ARGUMENT NOT YET SCHEDULED
No. 13-1035

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

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondent.

On Petition for Review of Final Agency Action of the
U.S. Environmental Protection Agency

BRIEF FOR PETITIONER

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Dated: June 21, 2013

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

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT	)
	)
Petitioner,	)
	) **Docket No. 13--1035**
v.	)
	)
U.S. ENVIRONMENTAL PROTECTION AGENCY	)
	)
	)
Respondent.	)

CERTIFICATE
OF PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and this Court's Order, Counsel for Petitioner National Environmental Development Association's Clean Air Project certifies as follows:

1. PARTIES.

Petitioner is the National Environmental Development Association's Clean Air Project ("NEDA/CAP"), a not-for profit coalition of manufacturing companies doing business in the United States. Some of NEDA/CAP's members are energy companies that also own and/or operate natural gas exploration and development wells for the extraction of oil and natural gas.

Respondent is the United States Environmental Protection Agency ("EPA").

Amici - At present, no *amici* have filed regarding their intent to participate in this case.

Intervenors - There are no intervenors in this case.

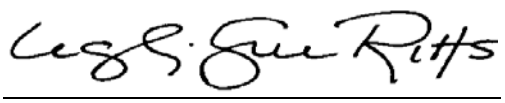
2. RULING UNDER REVIEW.

NEDA/CAP seeks review of the final action by EPA on December 21, 2012 entitled "*Applicability of the Summit Decision to EPA Title V and NSR Source Determinations.*" The final agency action is referred to herein as the "*Summit* Directive."

3. **RELATED CASES.**

There are currently no related cases. However, the *Summit* Directive discusses *Summit Petroleum v. EPA*, 690 F.3d 733, rehearing denied 2012 U.S. App. LEXIS 23988 (6th Cir. 2012).

Respectfully submitted,



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Dated: June 21, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Procedure 26.1 and Local Circuit Rule 26.1, the undersigned counsel for Petitioner National Environmental Development Association's Clean Air Project ("NEDA/CAP"), certifies that NEDA/CAP is a nonprofit trade association, as defined under Circuit Rule 26.1(b), whose member companies represent a broad cross-section of American industry. NEDA/CAP represents the issues of interest to its members relating to the development and implementation of federal Clean Air Act requirements under federal and state clean air programs. NEDA/CAP does not have any outstanding securities in the hands of the public, nor does NEDA/CAP have a publicly owned parent, subsidiary, or affiliate.

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 501-706
CAA	Clean Air Act, 42 U.S. C. §§ 7401-7671a
EPA	United States Environmental Protection Agency
MDEQ	Michigan Department of Environmental Quality, the permitting authority in that state.
NAAQS	National Ambient Air Quality Standards established by EPA to protect human health and the environment, 42 U.S.C. § 7407
NEDA/CAP	National Environmental Development Association's Clean Air Project, the Petitioner
NSR	New Source Review, a preconstruction permitting program set forth in Title I of the Act at Clean Air Act at Sections 161-169 (PSD permits) and 171-176, 42 U.S.C. §§ 7471-7479, 7501-7506 (NNS permits).
NNSR	Nonattainment New Source Review, a CAA preconstruction permit required for new "major stationary sources" that construct in a part of the country that fails to attain the NAAQS for a regulated air pollutant under CAA Sections 171-176, 42 U.S.C. §§ 7471-7479, 7501-7506
PSD	Prevention of Significant Deterioration, used to describe parts of the country that attain the National Ambient Air Quality

	Standards for which the CAA's goal is Prevention of Significant Deterioration of air quality
T-V Permit	Title V of the CAA requires "major sources" to obtain federal operating permits under CAA Sections 501-507, 42 U.S.C. 7661-7661f.

INTRODUCTION

This case involves a challenge to a directive issued by EPA instructing EPA's regional offices to apply one set of permit applicability criteria under the Clean Air Act (CAA) in the Sixth Circuit and another set of permit applicability criteria elsewhere in the country. Director, Office of Air Quality Planning and Standards, *Applicability of the* Summit *Decision to EPA Title V and NSR Source Determinations* (Dec. 21, 2013) (hereafter, the "*Summit* Directive" or "Directive"). Although such a directive might be regarded as unremarkable in other contexts, the *Summit* Directive is inherently suspect given the statutory and regulatory demands under CAA to "assure fair and uniform application by all EPA Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act." 40 CFR § 56.3 (2012); *see* CAA Section 301(a)(2), 42 U.S.C. § 7601(a)(2).

In *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, rehearing denied 2012 U.S. App. LEXIS 23988 (6th Cir. 2012), the Sixth Circuit considered when separate properties upon which pollutant emitting activities occur are "adjacent" under 40 CFR § 71.2 for purposes of aggregating those activities into a single stationary source, and a major source, under Title V of the CAA. The case arose when a natural gas producer (Summit) brought a challenge to EPA's determination that various wells located over 43 square miles at varying distances from a plant and with no common boundary constituted a single stationary source because,

although the wells were physically independent, they were (according to EPA) ""functionally interrelated" and, thus, "adjacent" as EPA interpreted that term. 690 F.3d at 739-740. The Sixth Circuit rejected EPA's determination and remanded, holding that EPA's use of "adjacent" in its regulations must be given its "ordinary, *i.e.*, physical and geographical, meaning." *Id.* at 751.

Although it (unsuccessfully) sought rehearing en banc, the EPA declined to ask the Supreme Court to review the Sixth Circuit's decision in *Summit*. Instead, the EPA issued a directive—the *Summit* Directive—ordering regional EPA offices to follow the *Summit* decision *only* in the Sixth Circuit and disregard the holding elsewhere in the country. *Summit* Directive at 1. The Directive also orders EPA Regions to instruct state permit authorities and potential CAA permit applicants of the Directive's requirements. *Id.* In explaining the reason for the Directive, EPA stated only that its interpretation of "'adjacent' to include a consideration of the "*functional interrelatedness* of two emission units" was "longstanding," and that EPA did not "intend to change its longstanding practice." *Id.* (emphasis added). EPA has subsequently invoked the *Summit* Directive in rulemaking involving activities outside the Sixth Circuit. *See infra* at 6-7.

Much has been written about the values and drawbacks of the so-called "'non-acquiescence' doctrine, under which the government may normally relitigate issues in multiple circuits." *National Mining Ass'n v. U.S. Army Corps. of Eng'rs*,

145 F.3d 1399, 1409 (D.C. Cir. 1998). But whatever the proper role for the "non-acquiescence doctrine," that doctrine has been displaced by both Congress's and the agency's action in the particular context at issue here. In enacting the CAA, Congress demanded that EPA "assure fairness and uniformity in the criteria, procedures and policies applied by the various regions in implementing and enforcing" the Act. *See* CAA Section 301(a)(2), 42 U.S.C. § 7601(a)(2). And in implementing that statutory "uniformity" requirement, EPA has adopted a "Regional Consistency" requirement mandating "fair and uniform application by all EPA Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act." 40 CFR § 56.3 (2012). Consistent with those requirements, EPA generally has refrained from non-acquiescence. *Infra* at 25.

The *Summit* Directive must be set aside under the Administrative Procedure Act (APA) because it flouts the statutory and regulatory "uniformity" mandate under the CAA. As a result of the *Summit* Directive, EPA Regional Offices across the country must apply two conflicting sets of criteria for determining the applicability of the CAA's three permitting programs under the CAA's for —

(1) "New Source Review (NSR)" of new "major emitting facilities" in areas of the country where the Act's goal is "Prevention of Significant Deterioration" (PSD); CAA Sections 165(a) & 169(1),

(2) NSR of new "major stationary sources" in areas that do not meet the National Ambient Air Quality Standards (NAAQS) called

"Nonattainment NSR (NNSR);" 172(5) & 302(j); and

(3) "Title V" federal operating permits for existing "major sources" across the country; 502(a) & 501(a).

See 42 U.S.C. §§ 7471-7479 (PSD Permits); 7501-7506 (Nonattainment NSR permits); 7661-7661(f) (Title V operating permits).

EPA's divergent regulatory scheme for when different sources may be aggregated on the ground that the properties on which they are located are "adjacent" under 40 CFR §§ 70.2, 71.2 is contrary to law because it directly contravenes the CAA's "uniformity" mandate and, indeed, the agency's own "Regional Consistency" rule. Moreover, even if EPA were ever allowed to disregard those "uniformity" requirements, EPA could not do so on the basis of the only reason that it gave for adopting different criteria in different regions here: that the practice at issue was (according to EPA) "longstanding." *Summit* Directive at 1. As the Sixth Circuit put it in *Summit*, "longstanding error is still error." 690 F.3d at 746. And EPA's stated desire to continue to adopt a practice declared unlawful by one circuit simply because it is "longstanding" is an arbitrary and capricious reason for departing from the statutory and regulatory "uniformity" requirement. For either (or both) of these independent reasons, the *Summit* Directive violates the APA and should be set aside by this Court.

JURISDICTIONAL STATEMENT

This is a petition for review of a final EPA action of nationwide scope and effect under the CAA. The CAA grants this Court exclusive jurisdiction over challenges to "any nationally applicable regulations promulgated, or final action taken, by the [EPA] Administrator." 42 U.S.C. § 7607(b)(1); *NRDC v. EPA*, 643 F.3d 311, 317 (D.C. Cir. 2011). NEDA/CAP challenges the December 21, 2012 *Summit* Directive. NEDA/CAP timely filed its petition on February 19, 2013, which is within the 60-day period provided for in 42 U.S.C. § 7607(b)(1).

The *Summit* Directive is a "final action" for purposes of review under 42 U.S.C. § 7607(b)(1). To qualify as "final" for purposes of the CAA, an agency action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997); *see also Appalachian Power v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). Both of those requirements are satisfied here.

The Directive marks the "consummation" of EPA's decisionmaking process because it is neither "tentative" nor "interlocutory," but rather provides direct, "unequivocal," and immediately-operative guidance to regional officials. *Appalachian Power*, 208 F.3d at 1022. The Directive's express purpose is to "explain the applicability" of the Sixth Circuit's *Summit* decision to all Regional

Air Division Directors—the officials responsible for overseeing implementation of the CAA. *Summit* Directive at 1. It declares that in all "permitting actions occurring outside of the 6th Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three-factor test in the NSR and title V regulations." *Id*. It also declares that "when making source determinations in its title V or NSR permitting decisions" in areas *within* the Sixth Circuit's jurisdiction, "the EPA may no longer consider interrelatedness in determining adjacency." *Id*. The Directive further makes clear that the Directive is definitive by directing that it be distributed outside the agency, both to "potential permit applicants" and to "state and local agencies in your Region." *Id*. at 2.

EPA has further confirmed that the Directive reflects a "settled agency position." *Appalachian Power*, 208 F.3d at 1023. EPA invoked the *Summit* Directive as a reason for rejecting public comments on a Federal Implementation Plan to regulate emissions from oil and natural gas facilities in North Dakota, *see* 78 Fed. Reg. 17836, 17842 nn. 9, 10 (March 22, 2013). Several commenters urged EPA to apply the Sixth Circuit's holding in *Summit* and "specify that functional interrelatedness should not be used to determine physical proximity" when making source determinations. *Id*. EPA responded by citing the *Summit* Directive as authority and declaring that "[t]his action affects facilities operating … in North Dakota, and thus the 6th Circuit's *Summit Petroleum* decision cited by the

commenters does not apply." *Id.* EPA's definitive application of the Directive to pending matters underscores that the Directive marks the consummation of the agency's decisional process of regarding whether and how to make stationary source determinations in the wake of the *Summit* decision.

Legal consequences also undeniably flow from the *Summit* Directive. As this Court has explained, an agency document has binding legal consequences if the agency "acts as if [the] document … is controlling in the field," "bases enforcement decisions on the policies or interpretation formulated in the document," or "leads private parties or State permitting parties to believe that it will declare permits invalid unless they comply with the terms of the document." *Appalachian Power*, 208 F.3d at 1021. Any of those conditions are sufficient to establish legal consequences. *All* of them are present here.

As noted above, EPA clearly intends the Directive to bind the Regional Air Division Directors (to whom the *Summit* Directive is formally addressed), as well as "state and local agencies" and "potential permit applications" (to whom the Directive must be distributed). *Summit* Directive at 1-2. As with the EPA guidance at issue in *Appalachian Power*, 208 F.3d at 1023, the Directive here "commands," "requires," "orders," and "dictates," and it permits no discretion for agency officials to apply the *Summit* decision outside the jurisdiction of the Sixth Circuit. EPA's reliance on the Directive as the basis for rejecting public comments

on the North Dakota Federal Implementation Plan provides direct evidence that EPA is treating the Directive as binding authority with legal consequences for parties regulated under the CAA. *See* 78 Fed. Reg. at 17842.

The Directive resolves all legal ambiguity flowing from that decision, and it establishes the binding legal standards applicable to stationary source determinations nationwide in its wake. Disregarding the *Summit* Directive could result in significant industry CAA enforcement penalties including injunctive relief, monetary fines, and possibly criminal prosecution.[1] In addition, if a State permit authority fails to obey the Directive, EPA can revoke the state's permit programs under CAA Sections 110(k)(5) and 502(i), 42 U.S.C. §§ 7410(k)(5), 7661a(i) and CAA permits would have to be obtained from EPA.

In short, the *Summit* Directive is a major EPA decision that will have immediate and significant consequences for regulated entities on the legal standards governing stationary source determinations throughout the United States.

[1] Under CAA Section 113, 42 U.S.C. § 7413, in addition to injunctive relief and personal and corporate criminal penalties, the failure to obtain a required NSR or Title V permit can result in fines of up to $25,000.00/day per violation (*NB*: multiplied by the Consumer Price Index, the fine now exceeds $39,000 per day per violation). CAA Section 120 provides for "noncompliance penalties" equivalent to the avoided cost for having not obtained a permit. *See* 42 U.S.C. § 7420. CAA Section 304, 42 U.S.C. § 7604, authorizes citizens to sue in the place of EPA or a State for alleged violations of the permitting provisions of the Act.

It is a "final action" subject to this Court's exclusive jurisdiction under 42 U.S.C. § 7607(b)(1), and for the reasons set forth below it must be set aside.

STATEMENT OF ISSUE

Whether the *Summit* Directive must be set aside under the APA because it violates the "uniformity" requirement set forth by the CAA and its implementing regulations, or is otherwise arbitrary and capricious or contrary to law.

STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions are reproduced in attached Addendum 1 ("ADD-1").

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress enacted the CAA "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." 42 U.S.C. § 7401(b)(1). EPA has primary responsibility for enforcing the CAA nationwide, which it does through ten Regional Offices located across the country. The CAA requires EPA to "assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act." CAA § 301(a)(1), 42 U.S. C. § 7601(a)(1). EPA's binding regulations implement and echo this statutory command by declaring that EPA's policy is to "[a]ssure fair and uniform

application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the [CAA]." 40 CFR § 56.3.

The CAA establishes several different permit programs for regulating stationary sources of air pollution. Preconstruction permits are required in certain areas of the country depending on whether those areas have satisfied National Ambient Air Quality Standards; these permits are generally known as New Source Review (NSR) permits. *See* 42 U.S.C. §§ 7475, 7479(1) (requiring permits for "major emitting facilities"); 42 U.S.C. §§ 7503, 7602(j) (requiring permits for "major stationary sources" in areas failing to attain national standards). Title V of the CAA also establishes a separate permit requirement applicable to any "major source" of air pollution. 42 U.S.C. §§ 7661a(a), 7602(j). Whether a source counts as "major" under these permitting programs turns on the quantity of pollutants that the source is capable of emitting; the precise threshold (*i.e.*, 1, 10, 25, 100 or 250 tons) varies depending on the specific CAA program, pollutant, local attainment status, and facility at issue. [2]

[2] For instance, in addition to "major sources" in PSD and NNSR areas, the Title V Operating Permit Program also includes "major sources" of hazardous air pollutants" across the country regulated by Title III of the CAA. 42 U.S.C. § 7661(2). CAA Title III defines "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity … on the basis of the potency of the air pollutant,

EPA has issued regulations allowing individual pollutant emitting activities to be aggregated for purposes of determining whether they collectively qualify as "major" under the various permitting programs. For each of these programs, aggregation is required if the individual pollutant emitting activities (1) are under common "control of the same person"; (2) "belong to a single major industrial grouping"; and (3) are "located on one or more contiguous or adjacent properties." *See* 40 CFR § 52.21(b)(5) & (6) (PSD definitions of "stationary source" and "building, structure, facility and installation); 40 CFR Part 51, Appendix S § II.A.1 & 2 (NNSR definitions); 40 CFR §§ 70.2, 71.2 (Title V definitions). As a practical matter, the aggregation analysis is frequently the key to determining whether industrial operations qualify as a "major emitting facility," a "major stationary source," and/or a "major source," and are therefore required to obtain preconstruction NSR permits and/or Title V operating permits.

B. The *Summit* Litigation

Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012), involved a challenge to EPA's interpretation of the three-factor test for determining whether pollutant emitting activities must be aggregated for purposes of determining

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persistence, potential for bioaccumulation, other characteristics of the air pollutant or other relevant factors. 42 U.S.C. 7412(a)(1) Also, in "extreme" ozone nonattainment areas established under CAA Title I, the Act defines a "major source" as "a source or group of sources located within a contiguous area and under common control that emits, or the potential to emit, at least 10 tons or more of volatile organic compounds." 42 U.S. C. § 7511a(e).

applicability of the permit requirements. The case arose when EPA determined that a natural gas sweetening plant and various gas production wells owned by Summit Petroleum Corporation (Summit) constituted a single stationary source under the CAA's Title V permitting program. *Summit*, 690 F.3d at 735. It was undisputed that the sweetening plant and wells were under common control of the same person and belonged to a single major industrial grouping, and thereby satisfied two of the three conditions of EPA's three-factor test. *Id*. at 741. But Summit denied that its facilities qualified for aggregation under the third factor — requiring that facilities be "located on one or more contiguous or adjacent properties" — because they were physically and geographically separated and spread out over an area of approximately 43 square miles. *Id*. at 735-41.

EPA disagreed with Summit and concluded that the company's sweetening plant and wells were "located on … adjacent properties" because they were functionally "interrelated" with one another, even though the facilities were spread out over 43 square miles and it was undisputed that they were not located on "'contiguous,' *i.e.*, bordering, properties." *Id*. at 735, 739-40. Summit then filed a petition for review to the Sixth Circuit, challenging EPA's stationary source determination. In particular, the company argued that EPA's interpretation of the term "adjacent" to encompass activities that are *functionally* interrelated — even if

not *physically* and *geographically* proximate — was unreasonable and contrary to the plain and unambiguous meaning of "adjacent." *Id*. at 741.

The Sixth Circuit agreed with Summit and set aside EPA's determination. The court explained that the term "adjacent" in EPA's regulations unambiguously requires facilities to have "physical proximity" to one another, and does not turn on their "functional relationship." *Id*. at 741-44. It reached this conclusion based on its detailed analysis of dictionary definitions and case law, including the Supreme Court's interpretation of the word "adjacent" in the Clean Water Act regulations in *Rapanos v. United States*, 547 U.S. 715 (2006). 690 F.3d at 741-44. As the court explained, it could not find "any authority suggesting that the term 'adjacent' invokes an assessment of the functional relationship between two activities." *Id.* at 742. Because EPA's interpretation contravened the plain meaning of "adjacent," the court declined to defer to the agency. *Id*. at 744. The court rejected EPA's argument for deference on the ground that its interpretation was "longstanding," explaining that an agency "may not insulate itself from correction merely because it has not been corrected soon enough," and that "longstanding error is still an error." *Id*. at 744-46. The court further explained that, even if "adjacent" were somehow ambiguous, EPA's interpretation was unreasonable, and thus unlawful,

because it rested on a "mischaracterization of its own regulatory history" and was "inconsistent with its own guidance memorandums." *Id*. at 746-49.[3]

EPA sought rehearing *en banc*, which was denied. 2012 U.S. App. LEXIS 23988 (6th Cir. Oct. 29, 2012). EPA did not seek further review of the Sixth Circuit decision by the Supreme Court. EPA later rescinded its determination that Summit required a Title V permit to operate its various facilities.

C. The *Summit* Directive

In December 2012, two months after the Sixth Circuit denied rehearing, EPA published the *Summit* Directive that is the subject of this petition for review. The Directive embodies EPA's formal response to the Sixth Circuit's *Summit* decision, and it is addressed to the "Regional Air Division Directors" charged with implementing the CAA nationwide. After summarizing the court's holding that the term "adjacent" in the CAA regulations "was related only to physical proximity" and did not involve any consideration of "functional interrelatedness," the Directive explains that "the EPA may no longer consider interrelatedness in determining adjacency when making source determination decisions in its title V or NSR permitting decisions in areas under the jurisdiction of the 6th Circuit, *i.e.*, Michigan, Ohio, Tennessee and Kentucky." *Summit* Directive at 1.

[3] Judge Moore dissented. In her view, "'adjacent' is ambiguous," and EPA's interpretation of that term was reasonable and entitled to deference, even if it was "somewhat inconsistent" with EPA's prior policy pronouncements. *Summit*, 690 F.3d at 752-56.

The *Summit* Directive makes clear, however, that "in other jurisdictions" — *i.e.*, those outside of the Sixth Circuit — EPA will continue to implement its "longstanding practice of considering interrelatedness" when determining whether separate properties on which pollutant emitting activities are located are "adjacent" and, therefore whether those activities must be aggregated under its three-factor test. *Id*. The *Summit* Directive concludes by instructing EPA's Regional Air Division Directors to "share this information with potential permit applicants, as well as the state and local agencies in your Region." *Id*. at 2.

The upshot of the *Summit* Directive is that it requires EPA officials in different parts of the country to apply different legal criteria for determining whether pollutant emitting activities may be aggregated for purposes of determining the applicability of the NSR and Title V permit requirements. This directly contravenes of the CAA's "uniformity" mandate.

SUMMARY OF ARGUMENT

For two independent reasons, EPA's *Summit* Directive is invalid and must be set aside under the APA.

First, the *Summit* Directive is not in accordance with law because it violates the CAA's and EPA's regulations' unambiguous requirement for uniform application of all "criteria" used to implement and enforce the Act. EPA's own regulations — in accordance with the statute's "uniformity" requirement —

explicitly mandate the "fair and uniform application by all EPA Regional Offices of the criteria … employed in implementing and enforcing the act." 40 CFR § 56.3.

The *Summit* Directive, by contrast, instructs EPA Regions (and "state permitting authorities and potential permit applicants") to implement two sets of conflicting criteria for determining the applicability of the three Clean Air Act permitting program requirements depending on the state in which a facility or project is located or proposed to be located. The *Summit* Directive is therefore directly contrary to the statutory and regulatory "uniformity" requirement.

Second, and in any event, the *Summit* Directive is arbitrary and capricious and an abuse of discretion. The Directive fails to provide any reasoned explanation for EPA's decision to depart from the "uniformity" requirement and adopt *different* criteria for determining the applicability of the CAA's permitting programs in jurisdictions within — and outside — the Sixth Circuit. The only reason stated in the Directive is that EPA's interpretation of "adjacent" as being dependent on "functional interrelatedness" is "longstanding." *Summit* Directive at 1. But the fact that a practice is (purportedly) longstanding does not mean that it is lawful and does not provide any inherently reasonable basis for disregarding the statutory and regulatory "uniformity" mandate. The *Summit* Directive does not even consider, much less rationally explain, available alternatives approaches. Nor

does EPA even attempt to justify why the agency will continue to apply permitting criteria that the Sixth Circuit emphatically and persuasively rejected as being inconsistent with the plain meaning of EPA's own regulations.

EPA's decision to ignore rather than implement the Sixth Circuit's decision in *Summit* across the country poses numerous problems from a practical and policy standpoint. The one of most concern to NEDA/CAP's members is that EPA fails even to discuss what it believes "adjacent" and "functionally interrelated" mean much less how that term and phrase would practically apply — preferring as the *Summit* Directive states to apply the adjacency criteria through "case-by-case" determinations that creates confusion and delay, and an opportunity for coercive behavior by permitting authorities. For all of these reasons, the *Summit* Directive is arbitrary and capricious and an abuse of discretion.

STANDING

NEDA/CAP has associational standing to seek review of the *Summit* Directive because of the permitting and enforcement consequences of the Directive on NEDA/CAP's members' operations and development projects throughout the United States. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Arizonians for Official English v. Ariz.*, 520 U.S. 43, 65-66 (1997). NEDA/CAP's members include companies in the oil and gas industry and others in a variety of manufacturing sectors that collectively own and operate CAA-regulated facilities

in all States except Hawaii. *See* ADD 2. Many of NEDA/CAP's members' existing operations are already major sources under the CAA's permitting programs, but an even greater number are "minor sources" under the Clean Air Act that could be subject to permitting under the *Summit* Directive if they are to be aggregated with physically separate but "functionally interrelated" operations. See ADD 2. Further, many of NEDA/CAP's companies are investigating opportunities to build new "stationary sources," or expand existing "stationary sources" particularly those in the energy business. The uncertainty regarding the practical application of the applicability criteria for the CAA's permitting programs poses regulatory obstacles for future development opportunities, particularly outside of the Sixth Circuit.

Regardless of whether NEDA/CAP's members are conducting oil and gas exploration and development, or manufacturing petrochemicals, home products or building materials, they are now subject to conflicting permitting criteria depending on where facilities are located. See ADD 2. And for facilities located outside the Sixth Circuit, they must obtain both NSR permits and Title V operating permits based on EPA's definition of "adjacent" as "functionally related" regardless of physical or geographic proximity of emitting facilities, even though the Sixth Circuit has (correctly) declared that interpretation unlawful.

The injury to NEDA/CAP's members also includes the prospect of attempting to obtain a timely EPA regional applicability determination outside of the Sixth Circuit that involves "a case-by-case application "of the "adjacency" criteria that EPA intends to implement according to the *Summit* Directive (at 1). For instance it took Summit Petroleum's over five years to obtain such a determination from EPA Region 5. In the context of a preconstruction permit that prohibits building any part of an emitting unit until a PSD/NSR permit is obtained and finally adjudicated, the prospect of such delays and the uncertainty surrounding such "case-by-case" determinations has a chilling effect on expansion and building new "plants."

The *Summit* Directive is of particular concern to NEDA/CAP's members that are involved in oil and gas exploration and development in several promising geological formations located beneath multiple States. The most immediately affected members are those with leaseholds or other property rights for exploration and development outside the Sixth Circuit states of Michigan, Ohio, Tennessee, and Kentucky. *See* Attachment 2.1. The Marcellus Shale formation under these States and States outside of the Sixth Circuit including Pennsylvania, New York, Virginia, West Virginia, and Maryland, is widely believed to be the largest

potential domestic source of future natural gas in the United States.[4] Exploration companies, including NEDA/CAP's members, are now subject to two sets of permit applicability rules even though they are seeking to withdraw gas from the same gas formation, depending on the state in which they do business. *See* ADD. 2.

This divergent set of regulatory criteria is itself disruptive and will create added confusion and compliance costs. Moreover, under this divergent regulatory scheme, companies with shale gas leases outside of the Sixth Circuit are placed at significant competitive disadvantage because they face additional permitting requirements and the ambiguity and delay that comes along with the "case-by-case" determinations called for by the *Summit* Directive (at 1).

The injuries discussed above all flow from the *Summit* Directive, and will be redressed by a decision from this Court vacating that Directive.

STANDARD OF REVIEW

This petition for review is filed under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b(1). In reviewing the petition, this Court must apply the

[4] The Marcellus formation is estimated to contain 410 trillion cubic feet of natural gas, and could supply U.S. consumers' need for energy for hundreds of years. www.energyfromshale.org/hydraulic-fracturing/marcellus-shale-gas. Other significant geological formations for oil and gas production include the Bakka formation in North Dakota, the Permian Basin and Barnett formation in Texas and the Green River formation beneath Utah and Colorado. NEDA/CAP members operate in all of these states, and thus are affected by two different permit applicability criteria depending on their location. See ADD 2.

standard of review under the Administrative Procedure Act (APA), 5 U.S. C. § 706(2). *See Alaska Dept. of Envtl Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). The APA authorizes this Court to set aside agency action that is arbitrary and capricious, an abuse of discretion, in excess of statutory authority, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A), (C).

When deciding whether an agency decision is arbitrary and capricious, this Court considers whether "the agency [examined] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

Agency action is not in accordance with law if it violates "any law," including statutes and that agency's own regulations. *See generally, e.g., FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003); *Environmentel, LLC v. FCC*, 661 F.3d 80, 84-85 (D.C. Cir. 2011) (an agency "must comply with its own regulations"); *Am. Fed'n of Gov't Emps., Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985) (same).

ARGUMENT

I. THE *SUMMIT* DIRECTIVE IS CONTRARY TO LAW

Both the CAA and its implementing regulations expressly require EPA to apply a "uniform" set of criteria when implementing the CAA's programs. CAA Section 301(a)(2), 42 U.S.C. § 7601(a)(2); 40 CFR § 56.3. The *Summit* Directive directly contravenes that statutory and regulatory "uniformity" mandate by adopting *different* criteria for determining whether stationary sources are "adjacent" for purposes of the CAA's permitting programs. Because the Directive violates the CAA and EPA's regulations, it must be set aside as contrary to law.

A. The CAA And EPA Regulations Require Nationwide Uniformity In The Criteria Used To Implement The Permitting Requirements

The CAA unambiguously requires all EPA officials nationwide to apply uniform criteria in administering CAA programs. Congress directed that EPA regulations must require all "regional officers and employees" to "follow" regulations designed "to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the Act." 42 U.S.C. § 7601(a)(2)(A). This mandate has not been lost on EPA.

EPA has repeatedly interpreted this statutory language to directly require uniformity and consistency in carrying out the CAA. For example, shortly after this statutory language was enacted, EPA stated in a rulemaking that § 7601(a)(2)(A) "requires 'fairness and uniformity in the criteria, procedures, and

policies applied by the various regions in implementing and enforcing the Act." 46 Fed. Reg. 8481, 8488 (1981). The Agency went on to say that "USEPA interprets this requirement provision to require *national consistency* in carrying out the Clean Air Act and USEPA regulations…." *Id*. (emphasis added).

EPA reiterated this interpretation several years later, when it stated that § 7601(a)(2)(A) "requires EPA 'to assure fairness and uniformity in the criteria, procedures, and policies'" applied in enforcing the CAA. 51 Fed. Reg. 32176 (1986). As EPA made clear at the time, the statutory language "reflects Congressional concerns that permitting different requirements in different parts of the country could lead to the inequitable location of some industries." *Id.*

This Court itself has endorsed EPA's understanding of § 7601(a)(2)(A) as directly requiring uniformity and consistency in EPA's substantive decision-making. In *Kennecott Corp. v. EPA*, for example, the Court rejected the argument that EPA's decision to impose a single, nationwide eligibility standard by which companies could obtain a "nonferrous smelter order" (NSO) usurped the role of the states in issuing such orders. 684 F.2d 1007, 1009, 1014 n.18 (D.C. Cir. 1982). In doing so, this Court explained that § 7601(a)(2)(A) "requires that [EPA] regulations assure fairness and uniformity in the criteria, procedures, and policies" applied under the Act, and that "[e]stablishing a single set of criteria [for obtaining an NSO] is consistent with that mandate." *Id*. at 1014 n. 18.

These interpretations of the CAA's nationwide uniformity requirement are also consistent with the legislative history of § 7601(a)(2)(A). As the House Report to the Clean Air Act Amendments of 1977 explains, the purpose of the uniformity provision is "to assure consistency in policy and legal interpretations by the Administrator's regional offices." H.R. Rep. No. 95-294, at 27 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1105. The House Report further notes that under the proposed CAA amendments, "there must be reasonable uniformity in the criteria, procedures, and policies applied by the various regional offices under the act," and that (for example) "use of different air quality models in different regions … would no longer be permitted." H.R. Rep. No. 95-294, at 324-25, reprinted in 1977 U.S.C.C.A.N. at 1403-04. The Report also explains that the statutory uniformity requirement "would prevent inconsistent legal interpretations of the act and regulations thereunder in different regions." *Id*.

Significantly, EPA has implemented the statutory uniformity requirement by enacting binding regulations that expressly require EPA officials to implement the CAA using uniform criteria nationwide. *See generally* 40 CFR §§ 56.1-56.6 (expressly implementing 42 U.S.C. 7601-7606). In particular, 40 CFR § 56.3 implements and echoes the statutory language by declaring that it is official EPA policy to "[a]ssure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act."

As EPA recognized when it promulgated § 56.3, the "intended effect" of its uniformity regulations is "to assure fair and consistent application of rules, regulations and policy throughout the country." 45 Fed. Reg. 85400, 85400 (Dec. 24, 1980).

Section 56.3's uniformity policy mandate is legally binding on all relevant EPA officials. It is black-letter administrative law that an agency "must comply with its own regulations." *Environmentel*, 661 F.3d at 84-85; *Am. Fed'n of Gov't Emps., Local 3090*, 777 F.2d at 759 (same); *cf. Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-596 (D.C. Cir. 2006) (explaining that rules published in Code of Federal Regulations have "general applicability and legal effect"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (same).

The CAA and its regulations also establish that § 56.3's "uniformity" rule is binding. For example, 42 U.S.C. § 7601(a)(2) directs EPA to "establish[] general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out" their authorities under the CAA. Section 56.2 states that the "Regional Consistency" requirements set forth in Part 56 of the regulations apply to EPA employees at Headquarters who are "responsible for developing the procedures to be employed or policies to be followed by Regional Offices in implementing and enforcing the Act," along with their counterparts in Regional Offices in carrying out authorities delegated by the

EPA Administrator. 40 CFR § 56.2. And § 56.5(a)(1) likewise provides that responsible officials in the Regional Offices "shall assure that actions taken under the [CAA] … [a]re carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules." 40 CFR § 56.5(a)(1).

Notably, in accordance with the statutory and regulatory uniformity requirements set forth above, EPA has generally followed a practice of acquiescing, nationwide, to unfavorable rulings issued by the federal courts of appeals. As the leading scholarly treatment on agency nonacquiescence observes, "EPA's general policy is to eschew relitigation of an issue that has been squarely decided against it in *any* circuit." Samuel Estreicher & Richard L. Revesz, *Nonacquiesence by Federal Administrative Agencies*, 98 Yale L.J. 679, 717 (1989) ((emphasis added). This policy reflects EPA's recognition of the "special need to maintain uniformity in the environmental context" and the fact of "a relatively responsive Congress" — both of which have led EPA to "avoid[] relitigation as a tool of policy." *Id*. (citing caselaw and interview with EPA General Counsel). As one EPA official has explained, "[i]t is very rare that EPA would nonacquiesce [in a court decision]," as EPA will instead typically "either seek *cert* [in the Supreme Court], or legislation, or … live with it." Robert J. Hume, **How Courts Impact Administrative Behavior** 96 (2009).

The bottom line is that both the CAA itself and EPA's implementing regulations affirmatively require EPA officials nationwide to apply uniform criteria and policies when administering the CAA. This binding mandate unambiguously directs EPA to apply a single legal standard when determining whether multiple pollutant emitting activities may be aggregated for purposes of CAA permitting requirements, and it bars EPA from adopting different standards applicable to different parts of the country. Any EPA policy that violates these uniformity requirements is contrary to law and must be set aside.

B. The *Summit* Directive Flouts The Statutory And Regulatory "Uniformity" Requirement For Permitting Criteria

The *Summit* Directive expressly contravenes this "uniformity" mandate. The Directive unambiguously establishes one set of permitting criteria for jurisdictions within the Sixth Circuit and another set of permitting criteria for jurisdictions "outside the 6th Circuit." *Summit* Directive at 1. Within the Sixth Circuit, "adjacent" is given its plain meaning (*i.e.*, physical proximity) in making permit applicability decisions, in accordance with the Sixth Circuit's decision in *Summit*. But outside the Sixth Circuit, EPA interprets "adjacent" to include the elastic and inherently subjective concept of "functional interrelatedness." That is precisely how the *Summit* Directive has been interpreted and enforced by EPA. As discussed, EPA has invoked the Directive in applying its "functionally interrelated" test of "adjacency" in rulemaking involving activities outside the

Sixth Circuit. *See supra* at 6-7. Because the Directive violates the CAA and the uniformity regulations, it is contrary to law and must be set aside.

In addition to violating the statutory and regulatory "uniformity" rule, the Directive also upsets the interests served by that rule. Uniformity for permitting major new and existing "sources" (and major new projects at existing major sources) is essential so that States and EPA regions are placed on a level playing field when competing for economic development opportunities like new manufacturing plants and energy development projects. The criteria for whether or not a permit is required should be the same in Ohio as it is in Florida. *Disuniformity* creates inequities in permitting decisions and increases the costs and difficulty of pursuing development projects and navigating the permitting process.

II. THE SUMMIT DIRECTIVE IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

Even if the *Summit* Directive did not directly contravene the CAA and its implementing regulations' uniformity requirement, it would still be unlawful because it is arbitrary and capricious and an abuse of discretion.

An agency must satisfy at least two basic requirements to avoid violating the "arbitrary and capricious" standard. First, the agency must engage in ''reasoned decisionmaking.'' *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983). Second, ''the agency must . . .

articulate a satisfactory explanation for its action.'' *Id.* at 43. Similarly, when there is a claim of "abuse of discretion," the court must undertake a "thorough, probing, in-depth review" of "whether the decision was based on consideration of the relevant factors" and determine whether there was "clear error in judgment" by the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

The *Summit* Directive contravenes both of those well-settled, minimum standards of reasoned agency decision-making.

A. EPA Ignored The Statutory And Regulatory Uniformity Mandate Without Justification

A hallmark of arbitrary agency action is a failure to recognize the agency rules and interests that agency policy is intended to advance. As the Supreme Court has explained, courts ''must 'consider whether the [agency's] decision was based on a consideration of the relevant factors,'" and an agency decision is arbitrary and capricious if the agency's explanation for its action "has … entirely failed to consider an important aspect of the problem." *State Farm,* 463 U.S. at 43. In the *Summit* Directive, EPA did not even acknowledge the statutory and regulatory uniformity mandate, much less attempt to articulate any reasoned basis for departing from that mandate in the situation here (even if an intentional *disuniformity* of permit program applicability criteria were ever allowed, which it is not). *See Summit* Directive at 1-2. The sole reason that EPA *did* identify for its

Directive is that its flawed interpretation of "adjacent" is purportedly "longstanding." *Id.* at 1. But that is insufficient. As the Sixth Circuit observed in *Summit*, "longstanding error is still error." *Summit Petroleum*, 690 F.3d at 746. More fundamentally, the agency in no way attempted to explain, why the (purportedly) "longstanding" nature of its interpretation, would by itself provide a reasoned basis for ignoring the uniformity mandate. In other words, the lone explanation that EPA did give for its Directive is plainly not "satisfactory." *State Farm*, 463 U.S. at 43; *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976); *Greyhound Corp. v. ICC*, 668 F.2d 1354 (D.C. Cir. 1981).

B. EPA Failed To Articulate Any Rationale for Ignoring *Summit*

Nor does the *Summit* Directive provide any reasoned explanation for continuing to apply a definition of "adjacent" that was thoroughly rejected by the Sixth Circuit. As the Sixth Circuit persuasively explained, EPA's interpretation of "adjacent" to encompass the murky concept of "functional interrelatedness" is inconsistent with (1) dictionary definitions of "adjacent" (which uniformly focus on *physical* proximity); (2) Supreme Court case law (*Rapanos v. United States*, 547 U.S. 715 (2006)) interpreting the term "adjacent"; and (3) EPA's own prior pronouncements. *Summit*, 690 F.3d at 741-749. In its *Summit* Directive, EPA did not even attempt to explain why the Sixth Circuit's decision was wrong or should not be given effect — other than by asserting that its interpretation was

"longstanding," which, as discussed, is not sufficient. Nor did EPA even attempt to explain how following the law as set forth in the Sixth Circuit's decision would frustrate the agency's legitimate regulatory objectives, or how (given its refusal to follow the *Summit* decision outside of the Sixth Circuit) it might act to restore national uniformity.

C. EPA Failed to Consider Alternatives to Ignoring *Summit*

An agency's failure to consider available alternatives is another tell-tale sign of arbitrary-and-capricious decision-making and an abuse of discretion. *State Farm*, 463 U.S. at 47-51; *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 (D.C. Cir 1986) (citations omitted); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 814 (D.C. Cir. 1983). Here, several alternatives to the *Summit* Directive seemingly are available. Yet EPA apparently considered none. For instance, EPA could have: (1) acceded to the *Summit* decision nationwide, in accordance with its typical practice, *supra* at 25; (2) followed *Summit* nationwide and, at the same, launched a rulemaking amending its CAA permit regulations to address the *Summit* decision, as counseled by the Sixth Circuit, see *Summit*, 690 F.3d at 748; or (3) sought Supreme Court review of the

Sixth Circuit's decision.[5] EPA did not discuss, much less provide a reasoned basis for rejecting, any of those alternatives.

The Supreme Court has held that the failure to consider available alternatives is an "obvious reason" to hold an agency action to be arbitrary and capricious. *State Farm,* 463 U.S. at 46. *State Farm* involved a challenge to the National Highway Traffic Safety Administration (NHTSA)'s decision to rescind its standard requiring passive restraints (automatic seat belts *or* airbags) in new motor vehicles. The agency's basis for the rescission was that the automatic safety belts installed in 99% of new cars to meet the standard could be easily detached thus defeating the safety improvement anticipated by the agency when it issued the standard. In addressing the agency's failure to consider mandating airbags to meet the National Highway traffic Safety Act's requirements to establish reasonable, practicable and appropriate motor vehicle safety standards, the Court stated that "[t]he first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized." *State Farm*, 463 U.S. at 46; s*ee also, e.g.*, *Chamber of Commerce of the United States v. SEC*, 412 F.3d

[5] The *Summit* Directive was issued before the time for filing a petition for certiorari had passed. EPA has not stated whether it asked the Solicitor General to authorize a petition for certiorari in this case. Even if EPA dis so, and the Solicitor General declined to authorize certiorari, that would not be a basis for ignoring the statutory and regulatory uniformity mandate. In any event, the pertinent point here is that EPA did not even *discuss* these alternatives in its Directive.

133, 145 (D.C. Cir. 2005) ("In sum, the disclosure alterative was neither frivolous nor out of bounds, and the Commission therefore had an obligation to consider it.").

The same goes here. By failing to consider the numerous available alternatives to the *Summit* Directive requiring divergent permitting criteria across the United States, EPA failed to engage in reasoned decision-making.

D. The *Summit* Directive Is Unsound As A Practical Matter

EPA's failure to consider the practical problems and inefficiencies created by the *Summit* Directive is another sign of arbitrary action. *See Alabama Power Co. v. Costle*, 636 F.3d 323, at 397 (cautioning EPA to adopt an aggregation test for determining the application of PSD that was sufficiently predictable to give plausibly regulated entities "explicit notice as to whether (and on what statutory authority) the EPA construes the term [stationary] source."). In adopting the Directive, EPA failed to recognize, much less provide a reasoned basis for inviting, the confusion and inequities that the *Summit* Directive creates by establishing divergent permitting criteria on the critical issue on when facilities qualify as a "major" source. Nor did EPA consider — or provide a reason for disregarding — the virtues of a uniform, plain-meaning interpretation of "adjacent" (without the subjective and unpredictable "functional interrelatedness" component rejected in *Summit*).

Creating uncertainty about when the permitting programs apply for new construction and for existing sources not only contravenes the statutory and regulatory uniformity mandate, it undermines the CAA's permitting process, unreasonably thwarts prudent economic development (thus impairing job growth), and unreasonably interferes with the legitimate competitive activities of individual companies like NEDA/CAP's members who are committed to complying with the CAA. Exacerbating the regulatory uncertainty inherent in the lawful permitting process by creating two sets of criteria for determining permit applicability is unfair and creates practical problems for business competitiveness and compliance.

Directing jurisdictions outside the Sixth Circuit to continue to apply a policy that ignores the ordinary definition of "adjacent" in favor one that includes the subjective concept of "functional interrelatedness" makes matters even worse. Indeed, EPA initially rejected functional interrelationships as a criterion for defining a "source" for permit applicability when it adopted its 1980 PSD/NSR regulations because it recognized the lack of certainty that such test would impose on the regulated community. As the Agency explained at the time:

> To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under the definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to asses these interrelationships would have embroil the agency in numerous fine-grained analyses.

45 Fed. Reg. 52676, 52695 (Aug. 7, 1980). See also *Summit* at 747. The concept of "functional interrelatedness" is no less subjective and unworkable today.

For any, or all, of these reasons, EPA's *Summit* Directive is arbitrary and capricious and an abuse of discretion, and invalid for those reasons as well.

CONCLUSION

For the foregoing reasons, the EPA's *Summit* Directive should be set aside.

Respectfully,

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CERTIFICATE OF COMPLIANCE WITH WORK LIMITATIONS AND TYPEFACE REQUIREMENTS

Petitioner National Environmental Development Association hereby certifies that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7) because it contains 7,889 words as counted by Microsoft Word™ excluding the signature block and the parts of the brief exempted by Fed. R. App. P 32(a)(7) and that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a) (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word™ in Times New Roman 14-point type.

Counsel for Petitioner NEDA/CAP

Dated: June 21, 2013.

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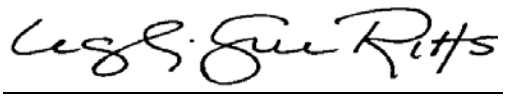
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2013, I electronically filed the foregoing **PETITIONER'S BRIEF** using the Court's ECF system, and thereby caused it to be served by electronic transmission on counsel of record, all of whom are registered to use ECF in this Court.



ADDENDUM

ADDENDUM 1

STATUTORY AND REGULATORY MATERIALS

(A) A State registration fee on new motor vehicles registered in the State which are not clean-fuel vehicles in the amount of at least 1 percent of the cost of the vehicle. The proceeds of such fee shall be used to provide financial incentives to purchasers of clean-fuel vehicles and to vehicle dealers who sell high volumes or high percentages of clean-fuel vehicles and to defray the administrative costs of the incentive program.

(B) Provisions to exempt clean-fuel vehicles from high occupancy vehicle or trip reduction requirements.

(C) Provisions to provide preference in the use of existing parking spaces for clean-fuel vehicles.

The incentives under this paragraph shall not apply in the case of covered fleet vehicles.

(4) No sales or production mandate

The regulations and plan revisions under paragraphs (1) and (2) shall not include any production or sales mandate for clean-fuel vehicles or clean alternative fuels. Such regulations and plan revisions shall also provide that vehicle manufacturers and fuel suppliers may not be subject to penalties or sanctions for failing to produce or sell clean-fuel vehicles or clean alternative fuels.

(July 14, 1955, ch. 360, title II, § 249, as added Pub. L. 101–549, title II, § 229(a), Nov. 15, 1990, 104 Stat. 2525.)

REFERENCES IN TEXT

The Solid Waste Disposal Act, referred to in subsec. (c)(2)(D), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795. Subtitle I of the Act is classified generally to subchapter IX (§ 6991 et seq.) of chapter 82 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

November 15, 1990, referred to in subsec. (e)(3), was in the original ''the date of the Clean Air Act Amendments of 1990'', which was translated as meaning the date of enactment of Pub. L. 101–549, which enacted this section, to reflect the probable intent of Congress.

§ 7590. General provisions

(a) State refueling facilities

If any State adopts enforceable provisions in an implementation plan applicable to a nonattainment area which provides that existing State refueling facilities will be made available to the public for the purchase of clean alternative fuels or that State-operated refueling facilities for such fuels will be constructed and operated by the State and made available to the public at reasonable times, taking into consideration safety, costs, and other relevant factors, in approving such plan under section 7410 of this title and part D,[1] the Administrator may credit a State with the emission reductions for purposes of part D[1] attributable to such actions.

(b) No production mandate

The Administrator shall have no authority under this part to mandate the production of clean-fuel vehicles except as provided in the California pilot test program or to specify as applicable the models, lines, or types of, or marketing or price practices, policies, or strategies for, vehicles subject to this part. Nothing in this part shall be construed to give the Administrator authority to mandate marketing or pricing practices, policies, or strategies for fuels.

(c) Tank and fuel system safety

The Secretary of Transportation shall, in accordance with chapter 301 of title 49, promulgate applicable regulations regarding the safety and use of fuel storage cylinders and fuel systems, including appropriate testing and retesting, in conversions of motor vehicles.

(d) Consultation with Department of Energy and Department of Transportation

The Administrator shall coordinate with the Secretaries of the Department of Energy and the Department of Transportation in carrying out the Administrator's duties under this part.

(July 14, 1955, ch. 360, title II, § 250, as added Pub. L. 101–549, title II, § 229(a), Nov. 15, 1990, 104 Stat. 2528.)

CODIFICATION

In subsec. (c), ''chapter 301 of title 49'' substituted for ''the National Motor Vehicle Traffic Safety Act of 1966 [15 U.S.C. 1381 et seq.]'', meaning ''the National Traffic and Motor Vehicle Safety Act of 1966 [15 U.S.C. 1381 et seq.]'', on authority of Pub. L. 103–272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

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.

[1] So in original. Probably should be ''part D of subchapter I of this 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 reimbursement, 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.

(July 14, 1955, ch. 360, title III, § 301, formerly § 8, as added Pub. L. 88–206, § 1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89–272, title I, § 101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90–148, § 2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91–604, §§ 3(b)(2), 15(c)(2), Dec. 31, 1970, 84 Stat. 1677, 1713; Pub. L. 95–95, title III, § 305(e), Aug. 7, 1977, 91 Stat. 776; Pub. L. 101–549, title I, §§ 107(d), 108(i), Nov. 15, 1990, 104 Stat. 2464, 2467.)

CODIFICATION

Section was formerly classified to section 1857g of this title.

AMENDMENTS

1990—Subsec. (a)(1). Pub. L. 101–549, § 108(i), inserted ''subject to section 7607(d) of this title'' after ''regulations''.

Subsec. (d). Pub. L. 101–549, § 107(d), added subsec. (d).

1977—Subsec. (a). Pub. L. 95–95 designated existing provisions as par. (1) and added par. (2).

1970—Subsec. (a). Pub. L. 91–604, § 15(c)(2), substituted ''Administrator'' for ''Secretary'' and ''Environmental Protection Agency'' for ''Department of Health, Education, and Welfare''.

Subsec. (b). Pub. L. 91–604, § 3(b)(2), substituted ''Environmental Protection Agency'' for ''Public Health Service'' and struck out provisions covering the payment of salaries and allowances.

Subsec. (c). Pub. L. 91–604, § 15(c)(2), substituted ''Administrator'' for ''Secretary''.

1967—Pub. L. 90–148 reenacted section without change.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

DISADVANTAGED BUSINESS CONCERNS; USE OF QUOTAS PROHIBITED

Title X of Pub. L. 101–549 provided that:

''SEC. 1001. DISADVANTAGED BUSINESS CONCERNS.

''(a) IN GENERAL.—In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments of 1990 [Pub. L. 101–549, see Tables for classification] which uses funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns.

''(b) DEFINITION.—

''(1)(A) For purposes of subsection (a), the term 'disadvantaged business concern' means a concern—

''(i) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a publicly traded company, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

''(ii) the management and daily business operations of which are controlled by such individuals.

''(B)(i) A for-profit business concern is presumed to be a disadvantaged business concern for purposes of subsection (a) if it is at least 51 percent owned by, or in the case of a concern which is a publicly traded

company at least 51 percent of the stock of the company is owned by, one or more individuals who are members of the following groups:

''(I) Black Americans.

''(II) Hispanic Americans.

''(III) Native Americans.

''(IV) Asian Americans.

''(V) Women.

''(VI) Disabled Americans.

''(ii) The presumption established by clause (i) may be rebutted with respect to a particular business concern if it is reasonably established that the individual or individuals referred to in that clause with respect to that business concern are not experiencing impediments to establishing or developing such concern as a result of the individual's identification as a member of a group specified in that clause.

''(C) The following institutions are presumed to be disadvantaged business concerns for purposes of subsection (a):

''(i) Historically black colleges and universities, and colleges and universities having a student body in which 40 percent of the students are Hispanic.

''(ii) Minority institutions (as that term is defined by the Secretary of Education pursuant to the General Education Provision Act (20 U.S.C. 1221 et seq.)).

''(iii) Private and voluntary organizations controlled by individuals who are socially and economically disadvantaged.

''(D) A joint venture may be considered to be a disadvantaged business concern under subsection (a), notwithstanding the size of such joint venture, if—

''(i) a party to the joint venture is a disadvantaged business concern; and

''(ii) that party owns at least 51 percent of the joint venture.

A person who is not an economically disadvantaged individual or a disadvantaged business concern, as a party to a joint venture, may not be a party to more than 2 awarded contracts in a fiscal year solely by reason of this subparagraph.

''(E) Nothing in this paragraph shall prohibit any member of a racial or ethnic group that is not listed in subparagraph (B)(i) from establishing that they have been impeded in establishing or developing a business concern as a result of racial or ethnic discrimination.

''SEC. 1002. USE OF QUOTAS PROHIBITED.—Nothing in this title shall permit or require the use of quotas or a requirement that has the effect of a quota in determining eligibility under section 1001.''

§ 7602. Definitions

When used in this chapter—

(a) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(b) The term ''air pollution control agency'' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term ''interstate air pollution control agency'' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term ''State'' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term ''person'' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term ''municipality'' means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term ''air pollutant'' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ''air pollutant'' is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term ''Federal land manager'' means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms ''major stationary source'' and ''major emitting facility'' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms ''emission limitation'' and ''emission standard'' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design,

equipment, work practice or operational standard promulgated under this chapter..[1]

(*l*) The term ''standard of performance'' means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term ''means of emission limitation'' means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term ''primary standard attainment date'' means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term ''delayed compliance order'' means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term ''schedule and timetable of compliance'' means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term ''applicable implementation plan'' means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) INDIAN TRIBE.—The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.—The term ''VOC'' means volatile organic compound, as defined by the Administrator.

(t) PM–10.—The term ''PM–10'' means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS AND CTG.—The term ''NAAQS'' means national ambient air quality standard. The term ''CTG'' means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.—The term ''NO_x'' means oxides of nitrogen.

(w) CO.—The term ''CO'' means carbon monoxide.

(x) SMALL SOURCE.—The term ''small source'' means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) FEDERAL IMPLEMENTATION PLAN.—The term ''Federal implementation plan'' means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) STATIONARY SOURCE.—The term ''stationary source'' means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, §302, formerly §9, as added Pub. L. 88–206, §1, Dec. 17, 1963, 77 Stat. 400, renumbered Pub. L. 89–272, title I, §101(4), Oct. 20, 1965, 79 Stat. 992; amended Pub. L. 90–148, §2, Nov. 21, 1967, 81 Stat. 504; Pub. L. 91–604, §15(a)(1), (c)(1), Dec. 31, 1970, 84 Stat. 1710, 1713; Pub. L. 95–95, title II, §218(c), title III, §301, Aug. 7, 1977, 91 Stat. 761, 769; Pub. L. 95–190, §14(a)(76), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title I, §§101(d)(4), 107(a), (b), 108(j), 109(b), title III, §302(e), title VII, §709, Nov. 15, 1990, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

CODIFICATION

Section was formerly classified to section 1857h of this title.

PRIOR PROVISIONS

Provisions similar to those in subsecs. (b) and (d) of this section were contained in a section 1857e of this title, act July 14, 1955, ch. 360, §6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88–206.

AMENDMENTS

1990—Subsec. (b)(1) to (3). Pub. L. 101–549, §107(a)(1), (2), struck out ''or'' at end of par. (3) and substituted periods for semicolons at end of pars. (1) to (3).

Subsec. (b)(5). Pub. L. 101–549, §107(a)(3), added par. (5).

Subsec. (g). Pub. L. 101–549, §108(j)(2), inserted at end ''Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.''

Subsec. (h). Pub. L. 101–549, §109(b), inserted before period at end '', whether caused by transformation, conversion, or combination with other air pollutants''.

Subsec. (k). Pub. L. 101–549, §303(e), inserted before period at end '', and any design, equipment, work practice or operational standard promulgated under this chapter.''

Subsec. (q). Pub. L. 101–549, §101(d)(4), added subsec. (q).

Subsec. (r). Pub. L. 101–549, §107(b), added subsec. (r).

Subsecs. (s) to (y). Pub. L. 101–549, §108(j)(1), added subsecs. (s) to (y).

Subsec. (z). Pub. L. 101–549, §709, added subsec. (z).

1977—Subsec. (d). Pub. L. 95–95, §218(c), inserted ''and includes the Commonwealth of the Northern Mariana Islands'' after ''American Samoa''.

Subsec. (e). Pub. L. 95–190 substituted ''individual, corporation'' for ''individual corporation''.

Pub. L. 95–95, §301(b), expanded definition of ''person'' to include agencies, departments, and instrumentalities of the United States and officers, agents, and employees thereof.

[1] So in original.

Subsec. (g). Pub. L. 95–95, § 301(c), expanded definition of ''air pollutant'' so as, expressly, to include physical, chemical, biological, and radioactive substances or matter emitted into or otherwise entering the ambient air.

Subsecs. (i) to (p). Pub. L. 95–95, § 301(a), added subsecs. (i) to (p).

1970—Subsec. (a). Pub. L. 91–604, § 15(c)(1), substituted definition of ''Administrator'' as meaning Administrator of the Environmental Protection Agency for definition of ''Secretary'' as meaning Secretary of Health, Education, and Welfare.

Subsecs. (g), (h). Pub. L. 91–604, § 15(a)(1), added subsec. (g) defining ''air pollutant'', redesignated former subsec. (g) as (h) and substituted references to effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate for references to injury to agricultural crops and livestock, and inserted references to effects on economic values and on personal comfort and well being.

1967—Pub. L. 90–148 reenacted section without change.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

§ 7603. Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

(July 14, 1955, ch. 360, title III, § 303, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1705; amended Pub. L. 95–95, title III, § 302(a), Aug. 7, 1977, 91 Stat. 770; Pub. L. 101–549, title VII, § 704, Nov. 15, 1990, 104 Stat. 2681.)

CODIFICATION

Section was formerly classified to section 1857h–1 of this title.

PRIOR PROVISIONS

A prior section 303 of act July 14, 1955, was renumbered section 310 by Pub. L. 91–604 and is classified to section 7610 of this title.

AMENDMENTS

1990—Pub. L. 101–549, § 704(2)–(5), struck out subsec. (a) designation before ''Notwithstanding any other'', struck out subsec. (b) which related to violation of or failure or refusal to comply with subsec. (a) orders, and substituted new provisions for provisions following first sentence which read as follows: ''If it is not practicable to assure prompt protection of the health of persons solely by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources). Prior to taking any action under this section, the Administrator shall consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking. Such order shall be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period. Whenever the Administrator brings such an action within such period, such order shall be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter.''

Pub. L. 101–549, § 704(1), which directed that ''public health or welfare, or the environment'' be substituted for ''the health of persons and that appropriate State or local authorities have not acted to abate such sources'', was executed by making the substitution for ''the health of persons, and that appropriate State or local authorities have not acted to abate such sources'' to reflect the probable intent of Congress.

1977—Pub. L. 95–95 designated existing provisions as subsec. (a), inserted provisions that, if it is not practicable to assure prompt protection of the health of persons solely by commencement of a civil action, the Administrator may issue such orders as may be necessary to protect the health of persons who are, or may be, affected by such pollution source (or sources), that, prior to taking any action under this section, the Administrator consult with the State and local authorities in order to confirm the correctness of the information on which the action proposed to be taken is based and to ascertain the action which such authorities are, or will be, taking, that the order be effective for a period of not more than twenty-four hours unless the Administrator brings an action under the first sentence of this subsection before the expiration of such period, and that, whenever the Administrator brings such an action within such period, such order be effective for a period of forty-eight hours or such longer period as may be authorized by the court pending litigation or thereafter, and added subsec. (b).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L.

Pub. L. 101–549, which is set out as a note under section 6921 of this title.

The Solid Waste Disposal Act, referred to in subsec. (g)(6), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§ 6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

REVIEW OF ACID GAS SCRUBBING REQUIREMENTS

Section 305(c) of Pub. L. 101–549 provided that: ''Prior to the promulgation of any performance standard for solid waste incineration units combusting municipal waste under section 111 or section 129 of the Clean Air Act [42 U.S.C. 7411, 7429], the Administrator shall review the availability of acid gas scrubbers as a pollution control technology for small new units and for existing units (as defined in 54 Federal Register 52190 (December 20, 1989)[)], taking into account the provisions of subsection (a)(2) of section 129 of the Clean Air Act.''

§ 7430. Emission factors

Within 6 months after November 15, 1990, and at least every 3 years thereafter, the Administrator shall review and, if necessary, revise, the methods (''emission factors'') used for purposes of this chapter to estimate the quantity of emissions of carbon monoxide, volatile organic compounds, and oxides of nitrogen from sources of such air pollutants (including area sources and mobile sources). In addition, the Administrator shall establish emission factors for sources for which no such methods have previously been established by the Administrator. The Administrator shall permit any person to demonstrate improved emissions estimating techniques, and following approval of such techniques, the Administrator shall authorize the use of such techniques. Any such technique may be approved only after appropriate public participation. Until the Administrator has completed the revision required by this section, nothing in this section shall be construed to affect the validity of emission factors established by the Administrator before November 15, 1990.

(July 14, 1955, ch. 360, title I, § 130, as added Pub. L. 101–549, title VIII, § 804, Nov. 15, 1990, 104 Stat. 2689.)

§ 7431. Land use authority

Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use.

(July 14, 1955, ch. 360, title I, § 131, as added Pub. L. 101–549, title VIII, § 805, Nov. 15, 1990, 104 Stat. 2689.)

PART B—OZONE PROTECTION

§§ 7450 to 7459. Repealed. Pub. L. 101–549, title VI, § 601, Nov. 15, 1990, 104 Stat. 2648

Section 7450, act July 14, 1955, ch. 360, title I, § 150, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 725, set forth Congressional declaration of purpose.

Section 7451, act July 14, 1955, ch. 360, title I, § 151, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 726, set forth Congressional findings.

Section 7452, act July 14, 1955, ch. 360, title I, § 152, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 726, set forth definitions applicable to this part.

Section 7453, act July 14, 1955, ch. 360, title I, § 153, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 726, related to studies by Environmental Protection Agency.

Section 7454, act July 14, 1955, ch. 360, title I, § 154, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 728; amended Pub. L. 96–88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695, related to research and monitoring activities by Federal agencies.

Section 7455, act July 14, 1955, ch. 360, title I, § 155, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 729, related to reports on progress of regulation.

Section 7456, act July 14, 1955, ch. 360, title I, § 156, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 729, authorized President to enter into international agreements to foster cooperative research.

Section 7457, act July 14, 1955, ch. 360, title I, § 157, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 729, related to promulgation of regulations.

Section 7458, act July 14, 1955, ch. 360, title I, § 158, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 730, set forth other provisions of law that would be unaffected by this part.

Section 7459, act July 14, 1955, ch. 360, title I, § 159, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 126, 91 Stat. 730, related to authority of States to protect the stratosphere.

SIMILAR PROVISIONS

For provisions relating to stratospheric ozone protection, see section 7671 et seq. of this title.

PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

SUBPART I—CLEAN AIR

§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air)[2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

(July 14, 1955, ch. 360, title I, § 160, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 731.)

[1] So in original. Probably should be ''anticipated''.

[2] So in original. Section was enacted without an opening parenthesis.

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

GUIDANCE DOCUMENT

Section 127(c) of Pub. L. 95–95 required Administrator, not later than 1 year after Aug. 7, 1977, to publish a guidance document to assist States in carrying out their functions under part C of title I of the Clean Air Act (this part) with respect to pollutants for which national ambient air quality standards are promulgated.

STUDY AND REPORT ON PROGRESS MADE IN PROGRAM RELATING TO SIGNIFICANT DETERIORATION OF AIR QUALITY

Section 127(d) of Pub. L. 95–95 directed Administrator, not later than 2 years after Aug. 7, 1977, to complete a study and report to Congress on progress made in carrying out part C of title I of the Clean Air Act (this part) and the problems associated in carrying out such section.

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

(July 14, 1955, ch. 360, title I, § 161, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 731; amended Pub. L. 101–549, title I, § 110(1), Nov. 15, 1990, 104 Stat. 2470.)

AMENDMENTS

1990—Pub. L. 101–549 substituted ''designated pursuant to section 7407 of this title as attainment or unclassifiable'' for ''identified pursuant to section 7407(d)(1)(D) or (E) of this title''.

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

(July 14, 1955, ch. 360, title I, § 162, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 731; amended Pub. L. 95–190, § 14(a)(40), Nov. 16, 1977, 91 Stat. 1401; Pub. L. 101–549, title I, §§ 108(m), 110(2), Nov. 15, 1990, 104 Stat. 2469, 2470.)

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, § 108(m), inserted at end ''The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.''

Subsec. (b). Pub. L. 101–549, § 110(2), substituted ''designated pursuant to section 7407(d) of this title as attainment or unclassifiable'' for ''identified pursuant to section 7407(d)(1)(D) or (E) of this title''.

1977—Subsec. (a)(4). Pub. L. 95–190 inserted a comma after ''size''.

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20

Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.[1]

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. 791a et seq.] over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

(July 14, 1955, ch. 360, title I, §163, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 732; amended Pub. L. 95–190, §14(a)(41), Nov. 16, 1977, 91 Stat. 1401.)

REFERENCES IN TEXT

The Federal Power Act, referred to in subsec. (c)(1)(B), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to chapter 12 (§791a et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 791a of Title 16 and Tables.

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–190 inserted ''section'' before ''7475''.

§ 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph[1] (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of

[1] So in original. The period probably should be a comma.

[1] So in original. Probably should be ''paragraphs''.

the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within[2] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

(July 14, 1955, ch. 360, title I, § 164, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 733; amended Pub. L. 95–190, § 14(a)(42), (43), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101–549, title I, § 108(n), Nov. 15, 1990, 104 Stat. 2469.)

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, which directed the insertion of ''The extent of the areas referred to in paragraph (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.'' before ''Any area (other than an area referred to in paragraph (1) or (2))'', was executed by making the insertion before ''Any area

[2] So in original. Probably should be ''with''.

(other than an area referred to in paragraph (1) or (2)'', to reflect the probable intent of Congress.

1977—Subsec. (b)(2). Pub. L. 95–190, §14(a)(42), inserted ''or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section'' after ''this section''.

Subsec. (e). Pub. L. 95–190, §14(a)(43), inserted ''an'' after ''If any State affected by the redesignation of''.

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE
(In micrograms per cubic meter)

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term ''high terrain area'' means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term ''low terrain area'' means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

(July 14, 1955, ch. 360, title I, §165, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 735; amended Pub. L. 95–190, §14(a)(44)–(51), Nov. 16, 1977, 91 Stat. 1402.)

AMENDMENTS

1977—Subsec. (a)(1). Pub. L. 95–190, §14(a)(44), substituted ''part;'' for ''part:''.

Subsec. (a)(3). Pub. L. 95–190, §14(a)(45), inserted provision making applicable requirement of section 7410(j) of this title.

Subsec. (b). Pub. L. 95–190, §14(a)(46), inserted ''cause or'' before ''contribute'' and struck out ''actual'' before ''allowable emissions''.

Subsec. (d)(2)(C). Pub. L. 95–190, §14(a)(47)–(49), in cl. (ii) substituted ''contribute'' for ''contrbute'', in cl. (iii) substituted ''quality-related'' for ''quality related'' and ''concentrations which'' for ''concentrations, which'', and in cl. (iv) substituted ''such facility'' for ''such sources'' and ''will not cause or contribute to concentrations of such pollutant which exceed'' for ''together with all other sources, will not exceed''.

Subsec. (d)(2)(D). Pub. L. 95–190, §14(a)(50), (51), in cl. (iii) substituted provisions relating to determinations of amounts of emissions of sulfur oxides from facilities, for provisions relating to determinations of amounts of emissions of sulfur oxides from sources operating under permits issued pursuant to this subpar., together with all other sources, and added cl. (iv).

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or[1] promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

(f) PM–10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter specified in section 7473(b) of this title and section 7475(d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in con-

[1] So in original. Probably should be ''of''.

centrations of particulate matter shall remain in effect.

(July 14, 1955, ch. 360, title I, § 166, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 739; amended Pub. L. 101–549, title I, § 105(b), Nov. 15, 1990, 104 Stat. 2462.)

AMENDMENTS

1990—Subsec. (f). Pub. L. 101–549 added subsec. (f).

§ 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

(July 14, 1955, ch. 360, title I, § 167, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 101–549, title I, § 110(3), title VII, § 708, Nov. 15, 1990, 104 Stat. 2470, 2684.)

AMENDMENTS

1990—Pub. L. 101–549, § 708, substituted ''construction or modification of a major emitting facility'' for ''construction of a major emitting facility''.

Pub. L. 101–549, § 110(3), substituted ''designated pursuant to section 7407(d) as attainment or unclassifiable'' for ''included in the list promulgated pursuant to paragraph (1)(D) or (E) of subsection (d) of section 7407 of this title''.

§ 7478. Period before plan approval

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a), section 7473(b) or section 7474(a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of ''commenced'' in section 7479(2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

(July 14, 1955, ch. 360, title I, § 168, as added Pub. L. 95–95, title I, § 127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95–190, § 14(a)(52), Nov. 16, 1977, 91 Stat. 1402.)

AMENDMENTS

1977—Subsec. (b). Pub. L. 95–190 substituted ''(in accordance with the definition of 'commenced' in section 7479(2) of this title)'' for ''in accordance with this definition''.

§ 7479. Definitions

For purposes of this part—

(1) The term ''major emitting facility'' means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term ''commenced'' as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term ''necessary preconstruction approvals or permits'' means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term ''construction'' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term ''best available control technology'' means an emission limitation based on the maximum degree of reduction of each

pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, 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 for control of each such pollutant. In no event shall application of ''best available control technology'' result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term ''baseline concentration'' means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, ch. 360, title I, §169, as added Pub. L. 95–95, title I, §127(a), Aug. 7, 1977, 91 Stat. 740; amended Pub. L. 95–190, §14(a)(54), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101–549, title III, §305(b), title IV, §403(d), Nov. 15, 1990, 104 Stat. 2583, 2631.)

AMENDMENTS

1990—Par. (1). Pub. L. 101–549, §305(b), struck out ''two hundred and'' after ''municipal incinerators capable of charging more than''.

Par. (3). Pub. L. 101–549, §403(d), directed the insertion of '', clean fuels,'' after ''including fuel cleaning,'', which was executed by making the insertion after ''including fuel cleaning'' to reflect the probable intent of Congress, and inserted at end ''Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.''

1977—Par. (2)(C). Pub. L. 95–190 added subpar. (C).

STUDY OF MAJOR EMITTING FACILITIES WITH POTENTIAL OF EMITTING 250 TONS PER YEAR

Section 127(b) of Pub. L. 95–95 directed Administrator, within 1 year after Aug. 7, 1977, to report to Congress on consequences of that portion of definition of ''major emitting facility'' under this subpart which applies to facilities with potential to emit 250 tons per year or more.

SUBPART II—VISIBILITY PROTECTION

CODIFICATION

As originally enacted, subpart II of part C of subchapter I of this chapter was added following section 7478 of this title. Pub. L. 95–190, §14(a)(53), Nov. 16, 1977, 91 Stat. 1402, struck out subpart II and inserted such subpart following section 7479 of this title.

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under sub-

section (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a ''nondiscretionary duty'' of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term ''manmade air pollution'' means air pollution which results directly or indirectly from human activities;

(4) the term ''as expeditiously as practicable'' means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term ''mandatory class I Federal areas'' means Federal areas which may not be designated as other than class I under this part;

(6) the terms ''visibility impairment'' and ''impairment of visibility'' shall include reduction in visual range and atmospheric discoloration; and

(7) the term ''major stationary source'' means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

(July 14, 1955, ch. 360, title I, §169A, as added Pub. L. 95–95, title I, §128, Aug. 7, 1977, 91 Stat. 742.)

EFFECTIVE DATE

Subpart effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7492. Visibility

(a) Studies

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

(C) adaptation of regional air quality models for the assessment of visibility;

(D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection (a)(1) of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

(b) Impacts of other provisions

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

(c) Establishment of visibility transport regions and commissions

(1) Authority to establish visibility transport regions

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section[1] may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

(2) Visibility transport commissions

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The[2] Administrator or the Administrator's designee; and

(C) A[2] representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

(3) Ex officio members

All representatives of the Federal Government shall be ex officio members.

[1] So in original. Words ''subsection (b) of this section'' probably should be ''paragraph (2)''.

[2] So in original. Probably should not be capitalized.

(4) Federal Advisory Committee Act

The visibility transport commissions shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C. App.].

(d) Duties of visibility transport commissions

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring ''reasonable progress'' toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

(July 14, 1955, ch. 360, title I, §169B, as added Pub. L. 101–549, title VIII, §816, Nov. 15, 1990, 104 Stat. 2695.)

REFERENCES IN TEXT

The Clean Air Act Amendments of 1990, referred to in subsec. (b), probably means Pub. L. 101–549, Nov. 15, 1990, 104 Stat. 2399. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Federal Advisory Committee Act, referred to in subsec. (c)(4), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

SUBPART 1—NONATTAINMENT AREAS IN GENERAL

§ 7501. Definitions

For the purpose of this part—

(1) REASONABLE FURTHER PROGRESS.—The term ''reasonable further progress'' means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) NONATTAINMENT AREA.—The term ''nonattainment area'' means, for any air pollutant, an area which is designated ''nonattainment'' with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) The term ''lowest achievable emission rate'' means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms ''modifications'' and ''modified'' mean the same as the term ''modification'' as used in section 7411(a)(4) of this title.

(July 14, 1955, ch. 360, title I, §171, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 745; amended Pub. L. 101–549, title I, §102(a)(2), Nov. 15, 1990, 104 Stat. 2412.)

AMENDMENTS

1990—Pub. L. 101–549, §102(a)(2)(A), struck out ''and section 7410(a)(2)(I) of this title'' after ''purpose of this part''.

Pars. (1), (2). Pub. L. 101–549, §102(a)(2)(B), (C), amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

''(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410(a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

''(2) The term 'nonattainment area' means, for any air pollutant an area which is shown by monitored data

(4) Federal Advisory Committee Act

The visibility transport commissions shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C. App.].

(d) Duties of visibility transport commissions

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring ''reasonable progress'' toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

(July 14, 1955, ch. 360, title I, § 169B, as added Pub. L. 101–549, title VIII, § 816, Nov. 15, 1990, 104 Stat. 2695.)

REFERENCES IN TEXT

The Clean Air Act Amendments of 1990, referred to in subsec. (b), probably means Pub. L. 101–549, Nov. 15, 1990, 104 Stat. 2399. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Federal Advisory Committee Act, referred to in subsec. (c)(4), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

SUBPART 1—NONATTAINMENT AREAS IN GENERAL

§ 7501. Definitions

For the purpose of this part—

(1) REASONABLE FURTHER PROGRESS.—The term ''reasonable further progress'' means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) NONATTAINMENT AREA.—The term ''nonattainment area'' means, for any air pollutant, an area which is designated ''nonattainment'' with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) The term ''lowest achievable emission rate'' means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms ''modifications'' and ''modified'' mean the same as the term ''modification'' as used in section 7411(a)(4) of this title.

(July 14, 1955, ch. 360, title I, § 171, as added Pub. L. 95–95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 745; amended Pub. L. 101–549, title I, § 102(a)(2), Nov. 15, 1990, 104 Stat. 2412.)

AMENDMENTS

1990—Pub. L. 101–549, § 102(a)(2)(A), struck out ''and section 7410(a)(2)(I) of this title'' after ''purpose of this part''.

Pars. (1), (2). Pub. L. 101–549, § 102(a)(2)(B), (C), amended pars. (1) and (2) generally. Prior to amendment, pars. (1) and (2) read as follows:

''(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 7410(a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title.

''(2) The term 'nonattainment area' means, for any air pollutant an area which is shown by monitored data

or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title.''

EFFECTIVE DATE

Part effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (*l*) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the ''Extension Year'') the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pol-

lutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

(July 14, 1955, ch. 360, title I, §172, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 746; amended Pub. L. 95–190, §14(a)(55), (56), Nov. 16, 1977, 91 Stat. 1402; Pub. L. 101–549, title I, §102(b), Nov. 15, 1990, 104 Stat. 2412.)

AMENDMENTS

1990—Pub. L. 101–549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), expeditious attainment of national ambient air quality standards; in subsec. (b), requisite provisions of plan; and in subsec. (c), attainment of applicable standard not later than July 1, 1987.

1977—Subsec. (b)(4). Pub. L. 95–190, §14(a)(55), substituted ''subsection (a) of this section'' for ''paragraph (1)''.

Subsec. (c). Pub. L. 95–190, §14(a)(56), substituted ''December 31'' for ''July 1''.

NONATTAINMENT AREAS

Section 129(a) of Pub. L. 95–95, as amended by Pub. L. 95–190, §14(b)(2), (3), Nov. 16, 1977, 91 Stat. 1404, provided that:

''(1) Before July 1, 1979, the interpretative regulation of the Administrator of the Environmental Protection Agency published in 41 Federal Register 55524–30, December 21, 1976, as may be modified by rule of the Administrator, shall apply except that the baseline to be used for determination of appropriate emission offsets under such regulation shall be the applicable implementation plan of the State in effect at the time of application for a permit by a proposed major stationary source (within the meaning of section 302 of the Clean Air Act) [section 7602 of this title].

''(2) Before July 1, 1979, the requirements of the regulation referred to in paragraph (1) shall be waived by the Administrator with respect to any pollutant if he determines that the State has—

''(A) an inventory of emissions of the applicable pollutant for each nonattainment area (as defined in section 171 of the Clean Air Act [section 7501 of this title]) that identifies the type, quantity, and source of such pollutant so as to provide information sufficient to demonstrate that the requirements of subparagraph (C) are being met;

''(B) an enforceable permit program which—

''(i) requires new or modified major stationary sources to meet emission limitations at least as stringent as required under the permit requirements referred to in paragraphs (2) and (3) of section 173 of the Clean Air Act [section 7503 of this title] (relating to lowest achievable emission rate and compliance by other sources) and which assures compliance with the annual reduction requirements of subparagraph (C); and

''(ii) requires existing sources to achieve such reduction in emissions in the area as may be obtained through the adoption, at a minimum of reasonably available control technology, and

''(C) a program which requires reductions in total allowable emissions in the area prior to July 1, 1979, so as to provide for the same level of emission reduction as would result from the application of the regulation referred to in paragraph (1).

The Administrator shall terminate such waiver if in his judgment the reduction in emissions actually being attained is less than the reduction on which the waiver was conditioned pursuant to subparagraph (C), or if the Administrator determines that the State is no longer in compliance with any requirement of this paragraph. Upon application by the State, the Administrator may reinstate a waiver terminated under the preceding sentence if he is satisfied that such State is in compliance with all requirements of this subsection.

''(3) Operating permits may be issued to those applicants who were properly granted construction permits, in accordance with the law and applicable regulations in effect at the time granted, for construction of a new or modified source in areas exceeding national primary air quality standards on or before the date of the enactment of this Act [Aug. 7, 1977] if such construction permits were granted prior to the date of the enactment of this Act and the person issued any such permit is able to demonstrate that the emissions from the source will be within the limitations set forth in such construction permit.''

STATE IMPLEMENTATION PLAN REVISION

Section 129(c) of Pub. L. 95–95, as amended by Pub. L. 95–190, §14(b)(4), Nov. 16, 1977, 91 Stat. 1405, provided that: ''Notwithstanding the requirements of section 406(d)(2) [set out as an Effective Date of 1977 Amendment note under section 7401 of this title] (relating to date required for submission of certain implementation plan revisions), for purposes of section 110(a)(2) of the Clean Air Act [section 7410(a)(2) of this title] each State in which there is any nonattainment area (as defined in part D of title I of the Clean Air Act) [this part] shall adopt and submit an implementation plan revision which meets the requirements of section 110(a)(2)(I) [section 7410(a)(2)(I) of this title] and part D of title I of the Clean Air Act [this part] not later than January 1, 1979. In the case of any State for which a plan revision adopted and submitted before such date has made the demonstration required under section 172(a)(2) of the Clean Air Act [subsec. (a)(2) of this section] (respecting impossibility of attainment before 1983), such State shall adopt and submit to the Administrator a plan revision before July 1, 1982, which meets the requirements of section 172(b) and (c) of such Act [subsecs. (b) and (c) of this section].''

§ 7503. Permit requirements

(a) In general

The permit program required by section 7502(b)(6)[1] of this title shall provide that permits to construct and operate may be issued if—

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that—

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(c) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and[2]

(4) the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part; and

(5) an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.

(b) Prohibition on use of old growth allowances

Any growth allowance included in an applicable implementation plan to meet the requirements of section 7502(b)(5) of this title (as in ef-

[1] See References in Text note below.

[2] So in original. The word ''and'' probably should not appear.

fect immediately before November 15, 1990) shall not be valid for use in any area that received or receives a notice under section 7410(a)(2)(H)(ii) of this title (as in effect immediately before November 15, 1990) or under section 7410(k)(1) of this title that its applicable implementation plan containing such allowance is substantially inadequate.

(c) Offsets

(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

(2) Emission reductions otherwise required by this chapter shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).

(d) Control technology information

The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other States and to the general public.

(e) Rocket engines or motors

The permitting authority of a State shall allow a source to offset by alternative or innovative means emission increases from rocket engine and motor firing, and cleaning related to such firing, at an existing or modified major source that tests rocket engines or motors under the following conditions:

(1) Any modification proposed is solely for the purpose of expanding the testing of rocket engines or motors at an existing source that is permitted to test such engines on November 15, 1990.

(2) The source demonstrates to the satisfaction of the permitting authority of the State that it has used all reasonable means to obtain and utilize offsets, as determined on an annual basis, for the emissions increases beyond allowable levels, that all available offsets are being used, and that sufficient offsets are not available to the source.

(3) The source has obtained a written finding from the Department of Defense, Department of Transportation, National Aeronautics and Space Administration or other appropriate Federal agency, that the testing of rocket motors or engines at the facility is required for a program essential to the national security.

(4) The source will comply with an alternative measure, imposed by the permitting authority, designed to offset any emission increases beyond permitted levels not directly offset by the source. In lieu of imposing any alternative offset measures, the permitting authority may impose an emissions fee to be paid to such authority of a State which shall be an amount no greater than 1.5 times the average cost of stationary source control measures adopted in that area during the previous 3 years. The permitting authority shall utilize the fees in a manner that maximizes the emissions reductions in that area.

(July 14, 1955, ch. 360, title I, §173, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 748; amended Pub. L. 95–190, §14(a)(57), (58), Nov. 16, 1977, 91 Stat. 1403; Pub. L. 101–549, title I, §102(c), Nov. 15, 1990, 104 Stat. 2415.)

REFERENCES IN TEXT

Section 7502(b) of this title, referred to in subsec. (a), was amended generally by Pub. L. 101–549, title I, §102(b), Nov. 15, 1990, 104 Stat. 2412, and, as so amended, does not contain a par. (6). See section 7502(c)(5) of this title.

AMENDMENTS

1990—Pub. L. 101–549, §102(c)(1), made technical amendment to section catchline.

Pub. L. 101–549, §102(c)(2), (8), designated existing provisions as subsec. (a), inserted heading, and substituted ''(1) shall be federally enforceable'' for ''(1)(A) shall be legally binding'' in last sentence.

Subsec. (a)(1). Pub. L. 101–549, §102(c)(3), inserted at beginning ''in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part,''.

Subsec. (a)(1)(A). Pub. L. 101–549, §102(c)(4), inserted ''sufficient offsetting emissions reductions have been obtained, such that'' after ''to commence operation,'' and substituted ''(as determined in accordance with the regulations under this paragraph)'' for ''allowed under the applicable implementation plan''.

Subsec. (a)(1)(B). Pub. L. 101–549, §102(c)(5), inserted at beginning ''in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted,'' and substituted ''7502(c)'' for ''7502(b)''.

Subsec. (a)(4). Pub. L. 101–549, §102(c)(6), inserted at beginning ''the Administrator has not determined that'', substituted ''not being adequately implemented'' for ''being carried out'', and substituted ''; and'' for period at end.

Subsec. (a)(5). Pub. L. 101–549, §102(c)(7), added par. (5).

Subsec. (b). Pub. L. 101–549, §102(c)(9), added subsec. (b).

Subsecs. (c) to (e). Pub. L. 101–549, §102(c)(10), added subsecs. (c) to (e).

1977—Par. (1)(A). Pub. L. 95–190, §14(a)(57), inserted ''or modified'' after ''from new'' and ''applicable'' before ''implementation plan'', and substituted ''source'' for ''facility'' wherever appearing.

Par. (4). Pub. L. 95–190, §14(a)(58), added par. (4).

FAILURE TO ATTAIN NATIONAL PRIMARY AMBIENT AIR QUALITY STANDARDS UNDER CLEAN AIR ACT

Pub. L. 100–202, §101(f) [title II], Dec. 22, 1987, 101 Stat. 1329–187, 1329–199, provided that: ''No restriction or prohibition on construction, permitting, or funding under sections 110(a)(2)(I), 173(4), 176(a), 176(b), or 316 of the Clean Air Act [sections 7410(a)(2)(I), 7503(4), 7506(a), (b), 7616 of this title] shall be imposed or take effect during the period prior to August 31, 1988, by reason of (1) the failure of any nonattainment area to attain the national primary ambient air quality standard under the Clean Air Act [this chapter] for photochemical oxidants (ozone) or carbon monoxide (or both) by December 31, 1987, (2) the failure of any State to adopt and submit to the Administrator of the Environmental Protection Agency an implementation plan that meets the requirements of part D of title I of such Act [this part] and provides for attainment of such standards by December 31, 1987, (3) the failure of any State or designated local government to implement the applicable implementation plan, or (4) any combination of the foregoing. During such period and consistent with the preceding sentence, the issuance of a permit (including required offsets) under section 173 of such Act [this section] for the construction or modification of a source in a nonattainment area shall not be denied solely or partially by reason of the reference contained in section 171(1) of such Act [section 7501(1) of this title] to the applicable date established in section 172(a) [section 7502(a) of this title]. This subsection [probably means the first 3 sentences of this note] shall not apply to any restriction or prohibition in effect under sections 110(a)(2)(I), 173(4), 176(a), 176(b), or 316 of such Act prior to the enactment of this section [Dec. 22, 1987]. Prior to August 31, 1988, the Administrator of the Environmental Protection Agency shall evaluate air quality data and make determinations with respect to which areas throughout the nation have attained, or failed to attain, either or both of the national primary ambient air quality standards referred to in subsection (a) [probably means the first 3 sentences of this note] and shall take appropriate steps to designate those areas failing to attain either or both of such standards as nonattainment areas within the meaning of part D of title I of the Clean Air Act.''

§ 7504. Planning procedures

(a) In general

For any ozone, carbon monoxide, or PM–10 nonattainment area, the State containing such area and elected officials of affected local governments shall, before the date required for submittal of the inventory described under sections 7511a(a)(1) and 7512a(a)(1) of this title, jointly review and update as necessary the planning procedures adopted pursuant to this subsection as in effect immediately before November 15, 1990, or develop new planning procedures pursuant to this subsection, as appropriate. In preparing such procedures the State and local elected officials shall determine which elements of a revised implementation plan will be developed, adopted, and implemented (through means including enforcement) by the State and which by local governments or regional agencies, or any combination of local governments, regional agencies, or the State. The implementation plan required by this part shall be prepared by an organization certified by the State, in consultation with elected officials of local governments and in accordance with the determination under the second sentence of this subsection. Such organization shall include elected officials of local governments in the affected area, and representatives of the State air quality planning agency, the State transportation planning agency, the metropolitan planning organization designated to conduct the continuing, cooperative and comprehensive transportation planning process for the area under section 134 of title 23, the organization responsible for the air quality maintenance planning process under regulations implementing this chapter, and any other organization with responsibilities for developing, submitting, or implementing the plan required by this part. Such organization may be one that carried out these functions before November 15, 1990.

(b) Coordination

The preparation of implementation plan provisions and subsequent plan revisions under the continuing transportation-air quality planning process described in section 7408(e) of this title shall be coordinated with the continuing, cooperative and comprehensive transportation planning process required under section 134 of title 23, and such planning processes shall take into account the requirements of this part.

(c) Joint planning

In the case of a nonattainment area that is included within more than one State, the affected States may jointly, through interstate compact or otherwise, undertake and implement all or part of the planning procedures described in this section.

(July 14, 1955, ch. 360, title I, §174, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 748; amended Pub. L. 101–549, title I, §102(d), Nov. 15, 1990, 104 Stat. 2417.)

AMENDMENTS

1990—Pub. L. 101–549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), preparation of implementation plan by designated organization; and in subsec. (b), coordination of plan preparation.

§ 7505. Environmental Protection Agency grants

(a) Plan revision development costs

The Administrator shall make grants to any organization of local elected officials with transportation or air quality maintenance planning responsibilities recognized by the State under section 7504(a) of this title for payment of the reasonable costs of developing a plan revision under this part.

(b) Uses of grant funds

The amount granted to any organization under subsection (a) of this section shall be 100 percent of any additional costs of developing a plan revision under this part for the first two fiscal years following receipt of the grant under this paragraph, and shall supplement any funds available under Federal law to such organization for transportation or air quality maintenance planning. Grants under this section shall not be used for construction.

(July 14, 1955, ch. 360, title I, §175, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 749.)

basis, to the owner or operator of the affected units from whose allocation the allowances were withheld.

(4) Additional auction participants

Any person holding allowances or to whom allowances are allocated by the Administrator may submit those allowances to the Administrator to be offered for sale at auction under this subsection. The proceeds of any such sale shall be transferred at the time of sale by the purchaser to the person submitting such allowances for sale. The holder of allowances offered for sale under this paragraph may specify a minimum sale price. Any person may purchase allowances offered for auction under this paragraph. Such allowances shall be allocated and sold to purchasers on the basis of bid price after the auction under paragraph (2) is complete. No funds transferred from a purchaser to a seller of allowances under this paragraph shall be held by any officer or employee of the United States or treated for any purpose as revenue to the United States or the Administrator.

(5) Recording by EPA

The Administrator shall record and publicly report the nature, prices and results of each auction under this subsection, including the prices of successful bids, and shall record the transfers of allowances as a result of each auction in accordance with the requirements of this section. The transfer of allowances at such auction shall be recorded in accordance with the regulations promulgated by the Administrator under this subchapter.

(e) Changes in sales, auctions, and withholding

Pursuant to rulemaking after public notice and comment the Administrator may at any time after the year 1998 (in the case of advance sales or advance auctions) and 2005 (in the case of spot sales or spot auctions) decrease the number of allowances withheld and sold under this section.

(f) Termination of auctions

The Administrator may terminate the withholding of allowances and the auction sales under this section if the Administrator determines that, during any period of 3 consecutive calendar years after 2002, less than 20 percent of the allowances available in the auction subaccount have been purchased. Pursuant to regulations under this section, the Administrator may by delegation or contract provide for the conduct of sales or auctions under the Administrator's supervision by other departments or agencies of the United States Government or by nongovernmental agencies, groups, or organizations.

(July 14, 1955, ch. 360, title IV, § 416, as added Pub. L. 101–549, title IV, § 401, Nov. 15, 1990, 104 Stat. 2626.)

REFERENCES IN TEXT

Section 79b of title 15, referred to in subsec. (a)(2)(C), was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. See section 16451(1) of this title.

SUBCHAPTER V—PERMITS

§ 7661. Definitions

As used in this subchapter—

(1) Affected source

The term ''affected source'' shall have the meaning given such term in subchapter IV–A of this chapter.

(2) Major source

The term ''major source'' means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term ''schedule of compliance'' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term ''permitting authority'' means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

(July 14, 1955, ch. 360, title V, § 501, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2635.)

§ 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[1] 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

[1] So in original. Probably should be ''part''.

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 administer 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[2] (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.

[2] So in original. Probably should be ''clauses''.

(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:[3] *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 re-

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

quired 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), promulgate, 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.

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

§ 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.

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

§ 7661c. Permit requirements and conditions

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV–A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

(July 14, 1955, ch. 360, title V, § 504, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2642.)

§ 7661d. Notification to Administrator and contiguous States

(a) Transmission and notice

(1) Each permitting authority—

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States—

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section, or (B) within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a

revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) Waiver of notification requirements

(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this subchapter for any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) of this section shall not apply. The preceding sentence shall not apply to major sources.

(3) The Administrator may exclude from any waiver under this subsection notification under subsection (a)(2) of this section. Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

(e) Refusal of permitting authority to terminate, modify, or revoke and reissue

If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit under this subchapter, the Administrator shall notify the permitting authority and the source of the Administrator's finding. The permitting authority shall, within 90 days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such 90 day period for an additional 90 days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within 90 days, the Administrator may, after notice and in accordance with fair and reasonable procedures, terminate, modify, or revoke and reissue the permit.

(July 14, 1955, ch. 360, title V, § 505, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2643.)

§ 7661e. Other authorities

(a) In general

Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter.

(b) Permits implementing acid rain provisions

The provisions of this subchapter, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to permits implementing the requirements of subchapter IV–A of this chapter except as modified by that subchapter.

(July 14, 1955, ch. 360, title V, § 506, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2645.)

§ 7661f. Small business stationary source technical and environmental compliance assistance program

(a) Plan revisions

Consistent with sections 7410 and 7412 of this title, each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator as part of the State implementation plan for such State or as a revision to such State implementation plan under section 7410 of this title, plans for establishing a small business stationary source technical and environmental compliance assistance program. Such submission shall be made within 24 months after November 15, 1990. The Administrator shall approve such program if it includes each of the following:

(1) Adequate mechanisms for developing, collecting, and coordinating information concerning compliance methods and technologies for small business stationary sources, and programs to encourage lawful cooperation among such sources and other persons to further compliance with this chapter.

(2) Adequate mechanisms for assisting small business stationary sources with pollution prevention and accidental release detection and prevention, including providing information concerning alternative technologies, process changes, products, and methods of operation that help reduce air pollution.

(3) A designated State office within the relevant State agency to serve as ombudsman for small business stationary sources in connection with the implementation of this chapter.

(4) A compliance assistance program for small business stationary sources which assists small business stationary sources in determining applicable requirements and in receiving permits under this chapter in a timely and efficient manner.

(5) Adequate mechanisms to assure that small business stationary sources receive notice of their rights under this chapter in such manner and form as to assure reasonably adequate time for such sources to evaluate compliance methods and any relevant or applicable proposed or final regulation or standard issued under this chapter.

(6) Adequate mechanisms for informing small business stationary sources of their obligations under this chapter, including mechanisms for referring such sources to qualified auditors or, at the option of the State, for providing audits of the operations of such sources to determine compliance with this chapter.

(7) Procedures for consideration of requests from a small business stationary source for modification of—

(A) any work practice or technological method of compliance, or

(B) the schedule of milestones for implementing such work practice or method of compliance preceding any applicable compliance date,

based on the technological and financial capability of any such small business stationary source. No such modification may be granted unless it is in compliance with the applicable requirements of this chapter, including the requirements of the applicable implementation plan. Where such applicable requirements are set forth in Federal regulations, only modifications authorized in such regulations may be allowed.

(b) Program

The Administrator shall establish within 9 months after November 15, 1990, a small business stationary source technical and environmental compliance assistance program. Such program shall—

(1) assist the States in the development of the program required under subsection (a) of this section (relating to assistance for small business stationary sources);

(2) issue guidance for the use of the States in the implementation of these programs that includes alternative control technologies and pollution prevention methods applicable to small business stationary sources; and

(3) provide for implementation of the program provisions required under subsection (a)(4) of this section in any State that fails to submit such a program under that subsection.

(c) Eligibility

(1) Except as provided in paragraphs (2) and (3), for purposes of this section, the term ''small business stationary source'' means a stationary source that—

(A) is owned or operated by a person that employs 100 or fewer individuals,

(B) is a small business concern as defined in the Small Business Act [15 U.S.C. 631 et seq.];

(C) is not a major stationary source;

(D) does not emit 50 tons or more per year of any regulated pollutant; and

(E) emits less than 75 tons per year of all regulated pollutants.

(2) Upon petition by a source, the State may, after notice and opportunity for public comment, include as a small business stationary source for purposes of this section any stationary source which does not meet the criteria of subparagraphs[1] (C), (D), or (E) of paragraph (1) but which does not emit more than 100 tons per year of all regulated pollutants.

(3)(A) The Administrator, in consultation with the Administrator of the Small Business Administration and after providing notice and opportunity for public comment, may exclude from the small business stationary source definition under this section any category or subcategory of sources that the Administrator determines to have sufficient technical and financial capabilities to meet the requirements of this chapter without the application of this subsection.

(B) The State, in consultation with the Administrator and the Administrator of the Small Business Administration and after providing notice and opportunity for public hearing, may exclude from the small business stationary source definition under this section any category or subcategory of sources that the State determines to have sufficient technical and financial capabilities to meet the requirements of this chapter without the application of this subsection.

(d) Monitoring

The Administrator shall direct the Agency's Office of Small and Disadvantaged Business Utilization through the Small Business Ombudsman (hereinafter in this section referred to as the ''Ombudsman'') to monitor the small business stationary source technical and environmental compliance assistance program under this section. In carrying out such monitoring activities, the Ombudsman shall—

(1) render advisory opinions on the overall effectiveness of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, difficulties encountered, and degree and severity of enforcement;

(2) make periodic reports to the Congress on the compliance of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program with the requirements of the Paperwork Reduction Act,[2] the Regulatory Flexibility Act [5 U.S.C. 601 et seq.], and the Equal Access to Justice Act;

(3) review information to be issued by the Small Business Stationary Source Technical and Environmental Compliance Assistance Program for small business stationary sources to ensure that the information is understandable by the layperson; and

(4) have the Small Business Stationary Source Technical and Environmental Compliance Assistance Program serve as the secretariat for the development and dissemination of such reports and advisory opinions.

(e) Compliance Advisory Panel

(1) There shall be created a Compliance Advisory Panel (hereinafter referred to as the ''Panel'') on the State level of not less than 7 individuals. This Panel shall—

(A) render advisory opinions concerning the effectiveness of the small business stationary source technical and environmental compliance assistance program, difficulties encountered, and degree and severity of enforcement;

(B) make periodic reports to the Administrator concerning the compliance of the State Small Business Stationary Source Technical and Environmental Compliance Assistance Program with the requirements of the Paperwork Reduction Act,[2] the Regulatory Flexibility Act [5 U.S.C. 601 et seq.], and the Equal Access to Justice Act;

(C) review information for small business stationary sources to assure such information is understandable by the layperson; and

(D) have the Small Business Stationary Source Technical and Environmental Compliance Assistance Program serve as the sec-

[1] So in original. Probably should be ''subparagraph''.

[2] See References in Text note below.

retariat for the development and dissemination of such reports and advisory opinions.

(2) The Panel shall consist of—

(A) 2 members, who are not owners, or representatives of owners, of small business stationary sources, selected by the Governor to represent the general public;

(B) 2 members selected by the State legislature who are owners, or who represent owners, of small business stationary sources (1 member each by the majority and minority leadership of the lower house, or in the case of a unicameral State legislature, 2 members each shall be selected by the majority leadership and the minority leadership, respectively, of such legislature, and subparagraph (C) shall not apply);

(C) 2 members selected by the State legislature who are owners, or who represent owners, of small business stationary sources (1 member each by the majority and minority leadership of the upper house, or the equivalent State entity); and

(D) 1 member selected by the head of the department or agency of the State responsible for air pollution permit programs to represent that agency.

(f) Fees

The State (or the Administrator) may reduce any fee required under this chapter to take into account the financial resources of small business stationary sources.

(g) Continuous emission monitors

In developing regulations and CTGs under this chapter that contain continuous emission monitoring requirements, the Administrator, consistent with the requirements of this chapter, before applying such requirements to small business stationary sources, shall consider the necessity and appropriateness of such requirements for such sources. Nothing in this subsection shall affect the applicability of subchapter IV–A of this chapter provisions relating to continuous emissions monitoring.

(h) Control technique guidelines

The Administrator shall consider, consistent with the requirements of this chapter, the size, type, and technical capabilities of small business stationary sources (and sources which are eligible under subsection (c)(2) of this section to be treated as small business stationary sources) in developing CTGs applicable to such sources under this chapter.

(July 14, 1955, ch. 360, title V, § 507, as added Pub. L. 101–549, title V, § 501, Nov. 15, 1990, 104 Stat. 2645.)

REFERENCES IN TEXT

The Small Business Act, referred to in subsec. (c)(1)(B), is Pub. L. 85–536, § 2(1 et seq.), July 18, 1958, 72 Stat. 384, which is classified generally to chapter 14A (§ 631 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 631 of Title 15 and Tables.

The Paperwork Reduction Act, referred to in subsecs. (d)(2) and (e)(1)(B), probably means the Paperwork Reduction Act of 1980, Pub. L. 96–511, Dec. 11, 1980, 94 Stat. 2812, as amended, which was classified principally to chapter 35 (§ 3501 et seq.) of Title 44, Public Printing and Documents, prior to the general amendment of that chapter by Pub. L. 104–13, § 2, May 22, 1995, 109 Stat. 163. For complete classification of this Act to the Code, see Short Title of 1980 Amendment note set out under section 101 of Title 44 and Tables.

The Regulatory Flexibility Act, referred to in subsecs. (d)(2) and (e)(1)(B), is Pub. L. 96–354, Sept. 19, 1980, 94 Stat. 1164, which is classified generally to chapter 6 (§ 601 et seq.) of Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 5 and Tables.

The Equal Access to Justice Act, referred to in subsecs. (d)(2) and (e)(1)(B), is title II of Pub. L. 96–481, Oct. 21, 1980, 94 Stat. 2325. For complete classification of this Act to the Code, see Short Title note set out under section 504 of Title 5.

SUBCHAPTER VI—STRATOSPHERIC OZONE PROTECTION

§ 7671. Definitions

As used in this subchapter—

(1) Appliance

The term ''appliance'' means any device which contains and uses a class I or class II substance as a refrigerant and which is used for household or commercial purposes, including any air conditioner, refrigerator, chiller, or freezer.

(2) Baseline year

The term ''baseline year'' means—

(A) the calendar year 1986, in the case of any class I substance listed in Group I or II under section 7671a(a) of this title,

(B) the calendar year 1989, in the case of any class I substance listed in Group III, IV, or V under section 7671a(a) of this title, and

(C) a representative calendar year selected by the Administrator, in the case of—

(i) any substance added to the list of class I substances after the publication of the initial list under section 7671a(a) of this title, and

(ii) any class II substance.

(3) Class I substance

The term ''class I substance'' means each of the substances listed as provided in section 7671a(a) of this title.

(4) Class II substance

The term ''class II substance'' means each of the substances listed as provided in section 7671a(b) of this title.

(5) Commissioner

The term ''Commissioner'' means the Commissioner of the Food and Drug Administration.

(6) Consumption

The term ''consumption'' means, with respect to any substance, the amount of that substance produced in the United States, plus the amount imported, minus the amount exported to Parties to the Montreal Protocol. Such term shall be construed in a manner consistent with the Montreal Protocol.

(7) Import

The term ''import'' means to land on, bring into, or introduce into, or attempt to land on,

Clean Air Act Regulatory Provisions

General Part 56 “Uniformity” Requirements

[57 FR 40806, Sept. 4, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting appendix A to Part 55, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

PART 56—REGIONAL CONSISTENCY

AUTHORITY: Sec. 301(a)(2) of the Clean Air Act as amended (42 U.S.C. 7601).

SOURCE: 45 FR 85405, Dec. 24, 1980, unless otherwise noted.

§ 56.1 Definitions.

As used in this part, all terms not defined herein have the meaning given them in the Clean Air Act.

Act means the Clean Air Act as amended (42 U.S.C. 7401 *et seq.*).

Administrator, *Deputy Administrator*, *Assistant Administrator*, *General Counsel*, *Associate General Counsel*, *Deputy Assistant Administrator*, *Regional Administrator*, *Headquarters*, *Staff Office*, *Operational Office*, and *Regional Office* are described in part 1 of this title.

Mechanism means an administrative procedure, guideline, manual, or written statement.

Program directive means any formal written statement by the Administrator, the Deputy Administrator, the Assistant Administrator, a Staff Office Director, the General Counsel, a Deputy Assistant Administrator, an Associate General Counsel, or a division Director of an Operational Office that is

intended to guide or direct Regional Offices in the implementation or enforcement of the provisions of the act.

Responsible official means the EPA Administrator or any EPA employee who is accountable to the Administrator for carrying out a power or duty delegated under section 301(a)(1) of the act, or is accountable in accordance with EPA's formal organization for a particular program or function as described in part 1 of this title.

§ 56.2 Scope.

This part covers actions taken by:

(a) Employees in EPA Regional Offices, including Regional Administrators, in carrying out powers and duties delegated by the Administrator under section 301(a)(1) of the act; and

(b) EPA employees in Headquarters to the extent that they are responsible for developing the procedures to be employed or policies to be followed by Regional Offices in implementing and enforcing the act.

§ 56.3 Policy.

It is EPA's policy to:

(a) Assure fair and uniform application by all Regional Offices of the criteria, procedures, and policies employed in implementing and enforcing the act;

(b) Provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees in implementing and enforcing the act; and

(c) Insure an adequate quality audit for each State's performance in implementing and enforcing the act.

§ 56.4 Mechanisms for fairness and uniformity—Responsibilities of Headquarters employees.

(a) The Administrator shall include, as necessary, with any rule or regulation proposed or promulgated under parts 51 and 58 of this chapter[1] mechanisms to assure that the rule or regulation is implemented and enforced fairly and uniformly by the Regional Offices.

(b) The determination that a mechanism required under paragraph (a) of this section is unnecessary for a rule or regulation shall be explained in writing by the responsible EPA official and included in the supporting documentation or the relevant docket.

§ 56.5 Mechanisms for fairness and uniformity—Responsibilities of Regional Office employees.

(a) Each responsible official in a Regional Office, including the Regional Administrator, shall assure that actions taken under the act:

(1) Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives,

(2) Are as consistent as reasonably possible with the activities of other Regional Offices, and

(3) Comply with the mechanisms developed under § 56.4 of this part.

(b) A responsible official in a Regional Office shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, or rule, regulation, or program directive when such interpretation may result in inconsistent application among the Regional Offices of the act or rule, regulation, or program directive.

(c) In reviewing State Implementation Plans, the Regional Office shall follow the provisions of the guideline, revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2–005A, or revision thereof. Where regulatory actions may involve inconsistent application of the requirements of the act, the Regional Offices shall classify such actions as special actions.

§ 56.6 Dissemination of policy and guidance.

The Assistant Administrators of the Offices of Air, Noise and Radiation, and of Enforcement, and the General Counsel shall establish as expeditiously as practicable, but no later than one year after promulgation of this part, systems to disseminate policy and guidance. They shall distribute material under foregoing systems to the Regional Offices and State and local agencies, and shall make the material

[1] Part 51 is entitled, ''Requirements for Preparation, Adoption, and Submittal of Implementation Plans.'' Part 58 is entitled, ''Ambient Air Quality Surveillance.''

available to the public. Air programs policy and guideline systems shall contain the following:

(a) Compilations of relevant EPA program directives and guidance, except for rules and regulations, concerning the requirements under the Act.

(b) Procedures whereby each Headquarters program office and staff office will enter new and revised guidance into the compilations and cause superseded guidance to be removed.

(c) Additional guidance aids such as videotape presentations, workshops, manuals, or combinations of these where the responsible Headquarters official determines they are necessary to inform Regional Offices, State and local agencies, or the public about EPA actions.

§ 56.7 State agency performance audits.

(a) EPA will utilize the provisions of subpart B, Program Grants, of part 35 of this chapter, which require yearly evaluations of the manner in which grantees use Federal monies, to assure that an adequate evaluation of each State's performance in implementing and enforcing the act is performed.

(b) Within 60 days after comment is due from each State grantee on the evaluation report required by § 35.538 of this chapter, the Regional Administrator shall incorporate or include any comments, as appropriate, and publish notice of availability of the evaluation report in the FEDERAL REGISTER.

PART 57—PRIMARY NONFERROUS SMELTER ORDERS

Subpart A—General

Sec.

Subpart B—The Application and the NSO Process

Subpart C—Constant Controls and Related Requirements

Subpart D—Supplementary Control System Requirements

Subpart E—Fugitive Emission Evaluation and Control

Subpart F—Research and Development Requirements

Subpart G—Compliance Schedule Requirements

ADDENDUM 2

DECLARATION AND SUPPORTING MATERIALS

DECLARATION OF LESLIE SUE RITTS

I, Leslie Sue Ritts, declare as follows:

1. I am the Executive Director of the National Environmental Development Association's Clean Air Project ("NEDA/CAP"), and my law firm, the Ritts Law Group, PLLC, is the Counsel for NEDA/CAP. I have held the unsalaried position of Executive Director since 1990 and have represented NEDA/CAP as its counsel since 1984.

a. In addition to representing NEDA/CAP, I have practiced law for more than thirty years and have obtained Clean Air Act permits and "permit applicability determinations" for various clients including some of NEDA/CAP's members.

b. I have served on the federal Clean Air Act Advisory Committee's NSR Subcommittee and the Title V Task Force.

2. I am executing this declaration in support of a PETITION FOR REVIEW of EPA's *Summit* Directive.

NEDA/CAP

3. NEDA/CAP is an IRS Section 501(c)(6) not-for-profit unincorporated trade association under the laws of the District of Columbia. NEDA/CAP has no employees.

4. NEDA/CAP's members come from a cross-section of U.S. manufacturing industries. In 2013, its members are Alcoa, the Boeing Corporation, BP America, Eli Lilly & Company, Inc., Exxon-Mobil Corp., Georgia-Pacific LLC, Invista SÀRL, Intel Corporation, Koch Industries, Merck & Co., Occidental Petroleum Corporation, Phillips 66, the Procter & Gamble Company, and Weyerhaeuser Corporation. These companies collectively operate in every state in the nation except for Hawaii.

5. NEDA/CAP's purpose is to provide an industry perspective which balances environmental and economic concerns on procedurally-related CAA issues that affect *all* U.S. manufacturers. Regulatory developments affecting Clean Air Act PSD, NNSR and Title V operating permitting for stationary sources are a NEDA/CAP "priority issue."

a. NEDA/CAP files numerous comments each year on EPA-proposed CAA regulations and related draft guidance documents. Many of these regulatory developments pertain to CAA permitting and the technical feasibility and practical consequences of meeting proposed requirements if promulgated without amendments.

b. NEDA/CAP also occasionally seeks review of EPA notice and comment rulemakings and other rules under the Clean Air Act's judicial review provision in this court.

EFFECTS OF SUMMIT DIRECTIVE ON NEDA/CAP'S MEMBERS

6. NEDA/CAP's members include several large energy companies with significant oil and gas development holdings in the United States. Attachment B.1 provides member information about oil and gas formations that ExxonMobil, Occidental Petroleum and BP America are developing in the United States. Most of this exploration and development is taking place in states outside of the Sixth Circuit (BP America has oil and gas leases in Ohio, but substantial energy interests outside of the Sixth Circuit.)

a. NEDA/CAP's members that have energy assets in North Dakota, are directly or indirectly injured or have the imminent potential to be injured by the *Summit* Directive on account of March 22, 2013 Federal Register Notice, stating that the *Summit* Directive is applicable to oil and gas operations on North Dakota's federal Indian reservation. See 78 Fed. Reg. 17836, 17842 FNs 9, 10.

b. All NEDA/CAP members have the imminent potential to be sued by citizen groups that wish to implement that *Summit* Directive. For instance, NEDA/CAP member BP America in 2012 settled an appeal by Wild Earth Guardians of its EPA Region 8-issued Title V permit for its Colorado Green River gas compressor station. At about the same time that Summit Petroleum Corporation filed its appeal of EPA's determination regarding its

Michigan oil & gas operations, Wild Earth Guardian's argued (like EPA argued in the *Summit* determination) that the definition of "adjacent" in the CAA Title V permit regulations *required* EPA to aggregate with BP's compressor station "interrelated oil and gas wells" that BP owned in Colorado on the Southwestern Ute Reservation. See Att. 2.2 --- *In re BP America Florida River Compression Facility,* Envt'l App. Board Case CAA-10-4 (2010). Such Title permit objections, which can be raised every five years when CAA Title V permits are renewed, are extremely resource-intensive to litigate and/or resolve, and they put companies in legal jeopardy for operating facilities without a Title V permit.

7. The *Summit* Directive injures or has the imminent potential to injure NEDA/CAP's members constructing and operating stationary sources of emissions outside of the Sixth Circuit because it imposes stricter permitting requirements on them than the same or similar stationary sources being constructed or operating in jurisdictions that are part of the Sixth Circuit. These projects and operations are now at a competitive disadvantage compared to similar operations and projects within the Sixth Circuit because of the differing applicability of the Clean Air Act's permit requirements. CAA permit requirements impose substantial procedural and substantive burdens, including the delay inherent in determining applicability and applying for and obtaining the permits, the initial and ongoing

costs of complying with those permits' pollution control requirements, and the costs of fulfilling requirements for monitoring, reporting, recordkeeping, deviation reporting and compliance certifications.

8. NEDA/CAP members also suffer injury or have the imminent potential to suffer injury from the *Summit* Directive when they make physical changes or changes in the method of operation of plants which also are regulated by the CAA. Importantly CAA NSR preconstruction review and permitting also apply to any "major modification" *of a "major source."* If a "stationary source" is not a "major source" under the *Summit* Directive, it would not be subject to the CAA's NSR requirements for major modifications.

9. Because the Summit Directive relies on case-by-case "source" permit applicability determinations, all of NEDA/CAP's other members also are injured or have the imminent potential to be injured if they operate outside of the Sixth Circuit where the *Summit* Directive does not apply because EPA has failed to articulate clear criteria for applying their (illegal) interpretation. This creates uncertainty not only with respect to preconstruction permitting of new projects (which can stifle or chill the development of commercial opportunities), but also creates uncertainty with respect to the legal status of existing operations. Most if not all of NEDA/CAP's members operate multiple "minor sources" (i.e., not required to have CAA PSD or NNSR preconstruction and/or Title V operating

permits) such as warehouses, research and development facilities or small manufacturing plants in the same state, which are not physically adjacent to each other or to a major source that required to have CAA permits. The *Summit* Directive is of imminent harm to them if EPA or a citizen were to seek to challenge whether these facilities should have had a CAA permit to construct years ago or at the time of Title V permit renewal, object [like Wild Earth Guardians objected to BP's Colorado permit, *supra* at ¶ 6.b] to the company's Title V permit on the basis that these minor sources should be in their Title V permit

10. Finally, NEDA/CAP's members suffer injury from the fact that except in the Sixth Circuit they must, as decreed in the *Summit* Directive, apply erroneous interpretation of the meaning of "adjacent" for purpose of determining CAA permit applicability.

Leslie Sue Ritts, Director of NEDA/CAP

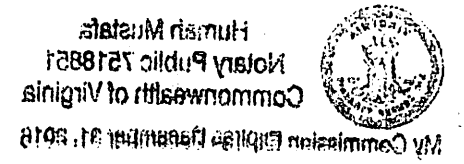
SUBSCRIBED AND SWORN to before me on this 21st day of June 2013.

Notary's Signature:

Seal

Humah Mustafa
Notary Public 7518851
Commonwealth of Virginia
My Commission Expires December 31, 2016

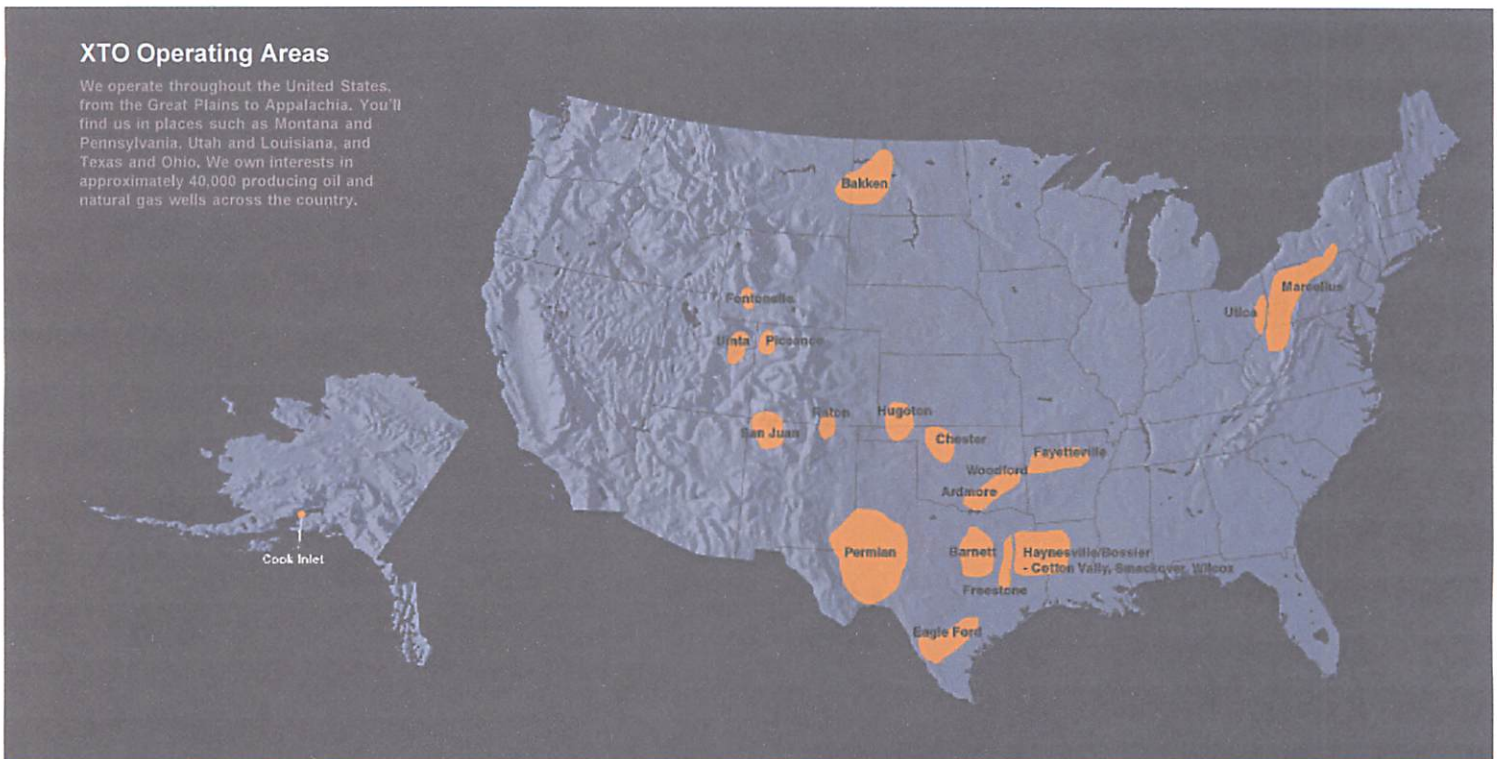
My commission expires [12/31/2016] day of [*month] in [year].*


Notary Public 7518851
Commonwealth of Virginia

ATTACHMENT 2.1

XTO Operating Areas

We operate throughout the United States, from the Great Plains to Appalachia. You'll find us in places such as Montana and Pennsylvania, Utah and Louisiana, and Texas and Ohio. We own interests in approximately 40,000 producing oil and natural gas wells across the country.



Links by State

Alaska	New York	West Virginia
Arkansas	North Dakota	Wyoming
Colorado	Ohio	
Kansas	Oklahoma	
Louisiana	Pennsylvania	
Montana	Texas	
New Mexico	Utah	

Regional XTO News

Natural Gas Firefighting Academy

Thanks to a $30,000 donation from XTO Energy, local firefighters and industry employees in West Virginia are learning how to handle natural gas fires.

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XTO Honored for Conservation Efforts

XTO Energy was honored by the U.S. Bureau of Land Management (BLM) for its efforts to enhance and restore public lands in the San Juan Basin in northwest New Mexico.

READ MORE

United States

The United States is the heart of Oxy's oil and gas business. Our net developed and undeveloped oil and gas assets in the U.S. encompass nearly 8.1 million net acres.

Oxy's U.S. operations are organized in several regions. The largest of these is in the Permian Basin of West Texas and southeast New Mexico, where Oxy is the No. 1 oil producer. Oxy operates more active carbon dioxide (CO_2) floods than any other CO_2 flood operator.

In California, Oxy is the largest natural gas producer and largest oil and gas producer on a gross-operated barrels of oil equivalent basis. We are also the state's largest mineral acreage owner (leasehold and fee), with approximately 2.1 million net acres.

Oxy's natural gas production in the midcontinent region of the U.S. includes the Hugoton Field in Kansas, Oklahoma and eastern Colorado; the Piceance Basin in western Colorado; the Williston Basin in North Dakota; fields in South Texas; and the bulk of non-associated gas assets in the Permian Basin.

Oxy continually strives to strengthen its North America position by increasing production through strategic acquisitions and additional development in each of the company's key U.S. business areas.

View Global Production Statistics

California	Elk Hills	Long Beach
Midcontinent	North Dakota	South Texas
Permian		

Our Businesses

Oil and Gas

- Overview
- United States
  - California
  - Midcontinent and Other
    - North Dakota
    - South Texas
  - Permian
- Middle East Region
- Latin America
- Technology
- Exploration
- Doing Business with Us

Midstream and Marketing

Chemicals

Career Opportunities

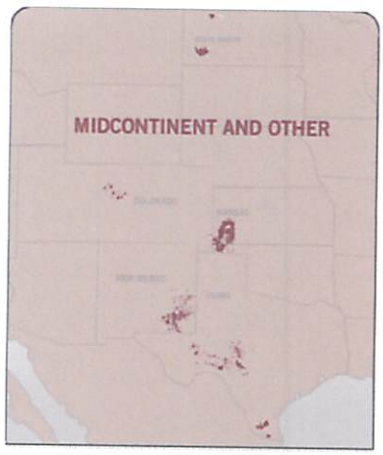
> Our Businesses > Oil and Gas > United States > Midcontinent and Other

Midcontinent and Other

The Midcontinent and Other properties comprise interests in the Hugoton Field spanning southwest Kansas, the Oklahoma panhandle and eastern Colorado; the Piceance Basin in western Colorado; the Williston Basin in North Dakota; and fields in South Texas.

Oxy's assets in southwest Kansas include approximately 1.4 million net acres in the Hugoton and Panoma gas fields. Oxy has operated these fields since the 1940s and uses 3-D seismic surveys and other technologies to develop oil-prone areas.

Oxy has owned interests in the Piceance Basin, one of the largest natural gas reserves in the U.S., since the 1970s. The company is maximizing production, reducing drilling times, and minimizing its environmental footprint in the Piceance through a variety of drilling and completion technologies.



View Global Production Statistics

California Elk Hills Long Beach
Midcontinent North Dakota South Texas
Permian

Operating Areas

Related links

- Major oil and gas projects

Our production strategy and a global map of our projects

North America gas operations

BP has been operating in the onshore US for nearly a century and is continuing to invest billions of dollars to help build a more secure and sustainable energy future. Natural gas is the cleanest fossil fuel for powering homes and businesses and is the bridge to renewable energy.

Unconventional gas

BP's NA Gas production is literally between a rock and a hard place. With nearly 90 percent of the company's onshore resources in tight gas, shale and coal-bed methane, NA Gas operates across the spectrum of unconventional gas plays.

In 2012, BP acquired about 100,000 acres in leasehold agreements in the Utica/Point Pleasant area of north eastern Ohio. The Utica play is a relatively new and promising shale basin with the potential for significant liquids-rich gas.

BP made a major move into shale gas plays in 2008 with its acquisition of the Woodford Shale in the Arkoma Basin and a joint venture in the Fayetteville Shale in Arkansas. In 2009, BP formed a strategic partnership with Lewis Energy in the Eagle Ford Shale in South Texas. Combined with our existing Haynesville Shale position in East Texas, shale is an important growing piece of the BP portfolio in the US. Our NA Gas operations encompass some of the best basins in the East and West areas of the Lower 48.

Wyoming

BP's NA Gas is one of the largest natural gas producers in the state, with major operations in south-central and western Wyoming covering more than 2,500 square miles. Anchored around its giant Wamsutter tight gas operations, BP's gross operated production in the state totals about 250 million cubic feet of natural gas per day from more than 2,300 wells.

San Juan Basin

The San Juan Basin is located in southern Colorado and northern New Mexico. BP operates in both states with local operating centers in Durango, Colo., and Farmington, N.M. In Colorado BP is the top natural gas producer and operates more than 1,500 wells, most of which are unconventional. On the New Mexico portion of the Basin, BP operates 2,200 gas wells. The vast majority of these wells are conventional, however the company has about 100 coalbed methane wells in the world class Fruitland area.

Oklahoma

BP was an early pioneer of Oklahoma's oil and gas industry and remains a major upstream presence today. It is home to significant BP assets including major natural gas producing areas in the Arkoma Basin in eastern Oklahoma with an operations center located in Wilburton. In 2008 BP acquired a large operating interest in the Woodford Shale in the eastern part of the state, as well as a 25 percent interest in the Fayetteville Shale in Arkansas.

Texas

Texas & Texas Panhandle — BP's operations in the Anadarko Basin are extensive with operating responsibilities for approximately 1,900 wells. Initially discovered in 1917, the basin is located on about 15,000 square miles in western Oklahoma and the Texas panhandle. The company's local operations center is located in Amarillo, Texas.

East Texas — BP's operations center in Longview, Texas, predominantly operates gas wells in eastern Texas. The East Texas basin is one of North America's most prolific oil and gas production areas, where BP operates over 900 wells from conventional and tight gas reservoirs. In 2009 BP furthered its entry investment in the US shale plays through a joint venture with Lewis Energy in the Eagle Ford shale located in South Texas.

Mississippi

The Pascagoula gas processing plant is located in Moss Point, Mississippi, and processes gas from the Destin pipeline. It is also the primary processing facility for gas from BP's giant Thunder Horse production operations in the deepwater of the Gulf of Mexico.

Ohio

BP leased about 100,000 acres in the Utica/Point Pleasant area of north eastern Ohio, a relatively new and promising shale basin with the potential for significant liquids-rich gas. With an operations center in Trumbull County, the company is pursuing an appraisal program that will help determine its development activities in the basin.

Our Businesses

Oil and Gas

- Overview
- United States
  - California
  - Midcontinent and Other
    - North Dakota
    - South Texas
  - Permian
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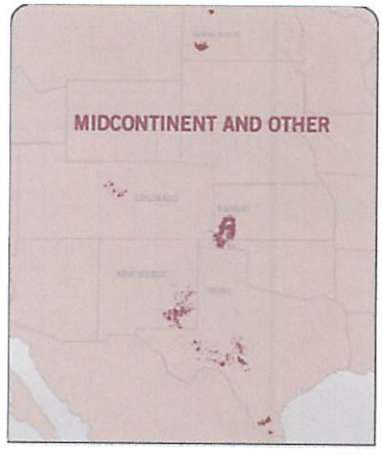

View Global Production Statistics

California	Elk Hills	Long Beach
Midcontinent	North Dakota	South Texas
Permian		

ATTACHMENT 2.2
In Re BP American Florida River Compression Facility
Envt'l App. Bd. Case CAA-10-04

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
BP America Production Company, Florida River Compression Facility,	)
Permit No. V-SU-0022-05.00	)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 71.11(l), WildEarth Guardians hereby petitions the Environmental Appeals Board ("EAB") to review the October 18, 2010 decision by Region 8 of the U.S. Environmental Protection Agency ("EPA") to issue a renewed federal operating permit pursuant to Title V of the Clean Air Act and 40 C.F.R. § 71 (hereafter "Title V Permit") for BP America Production Company (hereafter "BP") to operate the Florida River Compression Facility. The Title V Permit and associated Statement of Basis are attached to this petition. *See* Exhibit 1, Permit Number V-SU-0022-05.00, Air Pollution Control Title V Permit to Operate, BP America Production Company Florida River Compression Facility (Oct. 18, 2010); Exhibit 2, Statement of Basis for Title V Permit No. V-SU-0022-05.00 (Oct. 18, 2010).

Petitioner requests that the EAB review two issues of material relevance to the adequacy of the conditions of the Title V Permit:

1. Whether EPA Region 8 erred in not reopening the public comment period for the Title V Permit in response to substantial new questions concerning the permit raised during the public comment period; and

2. Whether EPA Region 8 failed to appropriately define the major source subject to permitting such that the Title V Permit assures compliance with Prevention of Significant Deterioration and Title V Permitting requirements.

FACTUAL AND STATUTORY BACKGROUND

The Title V Permit authorizes BP to operate the Florida River Compression Facility, which is located in La Plata County in southwestern Colorado within the exterior boundaries of the Southern Ute Indian Reservation. *See* Exh. 2 at 1. The facility processes natural gas produced and delivered via pipelines from coal-bed methane wells in the Northern San Juan Basin, a gas producing region in southwestern Colorado. *See* Exh. 3, Response to Comments on the Florida River Compression Facility's March 28, 2008 Draft Title V Permit to Operate (Oct.

18, 2010) at 6. The Florida River Compression Facility removes carbon dioxide ("CO_2") and water from natural gas piped into the facility, and compresses it for delivery into interstate pipelines. *See* Exh. 2 at 2.

The facility consists of natural gas-fired turbines, amine units to remove CO_2, a flare, a dozen diesel-fired electric generation units, and a number of "insignificant emission units." *See* Exh. 2 at 4-5. The facility has the potential to emit 282.07 tons/year of nitrogen oxides ("NO_x"), 181.94 tons of carbon monoxide, 30.27 tons of volatile organic compounds ("VOCs"), 7.95 tons of particulate matter ("PM"), 24.23 tons of sulfur dioxide ("SO_2"), and 4.14 tons of hazardous air pollutants. *See id.* at 6. The facility is an existing major source under Prevention of Significant Deterioration ("PSD"), although it has never been required to receive a PSD permit to construct. *See id.* at 10. According to the EPA, "significant emission increases due to modifications at the facility could trigger PSD permitting requirements." *Id*

An initial Title V Permit was issued for the Florida River Compression Facility on June 5, 2001. *See* Exh. 2 at 3. On December 1, 2005, the EPA received an application for a Title V Permit renewal from BP. *See id.* The application was deemed complete on January 19, 2006. *See id.* EPA finally issued a draft Title V Permit for public comment on March 28, 2008, more than two years after deeming BP's application to be complete. *See* Exh. 3 at 1. Both Petitioner and BP submitted comments on the draft Title V Permit during the public comment period. *See id.*

Petitioner's comments focused on one issue: whether EPA appropriately defined the source subject to permitting in order to ensure compliance with PSD and Title V permitting requirements under the Clean Air Act. Petitioner specifically questioned whether EPA was required to aggregate other pollutant emitting activities, including interrelated oil and gas wells

and potentially other compression facilities, together with the Florida River Compression Facility as a single source.

A Title V Permit must assure compliance with applicable requirements under the Clean Air Act. *See* 42 U.S.C. § 7661c(a); *see also* 40 C.F.R. § 71.7(a)(iv) (a permit may only be issued if "[t]he conditions of the permit provide for compliance with all applicable requirements and the requirements of this part"). Applicable requirements include, among other things, PSD and Title V requirements under the Clean Air Act as they apply to a source required to have a Title V Permit under 40 C.F.R. § 71. *See* 40 C.F.R. § 71.2 (definition of applicable requirement). An accurate source determination, therefore, is an absolute prerequisite to adequately demonstrating that a Title V permit assures compliance with PSD and Title V requirements.

In this case, PSD regulations at 40 C.F.R. § 51.21(b)(5) define a stationary source as, "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." These regulations further define "building, structure, facility, or installation" as "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)[.]" 40 C.F.R. § 52.21(b)(6). These definitions are echoed in EPA's Title V regulations. *See* 40 C.F.R. § 71.2 (providing definition of "major source" and "stationary source").

Thus, EPA must apply a three-part test to determine whether multiple pollutant emitting activities should be aggregated together for PSD and Title V purposes in order to ensure accurate source determinations:

1. Whether the sources belong to the same industrial grouping;
2. Whether the sources are located on one or more contiguous or adjacent properties; and
3. Whether the sources are under the control of the same person.

40 C.F.R. § 51.21(b)(6). These three factors apply equally in the context of oil and gas operations. *See* Exh. 4, Memo from Gina McCarthy, EPA Assistant Administrator for Air and Radiation to Regional Administrators, *Withdrawal of Source Determinations for Oil and Gas Industries* (September 22, 2009) (hereafter "McCarthy Memo"). If multiple pollutant emitting activities meet this three-part test, then they are collectively considered to be a "building, structure, facility, or installation" and must be aggregated together as one "stationary source" for PSD and Title V purposes, even in the context of oil and gas operations.

Prior to Petitioner's comments, the issue of aggregation received no attention from the EPA. The Agency proposed the draft Title V Permit without assessing whether other pollutant emitting activities should or should not be aggregated together with the Florida River Compression Facility in accordance with the definitions of "major source" and "stationary source" under both PSD and Title V. EPA simply presumed that its source determination was accurate.

EPA's presumption was erroneous. Indeed, in response to Petitioner's comments, EPA undertook the source determination analysis that it had failed to complete in the first place. In doing so, EPA requested from BP additional comments, which were submitted on December 17, 2009, December 21, 2009, and February 17, 2010. *See* Exh. 5, Letter from Julie Best to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: BP America Production Company Florida River Compression Facility proposed Air Pollution Control Title V Permit to Operate Number V-SU-0022-05.00 (Dec. 17, 2009); Exh. 6, Letter from Rebecca Tanory to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: BP America Production Company Florida River Compression Facility proposed Air Pollution Control Title V Permit to Operate Number V-SU-

0022-05.00 Clarification of December 17, 2009 Flow Description and Proximity Map (Dec. 21, 2009); Exh. 7, Letter from Charles Kaiser to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: Supplemental Comments on Florida River Plant Renewal Title V Operating Permit (Feb. 17, 2010).

Together with its new source determination analysis, which relied heavily on BP's additional comments, EPA issued the Title V Permit on October 18, 2010. *See* Exh. 1. Although finding that the coalbed methane wells that feed the Florida River Compression Facility, and potentially other compression facilities, belonged to the same industrial grouping and are under the control of the same person (or persons under common control), ultimately EPA asserted that any aggregation of pollutant emitting activities was inappropriate because of a lack of adjacency. Exh. 3 at 13. This finding relied on a novel claim that adjacency was not established due to a lack of "exclusive or dedicated interrelatedness." *Id.*

Although EPA has held on numerous occasions that pollutant emitting activities should be considered adjacent based on their interrelatedness (*see e.g.*, *infra*. Exh. 8 at Exhibit 9), in this case, EPA took the relationship between interdependency and adjacency to an absurdly extreme end. Although finding that the Florida River Compression Facility is indeed dependent on nearby coalbed methane wells, and likely other compression facilities, to provide natural gas to support its operations, the EPA rejected aggregation because these same wells and compression facilities "can also supply gas to other non-BP facilities[.]" Exh. 3 at 9.

This source determination defies prior EPA determinations that indicate "exclusive or dedicated interrelatedness" is not a determinative factor in assessing whether and to what extent pollutant emitting activities associated with oil and gas operations should be considered adjacent. Most significantly however, is that this position undermines EPA's duty to aggregate based on

the "common sense notion of a plant[,] [t]hat is, pollutant emitting activities that comprise or support the primary product or activity of a company or operation must be considered part of the same stationary source." *See infra*. Exh. 8 at Exhibit 15 at 2; *see also* 45 Fed. Reg. 52676, 52694–95 (Aug. 7, 1980) (EPA permitting decisions must "approximate a common sense notion of 'plant'").

THRESHOLD REQUIREMENTS

WildEarth Guardians satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 71.11(h). Regulations provide that, "[A]ny person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision." 40 C.F.R. § 71.11(l). In this case, Rocky Mountain Clean Air Action, an organization that formally merged with WildEarth Guardians in 2008, with WildEarth Guardians remaining the surviving organization, submitted comments on the draft Title V Permit on May 19, 2008. *See* Exh. 8, Comments from Rocky Mountain Clean Air Action, Draft Title V Operating Permit for Florida River Compression Facility (May 19, 2008). WildEarth Guardians assumed all rights, liabilities, and responsibilities of Rocky Mountain Clean Air Act as a result of the merger. *See* Exh. 9, Plan of Merger and Unanimous Consent to Merge (2008). Thus, WildEarth Guardians has the right to file this appeal.

Furthermore, the issues raised in this appeal were raised by Petitioner during the public comment period and therefore were preserved for review. The issues raised in this appeal were in fact the sole issues raised in Petitioner's comments. To the extent that Petitioner argues that EPA did not follow proper procedures in responding to substantial new questions raised in Petitioner's comments, the grounds for this argument arose after the public comment period.

ARGUMENT

As Petitioners demonstrate below, the decision to issue the Title V Permit was based on a "finding of fact or conclusion of law which is clearly erroneous" and/or was "an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. §§ 71.11(l)(1)(i) and (ii).

I. EPA Region 8 Should Have Reopened the Public Comment Period in Light of "Substantial New Questions" Concerning the Permit

Although Petitioner submitted comments that raised "substantial new questions" concerning the Title V Permit, the EPA issued the Title V Permit without reopening the public comment period, contrary to 40 C.F.R. § 71.11(h).

In comments on the draft Title V Permit, Petitioner raised significant concerns over the adequacy of EPA's source determination and accordingly, over whether the Title V Permit assured compliance with applicable requirements in accordance with 40 C.F.R. § 71. These comments pointed out a fundamental flaw in EPA's proposed permitting decision, namely that the Agency had failed to appropriately define the source subject to permitting. ***These comments clearly raised substantial new questions over the adequacy of the permit***. Indeed, these comments prompted EPA to solicit and obtain voluminous new information, ***including requesting supplemental comments from BP***, from the permittee and to concoct a brand new source determination analysis—all without allowing for any further public comment.

EPA's regulations regarding the reopening of public comment provide that, "[i]f any data, information, or arguments submitted during the public comment period ***appear to raise substantial new questions*** concerning a permit," the EPA may under take one or more of three

actions. 40 C.F.R. § 71.11(h)(5) (emphasis added). These three actions include "[p]repar[ing] a new draft permit," "[p]repar[ing] a revised statement of basis, and reopen[ing] the comment period," or "[r]eopen[ing] or extend[ing] the comment period to give interested persons an opportunity to comment on the information or arguments submitted." *Id.* at §§ 71.11(h)(5)(i)-(iii). Although the EAB has held that a determination of whether a public comment period should be reopened "is generally left to the sound discretion of the permit issuer," this discretion is not without bounds. *See In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 146-147 (EAB 2006). The EAB is empowered to "determine whether reopening the public comment period is warranted in a given circumstance." *Id.* at 147.

Although prior EAB rulings on reopening the public comment period have involved circumstances where permitting authorities added new conditions to a permit subsequent to a public comment period (*see e.g. Indeck-Elwood*, *In re Amoco*, 4 E.A.D. 954, 981 (EAB 1993), *In re Matter of GSX Services of S. Carolina, Inc.*, 4 E.A.D. 451, 467 (1992)), the requirements of 40 C.F.R. § 71.11(h)(5) clearly contemplate that reopenings may be warranted even where no changes to a permit are made.[1] Indeed, in response to "substantial new questions," it may only be necessary to "[p]repare a revised statement of basis" or simply to "[r]eopen or extend the comment period[.]" 40 C.F.R. §§ 71.11(h)(5)(ii) and (iii). Whether or not changes are made to a permit, the overlying intent of reopening is to ensure that interested persons have an opportunity to comment on substantial new questions that have significant bearing both on the EPA's permitting decision and on the public.

[1] To this end, the regulation at issue in prior EAB rulings on this issue, namely 40 C.F.R. § 124.14(b), also contemplates reopenings of the public comment period where no changes to a permit are made. In fact, 40 C.F.R. § 124.14(b) is echoed almost verbatim by 40 C.F.R. § 71.11(h)(5).

In this case, the circumstances argue that reopening of the public comment period was warranted prior to permit issuance for one or both of two reasons: Either (1) Because the EPA, in requesting and subsequently relying upon supplemental comments from BP in response to Petitioner's comments, essentially reopened the public comment period on a *de facto* basis, yet failed to formally reopen the public comment period in accordance with 40 C.F.R. § 71.11(h); or (2) Because Petitioner's comments clearly raised substantial new questions that would rise to the level of requiring a public comment reopening, as evidenced by EPA's subsequent efforts to gather significant additional new information from the permittee and to ultimately present a source determination analysis and rationale for issuing the permit that was entirely unlike anything presented to the public during the comment period for the draft Title V Permit. In either or both cases, EPA's failure to reopen the public comment period was an inappropriate exercise of discretion, and must be reviewed by the EAB.

With regards to the *de facto* reopening, it is clear that EPA solicited additional comments from BP in response to Petitioner's comments, and that it subsequently relied heavily on those comments to justify its permitting decision. Despite its actions to request and rely upon comments from BP, the EPA never officially reopened the public comment period in accordance with 40 C.F.R. § 71.11(h).

That EPA requested and BP submitted comments is supported on a number of grounds. To begin with, BP's February 17, 2010 submission is entitled, "***Supplemental Comments*** of BP American Production Company Regarding The Pending Renewal Title V Operating Permit for Its Florida River Plant" (emphasis added), indicating that additional comments were submitted. *See* Exh. 7 at cover letter and title page. Although EPA is allowed to request additional information from a permittee that may be "necessary to evaluate or take final action" on a Title

V Permit application (*see* 40 C.F.R. § 71.5(a)(2)), BP's Supplemental Comments do not entirely represent information necessary to evaluate or take final action on a Title V Permit. The Supplemental Comments express numerous opinions, including policy positions and legal arguments that, while relevant to this matter, do not represent information that was necessary for EPA to evaluate or take final action on the Title V Permit. Notably, in the introduction to the supplemental comments, BP states:

> BP American Production Company submits this memorandum and the attached materials in (i) support of the U.S. Environmental Protection Agency ("EPA") Region VIII's pending issuance of a renewal Title V operating permit for BP's Florida River Plant ("Florida River" or the "Plant") and (ii) opposition to Rocky Mountain Clean Air Action, n/k/a WildEarth Guardians ("WEG"), comments urging EPA to aggregate hundreds or thousands of BP-operated wells across the Northern San Juan Basin ("NSJB") and BP's Wolf Point compressor station in the renewal permit for Florida River.

Exh. 7 at 1. Clearly, BP's Supplemental Comments are just that: comments expressing the company's position on the EPA's proposed permitting decision, as well as BP's position regarding Petitioner's comments.[2]

There are other examples showing that BP's Supplemental Comments are, in fact, comments, and do not present information that was necessary for EPA to evaluate or take action on the final Title V Permit. For example:

- BP presents "Facts" that, while certainly disclosing some facts, is colored by rhetoric. *See* Exh. 7 at 4-14. For instance, BP asserts that prior EPA and/or State of Colorado permitting decisions affirmatively determined that aggregation was not necessary because, as the company claims, these agencies had a "thorough understanding of the nature and purpose of BP's operation of the sources permitting at the [Florida River]

[2] Similarly, BP's December 17, 2009 submission to EPA also appears to present opinions regarding the company's position on the EPA's proposed permitting decision and Petitioner's comments. *See* Exh. Xx at Attachment A.

Plant, as well as sources separate from the Plant but also operated by BP." *Id.* at 6. BP is in no position to accurately articulate EPA's and/or the State of Colorado's state of mind during prior permitting decisions.

- BP presents a legal analysis stating the company's position regarding aggregation of pollutant emitting activities that is simply an expression of opinion and argument, exactly the type of information that is typically submitted during public comment periods. *See* Exh. 7 at 15-29;
- BP presents a one-page comment letter from the Southern Ute Indian Tribal Council dated January 13, 2010, which expresses support for BP's positions regarding both the EPA's permitting proposal and Petitioner's comments. *See* Exh. 7 at Exhibit A; and
- BP presents an affidavit from Gordon Reid Smith, dated February 17, 2010, that states an opinion regarding the company's position on the aggregation of pollutant emitting activities and the company's perception of the implication of prior EPA's decisions. *See* Exh. 7 at Exhibit C.

Overall, BP's Supplemental Comments are more of an attempt to influence the EPA, rather than inform the Agency. Such comments can only be submitted during public comment periods.[3]

More importantly is that EPA explicitly relied on BP's Supplemental Comments, and in fact explicitly references portions of BP's Supplemental Comments throughout its Response to Comments. *See e.g.*, Exh. 3 at 6 ("BP information included as part of the record for this determination"). ***In fact, EPA's Response to Petitioner's Comments relies almost entirely on***

[3] 40 C.F.R. § 71.11(g) requires "[a]ll persons, including applicants" to "submit all reasonably ascertainable arguments supporting their position by the close of the public comment period." BP's comments represent arguments supporting their position. Thus, either they should have been rejected by EPA because they were submitted outside the public comment period, or EPA was obligated to reopen the public comment period before properly receiving and considering such comments.

information submitted by BP subsequent to the public comment period.[4] However, and as will be explained further in this Petition, EPA's Response to Comments appears heavily influenced by the rhetoric of BP's comments. For example, EPA asserts that WildEarth Guardians requested that every single oil and gas well in southwestern Colorado be aggregated together with the Florida River Compression Facility, an assertion first posited by BP. *See* Exh. 3 at 9 ("WEG asserts that Florida River Compression Facility, Wolf Point Compressor Station, ***and all the wells in the NSJB field*** are "adjacent" and "interrelated" to one another, and thus must be considered a single source under both PSD and title V." (emphasis added); *compare* Exh. 7 at 15 ("WEG asserts that ***BP's wells in La Plata County*** should be aggregated with Florida River…" (emphasis added)). However, Petitioner did not request that every single oil and gas well in the North San Juan Basin oil and gas field be aggregated with the Florida River Compressor Station.[5]

To the extent that BP's Supplemental Comments may have provided some information that was necessary for EPA to evaluate and take action on the Title V Permit, it does not appear that EPA is simply allowed to request and subsequently rely upon such additional information in justifying its permitting decision without reopening the public comment period. If such additional information was so critical to justifying the EPA's final permitting decision, then this

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[4] The only other information relied upon by EPA appears to be guidance memos from the Agency and regulatory language. Thus, the factual underpinning of EPA's Response to Comments seems firmly hitched to BP's subsequent comment submissions.

[5] To the extent EPA takes issue with the nature of Petitioner's requests regarding aggregation of interrelated pollutant emitting activities, Petitioner's submit that there was extremely limited information provided by both EPA and the permittee with which to prepare and present detailed comments on the matter. EPA and BP appear to take issue with the fact that Petitioner was not intimately familiar with the nature of the relationship between the Florida River Compression Facility and the other pollutant emitting activities. Petitioner cannot be faulted for providing the best comments it could in light of the extremely limited information provided by EPA and the permittee.

signals the draft Title V Permit and the basis for proposing the draft Title V Permit were, at the time of the public comment period, substantially, if not wholly, unjustified. EPA cannot remedy a substantial lack of justification for issuing a Title V Permit by simply padding the record and issuing a final permit. Although the Agency is allowed to request additional information from the permittee in accordance with 40 C.F.R. § 71.5(a)(2), once such a request is made to remedy a deficiency in the permit and/or the rationale for issuing the permit, then the Agency is conceding that public comments in this case did raise "substantial new questions."

And this gets to the heart of the matter. Regardless of whether BP's Supplemental Comments or any other submission of information subsequent to the public comment period indicate that EPA reopened the public comment period on a *de facto* basis, yet failed to adhere to reopening procedures under 40 C.F.R. § 71.11(h), the fact remains that Petitioner's comments did raise "substantial new questions" and that the EPA was unjustified in failing to reopen the public comment period in response.

This is not merely an abstract dispute over proper procedure. Because EPA did not reopen the public comment period, Petitioner, as well as other members of the public, were denied the opportunity to comment on EPA's newly articulated rationale and analysis supporting its source determination, as well as all the underlying information submitted by the permittee subsequent to the public comment period. At the time of the public comment period, no such rationale, information, or analysis was presented, or even hinted upon by EPA. The issues of aggregation, adjacency, interrelatedness, and the adequacy of the source determination were only addressed after the public comment period. Although the Title V Permit may not have changed, the EPA's rationale for issuing the permit was revised. And the revision was material to the final decision. Indeed, an accurate source determination is an absolute prerequisite to a valid Title V

Permit. Yet WildEarth Guardians, as well as other members of the public, had no opportunity to comment on this revised rationale, or the analysis supporting the rationale.

Certainly EPA is not required to reopen the public comment period every time it modifies its basis for proposing to issue a Title V Permit. However, whenever its basis is so revised as to provide a new justification altogether, including a new analysis, which was not articulated or presented at all prior to or during the public comment period and which is material to the adequacy of the Title V Permitting decision, EPA has a duty to exercise its discretion to reopen the comment period.[6] This is especially true when the revised rationale and analysis directly results from "substantial new questions" raised in public comments.

The circumstances here compel the EAB find that a public comment reopening is warranted, and that the EPA's decision to issue the Title V Permit is contrary to 40 C.F.R. § 71.11(h). Although a determination as to whether reopening is appropriate is typically left to the sound discretion of the EPA, that discretion cannot come at the expense of a sound permitting decision. In this case, not only is it apparent that EPA inappropriately solicited, received, and considered comments from BP without adhering to the reopening procedures set forth at 40 C.F.R. § 71.11(h), but it is apparent that Petitioner's comments did raise "substantial new

[6] It is informative that EPA's regulations regarding Title V Permit reopenings at 40 C.F.R. § 71.7(f) embody the same principle. These regulations provide that, whenever EPA determines that a Title V Permit "contains material mistakes or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit," a Title V Permit shall be reopened. *See* 40 C.F.R. § 71.7(f)(1)(ii). A Title V Permit reopening "shall follow the same procedures as apply to initial permit issuance[.]" *Id.* at § 71.7(f)(2). In the case of the Florida River Compression Facility Title V Permit, it does appear that EPA impliedly, if not expressly, determined that the draft Title V Permit was either based on "material mistakes" or "inaccurate statements." As the Agency's reopening regulations contemplate, public comment is necessary to properly address such mistakes or inaccurate statements.

questions" that rose to the level of requiring a public comment reopening in order to properly address the ramifications of these questions.

II. The Title V Permit Fails to Assure Compliance with PSD and Title V Permitting Requirements

Petitioner's argument is a straightforward challenge to EPA's source determination. In this case, EPA failed to appropriately assess whether pollutant emitting activities interrelated with the Florida River Compression Facility should be aggregated together with the Compression Facility as a single stationary source, in accordance with the factors set forth under 40 C.F.R. § 52.21(b)(5) and (6), as well as the definitions of "major source" and "stationary source" under 40 C.F.R. § 71.2. In other words, EPA failed to appropriately define the source subject to permitting, and therefore failed to ensure that the Title V Permit assures compliance with EPA's PSD and Title V regulations in accordance with 40 C.F.R. § 71.1(a). *See also* 40 C.F.R. § 71.6(a)(1).

EPA's source determination did not dispute that there exist pollutant emitting activities, including the coalbed methane wells that feed the Florida River Compression Facility and potentially other compression facilities, which belong to the same industrial grouping and are under common control by BP. *See* Exh. 3 at 13. Instead, EPA's determination hinged upon a finding that these pollutant emitting activities pollutant emitting activities are not adjacent to the Compression Facility. Thus, EPA refused to aggregate these pollutant emitting activities with the Florida River Compression Facility as a single source, as appropriate. As will be explained, this finding is unsupported.

A. Background

That aggregation of pollutant emitting activities associated with oil and gas operations

under PSD and Title V may be appropriate is not inconsistent with the history of the PSD program. In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the court described how the Clean Air Act defines the terms "source" and "stationary source." The court held that the term "stationary source" for PSD purposes, although not explicitly defined in the sections on PSD, should be defined as "any building, structure, facility, or installation which emits or may emit any air pollutant," which is how "stationary source" is defined in other sections of the Act. *See id.* at 395–96.

In light of the statutory definition, the court directed EPA to revise its regulation defining "source" for the PSD program. *Alabama Power Co. v. Costle*, 636 F.2d 323, 396-397 (D.C. Cir. 1979). In doing so the court cautioned that EPA should not aggregate sources unless they fit within the statutory terms "structure," "building," "facility," or "installation." *Id.* at 397. However, the court noted the breadth of the term "facility or installation" and concluded that Congress "clearly intended" to "allow an entire plant ***or other appropriate grouping of industrial activity***" to be treated as a single major source for PSD purposes. *Id.* (emphasis added).

Following the D.C. Circuit's decision, EPA in 1980 promulgated a new regulatory definition of "stationary source" for PSD purposes as "any building, structure, facility, or installation" that emits a regulated pollutant, a definition that continues in effect in the present PSD regulations. EPA further established the three-part aggregation test, discussed above, to determine when multiple individual activities should be aggregated as a single major source, a test that also continues in effect in today's PSD regulations. The Preamble to the new regulations discussed the policy considerations for aggregation identified by the D.C. Circuit in *Alabama Power*:

> In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

45 Fed. Reg. 52676, 52694–95.

In the context of oil and gas operations, sources under common control, connected by pipelines, and operating interdependently readily fit within the ordinary meaning of "facility" or "installation."

Moreover, in appropriate cases, aggregated oil and gas sources also fit the "common sense notion of a plant." First, the "common sense notion of a plant" has always extended beyond just a single factory building. In *Alabama Power*, the D.C. Circuit noted that under the PSD program Congress "clearly intended" that not just plants comprising a single building, but also "***other appropriate grouping[s] of industrial activity***," should be aggregated if they fit within the statutory terms "facility" or "installation." *Alabama Power Co. v. Costle*, 636 F.2d 323, 397 (D.C. Cir. 1979) (emphasis added).

Second, in considering the common sense notion of a "plant," the preamble explicitly suggests that an "oil field" could be aggregated. In addressing the "plant" definition, EPA focused largely on whether activities shared a common SIC code, in order to avoid "group[ing] activities that ordinarily would be considered separate." *See* 45 Fed. Reg. 52676, 52695. As an example of separate activities, the Preamble pointed to "a uranium mill and an oil field." *Id.* This choice of example, however, suggests that the component units in an oil field—to the extent they share a single SIC code—could be treated as a single stationary source. It would have made little sense for the Preamble to discuss aggregating an oil field with another activity if the component parts of the oil field could not themselves be aggregated as a single stationary source.

Third, while EPA expressly rejected a *per se* rule against aggregating multiple facilities that are connected by a multistate pipeline or a similar connection in adopting the regulatory definition of stationary source, this was not complete bar to appropriate aggregation of oil and gas pollutant emitting activities. EPA said that it "would not treat all of the pumping stations along a multistate pipeline as one 'source.'" 45 Fed. Reg. 52676, 52695. At the same time, the agency was "unable to say precisely at this point how far apart activities must be in order to be treated separately." *Id.*

To these ends, a number of prior EPA permitting determinations have concluded that aggregation is appropriate for oil and gas sources. Others have concluded that aggregation was appropriate for sources in other industries that involved operations separated by long distances but connected by pipelines or similar links. While case-specific, overall, these determinations demonstrate that aggregation of oil and gas sources, and other similar sources, can be appropriate in a broad array of circumstances. For example, EPA has found aggregation to be appropriate in the following circumstances:

1. Oil and gas tank batteries and associated emitting units (e.g., wells, pumps, line heaters, dehydration equipment, combustion equipment, tanks), in an oil and gas field with a twelve mile radius. *See* Exh. 8 at Exhibit 17 (Letter from Richard R. Long, Dir., Region 8 Air and Radiation Program, to Lee Ann Elsom, Environmental Coordinator, Citation Oil & Gas Corp. (Dec. 9, 1999)).

2. Pipeline compressor stations and associated emitting units (e.g., compressor engines, wells, pumps, dehydrators, storage and transmission tanks, etc.). *See* Exh. 8 at Exhibit 8 (Letter from Richard R. Long, Dir., Region 8 Air and Radiation Program, to Jack Vaughn, EnerVest San Juan Operating Co. (July 8, 1999)).

3. Natural gas gathering system (e.g., wells) and transmission system (e.g., distribution pipelines), on contiguous properties. *See* Exh. 8 at Exhibit 13 (Letter from William B. Hathaway, Director, Region 6 Air, Pesticides, and Toxics Division, to Allen Eli Bell, Executive Director, Texas Air Control Board (Nov. 3, 1986)).

4. Sour gas wells and a sour gas processing plant connected by pipelines. *See* Exh. 10, Letter from Cheryl Newton, Director, Air and Radiation Division, EPA Region 5 to Scott

Huber, Summit Petroleum Corporation (Oct. 18, 2010).

5. Pump station and salt processing plant 21.5 miles apart, connected by a dedicated channel. *See* Exh. 8 at Exhibit 5.

6. Mine and processing plant, thirty-five to forty miles apart and connected by a forty-four mile pipeline. *See* Exh. 8 at Exhibit 11 (Letter from Richard R. Long, Director, Region 8 Air and Radiation Program, to Dennis Myers, Construction Permit Unit Leader, Colorado Department of Public Health and Environment (April 20, 1999)).

7. Offshore oil and gas platform and onshore production facility 2.8 miles apart, connected by pipelines. *See* Exh. at 11, Letter from Douglas E. Hardesty, Manager, Region 10 Federal and Delegated Air Programs, to John Kuterbach, Chief, Alaska Department of Environmental Conservation (Aug. 21, 2001).

8. Two nearby plants producing coated metal castings. *See* Exh. 8 at Exhibit 15 (Letter from Joan Cabreza, Permits Team Leader, Region 10 Office of Air Quality, to Andy Ginsberg, Manager, Oregon Department of Environmental Quality (Aug. 7, 1997)).

9. Two sections of an oil refinery, 1.8 miles apart and connected by twenty pipelines. *See* Exh. 8 at Exhibit 12 (Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Clyde B. Eller, Director, Region 9 Enforcement Division (May 16, 1980)).

10. Brewery and landfarm where brewery disposed of waste water, six miles apart and connected by a pipeline. *See* Exh. 8 at Exhibit 14 (Memorandum from Robert G. Kellam, Acting Director, OAQPS, to Richard R. Long, Director, Region 8 Air Program (Aug. 27, 1996)).

11. Two General Motors facilities one mile apart, connected by a railroad line. *See* Exh. 8 at Exhibit 12 (Memorandum from Steve Rothblatt, Chief, Region 5 Air Programs Branch, to Edward E. Reich, Director, Stationary Source Enforcement Division (June 8, 1981)).

To be certain, EPA has found aggregation to be inappropriate in certain situations, for example in the following circumstances:

1. Two unconnected drilling ships. *See In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357 (E.A.B. 2007).[7]

2. Two bulk gasoline terminals 0.9 miles apart, not connected by any pipelines. *See* Exh.

[7] However, the EAB in this case did remand the EPA's permitting decision on the basis that Region 10 "did not provide an adequate analysis and record support for its conclusion that each OCS [outer-continental shelf] source separated by more than 500 meters is a separate stationary source." *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 358 (E.A.B. 2007).

12, Letter from Winston A. Smith, Dir., Region 4 Air, Pesticides and Toxics Management Division, to Randy C. Poole, Air Hygienist II, Mecklenburg County Department of Environmental Protection (May 19, 1999).

However, in these circumstances, it was clear that the pivotal factor was whether the pollutant emitting activities were connected, such as with pipelines.

Importantly, these prior EPA determinations provide insight with regards to the contiguous and adjacent prong of the definition of stationary source under PSD and Title V. Notably, these prior determinations demonstrate that the distance between sources is not necessarily a determinative factor for assessing contiguousness or adjacency, but rather interrelationship. Units that are miles apart commonly fit within the ordinary meaning of "facility" and "installation" for aggregation if the sources are integrated and physically connected. EPA Region 8 explained in one case that "whether two facilities are 'adjacent' is based on the 'common sense' notion of a source and the functional inter-relationship of the facilities, and is not simply a matter of the physical distance between two facilities." Exh. 8 at Exhibit 11 at 1. Similarly, Region 8 advised the Utah Department of Environmental Quality that "[d]istance between the operations is not nearly as important in determining if the operations are part of the same source as the possible support that one operation provides for another." Exh. 8 at Exhibit 9 at 1-2. Thus, where a pump station and a production operation are connected by a 21.5 mile channel, "the distance between the operations is not an overriding factor that would prevent them from being considered a single source." *Id.* at 2.

Some of these determinations by EPA are particularly instructive. In 1998, EPA Region 8 provided guidance to the Utah Division of Air Quality on what Utah should consider in its aggregation analysis. Utah sought EPA's guidance and recommendation on whether two Utility Trailer facilities located approximately one mile apart should be aggregated. *See* Exh. 8 at

Exhibit 5 (Letter from Richard R. Long, Director, Region 8 Air Program, to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality (May 21, 1998)). Region 8 did not make a recommendation either way on aggregation of the two facilities, but provided general guidance to the State regarding how it should make the determination.

Region 8 stated that when a permitting authority assesses the contiguous or adjacent factor, it should examine whether the sources are close enough to one another for them to be operated as a single source. Exh. 8 at Exhibit 5 at 2. Region 8 then identified four factors to be considered in determining whether the distance between activities is small enough to allow operation as a single source. While they are relevant, EPA noted that not all of the four factors are required to be present to satisfy the contiguous or adjacent requirement:

1. Will materials be routinely transferred between the facilities? Supporting evidence for this could include a physical link or transportation link between the facilities, such as a pipeline, railway, special-purpose or public road, channel or conduit.

2. Will managers or other workers frequently shuttle back and forth to be involved actively in both facilities? Besides production line staff, this might include maintenance and repair crews, or security or administrative personnel.

3. Will the production process itself be split in any way between the facilities, i.e., will one facility produce an intermediate product that requires further processing at the other facility, with associated air pollutant emissions? . . .

4. Was the location of the new facility chosen primarily because of its proximity to the existing facility, to enable the operation of the two facilities to be integrated? In other words, if the two facilities were sited much further apart, would that significantly affect the degree to which they may be dependent on each other?

Id. Other EPA regional offices have applied these Region 8 guidance questions when making aggregation determinations. *See, e.g.*, Exh. 12 at 5-6.

In this case, EPA clearly recognized that it could be necessary to aggregate the Florida River Compression Facility together with interrelated pollutant emitting activities, including

coalbed methane wells and other compression facilities. The EPA did not rely on "distance," but rather recognized that adjacency could exist where the Florida River Compression Facility and other pollutant emitting activities were interrelated. *See* Exh. 3 at 10 ("In examining whether two stationary sources that are not actually touching (i.e., non-contiguous) should be considered 'adjacent,' the determination ahs been made on a case-by-case basis, considering the extent to which two sources are functionally interrelated."). Unfortunately, EPA's assessment of interrelatedness fell short of justifying a finding that there is no adjacency between the Florida River Compression Facility and other pollutant emitting activities.

B. EPA's prior aggregation determinations, as well as PSD and Title V Regulations do not require complete an exclusive interdependence between sources for aggregation.

The EPA does not dispute that the Florida River Compression Facility could not operate without being piped natural gas from nearby coalbed methane wells. The EPA also does not dispute that nearby coalbed methane wells could not operate without the ability to pipe natural gas to processing facilities. What EPA does dispute is the level of interrelatedness required to support a determination of adjacency in this case.

Despite the fact that an inherent interrelationship exists between the Florida River Compression Facility and the coalbed methane wells that feed the compressor station (and likely other compression facilities), the EPA twisted the concept of interrelationship to ultimately reject a finding that the Florida River Compression Facility is adjacent to any other pollutant emitting activities. Indeed, the EPA's argument against aggregation is heavily, if not entirely, hitched to its beliefs regarding the degree of interdependence required for aggregation of oil and gas activities. In particular, the EPA asserts that two pollutant emitting activities must completely and exclusively rely on each other for aggregation to be appropriate. The EPA phrases this

concept in several ways—"dedicated interrelatedness" (Exh. 3 at 11 and 13), "exclusive dependency" (*Id.* at 11), "exclusive or dedicated interrelatedness" (*Id.* at 13), and "unique interdependence" (*Id.* at 13)—but the point is simple: EPA believes that the only time a finding of adjacency would be appropriate from an interrelatedness standpoint is where there exists complete and exclusive interdependence.

The EPA's complete and exclusive interdependence theory underlies its entire analysis of the Florida River Compression Facility. In particular, the EPA relies on this theory to argue that aggregation is improper because in some circumstances, wells that feed the Florida River Compression Facility ***can*** supply gas to other processing facilities. *See e.g.* Exh. 3 at 9 (stating "while gas from [BP's] Wolf Point [compressor station] and the various wells *can* supply gas to Florida River, they can also supply gas to other non-BP facilities in the field and thus do not have the type of dedicated interrelatedness that was determinative in other EPA statements on this issue"). The EPA asserts that "Florida River can continue to operate regardless of whether Wolf Point or one, two, three, four, or all of the BP operated well sites were to shut down—and vice-a-versa" (Exh. 3 at 13), and thus, the various BP pollutant emitting activities are not interdependent.

EPA has not previously taken the interdependence concept this far. In the past, EPA has applied a more sensible approach that does not require complete and exclusive interdependence. For example, the 1980 Preamble noted that a boiler providing process steam for two different sources should be aggregated with whichever source is the ***primary recipient*** of the boiler's output. 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980). This would result in aggregation of the boiler with another source despite the fact that the boiler also provides process steam to a separate source.

A number of EPA's prior determinations reinforce this approach, a fact that EPA refused to acknowledge in its Response to Comments, even though Petitioner presented the agency with the relevant guidance. For example, EPA Region 10 found that two metal casting plants should be aggregated, where both plants produced castings and one plant then sent its castings to the main plant for coating and packaging. *See* Exh. 8 at Exhibit 15. Thus, the main plant was not solely dependent on the other plant, since the main plant would produce, coat, and package castings regardless of the operations at the other plant. Region 10 found that these two sources should be aggregated, even though there was not complete and exclusive interdependence between them. Region 10 expressly determined that aggregating the two plants would approximate the common sense notion of "plant," as the production of both plants comprised and supported the primary activity of the company: producing coated metal castings. *See id.* at 2.

Moreover, EPA has issued determinations aggregating a number of oil and gas sources without mentioning any "exclusive or dedicated interrelatedness" standard. *See e.g.*, Exh. 8 at Exhibits 8, 13 and 17. If complete and exclusive interdependence were required, and was such a critical factor in an assessment of adjacency, one would expect the prior EPA determinations to have mentioned how exceptional their findings were. They did not, even in the context of oil and gas operations.

Rather than a complete and exclusive interdependence test, prior EPA determinations focus more broadly on whether one source ***regularly*** supports the operation of the other, thus approximating a common sense notion of "plant." As noted above, Region 8 has identified four factors for determining whether activities are contiguous or adjacent. In that analysis, which the EPA did not even address in permitting the Florida River Compression Facility, Region 8 looked to whether activities occurred "routinely," or "frequently" enough to conclude that they are

operated in effect as a single source. *See* Exh. 8 at Exhibit 5 at 13–14.

Other EPA determinations have been similar: they focus on whether two operations are functionally interdependent under normal operations, and whether one produces an intermediate product for the other. They do not require that both sources ***solely and exclusively*** support each other under all operating conditions. *See e.g.* Exh. 8 at Exhibit 15 at 2 (explaining that one key factor in aggregating sources is whether one source supports "the ***primary*** product or activity of a company or operation" at another source) (emphasis added); Exh. 8 at Exhibit 11 at 1; *see also*, Exh. 8 at Exhibit 8 (aggregating each natural gas pipeline compressor station with its associated wells, storage tanks, etc.).

Furthermore, the policy goals underlying the three-part aggregation test also do not require complete and exclusive interdependence. Where an energy company routinely transfers natural gas from a set of wells that are intended to supply a particular processing facility, the operation fits within the ordinary meaning of "installation" and "plant." Moreover, the wells produce an intermediate product that is processed into pipeline-quality natural gas. These compression facilities, wells and other equipment continue to fit the ordinary meaning of an "installation" or "plant," even if the company may direct gas from the wells elsewhere when the compressor station is temporarily closed for maintenance or other reasons. The EPA does not address this fact in its analysis, a fatal flaw.

The flaws in the EPA's complete and exclusive interdependence requirement can also be seen by considering a paradigmatic "plant" that consists of two adjacent buildings separated by only a public road. If the two plant buildings operate several different emissions units, all responsible for different phases of producing the plant's end product, it is indisputable that the emissions units should be aggregated, as the court in *Alabama Power* noted. *See* 636 F.2d at 397

(stating that "Congress clearly envisioned that entire plants could be considered to be single 'sources,'" because the statute itself states that entire plants, such as iron and steel mill plants, would be a single source).

Different emissions units in that plant, however, may not meet the EPA's complete and exclusive interdependence theory. For example, an emissions unit in one building may produce an intermediate product that is transferred to the other building for subsequent steps in the production process. If the intermediate unit will be shut down for maintenance or repairs, the company will commonly obtain the intermediate product elsewhere to ensure that the production process is not interrupted. Under the EPA's reasoning, however, such reasonable operational measures would prevent the aggregation of the intermediate source with plant's sources, as there would be a ***chance*** that some sources in the plant ***might*** rely on outside sources or products at certain times. Clearly, these contingency measures do not prevent this hypothetical plant from approximating the common sense notion of a "plant" and passing the three-part aggregation test.

The disconnect between the regular support analysis, and the complete and exclusive interdependence theory, highlights a major gap in the EPA's argument: it never analyzes how much gas actually flows to the Florida Compression Facility from particular wells under regular operations.

This omission is significant because it appears that under regular operations, the production of numerous BP wells flows to the Florida River Compression Facility. Indeed, BP forthrightly discloses that 63% of the gas processed by the Florida River Compression Facility comes from "BP-operated production" (*see* Exh. 7 at 11), indicating that there is a substantial interdependence, if not a high level of interdependency, between the facility and the BP wells

that provide 63% of the supply of natural gas for the compressor station.[8] Furthermore, based on BP 's Supplemental Comments to the EPA, it appears as if an assessment of pressure could lead to the identification of the very wells producing this gas. BP explains that the movement of gas within its pipelines "may also be a function of the gas pressure at any particular point in time." Exh. 7 at 12. Thus, although BP asserts that the flow of gas in the Northern San Juan Basin is "dynamic," it appears not only possible to quantify the amount of gas flowing to the Florida River Compression Facility from BP's wells, but possible to identify the wells producing this gas.

Although the EPA may argue the nature of interdependency between the Florida River Compression Facility and BP's wells in the vicinity, ***fundamentally, a relationship of interdependence exists.*** Simply because the EPA made no reasonable effort to discern the bounds of this interdependency, such as an assessment of normal gas pressures that could be used to identify the wells are most likely to provide gas to the Florida River Compression Facility, to ensure an accurate source determination is no grounds for upholding the Title V Permit. The EPA's failure to perform the analysis necessary to ascertain the nature of interdependence does not support a finding that no interdependency whatsoever exists, as the Division claims, particularly when the facts in this case indicate some level of interdependency clearly exists.

It is instructive to see how EPA has tackled the issue of interrelatedness in the context of support facilities. Under PSD and Title V, pollutant emitting activities must be aggregated together where they are adjacent or contiguous, under common control, and belong to the same

[8] There is likely to be interdependence with other wells that feed the Florida River Compression Facility that are under common control, rather than ownership, by BP. Unfortunately, the EPA did not assess whether a common control relationship exists between the Florida River Compression Facility and third-party wells feeding the compressor station.

industrial grouping. *See* 40 C.F.R. § 52.21(b)(6). When determining whether pollutant emitting activities belong to the same industrial grouping, EPA normally relies on Standard Industrial Classification ("SIC") code. However, situations have arisen where a primary pollutant emitting activity belongs to a different SIC code than the pollutant emitting activities that supports the operations of the primary activity. In these cases, EPA has generally made clear that, where an activity provides 50% or more of its output (in terms of material and/or services) to a primary activity, it "expects permitting authorities to conclude that a support facility exists, and expects these activities to be aggregated with the primary activity," regardless of SIC code. Exh. 13, Preamble to Revised Part 51 and Part 70 at 28, Draft (Feb. 18, 1998)[9]; *see also*, Exh. 14, Memorandum from John S. Seitz, Office of Air Quality Planning and Standards, *Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permits Programs of the Clean Air Act* (Aug. 2, 1996) (stating "a support facility usually would be aggregated with the primary activity to which it contributes 50 per cent or more of its output."). As expressed in EPA's PSD regulations, the intent here is to ensure that activities that "convey, store, or otherwise assist in the production of the principal product" are appropriately grouped together. *See* 45 Fed. Reg. 52695 (Aug. 7, 1980).

Although it appears that in this case a support facility relationship exists with regards to certain wells, and potentially other compression facilities, that feed the Florida River Compression Facility, EPA ultimately refused to address this issue in the context of its adjacency determination. *See* Exh. 3 at 8-9 (stating, "...there is no reason to analyze whether there is a support facility relationship between these various emission points."). While it is true that EPA's

[9] We understand this Draft Preamble contains a disclaimer from the EPA that it "does not represent final agency positions." We cite this Draft Preamble only as illustrative of a reasonable and informative interpretation of EPA's Title V and PSD regulations that relates to the matter of EPA's source determination for the Florida River Compression Facility.

views regarding support facilities have typically presumed a finding of adjacency or contiguousness, EPA has also stated that, "In practice, the three factors comprising the major source definition (adjacency/contiguity, common control, and SIC code/support) are sometimes interrelated and cannot always be evaluated in sequential fashion." Exh. 13 at 29. In other words, there is nothing to indicate that the support facility principle—i.e., where a secondary pollutant emitting activity dedicates 50% of its output, whether in terms of materials and/or services, it should be aggregated together with the primary activity as a single source—cannot equally, or at least substantively, inform an assessment of adjacency or contiguousness from the standpoint of interrelatedness. To this end, there is no merit to EPA's assertion that the support facility principle has no relevance in the context of the Florida River Compression Facility.

In sum, aggregating oil and gas sources does not require that the sources be meet the "exclusive dependency" test as EPA suggests. Instead, EPA's prior guidance on the matter, as well as the common sense notion of plant embodied by the EPA's PSD regulations, demonstrates that oil and gas sources should be aggregated if they ***regularly*** support one another in the production of pipeline quality gas. The EPA's reliance on a standard of "exclusive or dedicated interrelatedness" is, therefore, unsupported. The Title V Permit therefore fails to ensure compliance with applicable requirements and cannot be allowed to stand.

CONCLUSION

The Title V Permit for the Florida River Compression Facility suffers from procedural and substantive flaws. Petitioner requests the EAB review whether the EPA erred in not reopening the public comment period for the Title V Permit in response to substantial new questions concerning the permit raised during the public comment period and review whether the Agency failed to appropriately define the major source subject to permitting such that the Title V

Permit assures compliance with Prevention of Significant Deterioration and Title V Permitting requirements. Petitioner further requests that the EAB either remand the Title V Permit to address the aforementioned deficiencies and/or vacate the issuance of the Title V Permit.

Respectfully submitted this 17th day of November 2010

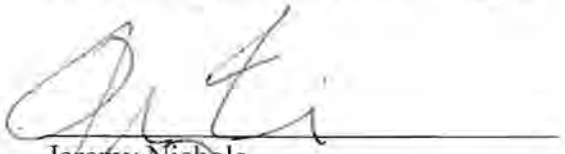

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TABLE OF EXHIBITS

1. Permit Number V-SU-0022-05.00, Air Pollution Control Title V Permit to Operate, BP America Production Company Florida River Compression Facility (Oct. 18, 2010);

2. Statement of Basis for Title V Permit No. V-SU-0022-05.00 (Oct. 18, 2010).

3. Response to Comments on the Florida River Compression Facility's March 28, 2008 Draft Title V Permit to Operate (Oct. 18, 2010).

4. Memo from Gina McCarthy, EPA Assistant Administrator for Air and Radiation to Regional Administrators, *Withdrawal of Source Determinations for Oil and Gas Industries* (September 22, 2009).

5. Letter from Julie Best to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: BP America Production Company Florida River Compression Facility proposed Air Pollution Control Title V Permit to Operate Number V-SU-0022-05.00 (Dec. 17, 2009).

6. Letter from Rebecca Tanory to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: BP America Production Company Florida River Compression Facility proposed Air Pollution Control Title V Permit to Operate Number V-SU-0022-05.00 Clarification of December 17, 2009 Flow Description and Proximity Map (Dec. 21, 2009).

7. Letter from Charles Kaiser to Claudia Young Smith, Environmental Scientists, Air and Radiation Program, U.S. EPA Region 8, in re: Supplemental Comments on Florida River Plant Renewal Title V Operating Permit (Feb. 17, 2010).

8. Comments from Rocky Mountain Clean Air Action, Draft Title V Operating Permit for Florida River Compression Facility (May 19, 2008).

9. Plan of Merger and Unanimous Consent to Merge (2008).

10. Letter from Cheryl Newton, Director, Air and Radiation Division, EPA Region 5 to Scott Huber, Summit Petroleum Corporation (Oct. 18, 2010).

11. Letter from Douglas E. Hardesty, Manager, Region 10 Federal and Delegated Air Programs, to John Kuterbach, Chief, Alaska Department of Environmental Conservation (Aug. 21, 2001).

12. Letter from Winston A. Smith, Dir., Region 4 Air, Pesticides and Toxics Management Division, to Randy C. Poole, Air Hygienist II, Mecklenburg County Department of Environmental Protection (May 19, 1999).

13. Preamble to Revised Part 51 and Part 70 at 28, Draft (Feb. 18, 1998).

14. Memorandum from John S. Seitz, Office of Air Quality Planning and Standards, *Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permits Programs of the Clean Air Act* (Aug. 2, 1996).

CERTIFICATE OF SERVICE

I certify that on November 17, 2010, I served this Petition for Review by overnight delivery upon:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

I also certify that on November 17, 2010, I served this Petition for Review by certified mail, return receipt requested, upon:

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James B. Martin
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U.S. Environmental Protection Agency
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