ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, ET AL., PETITIONERS, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT.	No. 10-1425

RESPONSE OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL OILSEED PROCESSORS ASSOCIATION, AND NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION TO PETITIONERS' EMERGENCY MOTION FOR A STAY PENDING REVIEW

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I.
STATEMENT OF INTEREST

The State of Texas challenges EPA's partial revocation of the State's permitting authority under its Clean Air Act implementation plan. Texas's brief in support of its emergency motion for a stay focuses mainly, but not entirely, on the Agency's glaring procedural missteps. Members of the *amici* have a keen interest in correcting a substantive error at the heart of the Agency's action and in clarifying the consequences of a decision granting Texas's motion. EPA premised its action and its evasion of public notice-and-comment rulemaking on the flawed notion that, without immediate federal intervention, many stationary sources in Texas will have to forgo construction and modification in 2011. But there is no construction ban in Texas, and sources in Texas, including *amici's* members, do not need EPA to take over the State's permitting program to prevent one. Even so, sources with imminent construction plans are being chilled by EPA's actions and pronouncements, which suggest that EPA will fight them (much like it is fighting Texas) for disagreeing with the Agency's views. A decision correcting EPA's errors and clarifying that a stay will not cause a construction freeze will give *amici's* members needed clarity and certainty.

Pursuant to Fed. R. App. P. 29(c), *amici* relate that their counsel alone wrote this brief and that only *amici* and their members contributed money with the intention of funding the preparation or submission of the brief.

II.
INTRODUCTION

Last week, in a two-step interim final rule, EPA partially rescinded its 18-year-old approval of Texas's Clean Air Act implementation plan, then immediately adopted a federal plan to fill the void. *See* 75 Fed. Reg. 82,430, 82,431 (Dec. 30, 2010). Normally, each step would have taken months or years. *See* 42 U.S.C. §§ 7410(k)(5) (up to 18 months to revise an inadequate plan), (c)(1) (up to two years to adopt federal implementation plan); *see also id.* §§ 7410(a)(1), (k)(1)(B), (k)(2) (providing additional months for preparing and reviewing plan submissions). But this time, EPA gave neither notice nor an opportunity for public comment. Despite admitting it has known about the supposed flaw in Texas's implementation plan since 1992, *see* 75 Fed. Reg. at 82,432-33, 82,449, 82,452, EPA justified its alacrity on a crisis it saw looming.

According to EPA, as of January 2, 2011 — the effective date of its ambitious, unprecedented, and unlawful effort to distort the Clean Air Act and the Act's Prevention of Significant Deterioration (PSD) program to regulate stationary-source greenhouse gas (GHG) emissions — large stationary sources throughout the country cannot begin construction or undertake modifications without obtaining a PSD permit based on their GHG emissions. *See* 75 Fed. Reg. at 82,444. In many states, sources already can get such permits because those states interpret their implementation plans to embrace all new pollutants EPA regulates under the PSD program, but Texas does not. *Id.* at 82,445. Texas cannot issue permits for GHG emissions without amending its plan under state law. Because EPA is convinced that Texas will not promptly do so, the Agency believes that large GHG-emitting sources in Texas, lacking an author-

ity from which to obtain PSD permits for their GHG emissions, will not be able to begin construction or modification in 2011. *Id.* at 82,446. So to ensure "that there will be no period of time when sources [in Texas] are unable to obtain necessary PSD permits," EPA issued an interim final rule making *itself* "the permitting authority in Texas beginning January 2, 2011" and planning, "in that capacity, [to] allow Texas sources to avoid delays in construction or modification." *Id.* at 82,431, 82,434.

Like Don Quixote, EPA is imagining giants. Its interim final rule averted no disaster. Large GHG-emitting stationary sources covered by Texas's implementation plan did not need PSD permits for their GHG emissions. PSD requirements and regulations (like EPA's GHG regulations) do not apply to stationary sources until worked into applicable implementation plans. Statutory text, appellate decisions, and regulations confirm that sources do not violate the Act by commencing construction or modification in accordance with an applicable, EPA-approved implementation plan — even when the plan is different from the Act and regulations (as a plan very well might be right after new regulations). The inability of Texas to issue PSD permits to GHG-emitting sources this year is not a flaw requiring an emergency fix; it is a long-standing feature of the combined federal-state administration and enforcement system Congress adopted for implementing the PSD program. EPA's construction-ban interpretation is unlawful, and Texas, accordingly, is likely to succeed on its challenge to EPA's interim final rule. For that reason and because, as Texas showed in its filing, the other stay factors favor the State, the Court should continue its stay of the rule and make clear that GHG-emitting sources in Texas can proceed with their construction and modification plans throughout the rest of this proceeding.

III.
ARGUMENT

A. PSD Requirements Do Not Bind Stationary Sources Unless Codified in Applicable Implementation Plans.

Section 110 of the Clean Air Act codifies Congress's intent that the PSD provisions of the Act be implemented, maintained, and enforced through implementation plans administered by states. *See* 42 U.S.C. §§ 7410(a)(1), (a)(2)(C), (D), & (J). Once approved, a state plan defines the entire set of PSD requirements for sources in that state until the plan is revised through processes established in Section 110. *See id.* § 7410(k); *see also Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 787 n.12 (3d Cir. 1987) (Section 7410(i), which prohibits unilateral modifications of approved implementation plans, confirms that "EPA must utilize the revision provisions to accomplish its purpose"). Put differently, the Act's PSD requirements are not self-executing, but rather depend on implementation plans developed through notice-and-comment rulemaking. Accordingly, EPA's regulation of GHGs does not, by its own force, compel stationary sources emitting GHGs to obtain PSD permits based on those emissions, as the Agency erroneously asserted in its interim final rule. *See* 75 Fed. Reg. at 82,444 ("Despite the time needed for the state to submit a SIP revision and EPA to approve it, the pollutant-emitting sources in the state become subject to PSD under the CAA as soon as EPA first subjects that pollutant to control.").

That conclusion is confirmed by Section 168(b) of the Act. *See* 42 U.S.C. § 7478(b). Before Congress legislatively created the present PSD program in 1977, EPA had imposed similar requirements by regulation. *See* 40 C.F.R. § 52.21 (1977). "The Amendments of 1977 significantly tightened these requirements and shifted the

principal burden of administration of PSD programs from the federal to state governments, while retaining substantial federal supervisory authority." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 851-52 (D.C. Cir. 1979). During the transition, a dispute arose over whether the PSD permitting requirements of Section 165(a) were self-executing; ostensibly, Section 165(a) directly prohibits construction or modification after August 7, 1977, unless a source obtains a PSD permit with the full complement of PSD conditions. *See* 42 U.S.C. § 7475(a). This Court agreed with EPA that the only clearly self-executing PSD requirements were listed in Section 168(b). *See Spencer County*, 600 F.2d at 864 (finding it unclear whether the "plain language" of Section 165(a) makes the section self-executing). Even then, Section 168(b) made those requirements self-executing only in the sense that it amended then-prevailing implementation plans to apply the requirements to stationary sources during the interregnum. *See* 42 U.S.C. § 7478(b) (deeming preexisting regulations "amended so as to conform with" enumerated requirements). In light of Section 165(a)'s absence from the Section 168(b) list, the Court agreed with EPA that Section 165(a) does not bind sources until incorporated into implementation plans, *i.e.*, until implemented by notice-and-comment regulation. *See Spencer County*, 600 F.2d at 888-90 (upholding regulations incorporating Section 165(a) into federal implementation plans well after the Section's effective date); *cf. id.* at 903 (Robinson, J., dissenting) (preferring to hold that EPA could not incorporate Section 165(a) into federal plans "before revision and approval of applicable state implementation plans").

The Act's savings clauses also reflect Congress's desire that state implementation plans, warts and all, remain binding notwithstanding intervening statutory

amendments or regulations. Section 406 of the Clean Air Act Amendments of 1977 provided that no "requirement of an approved implementation plan" would be affected by the new law until affirmatively "modified or rescinded in accordance with" the Act. Pub. L. No. 95-95, § 406, 91 Stat. 685, 796 (1977). (*Spencer County* recognized that Section 406 was a savings clause that did not, by itself, shed light on whether Section 165(a) was self-executing. *See* 600 F.2d at 861, 864-65.) Section 110(n), part of the 1990 amendments, reiterates Congress's desire more clearly, providing that provisions in approved plans "shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this Act." 42 U.S.C. § 7410(n)(1).

EPA has regulated as if the PSD program is not self-executing. According to regulations, "[a]ny State required to revise its implementation plan by reason of an amendment to this section [addressing minimum requirements for PSD implementation plans] … shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." Further, "[a]ny [such] revision … shall take effect no later than the date of its approval and may operate prospectively." 40 C.F.R § 51.166(a)(6)(i), (iii). Far from imposing a construction moratorium when PSD requirements change, EPA's own rules provide time to incorporate revisions into state implementation plans, during which the previously approved plans retain force.

In sum, PSD requirements and Section 165(a) in particular bind stationary sources only when incorporated, *and only as incorporated*, into applicable implementation plans. *See United States v. Cinergy Corp.*, 623 F.3d 455, 456-59 (7th Cir. 2010) (holding

that EPA cannot enforce Section 165(a) apart from the Section's implementation in implementation plans). Such plans can be changed in just two ways — by rare explicit statutory command (Section 168) or by the revision processes in Section 110. EPA, therefore, incorrectly posited that large GHG-emitting sources in Texas needed PSD permits for those emissions as of January 2. Given Texas's implementation plan, those sources had no obligation to obtain PSD permits merely because EPA began to regulate GHGs. Because EPA premised its interim final rule and its rejection of notice-and-comment rulemaking on its mistaken conclusion that stationary sources in Texas needed PSD permits based on their GHG emissions to fend off a phantom statewide construction freeze, Texas is likely to succeed on the merits.

B. Stationary Sources That Comply With Applicable, EPA-Approved Implementation Plans Do Not Violate the Clean Air Act Even When the Plans Deviate From the Act.

A corollary to the rule that stationary sources need to comply only with applicable implementation plans is that sources commit no violation of the Clean Air Act by so complying. Section 113(a)(1) of the Act protects sources that comply with applicable implementation plans by authorizing EPA to issue orders or bring civil actions *only* when a source violates a plan. *See* 42 U.S.C. § 7413(a)(1); *cf. General Motors Corp. v. United States*, 496 U.S. 530, 539-42 (1990) (sources *must* comply with applicable plans, which govern until EPA approves a replacement).[1/] That remains true even

[1/] EPA cannot contend that Section 113(a)(3), the Act's catchall provision for enforcing requirements and prohibitions not enforceable under other provisions, allows the Agency to enforce Section 165(a) against stationary sources complying with applicable implementation plans. As already shown, Section 165(a) is not self-executing but must be implemented through implementation plans, at which point it is enforceable under Section 113(a)(1), not Section 113(a)(3). If the Agency could en-

when an approved plan does not forbid (or even affirmatively allows) conduct that would otherwise violate the Act or EPA regulations — as invariably will happen after EPA issues new and transformative regulations like the GHG regulations at issue.

A panel of the Seventh Circuit (Posner, J., joined by Easterbrook, C.J., and Rovner, J.) recently reaffirmed that conclusion. In *United States v. Cinergy Corporation*, EPA sued Cinergy for violating Section 165(a) by modifying a number of plants over many years without obtaining permits. 623 F.3d at 456. A jury found Cinergy liable for unpermitted modifications at one plant between 1989 and 1992. *Id.* at 457. On appeal Cinergy argued that those modifications, which increased the plant's annual emissions but not its hourly-rate capacity, did not need permits because the applicable, EPA-approved implementation plan (Indiana's) required permits only for modifications that increased hourly-rate capacity. *Id.* EPA countered that Indiana's plan was unlawful "because the statute and implementing regulation … define modification in terms of increasing actual emissions rather than hourly capacity." *Id.* at 458.

The Seventh Circuit rejected EPA's argument as "untenable," for the Act "does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that EPA has approved." *Id.* (citing 42 U.S.C. § 7413(a)(1)). Cinergy was charged only with knowing that "a straightforward reading of [Indiana's implementation plan] permitted the company without fear of sanctions to make modi-

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force Section 165(a) through Section 113(a)(3), Section 113(a)(1) would be pointless: violations of plans would always be enforceable under Section 113(a)(3) as statutory violations. Such a reading of Section 113(a)(3) also goes against *General Motors*. If EPA could treat violations of implementation plans as violations of the Act, the question in *General Motors* — whether EPA can enforce *plans* when it has unreasonably delayed reviewing plan amendments — could have been bypassed completely.

fications without a permit as long as they would not increase a plant's potential generating capacity. … What Cinergy was not on notice of was that the EPA would treat approval of [Indiana's plan] as rejection of it." *Id.* at 458-59. EPA "should have disapproved it; it didn't; but it can't impose the good standard on a plant that implemented the bad when the bad one was authorized by a state implementation plan that the EPA had approved." *Id.* at 459. The position EPA advocated was a power-grab that would impale stationary sources on the horns of a dilemma when it appears that an approved implementation plan and the Clean Air Act disagree: either follow the plan and run the risk of liability for violating the Act, or follow the Act and run the risk of liability for violating the plan. The Seventh Circuit correctly held that EPA cannot *de facto* disapprove previously approved plans in enforcement proceedings.

EPA sought rehearing, arguing principally that the Court erred in resolving an evidentiary issue. In the final paragraph of its petition, EPA asked the Court to change its PSD holding into a holding under the Nonattainment New Source Review (NNSR) program. *See* Pet. for Reh'g, *United States v. Cinergy Corp.*, Case No. 09-3344 (7th Cir. Nov. 29, 2010), at pp. 14-15. Notably, EPA did not argue that the Court was wrong about the Agency's lack of authority to bring civil suits against stationary sources that comply with PSD requirements in approved implementation plans; EPA just contended that the issue was not at stake in *Cinergy*. The Court summarily rejected EPA's request to limit the scope of its holding. *See* Order Denying Pet. for Reh'g, *United States v. Cinergy Corp.*, Case No. 09-3344 (7th Cir. Dec. 29, 2010).

In its interim final rule, published one day after the Seventh Circuit denied the Agency's rehearing petition, EPA downplayed *Cinergy* on grounds the Court just re-

buffed, asserting that the Seventh Circuit "mistakenly" cited PSD provisions "when the issue before the court involved the separate and different" NNSR provisions. 75 Fed. Reg. at 82,444. Whether EPA is right about which issues should have been at stake in *Cinergy* (the Seventh Circuit apparently thought EPA was wrong), *Cinergy* clearly held that EPA cannot enforce purported violations of the Act against sources that are otherwise complying with applicable implementation plans. EPA's summary assertion that "it is the statute (CAA section 165), not just the SIP, that prohibits a source from constructing a project without a permit issued in accordance with the Act," *id.*, cannot withstand Section 113(a)(1), on which *Cinergy* relied, or *Spencer County*.

IV.
CONCLUSION

For PSD purposes, existing implementation plans govern until revised either explicitly by amendments to the Clean Air Act or through the plan-revision processes Congress provided. An EPA-approved plan that is out of step with the Act's PSD requirements, either *ab initio* or because of subsequent statutory amendments or agency rulemaking, is the law on which stationary sources are entitled to rely. Contrary to EPA's construction-ban interpretation of the Act, GHG-emitting sources in Texas planning to commence construction or undertake a modification this year do not need access to PSD permits for GHG emissions because Texas's implementation plan does not require such permits. A stay will not cause a construction freeze in Texas — a point the Court should drive home when it continues its stay of EPA's hasty and unlawful interim final rule.

Respectfully submitted,

/s/Charles H. Knauss

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APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 29, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

Nos. 09-3344, 09-3350, 09-3351

UNITED STATES OF AMERICA,
Plaintiff-Appellee/
Cross-Appellant,

and

STATE OF NEW YORK, *et al.*,
Plaintiffs-Intervenors-Appellees/
Cross Appellants,

v.

CINERGY CORPORATION, *et al.*,
Defendants-Appellants/
Cross-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:99-cv-01963-LJM-JMS

Larry J. McKinney, *Judge*.

O R D E R

On November 29, 2010, plaintiffs-appellees United States of America and State of New York, *et al.*, filed a petition for rehearing, and on December 23, 2010, defendants-appellants Cinergy Corporation, *et al.*, filed a response to the petition for rehearing. All of the judges on the panel have voted to deny the petition. The petition is therefore DENIED.