

February 17, 2009

The Honorable Lisa P. Jackson
EPA Administrator
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

In the early morning hours of January 20, 2009, shortly before President Obama was sworn into office, the Bush administration caused a rule weakening a longstanding Clean Air Act safeguard to become legally effective. That day, plainly out of an expectation that the Obama administration would not support this harmful rule change, the Bush administration put into effect a rule entitled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions.” 73 Fed. Reg. 77,882 (“Fugitive Emissions Rule”). Before this last-minute rule change, EPA had long followed a stronger, more protective legal interpretation first adopted in 1984, and finalized as a formal interpretive rule in 1989. See 54 Fed. Reg. 48870 (Nov. 28, 1989).

On behalf of the Natural Resources Defense Council, and pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), and the Administrative Procedures Act, I am petitioning you to (1) reconsider the final Bush administration Fugitive Emissions Rule; (2) administratively stay the Fugitive Emissions Rule for three months; (3) announce that EPA does not intend to require states to submit SIP revisions to adopt the Fugitive Emissions Rule, and that states may not implement the Bush administration rule changes through mere “public announcement” that the state accepts those changes by interpretation; (4) convene a public notice-and-comment period following reconsideration of the final rule; and (5) following such comment period, or even in the absence of such comment period, withdraw and abandon the final rule.

The final rule addresses the treatment of so-called “fugitive emissions” under one important aspect of the Clean Air Act’s major NSR programs, specifically the “modification” definition under section 111(a)(4) of the Act. Yet incredibly:

- The final Bush administration rule does not justify itself through *any* interpretation of the modification language in section 111(a)(4);
- The final Bush administration rule does not even *address* section 111(a)(4);

- The final Bush administration rule does not even respond to or otherwise address EPA’s 25-year old argument that the plain language of section 111(a)(4) prohibits the interpretation and outcome in the Fugitive Emissions Rule; and
- The final Bush administration rule does not even respond to or otherwise address adverse comments filed by state, local and tribal air pollution control officials objecting that the Fugitive Emissions Rule violates the plain language of section 111(a)(4) and EPA’s longstanding interpretation of that provision.

No less incredible, the Bush administration weakened its longstanding approach to fugitive emissions in this final rule, in response to an industry petition for reconsideration that even the Bush administration found to be groundless. The Newmont Mining Corporation petitioned EPA in 2003 to exempt fugitive emissions from being counted “for purposes of determining whether a physical or operational change constitutes a major modification for sources in source categories not listed pursuant to section 302(j). Newmont also argued that we failed to provide notice and an opportunity for comment on this issue.” 73 Fed. Reg. at 77,885/3. Yet the preamble to the Fugitive Emissions Rule explains that EPA “disagree[s] with the petition on the two counts summarized.” *Id.* at 77,888/2.

So in response to an industry petition filed in 2003 that the Bush administration openly *disagreed* with, on the very last day of the Bush administration’s eight-year term, EPA weakened 25 years of consistent and more protective agency practice with a rule that could not even manage to discuss -- much less explain -- the controlling statutory provision in the Clean Air Act.

For the reasons discussed herein, the Bush administration’s Fugitive Emissions Rule is unlawful and otherwise arbitrary and capricious, and the current administration should reverse it and return to EPA’s longstanding, lawful and more protective approach.

With this letter, I also am informing you of NRDC's filing today in the U.S. Court of Appeals for the D.C. Circuit of a petition for review of the Fugitive Emissions Rule.

As discussed in detail below, EPA has included in the Fugitive Emissions Rule a number of issues, justifications and changes for which it was impracticable to raise objections during the period provided for public comment. These issues are also centrally relevant to the rulemaking action because they demonstrate that the agency’s approaches violate the Clean Air Act (“CAA” or “Act”) and are otherwise arbitrary and capricious. As such, EPA must “convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.” 42 U.S.C. § 7607(d)(7)(B).

The Final Rule Unlawfully Exempts From NSR Coverage Fugitive Emissions Increases That Result From “Any Physical Change”

The final rule addresses the treatment of so-called “fugitive emissions” under the Clean Air Act’s major NSR programs. “For purposes of major NSR, [EPA] define[s] ‘fugitive

emissions’ as emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” The preamble summarizes the final rule’s objective thusly:

We have decided to reverse our existing policy and include fugitive emissions in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to section 302(j) of the Act.

73 Fed. Reg. at 77,885/3.

The Clean Air Act requires that facilities obtain a New Source Review permit for any “modification”, which is defined 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...”¹ In the 2002 *New York v. EPA* decision, the D.C. Circuit held that “Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions.” 413 F.3d 3, 40 (D.C. Cir. 2002) (“*New York I*”).

Echoing the statute’s exclusive focus on “actual” emissions in the modification definition, EPA has long recognized that section 111(a)(4)’s concern with the actual, total amounts emitted when a physical change occurs does not differentiate between stack emissions and fugitive emissions:

[S]ection 111(a)(4) defines modification solely in terms of the total amount of pollution that a change at a source would produce, we believed that Congress intended to establish no qualitative distinction between stack and fugitive emissions.

73 Fed. Reg. at 77,885/1 (summarizing EPA’s 1989 interpretive rule that identified the reasons for counting fugitive emissions toward all major modifications). Finally, in objecting to the Fugitive Emissions Rule, state, local and tribal commenters reminded EPA’s of its own longstanding position that “section 111(a)(4) defines modification solely in terms of the total amount of pollution that a change at a source would produce.” *See, e.g.*, EPA Response to Comments (“RTC”) document at 15-16.

Section 111(a)(4)’s coverage is broad—*any* physical change that increases emissions is subject to NSR—and any exceptions need to be narrow, subject only to the *de minimis* exemption authority recognized by the D.C. Circuit in *New York II*. *See generally* 443 F.3d 880 (D.C. Cir. 2006) (“*New York II*”). The Fugitive Emissions Rule exempts *all* fugitive emissions increases from *all* physical or operational changes at sources in source categories that have not been designated through rulemaking pursuant to section 302(j) of the Act. The Fugitive Emissions Rule thus created new, unwarranted exceptions to the broad “any physical change” provision of CAA section 111(a)(4), by allowing emissions increases associated with change that unquestionably “fit within one of the ordinary meanings of physical change” (*New York v. EPA*, 443 F.3d 880, 885 (DC Cir. 2006)) to escape review and controls under NSR.

¹ 42 U.S.C. § 7411(a)(4).

Amazingly, the Bush administration did not address any of these section 111(a)(4) points in the final rule's preamble or accompanying RTC document.

The Bush administration could not and did not deny that the Fugitive Emissions Rule contradicts the plain language of section 111(a)(4). The final rule could not and did not identify any authority in section 111(a)(4) or any other statutory provision for exempting fugitive emissions increases from the provision's broad coverage.²

The Bush administration could not and did not explain or overcome EPA's longstanding statutory interpretation that "section 111(a)(4) defines modification solely in terms of the total amount of pollution that a change at a source would produce", and that "Congress intended to establish no qualitative distinction between stack and fugitive emissions" when counting those emissions toward modifications. 73 Fed. Reg. at 77,885/1. The Bush administration did not offer *any* response, much less a coherent or legal response, to objections lodged by state, local and tribal commenters protesting the rule's failure to comply with section 111(a)(4). Indeed, prompted to do so by negative state, local and tribal comments, the final rule did not even offer any specific explanation for the reversal of the longstanding EPA section 111(a)(4) interpretation quoted above.³

The Bush administration did not and could not invoke the *de minimis* doctrine as a basis for the final rule; the final rule nowhere even mentions the *de minimis* doctrine and certainly does not create a data-based administrative record necessary to rely on that exemption.

The Bush administration did not and could not argue that increased fugitive emissions from a stationary source do not qualify as "the amount of any air pollutant emitted by such source" within the plain meaning of section 111(a)(4). The Bush administration did not and could not argue that fugitive emissions increases from exempt changes under the rule do not fall within the plain meaning of "any physical change" or "any" change in the method of operation.

It is abundantly evident that the Bush administration failed even to address these myriad section 111(a)(4) issues -- much less provide a coherent reading of the statute -- because the final rule thoroughly contradicts Clean Air Act Section 111(a)(4). So the former administration decided that the best course was to ignore this crucial statutory provision, not even attempt a lawful statutory interpretation of that provision, and not even bother to respond to public comments or try to explain its reversal of a 25-year consistent interpretation of section 111(a)(4).

² The final rule preamble argued only that the language of section 302(j) did not resolve the issue whether the fugitive emissions provisions of section 302(j) were intended by Congress to apply to major modifications as well as major sources. We address section 302(j) next in this reconsideration and stay petition.

³ The final rule's RTC document is remarkable both for its dutiful summary of these state/local/tribal adverse comments, and for its unapologetic, unaccountable failure to respond *at all* to comments raising section 111(a)(4) and EPA's longstanding interpretation. Indeed, a computer word search of the phrase "111(a)(4)" reveals that the phrase does not even appear in the sections containing EPA Responses, even though it appears numerous times in the public comments in the very same RTC document.

For all of the foregoing reasons, the final Fugitive Emissions Rule is unlawful, arbitrary and capricious, and should be reconsidered, stayed and reversed by the new administration.

The Bush Administration’s Novel Reading of Section 302(j) Provides No Authority for the Fugitive Emissions Rule

The Bush administration pretended to find legal authority for the Fugitive Emissions Rule solely in the negative space of Clean Air Act section 302(j), in that provision’s failure to *prohibit* what the former administration now claimed section 302(j) affirmatively *authorizes*:

We believe that section 302(j) evinces, at a minimum, an intent by Congress to require a special look at fugitive emissions for purposes of calculating a source’s emissions for NSR purposes. The statute is silent or ambiguous on the applicability of section 302(j) to the question of whether a physical or operational change is a modification. That is, we do not believe that the Act precludes us from applying the section 302(j) restrictions on counting fugitive emissions to the methodology for determining whether a physical and operation change constitutes a major modification for NSR purposes.

73 Fed. Reg. at 77,888/2-3. Here is what section 302(j) actually says in Title III’s “Definitions” section:

Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

42 U.S.C. §7602(j). This statutory provision is defining what the terms “major stationary source” and “major emitting facility” “mean.” By the provision’s plain terms, section 302(j) does not define or otherwise address a “modification” under the PSD/NSR programs, which is defined to “mean[]” something altogether different in section 111(a)(4). *Id.* §7411(a)(4). Nor does section 302(j) say anything about how fugitive emissions are meant to be treated or counted in modification calculations once a facility already meets the statutory definition of “major stationary source” or “major emitting facility.”

Indeed, the only inference to be drawn from section 302(j) is *not* that the provision supplies unspoken authority to EPA to exempt fugitive emissions from modification calculations at major stationary source or major emitting facilities that have not been designated through rulemaking pursuant to section 302(j). Rather, the only reasonable inference is that Congress meant what it said in section 302(j), and was (1) only defining “major stationary source” and “major emitting facility”; (2) was only defining the circumstances in which fugitive emissions were or were not to be counted for major source determinations; and (3) was *not* granting EPA authority to exempt fugitive emissions for any modification purposes. All of these conclusions are reinforced by the plain language of the modification definition in section 111(a), which does not admit the exception that EPA pretends to create under section 302(j).

The Bush administration's response to these points was the following: "We believe now that the absence of reference to 'major modification' in section 302(j) simply does not dispose of the issue of whether there was Congressional intent to limit inclusion of fugitive emissions in threshold applicability determinations for modifications for listed section 302(j) sources only. We cannot conclude from the *statutory text* or the legislative history what Congress explicitly intended on this point; the evidence is simply too ambiguous." RTC at 17 (emphasis added). The Bush administration was able to reach this astonishing lack of conclusion about the "statutory text" only through an arbitrarily blinkered approach that ignored altogether the "statutory text" in section 111(a)(4), and resorted to an upside down reading of section 302(j).

Congressional intent may not be discerned by ignoring the controlling statutory definition of modification in section 111(a)(4), and then proclaiming blithely "that the absence of reference to 'major modification' in section 302(j) simply does not dispose of the issue of whether there was Congressional intent to limit inclusion of fugitive emissions in threshold applicability determinations for modifications for listed section 302(j) sources only." Section 302(j) does dispose of the issue by virtue of defining "major stationary source" and "major emitting facility" only and not so much as mentioning modifications. But even if that were not the case, the exclusive definition of modification -- with its plain language and sweeping coverage of all non-*de minimis*, actual emissions increases from *any* physical change -- does dispose of the question of Congressional intent, confirming the unlawfulness of the Bush administration's rule.

The Bush administration's final rule undeniably exempts fugitive emissions from being counted in modification determinations even when those modifications occur at major stationary source or major emitting facilities. See generally 73 Fed. Reg. at 77,895-77,902. Accordingly, it is unlawful.

The Bush administration's pretense to discern favorable Congressional intent in the Act's legislative history is even more preposterous:

Moreover, although no authoritative conference or committee report addresses the issue of how fugitive emissions should be addressed in NSR permitting, there are numerous examples in committee hearings on the bills that led up to the 1977 Amendments of industry testimony to the effect that in many cases fugitive emissions would not be susceptible to control or would be exceedingly costly to control, or would be infeasible to measure. *See e.g.*, Hearings on Clean Air Act Amendments of 1977, Subcomm. On Health and the Environment, House Comm. on Interstate and Foreign Commerce, March 11, 1977, H.R. Rep. No. 95-59 at 1327 (statement of Earl Mallick, American Iron and Steel Inst.) (high costs of controlling fugitive emissions); *Id.*, Part 2, March 18, 1975, H.R. Rept. No. 94-25 at 690 (testimony of Fred Tucker, National Steel Corp.) (impossible to comply with SIP limits on fugitive emissions); Hearings on Implementation of the Clean Air Act — 1975, Subcomm. on Environmental Pollution, Sen. Comm. on Public Works, Apr. 22, 1975, S. Rept. No. 94-H10, Pt. 1 at 757 (statement of David M. Anderson, Bethlehem Steel Corp. to effect that control of fugitive emissions would be enormously costly but would have "a net negative environmental impact"); *Id.*, Pt. 2, App. A at 2026 (statement of Cast Metals Federation) (fugitive

emissions control at nonferrous metals smelters extremely costly with adverse energy impacts and no improvement in air quality).

73 Fed. Reg. at 77,888/3. Although I have not researched the question exhaustively, surely this passage represents the first time that EPA has cited as supportive legislative history *industry testimony* on the Clean Air Act Amendments of 1977. After citing the testimony of clean air “champions” Bethlehem Steel and the American Iron and Steel Institute, EPA’s preamble then concludes this astonishing discussion with the following wry citation: “But see EPA written responses to Committee questions (for some industries fugitive [emissions] control can be critical to attainment of standards).” *Id.* The hapless EPA staffer responsible for inventing the supposedly supportive legislative history, i.e., industry testimony, at least had the decency to note that EPA’s contemporaneous testimony completely contradicted the industry testimony. Thus, as is equally obvious in the statutory language and structure, the legislative history provides absolutely no support for the Bush administration’s unlawful exemption of fugitive emissions from NSR/PSD modification determinations.

The Bush Administration’s Skipping the SIP Trick

The Fugitive Emissions Rule advances the absurd proposition that “it may not be necessary for a state or local authority to revise its SIP to begin to implement these changes. Some state or local authorities may be able to adopt these changes through a change in interpretation of existing language in the approved SIP without the need to revise their SIP. For any state or local authority that can implement the changes without revising its approved SIP, we propose that the changes become effective when the reviewing authority publicly announces that it accepts these changes by interpretation.” 73 Fed. Reg. at 77,889-90. This gambit to skip SIP rulemakings accords perfectly, and perfectly cynically, with the prior administration’s complementary ploy to cause this harmful midnight regulation to take legal effect in delegated and SIP-approved programs alike 30 days following Federal Register publication.

This EPA may not do. The discussion above, along with EPA’s own preambular discussions, make painfully clear that the Fugitive Emissions Rule is a “revers[al]” of EPA’s “existing policy” of some 25 years. 73 Fed. Reg. at 77,885/3. Over the course of those 25 years EPA approved SIPs based upon its existing policy, which was diametrically opposed to the final Bush administration rule, by that administration’s own admission. Indeed, the sheer amount and detail and complexity of the regulatory text and changes adopted in the Fugitive Emissions Rule renders farcical the contention that states could simply re-interpret existing language in approved SIPs without need to revise those SIPs. See generally 73 Fed. Reg. at 77,895-77,902. EPA was rightly compelled to undertake sweeping regulatory changes to reverse its longstanding existing policy, and state SIPs could not have been approved by EPA in the first instance if those SIPs created unlawful exemptions at odds with federal regulations. It was absurd for the Bush administration not just to suggest that States could get away with what EPA recognized it could not, but to actively encourage States to become accomplices to this unlawful gambit.

The reason for these maneuvers is patently cynical on the part of the outgoing administration: the political officials responsible for this rule wanted it to take effect immediately

in states without awaiting the required SIP process steps -- decisions by states whether to adopt the weaker aggregation approach (or the weaker approach being forced upon states with no-more-stringent-than laws or policies); state rulemaking to adopt the federal rule; proposed SIP approvals with opportunity for public comment and public hearing; and finally, opportunity for the public to challenge any EPA SIP approvals in court. The Clean Air Act allows more than three years for this entire SIP process to unfold, yet the outgoing administration wanted to force its harmful policy desires upon not just the incoming administration but also on states with a wave of a magic pen in this manipulated undertaking. By publishing this classic midnight regulation in the Federal Register on December 19, with a legal effective date of January 20, and a claimed Federal PSD permit program effective date of February 17, the outgoing administration crudely hoped to make it very difficult for the incoming administration to reverse this harmful and illegal rule that weakens longstanding EPA, state and local regulatory practice.

Whether you decide to grant reconsideration of these petitions or not, I respectfully urge you to denounce and disavow the Bush administration's unprecedented and unlawful contention that any state may cause the Bush administration rule changes to become legally effective – even without undertaking a SIP revision – merely if “the reviewing authority publicly announces that it accepts these changes by interpretation.” 73 Fed. Reg. at 77,890/1. That suggestion by the outgoing administration lacked any legal foundation whatsoever and should be viewed as void *ab initio*. Whether you agree with the substantive merits of these petitions, surely EPA under your leadership does not wish to be a party to such gross circumvention of the Clean Air Act's well-established procedures for changing or adopting federal rules followed by the required SIP rulemaking procedures. The Bush administration's baseless contention added procedural insult to substantive injury, and the public procedures and opportunities associated with SIP rulemakings deserve better than the cynical circumvention resorted to by the outgoing administration. Procedural fairness and respect for the public's right to participate in government demand no less than public repudiation of the former administration's contention.

The Final Rule Violates Clean Air Act Section 193's Anti-Backsliding Prohibition.

Section 193 of the amended CAA unambiguously requires any relaxations to control requirements or state implementation plans in effect prior to November 15, 1990 to be offset by equivalent or greater emissions reductions:

No control requirement in effect . . . before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

Excluding fugitive emissions from the calculation of emissions increases associated with modification activity undeniably weakens 25 years of consistent EPA practice, as reflected in State Implementation Plans (SIPs). Under the Bush administration's final rule, fugitive emissions increases associated with modifications simply will be ignored and go uncontrolled. Yet EPA's final rule does not even address much less overcome the obvious point that EPA's rule change –

and the SIP revisions necessitated by it – will not “insure equivalent or greater emission reductions.”

In other words, EPA’s final rule represents backsliding on its face. The Fugitive Emissions Rule does not and cannot claim otherwise. Indeed, the Bush administration’s final rule was adopted as an unabashed reversal of existing, longstanding EPA policy that *on its face* was more encompassing, more protective and more effective in requiring fugitive emissions to be included in *all* modification determinations, not just for modifications occurring at major sources in source categories designated through section 302(j) rulemakings.⁴ Accordingly, every state that “publicly announces” adoption of the Bush administration rule in its SIP, 73 Fed. Reg. at 77,890/1; every proposed SIP revision that proposes adoption of the Bush administration rule; and every federally delegated program that adopts the Bush rule effective today will be in violation of Clean Air Act section 193, absent “equivalent or greater emission reductions” of any air pollutant whose fugitive emissions are deemed exempt from modification determinations.

State, Local and Tribal Air Regulators Strongly Opposed the Bush Administration Rule.

The nation’s most knowledgeable air pollution control officials, responsible for administering the NSR/PSD permitting programs, strongly objected to the Bush administration’s Fugitive Emissions Rule. It is worth reiterating here in full the very first objection lodged to the proposed rule in the comments submitted by the National Association of Clean Air Agencies, the national organization representing the country’s all-important state and local air pollution control agencies:

First, elimination of fugitive emissions from NSR modification calculations is likely to result in increases in emissions, which will interfere with our efforts to attain and maintain National Ambient Air Quality Standards (NAAQS) as well as impair compliance with increments under the PSD program. The SIP planning of many jurisdictions takes into account reductions of emissions projected to result from NSR major modifications. Elimination of fugitive emissions from the calculations of baseline actual emissions and projected actual emissions for sources other than those in the section 302(j) category will curtail the emissions reductions or increase actual emissions in many jurisdictions. Moreover, the NAAQS for various criteria pollutants are being tightened: The 24-hour PM_{2.5} standard has recently been lowered. More stringent ozone NAAQS are likely to be promulgated; and lead NAAQS revisions are pending. SO₂ and NO_x standards are also currently being reevaluated. State and local air pollution control agencies cannot afford to have an important regulatory tool withdrawn that has resulted in NSR applicability—and, equally important, efforts by sources to control emissions so as to avoid NSR applicability—in light of the increasingly challenging work we face to meet tighter standards that protect public health and welfare. This rule change, if

⁴ The preamble to the final rule recognizes that it will result in SIP backsliding: “We agree with commenters that this action could result in some sources (those not on the section 302(j) list) not having to go through NSR review for major modifications.” RTC at 20.

promulgated, will make our work of attaining and maintaining the NAAQS more difficult. With modifications occurring “under the radar screen” that would formerly have triggered NSR, state and local agencies will face increasing challenges as they strive to carry out their mandate to achieve clean and healthful air.

January 14, 2008 National Association of Clean Air Agencies Comments, at 2 (“NACAA Comments”). “NACAA strongly oppose[d] this proposed rule, primarily because it could result in increases in air pollution that adversely affect public health and welfare.” NACAA Comments at 1.

NACAA further pointed out that “EPA’s 2002 NSR rules reaffirmed the requirement for inclusion of fugitive emissions by all source categories in applicability determinations for major modifications,” *id.*, without any indication that factual circumstances had changed to justify reversal of EPA’s 1984 policy. Yet in December 2008, without *any* supportive factual information or data in the administration record to back that claim, the Bush administration suddenly claimed that “As a result of [its] review of both current practice and earlier constructions of the statute, we believe for both policy and programmatic reasons, it is better to now adopt a uniform approach to these threshold determinations.” This is sheer assertion, nothing more than midnight rhetoric that is belied by the actual experience of the state and local air pollution control officials that administer the PSD/NSR programs and whose members comprise NACAA.

Specifically, NACAA’s Comments confronted the Bush administration with the reality that fugitive emissions have very harmful impacts on local and regional air quality:

Third, the proposed rule flies in the face of the increasing awareness—of state and local agencies, environmental organizations, and industry—that excess and fugitive emissions are responsible for dramatic amounts of pollution nationwide and significant air quality impacts on nearby neighborhoods. Fugitive emissions are generated by material processing and conveying activities, coating operations, dusty material storage piles, plant road dust, quarries, and leaking valves and flanges at virtually all industrial source categories. A decision by EPA that fugitive emissions from these sources and all other unlisted source categories no longer count for NSR modification purposes will, in turn, eliminate the incentive of sources to devise technological or work practice solutions to minimize these fugitive emissions.

NACAA Comments at 4. The Bush administration did not respond to these objections much less rebut them.

* * * * *

For the foregoing reasons, we urge you to (1) reconsider the final Bush administration Fugitive Emissions Rule; (2) administratively stay the Rule for three months consistent with CAA section 307(d)(7)(B); (3) announce that EPA does not intend to require states to submit SIP revisions to adopt the Fugitive Emissions Rule, and that states may not implement the Bush administration rule changes through mere “public announcement” that the state accepts those

changes by interpretation; (4) convene a public notice-and-comment period following reconsideration of the final rule; and (5) following such comment period, or even in the absence of such comment period, withdraw and abandon the final rule.

We reserve the right to supplement these petitions and requests with additional information, but wanted to submit this letter to you now due to the rule's claimed February 17, 2009 effective date for Federal PSD programs.

Please feel free to have your staff contact me directly with any questions at (202) 289-2406 or jwalke@nrdc.org.

Sincerely,

John Walke
Clean Air Director
Natural Resources Defense Council

cc: Bill Harnett, Office of Air Quality Planning & Standards
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