ORAL ARGUMENT SCHEDULED FOR MAY 8, 2026

Case No. 18-1149 (and consolidated cases)

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

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

AIR PERMITTING FORUM, *et al.*,
Intervenor-Respondents.

ON PETITIONS FOR REVIEW OF ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF INTERVENOR-RESPONDENTS AIR PERMITTING FORUM, *et al.*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Federal Rule of Appellate Procedure 26.1(d) and Circuit Rules 26.1 and 28(a)(1)(A), the following Certificate as to Parties, Rulings, and Related Cases is made on behalf of Intervenor-Respondents:

I. Parties and *Amici*

Petitioners:

No. 18-1149: Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club.

Nos. 21-1039, 21-1259, and 25-1179: Environmental Defense Fund, Environmental Integrity Project, Natural Resources Defense Council, and Sierra Club.

Respondents:

Environmental Protection Agency (EPA) and Lee Zeldin in his capacity as Administrator of the U.S. EPA.

Intervenors:

Air Permitting Forum, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest and Paper Association, American Fuel and Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Auto

Industry Forum, Brick Industry Association, Council of Industrial Boiler Owners, The Fertilizer Institute, and American Cement Association.

***Amici*:**

There are no *amici* in these consolidated cases.

II. Rulings Under Review

No. 18-1149: EPA's memorandum entitled "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," (Mar. 13, 2018), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0048-0008, JA1; notice of issuance published at 83 Fed. Reg. 13,745 (Mar. 30, 2018), JA425.

No. 21-1039: EPA's rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 85 Fed. Reg. 74,890 (Nov. 24, 2020) (Accounting Rule), JA10.

No. 21-1259: EPA's action entitled "Denial of Petition for Reconsideration and Administrative Stay: 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,'" 86 Fed. Reg. 57,585 (Oct. 18, 2021), JA30.

No. 25-1176: EPA's action entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule," 90 Fed. Reg. 34,206 (July 21, 2025), JA32.

III. Related Cases

There are no related cases pending before any court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor-Respondents make the following disclosures:

The Air Permitting Forum is a "trade association" within the meaning of D.C. Circuit Rule 26.1 that advocates for the appropriate implementation of the Clean Air Act and other relevant statutes on behalf of its member companies. The Air Permitting Forum also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. The Air Permitting Forum's members operate manufacturing facilities throughout the U.S. and as a result would be subject to the requirements at issue in the rule and memorandum challenged in this case. The Air Permitting Forum has not issued shares or debt securities to the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in the Air Permitting Forum.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is a "trade association" within the meaning of Circuit Rule 26.1(b). The Chamber is a non-profit, tax-exempt

organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has a 10 percent or greater ownership interest in the Chamber.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). The NAM has no parent corporation, and no publicly held company has 10 percent or greater ownership in the NAM.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to

address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $768 billion enterprise and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for fourteen percent of all U.S. goods exported. ACC states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). ACC has no parent corporation, and no publicly held company has 10 percent or greater ownership in ACC.

The American Coke and Coal Chemicals Institute (ACCCI) is an association for the metallurgical coke and coal chemicals industry. ACCCI members include U.S. merchant coke producers and integrated steel companies with coke production capacity, as well as the companies producing coal chemicals in the U.S. and suppliers to these companies. ACCCI states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). ACCCI has no parent company, and no publicly held company has a 10 percent or greater ownership interest in ACCCI.

The American Forest & Paper Association (AF&PA) serves to advance public policies that foster economic growth, job creation and global competitiveness for a vital sector that makes the essential paper and packaging products Americans use every day. The U.S. forest products industry employs more than 925,000 people, largely in rural America, and is among the top 10 manufacturing sector employers in 44 states. Our industry accounts for approximately 4.7% of the total

U.S. manufacturing GDP, manufacturing more than $435 billion in products annually. AF&PA member companies are significant producers and users of renewable biomass energy and are committed to making sustainable products for a sustainable future through the industry's decades-long initiative — *Better Practices, Better Planet 2030*. AF&PA states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). AF&PA has no parent corporation, and no publicly held company has 10 percent or greater ownership in AF&PA.

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). AFPM has no parent company, and no publicly traded corporation owns 10 percent or more of its stock.

The American Iron and Steel Institute (AISI) is a trade association that serves as the voice of the American iron and steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI's membership is comprised of integrated and electric arc furnace steelmakers, and associate members who are suppliers to, or customers of, the steel industry. AISI states that it is a "trade association" within the meaning

of Circuit Rule 26.1(b). AISI has no parent corporation, and no publicly held company has 10 percent or greater ownership in AISI.

The American Petroleum Institute (API) is a national trade association with over 625 corporate members that represents all aspects of America's oil and natural gas industry, including producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). API has no parent corporation, and no publicly held company has 10 percent or greater ownership in API.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, an industry that provides approximately 400,000 men and women in the U.S. with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). AWC has no parent corporation and no publicly held company has a 10 percent or greater ownership interest in AWC.

The Auto Industry Forum represents the interests of U.S. auto and light duty truck manufacturers with respect to the appropriate implementation of the Clean Air Act as it applies to its facilities and for other relevant statutes on behalf of its member companies. The Auto Industry Forum also participates in administrative proceedings before EPA under environmental statutes and in litigation arising from those proceedings that affect its members. The Auto Industry Forum's members operate auto and light duty manufacturing facilities throughout the U.S. and as a result would be subject to the requirements at issue in the rule and memorandum challenged in this case. The Auto Industry Forum states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). The Auto Industry Forum has not issued shares or debt securities to the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in the Auto Industry Forum.

The Brick Industry Association (BIA) is a national trade association representing clay brick manufacturers, distributorships, and their suppliers. Two thirds of all the brick shipped in North America is manufactured by BIA members. BIA states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). BIA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in BIA.

The Council of Industrial Boiler Owners (CIBO) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and

University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations. CIBO states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). CIBO has not issued shares to the public and has no parent company.

The Fertilizer Institute (TFI) is a national trade association that represents the nation's fertilizer industry, including processors, importers, retailers, wholesalers, and companies that provide services to the fertilizer industry. It is governed by a board of directors representing the importing, manufacturing, wholesale and retail sectors of the industry. TFI has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in TFI. TFI is a "trade association" within the meaning of Circuit Rule 26.1. TFI is a continuing association operating for the purpose of promoting the general commercial, regulatory, legislative, or other interests of its membership.

The American Cement Association (ACA), founded in 1916, is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. ACA members represent 92 percent of US cement production

capacity and have facilities in all 50 states. ACA promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and generally promotes economic growth and sound infrastructure investment. ACA states that it is a "trade association" within the meaning of Circuit Rule 26.1(b). ACA has no parent corporation, and no publicly held company owns a 10 percent or greater interest in ACA.

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GLOSSARY

Accounting Rule	"Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," promulgated at 85 Fed. Reg. 74,890 (Nov. 24, 2020).
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NSR	New Source Review
PEA	Project Emissions Accounting

INTRODUCTION

This case is the result of a long-running effort by Petitioners to expand the applicability of certain Clean Air Act permitting requirements—known as "major new source review" or major NSR—beyond that intended by Congress. If successful, the result will be a major New Source Review program that runs counter to Congress's intent to promote both enhancement of the nation's air resources and the productive capacity of the population. 42 U.S.C. § 7401(b)(1). The U.S. Environmental Protection Agency's (EPA's) Project Emissions Accounting Rule (Accounting Rule) is consistent not only with the statutory provisions at issue but also with the relevant regulatory text and with EPA's implementation of these regulatory provisions for at least nearly two decades. The Rule should be upheld.

Specifically at issue here are EPA actions—a 2018 interpretive memorandum and the 2020 Accounting Rule—that assert the unremarkable proposition that in determining the emissions effects of a project at an industrial plant (like an auto assembly plant, a paper mill, a steel mill, or a chemical plant), it is important to address both how the project might increase emissions and how it might decrease emissions.[1] EPA concluded that this proposition follows from the best reading of

[1] The consolidated cases address four final agency actions: (1) EPA's memorandum entitled "Project Emissions Accounting Under the New Source Review Preconstruction. Permitting Program," (Mar. 13, 2018), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0048-0008, JA1; notice of issuance published at 83 Fed. Reg. 13,745 (Mar. 30, 2018), JA425;

the statute in which Congress dictated major New Source Review permitting requirements for those projects that actually "increase[]" emissions. 42 U.S.C. § 7411(a)(4). EPA also concluded that the proposition is sound policy and fits with the statutory language and purpose in that it promotes the implementation of projects that include emissions reductions and pollution prevention, which are referenced in Section 101(c) of the Act. *See* 42 U.S.C. § 7401(c). Petitioners' assertion that projects that reduce emissions should nonetheless be treated as if they increase emissions is plainly at odds with both common sense and the law. EPA's actions squarely apply the law and simply serve to clarify its pre-existing rules.

In issuing this rule, EPA acted in a manner consistent with the purpose of the major New Source Review program—to ensure that when major investments that significantly increase actual emissions are undertaken at major-emitting industrial facilities, emission controls can be designed into the project at that time. The Accounting Rule best interprets the relevant statutory provisions, correctly striking

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(2) EPA's rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting," 85 Fed. Reg. 74,890 (Nov. 24, 2020) (Accounting Rule), JA10; (3) EPA's action entitled "Denial of Petition for Reconsideration and Administrative Stay: 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,'" 86 Fed. Reg. 57,585 (Oct. 18, 2021), JA30; and (4) EPA's action entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule," 90 Fed. Reg. 34,206 (July 21, 2025), JA32. Petitioners make arguments with regard to only the first two actions.

a careful balance of interests consistent with statutory text by promoting both "public health and welfare" and "the productive capacity of the population." 42 U.S.C. § 7401(b)(1). The Rule also recognizes that considering the full effects of a project will promote the statute's purpose of encouraging pollution prevention. *Id.* § 7401(c).

The petitions for review should be denied.

STATUTES AND RULES

Intervenor-Respondents incorporate by reference the Statutory and Regulatory Addendum to the Respondents' brief.

STATEMENT OF THE CASE

Intervenor-Respondents incorporate by reference Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

The Accounting Rule provides clarity on the question whether a physical change or change in the method of operation of a stationary source of air pollution (i.e., a "project," *see, e.g.*, 40 C.F.R. § 52.21(b)(52)) constitutes a modification that triggers the requirements of the major New Source Review permitting program. Specifically, the Accounting Rule focuses on how to assess whether a project will cause an "emissions increase" and, if so, how much that increase might be. Petitioners would have EPA look only at some of the effects of a given project and ignore others. EPA rejected that piecemeal approach in favor of the common-sense

notion that for a project to result in an emissions increase, one needs to consider all effects—both those that tend to increase emissions and those that will decrease them. Petitioners would dismiss emissions decreases as irrelevant to determining whether a project causes an emissions increase. But that ignores the real world: projects that companies undertake will often have both upward and downward effects on emissions from different parts of the project. It is the sum of those activities that EPA's rules have historically required to be considered, and the Accounting Rule clarifies that right approach.

Since they were initially promulgated in 1980, EPA's major New Source Review regulations have used a two-step approach to determining if a project may cause an emissions increase that would trigger major New Source Review. Step one evaluates the project at hand and asks whether, if considered on its own, the project will result in a significant emissions increase. If it will not, major New Source Review does not apply. If it will, then step two applies. Under step two, the facility determines whether a significant emissions increase will occur considering all relevant source-wide emissions increases and decreases from *other* projects that have occurred during the "contemporaneous" period— generally the five year period preceding the project.[2] This second step is called "netting." If at step two the net emissions increase from all projects at the source during the contemporaneous period

[2] 40 C.F.R. § 52.21(b)(3).

exceeds the applicable significance threshold, then a major New Source Review permit must be obtained before actual construction of the project begins.

Since 1980, there has been a recurring question as to how to calculate project-related emissions in step one. Before the Accounting Rule was promulgated, some permitting agencies considered only elements of the project that resulted in emissions increases and ignored other elements that resulted in emissions decreases.[3] Other permitting agencies considered both emissions increases and emissions decreases from the project, the approach embodied in the Accounting Rule. When EPA revised its New Source Review regulations in 2002, it clarified in the regulations that "the sum of the difference" in emissions caused by the project should be calculated. 67 Fed. Reg. 80,186, 80,248 (Dec. 31, 2002). This language clearly indicated that both increases and decreases should be considered in the step one analysis. Still, questions continued to arise from permitting agencies because EPA's 2002 rules did not consistently use that articulation.

In the Accounting Rule, EPA explained that its purpose was to "clarify," at step one, that both emissions increases and decreases should be considered in

[3] States are the primary permitting agencies for the major New Source Review program, pursuant to Title I of the Clean Air Act. States administer the New Source Review programs, consistent with the federal rules and with oversight from EPA. States submit their programs to EPA for approval, which are then incorporated into State Implementation Plans. 42 U.S.C. § 7410. As a result, states often provide the first answers to questions around permitting applicability.

evaluating the emissions impact from the project. Step two would evaluate increases and decreases from other projects. In this way, the Accounting Rule eliminates any ambiguity and promotes consistency in interpretation and implementation of the major New Source Review Program.

Petitioners argue that EPA did not assert an adequate legal basis for the Accounting Rule and that no such basis exists. Not so. EPA put forth a clear and comprehensive legal analysis in the Accounting Rule, explaining that it reflects the best reading of the phrase "which increases the amount of any air pollutant emitted," which is an element of the statutory definition of "modification." 42 U.S.C. § 7411(a)(4). Indeed, it is the only reading that implements the plain language of that phrase, giving ordinary effect to the word "increase." Moreover, EPA's interpretation achieves the careful balancing of priorities directed by Congress. *See, e.g., id.* § 7401(b)(1); *id.* § 7470(3) (one purpose of the Prevention of Significant Deterioration program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources").

Petitioners also theorize that the Accounting Rule will allow significant emissions increases—either because a project may have multiple components with associated emissions increases and decreases that may take place at different times over the life of the project or because emissions decreases are not enforceable and, thus, allegedly will not always be accomplished. But project emissions accounting

had been implemented by many states since the prior rules were promulgated in 1980. Notwithstanding that long history, Petitioners cite no evidence that their hypothetical concerns have ever materialized. It was not arbitrary and capricious for EPA to conclude that Petitioners' hypothetical concerns were not persuasive, in part because they were not supported with concrete facts.

In the end, it never made sense to calculate the emissions from a project by looking only at the increases. That is akin to balancing your bank account by summing only the deposits and ignoring the withdrawals. The Accounting Rule clarifies this commonsense approach to the program.

The petitions for review should be denied.[4]

STANDING

To the extent that Intervenor-Respondents must demonstrate standing, that showing is met here. Intervenor-Respondents have standing to bring this action under the doctrine of associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020). First, many of Intervenor-Respondents' members operate manufacturing facilities that are subject to New Source Review permitting requirements. The Accounting Rule finalized by EPA

[4] To the extent that this Court conclude that it lacks jurisdiction for one or more of the reasons articulated by EPA in its brief, the Court should dismiss the petitions for review. This brief focuses on the merits arguments presented.

directly impacts their ability to operate and expand their facilities and to implement projects. Intervenor-Respondents' members would be harmed by vacatur of the Accounting Rule because that would prevent consideration of emissions decreases from proposed projects at major stationary sources under step one of the major modification definition in EPA's New Source Review regulations, delaying or preventing potentially beneficial projects because they would have to undertake a step two analysis, which is administratively burdensome, for projects that the Accounting Rule allows to count decreases at step one.

Accordingly, many of Intervenor-Respondents' members are the object of the Rule and therefore would have standing to sue in their own right. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (When parties are subject to government regulation, "there is ordinarily little question that the action or inaction has caused [them] injury."). This Court has held that "[t]he 'threatened loss' of [a] favorable action [by an agency] constitutes a 'concrete and imminent injury'" justifying intervention of right to defend that action, satisfying not only the injury requirement but the causation and redressability requirements of Article III. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (ECF No. 1722115) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003), *abrogated on other grounds by Institutional Shareholder Servs., Inc. v. SEC*, 142 F.4th 757 (D.C. Cir. 2025)).

This action is also germane to the purposes of Intervenor-Respondents to advocate on their members' behalf in court, particularly in challenges to rulemakings under the Act. *Hunt*, 432 U.S. at 333; *see also, e.g., Healthy Gulf v. U.S. Dep't of the Interior*, 152 F.4th 180, 190 (D.C. Cir. 2025) ("Germaneness requires 'pertinence between litigation subject and organizational purpose.'") (indirectly quoting *Humane Soc'y of U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)); *Hodel*, 840 F.2d at 58 (germaneness requirement is "undemanding"). For example, "[f]ighting and winning in the courts is one of the most impactful ways the U.S. Chamber of Commerce delivers for the American business community." Daryl Joseffer, U.S. Chamber of Commerce, U.S. Chamber Secured Major Supreme Court Victories This Term (Jul. 11, 2025), https://www.uschamber.com/lawsuits/u-s-chamber-supreme-court-victories (last visited Feb. 5, 2026).

Finally, neither the arguments asserted nor the relief requested requires the participation of individual members in the lawsuit, as Petitioners seek only vacatur of the Accounting Rule and the 2018 memorandum. *See, e.g.*, *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) ("'[I]ndividual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members" as opposed to "an action for damages to an association's members."); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 146 F.4th 1144, 1157 (D.C. Cir. 2025) ("[T]he purely injunctive and

declaratory relief sought by the Center does not require the participation of individual members either to litigate or to remediate the claim.") (internal citation omitted).

ARGUMENT

I. EPA interpreted the relevant Clean Air Act provisions correctly in the Accounting Rule.

Petitioners observe that in the Accounting Rule EPA declared the statute to be ambiguous and that EPA asserted authority to resolve the ambiguity. Pet'rs' Br. at 41 (citing 85 Fed. Reg. at 74,894, JA14). Petitioners cite *Loper Bright* for the proposition that "'[A]n ambiguity is simply not a delegation of law-interpreting power,'" and does not "'reflect a congressional intent that an agency … resolve the resulting interpretive question.'" *Id*. at 42 (citing *Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 399 (2024) (*Loper Bright*)). Petitioners thus conclude that EPA offered no valid grant of authority for the Accounting Rule because EPA relies on "'authority' that does not exist: a power to 'balance environmental concerns with economic and administrative concerns' as the Agency sees fit, arising solely out of purported 'ambiguity.'" *Id*. (citing 85 Fed. Reg. at 74,894, JA14).

Petitioners are wrong for two independent reasons.

A. EPA asserted the best reading of the Clean Air Act.

In the Accounting Rule, EPA began by identifying the relevant provision of law—the Clean Air Act's definition of "modification" and, in particular, the phrase

in that definition "which increases the amount of any air pollutant emitted." 85 Fed. Reg. at 74,894, JA14 (citing 42 U.S.C. § 7411(a)(4)). EPA then pointed out that the D.C. Circuit "has recognized that the [Clean Air Act] 'is silent on how to calculate such "increases" in emissions.'" *Id*. (citing *New York v. EPA*, 413 F.3d 3, 22 (D.C. Cir. 2005) (per curiam) (*New York I*). EPA was required to interpret that statutory term for purposes of establishing the legal basis for the rule.

EPA reasoned that considering both emissions increases and decreases from a project in step one of the emissions analysis is the "best" reading of Clean Air Act § 111(a)(4), 42 U.S.C. § 7411(a)(4), because:

(1) it fulfills the statutory directive (as interpreted in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (*Alabama Power*)) that a project should trigger New Source Review only if it results in a greater than *de minimis* increase in emissions, 85 Fed. Reg. at 74,894, JA14;

(2) it "further[s] the Congressional purpose of the NSR program which is to ensure environmental protection while allowing for economic growth," *id*. at 74,896, JA16; and

(3) it is sensible from a policy perspective because it "allows sources to undertake projects that may be environmentally beneficial overall and that may be forgone if emissions decreases cannot be considered in Step 1." *Id*. at 74,894, JA14.

Indeed, the ordinary meaning of the word "increase," when used as a transitive verb as in Section 111(a)(4), is "to make greater." *Increase*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986), JA414; *see also Increase*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("[t]o make greater or larger"),

JA419; *Increase*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969) ("[t]o make greater or larger"), JA424. The word "increase" thus requires a comparison of emissions after a change versus the pre-change status quo. And that comparison necessarily requires consideration of all emissions consequences of a project, including increases and decreases. Otherwise, an analytically correct comparison will not be produced. Indeed, the statute specifies that the "amount" of an increase must be determined, 42 U.S.C. § 7411(a)(4), which ordinarily is defined to mean a "total." *Amount*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986) ("the total number or quantity"), JA413; *see also Amount*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("The total of two or more quantities; aggregate"), JA418; *Amount*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969) ("The total of two or more quantities; aggregate"), JA423. In other words, unless decreases from a project are considered together with increases, there would be no way of knowing whether a project would make emissions "greater."

That squares with ordinary parlance. Consider, for example, a trip to the bank when you deposit three checks and also withdraw cash. Everyone would love for the bank just to consider the deposits and not the withdrawal. But, of course, that is not how the accounting works. Your total balance from the bank visit reflects both the deposits and the withdrawal. The same is true for determining whether a project

(i.e., a particular "physical change in, or change in the method of operation of," a particular source, 42 U.S.C. § 7411(a)(4)) will result in an emissions increase. EPA's reading is the best because the plain meaning of the word "increase" requires a full accounting of project-related emissions.

Petitioners do not explain what they believe to be the best interpretation of "increase." It stands to reason that since they ask for the Accounting Rule to be overturned, they presumably embrace the prior rule—which they contend should be interpreted to allow for consideration only of emissions increases in step one. But that cannot be the "best" interpretation. Under that approach, projects that reduce emissions overall could nonetheless be treated as if they increase emissions.[5]

Consideration of both increases and decreases from a project also squares with the role that the major New Source Review Program plays in the context of the Clean Air Act as a whole. Among the primary purposes of major New Source Review is to make sure that modifications to existing major emitting facilities can occur (thus promoting economic growth) while also ensuring modifications do not result in emissions increases that could significantly deteriorate existing good air quality or interrupt the progress being made in areas that are working to achieve national ambient air quality standards. *New York I,* 413 F.3d at 12-13. Consequently, as this

[5] Petitioners make too much of the notion that decreases are somehow different in character (and to their minds, more suspect) than increases. But as a matter of basic algebra, subtraction is simply the *addition* of a negative number.

Court has observed, "Congress wished to apply the permit process, then, only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Alabama Power*, 636 F.2d at 401. One important reason why EPA's approach in the Accounting Rule is the best interpretation of "increase" is that it ensures that a project that does not result in a significant emissions increase (thus, not significantly impacting ambient air quality) will not possibly trigger New Source Review.

Notably, EPA relied on record evidence to further support its interpretation. EPA highlighted that companies "have either significantly delayed or abandoned altogether projects that could have resulted in overall emissions decreases given the complexities that Step 2 contemporaneous netting can entail." 85 Fed. Reg. at 74,894-95 (footnote omitted), JA14-15. EPA also provided details of "actual projects that produced both increases and decreases in emissions to illustrate the types of projects that may result in overall emissions decreases in Step 1 of the NSR [New Source Review] major modification applicability test." *Id*. at 74,895, JA15; *see also id.* at 74,906 (describing three types of environmentally beneficial projects that could be accommodated under the Accounting Rule), JA26. All of that is relevant to understanding the meaning of the law here. *Loper Bright*, 603 U.S. at 402 ("[A]lthough an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the

agency's] expertise.'") (citation omitted); *Pac. Gas & Elec. Co. v. FERC*, 113 F.4th 943, 951 (D.C. Cir. 2024).

Intervenor-Respondents offered similar examples in comments included in the docket of the Accounting Rule. For example, Intervenor-Respondents described a project at a petroleum refinery involving an upgrade to one boiler that allowed two older and less efficient boilers to be shut down. Comments of the U.S. Chamber of Commerce, *et al.* at 5 (Oct. 8, 2019), https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0048-0081, JA320. Because the project resulted in decreased emissions, it could be implemented quickly under the Accounting Rule, avoiding the delays and complexity of step two netting. If the project were to trigger major New Source Review, the vagaries of the permitting process, which can extend to two years or more (*see id.* at 5-6, 8, JA320-321, JA323), could spell the end of the project entirely. On the other hand, under the Accounting Rule, the emissions-reducing components of the project improved boiler efficiency, would reduce emissions, and ultimately prevent pollution. *Id.*

Another project involved a paper mill that replaced three paper machines with a new, more efficient paper machine using the latest technology. *Id*. at 5, JA320. The project resulted in an emissions decrease. Without project emissions accounting, the project would have been significantly delayed while the facility owners undertook the substantial and time-consuming effort of step two netting.

A third project involved an automobile manufacturing plant where high-efficiency painting equipment was installed, which reduced emissions from the paint shop and enabled an increase in production rate without an overall increase in emissions. *Id*. at 7, JA322.

A fourth project cited by two of the Intervenor-Respondents involved a pulp mill (a facility that converts wood chips, recycled material, and the like into raw materials for paper production) implementing a quality improvement project that involved replacing certain production equipment, enclosing equipment as part of this process, and placing greater steam demand on existing boilers. Emissions from the processes involved in the project would go down. Presentation of American Forest & Paper Association and American Wood Council, *New Source Review Improvements* at slides 6-7 (Apr. 25, 2019), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0048-0011, JA377-78. If only increases may be counted at step one, though, then only the increased demand for steam from the boiler would be considered.

Thus, contrary to Petitioners' claim, EPA plainly and cogently identified the relevant statutory provision and explained how that provision authorizes EPA to issue the Accounting Rule, concluding that it was the best reading of the statute. EPA and Intervenor-Respondents reinforced that interpretation with substantial evidence supporting EPA's conclusion that project emissions accounting encourages

affected sources to undertake environmentally beneficial projects that might otherwise have been foregone without the Accounting Rule in place. EPA's interpretation is correct.

B. Petitioners misconstrue *Loper Bright*.

The key issue decided in *Loper Bright* is whether courts must defer to an agency's reasonable interpretation of an ambiguous statutory provision. The answer is no. *Loper Bright*, 603 U.S. at 413. But that does not mean, as Petitioners suggest, that EPA no longer has authority to interpret such provisions when issuing a rule.

As Petitioners point out, EPA still needs "to provide 'the major legal interpretations' underlying its rules." Pet'rs' Br. at 43 (citing 42 U.S.C. § 7607(d)(3)(C), (6)(A)). And it follows that, to the extent the relevant statute appears ambiguous, EPA still must determine the best reading of the relevant provisions to articulate the legal basis for its action. That is exactly what EPA did here. Thus, *Loper Bright* does not, as Petitioners assert, prohibit EPA from interpreting an ambiguous statute in establishing its legal authority for a rule. That would make no sense. Instead, *Loper Bright* stands for the wholly different proposition that courts no longer must give *deference* to EPA's interpretation.

EPA interpreted the Clean Air Act in promulgating the Accounting Rule, as it must. *Loper Bright* did not relieve EPA of that obligation. But now that EPA has

asserted a valid grant of authority for the Accounting Rule, *Loper Bright* holds that this Court must review EPA's interpretation *de novo*.

II. Petitioners Mischaracterize EPA's Historic Interpretations and Fail to Show that EPA's Accounting Rule Is Improper.

Petitioners assert that the Accounting Rule is impermissible because it "implement[s] two inconsistent understandings of the same statutory phrase: '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.'" Pet'rs' Br. at 46 (quoting 42 U.S.C. § 7411(a)(4)). Petitioners point to the venerable *Alabama Power* decision for the assertion that there are two possible ways to apply the term "increases"—(1) source wide under a "bubble" concept; and (2) on an individual emissions unit basis. Pet'rs' Br. at 46-47.

Petitioners argue that EPA opted for the first approach when it promulgated revised New Source Review rules in 1980 that allowed for source-wide netting. *Id*. at 47. Petitioners claim that EPA in the Accounting Rule "eschews that source-wide approach in favor of the 'second' approach." *Id*. In other words, Petitioners claim that the Accounting Rule "allows plant-owners to assess increases and decreases across a subset of units within the source—whatever the owner deems related to the 'project'—*without* regard to source-wide contemporaneous emissions." *Id*. at 48.

In short, Petitioners assert that EPA impermissibly is implementing "two different definitions of 'modification'" by "focusing on just the units affected by the

project – even while retaining the source-wide, contemporaneous 'bubble' approved by *Alabama Power*." *Id*. at 47-48.

That is incorrect. EPA has always had a two-step approach to major New Source Review applicability, with step one looking at the effects of the specific project at hand and step two allowing a company to evaluate the net effect of all *projects* at the source that had occurred over the prior five years, if the initial step showed a significant increase *from the project.* Petitioners' claim appears to be focused on whether EPA may implement a two-step approach *at all*, without regard to how emissions are determined in step one. The Accounting Rule does not address that issue.

Indeed, EPA promulgated the two-step approach in the foundational 1980 New Source Review regulations that followed and implemented *Alabama Power. See* 45 Fed. Reg. 52,676, 52,735 (Aug. 7, 1980); *see also* 67 Fed. Reg. 80,186, 80,190 (Dec. 31, 2002) (It "has always been our policy [] that determining whether a major modification has occurred is a two-step process."). EPA then clarified more explicitly the two-step approach in its 2002 regulatory revisions. 67 Fed. Reg. at 80,190 ("The new definition of major modification is 'any physical change in or change in the method of operation of a major stationary source that would result in: (1) A significant emissions increase of a regulated New Source Review pollutant;

and (2) a significant net emissions increase of that pollutant from the major stationary source.'").

To the extent that this issue is properly before this Court, *see* EPA Br. at 25, 42, 44 (challenging Petitioners' standing and arguing that challenges on this issue are time-barred), this Court should conclude that EPA's 1980 New Source Review rules, as confirmed and clarified in 2002, did not establish two conflicting ways to determine emissions associated with a physical change. Rather, the rules required a coherent, two-step approach, with step one focused on the project and step two examining site-wide emissions over the contemporaneous period (five years). Those provisions together govern emissions determinations and represent the best way to address the real-world complexities that this Court in *Alabama Power* sought to resolve.

In *Alabama Power*, this Court observed that "alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands. This dynamic aspect of American industry was not disputed by the parties." *Alabama Power*, 636 F.2d at 401.

The Court expressed concern that applying New Source Review on an individual unit basis "would require [prevention of significant deterioration] review for many such routine alterations of a plant; a new unit would contribute additional

pollutants, these increases could not be set off against the decrease resulting from abandonment of the old unit, and thus the change would become a 'modification' subject to PSD review." *Id*. The Court concluded that "[n]ot only would this result be extremely burdensome, it was never intended by Congress in enacting the Clean Air Act Amendments." *Id*.

Emphasizing that the purpose of the PSD program is to prevent significant deterioration in air quality, the Court concluded that "Congress wished to apply the permit process, then, only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id*. Accordingly, "[t]he interpretation of 'modification' as requiring a net increase is thus consistent with the purpose of the Act; while the other interpretation is not." *Id*.; *see also id.* at 403 (rejecting EPA's contention that EPA had authority under the PSD provisions of the Clean Air Act to impose requirements on sources "where there is no net increase of any pollutant from contemporaneous changes," and concluding that extending PSD requirements to sources in such circumstances "would seriously delay and impede industrial changes that Congress did not intend to regulate").

EPA's two-step process is entirely consistent with that holding. Step one's focus on emissions from the project serves the purpose of avoiding the "extremely burdensome" prospect that "routine alterations of a plant" might trigger the need for

a permit. Step two comes into play only if emissions from the project itself are significant. In that case, plantwide netting ensures that permitting is required only when "industrial changes might increase pollution in an area," *Id*. at 401.

In *New York I*, this Court upheld EPA's 2002 New Source Review rules (with limited exceptions that are not relevant here) against wide-ranging challenges. Among many other issues raised in that case, Petitioners argued that the manner in which emissions must be calculated under step one of EPA's two-step procedure was unlawful. Petitioners focused that claim on the "demand growth exclusion," which in step one allows "[t]he post-change emissions calculation [to] exclude[] any emissions increases that 'an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth.'" *New York I*, 413 F.3d at 31 (citing 67 Fed. Reg. at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(c)).

The Court determined the demand growth exclusion to be lawful. *Id.* at 33. Petitioners in that case did not raise the more fundamental question whether the two-step procedure itself is lawful. EPA Br. at 42, 44.

In sum, EPA's long-held two-step approach is coherent, wholly consistent with *Alabama Power* and *New York I*, and fully in accord with the law.

Perhaps recognizing that their primary arguments will not carry the day, Petitioners pivot to a wholly different argument as a fallback. They assert that "EPA's divergent interpretations excise[] 'any' from the text defining a modification." Pet'rs' Br. at 49. In other words, "EPA's interpretation does not make 'any' emissions-increasing project a modification." *Id*. at 50. According to Petitioners, that is because "a 'project' that produces a significant increase—one above EPA's *de minimis* thresholds—need *not* trigger New Source Review" because "a source may still look to *unrelated* changes elsewhere at the source—'other projects'—and if those changes produce an offsetting decrease no modification has occurred." *Id*.

Petitioners posit that "[t]his Court has established that because 'the word "any" … has an expansive meaning' … then *any* emissions increasing project must be a modification requiring New Source review." *Id*. at 51 (citing *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (*New York II*).

While it is true that this Court has held that the word "any" should be construed expansively in the phrase "any physical change or change in the method of operation" in Section 111(a)(4), that word does not modify the word "increases" in the Clean Air Act Section 111(a)(4) modification definition.[6] *See* 85 Fed. Reg. at

[6] As the Supreme Court has held, even where the word "any" modifies a term in the Clean Air Act, that does not create an "insuperable textual barrier" to encompassing a narrower definition. *See Util. Air Reg. Grp. v. EPA*, 573 U.S. 302,

74,894, JA14. It is telling that the statute uses "any" to modify other elements of the definition, but does not do so for "increases" (as would have been the case, for example, had Congress used the words "results in any increase"). *See* 42 U.S.C. § 7411(a)(4) ("The term 'modification' means 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"); *New York II*, 443 F.3d at 888 ("unlike [the phrase 'any physical change,' the word 'increases' in section 111(a)(4)] is unaccompanied by a qualifier").

Indeed, *New York II* makes clear that while Congress used "the word 'any' to indicate that 'physical change' covered all such activities," the requirement that the physical change "increase[] the amount of any air pollutant emitted by such source" is a separate "*limitation*" on the scope of activities covered by the statutory term "modification." *Id*. at 887 (emphasis added); *see id.* ("the scope of the definitional

316-20 (2014) (holding that *Massachusetts v. EPA,* 549 U.S. 497 (2007), did not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act than Title II [which is related to automobile emissions] where their inclusion would be inconsistent with the statutory scheme; citing numerous instances in which EPA had permissibly interpreted statutory language of "any air pollutant" more narrowly than the most expansive reading of that term); *see also id.* at 337 (Breyer, J., concurring in part and dissenting in part) ("courts must interpret the word 'any,' like all other words, in context"). As discussed, because "any" does not modify "increase," it is even clearer that EPA's interpretation is not prohibited (and is, indeed, "best").

phrase is *limited* only by Congress's determination that such changes be linked to emission increases") (emphasis added); *id.* at 888 ("The expansive meaning of 'any physical change' is strictly *limited* by the requirement that the change increase emissions.") (emphasis added).

New York II decided the meaning of the term "any physical change." This Court held that, because the term "physical change" is modified by the word "any," and because "any" should be construed "to give the word it modifies an 'expansive meaning,'" then the term "physical change" should be construed expansively. *Id*. at 885.

But the question here is not whether a "physical change" has occurred. Rather, the question is how to determine what an increase is and, therefore, whether a physical change will *cause* an emissions increase. *New York II* does not answer that question.[7]

But *New York I* does. There, the Court rejected Petitioner's contention that the revised definition of baseline actual emissions "'administratively excises the

[7] *New York II* did say, by way of distinguishing "any physical change" from "increases" in the statutory definition of "modification," that "Congress's use of the word 'increases' necessitated further definition regarding rate and measurement for the term to have any contextual meaning." 443 F.3d at 888-89. After *Loper Bright*, that overall observation might be recast in terms of focusing on the agency's discretion to "fill up the details of a statutory scheme." *Loper Bright*, 603 U.S. at 395 (internal quotation marks omitted). In any event, as explained above, the Accounting Rule's interpretation of "increases" reflects the best reading of the statute.

statutory word "any" by excluding *some* emissions-increasing changes' from NSR." *New York I*, 413 F.3d at 27 (citing Final Opening Br. of Env't Pet'rs, *New York v. EPA*, No. 02-1387, 2004 WL 5844251 at *13 (D.C. Cir. Oct. 26, 2004)). The Court determined that claim to be "misplaced because the 2002 rule redefines the baseline such that 'any' change that increases emissions beyond the redefined baseline still triggers NSR." *New York I*, 413 F.3d at 27.

Similarly, under the Accounting Rule, "[a]ny" change that results in a significant emissions increase under the step-one emissions calculation procedures articulated in the rule "still triggers" step two of the long-settled two-step approach to determining whether New Source Review permitting requirements apply to the change. Thus, the term "any" ensures that all emissions-increasing *projects* trigger step two.

That stands to reason because the term "any" in the statute modifies the term "physical change" and not the term "increases the amount of any air pollutant emitted."

III. The Accounting Rule provides for timely consideration of emissions increases and decreases from a project.

A. Petitioners' claims related to timeliness are based on hypothetical scenarios that do not undermine EPA's legal interpretation.

Petitioners claim that "[b]y eliminating any requirement that an anticipated emission decrease from a change be achieved *before* any increase, project accounting

allows a source to undertake a change producing years-long significant emissions increases without complying with New Source Review." Pet'rs' Br. at 52. Petitioners assert "[t]hat flatly contradicts any reasonable understanding of the statute, which defines a modification requiring review 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.'" *Id*. (citing 42 U.S.C. § 7411(a)(4) (emphasis added by Petitioners)).

But Petitioners' claim is based on a hypothetical scenario. They cite no record evidence showing that such a scenario has occurred or should be expected to occur. *See* EPA Br. at 46-47. Consequently, Petitioners' assertion is unsupported.

Even if there is a time gap between project-related increases and decreases, the effect of the project as a whole is what matters. As explained above, the statute requires a determination of whether an emissions "increase" from a change (i.e., from a project) will occur. That mandate cannot be satisfied if project-related decreases cannot be considered simply because they do not occur at precisely the same time as a project-related increase. *Cf. New York I*, 413 F.3d at 23 (rejecting attempt to impose more restrictive understanding of "increases" in the statutory definition where the attempt "fail[ed] to address a practical reality").

B. Petitioners' claims that the "substantially related" test does not assure contemporaneity are also unfounded and hypothetical.

EPA concluded in the Accounting Rule that its previously issued "substantially related" test should be used in determining what activities at a plant should be aggregated into a single project for purposes of calculating the emissions associated with the project. 85 Fed. Reg. at 74,895, JA15. Petitioners claim that the "substantially related" test does not assure that emissions increases and emissions decreases considered in step one of a project emissions analysis are "contemporaneous." Pet'rs' Br. at 59. To the extent that this claim is properly before the Court (*see* EPA Br. at 21, 30-33), this Court should conclude that the claim is meritless, as EPA reasonably explained its conclusion on this issue.

The idea of "contemporaneity" in the context of New Source Review permitting was first broached in *Alabama Power*. There, as explained above, the Court concluded that net sitewide emissions should play a role in determining New Source Review applicability because the New Source Review program is designed to protect area-wide air quality. *Alabama Power*, 636 F.2d at 401. In approving such a "bubble concept," the Court observed that "any offset changes claimed by industry must be substantially contemporaneous." *Id.* at 402. The Court stressed that "[t]he agency has discretion, within reason, to define which changes are substantially

contemporaneous." *Id*. That view was reiterated in *New York I* and figured prominently in the Court's opinion. *New York I*, 413 F.3d at 26.[8]

In the Accounting Rule, EPA asserted that it "believes that any emission decreases considered in Step 1 are and will need to be contemporaneous because[] the 'substantially related' test has a temporal component and … the decreases must be part of the same project." 85 Fed. Reg. at 74,898, JA18. The temporal component of that test is "a rebuttable presumption that project activities that occur outside a 3-year period are not related and should not be grouped into one project." *Id*. at 74,900, JA20. EPA's explanation of this issue was reasonable.

Long before the Accounting Rule was made final, EPA reasoned that a three-year period is appropriate because it "is long enough to ensure a reasonable likelihood that the presumption of independence will be valid but is short enough to maintain a useful separation between relevant construction cycles, consistent with industry practice." EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, 83 Fed. Reg. 57,324, 57,327 (Nov. 15, 2018) (quoting *Prevention of Significant*

[8] After *Loper Bright*, *Alabama Power*'s emphasis on the agency's discretion in applying the contemporaneity requirement—a requirement that *Alabama Power* drew from the statutory definition of "modification"—could now be seen as an area where EPA must exercise discretion to "fill up the details of a statutory scheme." *Loper Bright*, 603 U.S. at 395 (internal quotation marks omitted). In any event, Petitioners do not challenge this aspect of *Alabama Power*.

Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting, 74 Fed. Reg. 2376, 2380 (Jan. 15, 2009) (internal quotation marks omitted)). That is an exercise of the "discretion within reason" that this Court in *Alabama Power* approved.

This Court's decision in *New York I* further supports the conclusion that Petitioners' arguments concerning the "substantially related" test lack merit. The 2002 New Source Review rules at issue in *New York I* included a new provision called a "plantwide applicability limit" (PAL), which is "an alternative method for assessing 'increases' in emissions." *New York I*, 413 F.3d at 36. "Under this method, a change does not 'increase' net emissions and thus does not trigger NSR as long as source-wide emissions remain below the Plantwide Applicability Limitation ('PAL') specified in the source's PAL permit." *Id*. "The PAL is calculated by adding a 'significant' margin to [sitewide] baseline actual emissions from any two-year period within the ten-year period immediately preceding the permit application" and a "PAL permit is effective for ten years." *Id*.

Petitioners argued that "the ten-year PAL term violates the contemporaneity requirement of *Alabama Power* because it allows sources to 'net out' of NSR based on decreases in emissions that occur outside the five-year contemporaneity period established in the 1980 rule." *Id*.

Citing *Alabama Power* for the proposition "that EPA has 'discretion, within reason, to define which changes are substantially contemporaneous,'" this Court concluded that the ten-year PAL period was permissible. *Id*. at 37.

The far shorter three-year period reflected in the Accounting Rule is similarly appropriate.

IV. The Accounting Rule reasonably explained that existing recordkeeping requirements provide a reasonable assurance of compliance.

Many years prior to promulgation of the Accounting Rule, EPA promulgated recordkeeping requirements applicable to emissions determinations used in New Source Review applicability determinations. *See, e.g*., 40 C.F.R. § 52.21(r)(6). The rules provide detailed instructions for determining whether there is a reasonable possibility that a project might result in an emissions increase. If so, the rules mandate recordkeeping and, in some cases, reporting.

In the Accounting Rule, EPA "conclude[ed] that the provisions at 40 CFR 52.21(r)(6) are adequate to ensure sufficient monitoring, recordkeeping and reporting of emissions for projects determined not to trigger major NSR, after considering both emissions increases and decreases from the project in Step 1 of the NSR major modification applicability test." 85 Fed. Reg. at 74,895, JA15. Petitioners assert that "EPA adopted its 'reasonable possibility' requirements when its rules forbade project accounting, and only increases were considered at Step 1 of the New Source Review applicability analysis." Pet'rs' Br. at 62. They argue "now

that EPA has inserted netting into the Step 1 analysis," *id.* at 63, the reasonable possibility rules are inadequate, and that EPA's determination to the contrary is arbitrary and capricious, *id.* at 63-64.

Petitioners are wrong on multiple counts. EPA's explanation of its conclusion on this issue is reasonable and reasonably explained.

First, Petitioners' assertion that EPA's rules "forbade project accounting" when the reasonable possibility rule was promulgated is wrong. In the 2002 New Source Review rules, EPA expressly allowed for "'the sum of the difference'" in emissions from projects to be considered in determining whether a project results in a significant emissions increase. *See* 85 Fed. Reg. at 74,895, JA15. That reflected common practice preceding the rule, when some "reviewing authorities were counting both emissions decreases and emissions increases from a project at Step 1 of the major modification applicability test." 84 Fed. Reg. 39,244, 39,247 (Aug. 9, 2019), JA373, JA374. That is why EPA in the Accounting Rule characterizes that rule as clarifying, rather than changing, the existing New Source Review rules. *See, e.g.*, 85 Fed. Reg. at 74,890 (EPA is "promulgating revisions to its major New Source Review (NSR) applicability regulations to ***clarify*** when the requirement to obtain a major NSR permit applies to a source proposing to undertake a physical change or a change in the method of operation (*i.e.*, a project) under the major NSR preconstruction permitting programs.") (first emphasis added), JA10.

The reasonable possibility rule was promulgated in 2007—well after the 2002 New Source Review rules were promulgated. 72 Fed. Reg. 72,607 (Dec. 21, 2007). Thus, EPA's New Source Review regulations did not "forbid" project accounting when the reasonable possibility rule was promulgated. From its inception, the reasonable possibility rule necessarily accommodated both increases and decreases at step one. Because the necessary predicate to Petitioner's argument is wrong, Petitioners' argument fails.

Second, Petitioners assert that EPA's rules must "ensure that decreases used to avoid New Source Review actually occur." Pet'rs' Br. at 63 (internal quotation marks and citation omitted). Petitioners claim that the reasonable possibility rule does not provide that assurance.

Petitioners' argument is foreclosed by *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021) (*New Jersey*). Petitioner in that case challenged the 2007 reasonable-possibility rule. In its challenge, Petitioner asserted that "EPA inadequately considered concerns stemming from the predictive and subjective nature of projected emissions calculations." *Id*. at 1049. Petitioner further argued that "predicting emissions under the actual-to-projected-actual methodology [is] susceptible to manipulation." *Id.* at 1050. And Petitioner asserted that "[a]bsent independent verification, sources have compelling incentives … to apply unsubstantiated or overly optimistic preconstruction analyses" and evade New Source Review

requirements. *Id*. (internal quotation marks and citation omitted). This Court disagreed, concluding that "EPA adequately considered the enforcement problems referenced by petitioner." *Id*.

Notably, EPA justified the reasonable possibility rule in part by explaining that "[f]or projects that do not trigger recordkeeping and reporting requirements under the 'reasonable possibility' standard, many source owners/operators will have various types of records that, collectively, provide information on the baseline actual emissions and projected actual emissions, as well as post-change emissions." 72 Fed. Reg. at 72,612. "Such records include but are not limited to reports submitted to reviewing authorities pursuant to title V operating permit program requirements of 40 CFR parts 70 and 71, State minor New Source Review permit application data, business records, and emissions inventory data." *Id*. The Court concluded that "[e]ven assuming for the purposes of argument that non-NSR specific records are poor substitutes, petitioner fails to show how EPA acted arbitrarily or capriciously." *New Jersey*, 989 F.3d at 1051. EPA has no "obligation to show that its 'reasonable possibility' standard achieves 'perfect NSR compliance.'" *Id*. (citation omitted). In the end, EPA satisfied its obligation "to analyze the trade-off between compliance improvement and the burdens of data collection and reporting and articulate a reasoned judgment as to why any proposed additional burden would

not be justifiable in terms of the likely enhancement of compliance." *Id.* (internal quotation marks and citation omitted).

Petitioners' position here is inconsistent with *New Jersey*. By demanding that emissions decreases be enforceable, Petitioners are essentially arguing, as New Jersey did, that the reasonable possibility rule must provide for independent verification of emissions projections. In addition, Petitioners ignore that the reasonable possibility rule does not operate in a vacuum. Instead, as EPA pointed out in that rulemaking, affected sources are subject to numerous other monitoring, recordkeeping, and reporting requirements that provide useful information on the validity of New Source Review emissions projections. In that context, while the reasonable possibility rule may not "achieve[] perfect NSR compliance," it represents an appropriate balance of competing factors. In the 2020 rule, EPA reasonably explained how it was weighing these considerations. *See* EPA Br. at 54-56. In short, Petitioners bring nothing new to the table, and thus, their argument should be rejected in light of *New Jersey*.

V. EPA did not act arbitrarily and capriciously in declining to require states to adopt the "substantially related" test in their New Source Review programs.

Petitioners lastly argue that the Accounting Rule is arbitrary and capricious because it relies on the "substantially related" test for governing aggregation of projects but does not require states to adopt the "substantially related" test in their

own New Source Review programs. Pet'rs' Br. at 66. Petitioners are mistaken (assuming that they have not forfeited this argument, *see* EPA Br. at 52-53).

It is true that EPA concluded—in its final reconsideration notice on the 2018 project aggregation action—that states are not obligated to incorporate EPA's project aggregation principles into their state implementation plans as a mandatory minimum element. 85 Fed. Reg. at 74,900, JA20. But that is irrelevant, because EPA stated in the Accounting Rule "that the 'substantially related' test from our 2018 final action on project aggregation interpretation and policy provides the appropriate basis for sources to determine the scope of a project in Step 1 of the NSR applicability analysis." *Id*. In other words, while there is no general obligation for states to adopt EPA's aggregation policy, they must do so in the context of implementing project emissions accounting.

Notably, EPA concluded that "the 'substantially related' criterion is not materially different from the factors the agency has considered in previous project aggregation decisions." 83 Fed. Reg. at 57,331. Moreover, "in most cases … sources and state and local air agencies already implement a standard that is similar to the substantially related standard." *Id*. at 57,333. Thus, consistent criteria for project aggregation decisions will be applied in any event.

Lastly, Petitioners assert that since promulgating the Accounting Rule "EPA has … approved state implementation plans without the test, confirming its optional

nature." Pet'rs' Br. at 67 (citing 90 Fed. Reg. 21,232, 21,233-34 (May 19, 2025)). Aside from the fact that no such actions are in the record of the Accounting Rule (*see* EPA Br. at 54), approval of such plans proves nothing. As EPA concluded in the 2018 project aggregation action, "[i]n most cases … we do not think changes in state plans would be needed to implement" EPA's project aggregation criteria. 83 Fed. Reg. at 57,333. So, it is not a given that any change was needed in that state's plan in the first instance.

CONCLUSION

The Court should deny the petitions for review.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing final form Brief of Intervenor-Respondents complies with Fed. R. App. P. 32 and D.C. Circuit Rule 32 because it contains 8,579 words (as counted by the Microsoft Word software used to produce it) and has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2026, the foregoing final form Brief of Intervenor-Respondents was electronically filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and thereby served upon all ECF-registered counsel.

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