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EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**DINÉ CITIZENS AGAINST RUINING OUR
ENVIRONMENT, et al.,**

Plaintiffs,

v.

**ARIZONA PUBLIC SERVICE COMPANY, et
al.,**

Defendants.

Case No. 1:11-cv-00889-BB-KBM

**REPLY BRIEF IN SUPPORT OF DEFENDANTS'
RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS'
FIRST AND SECOND CLAIMS FOR RELIEF**

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Act	Clean Air Act
APS	Arizona Public Service Company
BART	Best Available Retrofit Technology
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
FCPP	Four Corners Power Plant
Four Corners	Four Corners Power Plant
NAAQS	National Ambient Air Quality Standards
NOI	Notice of Intent to Sue
NOx	Nitrogen Oxides
NSR	New Source Review
NSR programs	the Prevention of Significant Deterioration Preconstruction Permit Program and the Non-attainment New Source Review Program
PM	Particulate Matter
PSD	Prevention of Significant Deterioration
PTE	Potential-to-Emit
SCR	Selective Catalytic Reduction
SIPs	State Implementation Plans
SO ₂	Sulfur Dioxide

Plaintiffs' claims that Defendants violated CAA § 165(a) a quarter-century ago by replacing the pulverizers at Four Corners Units 4 and 5 are untimely, because those claims "first accrued" when construction began. And the claims as to the 2008 and 2010 projects fail because Plaintiffs do not allege these projects caused a significant emissions increase, a required element of any claim under the 2002 NSR Rules that a maintenance project was a "major modification".

In response, Plaintiffs ask the Court to resuscitate the 1980s claims through a "continuing violation" theory that has been rejected by a resounding majority of courts and is inconsistent with Tenth Circuit law. They also invent an equitable tolling theory that is not alleged in the complaint and lacks factual or legal support. As to the 2008 and 2010 projects, Plaintiffs do not dispute that the projects have not caused a significant emissions increase. Instead, they invent a system wholly at odds with the text of the rules under which an operator that allegedly fails to comply with notice and recordkeeping requirements is subject to the "potential-to-emit" (PTE) test. PTE has never been the test for judging replacement projects at existing units. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (*WEPCo*). In the 2002 NSR Reform Rules, EPA specified that the actual-to-projected-actual test is the default test "for projects that only involve existing emissions units," 40 C.F.R. § 52.21(a)(2)(iv)(c), and made crystal clear that it is the *source operator* that may *elect* to apply instead the PTE test. Neither the text of the rule nor the exhaustive rulemaking record contemplates Plaintiffs' "PTE as punishment" theory.

Reply to Plaintiffs' Assertions Regarding Factual Background

Plaintiffs expound at length on the harmful effects of certain pollutants emitted from coal-fired power plants, but fail to note that the Four Corners area is meeting the NAAQS for all relevant NSR pollutants.¹ NAAQS must be set at levels that protect human health with "an ade-

¹ EPA, *The Green Book Nonattainment Areas for Criteria Pollutants* (as of Mar. 30, 2012), available at <http://www.epa.gov/airquality/greenbk>.

quate margin of safety.” *See* 42 U.S.C. § 7409(b). If the NAAQS in effect are not stringent enough for Plaintiffs, their recourse is to challenge the NAAQS or ask EPA to revise them.

Plaintiffs also invite the Court to infer that, in the absence of NSR, older plants would never implement controls that would achieve emission reductions. But “the primary purpose of the major NSR program is *not to reduce emissions*, but to balance the need for environmental protection and economic growth.” 70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005) (emphasis added). Other CAA mechanisms—such as SIPs specifically designed to meet NAAQS, 42 U.S.C. § 7410; visibility programs, *id.* §§ 7491-7492; and the acid rain program, *id.* §§ 7651-7651o—are vehicles for achieving emissions *reductions*. These programs have worked well to improve air quality and reduce emissions from the utility sector specifically over the last three decades.²

Under one of the CAA programs listed above, the visibility program, EPA has proposed a rule that would require Four Corners to install selective catalytic reduction (SCR) for NO_x control—the very type of technology that Plaintiffs seek here—sometime in the next 4 to 8 years. Plaintiffs seek in this lawsuit essentially to bypass that rulemaking and have this Court order installation of this extremely costly equipment now. Plaintiffs say this would benefit the Navajo Nation economically. Pls.’ Br. at 5. The Navajo Nation disagrees. In its comments on EPA’s proposed rulemaking, the Navajo Nation sharply criticized EPA’s plan, and faulted it for “casually dismiss[ing] a real likelihood of disastrous economic impacts to the Navajo Nation and Navajo people” should it implement the costly SCR requirement too soon and potentially force Defendants to shut down the plant.³ Shutting down the plant would deprive the Navajo Nation of a

² *See, e.g.*, EPA, EPA-454/R-12-001, OUR NATION’S AIR: STATUS AND TRENDS THROUGH 2010 at 1-2 (Feb. 2012), available at <http://www.epa.gov/airtrends/2011/report/fullreport.pdf>. Defendants have substantially reduced emissions at Units 4 and 5 over the years in response to these programs. Units 4 and 5 now employ low NO_x burners, baghouses to control PM, and tray tower flue gas desulfurization to address SO₂. *See* EPA, TSD for Proposed Rule: Source Specific FIP for Implementing BART for FCPP at 40-42 (Oct. 2010), available at <http://www.regulations.gov>, EPA-R09-OAR-2010-0683-0002.

³ Navajo Nation Comments on the October 19, 2010 Notice of Proposed Rulemaking and the Febru-

major source of jobs and would force closure of the Navajo Mine. *Id.* at 4-5. “Revenue and job losses of that magnitude would be cataclysmic for the Navajo Nation and its People.” *Id.* at 5.

Argument

I. Plaintiffs’ Claims Respecting the 1980s Projects Are Time-Barred.

A. A Violation of § 165(a) Is Singular, Not Continuing.

Plaintiffs first argue that violations of § 165(a) are “continuing violations” that occur not only during construction, but during subsequent operation. This is the same theory the Government has advanced time and again in its enforcement initiative cases. A resounding majority of courts has rejected it for the reasons Defendants identify in their response to the Government’s *amicus brief*. See Resp. to DOJ Amicus Br. at 2-5; see also Defs.’ Br. at 8-9 n.7 (Doc. 35).

Plaintiffs suggest that the minority of courts that has adopted their theory is not as diminutive as Defendants suggest, *see id.* at 9 n.8, because Defendants did not cite the decision in *U.S. v. Cemex, Inc.*, 2012 WL 1079107 (D. Colo. Mar. 30, 2012) and two other earlier decisions by other courts.⁴ And Plaintiffs suggest that cases in the substantial majority can be distinguished because they “involved state-specific regulatory schemes that have no functional equivalent on tribal land.” Pls.’ Br. at 13. Neither of these arguments has merit.

First, the list of the relatively few decisions adopting Plaintiffs’ theory actually overstates its support. Three of them were issued by the same judge,⁵ and the lead decision from that judge has been rejected by virtually every other court because it “failed to conduct any type of in-depth

ary 25, 2011 Proposed Supplemental Rulemaking for Implementing BART at Four Corners Power Plant at 8 (June 2, 2011), available at <http://www.regulations.gov>, EPA-R09-OAR-2010-0683-0223.

⁴ Counsel was unaware of the *Cemex* decision when Defendants filed their motion to dismiss, and the omission of *U.S. v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 970, 975 (E.D. Ky. 2007) and *U.S. v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1166 (D. Colo. 1988) was an oversight. But even counting these cases, Plaintiffs’ position is still easily the minority view. *Cemex*, 2012 WL 1079107, at *6.

⁵ *U.S. v. Am. Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060 (S.D. Ohio 2001); *Sierra Club v. DP&L, Inc.*, 2005 WL 1972549 (S.D. Ohio); *U.S. v. Ohio Edison Co.*, 2003 WL 23415140 (S.D. Ohio).

review of the relevant statutes.” *U.S. v. Ill. Power Co.*, 245 F. Supp. 2d 951, 956 n.1 (S.D. Ill. 2003); *see also, e.g., New York v. AEP*, 2006 WL 1331543, *4 (S.D. Ohio 2006). Two other cases involved unique provisions in governing SIPs not found in the federal rules that govern here. *See NPCA v. TVA*, 480 F.3d 410, 417 (6th Cir. 2007) (*NPCA-6*) (Tenn. SIP); *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 651 (M.D.N.C. 2003) (N.C. SIP). And *Cemex* cannot be added to the tally, because it did not hold a violation of § 165(a) is continuing. Instead, in dicta and without any statutory analysis, it postulated that “the continued emission of pollutants that would otherwise be limited had the source complied with the [PSD Program] could be considered a repeated injury.” 2012 WL 1079107, at *6. But the court did not rely on the continuing violation theory—it instead ruled that the evidence might support equitable tolling.⁶ *Id.* at *7.

Second, Plaintiffs are simply wrong to suggest that cases like *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010) involved “state-specific regulatory schemes” that impose obligations different from those that govern on tribal land. *Otter Tail* involved precisely the same federal rules as here. *See id.* at 1012 (“At all times relevant to this case, South Dakota had not yet incorporated approved PSD provisions into its SIP and the federal PSD regulations set forth at 40 C.F.R. § 52.21 therefore govern this case.”). And even for cases that involve SIP provisions, Plaintiffs do not explain how these provisions differ in any way. In fact, all SIPs must meet the same minimum federal requirements, and most parrot almost word-for-word the default federal rules. If there are any cases in which the result depended on peculiar SIP provisions, they are the cases Plaintiffs rely upon. *See NPCA v. TVA*, 502 F.3d 1316, 1323 (11th Cir.

⁶ To the extent *Cemex* suggests that a violation of § 165(a) is continuing, it is at odds with Circuit authority and should not be followed. *See Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011) (“[T]he [continuing violation] doctrine is triggered by continual unlawful acts, not by continual ill effects from the original violation.”) (quotation marks omitted); *Kaw Valley Elec. Coop. Co. v. Kan. Elec. Power Coop., Inc.*, 872 F.2d 931, 933 (10th Cir. 1989) (noting that acts committed within the limitations period must be “somehow more than the abatable but unabated inertial consequences of some pre-limitations action.”).

2007) (*NCPA-11*) (distinguishing *NPCA-6* and *Duke*).

B. The Concurrent Remedy Doctrine Bars Plaintiffs’ Equitable Claims Because Those Claims Are Based on the Same Set of Facts As Their Legal Claims.

Plaintiffs argue that their claims for injunctive relief are not time-barred under the concurrent remedy doctrine because “injunctive relief, which stems from the once-exclusive jurisdiction of the equity courts, is not ‘concurrent’ with a legal remedy.” Pls.’ Br. at 14. In support, Plaintiffs observe that the concurrent remedy doctrine is inapplicable “‘where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right.’” *Id.* (quoting *Russell v. Todd*, 309 U.S. 280, 289 (1940)). Plaintiffs then assert conclusorily that “[u]nder the Act’s citizen suit provision, Plaintiffs’ right to injunctive relief (‘to enforce such emission standard or limitation’) is an equitable remedy that is wholly independent of their right to seek civil penalties, which is a legal remedy.” *Id.* (citing 42 U.S.C. § 7604(a)). Plaintiffs thus contend that, because the citizen suit provision gives the Court the power to impose both legal and equitable relief, the injunctive relief they seek is “exclusive,” and the concurrent remedy doctrine is inapplicable.

Plaintiffs’ argument is badly flawed. Legal and equitable remedies are concurrent when “an action at law or equity could be brought on the same facts.” *U.S. v. Telluride Co.*, 146 F.3d 1241, 1248 n.12 (10th Cir. 1998); *see also Otter Tail*, 615 F.3d at 1018-19 (collecting cases). “If ... the sole remedy is not in equity and an action at law can be brought on the same facts, the remedies are concurrent.” *Nemkov v. O’Hare Chicago Corp.*, 592 F.2d 351, 355 (7th Cir. 1979). Thus, because Plaintiffs’ equitable remedy is based on the same facts—Defendants’ alleged failure to obtain permits for the 1980s projects—as their legal remedy, the concurrent remedy doctrine applies. *See Otter Tail*, 615 F.3d at 1018-19; *NPCA-11*, 502 F.3d at 1326-27.

The three district court decisions cited by the Plaintiffs are inapplicable here. *See* Pls.’ Br. at 14-15 (citing *U.S. v. Cinergy*, 397 F. Supp. 2d 1025, 1032 (S.D. Ind. 2005); *U.S. v. Mid-*

west Generation, LLC, 694 F. Supp. 2d 999 (N.D. Ill. 2010); *Fed. Election Comm'n v. Christian Coal.*, 965 F. Supp. 66, 72 (D.D.C. 1997)). Each involved an enforcement suit brought by the Government and thus fell within the recognized exception to the concurrent remedy doctrine for Government claims for equitable relief. *See Telluride*, 146 F.3d at 1248-49. The Plaintiffs are not government agencies, so that exception does not apply.⁷ *See NPCA-11*, 502 F.3d at 1327.

C. Equitable Tolling Is Inapplicable Here.

Plaintiffs also assert, for the first time and with no factual basis, that Defendants fraudulently concealed the mid-1980s projects making equitable tolling appropriate. To begin, equitable tolling is not allowed in suits to recover civil penalties for regulatory violations governed by 28 U.S.C. § 2462. *See 3M Co. v. Browner*, 17 F.3d 1453, 1461-62 (D.C. Cir. 1994); *cf. e.g., SEC v. Kovzan*, 807 F. Supp. 2d 1024, 1031-34 (D. Kan. 2011) (acknowledging *3M*, but holding that equitable tolling under § 2462 was appropriate where the underlying claim sounds in fraud). Further, even where equitable tolling based on fraudulent concealment is allowed, the complaint must allege the factual basis for equitable tolling. *Dummar v. Lummis*, 543 F.3d 614, 621-22 (10th Cir. 2008); *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 336-37 (10th Cir. 1994).

Plaintiffs' complaint is utterly devoid of any allegation that Defendants fraudulently concealed the pulverizer projects. Any such allegation would be wildly implausible. Several defendants are public utility companies that must obtain regulatory approval to recover through rates the cost of most capital projects. Further, it is inconceivable that the pulverizers would have been replaced in the dead of night, and without anyone knowing about them. Indeed, the very document that Plaintiffs append to their NOI appears to be a marketing document from one

⁷ The *Cinergy* and *Christian Coalition* decisions suggest in dicta that equitable and legal remedies based on the same set of facts are not "concurrent," but each of those decisions ignored governing circuit precedent to the contrary. *See Nemkov*, 592 F.2d at 354-55; *Saffron v. Dep't of the Navy*, 561 F.2d 938, 943 (D.C. Cir. 1977). Any "limited support" these cases lend to Plaintiffs' argument pales in comparison to the "great weight of authority" that rejects it. *See Otter Tail*, 615 F.3d at 1018-19 (collecting cases).

of the suppliers involved in the pulverizer replacement—a curious tactic for a “secret” project.

II. Plaintiffs Cannot Allege Facts Essential to Their Claims as to the 2008/2010 Projects.

The 2002 NSR Reform Rules state in the clearest possible terms that a project is a major modification for a regulated NSR pollutant “if it causes [both] . . . a significant emissions increase . . . and a significant net emissions increase.” 40 C.F.R. § 52.21(a)(2)(iv). A project “is *not* a major modification if it *does not cause* a significant emissions increase.” *Id.* (emphases added); *see U.S. v. DTE Energy Co.*, 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011). Plaintiffs have not alleged facts that plausibly establish that emissions increased after the 2008 and 2010 projects.

Plaintiffs do not dispute key elements of Defendants’ argument. They do not dispute that they failed to allege an increase in emissions; that, under *Twombly* and *Iqbal*, they were required to allege these facts to adequately support their claims; or that the emissions data available in the public domain conclusively refute such a claim. Instead, they argue post-project data are irrelevant, and the projects must be judged by the PTE standard, under which pre-project actual emissions are compared to the unit’s PTE (i.e., emissions unrealistically assuming continuous operation 24 hours per day, 365 days per year). This is so, Plaintiffs contend, because Defendants failed to comply with the 2002 Rules’ recordkeeping and reporting requirements.

A. PTE Has Never Been the “Default PSD Analysis.”

Plaintiffs’ premise is that PTE “is the default PSD analysis that has been in place since 1980.” Pls.’ Br. at 17. That default rule applies, say the Plaintiffs, unless source operators opt into the so-called “reasonable possibility” test—“an alternative method to evaluate PSD applicability” that, according to Plaintiffs, was promulgated through EPA’s 1992 and 2002 revisions to the NSR rules. *Id.* at 17-18. Under this test, Plaintiffs claim, source operators that project that their projects create a “reasonable possibility” of an emissions increase must provide notice to EPA before commencing construction. *See id.* If an operator does not comply, say the Plaintiffs,

then the project is judged by the PTE standard. *Id.* at 19.

Plaintiffs' theory is nothing short of fantasy. To begin, the PTE standard has *never* been used to judge replacement projects at *existing* units. Under every iteration of the rules since 1980, PTE was used only for a unit which "has not begun normal operations." 40 C.F.R. § 52.21(b)(21)(iv).⁸ EPA briefly flirted with the idea that replacement projects at existing units could be judged by the PTE standard, but the Seventh Circuit in *WEPCo* famously rejected that theory,⁹ and EPA quickly abandoned in its "WEPCo Rule" the notion that PTE could be used as a test for any projects at existing power plants. *See* 57 Fed. Reg. 32,314, 32,317, 32,323 (July 21, 1992). And in the dozens of cases EPA's enforcement arm has brought under the misguided enforcement initiative, EPA has never sought to apply PTE to existing projects, and no court has adopted it. *See U.S. v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 863 (S.D. Ohio 2003) ("[A]ny use of the actual to potential to emit test is not legally supportable."); *see also NPCA v. TVA*, 618 F. Supp. 2d 815, 829-30 (E.D. Tenn. 2009) (rejecting argument that the PTE test applied).

Plaintiffs also grossly mischaracterize the changes to the NSR Rules effected in 1992 and 2002. First, there is no "reasonable possibility test" for determining PSD applicability. The "new" PSD applicability test introduced in 1992 and expanded in 2002 is the "actual-to-projected-actual" test now codified at 40 C.F.R. § 52.21(b)(41)(ii)(a) through (c). The reasonable possibility notice and recordkeeping rules—which were promulgated in 2002, not 1992 as Plaintiffs suggest—only apply *after* an operator has concluded *using the actual-to-projected-actual test* that there will be no significant increase in emissions, but that emissions nonetheless

⁸ Under the 2002 rules, an operator "*may elect* to use the emissions unit's potential to emit" in lieu of projected actual emissions. *See* 40 C.F.R. §52.21(b)(41)(ii)(d) (emphasis added).

⁹ *See* 893 F.2d at 916-19. The PTE test always projects an increase in emissions for power plants, because power plants do not operate continuously. Any baseline period therefore will reflect periods of planned or forced outages and lack of demand that will cause the unit to operate at less-than full capacity. So even if no change is made to the unit at all, the PTE test would project an increase in emissions merely by assuming continuous operation in the future.

will increase above one of two “reasonable possibility” thresholds. *See* Defs.’ Br. at 18-20.

Second, Plaintiffs mischaracterize the “reasonable possibility” requirements by suggesting that the operator always must “provide [to EPA] a description of the proposed modification and provide post-project emission projections to EPA *before* commencing construction of its project.” Pls.’ Br. at 18 (emphasis in original). That requirement, set forth in 40 C.F.R. § 52.21(r)(6)(ii), only applies if the operator, using the actual-to-projected-actual test, projects an increase of more than 50% of the significance level even after accounting for causation. *See id.* § 52.21(r)(6)(vi)(b). If, as Defendants concluded here with respect to the 2010 Unit 4 projects, reasonable possibility is triggered before (but not after) accounting for causation, then the requirements specified at subsections (r)(6)(ii) through (v) do not apply. *Id.* The source need only keep a record of its preconstruction analysis.

Finally, nothing in either the rules or the voluminous rulemaking record indicates that PTE can be used to judge a project if the *operator* does not *elect* it and instead allegedly fails to comply with its § 52.21(r)(6) obligations. If EPA intended to implement such a remarkable rule, it would have said so. Indeed, EPA discussed the PTE test extensively in its response to comments on the proposed 2002 rule and not once made any mention of using PTE in this way. *See* Response to Comments TSD at I-4-7 to I-4-9.¹⁰ In support of their theory, Plaintiffs cite EPA statements in 2007 that “the ‘reasonable possibility’ requirements only apply if such a project

¹⁰ In fact, shortly after the 2002 rules were promulgated, opponents filed an emergency motion to stay and argued *inter alia* that the “reasonable possibility” requirement was unenforceable. EPA in response discussed what happens if those recordkeeping requirements are violated and did not mention any punitive application of PTE. *See* EPA’s Resp. to Emerg. Mot. for Stay, at 20, *New York v. EPA*, No. 02-1387 (D.C. Cir. Feb. 21, 2003) (“EPA believes that there will be a considerable number of cases in which there will be [a] reasonable possibility that a significant increase will occur. In such cases, where a source does not maintain records, the source will have violated ***the record keeping requirements of the NSR Rule.***”) (emphasis added, citations omitted). That makes sense. Failing to comply with recordkeeping requirements logically may result in enforcement of those requirements. But it would be incredible if instead such a recordkeeping offense would result in the “nuclear option” of subjecting the source to the PTE test—one that in all but the most unusual cases would automatically trigger NSR.

relies on a projection of post-project emissions (as opposed to[PTE]) in order to demonstrate that the project is not part of a major modification.” Pls.’ Br. at 19 (citing 72 Fed. Reg. 10,445, 10,447 (Mar. 8, 2007)); *see also id.* at 20 (citing 67 Fed. Reg. 80,186, 80,193 (Dec. 31, 2002)). But EPA in this passage (and others like it) merely states that the “reasonable possibility” requirements apply only if the operator uses the actual-to-projected-actual test. It is a logical fallacy to infer from that unexceptional proposition (as Plaintiffs do) the converse proposition: that an operator that uses the actual-to-projected-actual test will have that projection judged by the PTE standard if it fails to comply with the recordkeeping requirements.

B. Plaintiffs Have Not Alleged That Defendants Failed to Comply with the 2002 Rules’ Recordkeeping and Reporting Requirements.

Plaintiffs couple their erroneous reading of the 2002 rules with an erroneous reading of the Defendants’ preconstruction projections for the 2008 and 2010 projects. Specifically, Plaintiffs contend (for the first time) that “APS knew that its modifications carried much more than a ‘reasonable possibility’ of a significant emissions increase, yet failed to provide EPA with the required applicability analysis and subsequent emissions reporting.” Pls.’ Br. at 19.¹¹ Plaintiffs are wrong—Defendants’ projections provide a textbook example of how an operator meets its preconstruction obligations under the 2002 rules.¹² But whether Defendants complied with the

¹¹ Plaintiffs complain that Defendants failed to include the spreadsheets showing the calculations underlying the preconstruction analyses for the 2008 and 2010 projects. Those calculations are not relevant to the motion here, so Defendants excluded them pursuant to Local Rule 10.5. But in response to Plaintiffs’ complaint, Defendants enclose those calculations at Exhibits B and C.

¹² In both projections, Defendants used the actual-to-projected actual test; they calculated baseline emissions using a consecutive 24-month period; projected actual emissions based on all available information, and compared the two figures. For the 2008 projects, Defendants concluded emissions would increase only for CO, and that increase would be less than 50% of the significance level. *See Spell Aff. Ex. 11* at 2. Accordingly, the 2008 projects did not trigger PSD permitting or either set of “reasonable possibility” requirements. Still, Defendants went beyond the rules and kept a record of their analysis.

For the 2010 projects, Defendants did project (before accounting for causation) that post-project emissions of NO_x would exceed baseline levels by 85 tons, more than 50% of the significance threshold. *Id. Ex. 10* at 2. But after accounting for causation by excluding “that portion of the unit’s emissions following the project that [the unit] could have accommodated during the [baseline] period ... and that are

“reasonable possibility” requirements is irrelevant, because Plaintiffs do not allege that Defendants violated those requirements. They instead allege Defendants constructed a “major modification” without a permit. And to state such a claim under the 2002 rules, the Plaintiffs must allege facts showing an actual increase in emissions caused by the project.¹³ If Plaintiffs believe that Defendants have not complied with reporting requirements, that would constitute a separate claim, *see e.g.*, EPA’s Resp. to Emerg. Mot. to Stay at 20, that Plaintiffs have not alleged.

C. Plaintiffs’ Remaining Arguments Lack Merit.

The only court to address the 2002 NSR Reform Rules’ standard for judging after the fact whether a major modification has occurred applied those rules exactly as Defendants ask this Court to apply them. *DTE*, 2011 WL 3706585 at *5-*6. Plaintiffs say *DTE* can be distinguished because Michigan rules governed there. But those rules are identical to the federal rules that govern here. *See id.* (citing 40 C.F.R. § 52.21 in parallel for all important regulatory provisions).

Plaintiffs next argue the actual emissions data for Units 4 and 5, which they do not dis-

also unrelated to the particular project,” 40 C.F.R. § 52.21(b)(41)(ii)(c), Defendants concluded that the projected increase in NO_x emissions was unrelated to the project and that 92 additional tons of NO_x emissions could have been accommodated during the baseline period. *Id.* Ex. 10 at 3. So PSD permitting was not triggered, and because the project created a “reasonable possibility” of a significant emissions increase under § 52.21(r)(6)(vi)(b), but not § 52.21(r)(6)(vi)(a), only the § 52.21(r)(6)(i) recordkeeping requirement was triggered. Plaintiffs do not dispute that Defendants kept the relevant records.

¹³ Plaintiffs also argue that the regulations prohibit actual emissions from being used to determine whether a major modification has occurred. *See* Pls.’ Br. at 23 (citing 40 C.F.R. § 52.21(b)(21)(i)). Plaintiffs misread the rules. Before the 2002 revisions, the “applicability procedures” now in § 52.21(a)(2) did not exist. The rules defined major modification as a change that would result in a significant increase in “actual emissions.” Section 52.21(b)(21) defined the regulatory phrase “*actual emissions*” under various circumstances (i.e., subsection (i) defined baseline emissions, and subsection (v) defined the WEPCo Rule’s post-project “representative actual annual emissions”), and was used to derive the actual-to-projected-actual test as applied before 2002. 40 C.F.R. § 52.21 (2001). In the 2002 rules, when EPA adopted the applicability procedures now codified in § 52.21(a)(2) and created new defined terms for “baseline actual emissions” (*see* § 52.21(b)(48)) and “projected actual emissions” (*see* § 52.21(b)(41)), EPA added the clause quoted by Plaintiffs to make clear that the regulatory phrase “actual emissions” . . . , *as determined in accordance with [the rest of § 52.21(b)(21)]*,” (emphasis added), no longer would be used for applicability purposes, including the actual-to-projected-actual test at § 52.21(a)(2)(iv)(c). *See* 67 Fed. Reg. at 80,189. EPA could not delete § 52.21(b)(21) altogether because the phrase “actual emissions” continued to be used in other parts of the rules—e.g., § 52.21(b)(3).

pute, are irrelevant because the work is ongoing. This contention is facially implausible and directly refuted by Plaintiffs' own representations. First, projects in the utility industry are done in discrete outages, and projects undertaken in separate outages cannot be aggregated for NSR analysis.¹⁴ *See* 74 Fed. Reg. 2376, 2378 (Jan. 15, 2009). Second, even a cursory review of the list of projects in Plaintiff's Ex. A (Doc. 43-3) shows those projects are unrelated. For example, the list includes activities like the replacement of a vehicle and the construction of a training facility that are unrelated to the boiler and turbine work identified in the NOI. *Id.* Third, Plaintiffs themselves recognized in the NOI this work was completed in outages in 2008 (Unit 5) and 2010 (Unit 4) that are reflected in publicly-available emissions data. *See* Spell Aff. Ex. 4 (Doc. 35-2).

And even if the Court credits Plaintiffs' implausible contention, Defendants still win. Any emissions increase from an "ongoing" project that, according to Plaintiffs, will not be completed until 2014, would not materialize until more than 3 years from now. If that is the case, Plaintiffs' action is woefully premature. *DTE*, 2011 WL 3706585, at *5.

Finally, Plaintiffs assert discovery is necessary to determine precisely when these projects commenced so that they can determine whether Defendants violated the revised reasonable possibility reporting requirements that went into effect in 2007. But Plaintiffs are not suing Defendants for violating those requirements—they are suing defendants for constructing a major modification without a permit. Moreover, Defendants complied with those requirements. And, in any event, Plaintiffs' list of projects makes clear the projects occurred in 2008 and 2009. Pl. Ex. B.

Conclusion

For the foregoing reasons, the Court should dismiss Plaintiffs' First and Second Claims.

¹⁴ Indeed, in the complaints filed in the NSR enforcement initiative, no plaintiff has claimed that projects undertaken in different outages are part of a single project. *See, e.g., Ohio Edison*, 276 F. Supp. 2d at 856-74 (analyzing projects by outage); First Am. Compl. at 14-17, *Sierra Club v. DP&L*, No. 2:04-cv-905 (S.D. Ohio Oct. 13, 2006) (listing multiple projects at each unit as separate modifications).

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Certificate of Service

I hereby certify that on June 22, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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