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Reforming the New Source Review Program

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REFORMING THE NEW SOURCE REVIEW PROGRAM

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INTRODUCTION

Two headlines: one captured the attention of thousands, the other only a few. In large bold text, the first headline screamed *Ozone Hole Reaches Record Size*[1] The first sentence of the article read "[t]he gap in the ozone layer is nearly three times as large as the United States—its biggest size ever, scientists at NASA said yesterday."[2] The other, smaller headline from the Daily Environment Report read *Air Pollution: State Officials Launch NSR Reform Drive, Claim EPA Revision Plan Unlikely to Succeed.*[3] Both of these headlines addressed important environmental issues. The smaller headline, however, should be of greater concern to Americans, for it announced the stalling of a key piece of legislative reform that could tighten existing statutory loopholes, reduce

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1. Geir Moulson, *Ozone Hole Reaches Record Size*, THE COLUMBUS DISPATCH, Sept. 9, 2000, at A1.

2. *Id.*

3. Pamela Najor, *Air Pollution: State Officials Launch NSR Reform Drive, Claim EPA Revision Plan Unlikely to Succeed*, Daily Env't Rep. (BNA) No. 78, at AA-1 (Apr. 21, 2000).

statutory complexity and more importantly lead to cleaner air in the United States.

The second headline referred to the New Source Review ("NSR") program of the Clean Air Act, the purpose of which is to protect and improve air quality while allowing for continued economic growth.[4] However, stakeholders, including industry, environmental groups, and regulators have determined that the current NSR program of the Clean Air Act is too complex, burdensome, and inefficient to achieve its goals.[5] Since 1992, the Environmental Protection Agency ("EPA") has attempted to champion NSR reform.[6] The reform process, however, has stalled as stakeholders have failed to develop a reform proposal with universal support.

Some authors have critiqued the current NSR reform effort, but no articles have set forth alternative reform proposals.[7] This article is an attempt to provide the structure of a proposal that meets the goals of NSR and NSR reform and would garner support from stakeholders. The cornerstones of this article are two NSR reform proposals: one for attainment areas and another for nonattainment

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4. *See, e.g.*, H.R. REP. NO. 95-294, at 13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1091.

5. *See, e.g.*, Bernard F. Hawkins, Jr., *The New Source Review Program: Its Prevention of Significant Deterioration and Nonattainment Analysis Programs, in* THE CLEAN AIR ACT HANDBOOK 98, 100 (Robert J. Martineau & David P. Novello eds., 1998); NATURAL RES. DEF. COUNCIL, COMMENTS OF NATURAL RESOURCES DEFENSE COUNCIL ON NOTICE OF AVAILABILITY; ALTERNATIVES FOR NEW SOURCE REVIEW (NSR) APPLICABILITY FOR MAJOR MODIFICATIONS (1998) (presented before the EPA on October 8, 1998 at Docket No. A-90-37) (on file with author and the *Fordham Environmental Law Journal*); *see also* David A. Golden, *The Need to Reform NSR Reform*, 12 NAT. RES. & ENV'T 170 (1998) (providing additional background on the impetus for reform).

6. *See* 61 Fed. Reg. 38,250, 38,252 (July 23, 1996) (to be codified at 40 C.F.R. pts. 51, 52); Hawkins, *supra* note 5, at 100. In 1993, the EPA undertook to reform the NSR requirements by authorizing the formation of an NSR reform subcommittee of the Clean Air Act Advisory Committee. Notice of Public Meeting, 58 Fed. Reg. 36,407 (July 7, 1993).

7. *See* Golden, *supra* note 5, at 170.

areas.[8] These proposals remedy a key fault with NSR reform proposals put forth by stakeholders, the failure to recognize that two NSR reform proposals must be developed. The analysis will begin by presenting the goals, structure, and difficulties of the current regulatory scheme. The various proposals submitted by the EPA and key stakeholders will then be reviewed in terms of how well each proposal meets the goals of the NSR program and NSR reform.[9] This article will discuss which proposals (or combination thereof) best meet the goals of the NSR program and NSR reform, with particular emphasis on the need to develop separate reform proposals for nonattainment and attainment areas.

I. BACKGROUND

The purpose of the Clean Air Act is "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."[10] Congress structured the Clean Air Act to accomplish its purpose by requiring the administrator of the EPA to list criteria pollutants and promulgate national primary and secondary ambient air quality standards for those criteria pollutants.[11] To ensure that the air quality

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8. *See* 42 U.S.C. §§ 7407(d)(1)(A)(i)–(ii) (1994) (defining a nonattainment area as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant . . . [and an] attainment area [as] any area [other than a nonattainment area] that meets the national primary or secondary ambient air quality standard for the pollutant").

9. The EPA proposal, in addition to reform regarding NSR applicability, also proposes enhanced control technology guidelines and resources, improved protection of Class I areas, and pre-construction monitoring requirements. *See* 61 Fed. Reg. 38250 (July 23, 1996). The additional proposals will not be addressed in this Article. The discussion, instead, will center on the reform proposals that address NSR applicability of new and modified sources.

10. 42 U.S.C. § 7401(b) (1994).

11. *Id.* § 7408(a). As of today, the EPA has listed lead, sulfur dioxide (SO2), nitrogen dioxide (NO2), carbon monoxide (CO),

standards would be achieved and maintained, Congress amended the Clean Air Act in 1977 by adding Parts C and D of Subchapter I.[12] Part C addresses the prevention of significant deterioration for areas that are in attainment for criteria pollutant(s) or that have not been classified as being in attainment or nonattainment for a criteria pollutant[13] Part D applies to areas that are in nonattainment for a criteria pollutant.[14]

The permitting sections of Parts C and D of Subchapter I are known as the NSR program.[15] Attainment areas require a pre-construction permit for any new source or modification that is deemed to be major[16] Nonattainment areas require a pre-construction permit for any major modification or new major source.[17] The permit requirements for nonattainment areas are more stringent than those for attainment areas.[18] A key feature of the NSR

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particulate matter (PM10), and ozone as criteria pollutants. *See* Hawkins, *supra* note 5, at 98. PM10 refers to particulate matter whose particles have a diameter of 10 micrometers or less. *See, e.g.*, OFFICE OF AIR QUALITY PLANNING & STANDARDS, EPA, 1995 NATIONAL AIR QUALITY: STATUS AND TRENDS (1996) (at docket number EPA-454/F-96-008 and prepared in October 1996), *available at* http://www.epa.gov/oar/aqtrnd95/pm10.html (last visited Mar. 5, 2002).

12. *See* 42 U.S.C. §§ 7470–7492, 7501–7515 (1994).

13. Hawkins, *supra* note 5, at 98.

14. *Id.* An area can be in attainment for one criteria pollutant and in nonattainment for another criteria pollutant. *See id.* at 101.

15. *See id.* at 98. The NSR program evolved primarily from CAA Amendments made during the 1970s. *Id.* The 1990 CAA amendments added additional requirements for nonattainment areas such as requiring additional offsets for areas out of attainment. *Id.* at 100. *See generally* Henry F. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVT'L L. 1721 (1991) (providing a general overview of the 1990 CAA amendments).

16. 42 U.S.C. § 7475 (1994); *see id.* § 7475(a) (setting forth the permit requirements for attainment areas).

17. *Id.* § 7502; *see id.* § 7503 (setting forth the permit requirements for nonattainment areas).

18. *Compare id.* § 7503 (requiring that a permit application for nonattainment areas must include a showing that sufficient offsets

program is that pre-construction permits require the planned installation of the best achievable control technology ("BACT") or the lowest achievable emissions rate ("LAER") for major modifications or major new sources as defined by the Clean Air Act.[19]

Best achievable emissions rate is required for new and modified sources deemed major in attainment areas, and LAER is required for new and modified sources deemed major in nonattainment areas.[20] Each permit must contain a selection of the proper control technology as applied to each criteria pollutant present in the emissions stream.[21] Stakeholders of NSR reform have criticized the NSR program for being too time consuming and complex,[22] and for containing loopholes that allow units to be installed or modified without the appropriate control technology.[23]

Responding to this criticism, the EPA launched a reform program in 1993 by authorizing the formation of a subcommittee to the Clean Air Act Advisory Committee that would focus on NSR reform.[24] Composed of various representatives from the EPA, state agencies, industry groups, and environmental organizations, the subcommittee made formal recommendations to the EPA.[25] The EPA reviewed the recommendations and issued a formal notice of proposed rulemaking on July 23, 1996, for revisions to the program that focused on

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are done to insure no increase in emissions will occur and a showing that the source will comply with lowest achievable emissions technology), *with id.* § 7475 (having no such requirements for attainment areas).

19. *See id.* §§ 7479(3), 7501(3).

20. *Id.* §§ 7475(a), 7503.

21. *Id.* § 7475(a)(4); 40 C.F.R. § 52.21(j)(3) (2000).

22. *See* Hawkins, *supra* note 5, at 100; *see also* Golden, *supra* note 5, at 170.

23. *See* NATURAL RES. DEF. COUNCIL, *supra* note 5.

24. Notice of Public Meeting, 58 Fed. Reg. 36,407 (July 7, 1993).

25. *See* Notice of Proposed Rulemaking, 61 Fed. Reg. 38,250 (July 23, 1996) (to be codified at 40 C.F.R. pts. 51, 52) (stating "[t]hese proposed changes are largely drawn from the discussions and recommendations of the Clean Air Act Advisory Committee's Subcommittee on NSR Reform").

applying NSR to fewer sources.[26] Comments were received from various industry, state, and environmental groups, and, on review, the EPA clarified the proposal to consider downward adjustments of the plant-wide applicability limits.[27] The entire EPA proposal was then presented and reviewed with stakeholders in February, 1999.[28] Following that meeting, industry, state, and environmental groups met to review and discuss various industry proposals.[29]

These stakeholders have not reached a resolution regarding how best to reform the NSR program. The EPA has worked with them in an effort to clarify proposals and develop a working NSR program.[30] The EPA held another public meeting on January 13, 2000 to discuss a modified EPA proposal that would include, in addition to the 1996 proposed regulations, an opt-out of NSR for the electric generating industry.[31] At the same meeting, proposals by key stakeholders were reviewed with an overall purpose of determining if and how the alternative approach should be proposed in the Federal Register.[32]

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26. *Id.*

27. *See* Notice of Availability, 63 Fed. Reg. 39,857 (July 24, 1998).

28. *See* Announcement of Public Meeting, 64 Fed. Reg. 3890 (Jan. 26, 1999) (to be codified at 40 C.F.R. pts. 51, 52).

29. *See* Pamela Najor, *Industry Groups Submit Reform Proposals for EPA New Source Review Program*, 30 Daily Env't Rep. (BNA) No. 7, at A-7 (June 18, 1999).

30. *See generally* Letter from Michael Bradley, Executive Director, The Clean Energy Group, to John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA (Nov. 10, 1999) (on file with author and the *Fordham Environmental Law Journal*); THE CLEAN ENERGY GROUP, INTEGRATED AIR QUALITY STRATEGY FOR THE POWER GENERATION INDUSTRY (1999).

31. *See* Letter from John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, to Participants (Dec. 20, 1999) (announcing public meeting on January 13, 2000), *available at* www.epa.gov/ttn/nsr/rule_dev.html (last visited Mar. 6, 2002) (on file with author and the *Fordham Environmental Law Journal*).

32. *Id.*

At this time, no decision has been made on NSR reform although the EPA hoped to complete NSR rulemaking in 2000.[33]

II. THE CURRENT REGULATORY SCHEME

A. *The Goals of the NSR Program*

The purpose of the NSR program must be pieced together using the Clean Air Act's legislative history, documents in the Federal Register, and excerpts from federal case law. Neither the Clean Air Act nor its legislative history clearly sets forth the goals of the NSR program. The legislative history pertaining to the 1977 Clean Air Act amendments comes closest to listing the goals of the NSR program. Regarding nonattainment legislation, a 1977 House of Representatives committee noted that "[t]his section is proposed as a means of assuring realization of the dual goals of attaining air quality standards and providing for new economic growth."[34] The same committee noted that the section has "two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than the EPA's present interpretative regulations afford."[35] The committee also noted that the NSR permitting process acts as a means to achieve the overall goals listed above.[36] Specifically, the committee stated that the

> purpose of the State permit process is to provide that the allowable pollution increments and appropriate emission limitation for each source which will be specified in the State

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33. Bebe Raupe, *New Source Review Program Too Complex, Unfair, Witnesses Tell Senate Field Hearing*, 41 Daily Env't Rep. (BNA) No. 41, at A-3 (Mar. 1, 2000) (stating that the "EPA hopes to complete NSR rulemaking later in 2000").

34. H.R. REP. NO. 95-294, at 13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1091.

35. H.R. REP. NO. 95-294, at 211, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1290.

36. H.R. REP. NO. 95-294, at 145, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1224.

> permit to meet these requirements will not be exceeded as a result of emissions from any new or modified major stationary source. This pre-construction review process should help minimize the need for enforcement or other actions under the State implementation plan requiring additional post construction control measures on the permitted plants.[37]

The legislative history also addresses the use of NSR in the prevention of significant air quality deterioration. In a 1977 Senate report regarding the definition of significant deterioration, a committee noted that "[t]his definition is intended to prevent any major decline in air quality currently existing in clean areas and will provide a margin of safety for the future. This will be made easier by a mandatory use of the best available control technology as set forth in the bill."[38] A 1977 House committee report also noted the purpose of a permit is "to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source."[39]

The Congressional Record of June 8, 1977, provides insight into why new sources are the focus of the NSR program.[40] During opening comments regarding bill S.252, Senator Edmund Muskie noted that

> [t]he committee voted to make specific the requirement that clean air areas be protected. We determined that each new major plant should be required to use the best pollution control technology available and that the impact of each new plant's emissions should be evaluated against a national nondegradation standard.
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> The committee confirmed that new air pollution sources have a special responsibility to preserve air quality values, both to avoid a repetition of the past air pollution mistakes that now

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37. H.R. REP. NO. 95-294, at 145, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1224.

38. 123 CONG. REC. S18,015 (daily ed. June 8, 1977).

39. H.R. REP. NO. 95-294, at 9, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1087.

40. 123 CONG. REC. S18,013-16 (daily ed. June 8, 1977) (statement of Sen. Muskie).

> plague our urban areas and to protect the capacity of our clean air resource to provide margins for future growth.[41]

These comments show support for the control technology application of the NSR program by recognizing the need for economic growth and placing the burden on those who install new major sources of air pollution.[42] As noted by Senator Muskie, "[t]he Nation must have clean growth."[43]

The preambles to proposed NSR regulations in the Federal Register also help determine the goals of the NSR program. The preamble to the final regulations implementing the 1977 amendments notes that "[t]he PSD increments must be protected through both pre-construction review and the SIP review process."[44] The EPA also noted that "[s]tate agencies and major industries that addressed the question uniformly felt that pre-construction review alone was the mechanism considered by Congress to protect increment consumption."[45] The preamble to 1980 regulations regarding NSR SIP requirements notes that

> [t]he principal mechanism within the SIP to implement the objectives of the PSD program is the pre-construction review process. These provisions require that new major stationary sources and major modifications are carefully reviewed prior to construction to ensure compliance with the National Ambient Air Quality Standards, the applicable PSD air

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41. *Id.* Senator Muskie was the Chairman of the Environmental Pollution subcommittee of the Environmental Public Works committee during this time. 1977 U.S.C.C.A.N. LXXXV (listing members of the subcommittee on environmental pollution, including Senators Culver, Hart, Anderson, Stafford, Chafee and Wallop of the 95th Congress).

42. *See* 123 CONG. REC. S18,015 (daily ed. June 8, 1977); H.R. REP. NO. 95-294, at 211, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1292.

43. *See* 123 CONG. REC. S18,015 (daily ed. June 8, 1977).

44. 1977 Clean Air Act Amendments to Prevent Significant Deterioration, 43 Fed. Reg. 26,388, 26,389 (June 19, 1978) (to be codified at 40 C.F.R. pt. 52).

45. Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 43 Fed. Reg. 26,380 (June 19, 1978) (to be codified at 40 C.F.R. pt. 51).

> quality increments, and the requirements to apply the best available control technology on the project's pollutant emissions.[46]

The preamble to the 1996 proposed NSR reform regulations notes that the pre-construction review program is meant to

> assure that the NAAQS are achieved and maintained; to protect areas of clean air; to protect AQRV . . . to assure appropriate emission controls are applied; to maximize opportunities for economic development consistent with the preservation of clean air resources; and to ensure that any decision to increase air pollution is made only after full public consideration of all the consequences of such a decision.[47]

The preambles in the Federal Register support the legislative history excerpts, showing that the NSR program is a vehicle to achieve the primary goals of attainment and nonattainment.

Federal case law also gives some insight into the goals of NSR. In *Chevron v. Natural Resources Defense Council*, the Supreme Court noted that ". . . in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest improving air quality."[48] In *Natural Resources Defense Council, Inc. v. Gorsuch*, then Judge Ginsburg writing for the D.C. circuit noted that the EPA did not dispute that Congress "intended the new source review requirements to operate not simply as a quality-maintaining scheme but specifically to promote the cleanup of nonattainment areas."[49]

Individually, none of the above sources provides a clear and complete statement regarding the goals of the New Source Review program. As a whole, however, three primary goals of the NSR program become apparent. First, the NSR program is intended to

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46. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed Reg. 52,676, 52,677 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, 124).

47. Notice of Proposed Rulemaking, 61 Fed. Reg. 38,250, 38,252 (July 23, 1996) (to be codified at 40 C.F.R. pts. 51, 52).

48. 467 U.S. 837, 851 (1984).

49. 685 F.2d 718, 720 (D.C. Cir. 1982).

protect the increment in attainment areas by requiring a pre-construction permit that requires measures that ensure that the new or modified source will not impact attainment. Secondly, the NSR program is intended to achieve the National Ambient Air Quality Standards ("NAAQS") in nonattainment areas by ensuring that new and modified sources have pre-construction permits that act to lower current total emissions. Third, the NSR program should allow for continued economic growth in both attainment and nonattainment areas.

B. *The NSR Regulatory Scheme*

To achieve the goals of the NSR program, the EPA has structured a regulatory scheme that is as complex as the statute that governs the regulations. Like Parts C and D of Title I of the Clean Air Act, the NSR regulations address nonattainment and attainment separately.[50] Regulations also specify the minimum requirements that a State Implementation Plan ("SIP") must adopt in order to receive EPA approval.[51] Furthermore, regulations provide a federal plan for permitting until a state has its own approved SIP.[52]

The regulations require pre-construction permits for new major sources or major modifications to existing sources in attainment or nonattainment areas.[53] For sources in attainment areas, the primary permit requirements are an analysis and application of BACT control technology, an analysis regarding the impact the change will have on air quality, and a general environmental analysis on the impact to

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50. *See* 40 C.F.R. §§ 51.165, 51.166, 52.21, 52.24 (2000) (setting out NSR regulations for attainment and nonattainment areas); *see also* Notice of Proposed Rulemaking, 61 Fed. Reg. 38,250, 38,252 (July 23, 1996) (to be codified at 40 C.F.R. pts. 51, 52).

51. *See* 42 U.S.C. § 7410(a) (1994) (requiring States to adopt and submit to the EPA a plan that "provides for the implementation, maintenance, and enforcement of" the NAAQS). These plans are called state implementation plans ("SIPs"). *Id.* at § 7410.

52. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676-679 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, 124).

53. *See* 40 C.F.R. §§ 52.21(i)(1), 52.24(a).

vegetation, visibility, and soils.[54] For sources in nonattainment areas, the permit requirements are an analysis and application of LAER technology, offsets for any pollution increase, and an analysis that shows that the environmental impact of the change is outweighed by the benefit of the change.[55]

Although the NSR program cannot be directly credited with pollution level decreases, national criteria air pollution levels have decreased.[56] An example is sulfur dioxide, for which the level in ambient air decreased 36% from 1990 to 1999.[57] Nitrogen dioxide levels also dropped by 10% during the same period.[58] Additional decreases in air pollution levels should occur as more sources apply control technology. However, lower levels of air pollution will be difficult to attain because, as cited by industry and environmentalists, certain provisions of the NSR regulations are too complex, cause delays in construction, and contain loopholes that allow emitting sources to escape the application of NSR control technology.[59]

The key provisions of the EPA regulations for NSR permits that have caused controversy deal with the applicability of NSR to a new source or modification of an existing source, allowing only certain pre-construction activities, and the application of control technology to a source.[60] For new sources in both attainment and nonattainment

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54. *See id.* § 52.21(j)–(r).

55. *See id.* § 52.24(a); *see also* 42 U.S.C. § 7503(a).

56. *See* OFFICE OF AIR QUALITY PLANNING & STANDARDS, EPA, NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT, 1999 (2001) (at docket number EPA-454/R-01-004 and prepared in March 2001), *available at* http://www.epa.gov/oar/aqtrnd99 (last visited Mar. 5, 2002).

57. *Id.*

58. *Id.*

59. Hawkins, *supra* note 5, at 100; Memorandum from the Utility Air Regulatory Group, to John S. Seitz, Director, Office of Air Quality Planning, EPA 39 (Oct. 8, 1999) (noting NSR review can take 18 months and can result in control costs exceeding $100,000,000) (on file with author and the *Fordham Environmental Law Journal*) [hereinafter UARG Memorandum].

60. *See* 61 Fed. Reg. 38,250, 38,252 (July 23, 1996) (stating "the issue of NSR applicability proved to be one of the most difficult and

areas, NSR applicability is based on the source output in tons per year.[61] For example, depending on the type of source, a major source for sulfur dioxide in an attainment area would have to emit one hundred tons per year or two hundred and fifty tons per year to be classified as such.[62] For nonattainment areas, major source levels differ based on the level of nonattainment.[63]

For modifications to existing sources, NSR applicability hinges on whether the modification will result in a significant increase in criteria pollutant emissions.[64] An existing source prior to any modification must determine if the modification is major.[65] A major modification is a change that results in a significant net emissions increase and requires the source to apply for an NSR pre-construction permit.[66] The net emissions increase is not determined by comparing actual emissions prior to and after the modification.[67]

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divisive issues for the Clean Air Act Advisory Committee's NSR Reform Subcommittee"); NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2; UARG Memorandum, *supra* note 59.

61. *See, e.g.*, 40 C.F.R. § 52.21(b)(1)(i) (2000).

62. *Id.* § 52.21(b)(1)(i)(a).

63. Hawkins, *supra* note 5, at 142.

64. *Id.* at 111.

65. *See, e.g.*, 40 C.F.R. §§ 52.21(b)(2)(i), (3)(*i*).

66. *See generally id.* § 52.21(b)(23)(i). *See also id.* §§ 52.21(b)(2)(i), 52.24(f)(5)(i). The regulations list three different ways that a net emissions increase or the potential of a source to emit will be deemed significant. *Id.* § 52.21(b)(2)(i). The first is when the emissions rate increase or potential to emit could equal or exceed listed rates by pollutant types. The second occurs when net emissions increase or the potential of the source to emit increases any pollutant not listed in the regulations. The third is when increase in emissions within ten kilometers of a Class I area has an impact equal to or greater than a listed amount. *Id.* §§ 52.21(b)(2)(i), 52.24(f)(5)(i).

67. *See* 40 C.F.R § 52.21(b)(21). An exception to this regulation is the WEPCO rule that allows electric utility steam generating units to compare actual emissions prior to and after the modification. *See* Wis. Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990); 40 C.F.R §§ 51.165(a)(1)(xii)(e), 51.166(b)(21)(v), 52.21(b)(21)(v), 52.24(f)(13)(v) (2000); 61 Fed. Reg. 38,250, 38,255 (July 23, 1996).

Rather, the emissions change is the difference between the average emissions rate for the contemporaneous two years and the unit's potential to emit, taking into consideration control technology after the modification.[68] The controversy with this calculation method is that sources are required to complete an NSR permit when there may not even be an actual emissions increase to the environment.[69]

For example, Source A has a potential to emit eighty tons of sulfur dioxide per year. However, it has operated at 50% capacity for the last three years. The proposed modification would consist of upgrades to existing equipment that will result in electric cost savings and would not increase emissions or Source A's potential to emit. Under the current NSR regulations, Source A would have actual emissions of forty tons per year and a potential to emit of eighty tons per year. The net emissions increase would be forty tons per year, which is a significant increase.[70] Source A would have to apply for an NSR pre-construction permit prior to making any changes to the operation. Because Source A would now have to apply for an NSR permit, Source A will most likely forgo the energy cost savings (that may decrease emissions at a utility generating plant because demand would decrease) because of the high costs associated with the installation of LAER technology.

The current regulations also include restrictions on pre-construction activities until an NSR construction permit is issued.[71] Allowed activities vary from state to state and range from no activities to land clearing and pad pouring.[72] The restrictions on

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68. Hawkins, *supra* note 5, at 113 (stating that the unit's potential to emit is the total emissions the unit is capable of emitting if run at full design capacity and accounting for any installed control technology). *See also* 40 C.F.R. § 52.21(b)(4).

69. Hawkins, *supra* note 5, at 114.

70. *See* 40 C.F.R. § 52.21(b)(23)(i).

71. *Id.* §§ 52.21(i)(1), 52.24(a).

72. STAPPA/ALAPCO, NEW SOURCE REVIEW PRE-CONSTRUCTION PERMITTING ACTIVITIES (2000) (containing a draft summary of state and local agency responses to EPA's request for information regarding NSR pre-construction activities, drafted on January 3, 2000).

construction result in major delays to projects while NSR applicability is being determined and during an NSR permit review.[73]

Environmental groups have strongly complained that the current regulations do not insure that control technology is applied to new and modified sources.[74] The NSR regulations are only trigged through major modifications resulting in significant net increases of regulated pollutants.[75] Facilities can make modifications and avoid installing BACT or LAER technology on units by taking contemporaneous offsetting decreases on older units.[76] This means of circumventing the regulations is particularly troubling in nonattainment areas where the installation of LAER control technology is a major means of insuring that the NAAQS are achieved, as old units without controls are decommissioned or modified.[77] The regulations also provide exemptions—for routine maintenance, repair, and replacement, that allow older sources to make modifications that result in the sources operating at full capacity instead of a declining emissions rate.[78]

Industry groups also criticize the control technology portion of the regulations as causing additional delays and cost.[79] A permit applicant must complete a technical analysis to determine which control technology will satisfy the BACT or LAER requirements of NSR.[80] The permit applicant must then complete the analysis for

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73. *See* UARG Memorandum, *supra* note 59 and accompanying text.

74. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2.

75. *See* 40 C.F.R. § 52.21(b)(2)(i).

76. *See id.* § 52.21(b)(3)(ii)(a) (defining contemporaneous as within five years prior to the change).

77. *See* H.R. REP. NO. 95-294, at 213 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1292 (commenting that "[n]ew sources and existing sources expand must meet lowest achievable emission requirements which are at least as stringent as new source standards of performance").

78. *See* 40 C.F.R. § 52.21(b)(2)(iii).

79. *See* UARG Memorandum, *supra* note 59, at 39 and accompanying text.

80. *See, e.g.*, Hawkins, *supra* note 5, at 121; 40 C.F.R. § 52.21(j)(4).

each criteria pollutant at each emissions unit.[81] Compliance with these provisions can be both time consuming and difficult to develop.[82]

C. *The Goals of NSR Reform*

All stakeholders, including the EPA, agree that the NSR program should be reformed.[83] A review of the stakeholder reform proposals, memoranda, and letters show three primary goals of NSR reform. First, stakeholders such as the EPA, the subcommittee for NSR reform, industry groups, the State and Territorial Air Pollution Program Administrators ("STAPPA") and the Association of Local Air Pollution Control Officials ("ALAPCO") want to simplify the existing NSR program by adding flexibility.[84] Industry groups note that the existing NSR program causes major delays and additional expenses on projects.[85] State regulators note that any reform should result in a simplified process with timeliness and certainty for industry.[86] These comments all point to the need to reform the NSR program to make it both simple and flexible.

Second, any NSR reform should result in a lesser burden for the regulated community. Industry groups and state agencies note that the current NSR and the proposed EPA reform impose a substantial burden on sources.[87] The EPA, in the preamble to the July 23, 1996,

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81. 42 U.S.C. § 7475(a)(4) (1994); 40 C.F.R. § 52.21(j)(3).

82. Hawkins, *supra* note 5, at 126.

83. *See generally* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR), 61 Fed. Reg. 38,250 (July 23, 1996).

84. *See, e.g.*, 61 Fed. Reg. 38,250 (July 23, 1996); STAPPA/ALAPCO, STATE AND LOCAL AGENCY GUIDING PRINCIPLES FOR NEW SOURCE REVIEW (1994) [hereinafter NRS GUILDING PRINCIPLES].

85. *See* UARG Memorandum, *supra* note 59.

86. *See* NRS GUILDING PRINCIPLES, *supra* note 84.

87. STAPPA/ALAPCO, COMMENTS: NEW SOURCE REVIEW (1997) (discussing comments on the EPA's proposal to revise the NSR program under the Clean Air Act in a letter to the EPA drafted on January 16, 1997), *available at* http://www.4cleanair.org/comments/nsrcmnt.html (last visited Mar. 5, 2002); *see also*

proposed rulemaking for NSR reform noted that "[i]f adopted, the proposed reforms will significantly reduce the number and types of activities at sources that would otherwise be subject to major NSR."[88] Any reform should mitigate the hardships associated with implementation of the current NSR program, thereby easing the burden on both industry groups and state agencies.

Third, the NSR reform should result in a better level of environmental protection. The EPA and the reform subcommittee of the Clean Air Act Advisory Committee both set a goal to maintain, at a minimum, the same level of environmental protection.[89] However, the NRDC notes that the existing program has been inadequate in protecting the environment.[90] The NRDC further notes that the goal should be to reform NSR in order to achieve Congress' clean air goals.[91] These goals include attaining NAAQS and protecting existing air quality,[92] and any reform proposal must provide a better level of environmental protection in order to reach these goals.

Memorandum from the Complex Manufacturers' Industry Group, to the Office of Air Quality Planning and Standards, EPA (May 10, 1999) (on file with author and the *Fordham Environmental Law Journal*) [hereinafter CMIG Memorandum].

88. 61 Fed. Reg. 38,250, 38,251 (July 23, 1996).

89. *See* 61 Fed. Reg. 38,250, 38,252 (July 23, 1996); *see also* Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA, to Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation (June 22, 1993), *at* http://www.epa.gov/ttn/nsr/gen/u3-20.txt (last visited Jan. 2, 2002) (on file with author and the *Fordham Environmental Law Journal*).

90. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 17.

91. *Id.* (stating that the "EPA should adopt changes to these programs . . . that would help achieve Congress' cleaner air goals").

92. *See supra* Part II.A.

III. STAKEHOLDER PROPOSALS

A. *Environmental Protection Agency Proposal*

1. The Proposal

The EPA has been developing an NSR reform proposal since 1992, and this proposal is the focal point around which other key stakeholders have designed competing proposals.[93] As noted previously, a subcommittee of the Clean Air Act Advisory Committee was formed in 1993 to develop NSR reform recommendations.[94] The goals of the committee were to reduce the complexity of the NSR process and shorten the review process, while still protecting and improving air quality.[95] The committee also had a goal of considering the potential impact of any reform on health, environment, and economy.[96] The work of the committee was compiled and issued for comments in 1996.[97] The EPA issued a supplemental notice on July 24, 1998, asking for additional comments.[98] The key elements of the EPA proposal addressing NSR are discussed below.

The first of the major NSR reform sections of the EPA proposal are the "clean unit" and "clean facility" exclusions.[99] The "clean unit" exclusion would allow states to exclude from NSR proposed changes to existing emissions units that have either installed the appropriate control technology (BACT or LAER) within the last ten years or have a federally enforceable emissions limit that is comparable to the appropriate control technology.[100] The "clean

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93. *See* 61 Fed. Reg. 38,250, 38,252 (July 23, 1996); Hawkins, *supra* note 5, at 100.

94. *See* Memorandum from Seitz to Shapiro, *supra* note 89.

95. *Id.*

96. *Id.*

97. 61 Fed. Reg. 38,250, 38,250 (July 23, 1996) (stating that "[t]he proposed revisions are largely drawn from the recommendations and deliberations of the Clean Air Act Advisory Committee's NSR Reform Subcommittee").

98. 63 Fed. Reg. 39,857 (July 24, 1998).

99. *See* 61 Fed. Reg. 38,250, 38,255 (July 23, 1996).

100. *Id.*

facility" exclusion would exclude major stationary sources that have undergone NSR for the entire source within the last ten years.[101] The EPA proposes that either a source or unit can be modified so long as the hourly potential to emit for the source or unit does not increase.[102] For a unit, this increase is measured in terms of the unit's emissions per hour.[103] For a source, this increase cannot exceed the existing NSR permit.[104]

The second reform section in the EPA proposal revises the method for determining the emissions baseline of an existing source.[105] The emissions baseline is used to determine whether a modification at a source will result in a significant increase, thus triggering NSR.[106] The current baseline calculation for existing sources is a two-year average of actual emissions in tons per year.[107] But this method of calculating the baseline can lead to inaccurate baseline emission levels.[108] An example is a source that has run at reduced capacity for the last two years. If that source wishes to make modifications, the baseline to determine whether there will be a significant increase in emissions will be the reduced capacity level of the last two years, possibly triggering NSR. If the source had not dropped capacity, NSR would most likely not be required. This issue has been noted by stakeholders who recognize the need for a true baseline that would not penalize industry but still control the impact of short-term emission bursts caused when a source increases emissions over a short time period.[109]

To address this issue, the EPA proposes extending the baseline determination to ten years, selecting the actual emissions average based on the highest consecutive twelve months during the ten-year

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101. *Id.* at 38,258. New units at the source would be required to undergo NSR because the new units would be outside any existing NSR permit. *Id.*

102. *Id.* at 38,255.

103. *Id.*

104. 61 Fed. Reg. 38,250, 38,258 (July 23, 1996).

105. *Id.*

106. *See* 40 C.F.R. § 52.21(k)(2) (2000); 61 Fed. Reg. 38,250, 38,258 (July 23, 1996).

107. 40 C.F.R. § 52.21(b)(21)(ii).

108. *See* 61 Fed. Reg. 38,250, 38,258 (July 23, 1996).

109. *See* STAPPA/ALAPCO, *supra* note 87, at 8.

period.[110] This proposal would protect against short-term emission increases by restricting the baseline average to no more than any existing federal or state imposed limit or any voluntarily set limit restriction.[111] Thus, under the revised baseline calculation, a source that has been recently operated at reduced capacity would not require NSR if the last ten years show a pattern of higher use.

The EPA also proposes excluding all pollution control projects on existing units and sources from NSR in order to minimize procedural delays for environmentally beneficial projects.[112] The project exclusions would include add-on controls, changing to less polluting fuels or raw materials, and pollution prevention projects that eliminate or reduce the release of air pollutants.[113] The proposal includes a safeguard that a project will not be excluded from NSR if it results in a significant increase in actual air emissions that will cause or contribute to a violation of the NAAQS or PSD increment.[114] Any project resulting in a significant increase will require an air quality impact analysis to determine the effects of the increase on attainment or achievement of the NAAQS.[115]

The EPA wishes to formalize regulations to allow states to include voluntary plant-wide emissions caps in the SIPs as a means of determining NSR applicability.[116] Known as plant-wide applicability limitations ("PAL"),[117] these caps would apply to existing major stationary sources in PSD areas and for proposed and existing major stationary sources in nonattainment areas.[118] A source would not have to undergo NSR review provided that the emissions from the source do not exceed the limit of the PAL.[119] If the source exceeds the PAL, the EPA proposes that the source be required to install either BACT or LAER control technology on those emission sources

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110. 61 Fed. Reg. 38,250, 38,258 (July 23, 1996).
111. *Id.*
112. *Id.* at 38,260.
113. *Id.* at 38,261.
114. *Id.* at 38,262.
115. *Id.*
116. 61 Fed. Reg. 38,250, 38,264 (July 23, 1996).
117. *Id.*
118. *Id.* at 38,265.
119. *Id.*

that are attributable to the increase in emissions.[120] The EPA is also considering how and when PALs should be adjusted (because of the concern that incentive for PALs will drop if the source is not allowed to make adjustments to the PAL) and whether the SIPs should require minimum control technology on all sources installed or modified.[121]

Although at first glance, the PAL appears to be the same as the federally enforceable existing limit on the potential to emit[122] (a "synthetic minor"),[123] a PAL is substantially different. The EPA defines a PAL "as a federally enforceable plantwide emissions limitation established for a stationary source to limit the allowable emissions of a source to a level such that major NSR is not required for changes under that emissions limitation."[124] Thus, the PAL is a cap on emissions from the site that also allows for modification activities underneath the cap with no thought to NSR applicability.[125] In contrast, a synthetic minor is a federal or state limit that acts to cap the facility's potential to emit.[126]

To clarify this distinction, suppose that over the last three years a facility has actual criteria pollutant emissions of thirty tons per year. The facility desires to make a modification to improve efficiency that would result in no change in emissions. The criteria pollutant has a significant increase level of forty tons per year. If the facility has a synthetic minor of one hundred and twenty tons per year with an allowable increase of thirty-nine tons per year, NSR would apply to this change because the actual baseline would be thirty tons per year and the potential would be limited to the synthetic minor of one hundred and twenty tons per year. This change results in a significant increase of ninety tons per year, thereby triggering NSR.

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120. *Id.*

121. *See id.*; 63 Fed. Reg. 39,857, 39,862 (July 24, 1998).

122. *See* Hawkins, *supra* note 5, at 108.

123. *See, e.g.*, Joyce M. Martin, *Crossroads for Federal Enforcement of the Clean Air Act*, 6 DUKE ENVTL. L. & POL'Y F. 77, 87 (1996) (defining "synthetic minor" as "those NSR sources with potential to emit above major source thresholds but whose controls allow the source to limit PTE and avoid major source status").

124. 61 Fed. Reg. 38,250, 38,264 (July 23, 1996).

125. *Id.* at 38,265.

126. *See* Hawkins, *supra* note 5, at 109.

Under the PAL proposal, if the site had a PAL limit of one hundred and twenty tons per year, the source could make any changes or increases provided the total source emissions did not exceed the PAL limit. Thus, the PAL allows much more flexibility by addressing actual emissions while a synthetic minor acts only to limit the potential to emit.

The EPA advocates allowing the calculation of a significant increase for existing sources in nonattainment and attainment areas to be based on projected future actual emissions versus using the source's or unit's potential to emit.[127] This calculation method, known as the WEPCO rule, is currently allowed in the electric generating industry.[128] The EPA wants to expand this rule to other industries and to continue requiring the five-year post tracking of actual emissions.[129]

The EPA is also proposing the use of a "potential to potential" calculation to determine if a modification is a significant increase.[130] Under this set of rules a source may either calculate emission increases using the "actual to potential" test in the existing rules or a "potential to potential" test.[131] The "potential to potential" method ignores current existing emissions and instead focuses on the design capacity of the unit or source, thus eliminating the issue of underutilized units triggering NSR when undergoing minor modifications.[132] Following this method, a modified source will only be subject to NSR if the modification results in a significant increase in its design capacity or potential to emit.[133] It should be noted that both the EPA and environmental groups believe this method will result in less environmental protection by allowing existing

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127. 61 Fed. Reg. 38,250, 38,266 (July 23, 1996).

128. *See* sources cited *supra* note 67.

129. 61 Fed. Reg. 38,250, 38,266–268 (July 23, 1996).

130. *See* 61 Fed. Reg. 38,250, 38,268 (July 23, 1996). The EPA was required to propose this test as a result of a settlement for a challenge to an EPA 1980 NSR regulation by the Chemical Manufacturers Association and others. *Id.*

131. *Id.*

132. *Id.* at 38,269.

133. *Id.*

grandfathered units to avoid NSR and continue to operate at high levels of emissions.[134]

Another component of the EPA proposal is the allowance of certain construction activities prior to a permit being issued.[135] The EPA recognizes that an NSR permit is a pre-construction requirement based on the governing statute.[136] However, the EPA also recognizes that the Clean Air Act does not specify whether the construction limits apply only to the installation of the emitting units or to all associated construction activities.[137] Although the EPA has not offered any specifics, it has requested comments on pre-construction permitting and activities.[138]

2. Does the EPA Proposal Meet the Goals of NSR?

The EPA proposal contains elements that work to preserve the increment in attainment areas. However, the proposal does not address the goal of achieving the NAAQS in nonattainment areas. In attainment areas the increment between existing air pollution levels and the NAAQS is preserved by utilizing the plant-wide applicability limits. This utilization in turn implements caps on existing emissions at facilities. In addition, the pollution control exclusion will allow industry to implement pollution control projects without fearing NSR applicability. These parts of the proposal, when applied to attainment areas, act to maintain existing air levels while allowing for economic growth, two of the goals of NSR.[139]

The EPA proposal does not, however, contain elements that work to achieve the NAAQS in nonattainment areas. The "clean unit" and "clean facility" exclusions, the PAL concept, the revision to the baseline emission calculations, and the "potential to potential" test will allow sources to continue to avoid NSR applicability, when they

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134. *See id.* at 38,269–270; NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2, 10. *But cf.* Golden, *supra* note 5, at 174 (supporting the use of a potential to potential test for its simplicity, logic, and consistency with the statutory definition of "modification").

135. 61 Fed. Reg. 38,250, 38,270 (July 23, 1996).

136. *Id.*

137. *Id.* at 38,271.

138. *Id.*

139. *See supra* Part II.A.

would otherwise be required to apply LAER control technology. For nonattainment areas, these proposals may hinder the reduction of existing criteria air pollutant levels to attainment levels.

A negative effect of the EPA proposal is its impact on continued economic growth. The PAL concept and "clean unit" and "clean facility" exclusions act to allocate portions of the increment to existing sources. Existing sources can, in essence, bank the allowable growth beneath the caps. As economic growth occurs, new sources may have a difficult time entering markets because existing sources have permits at set emission levels with no requirement to install pollution control technology as modifications and new units are added.

3. Does the EPA Proposal Meet the Goals of NSR Reform?

The EPA proposal better meets the goals of NSR reform than those of the NSR program. The use of the PAL concept and the "clean unit" and "clean facility" exclusions simplify the NSR process by allowing companies to make changes to equipment with less threat of NSR applicability.[140] In addition, the administrative burden for state and local agencies should be minimized because fewer sources will be subject to NSR. A major weakness of the proposal, however, is the failure to provide a better level of environmental protection. This failure is especially true in nonattainment areas. By revising the baseline, allowing a "potential to potential" test, and allowing the PAL concept, existing units will be able to run at full capacity instead of declining in emissions as they age.[141]

B. *Utility Air Regulatory Group Proposal*

1. The Proposal

The Utility Air Regulatory Group ("UARG") is an association of approximately sixty-four electric generating companies and three national trade associations that have a vested interest in ensuring that electric utility steam generating units are allowed to perform routine

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140. *See, e.g.*, 61 Fed. Reg. 38,250, 38,255, 38,258, 38,264 (July 23, 1996).

141. *See, e.g.*, NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2–3.

maintenance and like-for-like replacements without triggering NSR.[142] The UARG submitted a proposal regarding NSR reform on April 29, 1999.[143] The UARG then filed supplemental comments on October 8, 1999 concerning the pending enforcement actions by the EPA against various utility companies.[144] The UARG proposed eliminating the control technology netting loophole for new units, changing the significant increase calculation for existing units to a "potential to potential" calculation, and providing a backstop to ensure existing units meet new source performance standards by 2030.[145]

A key feature of the UARG proposal is to revise the NSR regulations to prevent new electric generating units from netting out of NSR control requirements.[146] Under current regulations, new units at existing sources can avoid NSR control technology by netting emission increases and decreases at other contiguous units with omissions at the new units.[147] The UARG proposes aggregation of increases at other contiguous units to determine NSR applicability but not to allow decreases to be considered as a means of avoiding the installation of BACT or LAER control technology on a new emissions unit.[148] This proposal has been embraced by different groups of stakeholders because it eliminates a major loophole in the regulations by ensuring the application of BACT or LAER technology to newly installed emitting units.[149] The UARG

142. *See* UARG Memorandum, *supra* note 59, at 2 n.6.

143. *See* Letter and Memorandum from Henry V. Nickel, Attorney, Hunton & Williams, to John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA (Apr. 29, 1999) (on file with author and the *Fordham Environmental Law Journal*).

144. *See* UARG Memorandum, *supra* note 59.

145. *Id.*

146. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

147. 40 C.F.R. § 52.21(j)(3) (2000).

148. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

149. *See* Letter from John A. Paul, Chair, ALAPCO and Bill O'Sullivan, Chair, STAPPA, to John Seitz, Director, Office of Air Quality Planning and Standards, EPA (Mar. 14, 2000) (on file with

proposal, however, would still allow netting to exclude a source from other NSR requirements such as an air quality impact analysis.[150]

The proposal also changes the NSR applicability test for modified sources.[151] The current test, known as the WEPCO rule, allows an electric generating facility to use "actual to actual" calculation for determining whether a modification results in a significant increase (thus triggering NSR).[152] The UARG proposes changing the major modification test to a "potential to potential" test.[153] NSR would then apply to any modification that results in a significant increase of the source's designed potential to emit on an hourly basis.[154] Under this test, electric generating units would be able to make like-for-like replacements and other changes to the unit, provided there is no significant increase in the unit's "achievable design capacity to emit on an hourly basis."[155] The UARG proposes that this test apply to all criteria pollutants except carbon monoxide.[156] It suggests that carbon monoxide emission increases should instead be evaluated as part of the environmentally beneficial test applied to nitrogen dioxide control projects.[157]

The UARG advocates implementing a program whereby electric utility generating units would reduce average emissions for sulfur dioxide and nitrogen dioxide to meet the New Source Performance Standards ("NSPS") levels by the year 2030.[158] They propose using a phase-out that employs age or a system-wide emissions reduction

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author and the *Fordham Environmental Law Journal*); Letter and Memorandum from Nickel to Seitz, *supra* note 143.

150. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

151. *Id.*

152. *See* sources cited *supra* note 67.

153. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

154. *Id.*

155. *See* UARG Memorandum, *supra* note 59, at 4.

156. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

157. *Id.*

158. *Id.*

plan as criteria for achieving emission reduction.[159] The age-based option would require any unit older than fifty-five years in the year 2010 to be limited to new source emission standards, with all units projected to be in compliance by 2030.[160] The UARG would allow trading and averaging of multiple units in this program but does not provide detail on how this would work to avoid regions, small in area, that have high levels of criteria pollutants. The system-wide option, known as the "glide-path" option, would commence in the year 2010 and require a yearly decrease in system-wide emission rates in order to meet the NSPS by the year 2030.[161] Initial control levels would be set at existing NSPS levels.[162]

2. Does the UARG Proposal Meet the Goals of NSR?

The UARG proposal ensures that the increment between existing pollution levels and the NAAQS is preserved. Disallowing netting forces more new sources to receive BACT technology while a reduction in emission levels to NSPS levels by year 2030 will reduce existing levels and still allow for economic growth. However, the proposal fails to provide a timely schedule for achieving the NAAQS in nonattainment areas and fails to fully protect the opportunity for continued economic growth.

The use of the "potential to potential" test could also result in large increases of emissions if the loss of capacity is not considered in determining the pre-change potential to emit.[163] Sources that have been running at low capacity, because of age or damaged equipment, would be able to make modifications that allow the facility to operate at full capacity but not increase the potential to emit.[164] Thus, the facility can avoid applying for an NSR permit while increasing emissions. In nonattainment areas, the "potential to potential" test is particularly damaging because old sources will be able to make changes that allow perpetual operation at full design

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159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

163. *See* 61 Fed. Reg. 38,250, 38,269 (July 23, 1996).

164. *Id.*

capacity levels. This allowance will have a direct impact on achieving the NAAQS and on future economic growth.[165] The "backstop" program proposed by the UARG does provide a means to reduce air pollution levels, which in turn will allow for new economic growth. However, as noted by STAPPA and ALAPCO, the protracted timeline of thirty years is of concern.[166]

3. Does the UARG Proposal Meet the Goals of NSR Reform?

Of all the proposals for NSR reform, the UARG's does most to meet reform goals. First, the use of a "potential to potential" test simplifies the NSR process by providing a clear test for determining NSR applicability.[167] This test will also minimize the administrative burdens of the NSR program, because application of the test will result in fewer modifications requiring NSR permits.[168] In addition, the test provides the industry with flexibility by allowing like-for-like replacements, provided there is no significant increase in design hourly emissions.[169] As noted by the UARG, adoption of the "potential to potential" test for the electric generating industry would no longer require the EPA to clarify "routine maintenance and replacement," which is at the heart of a current EPA enforcement action.[170]

The proposal creates a better level of environmental protection by focusing on installing the appropriate control technology and phasing out sulfur dioxide and nitrogen oxide emissions to NSPS.[171] The elimination of netting to escape the addition of control technology on new units will ensure that all new units that result in a major modification at a source receive BACT or LAER controls.[172] However, as noted by environmental groups, the UARG backstop program will not reduce sulfur dioxide and nitrogen oxide emissions

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165. *Id.* at 38,270.

166. *See* Letter from Paul and O'Sullivan to Seitz, *supra* note 149.

167. *See* 61 Fed. Reg. 38,250, 38269; Letter and Memorandum from Nickel to Seitz, *supra* note 143, at 2.

168. *See* 61 Fed. Reg. 38,250, 38,269 (July 23, 1996).

169. *Id.*

170. UARG Memorandum, *supra* note 59, at 43.

171. *See* Letter from Bradley to Seitz, *supra* note 30.

172. *Id.*

to NSPS levels for at least thirty years and it does not cover all criteria pollutants.[173] Also, as previously noted, the "potential to potential" test could be used by older facilities to avoid NSR and operate indefinitely at original design levels.[174]

C. *The Clean Energy Group Proposal*

1. The Proposal

The Clean Energy Group ("CEG") is comprised of Northeastern generating companies that have primarily converted to natural gas as an energy source.[175] The goal of this group is to provide flexibility to industry by opting out of NSR in exchange for a cap-and-trade program with set emission levels that either maintain or attain the NAAQS.[176] The CEG discussed a proposal with the EPA in September 1999, which was promoted as being capable of reducing administrative overhead by letting cap and emissions trading incentives provide the impetus to lower pollution.[177] The EPA has given the proposal serious attention.[178]

The CEG proposes replacing the NSR requirements with an emission cap-and-trade program that would cover regulated and unregulated pollutants for a particular source category (electric generating facilities) and geographic area.[179] In exchange for being able to opt out of NSR, power generation companies would have to

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173. *Id.*

174. *See* 61 Fed. Reg. 38,250, 38,269 (July 23, 1996).

175. *See* Letter from Bradley to Seitz, *supra* note 30. For NSR purposes, the Clean Energy Group is composed of Consolidated Edison, Inc., KeySpan Energy, Niagara Mohawk Power Corp., Northeast Utilities, PECO Energy Co., PG&E Generating, Public Service Electric and Gas Co., Rochester Gas and Electric Corp., and Sempra Energy. *Id.*

176. *Id.*

177. *Id.*

178. New Source Review (NSR) Sector Based Approach, 64 Fed. Reg. 71,026 (Dec. 20, 1999) (containing notice of public meeting to discuss EPA alternative for utility industry including Clean Air Energy Group proposal).

179. *See* Letter from Bradley to Seitz, *supra* note 30.

accept caps on emissions that would not change for a period of fifteen years, unless further reductions are required.[180] A company could leave the program and would not have to apply a retroactive NSR.[181] However, such a company would have to retain the cap limit as the federally enforceable limit on potential to emit.[182] The proposal notes that non-capped criteria pollutants would still undergo NSR as required and that pollutant allowances would be allocated by tonnage caps, which would be based on a portfolio output basis (i.e., total energy output).[183] New sources are protected through an initial allocation of emissions based on a portfolio allocation.[184]

2. Does the CEG Proposal Meet the Goals of NSR?

The CEG proposal acts to conserve the increment between existing air pollution levels and the NAAQS but does not address attainment of the NAAQS. Capping existing and new facilities at a set level and then proceeding to let a trading program provide incentives for higher polluting facilities to reduce emissions will help preserve the increment in attainment areas. However, in nonattainment areas, capping facilities at existing emission levels does not meet the goal of achieving the NAAQS because such levels already need to be reduced.

A primary concern surrounding the CEG proposal is that emission levels would be set for fifteen years.[185] As noted above, the CEG proposal sets emission caps and would require no further reductions unless reductions are necessary to attain and maintain health-based standards.[186] After fifteen years, the emission standards would be renegotiated based on an analysis of air quality conducted in advance of the fifteen-year deadline.[187] Implementation of this plan has the potential to keep air quality at nonattainment levels for a full fifteen

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *See* Letter from Bradley to Seitz, *supra* note 30.
186. *Id.*
187. *Id.*

years, instead of reducing emissions through the period to bring areas into attainment.

The need for economic growth is also not fully addressed by the CEG proposal. The proposal would adjust cap and emission reduction requirements every fifteen years if the NAAQS are being affected.[188] This aspect of the proposal, in conjunction with the trading portion of the program, addresses the need for reductions in existing facilities that will allow for new economic growth to occur in nonattainment and attainment areas. This aspect, however, does not address the issue of how older existing facilities would be able to run for at least fifteen years at full design capacities, thus continuing to retain a disproportionate amount of allowable emissions under the cap limit for the geographic area.

3. Does the CEG Proposal Meet the Goals of NSR Reform?

The CEG proposal works to simplify and provide flexibility in the modification process by entirely removing NSR considerations.[189] New units may be installed and modifications on existing units may be made without the construction delays and permitting complexity that occurs with NSR today.[190] In addition, the administrative burden of preparing and reviewing permits would be eliminated. Industry resources could then be shifted toward projects that reduce emissions and ensure that the cap is not exceeded. State and local agencies could shift resources from permitting to compliance, although it should be noted that STAPPA and ALAPCO believe that fewer resources are required to monitor the installation of control technology than are needed to ensure compliance with emissions standards.[191]

The CEG proposal could potentially create a better level of environmental protection. In order to trade emission reductions, a facility must install better control technology or shut down old emitting units.[192] The proposal applies to all criteria pollutants except lead and is an improvement over synthetic minors because it

188. *Id.*
189. *Id.*
190. *Id.*
191. *See* STAPPA/ALAPCO, *supra* note 87, at 3–4.
192. *See* Letter from Bradley to Seitz, *supra* note 30.

incorporates emission targets that can be adjusted every fifteen years,[193] while a synthetic minor allows operations to continue unchecked at the permit level.[194] However, this system is unproven, whereas the emissions reductions that are gained by installing BACT and LAER control technology are guaranteed. As noted previously, the permit program was intended to provide "clean growth" through the installation of BACT or LAER technology.[195] The CEG proposal will not assuredly result in a better level of environmental protection because of the lack of required control technology on new and modified units.

D. *Complex Manufacturing Group Proposal*

1. The Proposal

The Complex Manufacturing Group ("CMG") is comprised of various associations representing companies that operate complex manufacturing processes.[196] CMG's primary interest in NSR reform

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193. *Id.*

194. *See* Hawkins, *supra* note 5, at 109.

195. *See* 123 CONG. REC. S18,013 (daily ed. June 8, 1977) (statement of Sen. Muskie).

196. *See generally* Letter and Attachment from the Complex Manufacturers' Industry Group, to John S. Seitz, Director, and William T. Harnett, Division Director, Office of Air Quality Planning and Standards, EPA (Oct. 11, 1999) (listing the Complex Manufacturing Group signatories to the correspondence as Air Permitting Forum, Alliance of Automobile Manufacturers, American Forest & Paper Association, American Petroleum Institute, Association of International Automotive Manufacturers, Chemical Manufacturers Association, Clean Air Implementation Project, Council of Industrial Boiler Owners, National Association of Manufacturers, and the National Environmental Development Association's Clean Air Regulatory Project) (on file with author and the *Fordham Environmental Law Journal*) [hereinafter CMIG Letter I]. *See also* Letter from Complex Manufacturers' Industry Group, to John S. Seitz, Director, and William T. Harnett, Division Director, Office of Air Quality Planning and Standards, EPA 2 (Oct. 19, 1999) (listing the same signatories as Complex Manufacturers' Letter I, as

is simplifying the process through the creation of bright-line tests that determine whether control technology should be installed on emitting units.[197] The use of bright-line tests would help this part of industry because the batch-type processes, common in complex manufacturing, can change often and consist of many different types of units, resulting in NSR complications under current law.[198] The CMG proposal was first submitted on May 10, 1999 and updated on October 19, 1999.[199]

The CMG proposal advocates NSR reform through the applicability of NSR to new and modified units, units netting out of control technology, facility-wide determinations for NSR air quality impact analyses, the use of the PAL concept, and the incorporation of a backstop program similar to the UARG proposal.[200] The CMG proposal requires NSR control technology for all new units with a potential to emit that equals or exceeds one hundred tons of emissions per year.[201] For units that emit under the significant levels, a state selected control technology is required.[202] Under the original proposal, each unit was to be analyzed independently to determine NSR applicability.[203] After discussions with the EPA regarding concerns that a source may add multiple units that are slightly below the maximum allowable increases, the CMG has agreed to work with the EPA, states, and local agencies to develop a method to aggregate emissions from individual units to determine NSR applicability.[204]

The CMG also proposes applying NSR control technology to all units that increase the potential to emit by more than an NSR

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well as California Council for Environmental and Economic Balance, and National Petrochemical & Refiners Association) (on file with author and the *Fordham Environmental Law Journal*) [hereinafter CMIG Letter II].

197. CMIG Letter II, *supra* note 196, at 2.

198. *See id.*; CMIG Memorandum, *supra* note 87.

199. *See* CMIG Memorandum, *supra* note 87; *see also* CMIG Letter II, *supra* note 196.

200. *See* CMIG, *supra* note 87.

201. *Id.* at 1.

202. *Id.*

203. *Id.*

204. *See* CMIG Letter II, *supra* note 196, at 1–2.

significant level.[205] State-selected control technology would be applied to units that result in a less than significant increase.[206] The test used to determine if a modification results in a significant increase is the same "potential to potential" test recommended in the UARG proposal.[207] However, the CMG proposal addresses the issue of older facilities being allowed to operate at original design capacities indefinitely by limiting the pre-change potential to no more than the maximum achievable hourly emissions rate by the unit over the last five years.[208] This part of the CMG proposal addresses a major weakness of the UARG proposal.

The CMG proposal disallows netting of decreases at existing units to avoid NSR control technology requirements.[209] The proposal also allows states to add control technology as is necessary for increases that do not trigger NSR.[210] Disallowing netting would result in more units being installed with control technology.[211] In addition, the CMG proposes applying BACT technology and the same state-selected control technology for less than significant sources and modifications in both attainment and nonattainment areas.[212]

The third component of the CMG proposal looks at a facility's total emissions increase as a means of determining if an NSR air quality impact analysis is required.[213] An air quality impact analysis would be done only if a facility's emissions increase is over a significant amount.[214] A facility level application simplifies the NSR program for the industry by providing a bright-line test for the NSR air quality impact analysis. This simplification through a bright-line test is important to the regulated industry, given the changing processes and different units that the industry utilizes.

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205. *See* CMIG Memorandum, *supra* note 87.

206. *Id.*

207. *See* CMIG Memorandum, *supra* note 87; Letter and Memorandum from Nickel to Seitz, *supra* note 143.

208. *See* CMIG Letter I, *supra* note 196, at 5.

209. *See* CMIG Memorandum, *supra* note 87.

210. *Id.*

211. *See* CMIG Letter I, *supra* note 196, at 2.

212. *See* CMIG Letter II, *supra* note 196, at 1–2.

213. *See* CMIG Memorandum, *supra* note 87.

214. *Id.* at 3.

The fourth and fifth components of the CMG proposal incorporate the PAL option as outlined in the EPA regulations and utilize a backstop option.[215] The PAL concept would be of great use to the CMG because of the complex processes and changes associated with batch processes. As long as the facility PAL is not exceeded, a facility would be able to change processes and equipment without triggering NSR applicability.[216] The CMG also proposes a backstop program, which would be similar to the UARG proposal or to a state control plan that would help existing units achieve lower emission levels.[217] This backstop program requires further development by CMG in order to be adopted.[218]

2. Does the CMG Proposal Meet the Goals of NSR?

The CMG proposal does not meet the goals of NSR regarding attainment of the NAAQS. The proposal fails to require LAER technology for new and modified sources in nonattainment areas. Although it would apply BACT or a state-selected control technology, the Clean Air Act requires the use of LAER control technology in an NSR permit for a nonattainment area.[219] Implementation of this plan, while still adhering to the law, would require statutory amendment, eliminating the LAER technology requirement, and instead, depending on the installation of BACT technology.

The proposal suggests that an aggregation plan would be developed but does not clearly state how the plan would operate.[220] Failing to aggregate units at a source would allow new units to be installed with control technology that is less efficient than BACT or LAER technology. If a facility has an overall significant increase in emissions it is required to perform an air quality impact analysis, thereby helping to preserve the existing air quality levels in an attainment area. Though this preservation occurs, the CMG proposal leaves out a major component of NSR, the application of BACT and

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215. *Id.*
216. *See* 61 Fed. Reg. 38,250, 38,264 (July 23, 1996).
217. *See* CMIG Memorandum, *supra* note 87.
218. *Id.*
219. 42 U.S.C. § 7503(a)(2) (1994).
220. *See* CMIG Letter II, *supra* note 196.

LAER control technology. Furthermore, LAER control technology is absent in nonattainment areas and contiguous units are not clearly aggregated.

The proposal also attempts to address economic growth for source owners by requiring some level of control technology for all new and modified units,[221] however, this requirement does not guarantee room for source growth, thereby stagnating economic growth. The use of the PAL concept and backstop program provide further room for growth, but, as noted above, increments could be "held" by PAL sites[222] and a backstop program could take up to thirty years to achieve lower emission levels.[223]

3. Does the CMG Proposal Meet the Goals of NSR Reform?

The CMG proposal works to simplify regulations and provide flexibility for sources by applying NSR to each individual unit and utilizing a "potential to potential" test,[224] thereby creating a bright-line test for NSR applicability that removes doubt and reduces the burden on the industry. In addition, determining the NSR air quality impact analysis at the facility level will result in another bright-line test.[225] However, these bright-line tests do not remove the burden and complexity of the state control technology programs that would be applicable to units falling beneath the NSR significance level.

Whether the proposal will result in better environmental protection remains uncertain. Although the proposal assures control technology on new and modified sources and prevents netting practices, the lack of guaranteed LAER or BACT control technology is of concern. Although the CMG recognizes the frequency that units are currently installed without NSR control technology, proof is still needed that the proposal components would result in better environmental protection than the current program.[226]

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221. *Id.*

222. *See supra* Part III.A.2.

223. *See supra* Part III.B.2.

224. *See* CMIG Memorandum, *supra* note 87, at 2.

225. *Id.*

226. *See* CMIG Letter I, *supra* note 196, at 2 (noting that a major source on average will net out of NSR control requirements at least

E. *Natural Resources Defense Council—Comments and Proposal*

1. The Proposal

The Natural Resources Defense Council ("NRDC") is a national non-profit environmental organization that has been actively involved in NSR reform.[227] One of the NRDC's primary goals is to provide better environmental protection by ensuring that grandfathered units are forced to continue declining emission paths.[228] The organization estimates that electric generating units' emissions currently decline at a minimum one percent per year as equipment has aged.[229] The NRDC views the proposed EPA regulations as resulting in more exemptions for grandfathered sources that will allow the sources to continue operating at design levels.[230] As a result, the NRDC submitted comments on the proposed EPA regulations.[231]

The proposed changes to the EPA regulations are intended in part to correct what the NRDC views as loopholes.[232] A ten-year look back to determine a source's baseline emissions would be disallowed.[233] The NRDC notes that sources could use the ten-year look back approach to ensure increased emissions without

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once every three to five years and a unit will net out every year or two).

227. *See* Memorandum from Seitz to Shapiro, *supra* note 89 (including David Hawkins, of the NRDC, on the NSR reform subcommittee).

228. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2.

229. *Id.* at 4. The NRDC presented the results of a study done by Synapse Energy Economics, Inc. that indicated the existing electric generating coal facilities declined in capacity by one percentage point per year in the absence of significant capital improvements. *Id.* at 5.

230. *Id.* at 1.

231. *Id.*

232. *Id.* at 2.

233. *Id.* at 3 (stating that the "EPA proposes to allow sources to rely on maximum emissions from the source during the past ten years. We object strongly to this approach").

undergoing NSR requirements.[234] The Council proposes using a baseline that compares the current trend in decreasing emission levels to the future trend in emission levels if a source modification is made.[235] To determine NSR applicability, an analysis would be done by calculating the highest difference between the trend of emissions prior to the change and the trend after the change.[236] If the difference results in a significant increase, then NSR would apply.[237] In that case, a source operator must commit to an enforceable permit that would restrict emissions to a level below the pre-change emissions trend in order to avoid NSR applicability.[238]

The proposal also includes the requirement of a permanently enforceable permit for any source that undergoes an "actual to actual" test to determine NSR applicability.[239] Currently, the EPA wants to require the post actual emissions to be set for ten years,[240] postulating that any emissions increase after ten years would not be attributable to the changes made using the "actual to actual" test.[241] The NRDC disagrees with this approach noting that sources can be physically capable of operating more than ten years.[242]

The NRDC advocates the discontinuance of the netting in the NSR program.[243] Short of that, the NRDC recommends significantly curtailing netting.[244] The rationale behind this opposition is due to a loophole in the program, allowing many sources to net out of NSR

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234. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 4.
235. *Id.* at 5.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 7.
240. *See* 63 Fed. Reg. 39,857, 39,861 (July 24, 1998).
241. *Id.*
242. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 8.
243. *Id.* at 10.
244. *Id.* (stating that "[t]he time has come for EPA to conduct a thorough review of its netting rules to eliminate current perverse effects. The agency should constrain netting to the full extent permitted by current law, to reduce the advantage accorded to grandfathered sources and produce a reduction in emissions as investments are made, consistent with the purposes of the NSR/PSD programs").

control technology.[245] Under the current regulatory scheme, contemporaneous offsets must be considered a part of the project for which the netting claim is made.[246]

The NRDC also favors elimination of PALs, or at least changes to the EPA's application of the PAL concept, because offsets required under a PAL may not be contemporaneous with increases.[247] *Alabama Power Co. v. Costle*[248] is cited as supporting the requirement that any changes in the PAL due to significant increases must have contemporaneous offsets.[249] If PALs are allowed, the NRDC proposal would require a downward adjusting cap over a set period of time to ensure that NSR emission standards are met and that the contemporaneous requirements are satisfied.[250]

2. Does the NRDC Proposal Meet the Goals of NSR?

The NRDC comments demonstrate how to achieve the NAAQS in nonattainment areas and preserve the increment in attainment areas. Disallowing netting and narrowing exemptions will result in many existing sources having to undergo NSR in order to install new units and make modifications. In addition, if a future determination is made regarding emissions trends to determine NSR applicability, the state of decline in a facility would be considered against future emissions attributable to the modification of an existing unit or installation of a unit.[251] This approach also considers the need for economic growth by providing declining emissions against which new growth can occur.

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245. *Id.*

246. *Id.* (stating that the "EPA notes correctly that the PAL concept is simply a form of netting. As such, it must comply with the requirement that emission reductions be contemporaneous with emission increases to be creditable").

247. *Id.* at 13–16.

248. 636 F.2d 323 (D.C. Cir. 1979).

249. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 13 n.14 (noting that the court in *Alabama Power* required offsets to be contemporaneous with any increases).

250. *Id.* at 15–16.

251. *Id.* at 5.

3. Does the NRDC Proposal Meet the Goals of NSR Reform?

The NRDC proposal addresses the original goals of the NSR program by providing a better level of environmental protection. However, the proposal does not work to make the program more flexible or reduce the burden imposed by the program, a major goal of the reform process.[252] The NRDC proposal would disallow or constrain netting and minimize exemptions for existing sources.[253] The proposed emissions trend analyses and determinations of NSR applicability would result in more sources undergoing NSR, leading to more NSR permits and increased burden on industry and state regulators. The proposal provides better environmental protection but fails to address the underlying goals of NSR reform: simplicity, flexibility, and less administrative burden.[254]

F. *STAPPA & ALAPCO Proposal*

1. The Proposal

STAPPA and ALAPCO are two national associations comprised of representatives from air pollution agencies throughout the United States.[255] They were formed over twenty-five years ago to improve the effectiveness of state and local air quality programs.[256] These organizations have a primary interest in reducing the administrative burden and achieving the goals of NSR in the manner set forth by the organizations' guiding principles for NSR.[257] The STAPPA and ALAPCO proposal is based on the EPA proposed revisions.[258] The

252. *See* 61 Fed. Reg. 38,250 (July 23, 1996); CMIG Memorandum, *supra* note 87; NRS GUILDING PRINCIPLES, *supra* note 84.

253. NATURAL RES. DEF. COUNCIL, *supra* note 5, at 10.

254. *See supra* Part II.C.

255. *See* STAPPA/ALAPCO, ABOUT US, *available at* http://www.cleanairworld.org/stappa/about.html (last visited Mar. 5, 2002).

256. *Id.*

257. *See* NRS GUILDING PRINCIPLES, *supra* note 84.

258. *See* Letter from Bob Hodanbosi, Chair, Permitting Committee, STAPPA and John Paul, Chair, NSR Subcommittee,

proposal does not offer a new structure to NSR. Instead, the organizations give their opinions on the proposed EPA revisions.[259] The organizations also produced comments that provide additional structure to the EPA reforms and recommend the removal of some provisions.[260]

STAPPA and ALAPCO advocate continuing the use of the "actual to potential" test for non-utility sources.[261] The organization would not use an "actual to actual" test because non-utility industries do not have the oversight by public utility commissions.[262] As a result, local and state agencies would have to devote considerable resources to insure that the future actual projections of non-utility sources are accurate.[263]

STAPPA and ALAPCO agree that voluntary PALs should be utilized but only where the use of a PAL will result in a shorter delay in determining NSR applicability.[264] They recommend that the PAL concept be more structured, requiring BACT or LAER control technology on new units installed under the PAL.[265] Alternatively, they would require, at a minimum, that BACT and LAER control technology be installed on new or modified units that cause the PAL to be exceeded.[266] For nonattainment areas, the organizations would require NSR control technology for all changes that result in an aggregate increase of twenty-five tons per year over a five-year period.[267] In addition, offsets would be required to ensure continued progress towards achievement of the NAAQS.[268]

STAPPA and ALAPCO agree that changing the baseline calculation would assist in eliminating problems with the current

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ALAPCO, to EPA (Oct. 8, 1998) (on file with author and the *Fordham Environmental Law Journal*).

259. *See id.*

260. *See generally id.*; STAPPA/ALAPCO, *supra* note 87.

261. *See* STAPPA/ALAPCO, *supra* note 87, at 14.

262. *Id.* at 15–16.

263. *Id.* at 16.

264. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 4.

265. *Id.* at 4.

266. *Id.*

267. *See* STAPPA/ALAPCO, *supra* note 87, at 14.

268. *See* Letter from Paul and O'Sullivan to Seitz, *supra* note 149, at 2.

NSR program.[269] However, instead of a ten-year look back to determine the actual emissions, the organizations prefer using a five-year look back.[270] This shorter period would ensure that the baseline reflects emissions closer to the source's current emissions and reduces the hardship of finding records dating back ten years.[271]

Other key comments by STAPPA and ALAPCO address the use of the "potential to potential" test and the exclusion of units and facilities from NSR that have undergone control technology improvements within the last ten years.[272] They would not utilize the "potential to potential" test because the organizations believe that an "actual to potential" test is more protective of air quality.[273] They would also not allow units that have undergone NSR within the last ten years to avoid NSR because of possible improvements in control technology during that time period.[274] Instead, STAPPA and ALAPCO note that a site could simply resubmit a control analysis in the permit process if the increase is thought not to require any different controls.[275]

2. Does the STAPPA & ALAPCO Proposal Meet the Goals of NSR?

The comments by STAPPA and ALAPCO contain elements that satisfy the goals of NSR. The use of the PAL concept while requiring BACT technology for new units would ensure continued attainment of the NAAQS and create room for growth. In addition, disallowing a "potential to potential" test will make certain that older facilities are not able to run at 100% design capacity for the life of the facility and also protects the increment between existing air pollution levels and the NAAQS.

Requiring strict standards for increases above the PAL in nonattainment areas will also work towards achieving the NAAQS while still providing flexibility under the PAL.[276] However, if new

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269. STAPPA/ALAPCO, *supra* note 87, at 8.
270. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 4.
271. *Id.*
272. *See generally* STAPPA/ALAPCO, *supra* note 87.
273. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 3.
274. *See* STAPPA/ALAPCO, *supra* note 87, at 5.
275. *Id.*
276. *Id.* at 13.

units are not required to install LAER control technology, the PAL would not be reduced unless the STAPPA and ALAPCO proposed five-year PAL revision considers the degree of nonattainment in the area.[277]

STAPPA and ALAPCO do not comment on the need to create economic growth. Although parts of the proposal, such as readjusting PAL limits, not allowing an "actual to actual" test for other sources or allowing a "potential to potential" test, create room for economic growth, the comments do not provide clear structure on how economic growth can be balanced with environmental protection.

3. Does the STAPPA & ALAPCO Proposal Meet the Goals of NSR Reform?

The STAPPA and ALAPCO comments regarding PALs act to simplify the regulations, but the retention of the "actual to potential" test and disallowing the "potential to potential" test maintains complexity. As discussed above, the use of a PAL provides site-wide flexibility[278] and is supported by STAPPA & ALAPCO provided the program is regulated properly.[279] However, for non-PAL sites, STAPPA and ALAPCO do not provide any alternatives to the current NSR program. This lack fails to ease the existing burden on industry, state and local agencies.

The organizations' comments fail to ensure a better level of environmental protection. Although the "potential to potential" test would be disallowed and attainment areas protected by the use of PALs, economic growth elsewhere could decrease the increment between existing air pollution levels and the NAAQS. The use of a

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277. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 4.

278. *See* 61 Fed. Reg. 38,250, 38,264 (July 23, 1996).

279. *See* STAPPA/ALAPCO, *supra* note 87, at 12 (stating "STAPPA and ALAPCO generally support EPA's PAL proposal, but only where it speeds up the process and does not violate the basic NSR principles" as STAPPA and ALAPCO see them); Letter from Hodanbosi to EPA, *supra* note 258, at 3 (stating "STAPPA and ALAPCO continue to support EPA's PAL alternative to traditional major NSR applicability, as long as the regulations provide clear and adequate provisions for properly designing and enforcing them").

PAL in a nonattainment area would create a better level of environmental protection only by adjusting the PAL downward, since the only way to achieve NAAQS in a nonattainment area is by emissions reduction. STAPPA and ALAPCO note the need for reviewing the PAL every five years but do not cite the degree of nonattainment as a reason for downward adjustment of the PAL.[280]

IV. HOW TO BEST ACHIEVE NSR REFORM

A. *No Proposal Meets the Goals of NSR or NSR Reform*

On their own, each proposal has serious flaws in achieving the goals of NSR reform. The EPA reform proposal has been criticized by state and environmental groups for allowing more loopholes and exemptions than exist in the current regulations.[281] The EPA proposal includes both exclusions for "clean units" and "clean facilities" and the use of PALs, thereby extending the look-back for baseline calculation from two years to ten years.[282] These programs improve the flexibility and simplicity of the program but do not provide a better level of environmental protection because fewer units would receive control technology prior to installation or modification.[283]

Industry proposals also do not fully address the goals of the NSR program and NSR reform. They provide a simplified version of NSR with more flexibility through the use of PALs and bright-line tests for NSR applicability.[284] However, even with a commitment to end the practice of allowing new units to net out of control technology installation, the industry proposals fail to provide a better level of environmental protection. For nonattainment areas, they will result in continued emissions at current levels with no

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280. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 4.

281. *See* STAPPA/ALAPCO, *supra* note 87, at 3.

282. *See* 61 Fed. Reg. 38,250, 38,255, 38,264 (July 23, 1996).

283. *See, e.g.*, NATURAL RES. DEF. COUNCIL, *supra* note 5, at 17 (stating "EPA's current rulemaking would exacerbate the environmental problems caused by the inadequate coverage of the existing NSR/PSD programs").

284. *See, e.g.*, CMIG Letter II, *supra* note 196.

immediate improvement in achieving the NAAQS. An example is the "potential to potential" test that will allow old sources to continue operations at full design capacities as noted in the UARG proposal discussion.[285] The UARG proposal concerning a backstop program is promising for achieving NAAQS, however, the program would not be effective until 2010 and not completed until 2030.[286]

The STAPPA and ALAPCO and environmental group proposals focus on providing better environmental protection but do not address the failure of the current program to achieve the NAAQS and the need to provide flexibility in NSR reform. Both would continue to use the "actual to potential" test for all areas,[287] and would delete the "clean unit" and "clean facility" proposals in order to prevent loopholes.[288] To do so, though, would result in the same complexity and lack of flexibility and incentives that exist today.[289]

B. *Consideration of Area Classification in Developing NSR Reform*

A recurring theme in the above discussion is that components of proposals address the goals of attainment areas but not of nonattainment areas. This oversight is apparent when each reform proposal is applied to the goal of achieving the NAAQS and then applied to the goal of maintaining the NAAQS in attainment areas. An example of this oversight is the use of PALs.[290]

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285. *See* 61 Fed. Reg. 38,250, 38,269 (July 23, 1996).

286. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

287. *See* NATURAL RES. DEF. COUNCIL, *supra* note 5; STAPPA/ALAPCO, *supra* note 87, at 15.

288. See STAPPA/ALAPCO, *supra* note 87, at 5; NATURAL RES. DEF. COUNCIL, *supra* note 5, at 2 (stating "creating more exemptions is not a legitimate streamlining activity; it is simply a way to weaken the effectiveness of the new source programs").

289. *See, e.g.*, Letter and Memorandum from Nickel to Seitz, *supra* note 143 (regarding the use of a potential to potential test for NSR applicability to modified sources stating "[t]his clarification would remove uncertainty that has discouraged efficiency and reliability improvement projects, and would address confusion that has complicated and delayed permit proceedings").

290. *See, e.g.*, 61 Fed. Reg. 38,250, 38,264 (July 23, 1996).

Consider the following example: Plant *A* has a plant-wide criteria pollutant emissions capped at two hundred and thirty-nine tons. This maximum is Plant *A's* actual emissions (two hundred tons) plus a less than significant increase (thirty-nine tons). The PAL gives Plant *A* great flexibility in making changes and modifications to equipment, provided the PAL cap is not exceeded. Plant *A* can operate at the PAL cap and is not required to reduce it. If Plant *A* is located in an attainment area, the PAL works to achieve the goal of preserving the increment by setting emissions at current levels (which are below the NAAQS). However, if Plant *A* is located in a nonattainment area, the PAL acts to preserve existing emission levels at standards above that of the NAAQS. Thus, the key to developing an NSR reform package is to develop separate NSR reform proposals, one for attainment areas and one for nonattainment areas.

V. REFORM PROPOSALS FOR NONATTAINMENT AREAS AND ATTAINMENT AREAS

A. *NSR Reform—Nonattainment Areas*

Three questions must be addressed in order to develop an NSR reform proposal for nonattainment areas. First, which reform will result in increased flexibility and simplicity while still ensuring that new and modified sources deemed major have pre-construction permits that act to lower existing emissions, leading to the achievement of the NAAQS? Second, which reform will result in a lower administrative burden for the regulatory community? Finally, which reform will result in a better level of environmental protection, thus achieving the NAAQS in nonattainment areas?

Reform proposal elements that increase flexibility and simplify the NSR process are the PAL concept, the "clean unit" and "clean facility" exclusions, the cap-and-trade program, the ten-year baseline look-back, the pollution control exclusion, and the "potential to potential" test. However, as noted in the analysis of each proposal, these elements do not work towards achieving the NAAQS due to a lack of downward adjustments in emissions (the PAL concept), the failure to install current NSR control technology ("clean unit" and "clean facility" exclusions and cap-and-trade), the failure to account

for emission increases from other sources (pollution control exclusion) and allowing a source to continue to operate indefinitely at original design levels ("potential to potential" and ten-year look-back). The cap-and-trade and ten-year baseline look-back proposals are deficient because they act to exempt units and sources from the installation of control technology.[291] This deficiency is a fatal flaw in the proposals; although they provide flexibility, they do not meet the goals of NSR in nonattainment areas. As noted previously in comments from the Congressional Record, the NSR program should provide clean growth.[292] The cap-and-trade program and ten-year look-back proposals do not meet this standard. However, some of the reform proposal elements can be salvaged and implemented through minor modifications that will ensure that new and modified sources deemed major have pre-construction permits that act to lower existing emissions, leading to the achievement of the NAAQS.

The PAL concept can be modified to require downward adjustments to NSPS levels and the installation of LAER control technology on all new major aggregated units. This alteration would provide flexibility by allowing industries to make modifications under the PAL emission limit with no fear of NSR applicability, except that LAER control technology will be required on new units and the PAL emissions limit will be reduced on a set basis. This modification retains the PAL proposal supported by various stakeholders but with a control technology requirement suggested by STAPPA and ALAPCO and a declining cap to account for the area's nonattainment status.[293]

Limiting the exemption period from ten years to five years can salvage the "clean unit" and "clean facility" exclusion. Thus, a unit or facility would be exempt from NSR if the unit or facility underwent the application of BACT or LAER control technology within the last five years and any modification will not result in an increase of the unit's or facility's potential hourly emissions. This change retains the EPA proposal regarding the "clean unit" and "clean facility" exemptions but incorporates the comment of

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291. *See, e.g.*, STAPPA/ALAPCO, *supra* note 87, at 3 (stating that the proposed ten-year baseline look back acts as a loophole).

292. *See* 123 CONG. REC. S18,015 (daily ed. June 8, 1977).

293. *See* STAPPA/ALAPCO, *supra* note 87, at 13.

STAPPA and ALAPCO to allow only a five-year look back,[294] better addressing the STAPPA and ALAPCO concerns about the possibility of control technology becoming obsolete.[295]

The pollution control project exemption can be made viable by allowing an exemption from NSR only if actual emissions at the source decrease as a result of the project. This modification requires an actual decrease in emissions, as opposed to the EPA proposal.[296] In addition, assuming that netting is disallowed, the pollution control exemption cannot be used as a means to exempt new sources from NSR.[297]

The "potential to potential" test can also be salvaged by adopting the CMG's proposal whereby a source may use the test, but the pre-modification potential may not be greater than the maximum achievable hourly emissions rate by the unit over the last five years prior to the proposed modification.[298] This cap will ensure that facilities that are experiencing declining emissions because of demand or damage must account for that decline when determining the impact of any modification.

The next step in developing an NSR reform proposal for nonattainment areas is to determine which proposal elements reduce the administrative burden on the regulatory community, while making sure new and modified sources deemed major have pre-construction permits that act to lower existing emissions leading to the achievement of the NAAQS. The remaining reform proposal elements that reduce administrative burden are the PAL concept, the

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294. *See* 61 Fed. Reg. 38,250, 38,255 (July 23, 1996); STAPPA/ALAPCO, *supra* note 87, at 5.

295. *See* STAPPA/ALAPCO, *supra* note 87, at 3 (stating that the ten-year period "will allow sources to be excluded from NSR based on out-dated BACT or LAER").

296. *See* 61 Fed. Reg. 38,250, 38,260 (July 23, 1996) (allowing an exemption if the project will "not cause or contribute to a violation of a NAAQS or PSD increment and not adversely impact on the AQRV of Class I areas").

297. *See* 61 Fed. Reg. 38,250, 38,261 (July 23, 1996) (stating that "the proposed exclusion would not be applicable to air pollution controls and emissions associated with the construction of a proposed new emissions unit").

298. *See, e.g.*, CMIG Letter I, *supra* note 196, at 5.

"potential to potential" test, the pollution project exclusion, and the "clean unit" and "clean facility" exclusions. All of these proposal elements act to reduce the number of NSR permits. However, some proposal elements act to create additional compliance burdens, such as the "clean unit" and "clean facility" exclusions that may force local and state agencies to focus resources on records from ten year past and the PAL concept and pollution project exclusion that will focus additional resources on emissions compliance.[299] These proposals can be modified to minimize any additional burden on state and local agencies by requiring control technology installation for aggregated new units under the PAL and by limiting the "clean unit" and "clean facility" exclusions to five years. Hopefully, with less NSR applicability and permits, any additional burden on state and local agencies will be offset.[300]

Few reform proposal elements create a better level of environmental protection. The elimination of the use of netting to avoid NSR applicability for a new or modified unit and the UARG backstop program will create a better level of environmental protection than exists today.[301] Eliminating netting will close the existing loophole that allows new sources and units to be installed without LAER technology.[302] Also, creating a backstop program will assist in attainment of the NAAQS, as existing high emitting electric generating facilities are reduced to NSPS levels.[303]

The remaining reform proposals from above (PAL, the "potential to potential" test, "clean unit" and "clean facility" exclusions, and pollution control exclusion) would not create a better level of environmental protection without the modifications proposed. Requiring downward adjustments to the PAL and LAER technology on new units will act to reduce existing pollution levels in nonattainment areas.[304] Limiting the "potential to potential" test to

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299. *See* Letter from Hodanbosi to EPA, supra note 258, at 4.

300. *See id.* at 3.

301. *See* NATURAL RES. DEF. COUNCIL, *supra* note 5, at 10; Letter and Memorandum from Nickel to Seitz, *supra* note 143.

302. *See* 40 C.F.R. § 52.21(j)(3) (2000).

303. *See id.*; Letter and Memorandum from Nickel to Seitz, *supra* note 143.

304. *See* 40 C.F.R. § 52.21(j)(3); STAPPA/ALAPCO *supra* note 87, at 11.

no greater than maximum achievable hourly emissions rate by the unit over the last five years will ensure that older facilities must take into account declines in demand or declines in capacity due to age or damage.[305] Allowing a pollution control project exclusion will remove the existing disincentive to upgrade units and will allow industry to implement pollution control projects with no fear of NSR applicability.[306] However, allowing a "clean unit" exclusion or "clean facility" exclusion only within the last five years at a minimum still will not present a better level of environmental protection because of five-year-old control technology left in place instead of being upgraded.[307] The implementation of new control technology is an important part of NSR reform in nonattainment areas. The "clean unit" and "clean facility" exclusions should not be part of NSR reform in nonattainment areas because they do not require new control technology.

The overall goal of NSR in nonattainment areas is to achieve the NAAQS by ensuring new and modified sources deemed major have pre-construction permits that act to lower existing emissions.[308] The goals of NSR reform are to provide increased flexibility and simplicity, to reduce the burden on the regulated community, and to provide a better level of environmental protection.[309] The following modified proposals provide a solid base of NSR regulations that would reform the current system while helping achieve the NAAQS in nonattainment areas:

1) Require use of a voluntary PAL set at current emissions but subject to a declining cap with the requirement that new major aggregated units be subject to LAER control technology. This recommendation adopts the PAL proposal supported by various stakeholders but with a control technology requirement suggested by STAPPA and ALAPCO and a declining cap to account for the area's

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305. *See generally* NATURAL RES. DEF. COUNCIL, *supra* note 5.

306. *See* 61 Fed. Reg. 38,250, 38,260 (July 23, 1996).

307. *See* STAPP/ALAPCO, *supra* note 87, at 3 (stating the ten-year period "will allow sources to be excluded from NSR based on out-dated BACT or LAER").

308. *See supra* notes 34–36.

309. *See supra* notes 84, 87, 89 and accompanying text.

nonattainment status.[310] The recommendation provides flexibility for industry while ensuring a better level of protection as emission caps are adjusted downward and new units apply LAER technology.

2) Require use of a "potential to potential" test for all sources instead of an "actual to actual" or "actual to potential" test. The baseline for current potential would be restricted to no more than maximum achievable hourly emissions rate by a unit over the last five years. This recommendation incorporates proposals by the EPA, UARG, and CMG and attempts to address the concerns of the NRDC, STAPPA and ALAPCO by restricting the baseline to within five years.[311] The recommendation provides a bright-line test for NSR applicability while limiting the ability of grand fathered sources to make repairs that result in operation at original design levels.

3) Disallow netting for new and existing sources to avoid NSR applicability with respect to control technology while continuing netting for air quality impacts. This recommendation follows the UARG proposal for electric generating units and the CMG proposal regarding the use of netting, and also incorporates the NRDC comments regarding a call for the EPA to evaluate the role of netting.[312] The recommendation provides a better level of environmental protection and results in more equipment receiving LAER control technology.

4) Implement a backstop program for electric generating facilities, similar to the UARG proposal, that would result in sources achieving NSPS levels.[313] This proposal gives assurances of emissions reduction over time.

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310. *See* STAPPA/ALAPCO, *supra* note 87, at 13.

311. *See generally* STAPPA/ALAPCO, *supra* note 87.

312. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143; NATURAL RES. DEF. COUNCIL, *supra* note 5, at 10; CMIG Memorandum, *supra* note 87.

313. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

5) Allow an exclusion from NSR for pollution control projects provided that a decrease in actual emissions from the source will occur as a result of the project. This recommendation adopts the EPA proposal but requires a decrease in criteria pollutant emissions because of the area's nonattainment status.[314] The recommendation provides flexibility and removes an existing disincentive in the current program. Pollution control projects can be attempted without fear of triggering NSR, as is currently the case.

B. *NSR Reform–Attainment Areas*

The goal of NSR in attainment areas is to protect the increment in attainment areas by requiring a pre-construction permit that requires control measures be taken to ensure that the new or modified source will not impact attainment.[315] In addition, the opportunity for economic growth must continue to exist in the attainment area under the NSR program. As is the case for nonattainment areas, an NSR reform proposal for attainment areas must result in increased flexibility and simplicity, lessened administrative burden for the regulated community, and a better level of environmental protection.

Reform proposal elements that increase flexibility and simplify the NSR process are the PAL concept, the "clean unit" and "clean facility" exclusions, the cap-and-trade program, the ten-year baseline look-back, the pollution control exclusion and the "potential to potential" test. As noted in Part V.A, the cap-and-trade program and the ten-year look-back proposal contain fatal flaws because each could potentially exempt sources from NSR control technology application.[316] However, the remaining proposals can be modified.

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314. *See* 61 Fed. Reg. 38,250, 38,260 (July 23, 1996).

315. *See* 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, 124) (stating "[t]hese provisions require that new major stationary sources and major modifications are carefully reviewed prior to construction to ensure compliance with the National Ambient Air Quality Standards, the applicable PSD air quality increments, and the requirements to apply the best available control technology on the project's pollutant emissions").

316. *See* STAPPA/ALAPCO, *supra* note 87, at 3 (stating the ten-year period "will allow sources to be excluded from NSR based on

The PAL concept can be used to provide flexibility while ensuring control technology is installed on new units. This result is accomplished by taking the EPA proposal and subjecting it to the STAPPA and ALAPCO requirement that imposes BACT control technology on all aggregated new units that are considered major under the existing regulations.[317] Downward adjustments of the PAL would not be required because of the attainment status of the areas.

Other proposals can be modified to make them workable for attainment areas. The "clean unit" and "clean facility" exclusions can be modified as in the nonattainment area to ensure that obsolete control technology would not be relied upon. This modification adopts the EPA proposal regarding the "clean unit" and "clean facility" exemptions but incorporates the comment of STAPPA and ALAPCO to only allow a five-year look back.[318] The "potential to potential" test can be similarly modified to provide protection against older facilities running unchecked at full design levels.[319]

As noted in Part V.A, many of the proposals ease the administrative burden for industry while possibly adding administrative burden to state and local agencies.[320] By requiring control technology installation for new units under the PAL and by limiting the "clean unit" and "clean facility" exclusions to five years, hopefully the additional burden on state and local agencies will be minimized and possibly offset by less NSR permit requirements.[321]

To achieve a better level of environmental protection for attainment areas, the nonattainment proposals should be adopted but with slight differences. The PAL concept should be utilized but require BACT instead of LAER control technology for new units and not require downward adjustments.[322] The pollution control project exclusion should be allowed, but as noted above, it should not require a decrease of overall emissions. This recommendation

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out-dated BACT or LAER"); *see also supra* note 283 and accompanying text.

317. *See* STAPPA/ALAPCO, *supra* note 87, at 13.

318. *See* 61 Fed. Reg. 38,250, 38,255 (July 23, 1996); STAPPA/ALAPCO, *supra* note 87, at 5.

319. *See* CMIG Letter I, *supra* note 196, at 7.

320. *See* Letter from Hodanbosi to EPA, *supra* note 258, at 4.

321. *See generally* STAPPA/ALAPCO, *supra* note 87.

322. *See id.* at 13.

does not require a decrease but also does not allow an increase as a result of the project, whereas the EPA proposal that would allow an increase.[323] The modified "potential to potential" test would also help to insure that older facilities could not operate at full design levels indefinitely.[324] The backstop program proposed by the UARG could be utilized to help lower emission levels at existing electric generating sources.[325]

Lastly, modification to the "clean unit" and "clean facility" exclusions would create benefits in terms of simplification and lower administrative burdens that outweigh any additional protection that would follow by not adopting this program. As in nonattainment areas, updated control technology is important in attainment areas, but using five-year-old technology is not as much of an issue because of the attainment status of the areas.

The reform proposals presented here focus on *maintaining existing air quality*, whereas the reform proposals for nonattainment areas focus on *improving existing air quality*. The following proposals will provide a solid base of NSR regulations that would reform the current system while helping preserve existing air quality levels in attainment areas:

1) Require use of a voluntary PAL set at current emissions and requiring BACT control technology on aggregated major new units. This recommendation adopts the PAL proposal supported by various stakeholders but with a control technology requirement suggested by STAPPA and ALAPCO.[326] The recommendation caps current emissions while continuing to make sure that control technology is installed on new units. The goals of flexibility and a reduced

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323. *See* 61 Fed. Reg. 38,250, 38,260 (July 23, 1996) (allowing an exemption if the project will "not cause or contribute to a violation of a NAAQS or PSD increment and not adversely impact on the AQRV of Class I areas").

324. *See, e.g.*, CMIG Letter I, *supra* note 196, at 5 (presenting a five-year restriction on past maximum achievable emissions of a source).

325. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143.

326. *See* STAPP/ALAPCO, *supra* note 87, at 12.

administrative burden will be met as noted in the nonattainment proposal.

2) Require use of a "potential to potential" test for all sources instead of an "actual to actual" or "actual to potential" test. This recommendation incorporates proposals by the EPA, UARG, and CMG and attempts to address the concerns of the NRDC and STAPPA and ALAPCO by restricting the baseline to within five years.[327] The recommendation meets the goals of flexibility and reduced burden as a bright-line test is created for NSR applicability. The five-year restriction will act to ensure that older sources cannot operate at full design capacities indefinitely.

3) Disallow netting for new and existing sources that allows sources to avoid NSR applicability to control technology while continuing netting for air quality impacts. This recommendation follows the UARG proposal for electric generating units and the CMG proposal regarding the use of netting and also incorporates the NRDC comments regarding a call for the EPA to evaluate the role of netting.[328] The recommendation provides a better level of environmental protection that will help offset the "banking" effect of the PAL concept.

4) Allow the "clean unit" and "clean facility" exclusion but with a five-year look back and restrictions on increases in design emission levels. This recommendation adopts the EPA proposal regarding the "clean unit" and "clean facility" exemptions but incorporates the comment of STAPPA and ALAPCO to only allow a five-year look back.[329] The recommendation provides flexibility to industry and changing the ten-year period to five years minimizes the additional burden feared by state and local agencies.

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327. *See supra* Parts III.A.1., III.B.1, III.D.1., III.E.1., III.F.1.

328. *See* Letter and Memorandum from Nickel to Seitz, *supra* note 143; NATURAL RES. DEF. COUNCIL, *supra* note 5, at 10; CMIG Memorandum, *supra* note 87.

329. *See* 61 Fed. Reg. 38,250, 38,255 (July 23, 1996); STAPPA/ALAPCO, *supra* note 87, at 5.

5) Allow an exclusion from NSR for pollution control projects provided that an actual increase of emissions will not occur from the source as a result of the project. This proposal does not require a decrease but also does not allow an increase as a result of the project, whereas the EPA proposal that would allow an increase.[330] The recommendation provides flexibility and removes an existing disincentive in the current program. Pollution control projects can be undertaken and will not trigger NSR, as is the case in the current system.[331]

6) Implement a backstop program for electric generating facilities similar to the UARG proposal that would result in sources achieving NSPS levels.[332] This proposal ensures continued economic growth and that older grandfathered sources will eventually be emitting at NSPS levels.

The above reform proposals for attainment and nonattainment areas create a program that has increased flexibility (PAL, pollution control exclusion, "potential to potential" test), a better level of environmental protection (no netting loophole, PAL with BACT or LAER, "potential to potential" test restricted to five-year look back) and a reduced burden on the regulated community (PAL with BACT or LAER, "potential to potential" test).

CONCLUSION

NSR reform has been underway since 1992 and has been productive. Proposals have been developed by all interested parties

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330. *See* 61 Fed. Reg. 38,250, 38,260 (July 23, 1996) (allowing an exemption if the project will "not cause or contribute to a violation of a NAAQS or PSD increment and not adversely impact on the AQRV of Class I areas").

331. *See, e.g.*, Letter and Memorandum from Nickel to Seitz, *supra* note 143 (regarding the use of a potential to potential test for NSR applicability to modified sources stating "[t]his clarification would remove uncertainty that has discouraged efficiency and reliability improvement projects, and would address confusion that has complicated and delayed permit proceedings").

332. *See id.*

and there has been positive interaction between industry, the EPA, and environmental groups on the Clean Air Act Advisory subcommittee for NSR reform. Even with the progress and discussions, no current proposal fully satisfies both the goals of NSR and NSR reform. A key shortcoming of all NSR reform proposals is the failure to recognize that two NSR reform proposals must be developed—one for attainment areas and one for nonattainment areas. By developing a separate proposal for each area, the goals of both NSR and NSR reform can be achieved. The reform proposals presented and developed in this article for attainment and nonattainment areas are intended to provide a basis for NSR reform from which to start or to which the EPA reform proposals not discussed in this article can be added.