control methods than the low NOx burner technology that will be the minimum required by the acid rain title.

EPA correctly notes that legislation would be required to implement this proposal, since Section 169(3) of the CAA, defining BACT, requires the permitting authority to determine BACT on a case-by-case basis, thus barring any generic BACT standard. We agree that the Agency could alternatively create a presumption in favor of low NOx burners by interpretative rule or

legislative regulation, but would suggest that this be incorporated into EPA's contemplated "top-down" BACT rulemaking.

F. EPA Point H (EPA Guidance on Routine Maintenance) (Schmalensee Proposal Subsection (h)).

With regard to Point H (Guidance on Routine Maintenance), we agree with EPA and DOE that an interpretative rule would likely be valid here. The current regulation gives EPA wide flexibility in determining what is "routine" and an interpretative rule could merely provide guidance as to what "routine" means in particular refurbishment instances. Note that the Schmalensee proposal called for notice and comment.

WEPCO FIXES
EPA, DOE, DOJ VIEWS RE METHOD OF IMPLEMENTATION

Leg. Rule = legislative rulemaking (requiring notice & comment)
Interpr. = Interpretative Rulemaking (though DOJ generally suggests EPA also invite notice and comment for proposed interpretative rules)
Legislation = act of Congress

(Proposals follow the order of the EPA memo)

PROPOSAL	EPA	DOE	DOJ
A. NSPS Baseline	Leg. Rule	Leg. Rule	Leg. Rule
B. PSD Exclusion for Pollution Control Projects	Interpr. or Leg. Rule	Interpr.	Leg. Rule; possible narrow interpr. (excluding "max. hourly emissions" std.)
C. Safe Harbor	Leg. Rule or legislation	? (Does not seek a rule)	Leg. Rule; (maybe narrow interpr.)
D. Potential to Potential	Leg. Rule	? (No rule needed if EPA adopts interpr. rule broadly excluding pollution control projects)	Leg. Rule
E.1. Actual-to-Actual Baseline	Interpr. or Leg. Rule	Interpr.	Interpr.
E.2. Post-Modification Projection	Interpr. or Leg. Rule (except legislation for demand growth exemption)	Interpr. for everything	Interpr. (except legislation for demand growth exemption)

E.3. Modifications to which Actual-to-Actual May Apply:			
Like kind replacements	Interpr.	Interpr. for everything	Interpr.
Others	Leg. Rule	"	Leg. Rule
F. System-Wide Netting	Legislation	Leg. Rule	Legislation
G. Generic NOx BACT Determination	Interpr. or Leg. Rule for presumption only; legislation if mandatory	Agrees w/ EPA	Probably Leg. Rule for presumption, legislation if mandatory
H. EPA Guidance on Routine Maintenance, etc.	Interpr. or Leg. Rule	Interpr. or Leg. Rule	Interpr. or Leg. Rule

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(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

DRAFT

MEMORANDUM

SUBJECT: Administrative EPA Implementation of WEPCO Legislative Proposal

FROM: William Tyndall, Attorney
Air and Radiation Division, LE-132A

Gregory B. Foote
Assistant General Counsel
Air and Radiation Division, LE-132A

TO: E. Donald Elliott
Assistant Administrator
and General Counsel

THRU: Alan W. Eckert
Associate General Counsel
Air and Radiation Division (LE-132A)

This memorandum evaluates the feasibility of implementing the Administration's legislative initiative on WEPCO through administrative action.[1] Each section begins with a reference to the sections of the proposed legislation and a conclusion regarding the type of action (statutory change, legislative rulemaking or interpretative rulemaking) necessary to implement the provision. In drawing our conclusions, we have been guided by the general principal that "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985), quoting Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979). Conversely, "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." General Motors, 742 F.2d at 1565.

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[1] The Administration's legislative proposal was attached to a letter from Dr. Schmalensee to Senator Ford, dated July 23, 1990. For your convenience, a copy of this document is attached to this memorandum at Tab A.

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A. New Source Performance Standard Baseline: Subsection (a) of Schmalensee proposal.[2]

Interpretative Rule or Guidance: No

Notice-and-Comment Rulemaking: Yes

An existing source that modifies its facility is subject to new source performance standards ("NSPS"). Clean Air Act ("CAA") § 111, 42 U.S.C. § 7411 (1990-91). The Act defines modification broadly to mean "any physical change in or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted" by that source. CAA § 111(a)(4), 42 U.S.C. § 7411(a)(4). To determine whether a change to an existing facility will increase the emissions rate, the regulations (40 C.F.R. § 60.14) authorize the use of an "emissions factor analysis," or, if that is inconclusive, three valid runs of a materials balance, continuous monitoring, or manual emissions test to evaluate emissions before and after the change. 40 C.F.R. § 40.16(b)(2) (1989). The rules do not specify the time period within which these evaluations must be conducted although, as a practical matter, most applicants will be unlikely to have three valid runs meeting EPA's specifications unless they are conducted at the time of the NSPS analysis.

Because of the requirement of these three tests, the Administration's proposal to use historical operating capacity is relevant only if the source can use the emissions factor analysis. With regard to this methodology, nothing in the regulations specifies the period of time that EPA may look back to determine emission levels before the change. In WEPCO, EPA took evidence of the highest capacity demonstrated during the previous year as evidence of the current actual capacity and there is nothing in the regulations that would specifically preclude the Agency from looking back even further.

Using the results of earlier operations would, however, be vulnerable to legal challenge. First, the regulatory focus on before-and-after testing suggests that its drafters had in mind testing the source's current capacity, where that may differ from some historical measure. Moreover, EPA's long-held construction of this rule is that the analysis must focus on the source's "current maximum capacity" to produce emissions. (Letter from Lee M. Thomas to John Boston (October 14, 1988), p. 5.) That

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[2] The subsection references refer to the subsection headings in the Administrations's legislative proposal (as submitted in a letter from Dr. Schmalensee to Senator Ford on July 23, 1991) which is attached at Tab A.

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approach was affirmed on judicial review. Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 913 (7th Cir. 1990) ("WEPCO"). We believe a court would defer to a judgment made by the Agency in a legislative rulemaking to use some other metric, such as the highest capacity achieved in the last five years, for affected sources under the acid deposition program. See Chevron, U.S.A v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). But to adopt this interpretation without notice and comment where it reverses past practices would invite court intervention. See Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987) (interpretative rule may not change existing law or policy).

B. PSD Exclusion for Pollution Control Projects: Subsection (b)(1) of Schmalensee proposal (see Section D below for Potential-to-Potential issue).

Interpretative Rule or Guidance: Yes

Notice-and-Comment Rulemaking: Yes.

Last year, the Agency decided to create an exemption for pollution control measures, including certain fuel switches, from new source review and NSPS through an interpretative rule. The draft rule also created an exemption for both permanent and temporary CCT demonstration projects, but the 1990 Amendments have eliminated the need for this portion of the interpretative rule. See Clean Air Amendments of 1990 ("1990 Amendments") §§ 415(b)(2)) and (b)(3).[3] Thus, the Administration's proposal is either part of the existing draft interpretative rule or has been incorporated into the 1990 Amendments.

While the draft interpretative rule excludes pollution control projects, the Agency concluded that notice and comment rulemaking was not necessary since the Agency was merely interpreting the relevant regulations as not covering "certain environmentally-desirable activities at existing stationary sources which neither Congress nor EPA intended to be covered by the new source requirements of the Clean Air Act." Draft Interpretative Rule (Cong. Rec. S16910 (daily ed. Oct. 27. 1990)). Moreover, the draft rule only provides "general criteria" to be considered during the individualized new source review and NSPS applicability determinations. Id. at S16912; see Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) (notice and comment not needed for "directive" which gave agency

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[3] Temporary CCT demonstration projects are exempted from NSPS and parts C and D of title I of the Act. See 1990 Amendments, § 415(b)(2). Permanent CCT projects are exempted from NSPS and part C. Id. at 415(b)(3).

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officials flexibility to make individualized determinations). As such, a court should not consider it a legislative rule. Proceeding without notice and comment is not without risk, however, as courts have viewed the creation of a binding "exemption" as one indicator of legislative rulemaking. Alaska v. United States Dep't of Transp., 868 F.2d 441, 446 (D.C. Cir. 1989).

C. Safe Harbor Provisions: Subsection (b)(2) of Schmalensee proposal (see Section D for Potential-to-Potential issue.)

Interpretative Rule or Guidance: No.

Notice-and-Comment Rulemaking: Yes.

Part C incorporates the broad definition of "modification" set forth in section 111. See CAA § 169(1)(c), 42 U.S.C. § 7479(a)(c). Based on this language, the court in WEPCO rejected the utility's effort to construe the PSD modification provision as exempting an $80 million life extension project. WEPCO, 893 F.2d at 908. The corresponding PSD regulations are equally broad in their coverage and all exceptions have been adopted through notice and comment rulemaking. See 40 C.F.R. § 52.21(b)(2).[4] While an agency may of course change its interpretation through an interpretative rule, in this case the plain language of the regulations does not support a 20 percent safe harbor approach. Moreover, the rationale of the draft interpretative rule -- that Congress did not intend to force pollution control projects into PSD review -- does not apply to the 20 percent safe harbor. For these reasons, this exception should be adopted through legislative rulemaking.

In a rulemaking, EPA could conclude that pollution-control modifications rationally entail other, minor changes to the source and the 20 percent safe harbor allows for this economic reality. At the same time, it provides utilities with a bright line limit to the exemption. Still, because the exemption as proposed allows substantial life extension investments and

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[4] Section b2.21 defines "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2). The regulation excepts routine maintenance, repair and replacement, ownership changes, increases in the hours of operation or in the production rate, and modifications undertaken in conjunction with certain other programs. Id.

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results in a likelihood of long-term increases in actual emissions, it may -- as Dr. Schmalensee stated to Senator Ford -- require a statutory change.

D. Potential-to-Potential: Subsections (b)(1) and (2) of Schmalensee proposal.

Interpretative Rule or Guidance: No.

Notice-and-Comment Rulemaking: Yes.

The current PSD regulations require an actual emissions baseline. For instance, section 52.21 defines modification to include any physical change that would result in a significant "net emissions increase," 40 C.F.R. § 52.21(b)(2)(i), which turns on "any increase in actual emissions from a particular physical change," 40 C.F.R. § 52.21(b)(3)(i)(a) (emphasis supplied). See also 40 C.F.R. § 52.21(b)(21) (defines "actual emissions" as of a particular date as "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period"). Thus, the existing regulations must be amended to implement a potential-to-potential methodology. This requires legislative rulemaking.

However, a legislative rule creating a potential-to-potential system, while legal, would be difficult to implement. Any switch to a potential-based system would introduce massive inconsistencies into the PSD and nonattainment regulatory scheme. For instance, section 169(4) of the Act establishes as the baseline for PSD increment consumption the "ambient concentration levels which exist at the time of the first application for a permit in an area." (Emphasis supplied.) Thus, "Congress has defined with specificity the . . . manner in which the baseline . . . is to be determined," Alabama Power Co. v. Costle, 636 F.2d 323, 375-81 (D.C. Cir. 1979). EPA has in fact constructed increment baselines nationwide and new sources have been permitted on the basis of actual ambient levels. Accordingly, even if potential emissions could be used for increment purposes, doing so would result in PSD increment violations in many areas, making it difficult or impossible for modification projects to proceed even without PSD permits. See 45 Fed. Reg. 52,676, 52,720-21 (discussion of Gulf Coast increment consumption problem). This in turn would require SIP revisions to squeeze

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the excess "paper" out of the system. In the end, then, the cure might be worse than the disease.[5]

E. Actual-To-Actual: Subsection (c) of Schmalensee proposal.

1. The Actual-To-Actual Baseline

Interpretative Rule or Guidance: Yes.

Notice-and-Comment Rulemaking: Yes.

The Administration's baseline proposal does not conflict with existing regulations which allow a source to show that an earlier period is "more representative of normal source operations," (40 C.F.R. § 52.21(b)(21)(ii)), since the proposal merely puts a five-year limit on the Administrator's discretion. It could therefore be implemented through an interpretative rule. EPA could provide sources with even more flexibility by issuing a broad reading of "normal" operations that would encompass any reasonable concept of the source's operations during the last several years.

On the other hand, a court may consider the preamble to and structure of the regulations as limiting EPA's options beyond these changes. The preamble states that a reviewing authority should consider the two-year period prior to PSD application by a source "unless that period of time was atypical of normal source operation." 45 Fed. Reg. 52,676, 52,705 (1980); see also 45 Fed. Reg. 52,718. Likewise, the regulatory provision for use of a "more representative" period implies that the two year period should also be representative of "normal" operation. EPA also has a consistent administrative practice of requiring source

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[5] The 1990 Amendments also make a regulatory change difficult by requiring, in the context of nonattainment areas, that the baseline for offsets be consistent with the assumptions used for state implementation plan ("SIP") planning purposes. See revised § 173(a). The Amendments also call for offsets in nonattainment areas to be based on actual emissions. See revised § 173(c)(1). Since SIPs are largely based on actual emissions with respect to capacity utilization, this may preclude a switch to a potentials based system for nonattainment areas unless the states make corresponding changes to the SIP regulatory scheme. In any event, EPA remains obligated, under Exhibit B of the settlement agreement in Chemical Manufacturers Association v. EPA, No. 79-1113 (D.C. Cir. entered February 22, 1982) to propose and take final action on a potential-to-potential system across the board.

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owners to consider initially the most recent two-year period in establishing a PSD baseline. See, e.g., Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 296-97 (1st Cir. 1989). To harmonize any inconsistency with past practices, EPA would need to explain why the concerns that informed its 1980 preamble do not apply to affected power plants.

A more fundamental change, such as giving companies the ability simply to pick the highest level of operations during the prior five years, may also be possible. A textual analysis of the regulations suggests that a source owner has complete discretion to name any two year period as the actual emissions baseline. However, as PSD baseline concentrations and increment consumption are largely tied to actual ambient concentrations as of the date of the first PSD application in an area, see § 169(4) and Alabama Power, 636 F.2d at 374-381, it would be difficult to defend a PSD applicability system that would grandfather levels of emissions that had not been achieved after the baseline date.

2. The Post-Modification Projection

Interpretative Rule or Guidance:
Yes (except for demand growth exemption).

Notice-and-Comment Rulemaking:
Yes (except for demand growth exemption).

With one exception, the Administration's proposal regarding the post-modification projection would merely codify EPA's decision on remand in the WEPCO case. As such it could be accomplished through an interpretative rule.

The exception is the proposal to ignore emissions increases due to system growth. Neither the existing regulations nor the draft interpretative rule exclude post-modification emission increases linked to increased demand growth in the utility system. There is nothing in the statute, regulation or preambles to suggest that Congress or the EPA considered the underlying motivation for a modification project to be relevant in determining whether the project would result in an emissions increase.[6] Rather, as the court found in WEPCO, EPA's current regulations hinge on whether an emissions increase is

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[6] The statute in numerous places refers without qualification to the need for PSD review and permitting at the time of "construction." See, e.g., CAA §§ 165(a), (a)(3), (a)(8), (e)(3)(B) and 167, 42 U.S.C. § 7475(a), (a)(3), (a)(8), (e)(3)(B), and 7477. As discussed, section 169(2)(C), 42 U.S.C. § 7479(2)(C), defines "construction" to include "modification."

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attributable to significant construction activity as opposed to temporary fluctuations in market conditions. See WEPCO, 893 F.2d at 916 n. 11; see also 45 Fed. Reg. 52,704.

Moreover, any regulatory change to exclude system demand growth would probably not survive judicial review because of the strong indications that the statutory modification provisions were intended to address long-term emissions increases. The PSD provisions seek "to assure that any decision to permit increased air pollution in any area . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation." 42 U.S.C. § 7450(5). Based on this provision and other evidence of Congressional intent, the court in Alabama Power Co., 636 F.2d at 401, noted that "Congress wished to apply the permit process [of part C] . . . where industrial changes might increase pollution in an area."

3. Modifications To Which Actual-to-Actual May Apply

Interpretative Rule or Guidance: Yes (for like-kind replacements only).

Notice-and-Comment Rulemaking: Yes.

In determining whether there has been an increase in emissions under the current "actual-to-potential" methodology, EPA rules require an initial assumption that following a modification, a source will operate at its full potential to emit.[7] Under this test, the source must agree not to increase its actual emissions in order to avoid PSD applicability. The WEPCO court rejected EPA's interpretation that it could ignore past operating conditions in the case of like-kind replacements. See WEPCO, 893 F.2d at 917-18. On remand, EPA applied an "actual-to-actual" test. EPA could issue a clarifying "interpretation" of the existing regulations to apply actual-to-actual to like-kind modifications in a manner consistent with the WEPCO decision. Moreover, EPA could broadly define like-kind to include "functional equivalents" although too ambitious a definition of the exception would swallow the rule and be vulnerable to attack as contrary to the statutory provisions themselves.

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[7] Section 52.21(b)(21)(4) of Title 40 provides "[f]or any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date."

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The "past is prelude" rationale used by the court in WEPCO does not necessarily apply to modifications which are not "like-kind." For instance, in Puerto Rican Cement, 889 F.2d at 296-97, EPA successfully argued that a "non-like-kind" modification should use the actual-to-potential test of section 52.21. Because of this lack of rationale and EPA's consistent contrary practice which has withstood judicial challenge, any change to actual-to-actual for non like kind modifications may be undertaken only through legislative rulemaking.

F. System-Wide Netting: Subsection (d) of Schmalensee proposal.

Interpretative Rule or Guidance: No.

Notice and Comment Rulemaking: No.

Existing regulations explicitly embody a plant-wide definition of "source" and would have to be changed before system-wide netting could be adopted. See, e.g., 40 C.F.R. § 52.21(b)(5) and (6). This would require notice and comment rulemaking.

Moreover, EPA may have no power to implement the Administration's proposal through regulations. The PSD program applies to "major emitting facilities," which are defined as certain types of stationary sources that emit or could emit 100 tons of pollutants per year, or "any other source" that could emit 250 tons. See CAA §§ 165(a), 169(1), 42 U.S.C. §§ 7475(a), 7479(1). Section 169(1) lists specific types of installations that constitute "stationary sources" including "fossil-fuel fired steam electric plants," "incinerators" and 15 other types of "plants." The specificity of this statutory language precludes any interpretation to allow company wide or state wide netting as the Administration proposes. In Alabama Power, in response to the argument that this language did not allow a plant-wide PSD evaluation (the so-called "bubble" concept), the court stated that under section 169, "Congress clearly envisioned that entire plants could be considered 'sources.'" In contrast, the language of section 169 provides no basis for a reading that goes beyond a plant-wide definition of source. Id., 636 F.2d at 397.

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G. Generic NOX BACT Determinations: Subsection (f) of Schmalensee proposal.

Interpretative Rule or Guidance: Yes (as presumption only).

Notice-and-Comment Rulemaking: Yes (as presumption only).

Section 169(3) of the Act defines best available control technology ("BACT") as:

> the maximum degree of reduction . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . ."

(Emphasis supplied.) On its face, this language bars any generic BACT standard. Nevertheless, EPA can issue a general policy statement, interpretative rule, or legislative regulation creating a presumption in favor of low-NOx burners or similar technologies. Under section 169(3), however, the permitting authority would remain obligated to perform an individualized evaluation of other available control technologies.

H. EPA Guidance on Routine: Subsection (h) of Schmalensee proposal.

Interpretative Rule or Guidance: Yes.

Notice-and-Comment Rulemaking: Yes.

Both 40 C.F.R. § 52.21(b)(2)(iii)(a) and 40 C.F.R. § 60.14(e)(1) exclude as modifications "routine" maintenance, repairs or replacement. Since the Administration's proposal only calls for EPA to define a term in existing regulations, EPA could provide the specifics through an interpretative rule or other informal guidance or through notice and comment rulemaking as the proposal contemplates.

Key Preamble Statements on Meaning of Current
Rules and Proposed Legislative Rule Changes

1. The PSD exceptions to "physical and operational" changes should be construed to be examples of activities that are not covered by the modification rule. Because the PSD provisions of the Act incorporate the NSPS (§ 111) modification definition, a pollution control exception is implicit in the current rules. In other words, EPA should return to its prior interpretation of the PSD rules, as reflected in the EPA's April 21, 1983 memorandum prepared by William Pederson, then Associate General Counsel for Air and Radiation. The preamble should reflect this interpretation and a legislative rule should be proposed that makes this implicit exception explicit.

2. The PSD rules only allow EPA to use the "potential to emit" or a unit to represent future emissions where the unit has not "begun normal operations." The preamble should make clear that existing operating units are not covered by this provision. Only new "green field" units or units that enlarge production capacity or increase their potential to emit (thereby transforming them into new units that have no operating history) are subject to the "potential to emit" calculation of future emissions. A legislative rule should be proposed clarifying that where the production capacity of a unit enlarged (i.e., in the case of a utility boiler, increasing the amount of fuel that can be burned) or the "potential to emit" of a unit is increased, the enlarged unit is a "new unit," unless the change is covered by the PSD exception for "routine" repairs or for fuel switching or for pollution control projects.

3. The PSD rules require that a "physical or operational change" be shown to "result in" an increase in annual emissions. The preamble should make clear that this language contemplates a "causal link" between the change and the projected increase. Where projected increases are due to other factors, they must be excluded from the "future" increase calculation. A legislative rule should be proposed clarifying that increased utilization of a unit caused by increased electricity demand or by changes in the economic or environmental ordering of units in the utility dispatch system are examples of increases that must be excluded from emissions increase calculations.

4. The NSPS rules require a comparison of past maximum achievable hourly emissions before a change with maximum achievable hourly emissions after a change. The preamble should make clear that the NSPS rules do not require a comparison of emissions immediately before a change where operational constraints are temporary and are corrected under a normal repair or replacements schedule or where emissions immediately before a change are lower due to a temporary pollution control demonstration project that is being removed. A legislative rule should be proposed which provides that EPA will view "temporary" as a five year period. In other words, the NSPS rules will be amended to require EPA to compare maximum achievable hourly emissions during the past five years with maximum achievable hourly emissions after the change.

WEPCO FIXES
EPA, DOE, DOJ VIEWS RE METHOD OF IMPLEMENTATION

Leg. Rule = legislative rulemaking (requiring notice & comment)
Interpr. = Interpretative Rulemaking (though DOJ generally suggests EPA also invite notice and comment for proposed interpretative rules)
Legislation = act of Congress

(Proposals follow the order of the EPA memo)

PROPOSAL	EPA	DOE	DOJ
A. NSPS Baseline	Leg. Rule	Leg. Rule	Leg. Rule
B. PSD Exclusion for Pollution Control Projects	Interpr. or Leg. Rule	Interpr.	Leg. Rule; possible narrow interpr. (excluding "max. hourly emissions" std.)
C. Safe Harbor	Leg. Rule or legislation	? (Does not seek a rule)	Leg. Rule; (maybe narrow interpr.)
D. Potential to Potential	Leg. Rule	? (No rule needed if EPA adopts interpr. rule broadly excluding pollution control projects)	Leg. Rule
E.1. Actual-to-Actual Baseline	Interpr. or Leg. Rule	Interpr.	Interpr.
E.2. Post-Modification Projection	Interpr. or Leg. Rule (except legislation for demand growth exemption)	Interpr. for everything	Interpr. (except legislation for demand growth exemption)

E.3. Modifications to which Actual-to-Actual May Apply:			
Like kind replacements	Interpr.	Interpr. for everything	Interpr.
Others	Leg. Rule	"	Leg. Rule
F. System-Wide Netting	Legislation	Leg. Rule	Legislation
G. Generic NOx BACT Determination	Interpr. or Leg. Rule for presumption only; legislation if mandatory	Agrees w/ EPA	Probably Leg. Rule for presumption, legislation if mandatory
H. EPA Guidance on Routine Maintenance, etc.	Interpr. or Leg. Rule	Interpr. or Leg. Rule	Interpr. or Leg. Rule

Department of Energy
Washington, DC 20585

OFFICE OF THE GENERAL COUNSEL AND THE DEPUTY GENERAL COUNSEL

FACSIMILE
TRANSMITTAL SHEET

FAX NO. 586-7583
FTS FAX NO. 896-7583

DATE: 3-7

NO. OF PAGES 2
(INCLUDING COVER PAGE)

TO: Jeff Holmstead

TELEPHONE NO. _____
FAX NO. 456 7929

FROM: D. Rivkin

TELEPHONE NO. 586-3410

TO VERIFY: 202-586-5281 or 202-586-5284
FTS-896-5281 or 896-5284

REMARKS:

Key Preamble Statements on Meaning of Current Rules and Proposed Legislative Rule Changes

1. The PSD exceptions to "physical and operational" changes should be construed to be examples of activities that are not covered by the modification rule. Because the PSD provisions of the Act incorporate the NSPS (§ 111) modification definition, a pollution control exception is implicit in the current rules. In other words, EPA should return to the 1983 "Pedersen" interpretation of the PSD rules. The preamble should reflect this interpretation and a legislative rule should be proposed that makes this implicit exception explicit.

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Department of Energy
Washington, DC 20585

OFFICE OF THE GENERAL COUNSEL AND THE DEPUTY GENERAL COUNSEL

FACSIMILE
TRANSMITTAL SHEET

FAX NO. 586-7583
FTS FAX NO. 896-7583

DATE: 2-26

NO. OF PAGES 31
(INCLUDING COVER PAGE)

TO: Jeff Holmstead

TELEPHONE NO. _____
FAX NO. 456-7929

FROM: David Rivkin

TELEPHONE NO. 586-3410

TO VERIFY: 202-586-5281 or 202-586-5284
FTS-896-5281 or 896-5284

REMARKS:

Withdrawal/Redaction Sheet
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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Memo	From David B. Rivkin, Jr. through Mark C. Schroeder to Stephen A. Wakefield RE: Draft DOE Response to EPA WEPCO Memorandum (30 pp.)	02/26/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

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(Document Follows)
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FOIA/SYS Case #:	2001-1865-F		
Re-review Case #:			
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MR Case #:		**Appeal Case #:**	
MR Disposition:		**Appeal Disposition:**	
Disposition Date:		**Disposition Date:**	

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P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

DRAFT

February 26, 1991

MEMORANDUM

FOR: Stephen A. Wakefield
General Counsel

THROUGH: Mark C. Schroeder
Deputy General Counsel for
Environment, Conservation and Legislation

FROM: David B. Rivkin, Jr
Associate General Counsel
for Legal Policy and Analysis

RE: Draft DOE Response to EPA WEPCO Memorandum

I. Introduction

The February 19 draft memorandum (hereinafter referred to as the "EPA memorandum" or "memorandum"), prepared by the Environmental Protection Agency (hereinafter referred to as "EPA" or the "Agency") proceeds from the incorrect premise that the Agency does not have the discretion to revisit and revise its WEPCo interpretations through interpretive rulemaking. While the observations at the beginning of the EPA memorandum accurately summarize the case law on the difference between interpretive and legislative rules, such law is relevant only if the WEPCo interpretations reflect the only permissible view of current regulatory requirements. In that case, relevant EPA rules would have to be revised, a process that may well require notice and comment rulemaking. If, on the other hand, the rules do not explicitly compel the WEPCo interpretations, EPA can re-interpret

its rules.

We believe that the WEPCo interpretations of the NSPS and PSD rules are not compelled by any "plain meaning" reading of EPA's rules or their regulatory history. Indeed, as discussed more fully below, in certain respects, they are in conflict with the plain language of the rules. Moreover, past EPA interpretations of the modification rules are not consistent with its current WEPCo approach, thus providing a ready basis for a return to prior understandings. Finally, EPA can interpret relevant case law in a way that would allow EPA to implement the policies embodied in the Administration's legislative proposals through an interpretive rule.

A broad interpretive rule should be issued immediately in order to remove the WEPCo "cloud" over pollution control and other legitimate projects. If EPA is successful in its position that WEPCo relief can only be accomplished through legislative rulemaking, then WEPCo will be the law until rules are amended. Immediate relief (through an interpretive rule) is needed if the allowance trading program is to function.

After summarizing the background relevant to this matter and discussing EPA's discretion to revisit their past interpretations that have been collectively referred to as the "WEPCo interpretations," this response addresses the issues discussed in the EPA memorandum.

II. Background

The Clean Air Act (hereinafter referred to as the "Act" or "CAA") contains a number of provisions that establish stringent pollution control requirements that must be met by "new" industrial facilities, including existing facilities that undertake a "modification." This memorandum focuses on new source performance standards (NSPS) under § 111 and the "prevention of significant deterioration" (PSD) new source permitting program under Part C of Title I of the Act (§§ 160-169).

The term "modification" is defined in § 111 of the Act. Specifically, section 111(a)(2) defines "modification" as:

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

The PSD provisions cover sources that commence construction after January 6, 1975 and construction "includes the modification (as defined in section 111(a)) of any source or facility." CAA § 169(2)(C).

Modification is a term of art that has been given content through EPA rules implementing § 111 and the PSD provisions of the Act. These rules carry out the congressional intent that existing facilities be grandfathered unless they are changed in a way that creates "new pollution" -- i.e., pollution that the unit was not

capable of producing when it was built.[1]

A. EPA's Rules.

In the early 1970's, EPA promulgated NSPS rules defining the term "modification." Under those rules, a "modified" facility is one at which "any physical or operational change" occurs that "results in an increase in the emission rate of any pollutant to which a standard applies."[2] Whether an increase occurs is determined using the facility's emission rate (in kilograms per hour) at maximum production levels during periods of "representative performance."[3]

To further clarify the scope of this definition and to minimize its impact on existing sources undertaking projects that are consistent with maintaining normal operations, EPA provided examples of activities that do not constitute a "modification," including, inter alia, "routine" maintenance, repair or replacement, "increases" in production rate or hours of operation, and installation of pollution control equipment. In other words, these activities could result in an increase in hourly emissions, but would not be considered a physical or operational change under

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[1] National Asphalt Pavement Association v. Train, 539 F.2d 775, 783 (D.C. Cir. 1976) (§ 111 is "designed to prevent new pollution problems").

[2] 40 C.F.R. § 60.14 (1990); see 36 Fed. Reg. 24877, col. 2 (1971); 40 Fed. Reg. 58419, col. 1 (1975).

[3] 40 C.F.R. § 60.14(b) (1990); 40 Fed. Reg. 58419, col. 1 (1975).

the modification rule.[4]

As the D.C. Circuit noted in ASARCO v. EPA, a lawsuit challenging EPA's 1975 modification rules:

> . . . EPA candidly admits that it intended "to develop a modification regulation . . . which minimizes that impact [i.e., application of stringent new source requirements] on existing sources."[5]

Thus, EPA in implementing the modification provision did not sweep broadly, to capture all possible activities undertaken by a source. Indeed, it did not create regulatory exemptions from the modification definition but rather, consistent with the plain language of this provision and the Agency's intent, identified examples of activity that would not constitute a "modification."[6]

Because the PSD program incorporates the NSPS definition of modification, EPA used the NSPS approach to define modification. Thus, in 1980, EPA defined a modification for PSD purposes as a "physical change" or a "change in the method of operation" that "would result in" an "emissions increase."[7]

Similar to the NSPS modification rule, EPA provided that "a physical change or change in the method of operation" does not

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[4] 40 C.F.R. § 60.14(e) (1990).

[5] 578 F.2d 319, 327 n.24 (D.C. Cir. 1978) (emphasis added).

[6] 40 C.F.R. § 60.14(e) (1990).

[7] Id. § 52.21(b)(2) (1990); see 45 Fed. Reg. 52735, col. 3 (1980).

"include" activities that are not directed at creating "new pollution" such as "routine" maintenance, repair or replacement, or "an increase in the hours of operation or in the production rate" (unless a federally enforceable permit limits hours of operation or production rate).[8] EPA did not list pollution control projects among the examples of things that are not considered "physical or operational" changes, but the language of the rule (i.e., "includes") indicates that the exceptions listed are meant to be illustrative and not exhaustive.

EPA defined an "emissions increase" for PSD purposes in terms of total annual emissions (i.e., tons of a pollutant emitted per year), instead of in terms of kilograms per hours.[9] EPA's PSD rules require a comparison of past "actual" emissions with future "actual" emissions.[10] Past and future "actual" emissions can be based on "allowable" emissions of an existing unit,[11] or on past measured emissions and future projected emissions, or where a unit has not "begun normal operations," on the "potential to emit" (i.e., operations 365 days a year at maximum capacity).[12] of that new emissions unit.[13]

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[8] 40 C.F.R. § 52.21(b)(2)(iii)(a) and (f) (1990).

[9] Id. §§ 52.21(b)(3), 52.21(b)(21) (1990).

[10] See 40 C.F.R. § 52.21(b)(3) (1990).

[11] Id. at (b)(21)(iii).

[12] Id. at (b)(b) (definition of "potential to emit").

[13] Id. at (b)(21)(iv).

In other words, under the NSPS rules adopted shortly after the Act was amended in 1970, NSPS-grandfathered units could undertake changes that would allow the units to increase emissions (on an hourly basis) up to past maximum achievable levels without triggering NSPS. On the other hand, changes that would increase emissions above those levels would trigger NSPS. As a result, the former kind of changes were often undertaken, the latter were not.

While the PSD modification rules, adopted under the 1977 amendments to the Act, focus not on increases in hourly emission rate, but on increases in annual emissions, they, like the NSPS rules, authorize emissions increases resulting from activities that are not "physical or operational" changes. Thus, as noted above, under the PSD rules, an existing unit is authorized to increase its hours of operation and production rate, and thereby increase its annual emissions, without triggering PSD. As a result, industrial facilities throughout the country have for years been able to increase annual emissions through increases in utilization without those increases ever being viewed as triggering PSD review.

Under the PSD rules, the kind of conduct that was discouraged (i.e., the kind of conduct that could trigger costly PSD review) were as follows: (1) installation of new units; (2) enlargement of an existing unit that would allow greater production levels, and (3) a change that increase the emission rate of a unit above design levels (i.e., switching from gas to coal at a unit not capable of

burning coal). In each of these cases, past actual annual emissions at a source are to be compared with future annual emissions based on the new unit's potential to emit (operating at a maximum capacity, 24 hours a day, 365 days a year).[14] It should be emphasized that this comparison always produces a projected increase in annual emissions, because no unit actually operates at a maximum capacity, 365 days a year.

There was no suggestion prior to the WEPCo interpretations discussed below that operating units would be subject to PSD review if they undertook projects to improve efficiency, to maintain reliability, or to reduce costs where these projects neither affected the emission rate of the unit nor fundamentally transformed the unit by increasing its capacity to produce a product. According to past EPA determinations, the only emissions consequences that these kinds of projects could have had would be to make operations more economic and therefore increase utilization, an activity that does not trigger the PSD modification requirements due to the "hours of operation" exception.[15]

B. The WEPCo Interpretations.

Wisconsin Electric Power Company (hereinafter referred to as "WEPCo"), an owner of a power plant in Port Washington, Wisconsin, proposed certain repairs and replacements of equipment at its Port

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[14] 40 C.F.R. § 52.21(b)(21)(iv).

[15] See, e.g., Memorandum from Edward E. Reich to Amasjit Gill (June 24, 1981).

Washington units. The Port Washington project was characterized by the Company as a "life extension" project and involved a "like kind" replacement of equipment that physically constrained maximum unit operations in the case of two units and that required the shut down of a third unit for safety reasons. (The youngest of the units began operation in 1950.)

In October 1988, EPA determined that this project would trigger PSD requirements. According to this determination, because the replacements were not found to be "routine," EPA's PSD rules required a comparison between past actual emissions and future "potential" emissions. The determination never explained why this comparison was applicable at units that had "begun normal operations." The determination was based on the assertion that, unless the project fell within an exception to "physical or operational change" enumerated in the rule, the "past actual - future potential" test was required.

EPA also found that NSPS was triggered by comparing deteriorated operations (and zero operations, in the case of the unit shut down for safety reasons) with full capacity hourly emissions after the repairs. While two of the units had constrained operations for several years and the third had been shut down for several years, EPA did not rely on these operations as being "representative," but instead argued that its NSPS rules required comparison of constrained emissions immediately before a repair with emissions immediately after the repair removing the

constraint.

Subsequently, EPA, applying its WEPCo interpretation, found that a conversion of an existing power plant from higher polluting oil to lower polluting natural gas would trigger PSD because non-routine changes were involved and annual emissions of nitrogen oxides would be predicted to increase using EPA's "past actual-future potential" approach. (While the NOx emissions rate of natural gas was substantially less then oil, the units had only operated in the past at a very low capacity factor and, assuming 100 percent operations on natural gas (something that would never occur), there would be an increase in annual NOx emissions.)[16]

EPA also found, subsequent to the WEPCo determinations, that installation of pollution controls -- which clearly is not a "routine" repair or replacement -- would trigger the "past actual-future potential" comparison if annual utilization of the unit would increase in the future.[17] Since control equipment might only reduce emissions of one pollutant, this qualifier meant that many sources would be subject to PSD review before installing control equipment because electricity demand, or other factors, would increase annual utilization of the unit.

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[16] Letter from Don R. Clay, Acting Assistant Administrator, U.S. EPA, to Walter McCarthy, Jr., Detroit Edison Company (May 8, 1989); Letter from David Kee, Air and Radiation Division, U.S. EPA to Morton Sterling, Detroit Edison Company (Dec. 20, 1988).

[17] Letter from David Kee, EPA Region V, Air and Radiation Division, To Timothy Method, Indiana Department of Environmental Management (Jan. 30, 1990).

This post-WEPCo interpretation conflicted with a 1983 EPA interpretation that pollution control projects were exempt from PSD notwithstanding a significant net increase in emissions.[18] This earlier interpretation, which three years later was withdrawn, [19] was based on the NSPS regulatory definition of modification which explicitly excludes pollution control emission increases from "modification" and on the PSD statutory language which incorporates the § 111 modification definition.[20]

Curiously, subsequent to the WEPCo decision, EPA determined that removal of temporary pollution control demonstration projects would not trigger NSPS even though such removal would not be "routine" and even though emissions before removal would be less than emissions after removal. EPA indicated that the appropriate comparison would be between emissions before the temporary project with emissions after its removal.[21] In other words, EPA recognized that the "representative performance" language in its rules allowed EPA to look back to a time before the time that the unit had temporarily reduced emissions.

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[18] Memorandum from Edward Reich, Director, Stationary Source Compliance Division and William F. Pedersen, Acting Associate General Counsel, Air, Noise and Radiation Division to Allyn M. Davis, Region IV (April 21, 1983)(hereinafter referred to as "Pedersen Memorandum").

[19] Memorandum from Gerald A. Emison, Director OAQPS, to Regional Division Directors (July 7, 1986).

[20] Pedersen Memorandum, supra note 18 at 2.

[21] Note 17, supra.

C. Case Law.

WEPCo challenged EPA's NSPS and PSD interpretations in the Seventh Circuit. Wisconsin Electric Power Company v. Reilly, 893 F.2d 901 (7th Cir. 1990). The court affirmed EPA's NSPS determination, holding that the kind of "like kind replacements" before the court were "physical changes" and EPA could, under the facts of the case, compare hourly emissions immediately before the replacement with hourly emissions after the changes. Id. at 913-15. The court, however, reversed EPA's PSD determination, holding that a "past actual-future potential" comparison was not authorized at an existing unit and noting that EPA would have to revise its rules if it wanted to require such comparisons at operating units, like WEPCo's, undertaking "like kind replacements." Id. at 915-18.

Prior to the Seventh Circuit WEPCo decision, the First Circuit decided a case involving the PSD modification rules. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989). In that case, the court affirmed EPA's use of a "past actual-future potential" comparison at a facility that constructed "new [wet] kilns" that had much greater capacity than the "two older [dry] kilns" that had been in operation for some time. Id. at 293. In other words, the Court affirmed this comparison for new emission units that had not begun normal operations.

D. The Administration's Legislative Proposal.

During the time that the 1990 Clean Air Act Amendments were pending before Congress, the Administration considered the legal and policy implications of what had become known as EPA's WEPCo interpretations and concluded that they should be reversed. Legislative proposals, agreed upon by EPA would have returned EPA to pre-WEPCo understandings of the rule (e.g., eliminating the "past-actual future potential" comparison for any existing source) and would have relaxed or changed EPA's current PSD rules in certain areas (e.g., "system-wide netting").

In response to questions from the Senate Energy Committee, the Administration indicated that it could implement the legislative proposals administratively in several important respects. These included:

1. The position that emission reduction projects would be exempt from PSD review for a particular PSD regulated pollutant, unless the emission rate of that pollutant was increased at an existing operating unit above the unit's potential to emit;

2. Where an existing unit increased its potential emissions of a pollutant regulated under the PSD program, the applicability of the PSD program would be determined by comparing "past-actual and future-actual" emissions that, consistent with EPA's rules, "resulted" from the physical or operational change;

3. Where a past-actual and future-actual comparison is made, EPA will not consider emissions increases that are caused by

factors unrelated to the physical or operational change (i.e., where the causal link required by the "result in" language is absent), such as an increase in utilization associated with an increase in demand for the product.[22]

4. The NSPS emission increase comparison will be based upon the maximum hourly rate that could have been achieved during the previous five years with the maximum hourly rate after the change. This approach is consistent with EPA's past interpretations involving temporary demonstration projects and can be distinguished from the WEPCo case on the ground that the Port Washington units had been underutilized for several years.

The Administration reported to the Senate Energy Committee that each of these proposals could be implemented administratively, including the "causal link" proposal. EPA now claims that the "causal link" issue cannot be implemented even through a legislative rulemaking. The EPA memorandum further asserts that the remaining proposals can only be implemented through legislative rulemaking.

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[22] This principle is merely a clarification of pre-and post-WEPCo law, since EPA's rules only authorize a "modification" finding where a "physical or operational change . . . would result in" an increase in annual emissions. 40 C.F.R. § 52.21(b)(2)(1)(1990)(emphasis added). Where factors unrelated to a project lead to an increase in emission, they must be ignored (and therefore discounted) to give effect to the statutory and regulatory definition that requires a causal link (i.e., "will result") between a physical change and an emissions increase. This reading is consistent with the Seventh Circuit's understanding that "present hours and conditions" be used to predict post-change emissions. WEPCo, 893 F.2d at 918.

We believe that, for the reasons discussed below, EPA has discretion to, and should, implement by interpretive rule the PSD aspects of the Administration's proposal outlined above. EPA should implement the NSPS "5 year" proposal by a legislative rule, but should, by interpretive rule, make clear immediately that temporary emission reductions do not trigger NSPS.

III. EPA's Discretion to Revisit its WEPCo Position through Interpretive Rulemaking

At the outset of its memorandum, EPA states that it has been guided by the general principal that "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), cert. denied, 471 U.S. 1074 (1985). Conversely, EPA continues, "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." 742 F.2d at 1565. Yet, EPA has failed to take into account that its past interpretation of the modification rules is itself not consistent with the Agency's current WEPCo interpretations.

For instance, in 1983, when EPA considered whether equipment changes and additions at an existing pulp and paper mill would trigger PSD review, the Agency concluded that it could not use "potential emissions" to define the "actual" emission of this plant

because "this source has been in operation for some time."[23] As recently as May 1988, EPA was not applying a "past actual/future" potential approach. In reviewing an oil company's proposal to reactivate, after necessary equipment repair and replacement, two petrochemical plants that had been shut down since 1978 and 1981 respectively, EPA's Region II Administrator determined that because the shutdown "was not intended to be of a permanent nature," the "reactivation of these facilities would not be considered equivalent to the introduction of new sources for PSD purposes."[24]

As for NSPS applicability, in the past, even where a source has been closed for a substantial period of time, EPA has found that "those steps necessary to return the plant to its former operating conditions" do not trigger NSPS.[25] Where an oleum production tower that had been out of use for several years prior to 1974, and that had been physically removed from the production process in 1974, was proposed to be replaced two years later (in 1976) so that the facility could resume normal operations, EPA found that the like-kind replacement to restore former operating

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[23] Memorandum from Edward E. Reich to Michael M. Johnston at 2 (July 28, 1983).

[24] Letter from Christopher J. Daggett to Pedro A. Santiago Rios (May 4, 1988).

[25] See Memorandum to Jack R. Farmer, Chief, Standards Development Branch, from Michael A. James, Attorney, Air Quality and Radiation Division (Feb. 4, 1973).

conditions did not constitute a modification.[26] Where another facility "add[ed] . . . a baffle wall and rebrick[ed] . . . a furnace" to restore normal operations, EPA found that the work did not constitute a modification triggering NSPS.[27]

Thus, with respect to both PSD and NSPS, EPA's WEPCo interpretations are not in line with its previous interpretations of the modification rules. Given its contradictory approach in the past, it is plainly within the Agency's discretion to clarify its position and to implement, through interpretive rulemaking, the Administration proposal. Such an interpretive rule would not "create" any "new" rights or duties, but would simply reflect EPA's view, upon reflection and reconsideration, of what the Agency's rules truly mean.

IV. Discussion of Significant Issues Suitable for Resolution through Interpretive Rulemaking

A. Modifications to Which Actual-to-Actual May Apply.

As it has since the WEPCo decision was issued, the EPA continues to maintain that the actual-to-actual approach to calculating emissions increases for PSD only applies to "like-kind" changes. In that regard, EPA asserts that, in Puerto Rican Cement

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[26] Letter from O.W. Lively, Acting Director, Enforcement Division to Gary D. Whaley, Ozark-Mahoning Company, at 1 (Oct. 1976).

[27] Memorandum from Edward Reich, Director, Division of Stationary Source Enforcement, to William N. Sawyer, General Enforcement Branch, Region II (Sept. 16, 1980).

v. EPA, 889 F.2d 292, 296-97 (1st Cir. 1989), it had "successfully argued" that the actual-to-potential approach should be used where the activities involved are found to be "non-like-kind." A significant consequence of continued EPA adherence to this position would be to require utilities to obtain PSD permits before installing pollution control equipment. This, in turn, could increase the cost of the acid rain provisions of Title IV of the 1990 Amendments by billions of dollars, threatening in the process the achievement of the required emission reductions in the most efficient and least costly manner.

EPA's position stands the PSD rules regarding modification on their head. Those rules are, in fact, quite clear. Under the regulatorily prescribed calculation, past actual (or allowable) emissions from a stationary source are compared with future actual (or allowable) emissions from that source to determine whether there has been a net increase in emissions.[28] Only in one prescribed circumstance -- where an emissions "unit" has not yet begun "normal operations" -- is the "potential to emit" concept applied.

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[28] The first definition of modification in the PSD context was promulgated by EPA on December 5, 1974, and focused, as did the NSPS rule, on "actual" emissions from a facility. 39 Fed. Reg. 42,510, 42,514 (1974). In response to the 1977 Amendments, EPA promulgated a revised rule on June 19, 1978, that stated the measure of emissions increase not in terms of actual emissions, but in terms of "potential to emit." 43 Fed. Reg. 26,388, 26,403-04. In Alabama Power Co. v. Costle, 636 F.2d 323, 399-402 (D.C. Cir. 1979), the June 1978 modification definition was remanded by the U.S. Court of Appeals. When EPA promulgated final rules in response to the remand, it rejected the "potential to emit" approach. 45 Fed. Reg. 52,676 (1980).

The flaw in EPA's approach is that (with respect to non-like-kind replacements at least) the Agency ignores the fact that an operating unit that has undergone a physical or operational change is still a unit that has begun "normal operations." The entire impetus for applying the "potential to emit" concept to units that have not begun "normal operations" is that such units have no "track record" (i.e., no past operating history) on which to base the emissions calculation. Such, of course, is not the case with existing units that already have such a operating history.

As explained in part III above, in cases prior to WEPCo, the Agency employed a quite different interpretation, one that is prescribed by the Seventh Circuit's holding in WEPCo. Thus, not only is EPA authorized to revise its current position on this issue through an interpretive ruling, such a result is directed by the Seventh Circuit's decision.

Moreover, contrary to EPA's assertions, Puerto Rican Cement does not stand for the proposition that the actual-to-actual test may only be applied where the changes at issues are "like-kind" replacements. Rather, Puerto Rican Cement makes clear that, in calculating whether there is an emissions increase for purposes of PSD, the "potential to emit" concept is not applicable to existing units, but may only be applied where the emissions unit in question "has not begun normal operations."

Puerto Rican Cement involved construction of a "new" dry kiln with a capacity that was much greater than the capacity of the old

wet kilns that were being replaced. Specifically, the First Circuit noted that the company wished to "build a new cement kiln, replacing older kilns that it now operates at about 60 percent of their capacity." 889 F.2d at 293 (emphasis added). EPA, the court said, viewed this proposed "new kiln" as an "'emissions unit which has not begun normal operations,'" and, therefore, "counted as its 'actual emissions,'" the kiln's "potential to emit" pollution.[29] Id. at 297.

By contrast to the First Circuit case, which involved the installation of new dry kilns which had never operated, the Seventh Circuit case involved emissions units that had been operating for at least 38 years. As the court noted, "the PSD regulations state that the EPA may rely upon a facility's potential to emit if the unit" has not begun normal operations. . . ." WEPCo, 893 F.2d at 917 (emphasis in original). And the court stated the issue before it as follows:

> WEPCo argues that this phrase should be interpreted to include only those units that

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[29] While the court upheld EPA's application of its regulations in this particular case, it continued to note that one could "imagine circumstances that might test the reasonableness of EPA's regulation." Id. For example, the court said, an electric company "might wish to replace a peak load generator -- one that operates only a few days per year -- with a new peak load generator that the firm could, but almost certainly will not, operate every day." Id. at 297-98. Whatever the "arguments about the 'irrationality' of EPA's interpretation in such circumstances, however," the court concluded, "those circumstances are not present here." Id. at 298. In other words, the First Circuit suggested that utilities might be able to successfully argue that the "potential to emit" rule did not apply to a new boiler without any past operating history, where the new boiler would be expected to operate as the existing boiler had.

> have never been in operation, while EPA argues that the phrase can be applied to both new and modified units.

The court rejected EPA's interpretation and accepted WEPCo's. Adopting arguments made in WEPCo's brief,[30] the court found the EPA assertion that the provision applied to the WEPCo units because those units were "modified" units to be "circular: in order to demonstrate that the Port Washington like-kind replacement project constitutes a modification, the EPA applies the potential to emit concept (to show an increase in emissions)." Id. at 917. As a result, the court held that: "Although we accord great deference to an agency . . ., we cannot defer to agency interpretations that, as applied here, appears to assume what they seek to prove." Id. Finally, the court distinguished this case from the First Circuit case on the ground that "unlike the case at issue here, Puerto Rican Cement involved the construction of a new emissions unit at an existing source." Id. at 917 n.12 (emphasis in original).

In sum, to read Puerto Rican Cement and WEPCo as establishing that "non-like-kind" replacements at existing, operating unites must be subjected to the actual-to-potential test simply misstates the rulings of these courts. By giving effect to these holdings, EPA can issue an interpretive rule that recognizes an "actual to actual" comparison in evaluating a change at an existing unit that does not increase emission rates or enlarge the production capacity of the unit.

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[30] WEPCo Reply Brief at 27, n.38 (Aug. 4, 1989).

B. The Post-Change Projection.

The Administration's legislative proposal recognizes that EPA's current modification rules require that, in order for there to be a modification, there must be a direct causal link between the physical or operational change at issue, and any resulting increase in emission. This is reflected in the Administration's proposal to exclude from calculation that portion of the increased rate of utilization attributable to "factors unrelated to the physical or operational change," including an "increase in projected capacity utilization equal to the rate of electricity demand growth" for the system as a whole.

According to EPA, "[w]ith one exception," the proposed legislative definition establishing the parameters for the post-modification projection "would merely codify EPA's decision on remand in the WEPCo case," and, as such, could be accomplished either through an interpretative rule or through notice-and-comment rulemaking.[31] The "one exception" identified by EPA concerns the portion of the legislative language, noted above, which EPA labels the "demand growth exemption." According to the Agency, "[n]either

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[31] It should be noted that it is simply not true that the Administration's proposal "merely codifies" EPA's decision on remand in WEPCo, if by this the Agency is suggesting that the Administration agrees with EPA's position that, in rejecting the Agency's method of calculating emissions increases for PSD, the Seventh Circuit limited its decision to activities involving "like-kind" replacements. The court in WEPCo did no such thing.

the existing regulations nor the draft interpretative rule exclude post-modification emission increases linked to increased demand growth in the utility system."

EPA's search for a demand growth "exclusion" in the PSD regulations is fundamentally misguided. By their express terms, the PSD regulations specifically require that, in order for there to be a "major modification" in the first place, the physical or operational change must "result in" an increase in emission rate. EPA looks in vain for a "demand growth exclusion" in the regulations because, given the requirement that there be a direct causal nexus between the activity at issue and the emissions increased in order for PSD review to be triggered, no such exclusion is needed. Thus, EPA's assertion that the "demand growth exclusion" cannot be implemented through interpretative or even notice-and-comment rulemaking is puzzling, given that the plain terms of the its own regulations in fact dictate that emissions increases due to system growth (as opposed to physical or operational changes) do not trigger PSD requirements.

Beyond the plain language of the regulations, important public policy considerations argue for such a result. The modification rules were never intended to discourage the implementation of programs to reduce costs, to improve productivity or competitiveness, or to react to fluctuating market conditions. The PSD program was never intended to preclude existing units from increasing their utilization unless their utilization was

constrained by a "federally enforceable" permit term.[32]

EPA never suggested in past rulemaking or pre-WEPCo interpretations of its rules that the PSD rules have the effect of "capping" operating unit utilization below maximum production levels whenever a unit undertakes repairs that do not enlarge the production capacity of the unit or increase its historical emission rate. Only "new pollution" -- i.e., pollution that was not contemplated when a unit was built -- is the target of the modification rules.[33] Any rule that prevents facilities from increasing utilization to meet market demand without first undergoing new source review will create chaos in an economy that contemplates that industry can undertake repairs needed to respond to new market demands in the least cost and most efficient manner.

Thus, in the end, EPA's suggestion that a regulatory change to "exclude system demand growth" would "probably not survive judicial review," given the "strong indications" that the statutory modification provisions were "intended to address long-term emissions increases" is a non sequitur. The statutory modification provisions are directed towards the regulation of new pollution

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[32] The increased utilization exception to the PSD rules, of course, does not apply where a new emissions unit is added at existing stationary source. A unit that has not begun normal operations cannot be said to have "increased" its hours of operation or production rate above prior operating levels because it has no prior operating levels.

[33] Note 1 supra.

from new emission units or from existing emission units that have been altered to increase emission rates or production capacity above maximum levels previously achievable by those units.

C. PSD Exclusion for Pollution Control Projects.

EPA's discussion appears to contemplate that the pollution control aspects of the Administration's proposal could be adequately addressed through EPA's current draft interpretive rule. They cannot.

The draft interpretive rule is based upon a "death wish" legal theory -- EPA's WEPCo interpretations are based on the argument that the PSD rules provide an exclusive list of "exemptions"; EPA's draft interpretive rule, by contrast, assumes that EPA can read an "exemption" into the rules. Equally, if not more important, the EPA draft interpretive rule provides no relief for pollution control projects because it is inapplicable where unit utilization will increase after the project. Of course, if utilization will not increase, annual emissions will not increase and you do not need a pollution control exception. EPA must change its legal theory, if meaningful relief is to be provided for pollution control projects through an interpretive rule. There is an alternative and supportable legal theory -- that is, the PSD rules only enumerate certain exceptions, not all exceptions; the PSD modification definition must be consistent with the NSPS definition; the NSPS definition excludes emission rate increases

resulting from pollution control projects and therefore this exception can be read into the PSD rules.[34]

Acceptance of this alternative interpretation is critically important to the emissions trading program. For example, scrubbed and other controlled units will increase their utilization, making them subject to PSD review under the EPA interpretive rule. Also, acceptance of this alternative interpretation will eliminate the need for rulemaking on the "potential-to-potential" issue for pollution control projects.

D. NSPS Baseline.

After noting that, in WEPCo, it "took evidence of the highest capacity demonstrated during the previous year as evidence of the current actual capacity," EPA states that there is "nothing in the regulations that would specifically preclude the Agency from looking back even further." Using the results from earlier operations, however, EPA suggests, would be "vulnerable to legal challenge," given that its approach was upheld by the Seventh Circuit in WEPCo.

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[34] In 1983, former Deputy General Counsel of EPA and then Acting Associate General Counsel for Air, William F. Pedersen issued a memorandum which adopted this interpretation of the PSD regulations. See Pedersen Memorandum, supra note 18 at 2. Three years later, the Director of the Office of Air Quality Planning and Standards disagreed with Mr. Pedersen's legal analysis and re-interpreted the PSD rules as requiring legislative rulemaking to incorporate a pollution control exception. See Emison Memorandum, supra note 19. If EPA has discretion to reverse itself once on this issue, it has discretion to return to the Pedersen interpretation.

The WEPCo case, however, involved changes at two units that had been derated for a number of years due to air heater problems and changes at one unit that had been shut down for several years due to a steam drum crack. With respects to changes to correct a temporary constraint on operations, EPA need not compare emissions immediately before a change (regardless of representativeness) with post-change emissions. EPA may be correct that the court in WEPCo upheld its view that the Agency cannot base representativeness on a unit's emissions prior to the time when the unit was shut down or operated at significantly reduced capacity for an extended period of time. This does preclude the Agency, however, from using interpretive rulemaking in order to employ the concept of representativeness in other circumstances, such as where operational constraints have been temporary and are corrected under a normal repair or replacement schedule.

Such an approach would be consistent with EPA's position with respect to the removal of temporary controls at the conclusion of clean coal technology (CCT) demonstration projects. In a letter dated January 30, 1990, from David Kee, EPA, Region V, Director, Air and Pollution Division, to Timothy J. Method, Assistant Commissioner, Office of Air Management, Indiana Department of Environmental Management (IDEM), EPA noted its agreement with IDEM's determination that NSPS standards were not intended to apply to Northern Indiana Public Service Company's CCT project at its Bailly power plant. Specifically, EPA confirmed that the Bailly

plant "would not be subject to NSPS at the conclusion of the project . . . as the result of an increase in emissions rates back up to the level which existed before the changes were made to accommodate the temporary demonstration project." There, EPA recognized that the "removal of temporary controls will not result in a level of emissions higher than that experienced in the past."

EPA has the discretion to extend by interpretive ruling this acknowledgement that representative past performance is an essential consideration in properly defining the pre-change baseline in those situations where the constraints on operations are temporary. It is conceded that adoption of a specific five-year time period for establishing the NSPS baseline is best implemented through notice-and-comment rulemaking.

V. Other Issues Addressed in EPA Memorandum

A. Actual-to-Actual Baseline.

EPA recognizes that the Administration's actual-to-actual baseline proposal, which would put a five-year limit on the Agency's discretion in selecting a two-year period of "representative" operations, does not conflict with existing regulations. EPA even suggests that sources could be provided with "even more flexibility" if it were to adopt a broad reading of "normal" operations that would "encompass any reasonable concept of the source's operations during the last several years."

The five-year limit was the consequence of legislative compromises that are reflected throughout the Administration's proposal. If EPA is unwilling to back down from its WEPCo interpretation on such other important issues as "post-modification projections" and "modifications to which actual-to-actual may apply," then adherence to a five-year limit, at the expense of greater flexibility in setting the baseline, is no longer appropriate and might be revisited.

B. Safe Harbor Provisions.

EPA is attempting to use this proposal to further restrict legitimate projects at existing units. EPA should not be implement the "safe harbor."

C. Potential to Potential.

This change is not needed if EPA adopts an interpretive rule that broadly excludes pollution control projects.

EPA's argument that a potential-to-potential system "would be difficult to implement" is based on the incorrect assumption that the proposal would require EPA to use potential emissions in calculating PSD baseline concentrations and increment consumption. That is not what was being proposed. Potential-to-potential would only be used to trigger PSD review. On the merits, the discussion is inaccurate. Air quality analyses assume operations at a source's potential to emit and therefore the assertion that

increments would be violated using potential emissions is wrong.

D. System-Wide Netting.

EPA states that the existing regulatory definition of "source" would have to be changed through notice-and-comment rulemaking before the Administration's system-wide netting proposal could be adopted. This appears to be a sound conclusion.

E. Generic NO_x BACT Determinations.

EPA's position on this issue appears sound.

F. EPA Guidance on Routine.

It is agreed that EPA may provide guidance on the meaning of "routine" maintenance, repairs, and replacements through either an interpretive rule or through notice-and-comment rulemaking.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 19 1991

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA Administrative Implementation of WEPCO Legislative Program

FROM: E. Donald Elliott
Assistant Administrator
and General Counsel

TO: See Below

You will remember that at our meeting on WEPCO I committed to having the EPA Office of General Counsel draft a memorandum on the WEPCO legal issues. Attached is a copy of that memorandum for your use. If you have serious problems with something in the memorandum, please give me a call or write me a note. Should I find that there is a sufficiently weighty issue remaining, I will set up a meeting for us all to discuss it.

Attachment

Addressees:

Richard Stewart, Department of Justice
Jeff Holmstead, White House
David Rivkin, Depart of Energy
Steve Aitken, Office of Management and Budget

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
08. Draft Memo	From William Tyndall, Gregory B. Foote thru Alan W. Eckert to E. Donald Elliott RE: Administrative EPA Implementation of WEPCO Legislative Proposal (10 pp.)	02/20/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Subject File
WHORM Cat.:
File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

Open on Expiration of PRA
(Document Follows)
By Gap (NLGB) on 4/24/06

Date Closed:	7/2/2002	**OA/ID Number:**	45144-005
FOIA/SYS Case #:	2001-1865-F		
Re-review Case #:			
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MR Case #:		**Appeal Case #:**	
MR Disposition:		**Appeal Disposition:**	
Disposition Date:		**Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
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(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

DRAFT

MEMORANDUM

SUBJECT: Administrative EPA Implementation of WEPCO Legislative Proposal

FROM: William Tyndall, Attorney
Air and Radiation Division, LE-132A

Gregory B. Foote
Assistant General Counsel
Air and Radiation Division, LE-132A

TO: E. Donald Elliott
Assistant Administrator
and General Counsel

THRU: Alan W. Eckert
Associate General Counsel
Air and Radiation Division (LE-132A)

This memorandum evaluates the feasibility of implementing the Administration's legislative initiative on WEPCO through administrative action.[1] Each section begins with a reference to the sections of the proposed legislation and a conclusion regarding the type of action (statutory change, legislative rulemaking or interpretative rulemaking) necessary to implement the provision. In drawing our conclusions, we have been guided by the general principal that "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985), quoting Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979). Conversely, "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." General Motors, 742 F.2d at 1565.

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1 The Administration's legislative proposal was attached to a letter from Dr. Schmalensee to Senator Ford, dated July 23, 1990. For your convenience, a copy of this document is attached to this memorandum at Tab A.

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A. New Source Performance Standard Baseline: Subsection (a) of Schmalensee proposal.[1]

Interpretative Rule or Guidance: No

Notice-and-Comment Rulemaking: Yes

An existing source that modifies its facility is subject to new source performance standards ("NSPS"). Clean Air Act ("CAA") § 111, 42 U.S.C. § 7411 (1990-91). The Act defines modification broadly to mean "any physical change in or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted" by that source. CAA § 111(a)(4), 42 U.S.C. § 7411(a)(4). To determine whether a change to an existing facility will increase the emissions rate, the regulations (40 C.F.R. § 60.14) authorize the use of an "emissions factor analysis," or, if that is inconclusive, three valid runs of a materials balance, continuous monitoring, or manual emissions test to evaluate emissions before and after the change. 40 C.F.R. § 40.16(b)(2) (1989). The rules do not specify the time period within which these evaluations must be conducted although, as a practical matter, most applicants will be unlikely to have three valid runs meeting EPA's specifications unless they are conducted at the time of the NSPS analysis.

Because of the requirement of these three tests, the Administration's proposal to use historical operating capacity is relevant only if the source can use the emissions factor analysis. With regard to this methodology, nothing in the regulations specifies the period of time that EPA may look back to determine emission levels before the change. In WEPCO, EPA took evidence of the highest capacity demonstrated during the previous year as evidence of the current actual capacity and there is nothing in the regulations that would specifically preclude the Agency from looking back even further.

Using the results of earlier operations would, however, be vulnerable to legal challenge. First, the regulatory focus on before-and-after testing suggests that its drafters had in mind testing the source's current capacity, where that may differ from some historical measure. Moreover, EPA's long-held construction of this rule is that the analysis must focus on the source's "current maximum capacity" to produce emissions. (Letter from Lee M. Thomas to John Boston (October 14, 1988), p. 5.) That

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[1] The subsection references refer to the subsection headings in the Administrations's legislative proposal (as submitted in a letter from Dr. Schmalensee to Senator Ford on July 23, 1991) which is attached at Tab A.

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approach was affirmed on judicial review. Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 913 (7th Cir. 1990) ("WEPCO"). We believe a court would defer to a judgment made by the Agency in a legislative rulemaking to use some other metric, such as the highest capacity achieved in the last five years, for affected sources under the acid deposition program. See Chevron, U.S.A v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). But to adopt this interpretation without notice and comment where it reverses past practices would invite court intervention. See Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987) (interpretative rule may not change existing law or policy).

B. PSD Exclusion for Pollution Control Projects: Subsection (b)(1) of Schmalensee proposal (see Section D below for Potential-to-Potential issue).

Interpretative Rule or Guidance: Yes

Notice-and-Comment Rulemaking: Yes.

Last year, the Agency decided to create an exemption for pollution control measures, including certain fuel switches, from new source review and NSPS through an interpretative rule. The draft rule also created an exemption for both permanent and temporary CCT demonstration projects, but the 1990 Amendments have eliminated the need for this portion of the interpretative rule. See Clean Air Amendments of 1990 ("1990 Amendments") §§ 415(b)(2)) and (b)(3).[3] Thus, the Administration's proposal is either part of the existing draft interpretative rule or has been incorporated into the 1990 Amendments.

While the draft interpretative rule excludes pollution control projects, the Agency concluded that notice and comment rulemaking was not necessary since the Agency was merely interpreting the relevant regulations as not covering "certain environmentally-desirable activities at existing stationary sources which neither Congress nor EPA intended to be covered by the new source requirements of the Clean Air Act." Draft Interpretative Rule (Cong. Rec. S16910 (daily ed. Oct. 27. 1990)). Moreover, the draft rule only provides "general criteria" to be considered during the individualized new source review and NSPS applicability determinations. Id. at S16912; see Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) (notice and comment not needed for "directive" which gave agency

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[3] Temporary CCT demonstration projects are exempted from NSPS and parts C and D of title I of the Act. See 1990 Amendments, § 415(b)(2). Permanent CCT projects are exempted from NSPS and part C. Id. at 415(b)(3).

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officials flexibility to make individualized determinations). As such, a court should not consider it a legislative rule. Proceeding without notice and comment is not without risk, however, as courts have viewed the creation of a binding "exemption" as one indicator of legislative rulemaking. Alaska v. United States Dep't of Transp., 868 F.2d 441, 446 (D.C. Cir. 1989).

C. Safe Harbor Provisions: Subsection (b)(2) of Schmalensee proposal (see Section D for Potential-to-Potential issue.)

Interpretative Rule or Guidance: No.

Notice-and-Comment Rulemaking: Yes.

Part C incorporates the broad definition of "modification" set forth in section 111. See CAA § 169(1)(c), 42 U.S.C. § 7479(a)(c). Based on this language, the court in WEPCO rejected the utility's effort to construe the PSD modification provision as exempting an $80 million life extension project. WEPCO, 893 F.2d at 908. The corresponding PSD regulations are equally broad in their coverage and all exceptions have been adopted through notice and comment rulemaking. See 40 C.F.R. § 52.21(b)(2).[4] While an agency may of course change its interpretation through an interpretative rule, in this case the plain language of the regulations does not support a 20 percent safe harbor approach. Moreover, the rationale of the draft interpretative rule -- that Congress did not intend to force pollution control projects into PSD review -- does not apply to the 20 percent safe harbor. For these reasons, this exception should be adopted through legislative rulemaking.

In a rulemaking, EPA could conclude that pollution-control modifications rationally entail other, minor changes to the source and the 20 percent safe harbor allows for this economic reality. At the same time, it provides utilities with a bright line limit to the exemption. Still, because the exemption as proposed allows substantial life extension investments and

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[4] Section 52.21 defines "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2). The regulation excepts routine maintenance, repair and replacement, ownership changes, increases in the hours of operation or in the production rate, and modifications undertaken in conjunction with certain other programs. Id.

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results in a likelihood of long-term increases in actual emissions, it may -- as Dr. Schmalensee stated to Senator Ford -- require a statutory change.

D. Potential-to-Potential: Subsections (b)(1) and (2) of Schmalensee proposal.

Interpretative Rule or Guidance: No.

Notice-and-Comment Rulemaking: Yes.

The current PSD regulations require an actual emissions baseline. For instance, section 52.21 defines modification to include any physical change that would result in a significant "net emissions increase," 40 C.F.R. § 52.21(b)(2)(i), which turns on "any increase in actual emissions from a particular physical change," 40 C.F.R. § 52.21(b)(3)(i)(a) (emphasis supplied). See also 40 C.F.R. § 52.21(b)(21) (defines "actual emissions" as of a particular date as "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period"). Thus, the existing regulations must be amended to implement a potential-to-potential methodology. This requires legislative rulemaking.

However, a legislative rule creating a potential-to-potential system, while legal, would be difficult to implement. Any switch to a potential-based system would introduce massive inconsistencies into the PSD and nonattainment regulatory scheme. For instance, section 169(4) of the Act establishes as the baseline for PSD increment consumption the "ambient concentration levels which exist at the time of the first application for a permit in an area." (Emphasis supplied.) Thus, "Congress has defined with specificity the . . . manner in which the baseline . . . is to be determined," Alabama Power Co. v. Costle, 636 F.2d 323, 375-81 (D.C. Cir. 1979). EPA has in fact constructed increment baselines nationwide and new sources have been permitted on the basis of actual ambient levels. Accordingly, even if potential emissions could be used for increment purposes, doing so would result in PSD increment violations in many areas, making it difficult or impossible for modification projects to proceed even without PSD permits. See 45 Fed. Reg. 52,676, 52,720-21 (discussion of Gulf Coast increment consumption problem). This in turn would require SIP revisions to squeeze

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the excess "paper" out of the system. In the end, then, the cure might be worse than the disease.[5]

E. Actual-To-Actual: Subsection (c) of Schmalensee proposal.

1. The Actual-To-Actual Baseline

Interpretative Rule or Guidance: Yes.

Notice-and-Comment Rulemaking: Yes.

The Administration's baseline proposal does not conflict with existing regulations which allow a source to show that an earlier period is "more representative of normal source operations," (40 C.F.R. § 52.21(b)(21)(ii)), since the proposal merely puts a five-year limit on the Administrator's discretion. It could therefore be implemented through an interpretative rule. EPA could provide sources with even more flexibility by issuing a broad reading of "normal" operations that would encompass any reasonable concept of the source's operations during the last several years.

On the other hand, a court may consider the preamble to and structure of the regulations as limiting EPA's options beyond these changes. The preamble states that a reviewing authority should consider the two-year period prior to PSD application by a source "unless that period of time was atypical of normal source operation." 45 Fed. Reg. 52,676, 52,705 (1980); see also 45 Fed. Reg. 52,718. Likewise, the regulatory provision for use of a "more representative" period implies that the two year period should also be representative of "normal" operation. EPA also has a consistent administrative practice of requiring source

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[5] The 1990 Amendments also make a regulatory change difficult by requiring, in the context of nonattainment areas, that the baseline for offsets be consistent with the assumptions used for state implementation plan ("SIP") planning purposes. See revised § 173(a). The Amendments also call for offsets in nonattainment areas to be based on actual emissions. See revised § 173(c)(1). Since SIPs are largely based on actual emissions with respect to capacity utilization, this may preclude a switch to a potentials based system for nonattainment areas unless the states make corresponding changes to the SIP regulatory scheme. In any event, EPA remains obligated, under Exhibit B of the settlement agreement in Chemical Manufacturers Association v. EPA, No. 79-1112 (D.C. Cir. entered February 22, 1982) to propose and take final action on a potential-to-potential system across the board.

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owners to consider initially the most recent two-year period in establishing a PSD baseline. See, e.g., Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 296-97 (1st Cir. 1989). To harmonize any inconsistency with past practices, EPA would need to explain why the concerns that informed its 1980 preamble do not apply to affected power plants.

A more fundamental change, such as giving companies the ability simply to pick the highest level of operations during the prior five years, may also be possible. A textual analysis of the regulations suggests that a source owner has complete discretion to name any two year period as the actual emissions baseline. However, as PSD baseline concentrations and increment consumption are largely tied to actual ambient concentrations as of the date of the first PSD application in an area, see § 169(4) and Alabama Power, 636 F.2d at 374-381, it would be difficult to defend a PSD applicability system that would grandfather levels of emissions that had not been achieved after the baseline date.

2. The Post-Modification Projection

Interpretative Rule or Guidance:
Yes (except for demand growth exemption).

Notice-and-Comment Rulemaking:
Yes (except for demand growth exemption).

With one exception, the Administration's proposal regarding the post-modification projection would merely codify EPA's decision on remand in the WEPCO case. As such it could be accomplished through an interpretative rule.

The exception is the proposal to ignore emissions increases due to system growth. Neither the existing regulations nor the draft interpretative rule exclude post-modification emission increases linked to increased demand growth in the utility system. There is nothing in the statute, regulation or preambles to suggest that Congress or the EPA considered the underlying motivation for a modification project to be relevant in determining whether the project would result in an emissions increase.[6] Rather, as the court found in WEPCO, EPA's current regulations hinge on whether an emissions increase is

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[6] The statute in numerous places refers without qualification to the need for PSD review and permitting at the time of "construction." See, e.g., CAA §§ 165(a), (a)(3), (a)(8), (e)(3)(B) and 167, 42 U.S.C. § 7475(a), (a)(3), (a)(8), (e)(3)(B), and 7477. As discussed, section 169(2)(C), 42 U.S.C. § 7479(2)(C), defines "construction" to include "modification."

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attributable to significant construction activity as opposed to temporary fluctuations in market conditions. See WEPCO, 893 F.2d at 916 n. 11; see also 45 Fed. Reg. 52,704.

Moreover, any regulatory change to exclude system demand growth would probably not survive judicial review because of the strong indications that the statutory modification provisions were intended to address long-term emissions increases. The PSD provisions seek "to assure that any decision to permit increased air pollution in any area . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation." 42 U.S.C. § 7450(5). Based on this provision and other evidence of Congressional intent, the court in Alabama Power Co., 636 F.2d at 401, noted that "Congress wished to apply the permit process [of part C] . . . where industrial changes might increase pollution in an area."

3. Modifications To Which Actual-to-Actual May Apply

Interpretative Rule or Guidance: Yes (for like-kind replacements only).

Notice-and-Comment Rulemaking: Yes.

In determining whether there has been an increase in emissions under the current "actual-to-potential" methodology, EPA rules require an initial assumption that following a modification, a source will operate at its full potential to emit.[1] Under this test, the source must agree not to increase its actual emissions in order to avoid PSD applicability. The WEPCO court rejected EPA's interpretation that it could ignore past operating conditions in the case of like-kind replacements. See WEPCO, 893 F.2d at 917-18. On remand, EPA applied an "actual-to-actual" test. EPA could issue a clarifying "interpretation" of the existing regulations to apply actual-to-actual to like-kind modifications in a manner consistent with the WEPCO decision. Moreover, EPA could broadly define like-kind to include "functional equivalents" although too ambitious a definition of the exception would swallow the rule and be vulnerable to attack as contrary to the statutory provisions themselves.

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[1] Section 52.21(b)(21)(4) of Title 40 provides "[f]or any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date."

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The "past is prelude" rationale used by the court in WEPCO does not necessarily apply to modifications which are not "like-kind." For instance, in Puerto Rican Cement, 889 F.2d at 296-97, EPA successfully argued that a "non-like-kind" modification should use the actual-to-potential test of section 52.21. Because of this lack of rationale and EPA's consistent contrary practice which has withstood judicial challenge, any change to actual-to-actual for non like kind modifications may be undertaken only through legislative rulemaking.

F. System-Wide Netting: Subsection (d) of Schmalensee proposal.

Interpretative Rule or Guidance: No.

Notice and Comment Rulemaking: No.

Existing regulations explicitly embody a plant-wide definition of "source" and would have to be changed before system-wide netting could be adopted. See, e.g., 40 C.F.R. § 52.21(b)(5) and (6). This would require notice and comment rulemaking.

Moreover, EPA may have no power to implement the Administration's proposal through regulations. The PSD program applies to "major emitting facilities," which are defined as certain types of stationary sources that emit or could emit 100 tons of pollutants per year, or "any other source" that could emit 250 tons. See CAA §§ 165(a), 169(1), 42 U.S.C. §§ 7475(a), 7479(1). Section 169(1) lists specific types of installations that constitute "stationary sources" including "fossil-fuel fired steam electric plants," "incinerators" and 15 other types of "plants." The specificity of this statutory language precludes any interpretation to allow company wide or state wide netting as the Administration proposes. In Alabama Power, in response to the argument that this language did not allow a plant-wide PSD evaluation (the so-called "bubble" concept), the court stated that under section 169, "Congress clearly envisioned that entire plants could be considered 'sources.'" In contrast, the language of section 169 provides no basis for a reading that goes beyond a plant-wide definition of source. Id., 636 F.2d at 397.

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G. Generic NOX BACT Determinations: Subsection (f) of Schmalensee proposal.

Interpretative Rule or Guidance: Yes (as presumption only).

Notice-and-Comment Rulemaking: Yes (as presumption only).

Section 169(3) of the Act defines best available control technology ("BACT") as:

> the maximum degree of reduction . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility. . . ."

(Emphasis supplied.) On its face, this language bars any generic BACT standard. Nevertheless, EPA can issue a general policy statement, interpretative rule, or legislative regulation creating a presumption in favor of low-NOx burners or similar technologies. Under section 169(3), however, the permitting authority would remain obligated to perform an individualized evaluation of other available control technologies.

H. EPA Guidance on Routine: Subsection (h) of Schmalensee proposal.

Interpretative Rule or Guidance: Yes.

Notice-and-Comment Rulemaking: Yes.

Both 40 C.F.R. § 52.21(b)(2)(iii)(a) and 40 C.F.R. § 60.14(e)(1) exclude as modifications "routine" maintenance, repairs or replacement. Since the Administration's proposal only calls for EPA to define a term in existing regulations, EPA could provide the specifics through an interpretative rule or other informal guidance or through notice and comment rulemaking as the proposal contemplates.

Disk:Diane-C:AWEPCOPT.226:WP5.1:January 31, 1991

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
09. Memo	From Michael A. McCord, Jennifer A. Haverkamp, Jonathan B. Wiener to Richard B. Stewart RE: WEPCO- Implementing the Administration's Proposals Regarding PSD and New Source Review for Electric Utilities (16 pp.)	03/05/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
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File Location: Clean Air Act/WEPCO [Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901] [3]

Open on Expiration of PRA
(Document Follows)
By Cap (NLGB) on 10/28/05

Date Closed:	7/2/2002	**OA/ID Number:**	45144-005
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Re-review Case #:			
P-2/P-5 Review Case #:			
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Memorandum

PRIVILEGED & CONFIDENTIAL--ATTORNEY/CLIENT & DELIBERATIVE PROCESS
DRAFT March 5, 1991

Subject	Date
WEPCO: Implementing the Administration's Proposals Regarding PSD and New Source Review for Electric Utilities	March 5, 1991

To
Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division

From
Michael A. McCord
Assistant Chief
Environmental Defense Section

Jennifer A. Haverkamp
Policy, Legislation, & Special Litigation Section

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This memorandum addresses the EPA Office of General Counsel staff memorandum of February 19, 1991, sent to you by Don Elliott, which discusses the legal bases for various procedural options in implementing solutions to the "WEPCO" issues -- solutions proposed to the Congress in a letter from Dick Schmalensee (CEA) last year. We believe that the memorandum does a balanced job of presenting the pros and cons of proceeding through interpretative rules versus legislative rules. At the same time, we have some concerns as to the conclusions reached on particular proposals.

We also discuss in this memorandum a draft memorandum responding to EPA's analysis prepared by the Department of Energy's Office of General Counsel. In summary, we believe the DOE memo contains two significant flaws: 1) in advocating use of interpretative rules it does not consider fully the distinctions, articulated in case law, between legislative and interpretative rules; and 2) it relies on reading some of the existing regulations to allow or support interpretative constructions which do not seem plausible and are contrary to recent agency interpretations. Nevertheless, the DOE memo is in agreement with the EPA memo as to most of the items proposed for administrative action.

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SUMMARY OF CONCLUSIONS

There appears to be significant disagreement over the method of implementation for only 3 of the 10 WEPCO "fixes" discussed in EPA's memo (see attached chart): (1) We agree with EPA that a demand growth exemption for post-modification projections would require legislation, while DOE believes it may be done by interpretative rule. (2) DOE also would use an interpretative rule for implementing an actual to actual methodology for all modifications, while we and EPA would limit such a rule to like-kind replacements. (3) We (but not DOE) question EPA's conclusion that interpretative rules could be used to implement part of the PSD Exclusion for Pollution Control Projects, but agree that notice and comment would be necessary to implement the rest of that exclusion (shifting from annual to maximum hourly emissions). Neither we nor DOE dispute EPA's conclusion that interpretative rulemaking is inappropriate for four other fixes: NSPS Baseline, Safe Harbor, Potential to Potential, and System-Wide Netting. All agree that "routine" refurbishment may be defined through either interpretative or notice and comment rulemaking; that an interpretative rule is appropriate for actual to actual baseline; and that a generic NOx BACT would require legislation but that a presumption could be established by interpretative or legislative rule.

Even for those proposals for which we concede interpretative rules might be defensible, however, we recommend that EPA first invite public notice and comment before issuing a final rule, in order to guard against subsequent legal challenges that would thwart expeditious implementation of the proposals and that would invite adverse D.C. Circuit case law that would affect agency rulemakings throughout the Executive Branch.

I. INTERPRETATIVE VERSUS LEGISLATIVE RULES GENERALLY

A. Options for Issuing the Rules

EPA's memorandum presents the choice for rule promulgation as between "interpretative" rules and "notice and comment" rulemaking. In fact, interpretative rules could either be proposed for public comment, followed by issuance of a final rule, or issued initially as final rules with no opportunity for public comment. Legislative rulemaking would, of course, require public comment. Moreover, if some of the Schmalensee proposals can validly be issued as interpretative rules while others must be legislative rules, the two sets could be announced together or separately.

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As an initial matter, we would like to qualify an apparent assumption underlying this policy debate that implementing the WEPCO fixes by final interpretative rule is necessarily superior to notice and comment legislative rulemaking, and that EPA should, therefore, wherever plausible, forego notice and comment. Although issuing an immediately final interpretative rule covering all points would seem to give industry immediate legal authority to proceed in reliance on all aspects of the rule, legal challenge to some of these elements could delay and frustrate the success of this blanket approach well beyond the time it would require to seek public comment and issue a final rule. Although there are some reasonable arguments as to why some of the measures could be promulgated as final interpretative rules, it is, of course, very likely that those rules would be challenged as procedurally deficient. We should not unnecessarily run the risk of letting the D.C. Circuit make bad law on notice and comment questions and adversely affect future litigation unless there is a compelling reason why notice and comment procedures could not be utilized. (As discussed below, the District of Columbia Circuit, which would review these rules, takes a narrow view of interpretative rules.) And if the desire is to save time, using the format of a final interpretative rule (without offering the opportunity for comment) may be counterproductive, for if the interpretative rule is remanded for lack of notice and comment, the desired regulatory relief may be delayed unnecessarily.[1]

In addition to these considerations, an interpretative rule is generally considered a weaker policy instrument because there is a risk that its validity will be challenged in subsequent applications, and because courts may decline to accept

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[1] Of course, the issuance of legislative rules may also be challenged, e.g., on grounds that the legislative rule exceeds (or conflicts with) the agency's statutory authority. Or a party could argue that the agency has failed to adequately explain its basis for changing its substantive views. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 42 (1983) (an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). Development of any legislative rules must take care to avoid these problems. In any event, public notice and comment often flushes out such objections and gives the agency an opportunity to respond in the final rule, thus strengthening the chances of surviving judicial review.

the agency's interpretation. Generally speaking, an interpretative rule is not binding and may be challenged at any time (if final and ripe), Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980). Although this principle is somewhat counterindicated by Section 307 of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which requires challenges to final agency action to be brought within 60 days of the final action, this issue remains open: in General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 984 n. 30 (D.C. Cir. 1983), vacated on other grounds, 742 F.2d 1561 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985), the court observed that "[A] court is not required to give effect to an interpretative regulation", quoting Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). A legislative rule, in contrast, is considered legally binding by the courts if no one challenges it within the 60 day window or the D.C. Circuit upholds it following such a challenge. In other words, the final word on a legislative rule's defensibility may come much sooner, and its authoritativeness may be more solid, than for an interpretative rule.

One means of implementing the WEPCO proposals promptly might be simultaneous issuance of interpretative rules covering some of the proposals and proposed legislative rules covering others. Provided the proposals were appropriately divided between the two types of rules, this approach would likely be effective. A variant on this suggestion would be to put some of the proposals in both types of rules simultaneously (for example, where a proposal seems on the fence between interpretative and legislative status). This approach, however, may graphically focus the court's attention on the weakness of the interpretative approach; it could therefore pose serious litigation risks for the interpretative rule, and could elicit judicial opinion adversely affecting all administrative agencies.

The objectives of prompt promulgation, and of giving industry an immediate signal of the government's overall policy direction, could perhaps be achieved by initially issuing a proposed rule seeking public comment on all items. This proposed rule could be labeled "interpretative" or legislative" or remain silent as to its character. The fact that a proper interpretative rule has been voluntarily issued as a proposed rule, and subjected to public comment, does not alter its character as an interpretative rule. United Technologies Corp. v. EPA, 821 F.2d 714, 719 (D.C. Cir. 1987). Therefore, the agency could initially issue a proposed rule with a request for public comment, and then finalize certain provisions as interpretative rules very quickly after proposing them, i.e., without responding to all significant comments. At the same

time, those elements for which public comment indicated a legislative rule was more appropriate could be finalized accordingly (with a required record of public comment and response). An advantage of this approach is that once the set of initiatives were proposed as a full package, industry would see their full design and be able to make investment decisions -- and to comment -- more intelligently.

B. District of Columbia Circuit Law Regarding Interpretative Versus Legislative Rulemakings

It may be helpful to review the distinctions that the D.C. Circuit, the court that would review the WEPCO rulemakings, makes between interpretative and legislative rulemakings and the need for notice and comment.

While the Administrative Procedure Act exempts "interpretative rules" from its notice and comment procedures, 5 U.S.C. § 553(b)(A), the distinction between such rules and legislative rules that require notice and comment has aptly been described in one of our prior cases as "enshrouded in considerable smog." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984)(en banc)(quoting American Bus Ass'n v. ICC, 627 F.2d 525, 529 (D.C.Cir. 1980)(McGowan, J.)). While the District of Columbia Circuit has rejected the broad proposition that every rule with a "substantial impact" requires notice and comment, see Citizens to Save Spencer County v. EPA, 600 F.2d 844 (D.C. Cir. 1979), the court has "consistently afforded a narrow cast to the exceptions to section 553, permitting an agency to forego notice and comment only when the subject matter or circumstances divest the public of any legitimate stake in influencing the outcome." Air Transport Ass'n v. Bowen, 900 F.2d 369, 375 (D.C.Cir. 1990); cf. American Hospital Ass'n v. Bowen, 834 F.2d 1317, [] (D.C. Cir. 1987)(valid interpretative rule may have "substantial impact").

The hallmarks that the D.C. Circuit now attributes to an interpretative rule should suffice to establish that notice and comment would be advisable for most if not all of the proposed WEPCO fixes, even if we choose to defer labelling such rules as "interpretative" or "legislative" until after the notice and comment period. The law also raises the question whether notice and comment would be preferable to the affected utilities, since a comment period would include them more fully in the rule development process and provide more certainty as to the rule's binding effect (an important investment consideration). An interpretative rule is one that merely "states what the administrative agency thinks the statute or regulation means and

only reminds citizens of existing duties," General Motors, 742 F.2d at 1565, and so has no "present-day binding effect." Community Nutrition Inst. v. Young, 818 F.2d 942, 946 (D.C. Cir. 1987)(quoting American Bus Ass'n, 627 F.2d at 529). Such a rule cannot "conclusively affect the rights of private parties," American Hospital, 834 F.2d at 1045(quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980), and must "leave the agency and its decisionmakers free to exercise discretion." Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 536 (D.C. Cir. 1988); accord Community Nutrition Inst., 818 F.2d at 946. An agency cannot dispense with notice and comment, by contrast, if it intends "to establish a 'substantive' rule ... which creates or modifies rights that can be enforced against the agency." National Latino Media Coalition v. FCC, 816 F.2d 785, 788 n.2 (D.C. Cir. 1987) (Media Coalition). Such a rule is deemed legislative unless it does no more than "restate[] a consistent practice of the agency." General Motors, 742 F.2d at 1565. An interpretative rule, therefore, is not binding on the agency, third parties, or courts, and will receive only such deference "as its inherent persuasiveness commands." Batterton, 648 F.2d at 702 (footnotes omitted).

The court makes these distinctions according to specific, intelligible criteria, looking first to the label an agency attaches to its action. That label receives some deference, "but the degree [of deference] accorded to the agency on a point such as this is not overwhelming." Brock v. Cathedral Bluffs Shale Oil Corp., 796 F.2d 533, 537 (D.C. Cir. 1986)(Scalia, J.)(reviewing general statement of policy); accord Community Nutrition, 818 F.2d at 946 n.5 (same criterion as applied to interpretative rules). Courts give "far greater weight to the language actually used by the agency," Community Nutrition, 818 F.2d at 946: interpretative rules are identified only with precatory language, while "mandatory, definitive language" -- words such as "must," "shall," or "will" -- "is a powerful, even potentially dispositive factor in [the] court's determination" that a rule is legislative. McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); Community Nutrition Inst., 818 F.2d at 947. Such language necessarily denotes an agency action that "encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior," and consequently requires the notice and comment process. American Hospital Ass'n, 834 F.2d at 1034.

There is no doubt that for rules that cannot be deemed interpretative, "Congress specified that notice and an opportunity for comment are to precede rulemaking." New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980)(emphasis in original);

see also American Bus Ass'n, 627 F.2d at 599. The D.C. Circuit "strictly enforce[s] this requirement because [the court] recognize[s] that an agency is not likely to be receptive to suggested changes once they have made a 'final' determination." Air Transport Ass'n, 900 F.2d at 379. The court has suggested that there might be cases in which post hoc notice and comment would be permitted, "but only upon a compelling showing that the agency's mind remained open enough at the later stage." McLouth, 838 F.2d at 1317; accord Air Transport Ass'n, 900 F.2d at 379. Here, where the proposed interpretative rule would be incorporating the Administration's previously proferred legislative proposal, a court might be skeptical of the agency's openmindedness.

C. Assumptions in DOE Draft Memo

The DOE draft memo argues strongly in favor of interpretative rulemakings in several instances where EPA has concluded that legislative rulemaking or legislation is required. The DOE memo does not consider fully the distinctions, articulated in case law, between legislative and interpretative rules. Rather than assessing all of the indicia of a legislative rule -- in particular whether a rule changes the substantive norms to be followed by the agency and regulated public -- the memo argues only that if an existing legislative rule is subject to an interpretation (using that word in its general and broad meaning), that interpretation need not go through notice and comment rulemaking. We do not think the government could succeed in convincing the D.C. Circuit on judicial review that this is the hallmark of an interpretative rule. While some interpretations of existing regulations may properly be set forth in interpretative rules, a court will still look behind that interpretation to see what its effect is upon the regulated public. (See Part C above for a synopsis of D.C. Circuit precedent.)

DOE bases its vigorous insistence on an immediately effective set of interpretative rules on energy policy concerns. In short, DOE maintains that needed capital investment in energy facilities is being impeded by the WEPCO "cloud". We are not in a position to judge the merits of this contention. However, as pointed out above, there are other countervailing policies to consider, including the possible government-wide ramifications from adverse judicial precedent on as fundamental an administrative law issue as the respective roles of different forms of rulemaking; and there are other administrative options

for removing such a "cloud" without issuing an interpretative rule for every item.

II. COMMENTS ON SPECIFIC PROPOSALS

A. Proposals Not In Controversy

Neither we nor DOE dispute EPA's conclusion that the following proposals may not appropriately be implemented by interpretative rule:

EPA Point A (New Source Performance Standard Baseline) (Schmalensee Proposal Subsection (a));

EPA Point C (Safe Harbor Provisions) (Schmalensee Proposal Subsection (b)(2));

EPA Point D (Potential to Potential Emissions Comparison) (Schmalensee Proposal Subsection (b)(1) & (2)); and

EPA Point F (System-Wide Netting) (Schmalensee Proposal Subsection (d)).

With regard to Points A (NSPS Baseline), C (Safe Harbor), D (Potential to Potential), and F (System-Wide Netting), we agree with EPA's analysis and conclusions that legislative, notice and comment rulemaking (or for F, legislation) would legally be required. Each of those proposals would involve significant changes to the current regulatory system and could not likely be justified as a mere interpretation of an existing regulation.

The Department of Energy memo shares the view that an interpretative rule is not appropriate for Points A (NSPS Baseline), C (Safe Harbor), and F (System-Wide Netting). Similarly DOE does not appear to dispute the conclusion that Point D (Potential to Potential) would require notice and comment, though it opines that this fix would be unnecessary if EPA developed a sufficiently broad interpretative rule exempting pollution control projects (discussed next below).

B. EPA Point B (PSD Exclusion for Pollution Control Projects) (Schmalensee Proposal Subsection (b)(1)).

With regard to Point B (exclusion from the PSD

definition of "modification" of pollution control projects[2] that do not increase maximum hourly emissions), we have reservations regarding EPA's conclusion that this exclusion may be implemented by interpretative rule without notice and comment. A narrowly drawn exemption along the lines of EPA's earlier draft rule might be sustainable as an interpretative rule; however, it would depend upon how pollution control project was defined. Also, it is unclear to us what protection such a rule might provide that is not already available under the existing law. PSD rules define a "modification" to be a change which significantly increases net emissions; if a "pollution control project" means what it seems to mean,[3] it would presumably reduce emissions and therefore not constitute a "modification." In that sense, an interpretation of EPA's rules to clarify that a pollution-limiting change is not a "modification" would not be a new exemption and should not trigger notice and comment requirements.

On the other hand, the creation of an apparent exemption from PSD requirements, even if narrow, is the type of action which arguably triggers notice and comment rulemaking requirements. Alaska v. United States Dept. of Transportation, 868 F.2d 441, 446 (D.C. Cir. 1989). Note too the precedent that pollution control systems were explicitly exempted from the definition of "modification" for NSPS by promulgation of a legislative rule. See 40 C.F.R. § 60.14.(e)(5). At the same time, EPA has successfully argued in the past that a plant change that reduces emissions per unit output, but that also reduces operating costs per unit output, thus increasing consumers' utilization of the plant and hence predictably increasing total annual emissions, is subject to PSD review.[4] See Puerto Rican

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[2] We assume here that "pollution control project" is defined as indicated in the Schmalensee proposal ((g)(1)), to include changes in process design and raw materials inputs as well as "end-of-pipe" control installations."

[3] That is, if it indeed reduces pollution from current levels or baseline projections.

[4] A similar analysis has been applied in other contexts, e.g. to rebut claimed pollution advantages of proposals for higher CAFE standards: although the engineering changes induced by higher CAFE standards would increase fuel efficiency per mile traveled, they would also reduce the vehicle's operating cost per mile, hence inducing increased vehicle miles traveled and possibly increasing total emissions on net.

Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989). Since the PSD provisions currently require comparisons to be based on annual emissions, 40 C.F.R. part 52.21(B)(23), EPA could probably not switch to calculating "increase in net emissions" on an hourly basis without using a legislative rule (a point EPA acknowledges in its discussion of Point D (Potential to Potential). This implies that some amount of empirical forecasting and debate will still occur for some pollution control projects even under the Point B exemption; but pollution control projects that plainly reduce annual emissions (e.g., those that reduce pollution per unit output and increase cost per unit output) would not fall within the definition of "modification" under PSD.

C. EPA Point C (Safe Harbor Provision) (Schmalensee Proposal Subsection (b)(2)).

The "safe harbor" proposal (Point C) is, with one addition, essentially the same PSD exemption for pollution control projects as Point B, and to that extent the above analysis applies (including the need, which EPA recognizes, for notice and comment rulemaking before shifting from comparing annual emissions to maximum hourly rates). The rather significant addition is to allow an investment of up to 20% of the cost of the pollution control project in "contemporaneous physical or operational changes" at the plant without triggering PSD review. Since the additional 20% investment could significantly increase net emissions (depending on the use of the funds), it could trigger PSD review under current regulations, and we agree with EPA that it would be hard to interpret its current rules to allow a blanket safe harbor for such changes.[5]

Perhaps the problem is definitional: if the additional 20% investment is part of, or closely related to, or in support of, the pollution control project, EPA might clarify by

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[5] Indeed, the 20% expenditure test seems to bear little relation to the congressional goal of preventing ambient air quality deterioration. Perhaps, if there is a policy preference for allowing utilities installing pollution control devices to engage in contemporaneous additional modifications that could by themselves increase emissions, an emissions-based safe harbor test would be better than this dollar-based test, e.g. a test that allows a source to undertake a contemporaneous set of changes that adds emissions constituting no more than X% of the emissions reduction that would have been achieved by the pollution control project (where X is presumably less than 100).

interpretative rule that the contemporaneous changes (covering the 20% extra) need not undergo separate PSD review so long as the entire project as a whole does not significantly increase net emissions. But if the additional 20% investment is unrelated to the pollution control project but simply coincides in time, EPA could not likely use interpretative rulemaking to allow the 20% investment to cause an unreviewed increase in emissions; such an exemption would be in conflict with current regulations. See, e.g., General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 878-79 (D.C. Cir. 1979).[6]

We do not understand the comment in the DOE memo that "EPA is attempting to use this proposal to further restrict legitimate projects at existing units. EPA should not implement the 'safe harbor'." (p. 29.)

D. EPA Point E (Actual to Actual Emissions Comparison) (Schmalensee Proposal Subsection (a); see also Subsection (g)(2));

With regard to Point E (Actual to Actual), portions of the EPA memorandum are a bit difficult to follow. Most of the discussion actually deals with subsection (g)(2) of the Schmalensee proposal (defining "representative actual annual emissions" pre- and post-modification), which exempts "demand growth" from future capacity utilization when calculating future "actual" emissions.

1. EPA Point E.1 (Actual to Actual Baseline). Schmalensee Proposal Subsections (c) & (g)(2)(A) would allow EPA, for purposes of determining prior "representative actual annual emissions", to select any two year period out of the preceding

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[6] Moreover, if, as seems possible, a major purpose of the safe harbor provision is to allow utilities to engage in life extension modifications at old plants in conjunction with adding scrubbers, there would appear to be a skewing of market forces in favor of scrubbers where other acid rain pollution reduction methods might otherwise be more attractive economically. This proposal thus appears to endorse a policy decision that utilities should be encouraged to extend the life of old plants rather than meet electricity demand by other, perhaps more environmentally beneficial, methods.

five years that the Administrator considers representative of "normal operations".

We agree with EPA that a sustainable interpretative rule for this proposal appears possible. The regulations do give EPA wide discretion in determining the representative period for calculation purposes. However, we disagree with a portion of the first full paragraph on page 7 of the EPA memorandum. There the memorandum states that "a textual analysis of the regulations suggests that a source owner has complete discretion to name any two year period as the actual emissions baseline." (Emphasis added.) In fact, the text of 40 C.F.R. 52.21(b)(21)(ii) suggests that this is EPA's choice, not the source owner's; the regulation provides that EPA may "allow" a different two-year period. Perhaps EPA could issue an interpretative rule expressly "allowing" owners to choose from a range of two-year periods, such as any two consecutive years of the past five.

2. EPA Point E.2 (Post-Modification Projection). Subsection (g)(2)(B) of the Schmalensee proposal sets the time for determining "representative actual annual emissions" post-modification as the two year period following modification unless the Administrator determines that some other period within the first 10 years is more representative of normal operations. It allows the Administrator to consider projected capacity utilization in defining the emissions, but excludes from consideration increases "due to factors unrelated to the physical or operational change, including an increase in projected capacity utilization equal to the rate of electricity demand growth for the utility system as a whole."

EPA concluded that an interpretative rule was possible except for the demand growth exemption, which it said would require legislation. Like EPA, we believe an interpretative rule for most of Point E.2 is possible. Regarding the demand growth exemption, we believe EPA is generally correct in saying legislation is necessary, but this could hinge on how EPA would define the causal connection between the modifications (changes in physical plant or process) and the emissions increase. If the proposal would exempt modifications (physical changes) that are motivated by or somehow arise from anticipated demand growth, certainly EPA is correct that a legislative change would be needed. This change seems contrary to congressional intent in enacting Part C, and contrary to the plain requirement that any modification (for whatever reason) that increases emissions would

trigger review.[7] The Schmalensee proposal would exempt post-modification increases "due to factors unrelated to the physical or operational change", which might be consistent with existing law except for the fact that post-modification emissions increases must still be calculated using projections made at the time the modification is contemplated, not thereafter (since permits and offsets must be obtained in advance of the modification), so that it could be extremely difficult to distinguish modifications undertaken to accommodate projected demand growth from those simply incident to it.

Of course, a proposal limited to simply exempting increases in emissions that come from increasing utilization rates as demand grows, without any accompanying change in physical plant or process, would not require legislation, because such increases in emissions are not "modifications" and do not now trigger PSD.

DOE's memo maintains that a "demand growth exclusion" for post-change projections can be provided by an interpretative rule, contrary to EPA's conclusion that legislation would be required. Although DOE makes a policy argument for such an exclusion, the exclusion seems contrary to the PSD program as a whole[8] and inconsistent with the proposition that after the PSD review process the PSD permit issuer is to retain discretion regarding how increments are to be consumed. As noted above,

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[7] Section 111 of the Act defines modification for purposes of both NSPS and PSD as

> ". . . any physical change in, or change in the method of operation of, a stationary source <u>which increases</u> the amount of any air pollutant emitted by such source or <u>which results in</u> the emission of any air pollutant not previously emitted."

42 U.S.C. § 7411(a)(4). The pertinent question seems to be whether emission increases have "resulted from" a plant modification where that modification is what allowed a utility to continue operating an aged plant into a period of increased demand growth, and the utility responded by operating the facility at higher capacity, thereby increasing emissions. To date EPA has generally recognized a causal connection, and the Schmalensee proposal appears to reject one.

[8] <u>See</u>, <u>e.g.</u>, Section 160(3) and (5) of the Clean Air Act, 42 U.S.C. §§ 7470(3) & (5).

DOE's argument for handling this by interpretative rule fails to fully acknowledge the D.C. Circuit's legal constraints on interpretative rulemakings.

EPA Point E.3 (Modifications to Which Actual to Actual May Apply) is more difficult, but we believe that for this, too, a narrowly drafted interpretative rule for like-kind replacements might be upheld. EPA's theory is that, based in part on the decision in WEPCO v. Reilly, 893 F.2d 901, 913 (7th Cir.1990), an interpretative rule would draw a distinction between like-kind replacements and other modifications for purposes of using an actual to actual approach. While we agree that EPA might be able to draw such a distinction in an interpretative rule, we do not think WEPCO provides the justification, since we do not read that decision as drawing such a distinction -- it simply rejected EPA's approach for like-kind replacements in that case. Although the court in Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 296-97 (1st Cir. 1989), upheld EPA's approach in a case not involving like-kind replacements, neither decision states that this distinction was the basis for each court's conclusion.

EPA believes that, for types of modifications to existing units other than like-kind replacements (such as those in the WEPCO case itself), the existing regulations require an actual to potential approach. See pp. 8-9 of the EPA memo and 40 C.F.R. 52.21(b)(21)(4), which provides that "[f]or any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date."

The DOE memorandum on this point (modifications subject to the actual to actual approach) contends that EPA reads its regulations too restrictively in maintaining that this approach applies only to "like-kind" replacements. DOE is mistaken in concluding that the language of the above regulation applies only to totally new units as opposed to units which have been modified. The regulations contain no such distinction: they apply as well to an existing unit that ceases "normal operations" during a modification (e.g., is temporarily shut down), and is scheduled to resume normal operations in the future but has not yet done so. DOE errs in contending that EPA has consistently taken positions contrary to WEPCO in the past. See Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 298-99 (1st Cir. 1989) (explicitly rejecting arguments similar to those made by DOE in its memorandum). DOE's references to prior EPA rulings supporting DOE's reading of the regulations do not justify the use of an interpretative rule. There are numerous decisions which

support EPA's current reading of its regulations, and, while EPA may not have always followed its regulations, such an inconsistency does not authorize the agency to put forth an interpretative rule contrary to those regulations. General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc) (rule is legislative unless it does no more than "restate[] a consistent practice of the agency"). Moreover, where, as in WEPCO, the Agency has argued in court in favor of a particular interpretation which that court subsequently endorses in a legal opinion, prudence counsels the agency against deviating from that position without notice and comment. Moreover, DOE misreads the decision in Puerto Rican Cement Co. v. EPA, supra, in arguing that the above regulation applies only to totally new units. Contrary to DOE's assertion, that case did involve modifications (in the form of a process change) to an existing unit rather than construction of a new unit. Although the court at one point referred to the kiln as a "new" unit, the opinion later makes clear in several places that an existing kiln was simply being converted to a different production process. The parties agreed that the case involved modification of an existing unit, and the court clearly understood that to be the situation. See, e.g., 889 F.2d at 296, 297.

E. EPA Point G (Generic NOx BACT Determinations) (Schmalensee Proposal Subsection (f)).

With regard to Point G (NOx BACT), the EPA memorandum and Schmalensee proposal are somewhat difficult to follow. The text of the proposal appears designed to lock the PSD program's definition of BACT for electric utilities to the same low NOx burner technology that the acid rain title will require of utilities as part of its Section 407 NOx emissions reduction program. Under Section 407, utility boilers must employ low NOx burner technology to attain specified emissions rates, but if a source cannot achieve those rates by using low NOx burners, then the source may be excused from having to employ a more stringent technology. In other words, the proposal would guarantee that utilities could not be required under the PSD program to install more stringent control methods than the low NOx burner technology that will be the minimum required by the acid rain title.

EPA correctly notes that legislation would be required to implement this proposal, since Section 169(3) of the CAA, defining BACT, requires the permitting authority to determine BACT on a case-by-case basis, thus barring any generic BACT standard. We agree that the Agency could alternatively create a presumption in favor of low NOx burners by interpretative rule or

legislative regulation, but would suggest that this be incorporated into EPA's contemplated "top-down" BACT rulemaking.

F. EPA Point H (EPA Guidance on Routine Maintenance) (Schmalensee Proposal Subsection (h)).

With regard to Point H (Guidance on Routine Maintenance), we agree with EPA and DOE that an interpretative rule would likely be valid here. The current regulation gives EPA wide flexibility in determining what is "routine" and an interpretative rule could merely provide guidance as to what "routine" means in particular refurbishment instances. Note that the Schmalensee proposal called for notice and comment.

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