ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 11-1101, 11-1285, 11-1328, 11-1336 (Consolidated)

CENTER FOR BIOLOGICAL DIVERSITY, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petitions for Review of Administrative Action
of The United States Environmental Protection Agency

BRIEF OF RESPONDENTS

OF COUNSEL:

Scott Jordan
U.S. Environmental Protection Agency
Office of General Counsel (2344-A)
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
Tel: 202-564-7508

DATE: May 14, 2012

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Div.

PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 353-7792

Counsel for Respondents

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondents acknowledges that Petitioner's Brief correctly sets out the parties, rulings and related cases. References to the Ruling at issue appear in the brief for the Petitioner.

CORPRATE DISCLOUSRE STATEMENT

Respondent EPA is a governmental entity for which a corporate disclosure statement is not required.

So certified this 14th day of May, 2012, by

/s/ Perry M. Rosen
Perry M. Rosen
Counsel for Respondents

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THE CHALLENGED EPA RULE

Deferral Rule: "Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs," 76 Fed. Reg. 43,490 (July 20, 2011)

RELATED EPA RULES AND ACTIONS

Endangerment Finding: "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (December 15, 2009)

Tailoring Rule: "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010)

Vehicle Rule: "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010)

RELATED CASES BEFORE THIS COURT

Endangerment Case: D.C. Circuit Case No. 09-1322, challenging the Endangerment Finding.

Tailoring Rule Challenge: D.C. Circuit Case No. 10-1073, challenging the Tailoring Rule and Timing Decision.

Vehicle Case: D.C. Circuit Case No. 10-1092, challenging the Vehicle Rule.

TERMS

Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
BACT	Best Available Control Technology
CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
CFI	Call for Information
CO_2	Carbon dioxide
CO_2e	Carbon dioxide equivalent
EPA	Environmental Protection Agency
FIP:	Federal Implementation Plan
GHGs:	Greenhouse gases
GWP:	Global Warming Potential
JA:	Joint Appendix
NAAQS	National Ambient Air Quality Standards

NAFO	National Alliance of Forest Owners
NSR:	New Source Review
PSD	Prevention of Significant Deterioration, 42 U.S.C. §§7470-7492
RTC	Response to Comments
SAB	Science Advisory Board
SIP	State Implementation Plan
TPY	Tons per year
TITLE V	42 U.S.C. §§ 7661-7661f

STATEMENT OF THE ISSUES

As part of its ongoing process to apply the provisions of two Clean Air Act permitting programs to the emissions of six greenhouse gases in a multi-stepped process, did the Environmental Protection Agency ("EPA") exceed its authority or act arbitrarily in deferring the immediate application of those permitting programs to carbon dioxide ("CO_2") emissions resulting from the combustion of biomass, in order to allow for comprehensive scientific study of how biomass emissions should – or should not – be accounted for under these permitting programs, given that under at least some circumstances combustion of biomass in substitution for the burning of fossil fuels may be carbon-neutral or even reduce the net emission of CO_2?

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in Petitioners' briefs, the Addendums thereto, and in EPA's Addendum.

STATEMENT OF THE CASE

Under the Prevention of Significant Deterioration program, 42 U.S.C. §§7470-7492 ("PSD program") of the Clean Air Act, 42 U.S.C. §§7401-7671q ("CAA" or "Act"), a source constructing a new facility or modifying an existing facility that has the potential to emit any pollutant regulated under the Act at levels of 100 (or in some cases, 250) tons per year ("tpy"), must obtain a PSD

construction permit and, as part of that process, implement the best available control technologies ("BACT") to control emissions of each pollutant subject to regulation under the Act. Under Title V of the Act, 42 U.S.C. §§7661-7661f ("Title V"), all existing facilities that have the potential to emit regulated pollutants over the statutory threshold of 100 tpy must secure an operating permit.

In a seminal decision issued in 2007, the Supreme Court determined that greenhouse gases ("GHGs"), a major component of which is CO_2, is a pollutant covered under the ambit of the CAA. Massachusetts v. EPA, 549 U.S. 497 (2007) ("Massachusetts"). Through a series of subsequent actions and findings (discussed infra), PSD and Title V became applicable to stationary source emissions of CO_2 and other greenhouse gas pollutants on January 2, 2011. Because, however, combustion processes at stationary sources result in emissions of greenhouse gases, particularly CO_2, that are vastly greater than such sources' emissions of other pollutants regulated under the CAA, applying the 100/250 tpy statutory threshold would result in coverage of millions of additional sources, thereby presenting overwhelming regulatory burdens.

Relying both on its express statutory authority to promulgate regulations to administer the PSD and Title V permitting programs, and on this Court's well-recognized precedents that permit an agency to phase-in regulatory programs in a manner that is administratively achievable, EPA sought to avoid the inevitable

regulatory gridlock that was to occur by promulgating the "Tailoring Rule." "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010). Under that Rule, EPA is phasing-in the application of PSD and Title V to CO_2 (and other greenhouse gas pollutants) through a series of steps, which began on January 2, 2011 and will continue at least through 2016, initially by raising the applicability thresholds for greenhouse gases to 100,000/75,000 tpy.

Even at these increased thresholds, States still face significant administrative burdens, requiring them to incur a projected 42% increase in administrative costs per year, merely to deal with the increased number of permit applications. 75 Fed. Reg. at 31,540 (Table V-1). Moreover, under the Tailoring Rule, EPA will, as part of Step 3 (to be implemented in 2012) and Step 4 (to be implemented in 2016), address methodologies designed to reduce the emission threshold in an effort to eventually reach the statutory level of 100/250 tpy. Thus, the permitting burden could be expected to increase commensurate with the extent to which these upcoming actions reduce the tailored thresholds toward full implementation of the statutory thresholds.

Biomass or biogenic CO_2 emissions raise particularized issues under PSD and Title V. "Biogenic CO_2 emissions are defined as emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of

biologically-based materials other than fossil fuels and mineral sources of carbon," and include, e.g., forest residue, algae, agricultural residue, crops, grasses, standing trees, and waste from landfills or water treatment. "Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs," 76 Fed. Reg. 43,490, 43,493 (July 20, 2011) (the "Deferral Rule"). (The terms "biogenic," "biomass," "bioenergy," and "biofuels" are generally used interchangeably herein). The emission of CO_2 from the combustion of biomass adds a significant level of complexity to the permitting process.

For example, the combustion of some biomass, such as agricultural residue, may be "carbon-neutral" and may even be beneficial to the control of greenhouse gases (i.e., its use could reduce the overall amount of CO_2 emitted into the atmosphere) by, for instance, replacing the combustion of fossil fuels with biofuels, which would otherwise release a matching amount of CO_2 through natural decomposition. In contrast, the use of other types of biofuels, such as a stand of mature trees that presently act as a "carbon sink," absorbing or "sequestering" CO_2 that would otherwise contribute to the greenhouse effect, might be categorized as a net contributor of CO_2, but that could depend on how quickly the trees are replaced. The factors that need to be considered in assessing the emissions from various biofuels are myriad and include, e.g., the type of biofuel, its life cycle (e.g.,

how quickly it will be replaced with new plant life), its location and transport, and how it is used to replace the combustion of fossil fuels.

Opinions on these and related factors are quite varied in the scientific community and involve complicated and interrelated biological processes. Indeed, about the only consensus in the scientific community is that the issue is complex and requires further technical analysis. Accordingly, under its multi-stepped implementation process, EPA has deferred the application of PSD and Title V to CO_2 emissions from biomass while it conducts, through an independent scientific panel, a comprehensive study of the emissions, life cycle, and other attributes and effects of the use of biomass. 76 Fed. Reg. at 43,496.

Petitioners do not contest the view that the use of at least certain types of biofuels may be carbon-neutral or even beneficial to the effort to reduce emissions of CO_2, or that the treatment of such sources is – and should be – the subject of intense scientific scrutiny and study. Petitioners contend, however, that until those scientific analyses are concluded, all biomass sources should be subjected to PSD and Title V permitting. Under Petitioners' view, EPA should regulate first; *then* determine if the entity should have been subject to regulation in the first instance.

The "regulate-first" approach would require sources to spend significant sums of money not only on the permitting process but also on control equipment or other technologies necessary to satisfy BACT requirements that may, after

completion of the scientific studies, be deemed to have been wholly unnecessary. Imposing such an obligation where the justification for sources to bear it is so muddled, could discourage construction of certain types of facilities, including, in some cases, those that could be *beneficial* to the environment by contributing to the overall reduction of emissions of CO_2. JA __ (BACT CO_2 Bioenergy Guidance at 24). Additionally, given the complicated scientific issues and questions related to the emission of CO_2 from biomass, requiring permitting authorities to integrate these unanswered scientific issues into the permitting process will clearly increase the very permitting burden that the Tailoring Rule was designed to ameliorate.

The Tailoring Rule was based on a comprehensive analysis of the infeasible regulatory burden presented by the immediate application of PSD and Title V to greenhouse gas emissions at the statutory thresholds. While EPA did not, by the time it issued the Tailoring Rule, have an opportunity to delineate the contribution to that burden added specifically by addressing biomass emissions in the permitting process, EPA advised in the Tailoring Rule that it was prepared to address that issue as part of its continuing administrative process. Taking that next step, EPA sought and reviewed public comments and scientific papers from a wide variety of sources, which culminated in the promulgation of the Deferral Rule. That Rule defers the application of PSD and Title V to the biomass emissions of CO_2 (but not other greenhouse gases) for a three-year period, to allow for the

completion of an independent scientific analysis that will answer the question of which biofuels result in net CO_2 emissions and, therefore, must be regulated under these statues.

EPA relied on several legal doctrines recognized by this Court – the "Absurd Results," "Administrative Necessity," and "Step-at-a-time" doctrines – to issue the Tailoring Rule, which allows it to manage the application of PSD and Title V in a manner that is administratively feasible. The Deferral Rule, which relies on the same doctrines, is simply the continuation of the tailoring process and is equally necessary to address the overwhelming permitting burden faced by regulatory authorities in applying these important programs to greenhouse gases and to avoid the potentially absurd result of restricting biofuel operations that actually serve to reduce emissions of the pollutant that the programs are designed to control.

STATEMENT OF FACTS

I. Statutory Background

In 1970, Congress enacted the CAA, 42 U.S.C. §§7401-7671q, establishing a comprehensive program for controlling and improving the Nation's air quality. In doing so, Congress recognized that administering such a program involved significant complexities, explaining that the CAA was enacted to address "the growth in the amount and complexity of air pollution ...." 42 U.S.C. §7401(a)(2).

See also Husqvarna AB v. EPA, 254 F.3d 195, 199 (D.C. Cir. 2001) (describing the CAA as a statutory scheme that is "unwieldy and science-driven").

A. The PSD Program and Title V

As part of the 1977 amendments to the CAA, Congress codified the PSD program, 42 U.S.C. §§7470-7479, which requires pre-construction permitting of stationary sources of air pollutants. In addition to requirements relating to the six "criteria pollutants" covered by National Ambient Air Quality Standards ("NAAQS") established under 42 U.S.C. §§7407-7410, the PSD program requires preconstruction permits for sources emitting specific amounts of "any air pollutant" regulated under the CAA.

Specifically, a "major emitting facility" may not initiate construction or make major modifications in any area covered by the PSD program (an area that is in attainment or unclassified for any NAAQS), without first obtaining a PSD permit. 42 U.S.C. §7475(a)(1). The PSD provisions define the "major emitting facility" subject to this permitting requirement as any stationary source that emits or has the *potential* to emit 100 or 250 tpy (depending on the type of source) of "any air pollutant." 42 U.S.C. §7479(1). See also 42 U.S.C. §§7479(2)(C), 7411(a)(4) (governing modifications). Thus, once a pollutant becomes regulated under some provision of the CAA, a source intending to construct or modify a facility that has the potential to emit 100/250 tpy of that pollutant must submit to

the PSD permitting process. 40 C.F.R. §§52.21(b)(50)(iv), 51.166(b)(49)(iv), 52.21(b). To obtain a PSD permit the applicant must, among other things, apply the "best available control technology for each pollutant subject to regulation under this chapter [the CAA]." 42 U.S.C. §7475(a)(4). See also 42 U.S.C. §7479(3).

Title V of the CAA establishes an operating permit program covering stationary sources of air pollutants. 42 U.S.C. §§7661-7661f. Similar to PSD, the Title V operating permit requirement applies to, among others, any "major source" within the meaning of 42 U.S.C. §7661(2), including stationary sources that have the potential to emit 100 tpy of "any air pollutant." 42 U.S.C. §7602(j). Like PSD, EPA has long interpreted this requirement to apply to any air pollutant that is actually subject to regulation under the Act. 75 Fed. Reg. at 31,553-54.

B. Implementation of CAA Requirements for Stationary Sources

Although Congress and EPA establish the air quality standards and emission control requirements to which sources must adhere, the CAA requires the States to implement many of these requirements, including PSD requirements, through state implementation plans ("SIPs"). 42 U.S.C. §7410(a)(2)(J); 40 C.F.R. §51.166. See also Pet. Br. 5. While States are afforded flexibility in how to meet the requirements of the CAA, the standards set by States may never be less stringent

than the CAA and EPA's implementing regulations, and all SIP provisions must be approved by EPA. 42 U.S.C. §7410(k)(1)(A).[1]

Under the PSD permitting process, the State permitting authority must analyze and consider, among other things, air quality impacts, visibility impacts, NAAQS compliance, and impacts on Class I areas (parkland) from the proposed project. 42 U.S.C. §7475. In addition, the State permitting authority must analyze and require the implementation of the best available control technology (BACT) that is best suited for the specific permit applicant, while considering the energy, environmental and economic impacts of applying such technology controls. 42 U.S.C. §§7475, 7479(3).

All of this permitting analysis, done on a case-by-case basis, must be completed with alacrity. 42 U.S.C. §7475(c) (requiring a PSD permit to be acted upon within one year of its submission). Similarly, Title V permitting must be administered in a prompt manner. 42 U.S.C. §7661a(b)(6) (mandating procedures "for expeditious review of permit actions"); 42 U.S.C. §7661a(b)(8) (mandating procedures "consistent with the need for expeditious action by the permitting

[1] Applicable SIP provisions for greenhouse gas PSD permitting have not yet been approved in all or portions of 16 States, therefore, the permitting in those areas is administered under a Federal Implementation Plan. EPA is the PSD permitting authority for greenhouse gases in all or portions of eight of those states, with the remaining States or portions administered by the state or a local permitting authority under a delegation from EPA.

authority on permit applications"); 42 U.S.C. §7661a(b)(9) (mandating that permit revisions occur "as expeditiously as practicable"). These provisions reflect the direction of Congress "to avoid a logjam of permit applications." 75 Fed. Reg. at 31,553 (quoting 136 Cong. Rec. 3389 (1990) (statement of Sen. Chafee)).

II. Regulatory Background

A. Application of PSD and Title V to Greenhouse Gases: The Endangerment Finding, the Vehicle Rule, and the Timing Decision

The air pollutant described as "greenhouse gases" is comprised of six gases that are emitted by human activities: carbon dioxide (CO_2); methane; hydrofluorocarbons; perfluorocarbons; nitrous oxide; and sulfur hexafluoride. 75 Fed. Reg. at 31,518-19. Because these gases have different heat-trapping capacities and atmospheric lifetimes, they are measured in tons of carbon dioxide equivalents ("CO_2e"), a metric based on each gas's comparative global warming potential ("GWP"). Id. Thus, for example, while one ton of carbon dioxide equals one ton of CO_2e, one ton of methane equals 21 tons of CO_2e. Id.

While greenhouse gases and their impacts have been a matter of concern for years, it was not until 2007 that the Supreme Court definitively determined that the statutory text of the CAA forecloses any reading that might exclude greenhouse gases from its regulatory sphere. Massachusetts, 549 U.S. at 528-29. Although Massachusetts addressed greenhouse gas emissions from vehicles under Title II of

the Act, the Court subsequently explained that it is "equally plain that the Act 'speaks directly' to emissions of carbon dioxide from" stationary sources. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2537 (2011) ("AEP").

Under the terms of Title II of the CAA, before it was obligated to regulate emissions of greenhouse gases from vehicles, EPA had to determine whether such emissions cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. Massachusetts, 549 U.S. at 532-33. On December 15, 2009, EPA made its "Endangerment Finding," concluding that atmospheric concentrations of the six heat-trapping gases that together form greenhouse gases are reasonably anticipated to endanger public health and welfare of current and future generations. 74 Fed. Reg. 66,496. Once EPA made its Endangerment Finding, the CAA required the Agency to regulate emissions of greenhouse gases from new motor vehicles. Massachusetts, 549 U.S. at 533.

Accordingly, on May 7, 2010, EPA issued the "Vehicle Rule," which establishes controls on the emission of greenhouse gases from new light-duty vehicles. 75 Fed. Reg. 25,324. Under the terms of both PSD and Title V, both of which apply to "any pollutant" regulated under the CAA, the Vehicle Rule triggered the application of PSD and Title V to greenhouse gases. See 75 Fed. Reg. at 31,519-22 (describing the "triggering" process). Through a separate interpretative action, EPA clarified that the application of PSD and Title V to the

emission of greenhouse gases from stationary sources would become effective on the date the Vehicle Rule became operative as a limit on greenhouse gas emissions from motor vehicles, January 2, 2011. 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Decision").[2]

B. The Tailoring Rule

1. The Tailoring Process

As explained in the Timing Decision, the immediate and full application of PSD and Title V permitting requirements for stationary sources emitting greenhouse gases above the statutory thresholds on January 2, 2011, would cause "significant administrative and programmatic considerations." 75 Fed. Reg. at 17,023/3. Pursuant to an extensive study of the projected administrative burdens, EPA determined that immediately applying the PSD statutory threshold of 100/250 tpy to greenhouse gas emissions would cause annual PSD permit applications to increase nationwide from 280 to over 81,000 per year, a 140-fold increase. 75 Fed. Reg. at 31,535-40, 31,554. These additional PSD permit applications would require State permitting authorities to add 10,000 full-time employees and incur

[2] The application of PSD and Title V to greenhouse gases through the above-described "triggering" process is the subject of an action presently pending before the Court challenging the Tailoring Rule and Timing Decision. See Coalition for Responsible Regulation v. EPA, Case No. 10-1073 (D.C. Cir.) ("Tailoring Rule Challenge"). Challenges to the Endangerment Finding and Vehicle Rule also are pending before the same panel hearing the Tailoring Rule Challenge. Case Nos. 09-1322 and 10-1092.

additional costs of $1.5 billion per year just to process these applications, a 130-fold increase in the costs to States of administering the PSD program. Id. at 31,539/3. Additionally, sources needing operating permits would jump from 14,700 to 6.1 million as a result of application of Title V to greenhouse gases, a 400-fold increase. Id. at 31,562. Hiring the 230,000 full-time employees necessary to produce the 1.4 billion work hours required to address the actual increase in permitting functions would result in an increase in permitting administration costs of $21 billion per year. Id. at 31,535-40, 31,577.

Based on this analysis, EPA found that applying the literal statutory thresholds (100/250 tpy) on January 2, 2011, would "overwhelm[] the resources of permitting authorities and severely impair[] the functioning of the programs." 75 Fed. Reg. at 31,514. Thus, EPA promulgated the Tailoring Rule to "phase[] in the applicability of these programs to GHG sources, starting with the largest GHG emitters." Id. This phase-in permitting process occurs pursuant to a series of steps that transpire on a designated schedule.

During Step 1, which began on January 2, 2011, only a source that already requires a PSD permit by virtue of its emissions of non-greenhouse gases already covered by the PSD program must address its greenhouse gas emissions. 75 Fed. Reg. at 31,523-24. During Step 2, which began on July 1, 2011, a source is subject to PSD permitting requirements for greenhouse gases if: (a) it meets the standards

established in Step 1; or (b) it emits over the statutory threshold of greenhouse gases (100/250 tpy) on a mass basis and also has the potential to emit over 100,000 tpy CO_2e (or 75,000 net tpy CO_2e for a modification project). Id. at 31,523/3. Similarly, sources not already subject to Title V become subject at Step 2 if they have the potential to emit over 100,000 tpy CO_2e. Id. These measures vastly reduce, but by no means eliminate, the overwhelming administrative burden on State permitting authorities. For example, at Step 2, where we are presently, EPA estimated that the number of PSD permits required for modification projects would be more than triple what it was before PSD became applicable to greenhouse gases. Id. at 31,540 (Table V-1).

The 75,000/100,000 tpy thresholds established for Steps 1 and 2 are not permanent. In the Tailoring Rule, EPA established a process whereby it would further evaluate implementation of the program and address lowering the thresholds. 75 Fed. Reg. at 31,579, 31,523/1. On March 8, 2012, EPA issued its proposed Rule for Step 3. 77 Fed. Reg. 14,226. As part of that process, EPA reviewed the greenhouse gas permitting that has occurred during Steps 1 and 2 and consulted with permitting authorities in a number of States. Id. at 14,233/3. This review established that State permitting authorities have not been able to build up their greenhouse gas permitting infrastructure as anticipated. Id. at 14,234-37. EPA concluded: "In sum, the states' experiences to date do not provide a basis for

us to conclude that permitting authorities in fact have the ability to issue timely permits...." Id. at 14,237. Given the continuing permitting burdens, EPA presently is proposing to not lower the emission thresholds as part of Step 3. Id. at 14,226.

Regardless of the precise terms of the Final Rule regarding Step 3 when it is issued, EPA is committed to conduct a study of the administration of the PSD and Title V programs to greenhouse gases to be completed in 2015, and then to promulgate a Step 4 rulemaking to be implemented by April 30, 2016. In that rulemaking EPA will address what actions can be taken with regard to sources that have the potential to emit greenhouse gases in amounts above the statutory threshold but below the then-existing tailored threshold. 75 Fed. Reg. at 31,525. Thus, the Tailoring Rule is calculated to move toward eventual full compliance with the statutory threshold, unless, notwithstanding EPA's significant efforts at further reducing the administrative burdens through streamlining and other actions, impossibility of full administrative implementation persists at that time. Id. at 31,517-18, 31,522/1.

2. Treatment of Biomass Emissions in the Tailoring Rule

In the Tailoring Rule, EPA noted that it was still considering whether or not to except particular source categories from permitting requirements, explaining that it did not "have a sufficient basis to take final action at this time to promulgate

any of the suggested exclusions...." 75 Fed. Reg. at 31,590/2. With regard to biomass emissions in particular, EPA explained:

> We are mindful of the role that biomass or biogenic fuels and feedstocks could play in reducing anthropogenic GHG emissions, and we do not dispute the commenters' observations that many state, federal, and international rules and policies treat biogenic and fossil sources of CO_2 emissions differently. We note that EPA's technical support document for the endangerment finding [citation omitted] … states that carbon dioxide has a very different life cycle compared to the other GHGs, which have well-defined lifetimes....

Id. at 31,590/3-91/1.

Turning to the issue of whether EPA was prepared to exclude biofuel emissions because of the burden of dealing with this unique form of emissions in the permitting process, EPA explained that it needed to gather additional information:

> [W]e have not examined burdens with respect to specific categories and thus we have not analyzed the administrative burden of permitting projects that specifically involve biogenic CO_2 emissions taking account of the threshold-based approach.... At the same time, the decision not to provide this type of an exclusion at this time does not foreclose EPA's ability to either (1) provide this type of an exclusion at a later time when we have additional information about the overwhelming permitting burdens due to biomass sources, or (2) provide another type of exclusion or other treatment based on some other rationale. Although we do not take a final position here, we believe that some commenters' observations about a different treatment of biomass combustion warrant further exploration as a possible rationale. Therefore, although we did not propose any sort of permanent exclusion from PSD or title V applicability based on lifecycle considerations of biogenic CO_2, we plan to seek further

> comment on how we might address emissions of biogenic carbon dioxide under the PSD and title V programs through a future action....

Id. at 31,591/1-2.

C. Call for Information Regarding Biomass

Within 45 days of the promulgation of the Tailoring Rule, EPA, as promised, issued a Call for Information regarding the technical and scientific issues associated with CO_2 emissions from biomass. 75 Fed. Reg. 41,173 (July 15, 2010) ("Call for Information").[3] Noting that "in finalizing the Tailoring Rule, the Agency did not have sufficient information to address the issue of the carbon neutrality of biogenic energy," EPA sought information that could assist it in "[s]urveying and assessing the science by submitting research studies or other relevant information, and [] evaluating different accounting approaches" for CO_2 emissions from biomass. Id. at 41,174/3.

D. NAFO's Petition for Reconsideration

Soon after the Call for Information, on August 3, 2010, Intervenor National Alliance of Forest Owners ("NAFO") petitioned EPA for reconsideration of the application of PSD and Title V to CO_2 with regard to emissions from biomass. 76 Fed. Reg. at 43,490. NAFO also filed a challenge to the Tailoring Rule, NAFO v.

[3] EPA subsequently made a one-sentence and one-word correction to the Call for Information. 75 Fed. Reg. 45,112 (Aug. 2, 2010).

EPA, Case No. 10-1209 (D.C. Cir.), which was consolidated with all similar challenges in the Tailoring Rule Challenge.

On January 12, 2011, EPA granted NAFO's petition for reconsideration, explaining that EPA intended to "effectuate a detailed examination of the science associated with CO_2 emissions from biomass-fired and other biogenic stationary sources and to consider the technical issues that the Agency must resolve in order to account for such CO_2 emissions in ways that are scientifically sound and also manageable in practice." JA __. On the basis of EPA's granting of NAFO's petition for reconsideration, NAFO filed a motion to sever and hold in abeyance its challenge to the Tailoring Rule, which was granted on June 6, 2011.

E. The Challenged Regulation: the Deferral Rule

Based on the many submissions received in response to the Call for Information, EPA issued the Deferral Rule. EPA determined that the workload necessary for State permitting authorities to even seek to understand the "complexity and uncertainty associated with accounting for biogenic emissions of CO_2" was so extensive and beyond their general expertise, that it would stretch already strained resources beyond their capabilities. 76 Fed. Reg. at 43,496/1.

EPA found this burden on permitting authorities particularly troubling given the fact that after further study, it could very well be determined that certain forms of biofuels could have negligible or de minimis CO_2 net emissions or even result in

the net reduction of CO_2 emissions. Id. at 43,496/2. Thus, just as "the extensive workload of processing permit applications from sources below the Tailoring Rule thresholds justified" the temporary increase of those thresholds effectuated through the Tailoring Rule, "so too [does] the extensive workload associated with analyzing and accounting for biogenic CO_2 emissions as part of processing permit applications from biomass facilities justif[y]" affirmative action by EPA to address those burdens. Id. at 43,496/2-3.

Based on this burden, EPA concluded that it needed to defer the application of PSD and Title V to biomass emissions temporarily, for a period of three years, during which time "EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources, which will include a peer review by the SAB [Science Advisory Board], and resolve technical issues in order to account for biogenic CO_2 emissions in ways that are scientifically sound and also manageable in practice." Id. Within this three-year window, EPA would, based on its scientific review, propose and promulgate a regulation to permanently address biomass emissions under PSD and Title V. Id. at 43,492/2.

Because the complexities being addressed by EPA surround only CO_2 emissions from biomass, the deferral applies only to CO_2 emissions, not emissions of the five other constituent pollutants which combine to form greenhouse gases. Id. at 43,492-93. The deferral also applies only to CO_2 emissions from actual

biomass. Thus, where a facility combusts both fossil fuels and biomass, only the emissions associated with combustion of the biomass are excluded from coverage during the referral. Id. at 43,493/1. Finally, the deferral is optional. If a State believes that it has the resources and permitting capability to assess the emissions of CO_2 from biomass in a scientifically sound manner, it may do so and thus apply PSD and Title V to biofuel projects. Id. at 43,500.

F. Actions Taken Pursuant to the Deferral Rule – EPA's Study

Pursuant to the Deferral Rule, EPA already has taken a number of significant steps in pursuing its study and analysis of how, from a scientific standpoint, biomass should be treated and accounted for under PSD and Title V. First, EPA has published a synthesis of the comments received in response to the Call for Information ("Synthesis"), which conveniently collects and describes the comments and referenced scientific papers under headings that elucidate the various scientific issues being considered. JA. ___. Second, EPA issued a report, entitled, "Accounting Framework for Biogenic CO_2 Emissions from Stationary Sources" ("EPA Report") for submission to the Science Advisory Board. JA __. The purpose of the Report "is to consider the scientific and technical issues associated with accounting for emissions of biogenic carbon dioxide (CO_2) from stationary sources, and to develop a framework to account for those emissions." JA __ [p. iv]. Third, EPA has made available the Draft Report of the Science

Advisory Board ("SAB Draft Report"), which, through a peer review process, critiques EPA's Report and summarizes the scientific and technical issues associated with assessing the emissions of CO_2 from biogenic sources. JA ___.

EPA recognizes that these three reports, each issued after the Deferral Rule, are not part of the administrative record of that Rule. EPA offers these documents (as well as the proposed Step 3 Rulemaking) first to allow the Court to take judicial notice of the fact that EPA is promptly pursuing the scientific and technical analysis that formed the basis for issuing the Deferral Rule. Beyond that, the documents provide convenient summaries of much of the material that is, in fact, in the administrative record. For instance, the Synthesis merely summarizes the many comments and scientific reports that make up much of the administrative record in this case, and the other two reports to a large extent do the same, although in a less direct manner. In referring to these documents, infra, EPA in most cases provides parallel citations to materials from the administrative record of the Deferral Rule.

SUMMARY OF ARGUMENT

As detailed in the Tailoring Rule, EPA relied on three separate doctrines that were born out of the necessity to allow for federal agencies to administer Congressionally-mandated programs in a manner that is administratively feasible and that will not subvert the intent of the statute. As EPA explained, absent

reliance on the "Administrative Necessity," "Absurd Results," and "Step-at-a-time" doctrines (collectively the "Implementation Doctrines"), administrative gridlock would almost immediately occur in the application of PSD and Title V to greenhouse gases, leading to the absurd result that the very permitting program that Congress established to address emission of pollutants from new and modified stationary sources would become completely unworkable and unenforceable. Not only did the Petitioners concur with EPA's use of the Tailoring Rule to apply PSD and Title V to CO_2 and other greenhouse gases in a stepped manner over time, most intervened in the Tailoring Rule Challenge in support of EPA.[4]

EPA does not necessarily disagree that the application of PSD and Title V to a given subcategory of sources might not, standing alone, present the type of overwhelming administrative burden that would warrant application of the Administrative Necessity or perhaps the other Implementation Doctrines. For instance, one could identify almost any given industry and assert that application of PSD and Title V to the sources within that industry *alone* would not result in administrative gridlock or absurd results.

[4] See Tailoring Rule Challenge, Intervenors' brief at Dkt. 1364134, specifically supporting EPA's reliance on the Administrative Necessity doctrine. Six of the eight Petitioners in this case intervened on behalf of EPA and five of those were signatories to the referenced brief.

The decision, however, to include as part of the stepped application of PSD and Title V to greenhouse gases, a three-year deferral of the application of those programs to CO_2 emissions derived from biomass, is part of the comprehensive tailoring process established in the Tailoring Rule that Petitioners themselves are helping to defend. The fact that EPA did not judge that it had sufficient information at the precise time of the promulgation of the Tailoring Rule – which had to be promulgated before January 2, 2011, when PSD and Title V would become applicable to CO_2 emissions by operation of law – to opine specifically on the burdens associated with biomass emissions, does not place the justification for the Deferral Rule on some separate regulatory island divorced from the burdens already detailed in the Tailoring Rule. EPA explained in the Tailoring Rule that it would be seeking information on this issue and potentially taking action to address biomass-source emissions as part of its tailoring process, and it initiated that process within 45 days of the issuance of the Tailoring Rule.

The Clean Air Act was written so as to rely on the technical and scientific expertise of EPA in administering the requirements of that statute. Here, there is significant scientific disagreement as to the extent to which the combustion of biomass results in the net emission of CO_2. Indeed, it may be that some use of biomass is in fact carbon-neutral or even reduces the overall emission of CO_2 and thereby ameliorates the effects of climate change, a conclusion reflected in various

already-existing State, federal and international regulatory programs. JA __ (Response to Comments ("RTC") at 63). Under these circumstances, the prudent course is to scientifically analyze the various forms of biomass emissions as part of the tailoring process. But this path is more than prudent; it will ensure that State permitting authorities are not left to parse through the varying scientific positions and the often inconsistent State and federal regulations governing biofuels and base permitting decisions, including BACT, on such conflicting scientific and regulatory positions.

In the end, Petitioners may be correct that some (if not many) uses of biomass should be covered by PSD (and Title V) because they result in a net emissions increase of CO_2 that is beyond that which might be considered de minimis. Nevertheless, it is reasonable for EPA, as part of the tailoring process and within the stepped 5-year time frame established in the Tailoring Rule, to first determine which uses of biomass merit such treatment. To take the opposite approach – to regulate first and *then* figure out over several years whether the entity should have been regulated in the first instance – is not only antithetical to conventional notions of sound administrative law, it will potentially undermine the very intent of Congress in enacting the PSD program and Title V, by discouraging construction of sources that might contribute to reducing the overall emissions of

the pollutant that EPA is striving to control; the very type of absurd result that both the Tailoring Rule and the Deferral Rule are designed to forestall.

ARGUMENT

I. STANDARD OF REVIEW

The Deferral Rule can be set aside only if the Court finds that EPA's action was arbitrary, capricious, an abuse of discretion, beyond its authority or not in accordance with law. 42 U.S.C. §7607(d)(9). In assessing whether EPA correctly applied its statutory obligations in promulgating this Rule, the Court first inquires whether Congress "has directly spoken to the precise question at issue." Chevron, Inc. v. NRDC, 467 U.S. 837, 842-43 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the Court moves to Chevron's second step, where the agency's interpretation must be upheld "if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).

II. THE ISSUE OF HOW TO TREAT BIOMASS EMISSIONS UNDER PSD AND TITLE V REQUIRES FURTHER SCIENTIFIC REVIEW

As this Court has explained, in reviewing the actions of EPA it is sometimes called on to review matters that are "at the frontiers of science." NRDC v. EPA, 902 F.2d 962, 968 (D.C. Cir. 1990) (citation omitted). In such cases, particular

deference is accorded where EPA is interpreting equivocal evidence or where the evidence is "uncertain or conflicting." 902 F.2d at 968. See also Bluewater Network v. EPA, 372 F.3d 404, 410 (D.C. Cir. 2004); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983) (a court is "at its most deferential" where the agency "is making predictions, within its area of special expertise, at the frontiers of science"). This process requires EPA to "draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." NRDC v. EPA, 902 F.2d at 968 (quoting NRDC v. Thomas, 805 F.2d 410, 432 (D.C. Cir. 1986)). Yet, in the end, EPA must make reasoned decisions based on "reasonable extrapolations from some reliable evidence." Id.

If EPA does not yet have the data, information and "reliable evidence" to make scientifically sound and supportable conclusions, the prudent course is to gather the information necessary to do so; not leap to regulation and worry about the scientific support later. That is the precise purpose of the Deferral Rule.

Petitioners take the view that even though the use of biomass as fuel may in some circumstances be carbon-neutral or even serve to reduce the amount of CO_2 emitted into the atmosphere, EPA must nevertheless regulate all forms of biomass. In contrast, Intervenor NAFO asserts that all use of forest biomass, including the

use of whole, standing trees, is "carbon neutral." JA __ (EPA-HQ-OAR-2010-0560-0261.1 at 3). See also JA __ (RTC at 8-11, citing these divergent views from multiple commenters). The issue of how CO_2 emissions from biomass factors into the net emission of CO_2 is much more complex than either of these one-dimensional views. For example, in the Manomet study, relied on in at least three Declarations submitted with Petitioners' brief, the study team reported that "greenhouse gas (GHG) emissions from bioenergy systems raise complex scientific" issues and that this is a "complex subject that is technically challenging and inevitably we have not been able to resolve all critical uncertainties." JA __ (EPA-HQ-2010-0560-0004 at 95, 113). The complexity covers a number of issues.

For example, commenters from industry, environmental groups, universities, and technical bodies, citing numerous scientific papers, all recognize the "complexity of the carbon debt and payback cycle (how carbon sequestered by the regenerating forest is 'paying back' the debt)." JA __ (Synthesis at 2-5); JA ____ (Comments of Carbon Work Group, University of Michigan, University of California-Berkeley, Wild Virginia/GFW). Some commenters conclude that combustion of biomass results in greater emissions of CO_2 per-energy unit because some biomass burns less efficiently than fossil fuels. JA __ (Synthesis at 2-9); JA

___ (Pet. Comments at 20).[5] On the other hand, numerous commenters explained that use of biofuels results in the overall reduction of CO_2 because it replaces the burning of fossil fuel with a source that would have emitted the identical amount of CO_2 if left to lie fallow in the forest or fields *and* because biomass is generally replaced through replanting or required forest management, thereby creating a carbon sink to absorb CO_2 in the atmosphere. JA ___ (Synthesis at 2-9 to 2-10); JA __ (RTC at 8-9); JA __ (EPA-HQ-OAR-2010-0560-0261.1 at 3-9). Indeed, Petitioners themselves recognize that certain types of biofuels can *spur* additional cultivation of biomass, thereby increasing CO_2 carbon sequestration, and that some forms of biomass may be considered as "clean fuel" under the PSD program. JA ___ (Pet. Comments at 4).

Adding to the complexity is the fact that biogenic sources of CO_2 come in many forms, including: landfills; manure management; wastewater treatment; fermentation processes in ethanol production; combustion of biogas not resulting in energy production (e.g., flaring of landfill gas); forest deadwood or debris; sawdust and sawmill residues; use and disruption of soils; agricultural residues

[5] "Pet. Comments" refers to the comments of Petitioners Conservation Law Foundation, Natural Resources Defense Council, Natural Resources Council of Maine, and two organizations representing Petitioners here, Clean Air Task Force and Southern Environmental Law Center. EPA-HQ-2010-0560-0432.1. EPA also refers herein to the comments of the other Petitioners under the headings of "CBD Comments," EPA-HQ-2010-0560-0157, and "Wild Virginia/GFW" comments, EPA-HQ-2010-0560-0455.1.

such as corn stover (the stalks and leaves left in the field after harvesting); perennial herbaceous crops; standing trees; switchgrass; and a variety of other sources. See, e.g., 75 Fed. Reg. at 41,174/2, n.1. These biomass sources have different carbon content, replenishment patterns, heat value, efficiency of energy production, and other characteristics. JA ___ (Synthesis at 2-10 to 2-12); JA ___ (EPA-HQ-OAR-2010-0560-0004, -0036.1, -0085.1, -0163.1, -0190.1, -0509.1, -0516.1).

For instance, one might consider the combustion of switchgrass or agricultural residue, such as corn stover. These sources generally are replanted or otherwise regenerated by the next year, thereby creating a carbon sink. JA ____ (EPA-HQ-2011-0083-0108.1). One might further consider the combustion of sawdust or forest debris, which would release the identical amount of CO_2 even if not combusted for energy purposes, JA __ (BACT CO_2 Bioenergy Guidance at 23-24), and, in the case of combustion of forest debris, might also prevent large releases of CO_2 that would occur through forest fires that might be prevented or delayed by the collection and use of forest debris. Id.; JA ____ (Pet. Comments at 20). See also comment of Environmental Defense Fund ("EDF"), noting that "using waste biomass materials that will decompose rapidly in the absence of utilization, i.e., mill residue, logging debris, etc., will create energy with little or no net climate impacts relative to not burning these materials. JA ___ (EPA-HQ-

2010-0560-0326.1 at 1). Conversely, the use of whole, standing tress, removes a carbon sink that, although replaced with carbon absorbing trees through recognized and even regulated forest management, may take many years or decades to complete such replacement, depending on the type of tree, location and other factors. JA ____ (RTC at 9).

Other forms of biomass raise additional issues. For instance, biogenic waste might produce far greater amounts of greenhouse gas emissions if left to decompose naturally rather than being used for fuel generation, since the decomposition process leads to emission of methane, which has twenty-one times the global warming potential of CO_2. JA __ (Synthesis at 2-18); JA__ (RTC at 33-34). Indeed, Petitioners advise that "EPA should encourage the conversion of biowastes destined for landfills to biogas to avoid their decomposition and release of methane." JA __ (Pet. Comments at 13).

Other important factors complicating the analysis are space and time: how close to the combustion source the replanting or regeneration of the biomass occurs; and over what time period net emissions of biogenic CO_2 should be assessed. JA ___ (Synthesis at 2-5 to 2-7, containing chart referencing comments). As stated in the draft report of the Science Advisory Board ("SAB"), these issues are particularly complex. JA __ (SAB Report at 9-11, 22-25). For example, contrary to the approach applied to many other pollutants, where shorter review

periods may provide more accurate data, the SAB warned that "[a]nnual accounting of carbon stocks [of biomass] is likely to give highly distorted assessments of the overall carbon cycle impacts." JA __ (Id. at 23).[6] Thus, some entities call for measuring biomass emissions (and replenishment) over decades or even 100-year periods. JA __ (Synthesis at 2-4); JA __ (Comments of the Wilderness Society at 8-9).

In its Draft Report, the SAB, utilizing a panel of independent experts from various scientific disciplines, summed up the views of various commenters, concluding that the polarized views of the Petitioners and the Intervenors is this case are not scientifically supportable: neither a categorical inclusion (treating all biogenic CO_2 emissions as equivalent to fossil fuel emissions) nor a categorical exclusion (treating all biogenic CO_2 emissions as carbon-neutral) is appropriate. JA __ (SAB Report 2-3). As the Board explained, "[a] blanket assumption of carbon neutrality will underestimate the climate impact of bioenergy," while certain forms or uses of biofuels "could be better than carbon neutral," resulting in a net reduction of CO_2 and other greenhouse gas emissions. Id. As summed up by Petitioners themselves in citing one of the many studies on this subject:

[6] As noted, the views of the SAB are in a draft report that is not part of the administrative record. The Board's statements, however, are echoed in many of the comments in the record. See, e.g., the 34 sets of comments listed in the Synthesis at 2-4 to 2-7 (JA __), all dealing with space, time and life-cycle issues. Those comments are available in the docket of the administrative record.

"[B]ioenergy projects can result in increases or decreases in CO_2 emissions, depending on a wide range of factors, including growth rate, harvest rate and yield, energy conversion efficiency, the type of fossil energy displaced, and the timeframe of the assessment." JA __ (Pet. Comments at 20). See also JA __ (Petitioner CBD Comments at 13: "[A]nalysis of the climate impacts of bioenergy production is complex and difficult.... EPA cannot avoid this complexity, but rather must address it in a transparent and scientifically defensible manner.").

III. THE DEFERRAL RULE PROPERLY RELIES ON THE STEP-AT-A-TIME, ADMINISTRATIVE NECESSITY, AND ABSURD RESULTS DOCTRINES

As noted, the scientific and technical issues relating to emissions generated from biomass are difficult enough for EPA, which has considerable scientific and technical resources and the ability to impanel expert scientific advisory boards to assist it. Referring this issue to State permitting authorities, already dealing with the burden of processing significant increases in applications, would present the very type of overwhelming permitting burden that EPA is working so diligently to relieve through its phased-in, multi-stepped implementation of PSD and Title V for greenhouse gases. As EPA explained:

> The information collected to this point underscores the complexity and uncertainty associated with accounting for biogenic emissions of CO_2 and indicates that at present attempting to determine the net carbon cycle impact of particular facilities combusting particular types of biomass feedstocks would require extensive analysis and would

> therefore entail extensive workload requirements by many of the permitting authorities. In contrast to other sources of GHG emissions, these uncertainties and complexities are exacerbated because of the unique role and impact biogenic sources of CO_2 have in the carbon cycle. Further, methodologies are not sufficiently developed to assure that various permitting authorities would be able to perform the necessary calculations reasonably and consistently to determine the net atmospheric impact in many, if not all instances.
>
> The extensive workload requirements to understand the net biogenic CO_2 emissions from bioenergy facilities and other sources of biogenic CO_2 emissions, as part of the PSD and Title V permit process, including specifically how to measure and account for biogenic CO_2 emissions, would unnecessarily strain the resources of the affected permitting authorities and result in delays in processing permits for other applicants....
>
> Therefore, the information EPA has collected since promulgating the Tailoring Rule indicates that it is consistent with the rationale of the Tailoring Rule for affected permitting authorities to defer on a temporary basis biogenic CO_2 emissions from PSD and Title V applicability.

76 Fed. Reg. at 43,496. Thus, EPA issued the Deferral Rule, relying on the three Implementation Doctrines that this and other courts have recognized may be invoked to assist in the administration of a statute that cannot otherwise be immediately administered consistent with the wording and intent of the statute. Id.

A. Petitioners' Arguments Challenging Application of the *De Minimis* Doctrine are Inapposite

Petitioners concentrate the bulk of their argument (Pet. Br. 37-53) on a different doctrine, conceding confusion regarding EPA's references to the potential de minimis emissions of some biomass sources. Pet. Br. 38-39. EPA did discuss the de minimis doctrine in the Deferral Rulemaking. See 76 Fed. Reg. 43,498-99.

That is because the study being conducted *could* lead to determinations that certain types of biomass sources are de minimis. Adding excessive and extra burden to already overwrought permitting authorities, when that burden may involve whole classes of sources that may, after sufficient scientific analysis, be determined to be de minimis or even net negative CO_2 emitters, is a factor that should be considered in addressing whether the permitting burden associated with such sources is of the nature that supports at least temporary application of one or more of the three Implementation Doctrines.

The de minimis doctrine, however, generally is used to establish *permanent* exemptions for categories of sources or items covered by a statute where regulation of such categories would be trivial. Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979). EPA has taken no permanent action with regard to biomass emissions nor has it granted any category of sources a permanent exemption. JA __ (RTC at 39). The deferral is, by its express terms, temporary. 76 Fed. Reg. at 43,492/3.

EPA admittedly bears the burden of establishing that an exemption is warranted because the emissions from a certain class of sources are de minimis. *If and when* EPA comes to such a conclusion, it will provide the record to support it, and that determination will be subject to challenge at that time. But that question cannot be answered until the scientific analysis being done in conjunction with the

Deferral Rule is completed. Accordingly, Petitioners' attack on EPA's purported use of the de minimis exemption is not ripe, a conclusion with which Petitioners agree. Pet. Br. at 39 (explaining that if "EPA did not rely on the de minimis doctrine in making the present exemption, the [Court] need not determine in this case the limits on EPA's authority to make future exemptions.").

B. The Deferral Rule Is Supported by the Step-at-a-time Doctrine

In order to adapt to the realities of a given situation, agencies are often required to regulate in steps in order to achieve Congressional directives, as the Supreme Court explained in addressing the regulation of greenhouse gases:

> Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed. Cf. SEC v. Chenery Corp. 332 U.S. 194 (1947) ("Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.").

Massachusetts, 549 U.S. at 524.

In particular, when a lack of resources or existing technical expertise makes it difficult for an agency to achieve its full regulatory mandate in accordance with statutory time requirements, it may accomplish that task in a stepped process, particularly if the process focuses initially on the most acute problems. Grand

Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 478 (D.C. Cir. 1998). See also U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1010 (D.C. Cir. 2002) (allowing the agency to regulate in stages in order to address "unresolved technical issues"); City of Las Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir. 1989) ("[A]gencies have great discretion to treat a problem partially [and a court] would not strike down [agency action] if it were a first step toward a complete solution."). An incremental regulatory approach is particularly appropriate "against a shifting background in which facts, predictions, and policies are in flux." Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1210 (D.C. Cir. 1984).

Petitioners concede that an agency may implement the requirements of a statute incrementally in order to effectuate the mandate and intent of the statute. Pet. Br. 54-55. Petitioners contend, however, that such license is limited to only those situations where Congress *expressly* provides the agency with discretion over the area that is being incrementally implemented. Id. Express authority does not, however, appear to be a prerequisite for the application of the doctrine. The step-at-a-time doctrine is invoked to effectuate the mandate and intent of a statute in a manner that is manageable. Congress' failure to predict the future and expressly accord EPA discretion to deal with exigencies unknown at the time a statute was enacted, should not serve to hinder the agency from proceeding in a stepped manner, if necessary to implement Congress' mandate.

Petitioners assert that EPA's application of the step-at-a-time doctrine in support of the Deferral Rule is very different from its reliance on that doctrine in the Tailoring Rule. Pet. Br. 57. But, as noted above, EPA relies on the step-at-a-time doctrine in the Deferral rulemaking in precisely the same manner it relied on that doctrine in the Tailoring Rule, relying on the same administrative record supporting the necessity of administering the application of PSD and Title V incrementally in order to achieve full statutory implementation. See further discussion at Part III C, infra.

The CAA declares that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter [the CAA] ... as he may deem necessary and expedient." 42 U.S.C. §7601(a)(1). That authority has been specifically recognized in implementation of the PSD program. Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 873 (D.C. Cir. 1979). Indeed, "Congress clearly prescribed a somewhat larger role for the federal government in the formulation of PSD requirements than in some other aspects of the Act...." Id. at 868. See also Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 490 (2004) ("Congress ... vested EPA with explicit and sweeping authority to enforce CAA 'requirements' relating to the construction and modification of sources under the PSD program....").

The methodologies that EPA determines are necessary to administer Congress' mandates under PSD are to be afforded broad discretion. Massachusetts, 549 U.S. at 527 ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). See also Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring and dissenting) (noting that while "Courts are expert at statutory construction, [] agencies are expert at statutory implementation.").

The discretion accorded EPA to determine how to achieve Congress' intended objective is heightened when a situation arises that may not have been contemplated by the specific terms of the statute. In such situations, the agency must "use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999). See also American Trucking Ass'ns v. United States, 344 U.S. 298, 309-10 (1953); Indep. Bankers Ass'n v. Marine Midland Bank, 757 F.2d 453, 461 (2d Cir. 1985) ("Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies."); Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., 836 F.2d 599, 612 (D.C. Cir. 1988) ("Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make

'common sense' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.").

In the Deferral Rule, EPA employed its statutorily-granted authority to establish a common sense process for implementing the intent of Congress to an issue that was unquestionably unforeseen when Congress enacted PSD and Title V. That process establishes another step in the application of these programs, one that will allow EPA to understand the science before requiring various permitting authorities to make independent determinations on how different forms of biomass emissions are to be addressed under PSD and Title V.

C. The Deferral Rule Also Is Supported by the Administrative Necessity Doctrine

Under the doctrine known as "administrative necessity," "an agency may depart from the requirements of a regulatory statute ... 'to cope with the administrative impossibility of applying the commands of the substantive statute.'" EDF v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (quoting Alabama Power, 636 F.2d at 358-59). See also Sierra Club v. EPA, 719 F.2d 436, 462-63 (D.C. Cir. 1983); Public Citizen, Inc. v. Shalala, 932 F. Supp. 13, 17 (D.D.C. 1996). Even where the agency is not presently authorized to create a de minimis or other type of exemption, "administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute [where

'applying the commands of the substantive statute'] would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress." Alabama Power, 636 F.2d at 358-59. See also New York v. EPA, 443 F.3d 880, 888 (D.C. Cir. 2006).

1. The Burden Faced by State Permitting Authorities Supports the Application of the Administrative Necessity Doctrine

The factors to consider in assessing whether administrative necessity warrants deviation from strict application of a statute's literal requirements include inadequate funds, the need to apply the regulatory requirements in a timely manner, the lack of technical expertise of the personnel needed to administer the program, and the availability of enforcement resources. New York, 443 F.3d at 888; EDF v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980). In conjunction with the Tailoring Rule, EPA performed a comprehensive study of the processes, costs, manpower, expertise, and resources available at State permitting authorities to provide full and timely compliance with the statutory requirements necessary to process over 81,000 PSD permits, which include case-by-case analysis of BACT, and 6.1 million Title V permits, associated with application of these programs at the statutory thresholds. 75 Fed. Reg. at 31,538, 31,562. This analysis led to the conclusion that permitting authorities would be overwhelmed if forced to administer PSD and Title V to greenhouse gases at the statutory thresholds, thereby

requiring some type of tailoring of PSD and Title V permitting requirements to ensure their enforceability.

Petitioners assert that EPA's "thin factual assertions concerning the burden of permitting biomass-burning sources stand in stark contrast to the agency's robust showing in the Tailoring Rule regarding the burdens of permitting tens of thousands – or even millions – of additional sources." Pet. Br. 35. But EPA's description of the burdens associated with applying the permitting requirements in the context of biomass-burning sources is based on, and adds to, that "robust showing in the Tailoring Rule" of the burden faced by permitting authorities.

EPA relied on the record of the Tailoring Rule to support the Deferral Rule, explaining that the deferral is based on "the same rationale as EPA used to justify the Tailoring Rule's phase-in approach." 76 Fed. Reg. at 43,496/3. See also JA __ (EPA-HQ-OAR-2011-0083-0003), incorporating the entire Tailoring Rule record as part of the Deferral Rule. As the Agency explained, the deferral "constitutes a refinement of the approach EPA has taken to regulate GHG emissions from stationary sources through a phase-in approach, based on an evolving understanding of the complexities, uncertainties, and nuances associated with biogenic emissions." 76 Fed. Reg. at 43,496/3.

Moreover, the burden addressed by the Tailoring Rule will continue to grow – *not* be reduced – through the additional steps of the Tailoring Rule. Even though

EPA has proposed as part of Step 3 not to lower the thresholds at this time because State permitting authorities lack the capacity to handle the corresponding increase in permit applications, 77 Fed. Reg. at 14,237, the Tailoring Rule calls for EPA to explore streamlining and other methods to move toward application of the statutory thresholds. As that occurs, the burden will increase. For instance, lowering the threshold to 50,000 tpy is projected to increase the permitting burdens for States by increasing the number of facilities becoming subject to PSD by an additional 540%. Id. at 14,234/2.[7] Adding to State burdens now, by requiring permitting authorities to address perplexing scientific and technical issues for applicants using biomass, threatens to make the entire permitting process unworkable.

Attempting to explain away the "robust" record that EPA relied on, Pet. Br. 35, Petitioners direct the Court's attention to the comments of several States which purportedly opined that they would not be faced with numerous permit applications from users of biomass and therefore would not be inundated or overwhelmed by those specific applications. Pet. Br. 15-16, 34. First, the States were responding merely to EPA's inquiry about the number of biofuel facilities and the number of

[7] Although initial PSD permits have been fewer than initially anticipated (due at least in part to the economic downturn), both EPA and State permitting authorities believe this to be only a temporary phenomenon. Moreover, Title V permit applications for sources newly subject to the program due to greenhouse gas emissions generally are not due until July 1, 2012. 42 U.S.C. §7661b. Thus, States have not yet had to address the anticipated increase in Title V permit applications. 77 Fed. Reg. at 14,235-36.

permit applications they might expect. 76 Fed. Reg. 15,249, 15,263/3 (Mar. 21, 2011). The comments from the States did not consider the difficult scientific issues that would need to be addressed in the permitting process. JA __ (Comments cited at Pet. Br. 15-16).

Second, Petitioners' reference to the responses of several States misses the point. Some States would likely provide similar responses if they were asked to opine on how many permit applications they would expect to receive from rubber producers or furniture manufacturers, two of the many industry groups affected by PSD and the tailoring process. See 77 Fed. Reg. at 14,228. EPA did not apply source-category by source-category tailoring. EPA instituted a comprehensive tailoring process which includes: temporarily resetting the thresholds for application of PSD and Title V; extending the application of those provisions over at least a five-year period; *and* deferring certain aspects of their application where the science does not yet support full application to a given subgroup of sources. The fact that the last of these three actions came in a separate rulemaking, necessitated because EPA had to gather additional information which it was unable to do prior to the looming deadline for promulgation of the Tailoring Rule, does not render it outside of EPA's tailoring process.

Finally, the Deferral Rule is optional for States. If a State does not believe it needs to defer application of PSD and Title V to biomass sources, it can start

applying those permitting programs to such sources immediately. Accordingly, the deferral will apply only in those States where the permitting authority agrees that the deferral is necessary to address its ongoing permitting burden.

2. EPA Is Not Prohibited by the CAA From Deferring Application of PSD and Title V to Biomass Emissions Pending Further Scientific Review

Petitioners acknowledge the complexity of the issue of addressing CO_2 emissions from biofuels and the need for additional review by EPA:

> [W]e applaud EPA's effort here to solicit comment on the most current scientific assessments of CO_2 emissions associated with bioenergy projects *and accurate procedures to calculate those emissions*. We agree with EPA that accounting for greenhouse gas ("GHG") emissions associated with bioenergy is "*complex*" and thus *merits additional attention by EPA* regulating GHG emissions from stationary sources under the Prevention of Significant Deterioration ("PSD") program and Title V of the CAA.

JA ___ (Pet. Comments at 3-4) (emphasis added). Nevertheless, Petitioners assert that EPA essentially has no choice but to regulate CO_2 emissions of every kind under PSD and Title V, including all biomass emissions, before addressing this "complexity" or developing "accurate procedures to calculate those emissions," because the PSD and Title V programs do not contain ambiguous provisions that might allow EPA to pause to consider the science relating to these emissions. Pet. Br. 41 (citing the definitions of "major emitting facility" "any air pollutant," and other key terms).

First, Petitioners' reliance on the broad terms of the PSD and Title V provisions again misses the point. As established in the Tailoring Rule and reiterated in the Deferral Rule, applying those provisions now, to *every* "major emitting facility," would so inundate permitting authorities so as to make the entire permitting process spiral quickly into gridlock. The same statutory provisions Petitioners cite here were equally applicable to the Tailoring Rule, yet Petitioners made no argument there that EPA was prohibited from delaying full statutory compliance to all "major emitting facilities." To the contrary, at least five of the eight Petitioners fully supported EPA's legal basis for utilizing the Administrative Necessity doctrine to depart from literal compliance with PSD's requirement of permitting for all sources of all emissions of greenhouse gases above the statutory thresholds. EPA did not need to rely on ambiguous provisions of the PSD statute to tailor the literal language of the statute in the Tailoring Rule and it does not need to – nor purport to – exercise such reliance in issuing the Deferral Rule.

Moreover, Petitioners' argument is raised in their challenge to EPA's purported reliance on the de minimis doctrine and is, therefore, by Petitioners' own admission, premature. Nevertheless, even if this argument were both relevant to EPA's application of the Administrative Necessity and other Implementation

doctrines and ripe for review, it still incorrectly characterizes EPA's actions and authority regarding biomass CO_2 emissions.[8]

While Petitioners are correct that the definitional provisions of PSD and Title V are broadly worded to apply to any pollutant subject to regulation under the CAA from any major source, the Deferral Rule does not address whether CO_2 emissions from biomass are, as a general matter, constituents of a *regulated pollutant*. Instead, the Rule seeks scientific data to shed light on the question of whether and to what extent CO_2 emitted from biomass should be counted in examining emissions (or increases thereof) under PSD and Title V. See, e.g., Petitioners' statement quoted directly above, applauding EPA on collecting scientific data to determine how to "calculate those [biomass] emissions."

As outlined, EPA has not decided how to assess emissions from biofuels or what factors are necessary to such a determination; that is the very purpose of the Deferral Rule. EPA is not, however, prohibited from considering this issue, because it is one over which EPA has considerable discretion to fill a gap left by Congress. New York v. EPA, 413 F.3d 3, 27 (D.C. Cir. 2005) ("In enacting the NSR program, Congress did not specify how to calculate 'increases' in emissions,

[8] Petitioners separately assert that EPA did not address *non*-greenhouse gas impacts associated with a de minimis determination. Pet. Br. 52-54. For the reasons stated herein, those issues are neither ripe nor relevant to EPA's deferral action.

leaving EPA to fill in that gap while balancing the economic and environmental goals of the statute. "). See also id. at 36 ("The CAA is silent on how to calculate emissions increases….").

Thus, the courts have upheld EPA exercising its discretion to allow an entity with the potential to emit over the applicable threshold to nevertheless avoid PSD regulation through, for instance: plantwide applicability limitations ("PALs"), which allow a facility to take an enforceable limit based on actual emissions plus the significance threshold for a pollutant, New York v. EPA, 413 F.3d at 36-38; and synthetic minor permits, which reflect an enforceable agreement not to exceed the threshold by limiting the facility's actual emissions through operational restrictions. See Club v. Dairyland Power Coop., No. 10-CV-3030BBC, 2010 WL 4294622 at * 7 (W.D. Wis. Oct. 22, 2010); United States v. E. Ky. Power Comm'n, 498 F. Supp. 2d 995, 1005 n.8 (E.D. Ky. 2007).[9]

Petitioners question whether EPA may even study how to assess emissions from biomass because it would presumably include a life-cycle analysis that could include offsetting emissions based on actions occurring beyond the physical boundary of the emitting facility, which they contend exceeds EPA's discretion to consider. Pet. Br. 41-43. First, the decisions of this Court recognize (and even

[9] EPA did not include in the preamble to the Deferral Rule a description of its recognized discretion to assess emissions increases because, as noted, it is not relevant to any ripe issues.

require) offsetting reductions of emissions in determining emissions increases subject to regulation under PSD. See Pet. Br. 41-42, citing Chevron and Alabama Power. Moreover, Petitioners' reference to geographical limitations ignores key elements of the scientific analysis being conducted. While it is true that off-site absorption through carbon "sinks" is part of the life-cycle scientific analysis that an independent scientific body is considering, that analysis also includes the nature of the fuel combusted on site at the "stack." Regardless of whether a source is replacing a biofuel through replanting occurring many miles away from the combusting facility, the mere use of a fuel at that facility, that would otherwise emit the identical amount of CO_2 through natural decomposition, is a critical part of the scientific analysis being performed. JA __ (RTC at 8-9). If the use of this fuel replaces the use of fossil fuels, which do *not* naturally emit CO_2 but do so *only* when combusted, then the use of at least some biomass as fuel may lead to lower net emissions and therefore may not merit being included in what EPA determines to be an emissions increase, or at least potentially be considered de minimis.

Beyond purported geographic limitations, Petitioners assert that considering the emissions of a source based on the life-cycle of the fuel being utilized is inappropriate because it involves a temporal element that they contend EPA may not consider in assessing increases in emissions. Pet. Br. 45-46. But this Court has recognized that EPA may exercise its discretion to assess emissions in exactly this

manner. See, e.g., New York v. EPA, 413 F.3d at 26 (upholding EPA regulation which allowed for netting credits based on a ten-year look-back period and 15-year-old baseline). Indeed, Petitioners recognize that "lifecycle analysis of CO_2 emissions associated with biomass may be permissible" under certain aspects of PSD, citing subsection (a)(2) of the PSD permitting provision. 42 U.S.C. §7475(a)(2). JA __ (Pet. Comments at 6, n.5).

Petitioners assert that the burdens associated with the scientific complexities of considering the entire life-cycle of biomass emissions could be avoided simply by ignoring the life-cycle of biomass. Pet. Br. 36. As EPA noted, doing so in this case "could result in regulation of sources with trivial or positive impacts on the net carbon cycle...." 76 Fed. Reg. at 43,496/3. As summed up by the Environmental Defense Fund, "[m]easuring the net total flux of GHGs associated with bioenergy is much more complicated than simply measuring smokestack emissions," and measuring of CO_2 emissions just at the smokestack ignores the landscape sequestration elements of biomass and thus "fails to account for the potentially lower emissions profile of some biomass sources compared to fossil fuels." JA ___ (EPA-HQ-2010-0560-0326.1 at 2-4).

Indeed, addressing biomass emissions through a life-cycle analysis is already entrenched in the regulatory regime. For example, the Intergovernmental Panel on Climate Change ("IPCC"), which is charged with developing guidelines

for countries to report on all anthropogenic greenhouse gas emissions, accounts for CO_2 emissions from biomass combustion in the Land-Use Change and Forestry category, not the energy sector. 76 Fed. Reg. at 15,253/1-2. While EPA does not follow this approach in applying PSD and Title V to energy-generating facilities, the IPCC framework recognizes that biomass emissions should be considered from a life-cycle perspective, which reflects the carbon sequestration characteristics of biomass. Moreover, many countries provide incentives or credits for use of biogas from waste facilities or other forms of biomass-generated energy. JA __ (Synthesis at 2-14); JA ___ (RTC at 23); JA __ (EPA-HQ-OAR-2010-0560-0261.1 at 5) (citing European Union directive on carbon trading considering biomass to be carbon neutral).

Similarly, numerous States have regulations or programs that reward or incentivize the use of biofuels based, at least in part, on their life-cycle benefits to the environment. JA __ (BACT CO_2 Bioenergy Guidance at 27-28); Database of State Incentives for Renewables & Efficiency at www.dsireusa.org/incentives. More than 40 States reportedly have programs that treat types of biomass as a renewable resource and many provide incentives or subsidies for its use. JA ___ (Synthesis as 2-12); JA __ (EPA-HQ-2010-0560-0517.1 at 6-9, -0004 at 17). Petitioners themselves describe various State programs, including programs to

convert boilers at schools, hospitals and municipal buildings from fossil fuels to biomass. JA __ (Pet. Comments at 34-35).

Federal statutes also recognize and reward certain uses of biofuels based specifically on a life-cycle approach. For instance, under Title II of the CAA, Congress established a renewable fuel program that is based on the relative difference in emissions of greenhouse gases from biomass compared to the fossil fuel it replaces, measured over the full lifecycle of the fuels. See, e.g., 42 U.S.C. 7545(o)(1)(H), (defining "lifecycle greenhouse gas emissions" as "the aggregate quantity of greenhouse gas emissions …, as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution....").[10]

As outlined above, Congress left a gap in the CAA that requires EPA to assess how to consider and measure increases in emissions covered by PSD. New York v. EPA, 413 F.3d at 36. In reviewing EPA's effort to fill that gap, the Court is, given the technical and complex nature of the PSD program and the particular technical question being addressed, to accord "an extreme degree of deference."

[10] Petitioners assert that the appearance of biofuel life-cycle provisions in Title II argues for non-application of these considerations with regard to stationary sources, asserting that if Congress wants EPA to consider the life-cycle of biomass in addressing emissions of stationary sources, it will affirmatively say so. Pet. Br. 45. EPA makes no claims that these provisions are directly applicable to stationary sources; only that some federal regulatory programs already address biofuels from a life-cycle analysis with regard to their greenhouse gas effects.

Huls Am. Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir. 1996). See also St. Luke's Hosp. v. Sebelius, 611 F.3d 900, 904-05 (D.C. Cir. 2010) ("Our 'broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program.'"') (citations omitted); New York v. EPA, 413 F.3d 3, 24 (D.C. Cir. 2005) ("[T]here is no question that the NSR program [of which PSD is a part] is technical and complex"); AEP, 131 S. Ct. at 2533 n.2 (describing the "complicated issues related to carbon dioxide emissions and climate change").

It is an anathema to sound regulatory process to compel an agency that requires additional data and analysis in order to exercise its discretion in applying statutory requirements, to nevertheless blindly choose whether to regulate or not regulate, rather than take a relatively short amount of time to determine on a sound scientific basis what *should* be regulated under the relevant statute. As this Court explained in reviewing another EPA tiered regulatory approach where further regulation was contingent on additional study, "[t]hese considerations are hardly unreasonable; indeed, for this court to reject them would defeat the purpose of the statute by forsaking, in the EPA's determination, greater reductions in air pollution." Bluewater Network v. EPA, 372 F.3d at 412. See also South Coast Air Quality Mgm't Dist. v. EPA, 554 F.3d 1076, 1079-80 (D.C. Cir. 2009). Cf. Sierra Club v. EPA, 325 F.3d 374, 480 (D.C. Cir. 2003) (upholding tiered regulations

where "the agency decision made sense on the data then available"). As outlined supra, application of a life-cycle analysis may, after further study, in fact result in "greater reductions in air pollution" consistent with the intent of PSD and Title V.

3. Addressing Biomass Emission Issues Through the Application of BACT Will Not Supplant the Need for Deferral

Petitioners assert that the Deferral Rule is not narrowly tailored to the burden being addressed, as it must be under the Administrative Necessity doctrine. Pet. Br. 36. But here, EPA has done exactly this type of narrow tailoring "by deferring the applicability of PSD and Title V to biogenic emissions of CO_2 from stationary sources for *only* as long as necessary for EPA to complete the needed scientific study of these emissions, develop an accounting framework, and as appropriate conduct rulemaking specific to the unique nature and characteristics of these emission sources." 76 Fed. Reg. at 43,497/3 (emphasis added). Furthermore, as noted, supra, the Deferral Rule applies *only* to CO_2 emissions (not emissions of the other five greenhouse gases), *only* to CO_2 emissions directly from biomass combustion, and *only* where a permitting authority chooses to apply it.

Referring to EPA's interim guidance on BACT for CO_2 emissions, Petitioners assert that biofuels can instead be dealt with through BACT, rather than rigorous scientific analysis. Pet. Br. 10, 33. EPA did explain in the Tailoring Rule that, on a temporary basis, until EPA dealt head-on with the issue of biomass

emissions, such emissions should be addressed in the BACT process. 75 Fed. Reg. at 31,591. But delaying the complexities of dealing with emissions from biomass until the BACT determination does not make the analysis of whether a given type of biofuel is carbon-neutral any less complex, nor does it supplant the need to address these issues up front, at the applicability determination. 76 Fed. Reg. at 43,500/3 (explaining that EPA's BACT Guidance was issued as a temporary measure to relieve some of the permitting burden until a deferral could be considered). Indeed, without further declarations from EPA as to the technical and scientific effects of particular types of biofuels, States may conclude "that the exclusive utilization of biomass fuel *is BACT* for greenhouse gases at a bioenergy facility." JA __ (BACT CO_2 Bioenergy Guidance at 28) (emphasis added). See also 76 Fed. Reg. at 43,495/3. In other words, taking the gross approach of lumping all biofuels into one group, and without further scientific refinement, States may find that no control equipment or other measures are necessary for a facility combusting biomass because the mere use of biomass could potentially be considered a control technology that satisfies BACT requirements.

As outlined above, the States are, for the most part, the entities that implement and administer the permitting process, including the determination of BACT for a given source. This is not a simple application of some off-the-shelf technology. To the contrary, the BACT review process involves requiring

emissions limitations based on the best technology "which the permitting authority, on a case-by-case basis, taking into account *energy, environmental, and economic impacts* and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, *clean fuels*, or treatment or innovative fuel combustion techniques ...." 42 U.S.C. § 7479(3) (emphasis added).

Some forms of biofuels may be deemed to be clean fuels after further analysis. JA ___ (PSD and Title V Permitting Guidance at 27). Moreover, as outlined above, the use of some biofuels may have significant positive environmental and energy benefits while others may have significant negative impacts. JA ___ (Id. at 38-44); JA __ (BACT CO_2 Bioenergy Guidance at 27). Requiring State permitting authorities to implement these considerations into the BACT analysis they must perform for each applicant, before the scientific and technical questions outlined above are answered, will only further encumber the permitting process that already is under considerable strain to address all greenhouse gas emissions. Thus, the application of BACT to emissions of biomass bolsters the need for the deferral; it does not replace the need for it.

D. The Deferral Rule Also Is Supported by the Absurd Results Doctrine

As this Court explained, "where a literal reading of a statutory term would lead to absurd results, the term simply 'has no meaning ... and is the proper subject of construction by EPA and the courts.'" Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (citation omitted). This situation is not at all unusual, as the "case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended." Id. See also Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989); Buffalo Crushed Stone, Inc. v. Surface Transp. Bd., 194 F.3d 125, 129 (D.C. Cir. 1999) ("Courts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme.").

Although termed "absurd results," the doctrine allows an agency to divert from the literal meaning of a statute where "'acceptance of that meaning would lead to absurd results ... *or* would thwart the obvious purpose of the statute.'" In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978) (emphasis added) (quoting Comm'r v. Brown, 380 U.S. 563, 571 (1965)). See also Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."); United

States v. Bryan, 339 U.S. 323, 338 (1950) (refusing to apply the literal language where "congressional purpose would be frustrated"); Arkansas Dairy Coop. Ass'n v. U.S. Dep't of Agriculture, 573 F.3d 815, 829 (D.C. Cir. 2009); Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1088 (D.C. Cir. 1996). Indeed, this Court made it clear that the literal terms of the PSD provisions might have to yield in order to fulfill Congress' intent in enacting PSD: "'The policy as well as the letter of the law is a guide to decision ... to ameliorate ... (the law's) seeming harshness or to qualify its apparent absolutes....'" Spencer Cnty, 600 F.2d at 871 n.123 (D.C. Cir. 1979) (citation omitted).

Petitioners mount no challenge to EPA's use of the absurd results doctrine, asserting that EPA did not rely on that doctrine in issuing the Deferral Rule. Pet. Br. 56. That assertion is inaccurate. In the Deferral Rule EPA explained in detail the legal rationale behind the Tailoring Rule, mentioning reliance on the absurd results doctrine no fewer than six times. 76 Fed. Reg. at 43,493/3, 43,494/1, 43,494/2, 43,495/1, 43,496/2, 43,499/1. EPA then explained that the Deferral Rule relies on and is supported by "the same rationale as EPA used to justify the Tailoring Rule's phase-in approach." Id. at 43,496/3.

As Petitioners outlined in their brief, the application of PSD and Title V to greenhouse gases is based on EPA's finding that these gases have the potential to endanger public health and welfare by adding to global warming and the

greenhouse effect that is having marked impacts on our planet's climate. Based on that finding, EPA issued a regulation governing vehicles under Title II which, by operation of law, triggered application of PSD and Title V for stationery source greenhouse gas emissions. At the same time, as detailed above – and as Petitioners concede – emissions of CO_2 derived from certain forms of biomass may not only fail to endanger public health and welfare, but in fact may benefit the public by reducing the net emissions of CO_2, thereby reducing the effects of climate change. Given this phenomenon, it would lead to an absurd result – a result that subverts the intent of Congress in enacting PSD and Title V – to prohibit EPA from deferring application of these provisions for a short time while EPA performs the scientific analysis necessary to ensure that it is not regulating actions that Congress never intended to regulate, while diverting sparse permitting resources away from the vast number of sources clearly covered by these statutes.

CONCLUSION

For the foregoing reasons, the Petitions for Review should be denied.

Respectfully submitted,

OF COUNSEL:

Scott Jordan
U.S. Environmental Protection Agency
Office of General Counsel (2344-A)
Ariel Rios Building
1200 Pennsylvania Ave., NW

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Div.

/s/ Perry M. Rosen
PERRY M. ROSEN
United States Department of Justice

Washington, D.C. 20460
Tel: 202-564-7508
jordan.scott@epa.gov

DATE: May 14, 2012

Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 353-7792
perry.rosen@usdoj.gov

Counsel for Respondents

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 37(A)(7)(b)

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and the orders of the Court in this case because this brief contains 13,976 excluding the parts of the brief exempt under Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type.

So certified this 14th day of May, 2012, by

/s/ Perry M. Rosen
Perry M. Rosen
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF RESPONDENTS was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties who have registered with the Court's CM/ECF system.

Date: May 14, 2012

/s/ Perry M. Rosen
Perry M. Rosen
Counsel for Respondents

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 11-1101, 11-1285, 11-1328, 11-1336 (Consolidated)

CENTER FOR BIOLOGICAL DIVERSITY, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petitions for Review of Administrative Action
of The United States Environmental Protection Agency

RESPONDENTS' STATUTORY ADDENDUM

OF COUNSEL:

Scott Jordan
U.S. Environmental Protection Agency
Office of General Counsel (2344-A)
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
Tel: 202-564-7508

DATE: May 14, 2012

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Div.

PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 353-7792

Counsel for Respondents

STATUTORY ADDENDUM – Table of Contents

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds--

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are--

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 101, formerly § 1, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 392, and renumbered § 101 and amended Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(2), (3), 79 Stat. 992; Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 485; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(k), 104 Stat. 2468.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1963 Acts. House Report No. 508 and Conference Report No. 1003, see 1963 U.S. Code Cong. and Adm. News, p. 1260.

1965 Acts. House Report No. 899, see 1965 U.S. Code Cong. and Adm. News, p. 3608.

1967 Acts. House Report No. 728 and Conference Report No. 916, see 1967 U.S. Code Cong. and Adm. News, p. 1938.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Codifications

Section was formerly classified to section 1857 of this title.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

➡➡ § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated

with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or re-

voke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan;

transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph--

(i) The term “parking surcharge regulation” means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term “management of parking supply” shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term “preferential bus/carpool lane” shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such pro-

mulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or incre-

ment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination

and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of Novem-

ber 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680; amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

Current through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) approved 4-2-12

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed--

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reim-

bursement, as may be determined by the Administrator.

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator--

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if--

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 301, formerly § 8, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400,

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)
§ 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts [FN1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and admin-

ister the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of--

(i) reviewing and acting upon any application for such a permit,

(ii) if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

(iii) emissions and ambient monitoring,

(iv) preparing generally applicable regulations, or guidance,

(v) modeling, analyses, and demonstrations, and

(vi) preparing inventories and tracking emissions.

(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

(ii) As used in this subparagraph, the term "regulated pollutant" shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

(v) The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable

costs authorized by subparagraph (A)) in each year beginning after 1990, by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause--

(I) the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

(II) the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

(C)(i) If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

(4) Requirements for adequate personnel and funding to administer the program.

(5) A requirement that the permitting authority have adequate authority to:

(A) issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in

an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether

expressed therein as a rate of emissions or in terms of total emissions: [FN2] *Provided,* That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

(2)(A) If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(B) If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(C) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

(3) If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program under paragraph (1), pro-

mulgate, administer, and enforce a program under this subchapter for that State.

(e) Suspension

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

(f) Prohibition

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

(1) All requirements established under subchapter IV-A of this chapter applicable to “affected sources”.

(2) All requirements established under section 7412 of this title applicable to “major sources”, “area sources,” and “new sources”.

(3) All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be

the effective date of approval by the Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

CREDIT(S)

(July 14, 1955, c. 360, Title V, § 502, as added Nov. 15, 1990, Pub.L. 101-549, Title V, § 501, 104 Stat. 2635.)

[FN1] So in original. Probably should be “part”.

[FN2] So in original. A closing parenthesis probably should precede the colon.

Current through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) approved 4-2-12

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)
§ 7661b. Permit applications

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates--

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

(b) Compliance plan

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting

on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

(d) Timely and complete applications

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

(e) Copies; availability

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title V, § 503, as added Nov. 15, 1990, Pub.L. 101-549, Title V, § 501, 104 Stat. 2641.)

Current through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) approved 4-2-12

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