

## ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1149 (and consolidated cases)

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

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ENVIRONMENTAL DEFENSE FUND, ET AL.,  
*Petitioners*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,  
*Respondents.*

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ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTIONS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 83 FED. REG. 13,745 (MAR. 30, 2018), 85 FED. REG. 74,890 (NOV. 24, 2020), 86 FED. REG. 57,585 (OCT. 18, 2021), 90 FED. REG. 34,206 (JULY 21, 2025)

**PETITIONERS' PROOF REPLY BRIEF**

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## Table of Contents

Table of Authorities .....	ii
Glossary of Abbreviations.....	vi
Argument .....	1
I. Petitioners Have Standing.....	3
A. The Rule Has Injured Petitioners and Their Members.....	3
1. The Rule Permits Increased Pollution Harming Petitioners’ Members.....	3
2. The Rule Denies Petitioners’ Members Opportunities for Meaningful Public Participation. ....	5
3. The Rule Causes Informational Injury. ....	6
4. Vacatur Would Redress Petitioners’ Injuries.....	7
B. Petitioners’ Future Injuries Are Not Speculative.....	10
II. EPA Provided No Valid Statutory Interpretation.....	12
III. Project Accounting Cannot be Reconciled with the Statute.....	16
A. No Atextual Exception Permits EPA to Implement Two Understandings of a “Modification.” .....	16
B. Project Accounting Unlawfully Allows Years-Long Emissions- Increasing Changes Without Review.....	23
IV. EPA Has Not Explained How Its Regulations Ensure Accountability.....	27
V. EPA’s Rule Depends Upon Requirements It Never Imposed.....	31
Conclusion.....	36
Certificate of Compliance .....	38
Certificate of Service.....	39

## Table of Authorities

Cases	Page(s)
<i>Alabama Power v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1979) .....	1, 17, 18, 19, 22, 23, 24
<i>Alaska Dep't of Conservation v. EPA</i> , 540 U.S. 461 (2004) .....	4
<i>Bennett v. Donovan</i> , 703 F.3d 582 (D.C. Cir. 2013) .....	7
<i>Cal. Cmty. Against Toxics v. EPA</i> , 928 F.3d 1041 (D.C. Cir. 2019) .....	3
<i>EDF v. EPA</i> , 852 F.2d 1316 (D.C. Cir. 1988) .....	14
<i>EDF v. EPA</i> , 922 F.3d 446 (D.C. Cir. 2019) .....	6, 7
<i>Edison Elec. Inst. v. EPA</i> , 996 F.2d 326 (D.C. Cir. 1993) .....	14
<i>FDA v. All. for Hippocratic Medicine</i> , 602 U.S. 367 (2024) .....	7
<i>Fox TV Stations v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002) .....	14
<i>Indep. Mkt. Monitor for PJM v. FERC</i> , 162 F.4th 1167 (D.C. Cir. 2025) .....	7
<i>Kennecott Copper Corp. v. DOI</i> , 88 F.3d 1191 (D.C. Cir. 1996) .....	34
<i>King v. Burwell</i> , 576 U.S. 473 (2015) .....	26
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024) .....	12, 13

<i>Luminant Generation Co. v. EPA</i> , 675 F.3d 917 (5th Cir. 2012).....	31
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015).....	18, 29
<i>Nat’l Council for Adoption v. Blinken</i> , 4 F.4th 106 (D.C. Cir 2021) .....	9
<i>New Jersey v. EPA</i> , 989 F.3d 1038 (D.C. Cir. 2021).....	30
<i>New York v. EPA</i> , 413 F.3d 3 (D.C. Cir. 2005).....	18, 21, 24, 26, 28, 29, 31
<i>New York v. EPA</i> , 443 F.3d 880 (D.C. Cir. 2006) ( <i>New York II</i> ).....	19, 21
<i>Ohio v. EPA</i> , 603 U.S. 279 (2024).....	33
<i>SAS Inst. v. Iancu</i> , 584 U.S. 357 (2018).....	19
<i>Sierra Club v. EPA</i> , 551 F.3d 1019 (D.C. Cir. 2008).....	21, 22
<i>Sierra Club v. EPA</i> , 755 F.3d 968 (D.C. Cir. 2014).....	10
<i>Sierra Club v. EPA</i> , 964 F.3d 882 (10th Cir. 2020).....	4
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134 (1944). EPA Br. 24 .....	16
<i>SSM Litig. Grp. v. EPA</i> , 150 F.4th 593 (D.C. Cir. 2025).....	13
<i>Stern Produce Co. v. NLRB</i> , 97 F.4th 1 (D.C. Cir. 2024) .....	15, 22

*United States v. Powers*,  
885 F.3d 728 (D.C. Cir. 2018) ..... 30

*Univ. of Tex. Sw. Med. Ctr. v. Nassar*,  
570 U.S. 338 (2013)..... 16

## **Statutes**

42 U.S.C. § 7411 ..... 15

42 U.S.C. § 7411(a)(4)..... 15, 16, 17, 18, 20, 23, 26

42 U.S.C. § 7470 ..... 5

42 U.S.C. § 7475 ..... 6

42 U.S.C. § 7479 ..... 3

42 U.S.C. § 7503(a)..... 4

42 U.S.C. § 7503(b)..... 4

42 U.S.C. § 7607(d)..... 13, 14, 15

## **Other Authorities**

40 C.F.R. § 51.166 ..... 5

40 C.F.R. § 51.166(q)(2)(ii)-(iii) ..... 5

40 C.F.R. § 52.21(a) ..... 24, 25

40 C.F.R. § 52.21(b) ..... 17, 24, 25, 27

45 Fed. Reg. 52,676 (Aug. 7, 1980)..... 20

63 Fed. Reg. 39,857 (July 24, 1998) ..... 19

67 Fed. Reg. 80,186 (Dec. 31, 2002) ..... 20

72 Fed. Reg. 72,607 (Dec. 21, 2007) ..... 30

83 Fed. Reg. 57,324 (Nov. 15, 2018)..... 34

85 Fed. Reg. 74,890 (Nov. 24, 2020)..... 12, 13, 15, 31, 34  
89 Fed. Reg. 36,870 (May 3, 2024) ..... 13, 29, 30, 31, 32, 35  
90 Fed. Reg. 34,206 (July 21, 2025) ..... 35

## **Glossary of Abbreviations**

JA: Joint Appendix

EPA: U.S. Environmental Protection Agency

NSR: New Source Review

## Argument

EPA’s Project Accounting Rule enables a source to avoid New Source Review’s air quality safeguards by aggregating selected emissions increases and decreases into a “project,” whose boundaries are left entirely to source-owners’ discretion. EPA Br. 32-34. EPA does not contest that the Rule bypasses those safeguards even where a source-wide assessment of *all* emissions increases and decreases would reveal a significant increase in real-world pollution. *Id.* at 36 (no consideration of Step 2 “net” increase if project decreases counted at Step 1 make increase insignificant). EPA does not deny project accounting allows sources to avoid New Source Review based on unenforceable decreases projected to occur years *after* a change produces a significant emissions increase. *Id.* at 44. And EPA does not dispute the Rule consequently permits industrial changes that can violate air-quality standards to proceed without prophylactic review, *id.* 46-47—undermining the statutory design. *See id.* at 37; *Alabama Power v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979).

EPA instead responds primarily with a blizzard of threshold arguments—standing, exhaustion, and time-bars—seeking to shield its

Rule from judicial review. *E.g.*, EPA Br. 25-33, 42, 48-49, 52-54. But the Rule enables increased pollution and reduced information, and Petitioners have demonstrated that it thereby injures them and will continue to do so. Petitioners clearly raised each objection here in their comments, both when EPA proposed the Rule and again when it re-opened it. And the infirmities challenged here all first arose during the actions under review; Petitioners' claims are not, consequently, time barred.

On the merits EPA offers no meaningful reconciliation between the Rule and the statute, resorting instead to *post hoc* invocations of an extra-statutory "exception" to the Act's definition of a modification as *any* emissions-increasing change, and assertions of "discretion" that the statute does not provide. EPA Br. 39, 44. Nor does the Agency explain how the program remains enforceable when many sources using the Rule are exempt from recordkeeping or reporting requirements. And EPA now admits that its "substantially related" test has no "effect" on "regulated entities," rendering the Agency's reliance on sources' compliance with that test wholly arbitrary. *Id.* at 32-33 (citation omitted).

## **I. Petitioners Have Standing.**

### **A. The Rule Has Injured Petitioners and Their Members.**

EPA contests Petitioners' injury and its redressability. EPA Br. 26-29. Petitioners demonstrated, however, that their members live, work, and recreate near sources that avoided New Source Review because of the Rule—harming them through exposure to increased air pollution, denial of public participation opportunities, and lack of access to critical pollution information. Pet'rs' Opening Br. ("Brief") 35-40. That suffices to provide standing. *Cal. Cmty. Against Toxics v. EPA*, 928 F.3d 1041, 1048-49 (D.C. Cir 2019).

#### **1. The Rule Permits Increased Pollution Harming Petitioners' Members.**

EPA says that four of the minor-source permits described in one of Petitioners' declarations "contain emission-control requirements." EPA Br. 28. But EPA does not—and cannot—contest that those "requirements" allow more pollution than would be permitted under New Source Review. Fourteen facilities identified by Petitioners would be required, absent the Rule, to comply with the Act's "best available control technology" standard—reducing pollution to "the maximum degree" achievable by modern pollution controls, 42 U.S.C. § 7479(3).

McClintock Decl. ¶¶ 10, 17, 24, 30, 39, 45, 48, 52, 58, 63, 68, 73;  
Hawarden Decl. ¶¶ 12, 16; Arnett Decl. ¶¶ 17, 19; Taylor Decl. ¶ 20;  
Zedler Decl. ¶¶ 18, 26; Steele Decl. ¶¶ 9, 14; Masterson Decl. ¶¶ 17, 24;  
Griffith Decl. ¶¶ 13, 17, 22; Crow Decl. ¶¶ 13, 15, 18. *See Alaska Dep't  
of Conservation v. EPA*, 540 U.S. 461, 472-74 (2004). Two facilities are  
in areas violating the Act's air quality standards, and so (absent the  
Rule) would need to meet even more stringent "lowest achievable  
emission rate" standards, and to obtain enforceable emission offsets, 42  
U.S.C. § 7503(a)(2), (b). *See* McClintock Decl. ¶ 17; Coates Decl. ¶ 11;  
Lewis Decl. ¶ 32.

EPA does not suggest the "requirements" it describes are equivalent  
in stringency to the above-described New Source Review safeguards.  
EPA Br. 28. Nor could it. They emerge from state "minor" source  
permitting regimes "entail[ing] only the barest of requirements," none  
of which approach the pollution reductions required under New Source  
Review. *Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020) (citation  
omitted).

## **2. The Rule Denies Petitioners' Members Opportunities for Meaningful Public Participation.**

The New Source Review program is meant “to assure that any decision to permit increased air pollution” is made only “after adequate procedural opportunities for informed public participation in the decisionmaking process.” 42 U.S.C. § 7470(5). A permitting agency is therefore required to publish its analysis of New Source Review applications and a draft version of its permit for public comment. *See* 40 C.F.R. § 51.166(q)(2)(ii)-(iii). The Rule has injured Petitioners' members by depriving them of those opportunities to participate in decisions affecting their health, aesthetic, and recreational interests. *See* Brief 39.

EPA observes that for two power-plant expansions in Tennessee relying on the Rule, one petitioner “commented” on the “proposed modifications.” EPA Br. 29. EPA omits that those comments were limited to the underlying permit *applications* because the permitting agency refused to allow public comment on its own analysis of the applications or on draft permits—opportunities required under New Source Review, 40 C.F.R. § 51.166(q)(2)(ii)-(iii). *See* Arnett Decl. ¶¶ 10-11; Taylor Decl. ¶ 11. And EPA disregards entirely other instances where the Rule reduced the public-participation opportunities available

to Petitioners and their members. *See, e.g.*, Coates Decl. ¶ 12; Lewis Decl. ¶¶ 11, 24, 32.

### **3. The Rule Causes Informational Injury.**

Project accounting excuses compliance with Clean Air Act information requirements, including to gather “continuous air quality monitoring data” revealing the effect of pollution on local air quality, and to make available “[t]he results of such analysis.” 42 U.S.C. § 7475(e)(2). Petitioners’ declarations show that as a result EDF is unable to evaluate and communicate air pollution risks to the public, and to protect communities from air pollution. *See* Lewis Decl. ¶¶ 9, 13-15, 17-18, 25, 28-29; Coates Decl. ¶¶ 2, 7, 8. That impairs EDF’s ability to pursue its mission, and suffices to create standing. Barone Decl. ¶¶ 4, 18; Lewis Decl. ¶¶ 25, 28-30, 34. *See EDF v. EPA*, 922 F.3d 446, 452-53 (D.C. Cir. 2019).

EPA incorrectly claims that Petitioners failed to demonstrate that they have “diver[t]ed] greater organizational resources” to collect the missing information. EPA Br. 29-30. EDF explained that the Rule forces it to expend more organizational resources on air monitoring efforts. Lewis Decl. ¶¶ 12-14, 18, 34; Coates Decl. ¶¶ 4-5, 8. Moreover,

informational injury is a “distinct concept[]” from an injury based on a “drain” on organizational “resources.” *Indep. Mkt. Monitor for PJM v. FERC*, 162 F.4th 1167, 1175 (D.C. Cir. 2025) (Edwards, J., concurring); *see also FDA v. All. for Hippocratic Medicine*, 602 U.S. 367, 395 (2024) (distinguishing “informational injury” from diversion of resources). “The law is settled that ‘a denial of access to information’ qualifies as an injury in fact,” when—as here—a statute “requires that the information ‘be publicly disclosed’ and there ‘is no reason to doubt [Petitioners] claim that the information would help them.’” *EDF*, 922 F.3d at 452-53 (citation omitted).

#### **4. Vacatur Would Redress Petitioners’ Injuries.**

EPA speculates—without any factual substantiation—that all the projects affecting Petitioners’ members “may” avoid New Source Review through “Step 2” source-wide netting even without the Rule. EPA Br. 28. But Petitioners’ declarations showed the cited industrial projects—without project accounting—would have either: (1) been unable to avoid New Source Review through source-wide netting or (2) avoided New Source Review *only* with additional required protections for local air quality written into their permits. *See Bennett v. Donovan*, 703 F.3d

582, 589-90 (D.C Cir. 2013) (“The relevant question for standing” is “not whether relief is *certain*, but only whether it is *likely* as opposed to merely speculative.”).

Petitioners’ McClintock declaration explains that at Step 2, project proponents must account for “all contemporaneous increases and decreases,” whereas netting at Step 1 “is limited to reviewing only those hand-picked increases and decreases selected by the company.” McClintock Decl. ¶ 79. It also explains that at Step 2, offsetting decreases must be “contemporaneous and creditable,” such that “a source must accept enforceable restrictions ensuring that the decrease will actually occur and be permanent,” *id.*, whereas netting at Step 1 allows subtraction of emission decreases based only on “a company’s vague promises about shutting down units [that] are often ambiguous or are later revised,” *id.* ¶ 81.

The McClintock declaration also explains that many of the cited projects would *not* be able to avoid New Source Review under the regulations governing Step 2 contemporaneous netting. *See id.* ¶ 77 (“As identified above, there are many projects that have relied on emissions decreases that are not enforceable or creditable.”). It provides seven

examples of projects where the emission decreases are not contemporaneous, *see id.* ¶¶ 7-8, 15, 18, 22, 28, 34, 38, 44, 67, and two examples of projects where the emission decreases are not enforceable, *see id.* ¶¶ 8, 67. *See also* Hawarden Decl. ¶ 13; Arnett Decl. ¶¶ 17, 19; Taylor Decl. ¶ 18; Steele Decl. ¶ 10; Masterson Decl. ¶ 18; Griffith Decl. ¶ 15; Crow Decl. ¶ 14.

Also, project accounting enables sources to avoid Step 2's reporting and analysis, obstructing the public's ability to know (let alone contest) what pollution increases and decreases might be occurring source-wide. *See* McClintock Decl. ¶ 86 (Rule allows projects to proceed with "less than a few pages" of analysis, without "details about other contemporaneous emission increases" at the source). *See also* Hawarden Decl. ¶ 14; Arnett Decl. ¶¶ 22, 32; Taylor Decl. ¶¶ 21, 32; Zedler Decl. ¶ 19; Coates Decl. ¶ 10; Lewis Decl. ¶¶ 29-30; Masterson Decl. ¶ 19; Griffith Decl. ¶ 14. The Rule's vacatur would, at a minimum, force facilities to provide Petitioners with that information and opportunity for contestation. *See* Brief 39 (noting procedural injury); *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 113 (D.C. Cir 2021) (where agency

denies procedural opportunity, “possibility” that decisionmaker “will reconsider” is “enough”).

### **B. Petitioners’ Future Injuries Are Not Speculative.**

EPA suggests that Petitioners have provided insufficient evidence that “sources” affecting Petitioners’ members “would apply the Accounting Rule” in the future. EPA Br. 27. But to show a substantial risk of injury, it is sufficient that—as here—an agency adopted a harmful new policy that industry “specifically sought,” has a financial incentive to use, and described as vital to their operations. *Sierra Club v. EPA*, 755 F.3d 968, 975-76 (D.C. Cir. 2014).

Owners of plants located near Petitioners’ members specifically sought the Rule, including: Alliant Energy,<sup>1</sup> owner of the Columbia Energy Center and Edgewater coal plants near Joy Zedler, Zedler Decl. ¶¶7, 11; Kinder Morgan,<sup>2</sup> owner of a petroleum terminal near Andrew

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<sup>1</sup> JA\_\_ (EPA-HQ-OAR-2018-0048-0064) (Comments of group including Alliant).

<sup>2</sup> Kinder Morgan is a member of the Interstate Natural Gas Association of America and International Liquid Terminals Association. <https://ingaa.org/ingaa-member-companies/>; <https://www.ilta.org/Members/ILTA-Terminal-Members>. Both lobbied for Project Emissions Accounting. JA\_\_(EPA-HQ-OAR-2022-0381-

Taylor, Taylor Decl. ¶5; Owens Corning,<sup>3</sup> owner of a roofing and asphalt plant near Andrew Taylor, Taylor Decl. ¶5; and Tennessee Valley Authority,<sup>4</sup> owner of the Cumberland, Gallatin, and Kingston power plants near James Arnett, Arnett Decl. ¶ 4.

Intervenors confirm the likelihood of widespread reliance on the Rule to avoid New Source Review. Intervenor-Resp'ts' Br. ("Interv. Br.") 7-8 (Rule allows companies to "expand their facilities" and "implement projects" without New Source Review "burdens"). And Petitioners have shown that industry is *already* making ample use of project accounting

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0051); JA\_\_ (EPA-HQ-OAR-2018-0048-0060); JA\_\_ (EPA-HQ-OA-2017-0190-36694).

<sup>3</sup> Owens Corning is a member of American Forest and Paper Association, American Wood Council, National Association of Manufacturers, American Chemistry Council, Business Roundtable, and Asphalt Roofing Manufacturer Association.

<https://www.owenscorning.com/en-us/corporate/sustainability/docs/2025/2024-Owens-Corning-Sustainability-Report.pdf> at 342-345.

All have long sought the Rule. *See* JA\_\_ (EPA-HQ-OAR-2018-0048-0081), JA\_\_ EPA-HQ-OAR-2017-0001-0152, JA\_\_ (EPA-HQ-OAR-2017-0190-37771, JA\_\_ (EPA-HQ-OA-2017-0190-45005)); JA\_\_ EPA-HQ-OAR-2017-0001-0167; JA\_\_ (EPA-HQ-OA-2017-0190-36719), JA\_\_ (EPA-HQ-OAR-2017-0545-0223); JA\_\_, (EPA-HQ-OAR-2018-0048-0059)); *see also* McClintock Decl. ¶¶75-86

<sup>4</sup> JA\_\_ (EPA-HQ-OAR-2018-0048-0044).

to avoid the Act’s pollution-reduction, procedural, and informational requirements—directly demonstrating its likely future effect. *Supra* 3-6.

## II. EPA Provided No Valid Statutory Interpretation.

EPA’s sole interpretative rationale for the Rule was that “how to determine” whether a change “‘increases’ emissions is ambiguous,” providing EPA “authority” to “fill[] in the gaps” according to its policy preferences. 85 Fed. Reg. 74,890, 74,894 (Nov. 24, 2020) (claiming only that interpretation is “reasonable and allowable”). The Supreme Court has squarely established that no such authority exists. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399-400 (2024).

EPA primarily argues that this Court cannot apply *Loper Bright*, because Petitioners failed to raise “reliance on statutory ambiguity” in comments. EPA Br. 48-49. That is doubly incorrect. Petitioners’ objection is—and always has been—that there is no basis for the Rule in the Act. Petitioners commented that the proposal was “[i]n direct conflict with the statute” because it defined “‘modification’ in a fashion that would allow” a change “to avoid NSR despite causing an [emissions] ‘increase,’” and that “no congressional delegation authorizes

EPA’s proposed project exemption.” JA\_\_-\_\_ (EPA-HQ-OAR-2018-0048-0079 at 6-8). EPA responded by asserting gap-filling authority conferred by statutory ambiguity. 85 Fed. Reg. at 74,894. The question for review is whether such authority exists. 42 U.S.C. § 7607(d)(9) (requiring reversal of actions exceeding “statutory authority”). That EPA’s rationale has been plainly “foreclosed by” an “intervening decision” requires vacatur—Petitioners’ comments need not have cited the intervening court decision. *SSM Litig. Grp. v. EPA*, 150 F.4th 593, 599 (D.C. Cir. 2025).

And Petitioners *did* inform EPA that *Loper Bright* foreclosed the Rule’s ambiguity-based rationale, when EPA re-opened the Rule during its voluntary reconsideration. JA\_\_ (EPA-HQ-OAR-2022-0381-0060 at 41-42). EPA seeks to elide that comment as outside “the scope of review.” EPA Br. 48-49. But it was provided during EPA’s express reopening of the Rule, which requested comment as to whether the Agency should “disallow” project accounting. 89 Fed. Reg. 36,870, 36,881. EPA then refused to withdraw the Rule, acknowledging that it did so after “considering” these comments. EPA Br. 19. That satisfies the Act’s requirement that the objection be “raised with reasonable

specificity during the period for public comment,” 42 U.S.C.

§ 7607(d)(7)(B). *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331-32 (D.C.

Cir. 1993) (where agency “solicit[s] comment” on existing regulation and proposes “possible ‘alternative approach,’” court must review objections).

EPA seeks to avoid objections raised during its 2024 proceedings, maintaining Petitioners have not claimed that the “Withdrawal Notice” terminating those proceedings (rather than the Rule itself) “was unlawful.” EPA Br. 49. But Petitioners challenged EPA’s “decision not to amend” the Rule, following its 2024 reopener. Brief 5-6 (challenging withdrawal of proposal). *See EDF v. EPA*, 852 F.2d 1316, 1324 (D.C. Cir. 1988) (such decisions are subject to review) (citation omitted). The requested relief for that challenge—as for all Petitioners’ challenges—is vacatur of the underlying Rule. *See Fox TV Stations v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002). That remedial convergence does not permit EPA to ignore issues raised during its 2024 reconsideration.<sup>5</sup>

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<sup>5</sup> Petitioners do not challenge EPA’s initial refusal to begin mandatory reconsideration proceedings, because EPA voluntarily undertook reconsideration. *See* Brief 5-6 & n.2.

Finally, EPA suggests a passing reference in the Accounting Rule to the “best reading” of 42 U.S.C. § 7411(a)(4)—made while agreeing with comments stating that the Rule is a “clarification of pre-existing regulatory text,” 85 Fed. Reg. at 74,899—provides the requisite statutory rationale. EPA Br. 49. But mere incantation of the words “best reading” is not a statutory interpretation sufficient to uphold EPA’s Rule. *See* 42 U.S.C. § 7607(d)(3)(C). EPA stated only that project accounting is the “best reading” because it “ensure[s] that *projects* that overall decrease emissions or result in a *de minimis* increase in emissions will not be subject” to “NSR.” 85 Fed. Reg. at 74,899 (emphasis added). At most that construes “projects”—a term from EPA’s regulations, not the statute. *Stern Produce Co. v. NLRB*, 97 F.4th 1, 10-11 (D.C. Cir. 2024) (agency’s construction of regulatory terms cannot substitute for statutory rationale).

And EPA’s cited passage provides no reason why the traditional tools of statutory interpretation make the Agency’s view the best reading of the statute. It simply describes what project accounting does: measure a “change” that “increases” emissions on a project, rather than source-wide, basis. 42 U.S.C. § 7411(a)(4). That sort of “circular” reasoning,

which “assumes the answer to the central question at issue”—here, whether sources may escape New Source Review based on project accounting—cannot provide the Rule’s statutory foundation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361-62 (2013).

### **III. Project Accounting Cannot be Reconciled with the Statute.**

#### **A. No Atextual Exception Permits EPA to Implement Two Understandings of a “Modification.”**

By adding project accounting (at Step 1) alongside “contemporaneous” source-wide netting (at Step 2), EPA unlawfully implements two inconsistent understandings of a “modification,” under which some “change[s]” at a source that “increase[]” emissions may avoid New Source Review—violating the text’s inclusion of “any” such increase. 42 U.S.C. § 7411(a)(4). Brief 45-52.<sup>6</sup>

EPA now claims that because it defines a “change” as a “project,” its interpretation measures (via project accounting) whether a “change” will “increase[]” emissions on a *non-source-wide* basis—understanding the “steps involved” in a change as *just* those comprising the “project.”

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<sup>6</sup> EPA suggests that its interpretation deserves respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). EPA Br. 24. But *Skidmore* requires “consistency with earlier and later pronouncements,” *id.* at 140—consistency notably absent here. See Brief 12-22.

EPA Br. 38, 52. If so, then “any” project (*i.e.*, “change”) that “increases” emissions is a “modification,” 42 U.S.C. § 7411(a)(4). EPA cannot simultaneously apply a second, *source-wide* interpretation of those terms that allows an emissions-increasing project to escape New Source Review (under Step 2). *Alabama Power*, 636 F.2d at 403. *See* 40 C.F.R. § 52.21(b)(52) (equating “project” and “change”).

EPA responds—for the first time—that *Alabama Power* added an atextual “exception to the permitting requirement” such that even if “a *project [i.e., change]* is found to have a significant increase,” the source may escape review based on decreases produced by wholly separate and unrelated changes. EPA Br. 39. *Cf.* JA\_\_ - \_\_ (Comments Response 31-32) (*Alabama Power* upheld source-wide “bubble” as “only permissible interpretation of the term ‘modification’”). Contemporaneous, source-wide netting (Step 2), EPA says, implements that “offset exception” to the statutory definition of a modification as *any* single pollution-increasing change. *Id.* at 9. And this exception, in EPA’s view, permits it to adopt project-based netting (at Step 1) alongside contemporaneous, source-wide netting (at Step 2). *Id.* at 39.

The Rule cannot be upheld on that *post hoc* basis. *Michigan v. EPA*, 576 U.S. 743, 758 (2015). Moreover, *Alabama Power* did not graft a non-source-wide exception onto the statutory definition of a “modification.” It construed the text to “determin[e] what types of industrial changes” fit within that definition, and held that a modification includes “any change” where the *source-wide* “effect of all the steps involved in that change is to increase the emission of any air pollutant.” *Alabama Power*, 636 F.2d at 400-01. See *New York v. EPA*, 413 F.3d 3, 36 (D.C. Cir. 2005) (*Alabama Power* held “that EPA has the authority to define ‘increases’ in terms of *source-wide emissions*.”) (emphasis added). That is why *Alabama Power* forbade EPA from implementing “two different” definitions of a “change” producing an “increase,” one source-wide and another limited to portions of the source. 636 F.2d at 403.

Nor could this Court have added such an exception: The statute defines “any” change “which increases the amount of any air pollutant emitted” by a source as a modification requiring New Source Review. 42 U.S.C. § 7411(a)(4). That demands that if a “change” is a project, EPA Br. 10—so that EPA may measure an emissions increase by netting “all the steps involved” in that *project*, *id.* at 38-39—then *any* project

producing an increase must be a modification. *New York v. EPA*, 443 F.3d 880, 885--86 (D.C. Cir. 2006) (*New York II*). See *SAS Inst. v. Iancu*, 584 U.S. 357, 359-60 (2018) (“[A]ny’ means ‘every.’”). There is no statutory anchor for an exception based on offsetting decreases from other “unrelated” changes—EPA’s new characterization of “contemporaneous” (Step 2) netting. EPA Br. 40-42. See *Alabama Power*, 636 F.2d at 401 (approving only offsets from “steps involved” in a single “change”).

EPA seeks to insulate its statutory rationale (or lack thereof) from review because it “promulgated Step 2 in 1980.” EPA Br. 42 (asserting time-bar). But EPA’s interpretative incoherence arises because it now allows *both* project (Step 1) and source-wide (Step 2) netting—a position it disavowed for the 38 years separating its 1980 regulations from the actions challenged here. See Brief 12-22. EPA’s 1980 regulations did not even include the term “project”; they permitted *only* source-wide, contemporaneous netting, with no need for a further exception enabling two different definitions of an emissions-increasing change. See 63 Fed. Reg. 39,857, 39,863 (July 24, 1998) (Netting on a “less than plantwide scope” conflicts with Act). Indeed, the example EPA cites, EPA Br. 42,

makes clear that sources relying on offsetting pollution decreases were required to consider *all* contemporaneous increases and decreases *source-wide*, rather than cherry-picking a subset into a “project” that evades review. 45 Fed. Reg. 52,676, 52,705 (Aug. 7, 1980) (requiring inclusion of all “increases and decreases” occurring within “five-year period”).

EPA’s 1980 rulemaking thus did not suggest that it measured a “change” that “increases” emissions on a less than source-wide basis, 42 U.S.C. § 7411(a)(4), much less “clearly” establish that “Step 2” allowed sources to avoid NSR through “*other, unrelated changes.*” EPA Br. 42 (emphasis added). In 1980 EPA claimed its “second step” served “to identify and quantify any other prior increases and decreases” in pollution “that would be contemporaneous with the *particular change.*” 45 Fed. Reg. at 52,698 (emphasis added). The Agency thereby implied no exception based on wholly separate, unrelated changes—it defined the “increases and decreases” related to a *single* change as those that were contemporaneous at the source. *Id.*

When EPA introduced the term “project” in 2002, it suggested no consequent substantive change. 67 Fed. Reg. 80,186, 81,187-88 (Dec. 31,

2002); *See New York*, 413 F.3d at 14 (Step 2 remained the “process” by which regulations determined whether a “change” produced an “increase”). From then until these actions EPA insisted that it had *not* sanctioned project accounting (*née* “project netting”), retaining a uniform source-wide approach. Brief 16-21.

The Rule transformed contemporaneous netting (Step 2) from the *only* way sources could use offsetting decreases to escape New Source Review, to one of two *alternative* methods of counting decreases against increases: one project-based, and another source-wide. That creates the inconsistency contested here, and the need to justify contemporaneous netting through an exception looking to wholly unrelated changes. This contextual change would, if necessary, reopen the lawfulness of contemporaneous netting. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008).<sup>7</sup> Vacatur of the Rule solves the problem, obviating the

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<sup>7</sup> EPA claims its governing regime until 2018—which considered decreases only at Step 2—“contravene[d]” *New York II*. EPA Br. 51. *Cf.* JA\_\_\_ (Finazzo Memo 5) (project accounting unlawful after *New York II*). That gets it backwards: EPA’s Rule demands an atextual exception under which some changes—*i.e.* projects—that increase emissions are *not* a modification, EPA Br. 36. *New York II* forbids that exception. 443 F.3d at 885-86.

need for relief directed at EPA's prior regulations; but those regulations do not shield EPA's newly introduced inconsistency from review.

At base, the Agency claims authority to promulgate a regulatory regime in 1980, add the term "project" in 2002, then insert a novel interpretation of that term in 2018—without ever having to reconcile the end-result with the statutory text. An agency may not escape "obedience to" the statute through such "constructions of (its own constructions)." *Stern Produce Co.*, 97 F.4th at 11 (citation omitted). And the Clean Air Act's time-bar does not protect such disobedience from review. *See Sierra Club*, 551 F.3d at 1025-26.

Lastly: EPA cannot discern Petitioners' statutory interpretation. EPA Br. 34. Petitioners' interpretation is the one EPA followed for nearly four decades: that a "change" that "increases" emissions is measured through all contemporaneous increases and enforceable decreases at a source, exempting only *de minimis* changes. Brief 21-22. EPA's prior regime conformed with that interpretation: Step 1 served only to exclude *de minimis* changes, and Step 2 measured source-wide emissions increases and decreases. *Alabama Power*, 636 F.2d at 400. Project accounting does not: It requires two different, inconsistent

understandings of a “modification,” 42 U.S.C. § 7411(a)(4), based on an atextual exception permitting *some* emissions-increasing changes to escape New Source Review.

**B. Project Accounting Unlawfully Allows Years-Long Emissions-Increasing Changes Without Review.**

Neither EPA nor Intervenors dispute that Project Accounting allows sources to avoid New Source Review even where changes produce actual emissions increases years *before* any offsetting decrease—thereby interpreting a “modification” to exclude changes producing years-long pollution increases well above EPA’s significance thresholds. *See* EPA Br. 46-47, Interv. Br. 26-27. Nor do (or could) they dispute that such multi-year pollution increases can violate federal air-quality standards. Brief 52-54. Instead, EPA claims “discretion” to allow those increases to avoid New Source Review based on future, non-contemporaneous decreases. EPA Br. 44. But the Act provides no such discretion: It requires review of “any” physical or operational change that “increases the amount of any pollutant emitted by [the] source.” 42 U.S.C. § 7411(a)(4). For that reason, *Alabama Power* constrained EPA’s consideration of offsetting decreases to those that are contemporaneous, recognizing that otherwise New Source Review could not serve its

function of preventing air-quality deterioration. 636 F.2d at 402-403.

EPA claims *New York v. EPA* “already rejected” Petitioners’ argument. EPA Br. 43 (citing 413 F.3d at 25, 27). But *New York* did not address or uphold the interpretation of “increases” underlying project accounting, or suggest that EPA may exempt changes causing years-long significant emission increases. *New York* upheld the “ten-year lookback”—the baseline by which EPA defines a source’s past actual emissions. 413 F.3d at 10. EPA’s regulations, at Step 1, compare this ten-year baseline to a source-owner’s predicted “projected actual emissions” post-change; if the difference does not exceed EPA’s pollutant-specific significance thresholds, the regulations exempt the change from review as *de minimis*. 40 C.F.R. § 52.21(a)(2)(iv)(B)-(C), 52.21(b)(41)(i).

*New York* did not consider the lawfulness of counting non-contemporaneous decreases when calculating post-change “projected actual emissions” at Step 1. 413 F.3d at 26-27 (noting that regulations retained contemporaneity requirement). At the time *New York* was decided, sources could only include emission *increases* at Step 1; decreases were counted only at Step 2, and so had to be enforceable and

already achieved prior to the increase being offset. JA\_\_-\_\_ (Finazzo Memo at 2-3); 40 C.F.R. § 52.21(b)(3)(i)(B), (ii)(B), (iv). Thus, if a source planned to add a new boiler and remove an old one five years later, it could not use the decreases resulting from the removal in calculating the source's "projected actual" future emissions. 40 C.F.R.

§ 51.21(a)(2)(iv)(B)-(C). The source could still account for the boiler's removal—but only under Step 2's contemporaneous-netting requirements, which demanded that the decrease occur *before* any increase. *See* Brief 21-22; *cf.* EPA Br. 21-22 (claiming project accounting needed to "account[]" for "all the steps" in a change).

Pursuant to EPA's new interpretation of a "change" that "increases" pollution, the same source may now project *both* increases (from the new boiler) and decreases (from the old boiler's removal years later) at Step 1—so that the source's "projected actual emissions" are nominally unchanged, despite a multi-year increase between the new boiler's addition and the old boiler's removal. 40 C.F.R. § 52.21(b)(41). Project accounting thereby allows sources to make changes that produce significant emissions increases, yet avoid New Source Review based on years-later decreases—so long as the source deems the two changes

part of the same “project.” See EPA Br. 46 (not contesting allowance of such increases).

*New York* never sanctioned that interpretation, which contravenes the statute’s express definition of “any” change that “increases” emissions as a “modification” subject to review, 42 U.S.C. § 7411(a)(4). 413 F.3d at 27 (assuming that “‘any’ change that increases emissions” from redefined baseline “triggers NSR”). Statutory structure and purpose confirm the Rule’s unlawfulness. As EPA admits, “Congress enacted the New Source Review program” to capture “industrial changes [that] might increase pollution in an area’ and thereby affect” air-quality standards, to “ensure” that those standards “are achieved or maintained.” EPA Br. 37 (quoting *Alabama Power*, 636 F.2d at 401); *accord* Interv. Br. 13. By interpreting “increases” to exclude significant, actual, multi-year emissions increases—easily capable of violating air-quality standards—the Rule prevents the program from achieving that central aim, fundamentally “destabiliz[ing]” the statutory scheme. *King v. Burwell*, 576 U.S. 473, 492 (2015).

Intervenors claim that EPA’s “substantially related” test somehow assures contemporaneity. Interv. Br. 29. But EPA concedes the test

imposes no consequences, assuring nothing. EPA Br. 32. Finally, respondents suggest that source-owners *might* choose not to undertake “projects” in which promised decreases follow pollution-increasing changes, or that States *might* independently prevent such projects. EPA Br. 46-47, Interv. Br. 27. That possibility cannot excuse the Rule’s unlawfulness. And in any event, sources *already* are pursuing such delayed-decrease projects, with State approval—and, thanks to the Rule, avoiding New Source Review. *See* McClintock Decl. ¶¶ 7-8, 15, 18, 22, 28, 34, 38, 44, 67; Hawarden Decl. ¶ 13; Arnett Decl. ¶¶ 17, 19; Taylor Decl. ¶ 18; Steele Decl. ¶ 10; Masterson Decl. ¶ 18; Griffith Decl. ¶ 15; Crow Decl. ¶ 14.

#### **IV. EPA Has Not Explained How Its Regulations Ensure Accountability.**

Before the Rule, source-owners could only use enforceable, prior offsetting decreases to avoid New Source Review—ensuring those decreases would occur and persist. 40 C.F.R. § 52.21(b)(3)(vi)(B). The Rule now allows source-owners to utilize wholly unenforceable promises of future emissions-decreases. *See* Brief 61-65. EPA insists pre-existing regulatory recordkeeping requirements nevertheless ensure accountability, EPA Br. 45, 54-57. EPA does not, however, explain how

these requirements provide regulators and the public with the information needed to identify violations.

EPA does not dispute that under its “reasonable possibility” provisions, if projected emissions *after* the decrease are below 50% of EPA’s significance thresholds, no recordkeeping is required. Brief 61-62. The Agency claims that its regulations prevent sources from “arbitrarily project[ing] emissions below the applicability level to avoid the recordkeeping requirements.” EPA Br. 55. But for sources below the 50%-threshold, permitting authorities and the public have no means to determine, even after the fact: how source-owners exercise their discretion to define a project; what future decreases are promised; and when (or whether) those decreases might occur. *See New York*, 413 F.3d at 35 (regulations “require[] sources to predict uncertain future events”; “[w]ithout paper trails” there are “no means” to determine if their “exercise of such judgment was reasonable”). EPA offers no reasonable basis for exempting such sources from its recordkeeping requirements; the 50% “reasonable possibility” threshold—adopted when EPA forbade project accounting—has no rational relationship to whether a project

relying on large, offsetting decreases will, in fact, violate New Source Review. *See* Brief 61-65.

EPA argues that “regardless of any preconstruction projections,” review is required “if the project actually results in a significant emissions increase and a significant net emissions increase,” so a source that underestimates its projected emissions “can be held accountable for that error.” EPA Br. 45. But enforcement is impossible without “data by which the agency could prove an NSR transgression.” *New York*, 413 F.3d at 35. No matter how large an increase, the Rule allows sources to forego *any* recordkeeping or reporting of those projections so long as the source owner promises roughly equivalent decreases. 89 Fed. Reg. at 36,876-77. EPA has not and cannot explain how that assures accountability.

Intervenors claim that the pre-existing reasonable-possibility requirements were in fact designed to address emission decreases because when EPA promulgated its “reasonable possibility” recordkeeping rules, “some” reviewing authorities allowed project netting at Step 1. Interv. Br. 32. But *EPA* did not then understand its regulations to allow project accounting. JA\_\_ (Finazzo Memo at 2-3)

(regulations’ “first step” considered “only the emissions increases” from the project); Brief 18-21. So EPA could not, and did not, design its recordkeeping regulations to enable adequate scrutiny of sources using project accounting. 72 Fed. Reg. 72,607, 72,609 (Dec. 21, 2007) (explaining regulatory design). And contrary to Intervenor’s claim, *New Jersey v. EPA* did not hold that EPA’s recordkeeping rules assure compliance for sources netting increases and decreases on a project (or Step 1) basis. 989 F.3d 1038 (D.C. Cir. 2021). The court upheld regulations that “exclude[d] netting analyses from projected emissions calculations.” *Id.* at 1050.

EPA asserts, finally, that state “minor” source programs provide sufficient documentation to ensure compliance. EPA Br. 56. Yet EPA admits, first, that *some* changes the Rule exempts from New Source Review will *not* be subject to minor-source permitting. *Id.*; *accord* 89 Fed. Reg. at 36,872. Because EPA never offered minor-source rules as a complete defense of its Rule, Petitioners reasonably addressed them in a footnote. Brief 65 n.15. That footnote (and this reply) are hardly an “inchoate” waiver. EPA Br. 57. *See also United States v. Powers*, 885

F.3d 728, 732 (D.C. Cir. 2018) (party may “wait to see if government would invoke” argument and address in “reply”).

Second, EPA has acknowledged “the sparsity of information in minor NSR permit applications,” and that “oftentimes minor NSR permit records do not contain information on how the applicability analysis was conducted,” preventing “verification” of sources’ compliance. 89 Fed. Reg. at 36,884-85; see *Luminant Generation Co. v. EPA*, 675 F.3d 917, 922 (5th Cir. 2012) (Clean Air Act prescribes “only the barest of requirements” for state minor source permitting and federal regulations “are likewise sparse.”). Third, as *New York* held in rejecting EPA’s similar attempt to excuse its deficient rules by relying on “state programs to establish minimum recordkeeping and reporting standards”: Such reliance does not account for “states unwilling to impose stricter rules,” and is therefore “unacceptable” to demonstrate a “methodology’s enforceability.” 413 F.3d at 35.

#### **V. EPA’s Rule Depends Upon Requirements It Never Imposed.**

EPA premised the Rule’s lawfulness on its claim that a project can include only “substantially related” activities. 85 Fed. Reg. at 74,898 (because Rule forbids inclusion of “unrelated emissions decreases,”

sources cannot “arbitrarily group[] activities,” and excusing lack of enforceability because sources cannot include “unrelated changes”), 74,899 (justifying abandonment of contemporaneity because “‘substantially related’ test” prevents including “decreases from *another* project”), 74,900 (substantially-related test “alleviates concerns about potential NSR circumvention”) & 74,903 (excusing lack of recordkeeping because test ensures decreases “in fact result from the project”); JA \_\_, \_\_, \_\_, \_\_, \_\_ & \_\_ (Comments Response at 42, 48, 56, 58, 61, 68 & 76) (all relying on adherence to test). EPA underscored the centrality of that premise when it reopened the Rule. 89 Fed. Reg. at 36,878-89 (Agency “predicated finalization” on test). Even the Agency’s defense of the Rule here depends upon its assertion that “Step 1 considers the impact of one project while Step 2 considers the impact of *multiple* projects,” EPA Br. 40—which is only true if the Rule prohibits sources from considering unrelated decreases (*i.e.*, those from another “project”) at Step 1.

The Rule fails, however, to include anything to prevent sources from including unrelated activities in a project—a point EPA now full-throatedly concedes, emphasizing that its “substantially-related

standard” has “no legal consequences” or “practical effect,” and that permitting authorities are free to ignore it. EPA Br. 32-33. That renders the Rule unlawful—it “rest[s] on an assumption” whose falsity the Agency now trumpets. *Ohio v. EPA*, 603 U.S. 279, 293 (2024).

EPA mostly attempts (again) to shield that error from review, claiming that it “received no comments” on its failure to assure that projects contain only substantially related activities. EPA Br. 52. But Petitioners squarely objected that “[n]othing in EPA’s Proposal prohibits a source from including unrelated decreases in its Step 1 analysis,” because EPA has not “require[d] that emission decreases accounted for in Step 1 be ‘substantially related.’” JA\_\_-\_\_ (EPA-HQ-OAR-2018-0048-0079 at 10-13) (also noting need to “promulgate clear criteria and an effective oversight mechanism” to limit projects to substantially related activities). Petitioners repeated the point when EPA reopened the Rule, objecting that exhortation alone cannot “prevent a source from circumventing NSR by packaging unrelated changes into a single ‘project.’” JA\_\_-\_\_ (EPA-HQ-OAR-2022-0381-0060 at 49-50).

EPA mistakes Petitioners' claim for "an improper challenge" of its "2018 Aggregation Action." EPA Br. 31. But the Aggregation Action expressly declined to address the substantially related test's relevance to project accounting; EPA deferred that question to "a subsequent rulemaking." 83 Fed. Reg. 57,324, 57,326 (Nov. 15, 2018). That cannot bar review of EPA's decision, here, to "carr[y]" the substantially related test "into the Accounting Rule." EPA Br. 30. *See Kennecott Copper Corp. v. DOI*, 88 F.3d 1191, 1227 (D.C. Cir. 1996) (review available where agency gives pre-existing rule "new significance"). And this case does not challenge the substantially related standard; it challenges EPA's decision to premise the *Rule's* validity on adherence to a test that, it says, has no "effect on regulated parties." EPA Br. at 33.

On the merits, EPA claims that in its Project Aggregation Action—which disclaimed any relevance to project accounting—EPA explained that "it would be unreasonable to impose the substantially-related standard as a 'bright line' requirement because defining the scope of a project is heavily case-specific." EPA Br. 53; 83 Fed. Reg. at 57,326. But EPA cannot rely on that explanation, because it did not proffer it when it later promulgated this Rule, or when it decided to retain it. 85 Fed.

Reg. at 74,898 (“The application of the ‘substantially-related’ test ... should be sufficient to prevent sources from arbitrarily grouping activities”); 90 Fed. Reg. 34,206, 34,207 (July 21, 2025) (stating only that “proposed definition of ‘project’” could “increase uncertainty” and that proposal lacked “sufficient consideration”). And even if EPA’s substantially-related test is inappropriately bright-line, that does not excuse EPA’s failure to provide *any* requirement—if necessary, a more flexible one—that prevents “a source from including unrelated decreases” in a project. JA\_\_\_ (EPA-HQ-OAR-2018-0048-0079 at 10).

EPA also notes that its 2018 Aggregation Action claimed that many states implemented a standard “similar to the substantially-related standard.” EPA Br. 54. But EPA did not offer that rationale to justify this Rule, and so cannot rely on it here. In *this* proceeding EPA acknowledged that its faith in states’ implementation had been misplaced: “EPA has found that in some cases activities were *not* aggregated *despite* evidence that they were substantially related,” and these “determinations were made without documentation.” 89 Fed. Reg. 36,878 (emphasis added).

## Conclusion

Petitioners respectfully request that the Court grant the petitions for review.

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### **Certificate of Compliance**

I hereby certify that this Petitioners' Proof Reply Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32 because it contains 6,472 words (as counted by the Microsoft Word software used to produce it), excluding the parts of the filing exempted by Rule 32(f). This brief also complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6), respectively, because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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### Certificate of Service

I hereby certify that on March 6, 2026, I served the foregoing  
Petitioners' Proof Reply Brief on all registered counsel through the  
Court's electronic filing system (CM/ECF).

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