ORAL ARGUMENT NOT YET SCHEDULED

Case No. 11-1037 (and Consolidated Cases)

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

UTILITY AIR REGULATORY GROUP, *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review of Final Actions of the United States Environmental Protection Agency

REPLY BRIEF OF NON-STATE PETITIONERS AND INTERVENOR-PETITIONER

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MISCELLANEOUS

GLOSSARY OF TERMS

Act	The Clean Air Act
Agency	United States Environmental Protection Agency
BACT	Best Available Control Technology
CAA	The Clean Air Act
CO_2	Carbon Dioxide
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
GHG(s)	Greenhouse Gas(es)
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
$PM_{2.5}$	Fine Particulate Matter
PM_{10}	Coarse Particulate Matter
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
Tailoring Rule	75 Fed. Reg. 31,514 (June 3, 2010)
Tailpipe Rule	75 Fed. Reg. 25,324 (May 7, 2010)

SUMMARY OF ARGUMENT

Contrary to the arguments of Respondent U.S. Environmental Protection Agency ("EPA" or "Agency"), the Clean Air Act ("CAA" or "Act") does not abrogate states' authority to issue permits under extant, previously-approved state implementation plans ("SIPs") simply because EPA begins to regulate a new pollutant. In issuing the "SIP Call" here, EPA misread CAA § 110[1] and disregarded its own regulations giving states three years to revise SIPs to include new Prevention of Significant Deterioration ("PSD") requirements, such as EPA's greenhouse gas ("GHG") PSD requirements,[2] that are added by EPA rulemaking. EPA claimed the SIP Call was needed to avoid a construction moratorium that would have occurred upon GHG regulation taking effect. That is not the case.

The Act is not self-executing; it does not authorize, much less mandate, automatic imposition of new PSD requirements. Rather, the relevant statutory and regulatory provisions allow implementation of such requirements through SIP revisions, submitted within the three-year period established by EPA rule, before those requirements are applied to sources. EPA's actions challenged here violate those statutory and regulatory provisions.

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[1] Citations herein to the CAA are to sections of the Act. The Table of Authorities includes parallel citations to the U.S. Code.

[2] 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule"), Joint Appendix ("JA") __-__.

ARGUMENT

The CAA identifies two situations when EPA may require SIP revisions. The first is when EPA promulgates a new or revised national ambient air quality standard ("NAAQS"). CAA § 110(a)(1) ("Each State shall … adopt and submit to the Administrator … after promulgation" of a new or revised NAAQS "a plan which provides for implementation, maintenance, and enforcement" of the NAAQS.). The second is when EPA finds circumstances have made a previously-approved SIP "substantially inadequate" to attain or maintain NAAQS, to "mitigate adequately" interstate pollutant transport, or "to otherwise comply with any [CAA] requirement." CAA § 110(k)(5).

These two CAA provisions – §§ 110(a)(1) and 110(k)(5) – establish mutually exclusive mechanisms for EPA action. Under CAA § 110(a)(1), as amended in 1990, states have *three years* to adopt and submit to EPA revised SIPs to implement new or revised NAAQS.[3] Conversely, CAA § 110(k)(5) directs EPA to give states no more than *18 months* to submit revised SIPs "to correct … inadequacies."[4]

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[3] Until the 1990 Amendments to the CAA, which reorganized § 110 and adjusted the SIP program's timing, CAA § 110(a)(1) allowed states nine months to submit SIPs following NAAQS promulgation. CAA § 110(a)(1) (1988), JA__.

[4] Congress enacted CAA § 110(k) in conjunction with the 1990 Amendments' reorganization of CAA § 110. Under pre-existing provisions of § 110 that were incorporated (as amended) into subsection (k), states had been allowed as little as 60 days to submit revised SIPs following EPA findings of inadequacy. CAA § 110(a)(2)(H)(ii) (1988); *id.* § 110(c)(1)(C) (1988), JA__, __.

Nothing in CAA § 110, however, directly addresses the question presented here: What may EPA require of states when (i) a previously unregulated pollutant (here, GHGs) for which no NAAQS exists first becomes "subject to regulation" under the CAA; and (ii) EPA by rule establishes new minimum SIP requirements for PSD review and permitting of sources emitting that pollutant? Is that situation equivalent to that which CAA § 110(a)(1) addresses – *i.e.*, is regulating GHGs for the first time under PSD akin to adopting new NAAQS? Or is it like the situation CAA § 110(k)(5) addresses – *i.e.*, does making GHGs "subject to regulation" render previously-approved PSD SIPs "substantially inadequate"?

EPA provided the answer by rulemaking a decade ago. In 2002, EPA revised a legislative rule that, as it reads today, provides that whenever EPA establishes new minimum SIP requirements for PSD, states have a full three-year period to prepare and submit revised SIPs to implement the new requirements, which are to apply prospectively. 40 C.F.R. § 51.166(a)(6)(i), (iii). Pending submission and approval of SIP revisions, states may continue to issue PSD permits under previously-approved SIPs.

Yet EPA now argues that § 51.166(a)(6) does not control (and, remarkably, by implication must be invalid), and that CAA § 110(k)(5)'s "SIP Call" provisions authorized its actions here. EPA contends that, once GHGs became "subject to regulation" under the CAA on January 2, 2011, any state whose previously-approved SIP did not provide for PSD permitting of GHG emissions was precluded – by

operation of the language of CAA § 165(a) alone – from issuing PSD permits for GHG-emitting sources. According to EPA, therefore, new sources or major modifications of sources emitting GHGs could not be constructed until EPA approved a revised SIP (or promulgated a Federal implementation plan ("FIP")) incorporating the new minimum PSD requirements for GHGs. This threat of a construction moratorium, EPA argues, justified allowing states much less time to develop and submit revised SIPs than the three years provided by 40 C.F.R. § 51.166(a)(6)(i). EPA Br. at 14, 29; 75 Fed. Reg. 77,698, 77,709 (Dec. 13, 2010), JA__.

EPA's arguments that § 51.166(a)(6)(i) is inapplicable, and that CAA § 110(k)(5) authorized its actions, do not withstand scrutiny.

I. Because PSD SIPs Remain Effective Until Revised (or Supplanted by Duly Promulgated FIPs), States Were Not Precluded from Issuing PSD Permits that Do Not Address GHGs.

EPA's case rests on its premise that, once GHGs became "subject to regulation" on January 2, 2011, states with EPA-approved PSD programs that did not address GHGs could, beginning on that day, no longer lawfully issue PSD permits to GHG-emitting sources.[5] EPA points to CAA § 165(a)(1), which provides that "[n]o

[5] January 2, 2011 is when EPA's GHG "Tailpipe Rule," 75 Fed. Reg. 25,324 (May 7, 2010), JA__-__, took effect. 75 Fed. Reg. 17,004, 17,019 (Apr. 2, 2010), JA__. It is also when the first phase of EPA's Tailoring Rule, which amended 40 C.F.R. § 51.166, began. EPA's assertion that, with the Tailpipe Rule's taking effect, GHGs had to be regulated under the PSD program is being challenged in separate (Continued . . .)

major emitting facility on which construction is commenced after August 7, 1977, may be constructed … unless … a permit has been issued for such proposed facility … setting forth emission limitations for such facility which conform to the requirements of" the CAA's PSD provisions. Because CAA § 165(a)(4) says a facility may not be constructed unless it has a permit subjecting it to "the best available control technology ["BACT"] for each pollutant subject to regulation under" the CAA that is "emitted from" the facility, the corollary of EPA's position is that, after January 2, 2011, construction of GHG-emitting sources is barred.

The beginning and end of EPA's case is its assertion that "[t]he plain language of the CAA's PSD provisions … by their terms *directly apply* to stationary sources *without regard to the contents of [an] applicable SIP*." EPA Br. at 42 (emphases added). According to EPA, states with indisputable authority to issue permits to GHG-emitting sources under approved SIPs on January 1, 2011, *lost* that authority by operation of law the next day.

But the CAA does not operate that way, as the CAA's language establishes. This Court, in *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979), and *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (on which EPA relies), did

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litigation before this Court. For purposes of the present case, Petitioners assume *arguendo* that GHGs became "subject to regulation" on January 2, 2011.

not construe the Act that way. Indeed, until these proceedings, EPA had never construed the CAA in that manner.[6]

A. Previously-Approved SIPs Authorize Issuance of PSD Permits Until the SIPs Are Changed Pursuant to Statutorily Required Procedure.

Like most CAA provisions, the PSD regulatory provisions (CAA §§ 161-166) do not operate directly but must be implemented through legislative rules. CAA § 161 provides that "each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, *as determined under regulations* promulgated under" CAA Title I, Part C (which includes the CAA's PSD provisions), "to prevent significant deterioration" (emphasis added).

CAA § 165 thus must be given content – the "necessary" measures must be "determined" – through legislative "regulations" promulgated by EPA. Those regulations define what CAA § 165 requires and what SIPs must include. Since 1978, those regulations have been codified in 40 C.F.R. Part 51 (currently, in § 51.166), defining the CAA § 165 "minimum requirements" that PSD SIPs must include.

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[6] Intervenor-Respondents suggest that Petitioners' challenge is "at least arguably" time-barred under CAA § 307(b), to the extent that Petitioners "attack" the "proposition" that CAA § 165(a) "operates directly without need of being included" in SIPs. Intervenor Br. at 15-16. Intervenors' only proffered support for this suggestion, however, consists of certain EPA responses to comments in which the Agency notably failed to address (much less dispute) Petitioners' argument here – *i.e.*, that states with approved PSD SIPs may continue to issue PSD permits until those SIPs are revised to address new PSD minimum requirements.

When EPA changes its expectations of what the CAA requires, EPA changes these regulations, applying the changes prospectively. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (absent express congressional authorization, regulations must have prospective effect only). Only then must SIPs be revised to include those new requirements, pursuant to CAA § 110's SIP-revision procedures.

Where a PSD program is part of a SIP approved by EPA under CAA § 110, the state implements that program as a matter of state *and* federal law. *See*, *e.g.*, *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1363 (D.C. Cir. 1995) (per curiam). The provisions of a state's EPA-approved PSD SIP are themselves binding federal legislative rules that remain in effect until changed pursuant to the CAA's required procedures.

The Supreme Court, drawing on the Act's definition of "applicable implementation plan" (currently at CAA § 302(q)), stated "[t]here can be little or no doubt that the *existing SIP remains* the 'applicable implementation plan' *even after* … a proposed revision" to the SIP has been submitted to EPA, unless and until EPA approves the revision. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) (emphases added). The Court held that "the *approved SIP* is the applicable implementation plan during the time a SIP revision proposal is pending."[7] *Id.*

[7] In *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983), cited by the Supreme Court in *General Motors*, this Court held that "*current SIPs remain in force* until EPA grants formal approval to a revision." *Id.* at 471 (emphasis added). EPA argues (Continued . . .)

(emphasis added). And the Seventh Circuit similarly held that even where an "applicable implementation plan" may not conform to EPA's reading of the CAA, *and EPA* "*should have disapproved*" *the plan but "didn't*," EPA "must live with" its "blunder" because the SIP, as approved, continues to control until revised under CAA § 110.[8] *United States v. Cinergy Corp.*, 623 F.3d 455, 459 (7th Cir. 2010).

CAA § 110(i) underscores that, until SIP revisions are approved under § 110(a), or the SIP is supplanted by a lawfully-promulgated FIP under § 110(c), a SIP remains effective and continues to authorize issuance of permits that satisfy that SIP's requirements. Section 110(i) provides that no "action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator" except a "plan revision" under § 110(a) or "plan

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that *General Motors* "should not affect the Court's view of the GHG SIP Call," in that it had "not involve[d] any question about the enforcement of statutory CAA requirements, let alone the PSD requirements in section 165." EPA Br. at 60. This begs the question here, which is whether § 165's provisions directly extinguish, *as a matter of law*, *state authority to issue PSD permits under approved SIPs*.

[8] EPA's reliance on *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) ("*ADEC*"), and *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011), is unavailing. EPA Br. at 44-46. Both *ADEC* and *Jackson* involve CAA § 167, a provision authorizing EPA to enjoin unlawful construction "which does not conform to the requirements of" the CAA's PSD provisions. As CAA § 161 makes clear, these "requirements" are in EPA-approved SIPs or EPA-issued FIPs. *ADEC* involved enforcement of the Alaska SIP – not direct enforcement of the statutory provision that the Court described for background purposes. And *Jackson* involved an attempt to compel EPA to initiate an enforcement action under § 167. The Court held there that decisions to enforce under § 167 are committed to EPA discretion. EPA's characterization of the statements in *Jackson* describing Kentucky's SIP are contrary to *General Motors*, *Duquesne*, and *Cinergy*.

promulgation" under § 110(c). EPA misapprehends § 110(i)'s significance and misstates the reason Petitioners cite it. *See* EPA Br. at 36-39.

EPA argues for a reading of the CAA under which a state could, on January 1, lawfully issue under its SIP a permit to a source without imposing BACT limits on that source's GHG emissions, but would *lose* that authority on January 2, because GHGs become subject to regulation – *i.e.*, by direct operation of CAA § 165(a). CAA § 110(i) precludes EPA's interpretation, as that interpretation's consequence would be that the same SIP under which a state could lawfully issue PSD permits one day would be rendered inoperative the next without EPA's having either approved a revision to the SIP (under § 110(a)) or promulgated a FIP supplanting the SIP (under § 110(c)). Section 110(i) confirms that Congress did not intend that result.

Section 406 of the 1977 CAA Amendments further confirms that Congress did not intend those Amendments' new provisions defining programmatic requirements to have a direct and immediate effect on previously-approved SIPs, but provided that they instead would be implemented through rulemaking that defined new SIP requirements. Congress provided that "[n]othing in [the Amendments] … nor any action taken pursuant to [the Amendments] … shall in any way effect *any requirement of an approved implementation plan in effect under section 110 of [the Clean Air] Act* … before the date of enactment of this section [Aug. 7, 1977] *until modified or rescinded in accordance with* the [CAA] as amended." Pub. L. No. 95-95, § 406(c), 91 Stat. 685, 796 (1977), JA__, __ (emphases added). This section further stated:

> [E]ach State required to revise its applicable implementation plan by reason of any amendment made by [the 1977 Amendments] … shall adopt and submit to the Administrator … such plan revision before the later of the date – (A) one year after the date of enactment [i.e., August 7, 1977] … or (B) nine months after the date of promulgation by the Administrator … of any regulations … which are necessary for the approval of such plan revision.

Id. § 406(d)(2), JA__. Thus, Congress recognized that the 1977 Amendments would require states to revise SIPs to account for the new statutory provisions, including the CAA's newly-enacted PSD provisions, once EPA gave content to those statutory provisions through "regulations promulgated" under those new provisions. CAA § 161.[9]

Congress therefore clarified that already-approved SIPs and promulgated FIPs would remain effective until revised,[10] and states would not need to revise approved SIPs to address statutory changes to SIP programs any sooner than nine months after EPA promulgated the necessary implementing regulations (in the case of PSD, regulations promulgated under CAA § 161). EPA's argument here that CAA § 165(a) alone can and should be construed as extinguishing states' PSD-permitting authority

[9] CAA § 166 grants the states up to 21 months to submit SIP revisions after EPA promulgates PSD-program changes for new increments and "related measures." Reflecting this, 40 C.F.R. § 51.166(a)(6)(i) allows states not three years but 21 months to submit SIP revisions addressing such new requirements.

[10] *No* EPA-approved PSD SIP existed as of enactment of the 1977 Amendments. As EPA's brief recognizes, *see* EPA Br. at 52-53 n.13, the PSD program then consisted of EPA-implemented FIP regulations included in every state's CAA implementation plan.

under approved SIPs cannot be reconciled with congressional enactments that confirm that the 1977 Amendments had no such effect.

B. Neither *Spencer County* Nor *Alabama Power* Supports EPA's Position.

EPA contends *Spencer County* and *Alabama Power* should be read as affirming EPA's position here and "should foreclose any argument that the PSD requirements may be applied only through SIPs." EPA Br. at 48. EPA's reliance on these cases is misplaced. Both cases involved review of EPA's revisions to its PSD FIP regulations that were incorporated into the CAA implementation plan for each state at that time; both cases required the Court to address those FIP regulations' consistency with Part C statutory requirements, including CAA § 165. Neither case addressed the question presented here.

Critical to *Spencer County* but overlooked by EPA is that the PSD FIP rules that EPA promulgated in 1974 were the existing "applicable regulations" referenced in CAA § 168(a). The central question in *Spencer County* was one of timing: whether Congress had amended EPA's FIP regulations *by statute* to include, as of August 7, 1977, the new CAA § 165 requirements, or whether those regulations were amended by statute only to include new requirements in CAA §§ 162, 163, and 164 as provided in CAA § 168(b). In response to the challenges to its revised PSD FIP rules, EPA argued it had discretion to begin implementation of CAA § 165 requirements after August 1977 through rulemaking changes to those FIP regulations. The Court

agreed, holding that EPA could lawfully revise FIPs to begin implementation of CAA § 165 after March 1978. *Spencer Cnty.*, 600 F.2d at 879-81. In other words, *Spencer County* simply addressed when pre-existing *federal* PSD plans could, or must, be amended to begin implementation of CAA § 165 requirements, and not whether § 165 establishing a roving commission for EPA to extinguish state authority under approved PSD SIPs whenever new minimum requirements for PSD SIPs emerged.

Accordingly, EPA's assertion that *Spencer County* "determined that EPA had sufficient authority … to rely on *federal* PSD regulations to implement section 165 rather than waiting for implementation through a SIP, and that section 110 does not affect whether and when the CAA's requirements as set out in section 165 should apply," EPA Br. at 53 (emphasis in original), is inaccurate and, in any event, irrelevant to the issue here. *Spencer County* affirmed EPA's authority to revise its FIP regulations prospectively to implement CAA § 165, beginning March 1978, rejecting an argument that implementation should not begin until PSD SIPs were adopted by states.

By contrast, at issue *here* is whether § 165 can be construed to extinguish automatically states' authority to issue PSD permits under previously-approved PSD SIPs. That question was not presented in any form in *Spencer County*, and could not have been, given that no such approved PSD SIP programs existed then. *Spencer County* cannot be read to establish that § 165 gives EPA a continuing mandate to declare state authority extinguished under approved SIPs. EPA's reliance on *Spencer County* is simply wrong.

Likewise, *Alabama Power*, which involved review of EPA rules revising each PSD FIP as well as EPA rules defining minimum PSD SIP requirements, lacks any of the significance EPA ascribes to it. EPA says the Court's interpretation of CAA § 165 in *Alabama Power* "confirms that it is unambiguous" and "there is no hint in the text of the provision that a pollutant subject to regulation is exempt from the CAA's PSD requirement, including because it has not yet been regulated under the applicable SIP." EPA Br. at 57. But Petitioners are *not* arguing that the pollutant GHGs is somehow "exempt" from PSD. Petitioners concede *arguendo* that, upon GHGs' becoming "subject to regulation" on January 2, 2011, EPA could revise the few remaining PSD FIPs to include its GHG rules, as EPA had revised the FIP rules before the Court in both *Spencer County* and *Alabama Power*. And petitioners do not question in the present case that EPA could require states with approved SIPs to revise them to regulate GHGs, or that, if states did not do so under CAA § 110(a) within the 40 C.F.R. § 51.166(a)(6)(i) timeframe, EPA could then make a "finding of failure" and proceed (absent an intervening SIP-revision submittal) to adopt FIPs for those states under CAA § 110(c). What Petitioners *do* dispute is that, on January 2, 2011, those states' existing authority to issue PSD permits under approved SIPs was extinguished by operation of law.

Alabama Power provides no support for EPA's assertion that, as a result of CAA § 165(a) language alone, state authority to issue PSD permits under EPA-approved PSD SIPs disappeared when GHGs became "subject to regulation." Nothing in

Alabama Power speaks to this because, as in *Spencer County*, the Court had no occasion to address any issue related to Part C's effect on approved PSD SIPs. *There were no approved PSD SIPs.* In other words, *Alabama Power's* discussion of the "effective date" of § 165 for purposes of pre-existing federal PSD regulations and for prospective PSD SIP development had absolutely nothing to do with state authority in the future to issue PSD permits under the PSD SIPs that EPA approved beginning in the 1980s.

II. EPA Cannot Invoke CAA § 110(k)(5) To Evade 40 C.F.R. § 51.166(a)(6)(i).

The balance of EPA's argument that its actions were authorized by CAA § 110(k)(5) collapses once its erroneous predicate is discarded as unlawful. It was the EPA-presumed construction moratorium that EPA gave as the reason for acting. It was this moratorium that EPA used to intimidate states into accepting a FIP or agreeing to develop and submit SIP revisions on truncated schedules. And it was EPA's "by-operation-of-law" theory that the Agency invoked as its reason to disregard 40 C.F.R. § 51.166(a)(6)(i) and its three-year schedule for SIP revisions. Non-State Pet. Opening Br. at 12-14. The EPA rules challenged here conflict with § 51.166(a)(6)(i) and therefore must be vacated.

A. EPA Violated 40 C.F.R. § 51.166(a)(6)(i).

In 2002, EPA revised § 51.166(a)(6) to read, in pertinent part:

> Any State required to revise its implementation plan by reason of an amendment to this section … 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.

40 C.F.R. § 51.166(a)(6)(i).[11] Although numerous elements of the 2002 rule amendments were challenged, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), this element was not.

In promulgating this revision, EPA noted that the CAA "does not specify a date for submission of SIPs when [EPA] revise[s] the PSD … rules." 67 Fed. Reg. at 80,241, JA__. Given this statutory gap, EPA found it "appropriate to establish [by rule] a date analogous to the date for submission of new SIPs when a NAAQS is promulgated or revised." *Id.* Under CAA § 110(a)(1), as amended in 1990, "that date is 3 years from promulgation or revision of the NAAQS." *Id.* Accordingly, EPA made "conforming changes to the PSD regulations at § 51.166(a)(6)(i) to indicate that State and local agencies" would have three years (rather than nine months, as previously provided) to "adopt and submit plan revisions … after [any] new amendments" to the minimum requirements in 40 C.F.R. § 51.166 were "published in the Federal Register." *Id.*

EPA's arguments that 40 C.F.R. § 51.166(a)(6)(i) is not controlling here are meritless. First, observing that the "three-year SIP approval timeline [applies] only where revision is required 'by reason of an amendment'" to § 51.166, EPA asserts that

[11] 67 Fed. Reg. 80,186 (Dec. 31, 2002), JA__-__. Before this revision, paragraph (a)(6) provided that, consistent with the pre-1990 version of CAA § 110(a)(1), *see supra* note 3, states must adopt and submit SIP revisions "within 9 months." 40 C.F.R. § 51.166(a)(6)(i) (2001), JA__.

"[i]n this case, there was no triggering amendment to § 51.166, and thus the three year provision does not apply." EPA Br. at 73. Yet EPA concedes that the Tailoring Rule amended § 51.166 by adding brand-new provisions regarding the rule's "January 2, 2011 applicability date, the elevated thresholds, the definition of GHGs, [and] the measurement provisions." *Id.* at 74. These amendments require treating GHGs in a way that is entirely different from every other "regulated" pollutant that is subject to the § 51.166 PSD minimum requirements.

EPA ignores this reality, claiming that, in amending § 51.166 in the Tailoring Rule, it was merely "clarifying that [GHGs] were 'subject to regulation' under the CAA." *Id.* at 75. These § 51.166 amendments were hardly "clarifications." EPA amended § 51.166 to define the theretofore-undefined phrase "subject to regulation." EPA's amendments are an intricate assemblage of five distinct subparagraphs (subdivided into six separate clauses) occupying 11 column-inches in the *Federal Register*, and, unlike the rules' treatment of every other pollutant subject to PSD, these amendments make only *some* GHGs "subject to regulation" – those emitted at or above "CO_2 [carbon dioxide] equivalent" emission thresholds. *GHG emissions below the Tailoring Rule thresholds are outside the PSD-program requirements.*

EPA contends that "[w]hen PSD requirements are triggered due to regulatory changes that are not mandated through § 51.166 (such as promulgation of a new or revised NAAQS), then the three-year period established by § 51.166(a)(6) does not apply, and EPA has authority to set an earlier deadline for SIP revisions." *Id.* at 78.

Apart from the fact that the SIP revisions at issue here *are* "mandated through § 51.166" as discussed above, the examples EPA uses to show that "EPA has consistently recognized that PSD requirements are not subject to a multi-year implementation schedule," *id.*, show the opposite.[12]

For instance, when EPA promulgated PSD-program rules for fine particulate matter ("$PM_{2.5}$"), it acknowledged that "[s]tates with SIP-approved PSD programs that require amendments to incorporate these final [PSD] rule changes for $PM_{2.5}$ will need time to accomplish these SIP amendments," *e.g.*, "to amend … existing regulations to add" specific requirements established by EPA's $PM_{2.5}$ rule. 73 Fed. Reg. 28,321, 28,340 (May 16, 2008), JA__. How much time? Citing § 51.166(a)(6)(i), and referencing its 2002 PSD rulemaking in which EPA "looked to [CAA] section 110(a)(1)" as to when to "require States to adopt and submit plan revisions" after § 51.166 amendments, EPA said it would "requir[e] States with SIP-approved PSD

[12] EPA cites the provisions of 40 C.F.R. § 51.166(a)(6) as adopted in conjunction with August 7, 1980 PSD-rule revisions (which were then codified at 40 C.F.R. § 51.24(a)). Those provisions required submission of SIP revisions to address PSD-rule amendments "before May 7, 1981," a date that, EPA argues, indicates "States were required to adopt such revised regulations relatively quickly." EPA Br. at 77. EPA misses the salient point: "May 7, 1981," was precisely *nine months* after the date of publication of the 1980 PSD-rule revisions – nine months being the period that (before the 1990 CAA Amendments) CAA § 110(a)(1) gave states to submit revised SIPs for new or revised NAAQS, and the period to which Congress adhered in § 406(d) of Pub. L. No. 95-95, 91 Stat. 796, JA__. Today, that § 110(a)(1) NAAQS-SIP-revision timeframe is three years – precisely the period allowed now by § 51.166(a)(6).

programs to submit revised PSD programs … *within 3 years from the date of this action*." *Id.* at 28,341 (emphasis added), JA__.

Similarly, in promulgating regulations for implementing NAAQS for coarse particulate matter ("PM_{10}"), EPA acknowledged a distinction between (i) "PSD applicants requesting preconstruction review approval" in a state subject to a PSD FIP and (ii) applicants seeking such approval from states "with [EPA-]approved PSD SIP's." 52 Fed. Reg. 24,672, 24,682 (July 1, 1987), JA__. Regarding FIP states, the PSD programs were amended to include the new PM_{10} requirements when the new NAAQS became effective (unless applicants qualified for "grandfather[ing]"). *Id.* By contrast, states with approved PSD SIPs would, according to EPA, "*have 9 months* [the then-applicable timeframe under § 51.166] *from the effective date of today's PSD amendments* to revise their SIP's for PM_{10} and submit them to EPA for approval." *Id.* (emphasis added). "In the meantime," EPA said, it "*expect[ed]* these States to *continue implementing their existing [PSD] programs* for particulate matter." *Id.* (emphases added).

In short, the "consistent" interpretation EPA has *actually* applied "over the course of decades," EPA Br. at 76, is that states with previously-approved PSD SIPs may continue to issue PSD permits under those SIPs until EPA approves SIP revisions submitted within the timeframe established by CAA § 110(a)(1) and 40 C.F.R. § 51.166(a)(6). It is EPA's actions *here* that departed abruptly – and unlawfully – from long-standing practice and controlling legislative rules.

B. Use of the SIP-Call Procedure Here Is Unlawful.

As Non-State Petitioners' Opening Brief explained, CAA § 110(k)(5) does not authorize SIP calls to address new minimum PSD requirements. Rather, CAA § 110(k)(5) authorizes SIP calls when a SIP no longer satisfies the requirements that applied when EPA approved that SIP. That the SIP-call procedure is available only in such circumstances is confirmed by § 110(k)(5)'s fourth sentence, which provides, in relevant part: "Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this [Act] *to which the State was subject when it developed and submitted the plan* for which such finding was made" (emphasis added).

EPA first claims Petitioners "waived" their argument. EPA Br. at 30, 31. But EPA acknowledges that rulemaking comments expressly argued that CAA § 110(k)(5) "'authorizes EPA to issue a SIP call requiring SIP revisions when an approved SIP becomes "substantially inadequate" to satisfy the *requirements that applied when EPA approved the SIP*.'" *Id.* at 31 (quoting Comments of the Utility Air Regulatory Group at 6 (Oct. 4, 2010), Doc. ID No. EPA-HQ-OAR-2010-0107-0071, JA__) (emphasis added). Those comments, at a minimum, gave EPA the "substance" of the argument raised here, "put[ting] EPA on notice of [the] challenge" – which is all that is required. *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (per curiam).

Second, EPA argues that Petitioners' interpretation of § 110(k)(5)'s fourth sentence is "flatly wrong." EPA Br. at 33. According to EPA, that sentence "simply

clarifies that EPA's finding of substantial inadequacy may relate to requirements that existed at the time the existing SIP was submitted," *id.* at 35, and need not be "read to limit SIP calls to requirements in existence at the time of SIP approval," *id.* at 33. EPA claims the general reference to "requirements" in CAA § 110(k)(5)'s first sentence provides EPA SIP-call authority "without limitation," notwithstanding the specific limiting language in the fourth sentence.

Thus, EPA's argument is that the *only* explicit reference in CAA § 110(k)(5) to the "requirements" to which states may be subjected by SIP calls – *i.e.*, requirements to which a state "was subject when it developed and submitted the plan" – should be dismissed as mere "clarifi[cation]." *Id.* at 35. By contrast, in EPA's view, the *absence* in § 110(k)(5) of any mention of using SIP calls to subject states to *new* requirements communicates congressional intent to authorize exactly that. No basis exists for this backwards approach to statutory interpretation.

Indeed, EPA's interpretation would upend the entire SIP process, as any new requirements not in SIPs (including new NAAQS) would necessarily render SIPs "substantially inadequate" the moment the new requirements take effect. EPA's interpretation would allow EPA to put states on a 18-month revision clock rather than the three-year clock established by CAA § 110(a) for new NAAQS SIPs and by 40 C.F.R. § 51.166(a)(6) for new PSD SIPs. EPA thus promotes a statutory interpretation that would liberate it from the CAA's elaborate protections for state prerogatives. That interpretation cannot be sustained.

Further, EPA argues that, "[e]ven if … a SIP Call may be issued only for requirements in existence at the time of SIP approval," the "requirement that SIPs be updated to apply PSD programs to greenhouse gases" *did* "exist at the time of SIP approval." *Id.* at 31-32. EPA claims it made clear in the SIP-call rulemaking that "the inadequacy identified in the SIP Call – the failure of the PSD SIPs to apply to greenhouse gases – 'is rooted in the failure of the SIPs to apply PSD to newly regulated pollutants on an automatically updating basis.'" *Id.* (quoting 75 Fed. Reg. 77,698, 77,708 (Dec. 13, 2010), JA__). This claim fails for two reasons.

First, EPA never before took the position that, to be approvable, PSD SIPs must "apply PSD to newly regulated pollutants on an automatically updating basis." Nothing in 40 C.F.R. § 51.166 sets forth "automatic updating" as a minimum requirement for PSD SIPs. As discussed above, it was only with the Tailoring Rule's § 51.166 amendments that EPA adopted a regulatory definition of the phrase "subject to regulation," and that definition *nowhere requires* "automatic updating."[13]

[13] In any event, it is questionable whether EPA could lawfully adopt a § 51.166 rule that required "automatic updating" of SIPs to incorporate new, substantive PSD requirements like those promulgated in the Tailoring Rule. For example, "incorporations by reference" are prohibited by 5 U.S.C. § 552(a) except with the approval of the Director of the Federal Register, and any "updating" of an "incorporation" must follow new notice and comment. *See* 1 C.F.R. pt. 51; 1 C.F.R. § 51.11; *see Appalachian Power Co. v. Train*, 566 F.2d 451, 455-57 (4th Cir. 1977). Similarly, because CAA §§ 110(a)(2) and 110(*l*) require that any revision to an approved SIP be preceded by "reasonable notice and public hearing," neither EPA nor any state could "interpret" a federally-enforceable SIP to be "automatically updated" to regulate GHGs in accordance with the Tailoring Rule. Likewise, a

(Continued . . .)

Second, EPA's argument is belied by its rulemaking statements purporting to explain that – although EPA believed it was "authorized to decide whether to issue the finding of substantial inadequacy on the basis of the SIP's lack of automatic updating or the narrower basis of [a] SIP's failure to apply PSD to GHGs" – EPA "chose the narrower basis." 75 Fed. Reg. at 77,714, JA__. EPA said it did so because that narrower basis "addresses the immediate problem" with SIPs that EPA had asserted "and because even states *that do not adopt the automatic updating approach* may nevertheless promptly take action to apply PSD to new pollutants and thereby avoid the problem of gaps in permitting authority." *Id.* (emphasis added). Thus, even if an "automatic updating" requirement existed – as EPA now claims (but has never demonstrated) and for which no support or authority exists – its SIP-call rule still could not be affirmed because that action was not based on any such purported requirement.

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federally-enforceable SIP could not be interpreted to require regulation of GHGs *below* the Tailoring Rule thresholds because the CAA defines an "applicable implementation plan" as the plan "which has been approved under section 110 … *and which implements [a] … relevant requirement[ ] of this [Act]*." CAA § 302(q) (emphasis added). A requirement in an approved PSD plan to regulate GHGs emitted *below* the Tailoring Rule's thresholds would not implement any "requirement" of the Act. In this case, EPA concedes that neither the Texas nor the Wyoming PSD SIP authorized any GHG regulation.

CONCLUSION

The Court should grant the petitions for review and order the relief requested in Non-State Petitioners' and Intervenor-Petitioner's Opening Brief (at 39).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Reply Brief of Non-State Petitioners and Intervenor-Petitioner contains 5,861 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

/s/ Allison D. Wood

Dated: May 14, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that I have this 14th day of May 2012, served a copy of the foregoing Reply Brief of Non-State Petitioners and Intervenor-Petitioner electronically through the Court's CM/ECF system.

/s/ Allison D. Wood