IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC., Plaintiff,	)	Civil Action No. 1:11-cv-353-JL
v.	)	Judge Joseph N. Laplante
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, Defendant.	)	

AMICUS CURIAE UNITED STATES' MEMORANDUM REGARDING THE PROPER INTERPRETATION OF THE 2002 NEW SOURCE REVIEW RULES

Table of Contents

BACKGROUND 2

I. THE CLEAN AIR ACT 2

A. The New Source Review Program 3

B. EPA's Role in the NSR Program..4

C. The 2002 Revisions to the NSR Regulations 5

ARGUMENT..8

A. The Statute Requires Enforceable Pre-Construction Review.............................8

B. The 2002 Rules Do Not Support the Radical Revision Proposed by PSNH 12

C. EPA's Interpretation Warrants Deference and Should Be Upheld............................15

D. Courts Have Consistently Rejected PSNH's Argument...18

E. PSNH's Argument and the *DTE* Decision Are Unpersuasive 21

CONCLUSION...25

Table of Authorities

Federal Cases

Ala. Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) 3-4

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004).......... 5, 9, 14-15

Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 398 F.3d 105 (1st Cir. 2005) 17

Anthony v. United States, 520 F.3d 374 (5th Cir. 2008).......... 11

Auer v. Robbins, 519 U.S. 452 (1997) 15-16

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 15

Chase Bank, N.A. v. McCoy, 131 S. Ct. 871 (2011) 16-17, 22

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 9, 15-17

Christensen v. Harris County, 529 U.S. 576 (2000).......... 16

Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007).......... *passim*

Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008).......... 15

In re Steel Dynamics, Inc., 9 E.A.D. 165, 2000 WL 833062 (E.A.B. June 22, 2000).......... 10

Ky. Res. Council, Inc. v. EPA, 467 F.3d 986 (6th Cir. 2006) 17

New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) .... *passim*

Puerto Rican Cement Co., Inc. v. EPA, 889 F.2d 292 (1st Cir. 1989).......... 5, 10

Royal Siam Corp. v. Chertoff, 484 F.3d 139 (1st Cir. 2007) 16-17

Sidell v. C.I.R., 225 F.3d 103 (1st Cir. 2000).......... 15

Stinson v. United States, 508 U.S. 36 (1993).......... 15

Stowell v. Sec'y of Health & Human Servs., 3 F.3d 539 (1st Cir. 1993) 17-18

Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011) 15-16

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).......... 16-17

Udall v. Tallman, 380 U.S. 1 (1965)....16

United States v. Cinergy Corp., 384 F. Supp. 2d 1272 (S.D. Ind. 2005).... 18-19

United States v. Cinergy Corp., 458 F.3d 705 (7th Cir. 2006) 18-19

United States v. DTE Energy Co., No. 10-13101, 2011 WL 3706585
(E.D. Mich. Aug. 23, 2011) 18, 21-23

United States v. Duke Energy Corp., No. 00CV1262, 2010 WL 3023517
(M.D.N.C. July 28, 2010) 19

United States v. Hoyts Cinemas Corp., 380 F.3d 558 (1st Cir. 2004) 16

United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003) 3, 8, 18-19

United States v. S. Ind. Gas & Elec. Co., No. IP99-1692 C-M/F, 2002 WL 1629817
(S.D. Ind. July 18, 2002).... 18-19

United States v. Xcel Energy, Inc., 759 F. Supp. 2d 1106 (D. Minn. 2010).... 11, 19-20

Visiting Nurses Ass'n Gregoria Auffant, Inc. v. Thompson, 447 F.3d 68 (1st Cir. 2006) 16

Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 25

Wis. Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) 3-4, 16, 24

Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43 (D.C. Cir. 1999) 15

Federal Statutes

42 U.S.C. § 7401(b)(1) 2

42 U.S.C. § 7409....3

42 U.S.C. § 7410(a)(1)....3

42 U.S.C. § 7410(a)(2)....3

42 U.S.C. § 7413(a) 3, 4

42 U.S.C. § 7413(b) 3, 4, 15

42 U.S.C. § 7470....1

42 U.S.C. § 7470(1) 11

42 U.S.C. § 7470(5) 11

42 U.S.C. § 7475 ....8, 9

42 U.S.C. § 7475(a) 4, 9-10

42 U.S.C. § 7475(a)(1) 8-9, 10

42 U.S.C. § 7475(a)(3) 8-9

42 U.S.C. § 7475(a)(4) 8-9, 10

42 U.S.C. § 7475(a)(6) 8-9

42 U.S.C. § 7477 10

42 U.S.C. § 7479(2)(C) 8

42 U.S.C. § 7503 4

42 U.S.C. § 7503(a)(1)(A) 9

42 U.S.C. § 7604(a) 4

42 U.S.C. § 7604(a)(3) 10-11

Federal Regulations

40 C.F.R. § 51.165 4

40 C.F.R. § 51.166 4

40 C.F.R. § 52.21(a)(2) 22

40 C.F.R. § 52.21(a)(2)(ii) 12

40 C.F.R. § 52.21(a)(2)(iii) 12, 22

40 C.F.R. § 52.21(a)(2)(iv) 22

40 C.F.R. § 52.21(a)(2)(iv)(a) 4, 23

40 C.F.R. § 52.21(a)(2)(iv)(b) 7

40 C.F.R. § 52.21(a)(2)(iv)(c) 23

40 C.F.R. § 52.21(b)(21)(iv) 5

40 C.F.R. § 52.21(b)(41) 24

40 C.F.R. § 52.21(k) 12

40 C.F.R. § 52.21(m) 12

40 C.F.R. § 52.21(o) 12

40 C.F.R. § 52.21(r) 13

40 C.F.R. § 52.21(r)(1) 7-8

40 C.F.R. § 52.21(r)(2) 13

40 C.F.R. § 52.21(r)(6) 8, 12-13

40 C.F.R. § 52.21(r)(6)(i) 7

40 C.F.R. § 52.21(r)(6)(ii) 7, 23

57 Fed. Reg. 32,314 (July 21, 1992) 5-7, 22

67 Fed. Reg. 80,186 (Dec. 31, 2002) 6-7, 13, 19, 22, 24

Legislative History

Stat. of Rep. Rogers, Clean Air Conf. Rep. (1977): Stat. of Intent; Clarification of Select Provisions, H. Consideration of Rep. of the Conf. Comm., 123 CONG. REC. 27,070 (1977).....11

H.R. Rep. No. 91-1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356 2

Miscellaneous

Brief for Respondent U.S. EPA, *New York v. EPA*, No. 02-1387, 2004 WL 5846388 (Oct. 26, 2004) 20

Joint Brief of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442 (Oct. 26, 2004) 2, 20-21

The motions before the Court involve the New Source Review ("NSR") pre-construction permitting program under the Clean Air Act ("Act" or "CAA"). The United States Environmental Protection Agency ("EPA") plays a critical role with respect to the NSR program: Congress has entrusted EPA with supervision and implementation of the Act and the NSR program. *New York v. EPA*, 413 F.3d 3, 23 (D.C. Cir. 2005) ("*New York*"). EPA sought leave to respond to the instant motion as amicus curiae because Defendant Public Service of New Hampshire ("PSNH") relies in part on a flawed interpretation of the NSR rules. This brief sets forth the proper interpretation of the rules and then shows why PSNH's interpretation is incorrect.

The statutory NSR program was created by the Clean Air Act Amendments of 1977. For more than three decades, NSR has required sources to undergo review, obtain a permit, and install pollution controls *before* constructing new facilities or modifying existing facilities. One of the critical questions in determining whether NSR applies is whether a proposed construction project would result in increased pollution in the future. NSR applicability thus hinges on a pre-construction estimate of the work's effect on emissions. The pre-construction nature of NSR is fundamental to one of the core purposes of the program: preventing air pollution and its harmful effects on human health and the environment. *See*, *e.g.*, 42 U.S.C. § 7470. NSR cannot protect public health if regulators are required to wait for pollution to increase before acting.

In its motion to dismiss (Doc. 15 at 10-16),[1] PSNH argues that NSR rule changes promulgated by EPA in 2002 ("2002 Rules") eliminated any meaningful pre-construction

[1] PSNH filed two motions to dismiss advancing several theories. The United States only addresses the company's argument based on the 2002 Rules, specifically that compliance with notice requirements precludes enforcement based on pre-construction expectations. The United States takes no position on the company's remaining arguments. For the purposes of this brief, we assume that PSNH is correct that the New Hampshire State Implementation Plan ("SIP") has

permitting review and thus any potential enforcement based on pre-construction projections. *See*, *e.g.*, Doc. 15 at 8. This is directly contrary to EPA's view of its own regulations, and EPA's interpretation is controlling. PSNH relies on a single, incorrectly-decided district court case to argue that enhanced recordkeeping and reporting requirements in the NSR rules eviscerate the pre-construction review and enforcement authority under the Clean Air Act and the NSR regulations. In essence, PSNH argues that if a source tells the state permitting authority about upcoming work, it need not get a permit unless and until emissions actually increase after the work concludes. This argument would vitiate NSR by turning a pre-construction *permitting* program into a pre-construction *notice* program. As detailed below, nothing in the 2002 Rules could allow such a radical reversal. Indeed, in prior litigation, the utility industry agreed that the 2002 Rules "*do not change* the extensive enforcement tools and opportunities available to EPA and states." Joint Brief of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442, at *19 (Oct. 26, 2004) (emphasis added).

EPA respectfully requests that the Court deny PSNH's motion to dismiss to the extent it relies on the company's incorrect interpretation of the 2002 Rules.

BACKGROUND

I. THE CLEAN AIR ACT

Congress enacted the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see also* H. R. Rep. No. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356 (purpose "is to speed up, expand, and intensify the war against air

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adopted the 2002 Rules promulgated by EPA. Whether PSNH is correct is a mixed question of fact and law involving the nature of the SIP. If earlier rules apply, PSNH's argument necessarily fails because it is premised on the effect of the 2002 Rules. *See, e.g.*, Doc. 15 at 8-9.

pollution in the United States with a view to assuring that the air we breathe throughout the nation is wholesome once again."). Section 109 of the Act, 42 U.S.C. § 7409, requires EPA to establish national ambient air quality standards ("NAAQS") that specify the maximum permissible concentration of air pollutants in different areas of the country. The CAA requires states to meet these NAAQS by developing plans, called State Implementation Plans ("SIPs"), which, among other things, impose regulatory requirements on individual sources of air pollution. 42 U.S.C. §§ 7410(a)(1), (a)(2). SIPs are subject to EPA approval; once approved they are federally enforceable. 42 U.S.C. §§ 7413(a), (b).

A. The New Source Review Program

The NSR program was added by the 1977 CAA Amendments after earlier programs failed to achieve the statutory goals. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007). To ease the initial burden of complying with NSR, Congress "grandfathered" existing sources from the program, so that they would only have to comply once they made "modifications." *New York*, 413 F.3d at 13. The term "modification" is broadly defined by the statute and applicable regulations as, in general, *any* physical or operational change that should be expected to increase a plant's actual amount of annual pollution. *Duke Energy*, 549 U.S. at 567-68; *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) ("WEPCo"). Congress's expectation was that, over time, existing units would either be retired or would undergo overhauls to keep operating, and that those overhauls would trigger NSR. "Congress chose to 'grandfather' existing pollution sources from the . . . NSR provisions at the time the statute was enacted . . . . Congress did not, however, intend that such existing sources be forever spared the burden and expense of installing pollution control devices." *United States v. Ohio Edison Co.,* 276 F. Supp. 2d 829, 850 (S.D. Ohio 2003); *see also Ala. Power Co. v. Costle*, 636

F.2d 323, 400 (D.C. Cir. 1979). By requiring that sources install and operate state-of-the-art pollution control technology as soon as existing units are modified, the NSR program aims "to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction." *See WEPCo*, 893 F.2d at 909.

The NSR program has two components: a Prevention of Significant Deterioration ("PSD") program applying in areas of the country that comply with at least one NAAQS, 42 U.S.C. §§ 7470-7479, and a Nonattainment NSR ("NNSR") program addressing pollutants for which an area fails to satisfy the NAAQS, 42 U.S.C. §§ 7501-7515. *See Duke Energy*, 549 U.S. at 567-68. While some of the details and terminology differ, both PSD and NNSR require a source to obtain permits and install state-of-the-art pollution controls whenever the source undergoes a modification. 42 U.S.C. §§ 7475(a) (PSD), 7503 (NNSR). Any physical change that should be expected to result in a significant net increase in emissions qualifies as a triggering modification under the program. *See, e.g.*, 40 C.F.R. § 52.21(a)(2)(iv)(a).

The Clean Air Act provides for EPA, the local permitting authority, and citizens to enforce the failure to obtain an NSR permit. *See* 42 U.S.C. §§ 7413(b); 7604(a).

B. EPA's Role in the NSR Program

Congress entrusted EPA with supervising the implementation of the Clean Air Act, including the NSR program. *New York*, 413 F.3d at 23. EPA sets the national air quality standards and must review and approve the plans states employ to meet those standards. Once the state plans are approved, they are federally enforceable. *See* 42 U.S.C. §§ 7413(a), (b). EPA has crafted regulations that states can adopt for NSR purposes, and set out the minimum requirements for states that draft their own rules. *See* 40 C.F.R. §§ 51.165, 51.166; *New York*, 413 F.3d at 21 ("the Act gives EPA responsibility for developing basic rules for the NSR

program"). As the Supreme Court has recognized, "Congress . . . vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to the construction and modification of sources under the PSD program . . . ." *Alaska Dep't of Envtl. Conservation v. EPA* ("*ADEC*"), 540 U.S. 461, 490 (2004).

C. The 2002 Revisions to the NSR Regulations

PSNH relies entirely on the 2002 Rules. *See, e.g.*, Doc. 15 at 11. While those rules made significant changes for air pollution sources *other than electric utilities*, the 2002 Rules remain largely the same as the WEPCo Rules for utilities sources like the Merrimack plant at issue here.

Under EPA's 1980s-era NSR regulations, the Agency directed that, if a facility had not "begun normal operations," it must compare its past emissions with its maximum *potential* emissions post-project to determine whether the work triggered NSR. *See* 40 C.F.R. § 52.21(b)(21)(iv) (1988); *Puerto Rican Cement Co., Inc. v. EPA*, 889 F.2d 292, 296-97 (1st Cir. 1989) (describing emissions calculation then required by the regulations). However, in 1992 EPA enacted regulations commonly known as the WEPCo Rules, which allowed existing electric utilities to side-step the question of whether a facility had "begun normal operations." *See* 57 Fed. Reg. 32,314, 32,317, 32,325 (July 21, 1992); *see also New York*, 413 F.3d at 16. Under the WEPCo Rules, rather than calculating the unit's maximum potential emissions, "utilities would determine whether they had post-change increases in emissions – and thus whether they needed NSR permits – by comparing actual emissions before the change to their projections of actual post-change emissions." *New York*, 413 F.3d at 16 (citing 57 Fed. Reg. at 32,323-26).

However, EPA was concerned that utilities might underestimate their future emissions under this approach. 57 Fed. Reg. at 32,325. Moreover, "without appropriate safeguards[,] increases in future actual emissions that in fact resulted from the physical or operational change

could go unnoticed and unreviewed." *Id*. Thus, as part of the same rule allowing a more flexible projection method, EPA also required that any facility electing to use that method must submit emissions totals for five to ten years after the project. *See id*. Importantly, the recordkeeping requirement did not create a safe haven from enforcement but rather provided a safeguard necessary to protect the integrity of the requisite pre-construction analysis. *Id*; *see also New York*, 413 F.3d at 34 (reporting was required to "verify the projections' accuracy"); 67 Fed. Reg. 80,186, 80,188 (Dec. 31, 2002) (post-project reporting under WEPCo Rules was required to "ensure the projection [was] valid"). Thus, in addition to applicability based on pre-construction projections, the WEPCo Rules clarified that NSR also applies if post-construction reporting shows an emissions increase related to the project. *See* 57 Fed. Reg. at 32,325 (stating that "[i]f . . . the reviewing authority determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements at that time."). Nothing in the WEPCo Rules changed EPA's authority to take enforcement action based on pre-construction projections.

The 1992 WEPCo Rules allowed for flexibility in pre-construction calculation methodologies, but imposed post-construction recordkeeping and reporting requirements as accountability measures for sources electing to project their emissions rather than calculate their potential emissions. These paired changes applied *only* to electric utility generating units. The 2002 Rules expanded the 1992 approach to all air pollution sources. *New York*, 413 F.3d at 16 (citing 67 Fed. Reg. at 80,275); *see also* 67 Fed. Reg. at 80,192 (2002 Rules implement a "similar set of procedures" and requirements as those put in place for electric utilities in 1992). Sources other than electric utilities could now elect the "actual-to-projected-actual" methodology for evaluating NSR applicability, but, as with electric utilities under the WEPCo Rules, that

choice came with recordkeeping and reporting requirements aimed at preserving the integrity of the pre-construction projection requirements and preventing gamesmanship of the NSR Rules. *See* 67 Fed. Reg. at 80,194, 80,197; s*ee also* 40 C.F.R. § 52.21(r)(6). Meanwhile, the rules for electric utilities changed little, though utilities are now required to provide notice to the permitting authority before beginning projects that could trigger NSR. *See* 67 Fed. Reg. at 80,192. ("The effect of this consolidation is that we make minor changes to the existing procedures for [electric utilities]."); 40 C.F.R. § 52.21(r)(6)(i), (ii) (utility notice requirements).[2]

To summarize, the 1992 Rules (for utilities) and the 2002 Rules (for all sources, including utilities) made three important changes to NSR procedures relevant to the motions before the Court:

- First, existing sources were allowed to project post-construction emissions based on an expectation of actual emissions, rather than maximum potential emissions, *see* 57 Fed. Reg. at 32,317 (utilities); 67 Fed. Reg. at 80,189 (all sources);

- Second, sources using the projected-actual method can be required to maintain records related to their projection and actual post-construction emissions, while electric utilities are also required to provide pre-construction notice to the permitting authority, *see* 57 Fed. Reg. at 32,325 (utilities); 40 C.F.R. § 52.21(r)(6) (all sources);

- Third, EPA clarified that in addition to liability based on projected emissions increases, sources would also be liable if actual emissions increased as a result of a project. *See* 57 Fed. Reg. at 32,325 (utilities); 40 C.F.R. § 52.21(a)(2)(iv)(b) (all sources).

Importantly, neither the 1992 WEPCo Rules nor the 2002 Rules decreed that the post-construction actual emissions reporting *replaced* the pre-construction analysis based on projected emissions or prevented EPA from enforcing based upon its own determination of a projected

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[2] Under the 2002 Rules, recordkeeping and reporting is only required if there is a "reasonable possibility" of triggering NSR. *See, e.g.*, 40 C.F.R. § 52.21(r)(6). By applying the "reasonable possibility" standard to power plants, the 2002 Rules represented something of a relaxation of the 1992 WEPCo Rules, which required recordkeeping and post-construction reporting for all changes by utilities. *New York*, 413 F.3d at 34. PSNH has not disputed that there was a reasonable possibility of NSR applicability and thus that the recordkeeping and reporting requirements applied.

emissions increase. *See* 40 C.F.R. § 52.21(r)(1) (provision of the 2002 Rules that maintains "any owner or operator of a source or modification . . . who commences construction . . . without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action"). A source must get an NSR permit, or be subject to enforcement, if:

(1) Emissions should have been expected to increase *before* construction as a result of the project; or

(2) Emissions actually increase as a result of the project *after* construction.

ARGUMENT

A. The Statute Requires Enforceable Pre-Construction Review

NSR is a pre-construction program[3] by Congressional mandate: whether the program applies is determined by whether a project should be *expected* to increase pollution. *See* 42 U.S.C. § 7475 ("*Preconstruction* requirements" bar modifications without permits (emphasis added)). As one court to consider an NSR enforcement case explained, "The statute makes it abundantly clear that PSD applicability is to be determined prior to the commencement of a project." *Ohio Edison*, 276 F. Supp. 2d at 881. This pre-construction emphasis makes perfect sense in light of one of the central purposes of NSR: reviewing construction projects *before* they occur and requiring pollution controls at the time of modification in order to *minimize* air pollution and improve air quality.

Both PSD and NNSR[4] include specific statutory requirements that would be circumvented by PSNH's argument that only "post-construction data triggers" NSR review. Doc. 15 at 8-9. Under the PSD program, no source may be modified unless certain conditions

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[3] As used in NSR, "constructed" or "construction" means both new construction and modifications to existing facilities. *See Duke Energy*, 549 U.S. at 566-67; 42 U.S.C. § 7479(2)(C).

[4] According to PSNH's brief, both PSD and NNSR are relevant in this case. Doc. 15 at 6.

are met, including the following statutory requirements that must be satisfied before construction begins:

- "a permit *has been issued*…"
- the source demonstrates that its emissions "*will* not cause, or contribute to, air pollution in excess of" various standards
- "the *proposed* facility is subject to the best available control technology. . ."
- "there has been an analysis of any air quality impacts *projected* for the area as a result of growth associated with such facility"

42 U.S.C. § 7475(a) (1), (3), (4), (6) (emphases added).

Because NNSR covers areas in which the air quality fails to comply with national standards, its provisions are, if anything, even stricter than those for PSD. In addition to pollution control requirements, sources seeking NNSR permits must obtain "offsets:" emissions reductions so that the total pollution in the area will remain static or go down despite any increase from the source seeking the permit. 42 U.S.C. § 7503(a)(1)(A). Again, the statute demonstrates the pre-construction nature of the program by explicitly stating that no NNSR permit can be issued unless the offsets have been obtained "by the time the source is to commence operation." *Id.*; *see also Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 850 (1984) (noting that NNSR statutory provisions require a permit before construction and listing four statutory requirements that must be met to obtain a permit).

The Supreme Court and appellate courts have recognized that the pre-construction focus of NSR is mandated by the Clean Air Act: "The federal Act enumerates several '[p]reconstruction requirements' for the PSD program. Absent these, '[n]o major emitting facility . . . *may be constructed*." *ADEC*, 540 U.S. at 484 (citing 42 U.S.C. § 7475) (emphasis added); *see also Duke Energy*, 549 U.S. at 568 (citing 42 U.S.C. § 7475(a)) ("The 1977

amendments required a PSD permit *before* a 'major emitting facility' could be 'constructed' [or modified] in an area covered by the scheme.") (emphasis added).

The pre-construction requirements are vital to ensuring the protection and improvement of air quality. As then-Judge Breyer found, the PSD statutory provisions establish "that '[n]o major emitting facility . . . *may be constructed* in any [such] area' without various specified studies, reviews, demonstrations of compliance with certain substantive standards, and the issuance of a permit." *Puerto Rican Cement*, 889 F.2d at 294. The purpose of those studies is to ensure that the new or modified source will not cause the region to lose compliance with various air quality standards. *See New York*, 413 F.3d at 13. For this reason, a post-hoc analysis that looks at air quality impacts *after* the facility has been operating comes too late. Once the pollution has been emitted, it cannot be retrieved and air quality cannot be easily restored. Congress addressed this problem with an expressly pre-construction review and permitting process. *See New York*, 413 F.3d at 12 (the 1977 Clean Air Act "amendments strengthened the Act by . . . *expressly* creating a *preconstruction* review process for new or modified major sources" (emphasis added)).[5]

In addition to the pre-construction mandate of the permitting requirements, Congress provided other clear signals that pre-construction review and enforcement are a bedrock part of NSR. Section 167 of the Clean Air Act empowers EPA to prevent construction or modification of any source that fails to comply with PSD requirements. 42 U.S.C. § 7477; *see also* 42 U.S.C. § 7604(a)(3) (granting right to "any person" to bring suit against a source that "*proposes* to

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[5] NSR obligations generally continue for the operational life of a facility. *See* 42 U.S.C. §§ 7475(a)(1) and (4) (requiring operation of "Best Available Control Technology" ("BACT"); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 2000 WL 833062, at *31-33 (E.A.B. June 22, 2000) ("BACT limits must be established to ensure compliance on a continuous basis at all levels of operation.").

construct" a new or modified source without an NSR permit) (emphasis added). If Section 167 grants the authority to stop a project from proceeding, that authority allows EPA and the state to review NSR applicability *before* the project begins. *See United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106, 1113 (D. Minn. 2010) (finding Section 167 "clearly accords EPA the authority to investigate, and then to prevent through appropriate legal remedies, violations committed before construction commences."). Such authority is only meaningful if liability attaches before construction. PSNH's argument makes Section 167 a dead letter.

Congress made plain the pre-construction nature of NSR in the "declaration of purpose" it wrote into the statute. Congress articulated the purposes of NSR as including "to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be *anticipated* to occur from air pollution," and "to assure that any decision to *permit* increased air pollution . . . is made only *after* careful evaluation of all the consequences of such a decision." *See* 42 U.S.C. § 7470(1), (5) (emphasis added). By requiring assessment of projects before their implementation, the Act illustrates an emphasis on preventing harm to the public and best serves its "overriding commitment" to the protection of the public health and welfare. Stat. of Rep. Rogers, Clean Air Conf. Rep. (1977): Stat. of Intent; Clarification of Select Provisions, H. Consideration of the Rep. of the Conf. Comm., 123 CONG. REC. 27,070 (1977).

PSNH advocates a reading of the 2002 Rules that would abrogate the statutory pre-construction requirements for any source submitting a pre-construction notification. Such a reading renders meaningless the statutory pre-construction requirements and thus cannot stand. *See, e.g.*, *Anthony v. United States*, 520 F.3d 374, 380 (5th Cir. 2008) ("[C]ourts should not interpret an agency regulation to thwart the statutory mandate it was designed to implement." (internal quotations omitted)).

B. The 2002 Rules Do Not Support the Radical Revision Proposed by PSNH

Just like the statute, the 2002 Rules require pre-construction review and thus cannot accommodate PSNH's argument. As described below, several critical requirements of the NSR regulations are clearly pre-construction in nature and would not make sense in the world PSNH describes. The notice and recordkeeping requirements cannot and do not erase those other provisions. Instead they heighten EPA's[6] ability to review a source's pre-construction projections and take enforcement action when necessary: when a source proceeds with a project that should be expected to increase emissions without getting a permit. Moreover, as detailed in Section C below, EPA's interpretation of its regulations is entitled to controlling weight.

The EPA regulations explicitly state that "[n]o . . . major modification . . . shall begin actual construction without a permit that states that" it meets NSR requirements. 40 C.F.R. § 52.21(a)(2)(iii). The requirements for a permit are set forth in subsections (j) through (r). 40 C.F.R. § 52.21(a)(2)(ii). Like the statutory requirements, the regulatory requirements make clear that pre-construction applicability and enforcement authority are required for NSR. For instance, the source is required to:

- Show that its emissions "would not cause or contribute" to air pollution violations;
- Provide a "preapplication analysis" of air pollution impacts from the proposed modification;
- Provide an analysis of the impairment to visibility, soils, and vegetation "that would occur as a result of the source or modification"

40 C.F.R. § 52.21 (k), (m), (o).

PSNH ignores all of the requirements of the regulations except those set forth in 40 C.F.R. § 52.21(r)(6), suggesting the source can circumvent them at its discretion. *See, e.g.*, Def.

[6] While we generally use "EPA" throughout this brief, the local permitting authorities (typically a state agency) and citizens also have authority to assert violations of NSR.

Br. at 7-8. But even the other provisions of 40 C.F.R. § 52.21(r) confirm the pre-construction nature of NSR. Subsection (r)(2) states that the approval to proceed with a project expires if work does not begin within 18 months of the approval, reflecting the requirement that a permit come *before* rather than after construction. Subsection (r)(6) lays out the recordkeeping and reporting requirements for sources; it does not eclipse the rest of the requirements in the statute and regulations.

The language of the 2002 Rules is reinforced by EPA's statements in issuing the new rules, where the agency made perfectly clear that pre-construction review—and liability—remained in effect. As the Agency said in the preamble to the rules, "If you are subsequently determined not to have . . . properly project[ed] emissions . . . you will be subject to any applicable enforcement provisions."[7] 67 Fed. Reg. at 80,190. In its official response to comments on the 2002 revisions to the PSD regulation, EPA explained that:

> *The NSR program remains a pre-construction review program.* To ensure a level playing field between sources that may approach the pre-construction projection of post-change emissions with different degrees of conscientiousness, monitoring the quality of pre-construction projections is important.

Ex. A (Excerpts of EPA Technical Support Document for 2002 Rules) ("NSR TSD") at I-4-41 (emphasis added). In response to another comment regarding "enforcement ramifications" of a source's projection, EPA stated that "[t]here are no provisions in the final rules to protect from civil or criminal penalties the owner or operator of a source that constructs a 'major modification' without obtaining a major NSR permit." *Id*. at I-4-24, I-4-26. EPA thus made clear in creating the rules that the Agency retained the ability to conduct its own review of a

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[7] As the *New York* court noted, there are various ways that a source could understate its expected emissions and thus improperly conclude that NSR does not apply. *See* 413 F.3d at 35.

source's pre-construction project and, if necessary, require a source that should have projected an increase based on pre-construction information to get a permit.

The recordkeeping provisions in the regulation do nothing to preclude enforcement—to the contrary, they were designed to enhance pre-construction enforcement, not as a substitute for it. The pre-construction notice requirements allow EPA to determine whether the source should have expected an emissions increase and thus triggered NSR before beginning the work, while the post-construction reporting requirements allow EPA to see if the project triggers NSR based on an actual emissions increase. As EPA stated in explaining the rule: "The records are needed to enable . . . [EPA] to ensure that the [changes] do not actually result in a major modification." Ex. A, TSD at 1-4-8. Subsection (r)(6) says nothing about pre-construction enforcement authority; it merely codifies recordkeeping and reporting requirements for construction projects. Elsewhere, EPA has made clear that the Rules' recordkeeping requirements are an accountability measure layered on top of the traditional pre-project review. EPA explained in 2002 that,

> [t]he main purpose of the annual tracking requirements is to maintain adequate information to ascertain whether the source's initial estimate of post-change actual emissions is accurate, but such a tracking requirement should also promote careful and accurate projections so that sources will not have to face the *risk of retroactive NSR applicability* and possible enforcement actions.

Ex. A (NSR TSD) at I-4-18 (emphasis added). The notice and recordkeeping provisions do not exempt construction without a permit simply because a source has notified the permitting agency of its plans. They do not create a safe harbor. If emissions should have been expected to increase as a result of the project, NSR is triggered, whether or not the source provides notice, and both EPA and the state permitting authority have the power to seek relief.[8]

[8] Even if PSNH is correct that New Hampshire "conditionally approved" its work, EPA retains enforcement authority. *See, e.g.*, 42 U.S.C. § 7413(b) (providing EPA enforcement authority to enforce violations of statute, SIPs and state permits); *ADEC,* 540 U.S. at 490-95 (noting

C. EPA's Interpretation Warrants Deference and Should Be Upheld

Under well-established precedent, EPA's interpretation of its own rules is controlling unless it is inconsistent with the regulatory text. As detailed throughout this brief, EPA's interpretation of the 2002 Rules has been set forth in the materials supporting the rule, in court briefs defending the 2002 Rules, in an NSR enforcement case, and again here. EPA has consistently stated that pre-construction review and enforcement remains in effect with the 2002 Rules, and that providing notice does not create a safe harbor from enforcement. This interpretation is consistent with the regulatory text, and thus EPA's interpretation is entitled to controlling weight.

An agency's interpretation of its own regulation is considered "controlling" where it is not "plainly erroneous or inconsistent" with the regulatory language. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945)); *see also Sidell v. C.I.R.*, 225 F.3d 103, 109 (1st Cir. 2000) ("A court *must* uphold such an interpretation unless it is obviously erroneous or inconsistent with the language of the regulation.") (emphasis added) (citing, *inter alia*, *Stinson v. United States*, 508 U.S. 36, 45 (1993)). "[R]eview in such cases is more deferential than that afforded under *Chevron.*" *Wyo. Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 52 (D.C. Cir. 1999) (internal citations and ellipses omitted); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008). An

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authority vested in EPA by Congress with respect to NSR and upholding EPA's ability to reject state permitting decisions). Moreover, the very letter from the New Hampshire Department of Environmental Services ("DES") that PSNH cites confirms that DES has the authority to require compliance with NSR based on pre-construction projections, even if the source has projected no increase. The DES letter, Ex. A-13 to the Complaint, states that its conditional approval "is based solely on the future actual annual emissions projections provided by PSNH, as DES currently has no method available to confirm or dispute future actual emissions projections." *See* Doc. 15 at 14. The implication is that if DES had the tools available to investigate PSNH's projection, it could do so and allege NSR liability on that basis.

agency's interpretation deserves no less deference simply because it is presented in a brief to the court. *See Talk America, Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261, 2263 (2011) (deferring to agency's "novel" interpretation advanced in a "legal brief"); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (deferring to agency interpretation presented in amicus brief); *Auer*, 519 U.S. at 461 (same); *see also United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004). Thus, this Court's "task is not to decide which among several competing interpretations best serves the regulatory purpose," but rather whether EPA's interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)).[9]

Such "broad deference" is all the more warranted and appropriate in the context of a "complex and highly technical regulatory program." *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 76 (1st Cir. 2006) (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). As the Seventh Circuit concluded with regard to EPA's NSR rules: "The principle of deference has particular force where, as is the case here, the subject being regulated is technical and complex." *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 907 (7th Cir. 1990). Moreover, "in enacting the NSR program, 'Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality,' and *delegated the responsibility of balancing those interests to EPA*." *New York*, 413 F.3d at 23 (emphasis added) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S.

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[9] As the Supreme Court underscored again this year, consistency with the regulation is the threshold issue under the deference inquiry. *See Chase Bank*, 131 S. Ct. at 880, 882 (holding a court "need look no further" than whether an interpretation is consistent with the regulation, discussing *Christensen v. Harris County*, 529 U.S. 576 (2000), and noting that "if the text of a regulation is unambiguous, a conflicting agency interpretation . . . will necessarily be 'plainly erroneous or inconsistent with the regulation' in question").

837, 851 & 865 (1984)); *accord Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 146 (1st Cir. 2007) ("When Congress has entrusted an agency with rulemaking and administrative authority, courts ordinarily afford considerable deference to the agency's interpretation of the regulations that it has promulgated under that authority.") (citations omitted). Contrary to PSNH's implication, it is the Agency's duty – not the Court's – to engage in policymaking and craft a regulatory program to achieve the Clean Air Act's purposes.

Under this highly-deferential standard of review, the Court need not even entertain "close calls." *See Thomas Jefferson Univ.*, 512 U.S. at 515 (the Court is required to defer to an agency's interpretation even where it is not "more consistent" than the opposing interpretation); *Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006) (deferring to EPA's "somewhat strained reading" of its own regulation where the interpretation was not "plainly inconsistent with the wording of the regulations"); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 112 (1st Cir. 2005) ("Even if the regulation did not clearly support the [agency's] interpretation on its face, the [agency's] interpretation would nonetheless be entitled to deference."). Rather, as the Supreme Court recently held in *Chase Bank USA, N.A. v. McCoy*: "Because the interpretation the [agency] present[ed] in its brief is consistent with the regulatory text, [the Court] need look no further in deciding this case." 131 S. Ct. 871, 880 (2011).

The Supreme Court's rule of deference plays a critical role in facilitating the accurate and consistent implementation of a complex, nation-wide regulatory program by the expert agency tasked with protecting the public health and welfare. *See Stowell v. Sec'y of Health & Human Servs.*, 3 F.3d 539, 544 (1st Cir. 1993) ("In this instance [deferring to the agency] preserves the program's flexibility and facilitates its administration."). When a court ruling contradicts an agency's implementation of its own rules even though the agency's interpretation is not plainly

erroneous, the regulated community faces an impossible situation: whether to follow the direction of the expert agency charged with implementing Congress' directive or the reasoning of the single district court. As such, "[c]ourts should not cavalierly discount the value of agency expertise painstakingly garnered in the administration, over time, of programs of remarkable intricacy." *Id*. Doing so frustrates Congress' delegation of authority to the expert agency and fractures the implementation of the agency's regulatory program.

As described above, EPA's interpretation of the 2002 Rules is perfectly consistent with the language of the regulations. EPA's interpretation thus merits controlling weight.

D. Courts Have Consistently Rejected PSNH's Argument

PSNH's argument relies on a single district court decision that veered from settled case law. Until the decision in *United States v. DTE Energy Co.*, No. 10-13101, 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011), courts consistently held that NSR violations could be enforced based solely on the emissions increases that reasonably should have been expected, in keeping with the pre-construction nature of the program. Nothing in the 2002 Rules changes the logic of those cases, as the litigation over the rules themselves demonstrates.

Several courts have interpreted the statutory NSR provisions and/or the 1992 WEPCo Rules to allow for enforcement based on pre-construction emissions projections. For instance, the *Ohio Edison* court found the defendants' argument that only actual emissions measured after the project could trigger NSR was "inconsistent with Defendant's obligation under the statute to project future emissions *prior* to an activity being undertaken." *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 881 (S.D. Ohio 2003) (emphasis in original). The court went on to say: "The statute makes it abundantly clear that PSD applicability is to be determined prior to the commencement of a project." *Id.*; *see also United States v. Cinergy Corp*, 384 F. Supp. 2d 1272,

1276 (S.D. Ind. 2005) *aff'd* 458 F.3d 705, 708 (7th Cir. 2006); *United States v. Duke Energy Corp.*, No. 00CV1262, 2010 WL 3023517, at *5 (M.D.N.C. July 28, 2010); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692 C-M/F, 2002 WL 1629817, at *2-3 & n.3 (S.D. Ind. July 18, 2002). Nothing in the 2002 Rules could change that statutory requirement, and nothing in the rules attempted to do so.

Although these cases were interpreting the 1992 WEPCo Rules, the 2002 Rules made few changes for electric utilities. *See New York*, 413 F.3d at 16 (describing pre-construction projection requirement for electric utilities under both WEPCo and 2002 Reform Rules). As EPA stated in the preamble to the 2002 Rules: "we make *minor changes* to the existing procedures for" electric utilities. 67 Fed. Reg. at 80,192 (emphasis added). The Seventh Circuit confirmed in *Cinergy* that any changes in the rules for utilities between 1992 and 2002 did not affect pre-construction review and enforcement. In that case, in which EPA alleged that defendants violated NSR by failing to get a permit for construction projects that would increase emissions, the court noted that any difference between the 1992 and 2002 rules "would not affect our analysis." *Cinergy Corp*, 458 F.3d at 708.

In another enforcement case specifically interpreting the 2002 Rules, the court granted a preliminary injunction to EPA and required a utility to provide information about future projects to allow the agency to assess NSR applicability. *United States v. Xcel Energy*, 759 F. Supp. 2d 1106 (D. Minn. 2010). Just as PSNH does here, Xcel argued that enforcement was premature. In that case, Xcel argued that there could be no NSR violation because it had not yet started the construction work at issue.[10] The court found that EPA's statutory authority "clearly accords EPA the authority to investigate, and then to prevent through appropriate legal remedies,

[10] Notably, Xcel did not go so far as to argue that no violation was possible until data showed an actual emissions increase, as PSNH does here.

violations committed *before construction commences*." *Id*. at 1113 (emphasis added). The *Xcel* decision confirms the prior case law that EPA can enforce NSR violations based on pre-construction emissions projections alone, this time under the 2002 Rules. Notably, the *Xcel* court found it was "an instance in which this Court must defer to reasonable agency interpretation." *Id*.

The litigation over the 2002 Rules confirms that the new rules did not restrict EPA's enforcement authority—as both EPA *and industry* agreed at the time. The 2002 Rules were challenged by industry, states, and environmental groups. Some of the petitioners challenged the recordkeeping provisions as insufficient to properly assess compliance. In defending the rules before the D.C. Circuit in *New York v. EPA*, EPA stated:

> In the 2002 Rule, EPA did not alter any of the mechanisms provided by the CAA to take enforcement action against sources that improperly determined that NSR does not apply. *In fact, it added* a monitoring requirement for changes that have a reasonable possibility of resulting in a significant increase.

Brief for Respondent U.S. EPA, *New York v. EPA*, No. 02-1387, 2004 WL 5846388, at *98 (Oct. 26, 2004) (emphasis added). Thus in defending the rules, EPA made clear that the recordkeeping provisions were an *additional* requirement, rather than a way to relax the rules.

The brief on behalf of the utility industry *made the same point*. A joint industry brief filed by the Utility Air Regulatory Group (known as "UARG") and others stated that "[t]he final [2002] rules *do not change* the extensive enforcement tools and opportunities available to EPA and states." Joint Brief of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442, at *19 (Oct. 26, 2004) (emphasis added). Instead, the utility group told the court that:

> [t]he basic approach to enforcing NSR requirements under the [2002] final rules is similar to the approach that existed previously. In either case, a source is to make an initial determination regarding whether a proposed change would result in a significant net emissions increase that, in turn, would require that the source apply for an NSR permit. If the source's determination ultimately turns out to be

> incorrect *in the view of EPA or a state agency,* the source may be subject to enforcement for violating NSR.

Id. at *18-19 (emphasis added).

The D.C. Circuit did not opine on the specific argument presented by PSNH here because no party raised it at the time. However, the decision clearly contemplates NSR enforcement based on pre-construction emissions projections. The issue before the court was whether the pre-construction recordkeeping requirements in the 2002 Rules were sufficient to make the emissions projection requirement enforceable. *New York*, 413 F.3d at 34. The court there observed:

> By understating projections for emissions associated with malfunctions, for example, or overstating the demand growth exclusion, sources could conclude that a significant emissions increase was not reasonably possible. Without paper trails, however, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed "reasonable."

Id. at 35. If the PSNH interpretation were correct, the D.C. Circuit's analysis was simply irrelevant – the reasonableness of a company's projections is meaningless if only post-project data can trigger NSR review. *Cf.* PSNH Brief at 8. However, the *New York* court instead concluded that recordkeeping is important to protect the integrity of emissions projections and facilitate enforcement of the program. 413 F.3d at 35.

E. PSNH's Argument and the *DTE* Decision Are Unpersuasive

PSNH relies almost entirely on the *DTE* decision. However, in concluding that a source can simply provide notice and by doing so avoid any meaningful pre-construction review, that case was wrongly decided for all the reasons discussed above. Neither PSNH nor the *DTE* court addressed the explicitly pre-construction requirements of the statute and the regulations, the established case law, or the deference due EPA. The *DTE* interpretation is simply incorrect and incompatible with the NSR program mandated by the Clean Air Act.

Apparently fundamental to both the *DTE* decision and PSNH's challenge is 40 C.F.R. § 52.21(a)(2). Notably, this provision reconfirms the pre-construction permit requirement, 40 C.F.R. § 52.21(a)(2)(iii), before stating—in the language quoted by PSNH: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv).[11] This is an extraordinarily weak foundation for such a radical reinvention of NSR. PSNH's reading essentially inserts the word "only" into the phrase "a major modification results," but there is no basis to do so. PSNH's suggestion creates an intolerable tension between the regulations and the statute's pre-construction mandate, *see* Section A; EPA's interpretation reflects Congressional intent. Indeed, PSNH's approach defies reason since even fraudulent notices would allow companies to evade pre-construction review. As is plain on its face, the provision states that NSR is triggered if actual data shows an increase in emissions resulting from the project. It says *nothing* about enforcement based on pre-construction analyses.[12] In fact, the point of the provision is that even if pre-construction analysis did *not* predict an emissions increase, the source may nonetheless be liable if actual post-construction data shows an increase in emissions. As described above, this provision represents an *additional* basis for NSR applicability, not the creation of a safe harbor, and that interpretation merits controlling deference as consistent with the regulatory text. *See Chase Bank*, 131 S. Ct. at 880; *supra* Section C. When EPA shifted—in the 1992 WEPCo Rules for electric utilities and the 2002

[11] Contrary to PSNH's suggestion, the substance of this provision was not new to electric utilities in 2002; the WEPCo Preamble stated similarly that "[i]f . . . the reviewing authority determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements at that time." 57 Fed. Reg. at 32,325.

[12] The same is true of the *DTE* court's citation to 67 Fed. Reg. at 80,190. 2011 WL 3706585 at *5.

Rules for other sources—from an applicability determination based largely on projection of maximum potential emissions to one of actual projected emissions, it became much more likely that a source's real world measured emissions would exceed that of its projection. This potential for pre-construction estimates to understate emissions, and so allow sources to avoid NSR, created the need for a post-construction accountability to *support* rather than *replace* liability based on pre-construction estimates.

PSNH and the *DTE* court also attempt to find support in a portion of 40 C.F.R. § 52.21(a)(2)(iv)(a) that notes a "project is not a major modification if it does not cause a significant emissions increase." *See* PSNH Brief at 8-9; *DTE*, 2011 WL 3706585 at *2-3. Again, any argument that this language creates an exclusively *post hoc* review program is meritless: the rules' causation requirement must be understood in the context of NSR applicability—which the very same provision explains is a pre-construction permitting program based on emissions *projections.* 40 C.F.R. § 52.21(a)(2)(iv)(c).[13] Nor can PSNH successfully argue that the pre-construction requirements of the statute and the rule are satisfied simply because the Company concluded NSR did not apply and provided its analysis to the state. Contrary to PSNH's arguments, nothing in the rules makes the source the sole arbiter of its own liability. *Cf.* Doc. 15 at 8 (suggesting that, once notice is given, only post-project data triggers NSR review by a permitting authority).

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[13] The *DTE* court also appeared to rely on the fact that, once a unit has reported its pre-change emissions to the state agency, it need not wait for the agency's response before beginning construction, *See DTE,* 2011 WL 3706585 at *3 (citing Michigan regulatory analog of 40 C.F.R. §52.21(r)(6)(ii)). This is consistent with NSR practice dating back to the 1977 Clean Air Act Amendments. It is no basis for reading immunity into the regulations for a source that provides notice. In fact, EPA declined to require that sources await agency approval before beginning construction since "the projection of post-change emissions alone is sufficiently reliable *and enforceable*." Ex. A (NSR TSD) at 1-4-7 (emphasis added).

Neither PSNH nor the *DTE* court grappled with the absurd consequences of the proposed interpretation. The rules require that numerous considerations be folded into the calculation of a company's projected emissions, including historical operations data, the company's own representations, and the company's highest projections of business activity. *See* 40 C.F.R. § 52.21(b)(41) (defining projected actual emissions). Yet under PSNH's interpretation, pre-construction projections are meaningless exercises—accountable to no authority and suffering no review—since only "post-project" data forms the basis for NSR applicability and projection-based enforcement actions would be "premature." PSNH's brief at 8, 10-12. This interpretation of unreviewable pre-construction projections invites sources to say no increase will occur (even if such conclusion is baseless), bypass NSR, and simply wait and see whether their emissions go up. By doing so, a source could, at the least, forestall controls by several years, saving money at the expense of air quality. This is directly contrary to the NSR purpose of ensuring "that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction." *See WEPCo*, 893 F.2d at 909. Moreover, the 2002 Rules explicitly portray the recordkeeping and reporting provisions as the additional obligation a source bears *if* it uses the more flexible emissions calculation based on a projection of actual emissions rather than maximum potential emissions. *See*, *e.g.*, 67 Fed. Reg. at 80,194 ("If you use this [maximum potential emissions] method, you need not record your projections or track or report post-change emissions."). PSNH's interpretation turns those obligations into an advantage that allows sources using the more flexible emissions analysis to forgo meaningful review for years, while sources using the more stringent test have to comply at the time of construction. The recordkeeping and reporting provisions were implemented to protect against gaming the emissions projection requirement, not to nullify it.

The simple truth is that the 2002 Rules made only minor changes to the existing recordkeeping and reporting obligations for electric utilities. The new rules did not eliminate the existing enforceable pre-construction requirements, nor did they cede to sources the exclusive right to determine pre-construction applicability. Had EPA wanted to make such a fundamental change, it would have said so clearly and grappled with whether such a reinvention was permissible under the statute. EPA does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Nothing in the 2002 rules announced that EPA was abrogating its authority under the statute, regulations, and case law to enforce the law. Instead, EPA's long-standing interpretation is perfectly consistent with the regulatory language, and this Court should defer to EPA's reading rather than credit PSNH's nonsensical construction.

CONCLUSION

In 1977, Congress created a pre-construction review and permitting program in response to the nation's air pollution problems. For three decades Congress has entrusted EPA with the oversight and implementation of the NSR program. PSNH now comes before this court seeking to dismiss Plaintiff's complaint based upon an argument that is wholly contrary to the statute, regulations, case law, EPA's interpretation, and NSR practice. The portion of PSNH's motions to dismiss that rely on its flawed interpretation of the 2002 Rules should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, the foregoing brief and supporting materials were served via ECF on counsel of record.

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