




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

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MEMORANDUM

To: William Harnett, Director
IPTID/OAQPS

From: Adam M. Kushner, Director 
AED/OECA

Subject: Air Enforcement Division's Comments on the Draft New Source Review Clean
Air Interstate Rule (August 24, 2005 draft)

Date: August 25, 2005

The Air Enforcement Division (AED) has reviewed the draft New Source Review Clean Air Interstate Rule (August 24, 2005 draft) and has significant concerns about the test proposed and the positions taken in this proposed rule. The proposed rule will adversely impact our enforcement cases and is largely unenforceable as written. AED's concerns are outlined in more detail below.

AED received the latest (and substantially revised) draft of the proposed rule on August 24th. The proposed rule represents a significant departure from heretofore applied New Source Review (NSR) emissions tests for electric generating units (EGUs). We are diligently working to assess the impact the proposed rule will have on both the filed cases as well as our ability to bring future enforcement actions, as appropriate. In addition, we are assessing the relative enforceability of the proposed rule as drafted. While we have completed a good deal of work (which we share below), our work to assess the impact of the rule continues. We will be certain to share with you the additional work we perform as it becomes available.

We will not restate our prior general comments on earlier drafts of the proposed rule as contained in our memoranda of June 30, 2005 and August 18, 2005. However, to the extent that the latest proposed draft of the rule does not reflect those comments, we again request that such comments be addressed in subsequent drafts of the proposed rule. Thank you for the opportunity to comment on this draft and I look forward to discussing these matters with you.

The Emissions Tests

We stated in the draft rule that one of its purposes is to ensure that existing sources that increase their operating capacity be subject to major NSR permitting. In the section of the draft rule entitled "Significant Emission Rates," OAR states:

By eliminating the use of a significant rate, we balance the differences in these tests, and focus permitting authority resources on reviewing all changes that result in increases in existing capacity. We believe that this result is consistent with our interpretation of Congressional intent in that it assures that, at a minimum, capacity increases undergo major NSR review.

See Draft Rule at p. 23.¹

To assess whether the proposed alternative applicability test(s) in the rule in fact preserve EPA's stated intention to capture modifications that increase emissions as a result of an increase of capacity, AED analyzed emissions data obtained from EPA's Clean Air Markets Division from units with known capacity increases. AED evaluated such data both pre- and post-change. The changes selected for analysis were based on data availability. The results of our analysis are set forth in Attachment A to this memorandum.

As currently written, the draft rule sets forth two possible methods that an EGU could apply in assessing whether or not a change would trigger major NSR. As we understand the "achievable" emissions test proposal, an EGU must obtain a major NSR permit if the modification to be made increases the maximum achievable hourly emissions.² To apply the proposed test, an EGU would first select a maximum achievable hourly emission rate that could have been obtained within the five years before the change. It would then project what the maximum achievable hourly emission rate could be after the change. If the projection shows that the change would cause an increase in the maximum achievable hourly emission rate, the source would trigger major NSR and would need to apply for and obtain a pre-construction permit before performing the change.

AED believes that a utility would have many ways to show that a particular capacity is or was theoretically achievable, which makes analysis of the impact of the test difficult and application of the test largely unenforceable. Because most of the information and data that might inform application of the test would be solely in the possession of the EGU (under the draft

¹ As noted elsewhere in this memorandum, AED believes that conflating the emissions test for triggering NSR with the NSPS emissions test is contrary to Congressional intent. See *State of New York v. EPA*, Slip op. at pp. 9-11, 24-26.

² Compare Definition of "major emitting facility" at CAA Section 169 (1) ("stationary sources which emit or have the potential to emit, one hundred tons per year or more."

proposal as written), a permitting authority would have exceedingly difficult time assessing whether or not a change at an EGU in fact triggered NSR. Thus, this theoretical achievable test creates a subjective test leading to a "battle of the experts," and consequently greatly handicaps the efficient administration of a meaningful pre-construction permitting program. The proposed test will make it difficult for both a utility and the regulators to assess the compliance status of an EGU.

An illustration of the problems associated with such a test is contained in our analysis of a project at Case Study # 2. See Attachment A page 12. See Attachment A. In this example, a reasonable theoretical "achievable" emission rate was calculated using the methodology described in this memorandum. Using this method, the achievable hourly emission rate was calculated to be more than ten times higher than the average hourly emission rate in the five-year period prior to the change. Comparison of this baseline to a calculated maximum achievable emission rate after the change would make meaningful analysis of the change impossible, because the achievable emission rate is not a clear indicator of capacity. Any increase in capacity or emissions caused by this change would not register because the comparison takes place at a level 10 times higher than representative emission rates of the unit.

In addition, because NSR is a pre-construction permitting program, the unit would retain the ability to apply for a limit at this achievable hourly rate. Since the rate is not based on representative emissions and is not indicative of capacity, a source could increase capacity significantly and still not exceed the limit. Because the analyses in the attachment were performed using actual operating data, and, presumably, the rule would not restrict the calculation of achievable emissions, we would expect a source to calculate achievable emission rates higher than those in these examples by using theoretical heat rates or emission rates, exacerbating the enforceability problem.

Because of the difficulties associated with anticipating all of the arguments which a utility could make as to what is or is not "achievable," AED used actual maximum historical emissions coupled with maximum heat rate data to analyze the "achievable" test. AED believes that this approach is more conservative, and consequently probative of the practical implications of the proposed "achievable" test (i.e., it has a better chance of triggering the NSR pre-construction permitting requirements) than applying the "achievable" test to determine what emission rates were potentially or theoretically "achievable."

For each case study, the baseline level is represented as a horizontal line across the graph. The maximum achievable hourly baseline represented in the attached case studies were calculated using the maximum heat rate, expressed in mmbtu/hr, multiplied by the maximum emission rate, expressed in lbs/mmbtu, within the years prior to the change, but no earlier than 5 years before the

modification.³ Significantly, these two input values (heat rate and emission rate) may not have been (and are not typically in the real world) temporally coincidental. AED believes that the draft rule allows such an interpretation, although we strongly suggest that there would be no basis for characterizing such an approach as representative of operations of an EGU either prior or subsequent to a change.

AED further understands that we are proposing to seek comment on an alternative emissions test that would use an "achieved" baseline calculated by using the maximum hourly emission rate, in lbs/hr, in the 5 years prior to the change. As we understand this proposal, an EGU must obtain a major NSR permit if the change is projected to cause an emissions increase above an actually achieved maximum hourly emission rate. An EGU would first select a maximum achieved hourly emission rate that occurred within the five years before the change. It would then project what the maximum hourly emission rate could be after the change. If the projection showed that the change would cause an increase in the hourly emission rate, the source would need to obtain a major NSR permit before performing the change.

The achieved baselines represented in the attached case studies set forth in Attachment A, were selected as the maximum hourly emission rate, expressed in lbs/hr, within the years prior to the change, but no earlier than 5 years before the modification. No calculation of this baseline was necessary because the CAMD data contain these values.⁴ As with our previous analysis, AED compared the baseline level to actual emission rates that occurred after the change to identify any hourly emissions rates which exceeded the baseline level.

³ Data collected by the Clean Air Markets Division's is available for the calendar year beginning in 1995. As a consequence, where a change occurred before 2000, less than five years of emissions data was available to be used in determining baseline emissions. Please also note that for some units, we have identified a very small subset of hourly data which is clearly outside a reasonable operational range, which we attribute to data substitution, continuous emission monitor malfunction or other reasons. There was probably no need for CAMD to address these data issues in that the acid rain program evaluates EGU performance on an annual, not hourly, basis. For this subset we have applied a data correction factor which eliminated the extreme 0.1% of heat rate data points only. After application of this correction factor, all the data seemed to fall within reasonable operating parameters. See e.g., Comanche analysis at Attachment A. As noted above and elsewhere in this memorandum, the proposed rule does not allow for any data correction nor does it have any requirement that the maximum achievable hourly rate or emission rate be representative of operating conditions.

⁴ Note that the preamble states that these two baselines should be similar. As illustrated in the attached graphs, this is not the case. The analysis of this "achieved" proposal contains the same data limitations noted above.

The attached analysis shows that even where we have known capacity increases, the proposed test and the test for which EPA seeks comments, does not fulfill the stated intent of the proposed regulation. Consequently, one can only conclude from application of the so-called “achievable” test that no “change” causing an emissions increase (capacity or otherwise) at an EGU would trigger NSR requiring the source to seek a pre-construction permit from its permitting authority and install pollution controls. Moreover, one can only conclude from application of the so-called “achieved” test that only under the rarest of operational circumstances would a “change” causing an emissions increase (capacity or otherwise) at an EGU trigger NSR requiring the source to seek a pre-construction permit.

Specific Comments on Proposed Rule

The following are AED’s specific comments to the August 24, 2005 draft rule:

- Language: Pages 3, 11: “The revised applicability test is the same as that in the New Source Performance Standards Program under CAA Section 111.”
- Comment: We suggest that you modify the sentence as follows: “The revised applicability test is the same as that for the emissions test for the New Source Performance Standards Program.” The modified sentence emphasizes that it is the emissions aspect of the new source performance standards (NSPS) program applicability test only that is being purportedly adopted for purposes of measuring emissions increases in the NSR program. Such an approach will give us a better chance of disentangling the proposed rule from the issues raised in the *Duke* and *New York* matters, while minimizing collateral and unintentional adverse impacts on the NSPS program for other non-EGU sources. We believe, however, a better approach would be to not tinker with the NSR test at all. Nonetheless, should a decision be made to alter the NSR applicability test for EGUs we suggest that a new and distinct NSR rate-based test be developed that, at a minimum, in fact captures emission increases that are the result of unit expansions and design changes. We suggest that the proposed rule be conformed in its entirety to conform to this recommendation.
- Language: Pages 3 and 11: “we are proposing to compare the *maximum hourly emissions achievable* at that unit during the past five years to the maximum hourly emissions achievable at that unit after the change . . .” Compare to page 16: “by comparing the pre-change *maximum achievable actual hourly emission rate* to the post-change maximum achievable actual hourly emission rate assuming the source is operating at its maximum operating capacity.
- Comment: The language used to identify the test should be referenced consistently

throughout the draft rule. Based on the language offered it is difficult to discern whether OAR intends to propose a "maximum achievable hourly emission rate" test or a "maximum achievable *actual* hourly emission rate" test. AED prefers the latter formulation.

- Language: Page 12: "There is little additional benefit to be gained by applying the requirements of the major NSR program to existing sources that modify without changing their current operating capacity."
- Comment: As discussed in detail above in the Section of this memorandum entitled "The Emissions Test," the "achievable" test offered by OAR in the draft rule is not triggered by an increase in "current operating capacity," and the "achieved" test is triggered only in rare instances.
- Language Page 12: "We designed these regulatory systems [cap-and-trade] to encourage reductions from the higher, less efficient emitters . . ." *See also* p. 37
- Comment: While it may be true that the intent of EPA in fashioning the cap-and-trade programs over the years is to encourage reductions from the higher, less efficient emitters, and while in fact it may be the case that some utilities have elected to install controls on those dirtier plants, our experience demonstrates that in fact many "higher, less efficient emitters" have not been controlled.
- Language: Page 11: "[f]or existing EGUs, we are proposing to compare the maximum hourly emissions achievable at that unit during the past five years to the maximum hourly emissions achievable at that unit after the change to determine NSR applicability.
Page 21: "As a practical matter, little difference exists between our proposed maximum achievable hourly emissions test and this [achieved] alternative. Both approaches provide a measure of a source's actual emissions."
- Comments: As noted above in the Section of this memorandum entitled "The Emissions Test," it is unclear how a maximum hourly emissions achievable test would be applied in practice, as there are many ways one could formulate such a test or demonstrate what is "achievable." Consequently, it is difficult to compare the two tests and the question remains as to how either test measures actual emissions when neither consider hours of operation.

As written the draft rule would permit a utility to rely on *any* "maximum hourly achievable emissions" to both establish an emissions baseline and to project its emissions post change. This is problematic because the rule fails to proscribe that the maximum hourly achievable emissions be representative of typical operating conditions and be representative of good air pollution control practices. Failure to establish data standards will afford a utility an opportunity to rely on artificially high, non-representative emissions data. For this reason, application of any test should require that the data used by a utility be representative of typical operating conditions and good air pollution control practices.

The stated intent of the rule is to capture emissions increases that are the result of modifications that are caused by an increase in design capacity. We have two overarching concerns with these statements. First, an increase in achievable or achieved emissions is not in and of itself and indicator of an increase in capacity. Second, the emissions impact from recapturing lost utilization or through life extension projects are equal to (and in many instances) greater than emissions increases that may result from capacity and expansion projects. Thus, there is no rational basis for establishing a test that excludes emissions increases associated with boiler changes that are intended to recapture lost utilization or extend the life of a unit. Third, as proposed, and as demonstrated in Attachment A, NSR is not necessarily triggered where there *are* capacity increases, notwithstanding significant emission increases.

Language: Page 13: "Once the Court's opinion is entered into the record (what's correct terminology for this)"

Comment: There is no mention that EPA is seeking reconsideration of either or both the *Duke* and/or *New York v. EPA* decisions. In addition, the summaries of both decisions contained on pages 75-77 is inaccurate as it is incomplete. Given the pendency of both decisions, it is unwise to comment on either decision at this time in a way that may hurt our chances in either case, should an appeal be granted.

The discussion of the D.C. Circuit's decision in *Alabama Power* on pages 78-79 of the proposed rule also re-characterizes that decision in a way that is contrary to one of the central holdings of the D.C. Circuit in that case. In *Alabama Power*, the D.C. Circuit remanded an EPA regulation exempting changes below a certain size from PSD coverage, finding that EPA could grant only limited exemptions from the permitting requirements of the Act. *Alabama Power*, 636 F.2d at 400. The discussion of the *Alabama Power* decision on pages 78-79 of the proposed rule glosses over the fundamental point that exemptions to the term modification should be narrowly construed. The D.C. Circuit also noted that the Act would

clearly require “grandfathered” industries to undergo PSD review if they made modifications, even though this would be costly and inconvenient: “If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are *de minimis*, and when the increases are offset by contemporaneous decreases of pollutants. . . .” 636 F. 2d at 400.

Language: Footnote 2

Comment: There are many instances in the draft rule (including footnote 2) where the drafting of the rule appears incomplete. AED reserves its comments on those portions of the draft until such language is offered for review.

Language: Page 15, “Unlike our NSPS regulations, our major NSR regulations do not contain a specific definition of the term “modification.”

Comment: While perhaps technically correct, it is misleading to say that the NSR regulations do not contain a definition of “modification” when in fact we have been effectively arguing to the contrary in our briefs in the various court proceedings at which the issue has been joined. We suggest revising this statement to comport with what has been stated in our filed briefs, which reflects the consensus amongst all the interested EPA offices.

Language: Page 20 and the paragraph that follows: “[w]e are not proposing to change the types of physical or operational changes regulated by the major NSR program.”

Comment: While it is true that the draft rule does not in fact re-define what physical or operational changes are modifications for NSR purposes, the effect of the rule is to make very few, if any, changes modifications that trigger NSR.

Language: Page 21: “The pre-change maximum actual hourly emission rate would be the *average rate* at which the EGU actually emitted the pollutant within the 5-year period immediately before the physical or operational change.”

Comment: This language describes the “slightly revised” version of the proposed maximum achievable hourly emissions test, based on assessing an emission unit’s historical maximum hourly emissions. First, “average rate” is a new term and needs to be defined to be enforceable. Second, see comments below regarding enforceability generally of these proposals (*i.e.*, lack of record keeping/reporting requirements, discussion of prospective only effect of the new test). Third, see comments above, in the context of discussing the proposed “achievable” regarding the need to ensure that a source relies on data that is typical of its operations and representative of good

air pollution control practices. The same concerns are at issue with respect to the proposed "achieved" test.

Language: Page 21: "Both approaches provide a measure of a source's actual emissions."

Comment: The "achievable" test is a measure of the "potential" emissions of a source (and not an accurate one at that) in the classic and historic sense of the use of that term. Unless the draft rule incorporates standards regarding representativeness of data and data correction, neither the "achievable" or "achieved" test can be characterized as an accurate measure of actual emissions as a source would be able to inflate its baseline or change its practices to ensure that NSR was never triggered.

Moreover, the draft proposed rule should indicate explicitly that EPA is considering whether the NSPS test is an "actuals" test in the sense meant by the D.C. Circuit in NY v. EPA. The proposed rule should further highlight that EPA is taking comment on that particular issue. Doing so (rather than indicating or implying that EPA has already so decided) will (1) make the rule more defensible by defusing criticism that EPA without explanation (*i.e.*, arbitrarily and capriciously) reversed course from the position expressed in the enforcement briefs (in Duke most notably) and (2) keep the Fourth Circuit (and other courts with pending enforcement actions) from accusing EPA of being duplicitous (or at least minimize that chance). Taking a definitive position in a proposal rather than in a final rule is not necessary, and we fail to see how it gains us anything rather than merely inviting attack in both the inevitable petitions for review and the pending enforcement actions.

Adjustments could be made in this vein to page 21 (for instance, taking out the sentence "Both approaches provide a measure of a source's actual emissions.") and the paragraph on pages 82-83 (the paragraph beginning "As we explained in the statutory and regulatory background section, we codified the maximum hourly emissions test in the NSPS program as a way of measuring actual emissions to the atmosphere."). We could there include a sentence or a footnote stating: "For such reasons, some parties have suggested that the NSPS test measures 'actual' emissions in the sense meant by the D.C. Circuit in New York v. EPA. We invite comment on that issue." Gratuitous references to the NSPS test being an "actuals" test (*e.g.*, on page 16, in the repeated phrase "maximum achievable actual hourly emission rate") should also be removed.

Language: Page 22: We are concerned that adopting this alternative approach would undermine some of secondary policy objectives supporting this proposal. We stated that two of our goals for this proposal are to streamline the regulatory requirements applying to EGUs by allowing EGUs to apply the same test for

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measuring emissions increases from modifications under both the NSPS program and NSR program, and to provide some nationwide consistency in the emissions calculation procedures in light of the Fourth Circuit's decision in Duke.

Comment: These goals are not met under either an achievable or achieved test because: 1) the proposed NSR emissions test does not accurately reflect the current NSPS emissions test; 2) the proposed NSR test and the current NSPS test are not the same because differences will still remain in application of the term "modification" as recognized on page 20 of the draft proposed rule; 3) the proposed new NSR emissions test and the current NSPS emissions test will still be different for PM and CO after promulgation of this rule.

Language: Page 23, and seriatim: The use of the term "significant rates," "significant emissions rate."

Comment: The draft rule is unclear by what is meant by "significant emissions rates." The discussion appears to distinguish between "significant rates" and "significant thresholds" but the loose use of those terms causes the discussion to be confusing.

Consistent with the stated intent of the rule, in AED's view, no significance threshold (level) should attach to emissions increases associated with an increase in design capacity.

Language: Page 28: "We believe that implementing our proposed maximum achievable hourly emissions rate test for EGUs offers significant benefits over the existing actual-to-projected actuals emissions test" and the paragraph that follows.

Comment: Since as written NSR would never be triggered it is fair to say that the so-called "alternative applicability test" would reduce the administrative burdens.

Language: Page 29, "It reduces record keeping and reporting burdens on sources because compliance will no longer rely on synthesizing emissions data into rolling average emissions."

Comment: The referenced statement is unclear. This is the only instance in the entire proposal where either record keeping or reporting requirements are discussed. The proposal does not put any obligation on the source to maintain records to support a claim that it has not triggered NSR. Significantly, enforcement and enforcement impacts of the proposed rule are not addressed *at all* in the proposal. Absent record keeping and reporting requirements the rule is effectively unenforceable. *See State of New York v. EPA*. Further, the records that an EGU maintains that would bear on a

determination of whether NSR is triggered as a result of a change is no different under the current test than under the proposed test. Moreover, a sources obligation to maintain such records exists independent of the NSR program. For example, hourly data and annual emissions for SO₂ and NO_x are recorded and reported by a source to EPA in order to comply with Title IV and now CAIR. Similarly, records of changes made to a unit are recorded and reported independent of the NSR program -- i.e., for, inter alia, the IRS and public utility commissions.

Language: Page 29: The draft rule does not state that it is intended to apply to prospective conduct only.

Comment: We again urge you to include in the proposed rule the same language that was inserted into the equipment replacement proposal regarding enforcement and that the proposal does not affect past/future conduct (and associated liabilities) of the source. In addition, we must insist that we review the proposed language to ensure that it addresses our concerns. We recite some of the relevant ERP language below with conforming changes noted in brackets:

Today's rule provides revisions to the major NSR program to specify [a new emissions test that will become applicable] in the future. As recognized by the U.S. Supreme Court, an agency may not promulgate retroactive rules absent express congressional authority. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). The CAA contains no such expressed grant of authority, and we do not intend by our actions today to create retroactive applicability for today's rule. 42 U.S.C. 7401 et seq. Today's rule applies only to conduct that occurs after the rule's effective date. None of today's rule revisions apply to any changes that are the subject of existing enforcement actions that the Agency has brought and none constitute a defense thereto. Furthermore, prior applicability determinations on major modifications that result in control requirements in an NSR permit that currently applies to a source remain valid and enforceable as to that source. [Once effective,] if you subsequently undertake an activity that does not meet the applicable provisions of these new [provisions] and do not obtain a preconstruction permit if you are required to do so, you will be subject to any applicable enforcement provisions (including the possibility of citizens' suits) under the applicable sections of the CAA. Sanctions for violations of these provisions may include monetary penalties of up to \$27,500 per day of violation, as well as the possibility of injunctive relief, which may include the requirement to install air pollution controls.

Language: Page 29: "The CMA Exhibit B Settlement Agreement" approach.

Comment: We have not reviewed the referenced settlement agreement and consequently we are unclear of its terms. Please forward a copy of the settlement agreement at the earliest possible opportunity.

Language: Page 41: "These analyses [by economists] assert that NSR requirements allow existing sources to operate under less stringent emissions standards than new sources."

Comment: Prior to EPA's coal-fired enforcement initiative few, if any, EGUs sought NSR pre-construction permits because of the industry-wide held view (rightly or wrongly) that changes to their boilers (no matter the magnitude) were routine and therefore exempt. However, in recent years many sources (both existing and new) have sought and obtained NSR permits. A review of those permits, the control requirements, and the emission limits required indicates that existing sources are operating under (in many instances) as, or more, stringent standards than new sources. We also note that much of the literature that is relied upon to support the efficiency and stringency arguments pre-date the coal-fired enforcement initiative.

Language: Page 54, Relationship of BART and CAIR, and discussion about non-CAIR units not subject to BART

Comment: There are several reasons why we believe that extending the alternative test to non-CAIR units and relying on BART to do so is misplaced. CAIR has a regional emission cap backstop for both NO_x and SO₂, BART does not. BART applies only to facilities constructed between 1962 and 1977, and only those that directly impact Class 1 areas. All non-CAIR EGUs constructed prior to 1962 or after 1977 would be receiving the benefit of the proposed new rule, but would not have the BART or CAIR backstop. BART applies to all major sources of NO_x and SO₂ (26 major source categories) and is not limited to just EGUs, creating arguments for other non-EGU sources to argue that the NSR alternative emissions test should apply to them. CAIR assumes NO_x-controlled units will meet a presumptive limit of 0.05 lb/mmBtu and a regional limit of 0.125 lb/mmBtu in 2015. BART presumes that subject units will meet a presumptive limit between 0.15 - 0.62 lb/mmBtu for NO_x and does not require a regional or national rate limit or ton cap. CAIR assumes SO₂-controlled units will have removal efficiencies of approximately 98%. BART assumes SO₂-controlled units will have removal efficiencies of between 90-95%, or even lower if using low sulfur coal. We have stated in the CAIR rule that BART is

not as effective as CAIR in obtaining emission reductions. Finally, NSR requires BACT or LAER at a source where there is a modification, but neither CAIR nor BART require the same.

Language: Pages 61-62, discussions about how CAIR and BART programs are expected to protect local air quality.

Comment: This issue is never really addressed. There is considerable discussion as to how CAIR will improve air quality throughout the Eastern United States, and there is little doubt that the emissions reductions that will be realized from implementation of CAIR represent a dramatic improvement from existing emissions levels. However, CAIR does not require a source to install BACT/LAER-type controls to meet its CAIR obligations (although out of necessity it may have to). Moreover, in the instance where a source might install BACT/LAER-type of controls there is nothing in CAIR that would require a source to operate those controls at BACT/LAER-levels or to even operate such equipment at all times. This is an issue because as we acknowledge in the CAIR rule making package and preamble some areas will remain in non-attainment even after full implementation of CAIR. Thus, we believe that NSR remains an important tool in ensuring that the Clean Air Act's air quality objectives are achieved, and once achieved maintained (as envisioned by Congress). For this reason, and as discussed above, we believe that so-called applicability test(s) as proposed does not comport with Congressional intent and should be revised consistent with the concerns reflected in the comments in this memorandum in the section entitled "The Emissions Test."

Language: Page 63, fn. 37: "As explained above, such new sources may take the form either of entirely new facilities or expanded or modified facilities, or of expanded or modified operations which result in substantially increased pollution. . . ."
Page 64, "we interpret the Congressional history to show that at a minimum, Congress was concerned about regulating new sources of emissions caused by expanding or modifying the existing capacity of operations, as the following two statements indicate"

Comment: This notion is fatal to our cases to the extent "expanded" is measured from design capacity or capacity at the time of original placement into service or original permitting. This also appears to be inconsistent with the D.C. Circuit decision in *Alabama Power*. This is Duke's, and every other Defendant's, favorite defense in the NSR enforcement cases: we have not expanded capacity and, consequently, NSR was not triggered. The views expressed in the draft rule are inconsistent with the D.C. Circuit's decision in *Alabama Power*, wherein the court rejected the idea that Congress intended to cover only physical changes that resulted in increased

operating capacity. The court noted that the legislative history indicates that one Senator thought this was the proper scope, but that Congress rejected this notion. The D.C. Circuit stated: "Describing the scope of the senate bill, Senator Buckley stated 'No significant deterioration' is a policy that has no effect on existing sources, unless a source undertakes a major expansion program. . . ." When this debate took place, the statutory language did not apply PSD preconstruction review to source "modification." In November 1977, the Senate and House passed technical amendments, one of which had the effect of defining "construction" to include "modifications." It was this new language that had the effect of overriding Senator Buckley's interpretation of the meaning of 'no significant deterioration.'" *Alabama Power*, 636 F.2d 323, 400 (D.C. Cir. 1979). We suggest that all references to expanded and congressional intent as to the NSPS be deleted.

Language: Page 68: "However, since the NSPS test is based on actual operating capacity rather than design capacity, we believe that the potential-to-potential terminology can be misleading, and prefer the name 'maximum achievable hourly emission rate'"

Comment: As demonstrated in "The Emissions Test" section of this memorandum, the proposed achievable test does not reflect emissions at operating capacity or even during typical operating conditions. Moreover, there is little ability for the permitting authority to meaningfully distinguish between operating and design capacity particularly where a utility conflates the two to support an inflated baseline.

Language: Page 76-77: *Duke Energy* discussion.

Comment: See discussion above regarding characterization of the status of the decision and EPA's request for rehearing *en banc*.

Language: Page 88, "In a 2003 (cite RMMR) rule, we articulate our position that activities designed to promote safety, reliability and efficiency of emissions units should not be subject to major NSR, yet it is often these types of projects that raise questions as whether post-change emissions are related to a change."

Comment: The ERP rationale should not be re-stated here without also acknowledging that the rule has been stayed. We suggest you delete this sentence altogether.

Language: "Major NSR Program"

Comment: Need to expressly and plainly state that the draft rule would be prospective only. As discussed above, we suggest lifting the "prospective only" language from the ERP and inserting it in the draft rule.

Conclusion

Thank you for the opportunity to comment on the draft rule. We believe that a good deal of additional work and analysis should be done before finalizing the proposed rule and making it available for public comment. Not only does the text of the preamble itself need to be revised to better identify what we are specifically proposing, but the impact of the proposed rule needs to be better understood. As you can see from our analysis, the proposed test(s) do not reflect the stated intent of the proposed rule -- *i.e.*, to have an increase in emissions associated with an increase in operating capacity trigger NSR pre-construction permitting requirements.

