Before the United States Environmental Protection Agency

STATE OF WEST VIRGINIA,

to

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SCOTT PRUITT, Administrator of the United States Environmental Protection Agency, and WILLIAM L. WEHRUM, Administrator of the United States Environmental Protection Agency for Air and Radiation

On Petition for Rulemaking

PETITION FOR RULEMAKING TO PROTECT DOMESTIC INTEGRATED IRON AND STEEL PRODUCTION

Patrick Morrisey
ATTORNEY GENERAL OF
WEST VIRGINIA
Anthony Martin
Chief Deputy Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
anthony.p.martin@wvago.gov

Counsel for Petitioner
State of West Virginia

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The State of West Virginia, by and through Attorney General Patrick Morrisey, petitions the Environmental Protection Agency to establish when a project qualifies for the "routine maintenance, repair, and replacement" exemption from New Source Review. Specifically, the State respectfully requests that the Agency promulgate a rule:

- Clarifying that replacing components consumed or degraded by the normal operation of a source, or remediating "wear-and-tear" arising from the normal operation of a source, qualifies as "maintenance, repair, [or] replacement;"
- Clarifying that the determination of whether "maintenance, repair, or replacement" is "routine" will be based on common practices within the industry and source category; and
- Repudiating the inconsistent, erroneous, and unlawful positions that the Agency previously asserted in litigation against the steel and electricity industries.

This petition is authorized by 5 U.S.C. § 553(e).

I. SUMMARY AND STATEMENT OF INTEREST

The State of West Virginia, by and through Attorney General Patrick Morrisey, has been a consistent leader in protecting West Virginia coal miners and coal jobs from suffocating regulatory overreach. When previous administrations took an aggressive and heavy-handed position against coal miners, the Attorney General's office struck back with litigation that halted regulators in their tracks. Now that President Trump has made it a priority to bring back coal jobs, our office stands ready to help roll back the convoluted policies that are standing in the way.

President Trump has already made great strides revitalizing the thermal coal industry. Exec. Order No. 13783, 82 Fed. Reg. 16093 at § 2(a) (Mar. 28, 2017). Moreover, his work bolstering American manufacturing creates a special nexus with West Virginia coal. Specifically, with the high-grade metallurgical coal, or "met coal," that is found extensively in West Virginia. Met coal is an essential component of reducing iron ore into steel. *See, e.g.,* Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8667 (Jan. 24, 2017). Fortunately, President Trump has made revitalizing domestic steel production a priority of both his economic and national security agenda. Presidential Memorandum for the Secretary of Commerce on Steel Imports and Threats to National Security, 2017 WL 1405455 (Apr.

20, 2017). From a regulatory standpoint, there is considerable room for improvement in the domestic steel industry. "In past years, the aggressive environmental regulatory programs at the federal and state levels created a competitive disadvantage for manufacturers, endangering jobs and adding significant costs and uncertainty to basic operations while providing only marginal environmental benefits in exchange." AMERICAN IRON AND STEEL INSTITUTE, 2018 PUBLIC POLICY AGENDA 8 (Feb. 15, 2018), https://www.steel.org/~/media/Files/AISI/Reports/AISI-2018-Public-Policy-Agenda.pdf. In this spirit, the State is requesting the Agency implement a new rule taking aim at a convoluted policy standing in the way of President Trump's steel agenda: "New Source Review" permitting under the Clean Air Act.

New Source Review is an expansive process, both in terms of its scope and the burdens it imposes on industry. It applies to the construction of nearly any industrial facility, including power plants and steel mills. Moreover, it applies whenever such a facility undergoes "modification," which can mean "any physical change . . . which increases emissions" of air pollutants. 42 U.S.C. § 7411(a)(4). Obtaining a construction or modification permit requires significant capital expense, but the mere process of applying for a permit is an exhaustive, expensive, and complicated.

To prevent New Source Review from stifling the regular operations of existing industrial facilities, "routine maintenance, repair, and replacement" is exempted from the definition of "physical change." 40 C.F.R §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). Thus, ordinary upkeep projects will not trigger the heavy burden of New Source Review. Unfortunately, industries cannot rely on this exemption due to the inconsistent, case-by-case basis on which the Agency applies it. In addition to the Agency shifting its definition of these terms, courts have also imposed erroneous and unreasonable limits on the exemption.

In one particularly egregious case, the Agency initiated litigation against the owners of a steel mill after owners replaced the lining of the mill's blast furnace. Because reducing iron ore into steel involves extreme temperatures and corrosive chemicals, furnace linings are subject to considerable wear and tear. AISE STEEL FOUNDATION, THE MAKING, SHAPING, AND TREATING OF STEEL 245 (Richard J. Fruehan ed., 11th ed. 1999). Although blast furnaces can remain operational for centuries, even the most durable cooling components must be replaced every ten to fifteen years. *Id.* at 679. This is an unavoidable and recurring process for all blast furnaces, and

involves no mechanical or operational changes, but the Agency treated it as a "modification" rather than "routine maintenance and repair."

The Agency's practice of subjecting routine maintenance and repair New Source Review has gone on too long, and correcting this flawed approach is consistent with President Trump's directive to pursue "reductions in regulatory burdens affecting domestic manufacturing." Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8667 (Jan. 24, 2017). Accordingly, the State of West Virginia respectfully requests the Agency issue a new rule clarifying standards for the "routine maintenance, repair, and replacement" exemption that, at a minimum, encompass lining repairs for blast furnaces.

II. BACKGROUND

In 1977, Congress amended the Clean Air Act to impose a new permitting system on construction projects: "New Source Review." Clean Air Act Amendments of 1977, Pub. L. No 95-95, §§ 127, 129, 91 Stat. 685, 731–42, 745–51 (codified as amended at 42 U.S.C. §§ 7470–7479, 7501–7508). New Source Review encompasses two permitting programs that govern the construction of new stationary sources of air pollution, depending on where the source will be constructed. In regions where National Ambient Air Quality Standards have not been met, projects must obtain a "Nonattainment New Source Review" ("NNSR") permit. 42 U.S.C. §§ 7501–15. In regions where air quality standards have been met, projects must obtain a "Prevention of Significant Deterioration" ("PSD") permit. 42 U.S.C. §§ 7470-92.

Although there are differences between NNSR and PSD permitting, both forms of New Source Review have largely similar scopes. *See, e.g., Env't Defense v. Duke Energy Corp.*, 549 U.S. 561, 568-570 (2007) (describing narrow distinctions between PSD and NNSR terminology). For example, both systems can apply to *modifications* of existing sources, and not merely the construction of new sources. 42 U.S.C. §§ 7479(2)(C), 7502(c)(5). In both systems, "modification" is defined as "any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §§ 7472(2)(C), 7501(4) (both referencing 42 U.S.C. § 7411(a)). To clarify that this broad language is not all-encompassing, the Agency has long maintained that performing "maintenance, repair, and replacement" does not constitute a "physical

change," and thus does not trigger new source review, if the activity is "routine." 40 C.F.R §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). Determination of whether the "routine maintenance" exception applies is delegated to the Administrator on a "case-by-case" basis. *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 910-11 (7th Cir. 1990) ("*WEPCO*"); *see also United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 855 (S.D. Ohio 2003).

The importance of the routine maintenance exemption is underscored by the onerous and uncertain nature of New Source Review. For example, PSD permitting "imposes numerous and costly requirements on those sources that are required to apply for permits." *Util. Air Regulatory Grp. v. EPA*,134 S. Ct. 2427, 2443 (2014) ("UARG"). To obtain a permit under the PSD program, "the applicant must make available a detailed scientific analysis of the source's potential pollution-related impacts, demonstrate that the source will not contribute to the violation of any applicable pollution standard, and identify and use the 'best available control technology' for each regulated pollutant it emits." *UARG*, 134 S. Ct. at 2443 (citing § 7475(a)(3), (4), (6), (e)). For example, the Agency has acknowledged "that PSD review is a 'complicated, resource-intensive, time-consuming, and sometimes contentious process' suitable for 'hundreds of larger sources,' not 'tens of thousands of smaller sources.'" *Id.* (quoting 74 Fed. Reg. 55304, 55321–55322). Similarly, under NNSR permitting, an applicant must show that the project will comply with "the most stringent emission limitation" imposed by States or "achieved in practice" for sources in that category. 42 U.S.C. §§ 7501(3), 7503(a)(2). Although this presents a lower standard, the process imposes similar costs and uncertainties and is still stringent.

This uncertainty has been exacerbated by the inconsistent interpretations and applications of the exemption under previous administrations. The Agency initially argued that a project qualifies as "routine" based on the common practices *within a particular source category*. *WEPCO*, 893 F.2d at 911-12; *see also* 57 Fed. Reg. 32,314, 32,326 (July 21, 1992). This approach was consistent with the Agency's definition of "modification" under the New Source Performance Standards program, which was expressly cross-referenced by the New Source Review statutes. 40 C.F.R. § 60.14(e)(1) ; *see also* 42 U.S.C. §§ 7501, 7479. Notwithstanding this clear indication of uniformity, the Agency later pivoted to a more restrictive interpretation for New Source Review exemptions that only considered routines "*for a generating unit*." *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1008 (S.D. Ind. 2003) (emphasis added).

Recognizing the importance of the routine maintenance and repair exemption, the Agency previously attempted to clarify its scope. In 2003, the Agency promulgated a rule that defined "routine maintenance, repair, and replacement" to include "the replacement of any component of a process unity with an identical or functionally equivalent component(s)," within certain cost limitations. 68 Fed. Reg. at 61,272 (enacting 40 C.F.R. § 52.21(cc)). In 2006, this rule was vacated by the D.C. Circuit Court, based on a broad reading of the Clean Air Act. *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006) ("Hence, the ERP [Equipment Replacement Rule] would allow sources to avoid NSR when replacing equipment under the twenty-percent cap notwithstanding a resulting increase in emissions. The court stayed the effective date of the ERP on December 24, 2003. We now vacate the ERP because it is contrary to the plain language of section 111(a)(4) of the Act[.]"). This broad reading gave the term "any physical change" an "expansive" and "indiscriminate[]" application, *Id.* (quotations omitted), and was subsequently invoked in litigation by the Agency against steel producers in Region V.

Moreover, this broad method of reading the Clean Air Act has since been repudiated by the Supreme Court. *UARG*, 134 S. Ct. at 2439-40. In light of past confusion and this recent repudiation, it is appropriate for the Agency to clarify the scope of the routine maintenance exemption to provide clarity and certainty in the coal industry.

III. THE REQUESTED RULE

The State of West Virginia respectfully requests the Agency provide clear, reasonable, and predictable rules that will establish the scope of the routine maintenance and repair exemption. There is currently no rule defining the precise scope of "routine," "maintenance," or "repair." Indeed, the Agency has historically treated this as a "case-by-case" determination based on a range of factors, including "the nature, extent, purpose, frequency, and cost of the work." *WEPCO*, 893 F.2d at 910. The resulting unpredictability and confusion has provoked litigation, which in turn has only further confused the issue. The State of West Virginia proposes a twofold solution to this confusion: clarifying the methodology used to determine both when work is "routine," and when it is "maintenance [or] repair."

With respect to "routine," it should be clarified that the nature and frequency of the work is determined by reference to the source category or industry overall, rather than the specific source in question. Work that is regular, predictable, and recurring in the industry should be considered *per*

se "routine." To the extent this is not the case, or if the facts of a particular application are unclear, factors such as cost should then be considered.

Similarly, "maintenance and repair," should be consistently defined based on the particular needs of an industry and source category. If the nature and purpose of a project centers on remediating the effects of unavoidable wear-and-tear caused by the ordinary operation of the type of source in question, then the work should be considered *per se* "maintenance." Similarly, replacing components that are necessarily damaged by the ordinary operation of sources in the category should be considered *per se* "repair." The cost and extent of such projects should not predominate over their nature and purpose, if the nature and purpose make it clear the project is "maintenance [or] repair."

By way of example, in the context of blast furnaces, wear and tear on the interior of a furnace chamber is an unavoidable consequence inherent in its operation. AISE STEEL FOUNDATION, THE MAKING, SHAPING, AND TREATING OF STEEL 245 (Richard J. Fruehan ed., 11th ed. 1999). Replacing worn out lining is both necessarily predictable and recurring. Such repairs effect no substantive change from the furnace as originally designed. Accordingly, other factors, such as the cost and scope of relining need not be considered, and certainly should not override the straightforward, common-sense conclusion suggested by the project's nature and purpose.

Promulgating the requested rule is comfortably within the Administrator's authority, and the rule conforms the Agency's practice to Supreme Court decisions interpreting the scope of the Clean Air Act. Moreover, because the uncertainty and unlawful overreach of previous administrations in this area has had a particularly harmful effect on the domestic steel and coal industries, the requested rule will advance President Trump's goal of revitalizing these industries.

A. The Administrator Has Authority To Promulgate The Requested Rule.

The Administrator has well-established authority to interpret the scope of "physical change" via the routine maintenance and repair exemption. Under *Chevron*, "when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity" and the agency need only act "reasonably" in order to stay within its statutory authority. *UARG*, 134 S. Ct. at 2439 (citing *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). The Clean Air Act does not specify a meaning of "physical change." Moreover, the Agency has

consistently maintained, and courts have consistently agreed, that the Administrator may interpret the applicability of the routine maintenance exemption "on a case-by-case basis." *WEPCO*, 893 F.2d at 910-11; *see also Ohio Edison Co.*, 276 F. Supp. 2d at 855.

Although there is little dispute that the Administrator can promulgate a legislative rule in this context, there has been dispute regarding the level of deference a court should afford Agency interpretations of such rules. Courts have pointed to the Agency's inconsistent interpretation of the routine maintenance exemption—particularly with regard to whether "routine" is determined by reference to specific sources or the source category overall—when granting limited or no deference to the Agency's interpretation. *See, e.g., United States v. E. Ky. Power Coop.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2008) (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)); *see also United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1306 (N.D. Ala. 2005) order vacated in part, No. 2:01-cv-00152, 2008 WL 11383702 (N.D. Ala. Feb. 25, 2008); *Pennsylvania et al. v. Allegheny Energy, Inc. et al*, No. 05-885, 2008 WL 960100 at *7 (W.D. Pa. Sep. 2, 2008) (subsequent history omitted).

However, there are two reasons why the interpretation advanced by the requested rule would not be susceptible to such judicial criticism. *First*, the requested rule returns the Agency's interpretation of "routine" to its original position, and "closer to the enactment of the governing statute." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976). When conflicting interpretations are advanced by an agency, the interpretation that was adopted closer to the enactment of the governing statute is given more deference than subsequent, conflicting interpretations. *Id.*

Second, a changing agency interpretation is entitled to deference if the change is supported by a "reasoned justification." *See, e.g., N.L.R.B. v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 n.4 (6th Cir. 1997); *Sacred Heart Med. Ctr. v. Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992). Here, the requested rule would update the Agency's interpretation to reflect new Supreme Court precedent, which is a "reasoned justification." The narrow interpretation suggested by *New York v. EPA* was not informed by the Supreme Court's analysis in *UARG* or *Env't Defense v. Duke Energy Corp.* The Clean Air Act "does not strip EPA of authority to exclude" activities from the ambit of the PSD permitting requirement "where their inclusion would be inconsistent with the statutory scheme." *UARG*, 134 S. Ct. at 2441.

B. The Requested Rule Reasonably Conforms To The Text and Purpose Of The Clean Air Act.

Applying the routine maintenance and repair exemption to all industry-standard replacement projects is consistent with a proper understanding of New Source Review. A plain reading of the Clean Air Act and related regulations certainly suggests that relining a furnace to replace cracked, worn-out bricks is a "repair" rather than a "physical change." 42 U.S.C. § 7411(a)(2). Moreover, it is unreasonable to interpret the phrase "any physical change" to mean any physical change "whatsoever." *UARG*, 134 S. Ct. at 2440. "[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole." *Id.* at 2442 (quoting, in part, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Just like the phrase "any air pollutant," the phrase "any physical change" requires "a narrower, context-appropriate meaning." *Id.* at 2439.

Here, "physical change" is used to describe a "modification" that is included in the same permitting scheme as the construction of an entirely new source. The "elaborate, burdensome permitting process" created for constructing new sources can reasonably extend to projects that fundamentally alter an existing source, which may be effectively indistinguishable from creating a new source. *Id.* at 2440. Similarly, a "change in the method of operation" of a source converts the fundamental nature of the source, analogous to creating a new source, and is consequently included as a "modification" that can trigger New Source Review. 42 U.S.C. § 7411(a)(4).

The common thread between constructing a new source, making major modifications to existing sources, and altering the actual operation of a source is observable, fundamental shifts from the *status quo*. Viewed in this context, "physical change" cannot readily encompass projects that are undertaken for the sole purpose of remediating ordinary wear-and-tear and leaving the essential nature of sources unchanged.

Some interpretations have ignored the limited context of New Source Review by emphasizing the second element of "modification:" an "increase[] in the amount of any air pollutant" emitted by the modified source. *Id.* For example, before *UARG* was decided, the D.C. Circuit held that the routine maintenance and repair exemption only applied to physical changes that had a "*de minimis*" effect on emissions. *New York*, 443 F.3d at 889. Although it is correct to note that projects causing *de minimis* emissions changes likely do not trigger New Source Review, it is incorrect to allow the "emissions"

requirement to limit the scope of the "physical change" requirement. A "modification" consists of two independent elements: a change in the source itself, whether physical or operational, and an emissions change associated with the change in the source. *Duke*, 549 U.S. at 578-79. Thus, emissions increases are irrelevant if the nature and purpose of projects do not involve physical or operational changes in the context of New Source Review.

Conversely, other interpretations have emphasized the scope and cost of projects over nature and purpose. Although these factors may be informative in edge cases, they should not control when the nature and purpose of a project is clearly to provide routine maintenance or repair. For example, courts have suggested the "technology-forcing" objective of the Clean Air Act means that projects with expansive scopes should not be considered "routine maintenance and repair." *WEPCO*, 893 F.2d at 909-10. In this framework, New Source Review should apply whenever "construction" is undertaken, as this is when "pollution control measures . . . can be most effective." *Id.* at 909. This interpretation of "modification" is both under and over-inclusive. It does not account for a change in the "method of operation," involving no construction whatsoever, which would expressly be included in the definition of "modification." 42 U.S.C. § 7411(a)(4). At the same time, it suggests that deconstructing and reconstructing a source, using the same parts and effecting no physical or operational change whatsoever, would nonetheless constitute a "modification" due to the amount of construction involved. Similarly, a stayed Agency rule suggests that cost alone can be a dispositive factor. 40 C.F.R §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). It strains credulity to suggest that an otherwise routine furnace relining should be treated as a modification if the price of bricks increased.

C. The Requested Rule Advances The Administration's Goals.

The Agency's inconsistent, "case-by-case" application of the routine maintenance and repair exemption from New Source Review hurts every industry, and has led to unlawful and overreaching litigation against the steel industry. Allowing this to continue flatly contradicts President Trump's emphatic declaration that the domestic steel industry is a "critical element[] of our manufacturing and defense industrial bases." Presidential Memorandum for the Secretary of Commerce, 2017 WL 1505901, at §1 (Apr. 27. 2017).

Although the Agency can use its enforcement discretion to avoid reinforcing the mistakes of the past, it is necessary to "go beyond merely

exercising enforcement discretion" in order to "mitigate the unreasonableness of" past applications. *UARG*, 134 S. Ct. at 2445. If no permanent solution is put in place, subsequent administrations can invoke their own enforcement discretion to revert to old practices. As long as the specter of inconsistency lingers, investment in steel and iron works remains risky and stumps long term growth. Even in the immediate term, the Agency's enforcement discretion does not protect against the prospect of citizen suits. *Id*. Accordingly, the only way to effectively resolve the issue is by issuing a legislative rule.

Resolving this confusion will allow domestic steel producers to repair their furnaces and provide certainty that their furnaces can continue operating, which will in turn increase the demand for West Virginian met coal. Accordingly, by resolving this uncertainty and removing the looming threatof litigation from the domestic steel industry, the requested rule will advance several elements of President Trump's agenda, including fostering the growth of our economy, getting miners back to work, and providing essential steel for our nation's defense and infrastructure.

IV. CONCLUSION

President Trump's pro-jobs agenda has identified the singular importance of saving the American coal miner from extinction. Similarly, his "America First" trade policy is revitalizing domestic industries of all types, and in particular the American steel industry. The requested rule is in lock-step with the President's agenda, and implementing the rule will indisputably help make America great again.