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April 7, 2006

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Gino J. Agnello
Clerk
U.S. Court of Appeals for the
Seventh Circuit
Room 2722
219 S. Dearborn Street
Chicago, IL 60604

Re: United States v. Cinergy Corp., et al., No. 06-1224

Dear Mr. Agnello:

Please find enclosed for filing in the above-referenced case the Brief of *Amici Curiae* The Indiana Manufacturers Association, The Indiana Chamber of Commerce, The Indiana Energy Association, The Chamber of Commerce of the United States of America, The Alliance of Automobile Manufacturers, The Rubber Manufacturers Association, The National Petrochemical & Refiners Association, and The American Forest & Paper Association in Support of Defendants-Appellants.

Counsel has obtained consent from all of the parties to the case for the filing of this brief and is filing the brief pursuant to Federal Rule of Appellate Procedure 29(a).

Please let me know if you have any questions regarding this matter.

Sincerely,

Robert V. Zener /srf

Robert V. Zener

RECORD NO. 06-1224

In The

United States Court of Appeals

For The Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

and

**STATE OF NEW YORK; STATE OF CONNECTICUT;
STATE OF NEW JERSEY; HOOSIER ENVIROMENTAL COUNCIL;
OHIO ENVIRONMENTAL COUNCIL,**

Plaintiffs - Appellees,

v.

**CINERGY CORPORATION; CINERGY SERVICES, INCORPORATED;
PSI ENERGY, INCORPORATED; CINCINNATI GAS & ELECTRIC COMPANY,**

Defendants - Appellants.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

and

STATE OF NEW YORK, STATE OF NEW JERSEY and STATE OF CONNECTICUT,

Intervening Plaintiffs - Appellees,

and

HOOSIER ENVIRONMENTAL COUNCIL and OHIO ENVIRONMENTAL COUNCIL,

Third Party Plaintiffs - Appellees,

v.

**CINERGY CORPORATION; CINERGY SERVICES, INCORPORATED;
PSI ENERGY, INCORPORATED and CINCINNATI GAS & ELECTRIC COMPANY,**

Defendants - Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA IN CASE NO. 1:99-CV-01693
THE HONORABLE JUDGE LARRY J. MCKINNEY**

BRIEF OF *AMICI CURIAE* THE INDIANA MANUFACTURERS ASSOCIATION, THE INDIANA CHAMBER OF COMMERCE, THE INDIANA ENERGY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE AMERICAN FOREST & PAPER ASSOCIATION, THE RUBBER MANUFACTURERS ASSOCIATION, and THE NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION IN SUPPORT OF DEFENDANTS - APPELLANTS AND SUPPORTING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-1224

Short Caption: United States, et al. v. Cinergy Corp., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Indiana Manufacturers Association, The Indiana Chamber of Commerce, The Indiana Energy Association, The Chamber of Commerce of the United States of America, The Alliance of Automobile Manufacturers, The Rubber Manufacturers Association, The National Petrochemical & Refiners Association, and The American Forest & Paper Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bingham McCutchen LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: Robert V. Zener Date: 4/7/06

Attorney's Printed Name: Robert V. Zener

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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MISCELLANEOUS

INTEREST OF *AMICI*

This brief is filed on behalf of the following associations: the Indiana Manufacturers Association, the Indiana Chamber of Commerce, the Indiana Energy Association, the Chamber of Commerce of the United States of America, the Alliance of Automobile Manufacturers, the Rubber Manufacturers Association, the National Petrochemical & Refiners Association, and the American Forest & Paper Association (collectively, "the Associations"). The Associations' interest in this case is described below.

The Indiana Manufacturers Association is a not-for-profit trade association representing manufacturing businesses and facilities throughout the State of Indiana. It performs essential services for manufacturers operating in the State of Indiana to preserve a favorable business climate for manufacturing throughout the state.

The Indiana Chamber of Commerce is a not-for-profit trade association serving some 16,000 businesses and customers throughout the State of Indiana with a mission of providing a world-competitive business climate throughout the state in order to maximize opportunity for meaningful employment of all Indiana citizens.

The Indiana Energy Association is a trade association made up of 14 Indiana investor-owned gas and electric utilities and one public charitable trust gas utility. Its primary role is to advocate, communicate and promote energy policies to improve the economy and quality of life in Indiana.

The Chamber of Commerce of the United States of America (the "Chamber") is the nation's largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. One important function of the Chamber is to represent the interests of its members in court on environmental issues of national concern to American business. While virtually all of the nation's largest companies are Chamber members, more than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 71 percent of which have 10 or fewer employees.

The Alliance of Automobile Manufacturers is a not-for-profit trade association representing nine car and light truck manufacturers. Its members operate numerous manufacturing plants throughout the United States, and collectively constitute one of the largest industries in the United States.

The Rubber Manufacturers Association ("RMA") is the national trade association for the rubber products industry. Its members include more than 100 companies that manufacture various rubber products, including tires, hoses, belts, seals, molded goods and other finished rubber products. RMA members employ over 120,000 workers and account for more than $21 billion in annual sales.

The National Petrochemical & Refiners Association is a national trade association of more than 450 companies. Its members include virtually all United States refiners and petrochemical manufacturers, and supply

consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants and the chemicals that serve as "building blocks" in making diverse products, such as plastics, clothing, medicine and computers.

The American Forest & Paper Association is the national trade association of the forest, paper and wood products industry. Its members are engaged in growing, harvesting and processing wood and wood fiber; manufacturing pulp, paper and paperboard products from both virgin and recycled fiber; and producing engineered and traditional wood products. These activities require the burning of organic fuels to supply steam, hot water, thermal oil, hot air, and other forms of energy, which is used to dry wood and paper, "cook" wood chips to make pulp, press wood panels, recover post-consumer fiber, recover used pulping chemicals, and the like. Energy is one of the most important inputs to the manufacture of its members' products. The forest products industry is one of the largest consumers of electricity, but it generates more than half of that electricity itself, largely by burning waste wood and bark and spent pulping liquor produced in the pulping of wood.

Amici are interested in this case, because their members frequently perform repair and replacement in their plants. EPA has conducted sector-based enforcement initiatives targeting several industries, including utilities, the refining industry and others. EPA has stated a goal of expanding its

program to include three more industry sectors by the end of fiscal year 2006.[1] If EPA's litigating position and the district court's decision are sustained in this case, *amici* could be faced with EPA's litigating position in their own cases and indeed, some of the members of the *amici* Associations are subject to pending new source review enforcement actions in which EPA's litigating approach to calculating emission increases could be or is being advanced.

All parties have consented to the filing of this *amici* brief.

ARGUMENT

The Clean Air Act requires new source review ("NSR") for "modifications" at a plant that "increase" emissions, subject to certain conditions. The position espoused by EPA's litigators in this case, and adopted by the district court, is that commonplace industrial maintenance and repair projects that enable a facility to avoid breakdowns and thus operate more hours may be subject to NSR, even if emissions remain within permitted capacity and hourly emissions do not increase.

The purpose of this brief is to explain how EPA's litigating position and the district court's opinion lead to NSR being applied to activities that Congress did not consider within the scope of the modification definition because they do not lead to new emissions. Indeed, the method of measuring emissions "increases" adopted by EPA litigators and the district court would extend NSR

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[1] EPA, *Compliance and Enforcement National Priority: Clean Air Act, New Source Review/Prevention of Significant Deterioration* ("EPA Enforcement Priority"), at 3 (Nov. 2004), available at http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2005prioritycaansrpsd.pdf (last visited Apr. 6, 2006).

to common industrial maintenance practices. Our brief first puts the EPA litigating approach into perspective through the use of examples taken from common industrial practice; we describe how the company must parse the EPA regulations to determine in each case whether NSR is required and explain how, in this context, the overly broad "increase" measurement method that EPA and the district court have adopted in this litigation extends the reach of NSR far beyond its intended scope. Our brief then explains that EPA's litigating position and the district court's decision would extend NSR in a manner that is inconsistent with the statute and Congressional intent.

I. The District Court's Method of Measuring Emissions Increases Extends New Source Review to Common Industrial Maintenance Practices, Contrary to the Language and Intent of the Clean Air Act.

For purposes of this discussion, we describe three examples of common industrial repair and replacement activities. We then explain how the EPA regulations should apply to each example and the impact of the method of measuring emissions "increases" adopted by EPA and the district court in this case. In each case, we show how EPA's litigating position would lead to absurd results by casting such a wide "NSR net" that existing sources could be under review as new sources simply for maintaining plants within their permitted capabilities.

A. EPA's litigating position in this case could lead to part replacements in industrial machinery being subjected to new source review notwithstanding that nothing has changed in terms of the actual emissions capability of the process unit.

In this case, EPA litigators take a position that leads to the conclusion that permits do not mean what they say and that the typical process for obtaining air emission permits to construct and operate industrial equipment is flawed. When manufacturing plants are issued air emission permits, they are typically issued on the basis of continuous operation with no downtime. In actual operation, however, this optimal level is almost never achieved. EPA and state regulators permit at maximum levels, however, to ensure that these emissions are considered before a process is installed. Companies have historically devoted and continue to devote considerable effort to eliminating the imperfections in the real-world operation of their equipment and to thereby reach the actual operational levels for which they previously received permits. In other words, they try to achieve what their permits say they can do. EPA's approach in this case effectively tells these companies not to bother because the permitted levels do not matter.

For example, replacement of worn-out bearings with new, improved versions may reduce the frequency of breakdowns in heavy equipment and the corresponding unscheduled maintenance/repair, and enable a company to lengthen the periods between scheduled maintenance outages. Improved bearings do not change the capability of the equipment—*hourly emissions remain the same*. But they allow the process to operate more reliably (*i.e.*, with fewer equipment breakdowns). If the equipment breaks down less often, it may

be able to operate a few more hours, days or even a week a year depending on the equipment.

In the foregoing example, production would increase by increasing hours of operation, but without increasing the hourly emission rate or the actual hourly emissions capacity of a unit. But, based on the position espoused by EPA in this case, these types of activities would likely trigger NSR.

B. EPA's litigating position in this case could lead to simple paint applicator replacements at automobile assembly plants being considered subject to new source review even though emissions rates remain within contemplated and permitted levels.

The following example involves a common industrial practice at automobile assembly plants, the replacement of robot arm paint applicators as part of a large assembly plant operation. It shows that if the actual emitting capability of a plant is not considered in the NSR emissions increase evaluation, automobile plants could be considered subject to NSR whenever robot arms require replacement. Consider a new automobile assembly and coating line built at an existing plant, which undergoes NSR and is permitted with a maximum hourly emissions rate and required control equipment. After several years of operation, production increases within permitted capacity, either because the "kinks" have been worked out, demand for the particular model increases, or because production at another plant shuts down and is shifted to this plant, or for some other reason. Coincidentally, before increasing production, the plant replaces robotic applicator guns that apply paint to the vehicle. This replacement is considered routine within the

industry as paint applicators degrade over time. The new applicators do not increase emissions per hour; indeed, they may decrease the emission rate because more efficient applicators decrease the amount of paint required per vehicle. But if production increases, total annual emissions may increase, although remaining within the unit's originally permitted levels (which were based on the unit's actual emissions capacity). Because EPA takes the position (and the district court concurs) that the plant's pre-existing capabilities are not relevant (*i.e.,* that the increase in hours of operation exclusion does not apply), this common-place activity could well trigger NSR.

C. EPA's litigating position in this case could lead to simple (and previously permitted) adjustments to product mixes or minor pump replacements in batch processes at specialty chemical and pharmaceutical production plants being considered subject to new source review even though emissions rates remain within contemplated and permitted levels.

As with the automobile manufacturing industry, EPA's position in this case simply ignores the fundamental way that batch processing plants are permitted by regulatory agencies including EPA. Batch processes are common in the specialty chemical and pharmaceutical industries. These operations consist of many pieces of equipment operating in sequence to produce a batch of chemicals or medicines. The fundamental purpose of these operations is to use a given set of equipment components in a variety of physical configurations to make a variety of different products and product mixes. In general, batch production facilities are capable of making many different products with minimal, if any, physical alteration.

The facility generally receives a permit based on a process with the highest expected emissions per batch and the maximum number of batches made in a year. The emissions from this operation during any given period of time, however, may be less than the emissions for the batch used for permitting, and will vary significantly over time because the equipment may produce a variety of chemicals or medicines. Each product has a unique emission profile based on the chemicals used in the process, the length of time it takes to produce a batch, and the specific actions taken to make the chemical or medicine. In addition, there may be significant periods of time when the production equipment is not operating, such as the time between switching from one product to another. If a batch production facility happens to change from a lower emitting product to a higher emitting one (because of changes in the marketplace or any other reason) after a repair to or replacement of some of the production equipment, then a question may arise whether the repair or replacement caused the increase because it allowed the production equipment to continue in operation.

For example, the facility might replace a pump needed to keep a batch process running. The question could then arise whether the replacement requires NSR if it is followed by an alteration of the product mix that resulted in higher emissions than a prior product mix on an annual basis but still within its actual emissions capacity. While total annual emissions will vary by product mix, and will be higher for some than for others, hourly emissions capability would not change and the source would stay within the permitted

capacity. Under the position adopted by EPA's litigators and the district court, this activity too would likely have triggered NSR, even though the emissions capability did not change (*i.e.*, there were no new emissions) and remained consistent with the permits that were applied for, reviewed by the regulatory agency and issued.

These examples, a few of many, show that American industry could not continue to operate reliably or to compete in the international market place under the EPA enforcement interpretation adopted by the district court.

II. In Addition to Leading to Absurd Results, EPA's Litigating Position and the District Court's Decision Are Inconsistent With the Statute and Congressional Intent.

In any of the thousands of situations like those described in Section I that arise every year in industrial America, the person deciding whether NSR is needed must address at least two issues: 1) will the repair or replacement constitute a "change"; and 2) if so, will the repair or replacement cause an emissions increase? EPA's litigating position and the district court opinion ignore how industrial plants are permitted and how NSR analyses have been conducted since the regulations governing this case were issued in 1980.

The following discussion explains that under EPA's litigating position and the district court's decision, none of these questions has a simple answer, with the result that, regardless of the ultimate outcome, uncertainties abound, lawyers become involved, and the prudent company may at least have to forego the repair or replacement pending completion of a time-consuming process of seeking an EPA ruling (or forego the repair or replacement altogether if the

plant cannot afford to take the time and can "scrape by" without it). When this effect is multiplied by the thousands of times a year that the kind of repair and replacement projects we describe occur, the potential for a serious impact on industrial operations is apparent. This is not how the 1980 NSR rules were applied in practice by EPA and should not be a position validated by a court reviewing the actions of a plant that only sought to maintain its actual operating capabilities.

These issues continue to be relevant for industry generally in part because EPA is conducting on-going, sector-based enforcement initiatives targeting several industries, including utilities, the pulp and paper industry, the refining industry, and others under the 1980 rules. EPA has further stated a goal of expanding its program to include three more industry sectors by the end of fiscal year 2006.[2] If the mistaken litigation method of measuring an emissions "increase" espoused by EPA's litigators and adopted by the district court is sustained, this continues to place repair and replacement projects undertaken over the past 25 years at potential risk of being turned retroactively into NSR triggering events.[3]

With that background, we address two questions a company must address when considering one of the examples described above, or any other

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[2] EPA Enforcement Priority, *supra* note 1, at 3.

[3] We note that EPA often speaks with two voices on applicability issues, putting industrial sources in a difficult position in applying its rules: the voice of the program office that issues the rules and explains what it intends them to do and the voice of the enforcement litigators at the agency that come in years later to allege violations of those same rules.

similar industrial repair or replacement project: whether the repair or replacement is a "change; and whether the repair or replacement will cause a significant net emissions increase. In each case, we show that if EPA's litigating position in this case is sustained, there is a substantial probability that these questions will be answered in a manner requiring NSR for commonplace industrial repair and replacement activities.

A. EPA's rules on whether a repair or replacement constitutes a "change" would not prevent the impermissible extension of new source review caused by EPA's litigating position and the district court's decision.

The Clean Air Act defines modification as "any physical change" that increases emissions. The term "physical change" has been interpreted broadly. *New York v. EPA*, __ F.3d __, 2006 WL 662746, at *4 (D.C. Cir. Mar. 17, 2006). Under a broad interpretation, the "potential" reach of this term could mean that even "the most trivial activities—the replacement of leaky pipes, for example—may trigger the modification provisions *if* the change results in an increase in the emissions of a facility." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990) (emphasis added). Regardless of how broadly the term "any physical change" is interpreted, NSR is statutorily limited to those activities that increase emissions. In this case, EPA is seeking to expand the emissions increase test to bring within the scope of NSR any repair or replacement (*e.g.*, of a leaky pipe) that enables the plant to maintain or accommodate increased production within its existing permitted emissions capacity, even though the hourly emissions rate stays the same or declines.

EPA has previously taken steps to implement the limited purpose of the NSR program consistent with its statutory mandate by adopting practical regulatory exclusions. For example, as this Court recognized, to limit the potential reach of this provision in accordance with the statute, EPA adopted a regulatory exclusion for "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category." *Wisconsin Elec. Power Co.*, 893 F.2d at 905 (quoting 40 C.F.R. §§ 60.14(e) (1988) (New Source Performance Standards ("NSPS") program), 52.21(b)(2)(iii) (1988) (Prevention of Significant Deterioration program)). Due to serious problems that emerged in applying this so-called "RMRR" exclusion, EPA adopted amendments to its rules in 2003 to clarify and expand its scope. 68 Fed. Reg. 61,248 (Oct. 27, 2003). These amendments were vacated by the D.C. Circuit, however, last month. *New York*, *supra*. In light of the continuing lack of clarity regarding the proper scope of the RMRR exclusion, ensuring that EPA applies the proper test for emissions increase under the 1980 rules and the statute generally has even more importance to industry.[4]

[4] If the D.C. Circuit's decision is read to allow only trivial projects to fall under the "routine" exclusion, then the "emissions increase" standard may be the *only* element that prevents NSR from applying to many commonplace maintenance and repair projects that do not increase a facility's actual emissions capacity. Thus, its proper interpretation by this Court is critical. It is worth noting that the D.C. Circuit recognized the importance of the emissions increase test in determining which projects require NSR, placing great reliance on the fact that there must also be an increase in emissions for a "change" to trigger NSR. *See New York*, 2006 WL 662746, at *5 ("The expansive meaning of 'any physical change' is strictly limited by the requirement that the change increase emissions.").

In October of last year, in response to the Fourth Circuit's decision in *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3407 (U.S. Dec. 28, 2005) (No. 05-848), EPA proposed a rule which would bring the "increase" measurement back in line with the hourly rate measurement used for NSPS, thus largely bypassing the difficulties caused by broad interpretations of "change." 70 Fed. Reg. 61,081, 61,082-83 (proposed Oct. 20, 2005). However, notwithstanding the fact that the court's interpretation in *Duke Energy* was of broadly applicable statutory and regulatory provisions and that the reasoning EPA used to justify its proposed rule apply with equal force to other industrial operations, EPA confined its proposal to electric generating units (although soliciting comment on whether it should be extended to non-utility sources). *Id.* at 61,083, 61,092.

In the proposal, EPA explained that its current approach to the routine maintenance exclusion "discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways." *Id.* at 61,094. This, EPA explained, does not advance the policy of the NSR program, which "is not to limit productive capacity of major stationary sources, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so." *Id.* at 61,083. This reasoning explains why the position adopted by EPA's litigators and the district court in this case is inconsistent with the NSR provisions of the Clean Air Act and cannot stand. EPA's litigating position, if upheld, would limit the productive capacity of major

stationary sources and would require installation of expensive controls when it otherwise would not make sense to do so—during common and frequently unscheduled maintenance activities and hardly what could be considered "major modifications" of a plant.

EPA's own proposal has thus recognized that the result of its interpretations of the 1980 rules in this litigation could be to extend NSR to common industrial maintenance and repair practices that merely maintain existing operating capabilities at a plant, well beyond the scope of Congressional intent.

B. EPA's position on whether a repair or replacement causes a subsequent emissions increase would not prevent the impermissible extension of new source review caused by EPA's litigation position and the district court's decision.

The Clean Air Act requires NSR only when a physical change at a source "increases" emissions. 42 U.S.C. § 7411(a)(4). EPA recognizes that this language requires "a causal link between the proposed change and any post-change increase in emissions." 67 Fed. Reg. 80,185, 80, 203 (Dec. 31, 2002). If EPA confined its review to increases in the hourly emissions rate, as it does under NSPS, the required causal link typically would exist only if the change makes the process dirtier—a relatively easy determination, and one that fully accords with the purpose of NSR under the Clean Air Act. But EPA's position in this case greatly complicates the causation determination.

The causation requirement has been an integral part of the Clean Air Act's NSR provisions and EPA's implementing regulations since the 1970s. EPA has recently confirmed the causation requirement. Indeed, the current

EPA regulations (as amended in 2002) implement that statutory requirement, *inter alia,* by excluding emissions that the emissions unit "could have accommodated during the [baseline] period . . . and that are also unrelated to the particular project, *including any increased utilization due to product demand growth*." 40 C.F.R. § 52.21(b)(41)(ii)(*c*) (emphasis added).

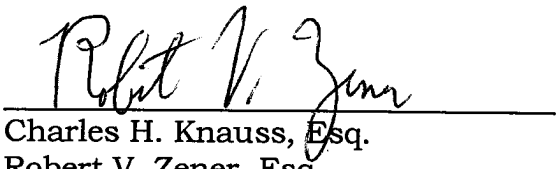
However, there are critical ambiguities in EPA's interpretation, which make it difficult for a company to rely on it in most situations similar to the examples we have described. For example, if an emissions increase results from production growth that follows a repair or replacement project, even though the production growth results from demand, the question arises whether there is a "relationship" between the repair or replacement and the emissions increase, and if so, whether NSR applies. While we believe the proper answer is "no," EPA has not defined what the "relationship" must be, if one is required to trigger NSR. And its litigating position in this case appears to be that any emissions increase preceded by a repair or replacement has a sufficient "relationship" to require NSR even though it resulted from demand growth. In light of the ambiguities and EPA's litigation position, the manufacturing plant in the first example, that uses longer lasting bearings to extend the time period between bearing replacements, cannot confidently avoid NSR by attributing a subsequent production and emissions increase to demand growth (although some demand must exist for its increased production). Similarly, the automobile company in the second example, and the pharmaceutical or specialty chemical company in the third, cannot confidently

assume that replacement of the robot arm or repair or replacement of a faulty pump to keep the plant running does not cause a subsequent change in production and the resulting emissions "increase," even though the production increase results from increased demand for the automobile model or drug or specialty chemical.

III. CONCLUSION

For the foregoing reasons and for the reasons stated in Cinergy's brief, the district court's decision should be reversed. EPA's recent regulatory actions only serve to confirm that EPA has long recognized the limited scope Congress intended for the NSR program. The district court's decision expands NSR beyond that intended scope. Thus, this Court should find that NSR is triggered only by activity that causes an increase in the actual emitting capacity (measured in terms of hourly emission rate) of an existing facility.

Respectfully submitted,



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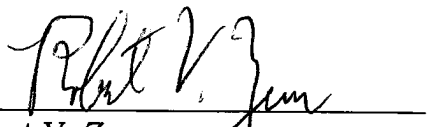
CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 4,265 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 12-point font Bookman Old Style.



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