January 30, 2009

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

Dear Administrator Jackson:

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 EPA rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting," published at 74 Fed. Reg. 2376 (Jan. 15, 2009) (hereinafter "NSR Aggregation Rule"); (2) administratively stay the NSR Aggregation Rule for three months; (3) in the alternative or in conjunction with an administrative stay, extend the February 17, 2009 effective date of the final rule consistent with the January 20, 2009 memorandum from White House chief of staff Rahm Emanuel to agency heads and the January 21, 2009 memorandum from Peter Orszag, Office of Management and Budget, to agency heads; (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.

With this letter, I also am informing you of NRDC's intention to file a petition for review of the NSR Aggregation Rule in the U.S. Court of Appeals for the D.C. Circuit during the week of February 1, 2009.

As discussed in detail below, EPA has included in the NSR Aggregation 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 NSR Aggregation Rule Unlawfully "Clarifies" EPA's Longstanding Policy Out of Existence

EPA's proposed rulemaking, 71 Fed. Reg. 54,235 (Sept. 14, 2006) (hereinafter "NSR Aggregation Proposal") correctly observed that one of EPA's more important guidances "for the purposes of an aggregation policy is the letter EPA issued in 1993 related to a research facility owned by 3M Company in Maplewood, Minnesota." *Id.* at 54,244/3. The 3M Memo

"consistently applies [EPA's] longheld position on aggregating related projects." *Id.* at 54,245/1. Notwithstanding the proposal's failure to identify any *actual* problems or inconsistencies arising out of the longstanding 3M approach, pointing instead vaguely to "*potential* inconsistent application of the 3M letter," EPA justified its proposal based on "NSR stakeholder[s'] . . . concerns that EPA's position on aggregation is in need of clarification." *Id.* at 54,245/2 (emphasis added).

The 3M Memo sets forth five criteria for "permitting and enforcement authorities to apply when making determinations whether a source is circumventing major NSR through the minor modification process."[1] Specifically, considerations in the 3M Memo include: economic viability, technical processes, physical proximity, time-frame, funding, and administrative records.[2] These terms question how modifications might (1) be presented to a funder, stockholder, or permitting authority, (2) accomplished by company management, and (3) actually affect the environment.

Importantly, the 3M Memo also emphasized the critical importance of a plant's basic business purpose in the aggregation analysis:

> Reports on consumer demand and projected production or emission levels may provide evidence that this plant is expected to modify regularly in response to such demands or research needs. Some minimum level of research activity and commensurate emissions, source-wide, perhaps could be expected from year to year, as would be expected to keep the 3M plant productive or operable. These emissions and thereby modifications cannot be presumed to be independent given the plant's overall basic purpose to support a variety of research and development activities. Therefore, even though each research project may have been individually conceived and separately funded, it is appropriate to look at the overall expected research activity in assessing NSR applicability and enforcement.

3M Memo, at 5.

The final NSR Aggregation Rule pretends to "clarify" EPA's aggregation policies and the 3M Memo. 74 Fed. Reg. at 2376. Instead, the Rule jettisons EPA's longstanding aggregation policies – without changing a single word of the governing regulatory text in 40 CFR parts 51 and 52 as EPA had proposed to do (71 Fed. Reg. at 54,252; 74 Fed. Reg. at 2377/3) – and worse, subverts and weaken those policies by ignoring and repudiating fundamental elements of the important 3M Memo.

The NSR Aggregation Rule dispenses with the five separate criteria outlined in the 3M Memo in favor of several very different, weaker approaches: (1) the rule adopts a new, vague and undefined "substantial relationship" test that was not even mentioned in the proposed rule

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[1] U.S. EPA, Office of Air and Radiation, "Applicability of New Source Review Circumvention Guidance to 3M – Maplewood, Minnesota," (June 17, 1993) 3.

[2] "Administrative records" refers, for example, to multiple minor source permit filings, other permits related to source processes or units, and filed statements made by authorized source representatives regarding plans for operation, *see* Id at 3-4.

and that nowhere appears in the 3M Memo;[3] (2) the rule substitutes and re-defines two narrower factors, "technical or economic interdependence," that do not correspond precisely to any of the factors in the 3M Memo, and that do not capture the totality of the five criteria in the 3M Memo;[4] (3) the rule eliminates the 3M Memo's "circumvention" analysis and concern altogether;[5] and (4) the all-important "basic business purposes" consideration is repudiated altogether through a patent exercise of revisionism on EPA's part:

> In a memorandum issued in 1993 related to a research facility owned by 3M Company in Maplewood, Minnesota (hereafter ''3M-Maplewood memo''), after describing different factors that could be considered in deciding whether the source may have circumvented NSR by not aggregating related research and development activities, we concluded the determination by stating that modifications at plants which are expected to modify regularly in response to consumer and projected production demands or research needs

[3] The final rule thus suffers from the same basic problems identified in negative comments on the proposal by the National Association of Clean Air Agencies: "the proposal does not define 'technical dependence' or 'economic dependence,' leaving greater uncertainty than the previous, reasonably well-developed policy." November 13, 2006 NACAA Comments at 8. Notably, the final rule does no better job defining "technical dependence" nor "economic dependence" and, as discussed below, subverts and weakens EPA's prior well-developed policy.

[4] EPA responds to the critique that the economic and technical dependence criteria improperly narrow and weaken the multi-factor 3M Memo criteria with the following absurd argument: "Any perceived narrowing of the criteria for aggregation through the technical / economic dependence rule language is now irrelevant because we have not adopted that language." NSR Aggregation Rule Response to Comment, at 10. To be sure EPA did not adopt the proposed regulatory text, but it is evident that the "clarification" approach adopted in the NSR Aggregation Rule relies upon the same "economic or technical interdependence" approach set forth in the proposed regulatory text. EPA's silly explanation promotes form over substance, since the point of the narrowing critique is that the technical/economic dependence approach itself, however embodied, is more narrow (and weaker) than the 5-factor 3M Memo approach to circumvention. Even EPA seems to realize that its justification is nonsensical, since the very next sentence in the Response to Comments does not even try to explain its justification, and instead relies upon a purely uninformative, circular conclusion: "The substantial relationship aggregation test explained in this rule will cover circumstances in which emissions increases should be aggregated." *Id.*

[5] See, *e.g.*, NACAA Comments at 9 ("Moreover, NACAA does not agree with EPA's elimination of NSR "circumvention" analysis as one relevant focus of an aggregation determination. Permitting authorities should continue to attempt to ascertain from all the circumstances, as they have in the past, whether or not a source's minor source permit applications demonstrate an effort to avoid major source NSR. If it appears that a facility is deliberately avoiding NSR, permitting authorities should be able to deny the permit. EPA spokespersons have stated that the proposed rule is intended to eliminate consideration by permitting authorities of NSR circumvention, leaving such an inquiry to enforcement authorities. Permitting, however, should not be divorced from enforcement in this way, particularly when enforcement actions are resource-intensive exercises that can be avoided in the first instance by permitting authorities.")

> ‘‘cannot be presumed independent given the plant’s overall basic purpose to support a variety of research and development activities.’’ This portion of the analysis could be taken to posit a presumption that all activities at a facility are related for NSR purposes if they contribute to the plant’s basic business purpose. This suggestion that all changes consistent with the basic purpose of the source can and should be aggregated is inconsistent with the policy we are adopting in this notice that aggregation should be based on a substantial technical or economic relationship among the activities.

74 Fed. Reg. at 2379/1.

The NSR Aggregation Rule similarly retreats from longstanding aggregation policy with respect to the timing of activities. In the 3M Memo, EPA noted that "[i]f a source files more than one minor source permit application simultaneously or within a short time period of each other, this may constitute *strong evidence* of an intent to circumvent the requirements of preconstruction review. Authorities should scrutinize applications that relate to the same process or units that the source files either before initial operation of the unit or after less than a year of operation." 3M Memo at 3 (emphasis added). In sharp contrast, the final rule essentially attempts to invert and thereby subvert this understanding:

> There should be no presumption that activities automatically should be aggregated as a result of their proximity in time. Activities that happen to occur simultaneously at different units or large integrated manufacturing facilities do not necessarily have a substantial relationship. Even if they occur over a short period of time, multiple activities should be treated as a single project for NSR purposes only when a substantial technical or economic relationship exists among the changes.

74 Fed. Reg. at 2379/2. The final rule then goes on to establish a "rebuttable presumption" with respect to timing that appears nowhere in the 3M Memo or other EPA policies: the final rule "also adopts a rebuttable presumption that activities at a plant can be presumed not to be substantially related if they occur three or more years apart." *Id.* at 2376/2.

I note wryly that the final rule's quotation of the relevant passage from the 3M Memo above somehow managed not to quote the "strong evidence" language above, pretending instead that the 3M Memo "simply reaffirmed our view that multiple changes over a short period of time 'should be studied' for treatment as one project. Hence, it is consistent with this notice." *Id.* at 2379.

That argument is revisionist rubbish.

Far from being "clarifications" of EPA's aggregation policies, all of these weakening differences and failings in the final rule result in *fewer* activities being aggregated for NSR purposes, meaning fewer pollution reduction measures will be required and greater numbers of significant emissions increases will escape review and control.[6]

[6] See also NACAA Comments at 10 ("EPA's proposed language" – adopted in the final rule – "is likely to encourage virtually unilateral economic decision-making on emissions increases and

The problem with EPA's longstanding NSR aggregation policies was not that they demanded clarification; indeed, as noted earlier, EPA does not identify any *actual* instances of problems following the 3M Memo and its progeny. Rather, it is abundantly clear that any "problem" stemmed from industrial polluters (referred to colloquially by EPA as "NSR stakeholders") that did not *like* EPA's longstanding NSR aggregation policies. Thus, EPA's pretense to clarify those policies resulted in their weakening and overturning. In fact, EPA's final rule does not shy from quoting industry commenters at length to justify itself. See, *e.g.*, 74 Fed. Reg. at 2378.

The Final Rule Unlawfully Exempts Changes That Constitute "Any Physical Change" From NSR

As NRDC and other environmental and public organizations argued in comments on the proposed rulemaking:

> 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…"[7] Section 111(a)(4) is broad—<u>any</u> physical change that increases emissions is subject to NSR—and any <u>exceptions need to be narrow</u>. EPA has long recognized that a physical modification may be comprised of an "aggregation" of discrete activities that comprise single project. Until now, EPA has used a comprehensive test to determine whether these discrete activities comprise a single physical modification.

The NSR Aggregation Rule creates new, unwarranted exceptions to the broad "any physical change" provision of CAA section 111(a)(4), by allowing 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.

EPA pretends that the final rule is consistent with the N*ew York II* decision in a remarkably wrongheaded passage that utterly misses the point:

> The final rule for NSR aggregation is consistent with case law from the US Court of Appeals for the District of Columbia Circuit interpreting the definition of "modification," including but not limited to *State of New York v. EPA*, 443 F.3d 880 (DC Cir. 2006), *cert. den.* 127 S. Ct. 2127 (2007) ("*New York II*"). The court in *New York II* cautions "EPA [to] apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" (443 F.3d at 885). Substantially related, nominally separate changes can be seen as one change when

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project aggregation by sources, with the result that NSR requirements are triggered less often and air quality may be adversely affected.")

[7] 42 U.S.C. § 7411(a)(4).

> viewed as a whole. Aggregation of nominally separate changes that are substantially related "fits within one of the ordinary meanings of physical change."

NSR Aggregation Rule Response to Comments at 8. We agree that "[a]ggregation of nominally separate changes that are substantially related 'fits within one of the ordinary meanings of physical change.'"

But it is *also* the case that the aggregation of nominally separate changes that are *not* substantially related according to the new economic and technical dependence test invented by EPA "fits within one of the ordinary meanings of physical change." The statute plainly covers "any physical change," and both the D.C. Circuit have ruled that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,' " United States v. Gonzales, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997)." See also *New York II*, 443 F.3d at 885. EPA does not and cannot deny that physical changes that the NSR Aggregation Rule would not require to be aggregated and covered by NSR permitting "fit[] within one of the ordinary meanings of physical change." Yet nowhere does the clarification rule (or Response to Comments) offer any justification for the exemption of these incontrovertible physical changes; nor does EPA's administrative record even respond to the environmental commenters' point that the phrase "any physical change" must be accorded a broad reading and any regulatory exceptions are to be construed very narrowly.

In a truly remarkable series of passages in the Response to Comments document, EPA dutifully summarizes the points made above from the NRDC *et al* Comments:

> Another commenter (0075) stated that EPA proposed basing aggregation determinations upon whether a modification is dependant on another modification for its "technical or economic viability." However, not all factors listed in EPA's 3M Guidance Memo to arrive at aggregation determinations are captured within the proposed technical and economic dependency tests. As the court in *New York v. EPA* explicitly stated, "Congress did not expressly authorize EPA to create regulatory exemptions to NSR." By narrowing the factors to be considered, the proposed tests likely would exclude sources from NSR that would otherwise be covered under the current aggregation policy, thereby providing a broad and illegal exclusion to section 111(a)(4).

Response to Comments at 11. But EPA's nominal "response" to these comments is non-responsive, seeming to go out of its way again to fail to grasp the essential point:

> The final rule is consistent with case law from the US Court of Appeals for the District of Columbia Circuit interpreting the definition of "modification," including but not limited to *State of New York v. EPA*, 443 F.3d 880 (DC Cir. 2006), *cert. den*. 127 S. Ct. 2127 (2007) ("*New York II*"). The court in *New York II* cautions "EPA [to] apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" (443 F.3d at 885). Substantially related, nominally-separate changes can be seen as one change when viewed as a whole. Aggregation of nominally-separate changes that are substantially related "fits within one of the ordinary meanings of physical change." Any perceived narrowing of the criteria for

aggregation through the technical / economic dependence rule language is now irrelevant because we have not adopted that language.

Id. at 12. Nowhere does this purported response address the commenters' point that "Congress did not expressly authorize EPA to create regulatory exemptions to NSR," nor the related point that the word "any" must be accorded a broad meaning and that exempted changes plainly "'fit[] within one of the ordinary meanings of physical change."

By the time one reads the just-quoted non-responsive "response" for the third time in the Response to Comments document, it's clear that the passage is just boilerplate. There is good reason that the boilerplate is non-responsive; the prior administration *had* no response, because the NSR Aggregation Rule is inconsistent with the teaching of *New York II* and the plain language of CAA section 111(a)(4).

EPA's Skipping the SIP Trick

In addition to dropping the proposed rulemaking text in favor of a phony, revisionist "clarification," the NSR Aggregation Rule abandons the proposal's recognition that States would need to revise their State Implementation Plans no later than three years after the final rule's effective date.[8] This gambit to skip SIP rulemakings accords perfectly, and perfectly cynically, with the prior administration's complementary ploy to avoid actual rule language in favor of a clarification that pretends to take legal effect throughout the land 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 NSR Aggregation Rule is no mere "clarification" of existing rule text in SIP-approved or federally delegated regulations, nor clarification of existing EPA policy. EPA's final rule twists and turns to interpret prior guidance; invents new and vague phrases and explanations; abandons prior criteria that have been fundamental to longstanding EPA policies; credits new arguments and suggestions proffered by industry for the first time in this very rulemaking; and otherwise reflects a brand new rulemaking and legal standard in everything but name.

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

[8] "We propose the debottlenecking approaches described in this proposed rule as a minimum program element of our base NSR program. Accordingly, each State must submit a revision to its SIP to incorporate this change or provide a demonstration that an alternative approach is at least equivalent to the Federal requirement. We propose to require States to submit these revisions for our approval no later than 3 years after the effective date of the final rule." 71 Fed. Reg. at 54,244/2.

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 on also states with a wave of a magic pen in this manipulated "clarification" undertaking. By signing this classic midnight (de)regulation on January 12th and publishing it in the Federal Register on January 15th, with a legal effective date of February 17, 2009, the outgoing administration crudely hoped to make it very difficult for the incoming administration to reverse this harmful purported "clarification" that in fact weakens longstanding EPA, state and local regulatory practice.

The Final Rule Suffers From EPA's Failure to Comply with Executive Order 12866, Since EPA Failed to Involve State, Local and Tribal Air Regulators Prior to the Rule's Proposal.

It is worth reiterating here the very first objection lodged to the proposed NSR Aggregation 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:

> EPA's Proposed Rule Ignores Executive Order 12866, which Requires Pre-Proposal Involvement of State and Local Agencies.
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> EPA states at the beginning of the proposed rule that the changes "reflect EPA's consideration of the Agency's 2002 Report to the President...as well as discussions with various stakeholders including representatives of environmental groups, State and local governments, and industry." Contrary to this statement, however, EPA did not consult with or discuss these proposals with NACAA or its members. Rather, NACAA members were briefed on the proposed changes in August 2006, after the proposal had been sent to the Office of Management & Budget. At this late stage, state and local officials were merely informed of the contents of the proposed rule. No meaningful opportunity was ever provided to state and local air pollution control officials to review and discuss the proposed rule, and to suggest changes, despite the fact that the debottlenecking, aggregation, and project netting proposals have been under development since 2002.
>
> In fact, EPA is charged with a duty to consult with the state and local permitting authorities early in the process of rule development. Executive Order 12866 states, "…[B]efore issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)." (Emphasis added) With regard to EPA's proposal, the changes are likely to result in burdens to state and local officials, ranging from unreported increases in emissions and degradation of air quality (debottlenecking and project netting), to the imposition of problematic criteria for evaluating minor source projects (aggregation). Thus, early and meaningful involvement of state and local officials before issuance of the notice of proposed rulemaking was required by Executive Order 12866.

November 13, 2006 Comments by NACAA to EPA. As the discussion in the foregoing section demonstrates, the proposed rule suffered from the prior administration's failure to comply with E.O. 12866 and consult with state and local officials, since the prior administration presumptuously proposed to impose the weaker aggregation approach upon permitting authorities as a mandatory minimum element of NSR programs. 71 Fed. Reg. at 54,244/2.

Worse, the final NSR Aggregation Rule skips the SIP rulemaking process altogether and outrageously purports to impose the prior administration's weaker, harmful policies upon states in the form of a supposed "clarification" that would take legal effect in all state programs on February 17, 2009. EPA under the new administration should abandon this rule and certainly not force a fabricated "clarification" upon existing federal rules and the state and local officials that carry out those rules through their delegated or SIP-approved program. At the very least, EPA should reconsider this NSR Aggregation Rule, stay its effectiveness, extend the effective date and seek public comment, allowing proper consultation with state and local officials and compliance with E.O. 12866 before even considering whether to propose a future NSR aggregation rule.

We also raise anew another significant concern highlighted by NACAA that the final "clarification" rule simply fails to address:

> NACAA is concerned that there are no provisions for sources to submit records to state and local permitting authorities substantiating the sources' determinations about NSR applicability under the proposed rule. On June 24, 2005, the D. C. Circuit Court of Appeals addressed the record-keeping issue in *New York v. Environmental Protection Agency*. EPA's 2002 NSR reform rule required sources to keep records of their determinations of NSR applicability when "[they] believe that there is a reasonable possibility that [the] project…may result in a significant emissions increase." The Court remanded this regulatory provision to EPA "to either provide an acceptable explanation for its 'reasonable possibility' standard or to devise an appropriately supported alternative." . . . . Determinations of when NSR applies to debottlenecking, aggregation, and project netting activities appear to be within the exclusive domain of the source and record-keeping and reporting are apparently undertaken, if at all, as a voluntary activity by the source.
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> . . . .
>
> With regard to aggregation, the proposal states, *"Determining whether a permit is needed necessarily requires a source to make certain evaluations about the nature of an activity. Thus when planning a physical or operational change, the source should always consider the rules and guidelines provided by EPA, and/or in the applicable SIP, in determining whether multiple projects should be aggregated. Nonetheless, the source's determination of the proposed project is not the final decision; rather, the reviewing authority is responsible for ensuring that sources in their jurisdiction abide by the applicable rules and guidance for aggregating projects. This may require the reviewing authority to gather facts and request specific information from the source when further scrutiny is warranted."* (Emphasis added)

> In effect, the Preamble suggests that a permitting authority must request—without any regulatory requirements—more facts in order to revisit and, possibly, change the source's determination on aggregation. NACAA objects to the lack of record-keeping and reporting requirements, and believes that the regulations should provide that a source submit relevant information on the project or projects to the permitting authority at the planning stage of development.

NACAA Comments at 3-4; see also *id.* at 8 ("State and local permitting authorities are likely to face an uphill battle in obtaining the internal corporate planning and balance-sheet information that would enable them to understand whether or not projects are genuinely economically dependent, and would have no recourse if information requests were ignored or given an inadequate response.") In response to these very valid concerns from the most informed experts in this arena, state and local air pollution control officials, the NSR Aggregation Rule fails to require regulated sources to submit any records to state and local permitting authorities substantiating the sources' determinations about NSR applicability based on (dis)aggregation. Nor does the source even need to maintain records. These failings cause the rule to suffer from the same legal and policy defects as EPA's 2002 NSR reform rule, and further renders the NSR Aggregation Rule arbitrary and capricious.

* * * * *

For agency rules that were published but not yet effective by January 20th, the January 21, 2009 Orszag Memo counsels agency heads to "consider postponing the effective dates for 60 days and reopening your rulemaking processes." Through this petition for administrative stay, we urge you to administratively stay the NSR Aggregation Rule for three months, as provided under CAA section 307(d)(7)(B). EPA also should consider extending the effective date of the rule, as appropriate, under the Orszag Memo.

We believe such extension is warranted based upon at least the following considerations identified in the Orszag Memo and discussed in the present context as a basis for these petitions:

- The rule's procedural inadequacy, based upon the logical outgrowth and section 307(d)(7)(B) defects identified herein, along with the failure to comply with Executive Order 12866 originally identified by NACAA;
- the rule's failure to properly consider all relevant facts, including the burden on state and local permitting authorities; their lack of specialized expertise in the economic interdependence test created by the rule's "clarifying" interpretation; the implementation problems with the rule due to permitting authorities lack of access to source records; and the rule's utter failure to determine the emissions consequences arising from the new interpretation;
- the rule's failure to consider all legal aspects of the controlling *New York II* decision and CAA section 111(a)(4) and the agency's legal obligations thereunder;
- the rule's unreasonable judgments about legally relevant policy considerations, such as the relaxation of approved SIP and delegated programs relying upon EPA's stronger longstanding aggregation policies, and anti-backsliding concerns arising

from the final rule's weaker approach; the introduction of vague new legal standards and criteria that will pose legal enforceability problems to federal, state and local regulators and the public; and the lack of experience by regulators and regulated sources with these vague new legal standards and criteria, in contrast to many years of implementation experience with the aggregation policies that the final rule supplants;

- the rule's failure to adequately consider and address objections to the rule, including those identified in the Response to Comment discussions above and the failures to respond to deep concerns by NACAA; and
- finally, the rule's failure to find adequate support in the rulemaking record, based upon the numerous deficiencies identified in these reconsideration and administrative stay petitions.

For the foregoing reasons, we urge you to (1) reconsider the final NSR Aggregation Rule; (2) administratively stay the Rule for three months consistent with CAA section 307(d)(7)(B); (3) in the alternative or in conjunction with an administrative stay, extend the February 17, 2009 effective date of the final rule consistent with the January 20, 2009 Emanuel memorandum and the January 21, 2009 Orszag memorandum to agency heads; (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 impending February 17, 2009 effective date.

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
Lisa Heinzerling, Office of the Administrator
Adam Kushner, Office of Enforcement & Compliance Assurance
Rich Ossias, Office of General Counsel
Steve Page, Office of Air Quality Planning & Standards
Elliott Zenick, Office of General Counsel