ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1425 (and consolidated cases)

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

STATE OF TEXAS et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY et al.,

Respondents.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTIONS OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and Amici:

Petitioners:

The State of Texas

Rick Perry, Governor of Texas

Greg Abbott, Attorney General of Texas

Texas Commission on Environmental Quality

Texas Department of Agriculture

The Railroad Commission of Texas

Texas General Land Office

Barry Smitherman, Chairman, the Railroad Commission of Texas

Donna Nelson, Chairman, Public Utility Commission of Texas

Kenneth Anderson, Commissioner, Public Utility Commission of Texas

Utility Air Regulatory Group

Chase Power Development, LLC

SIP/FIP Advocacy Group

Texas Chemical Council

Texas Association of Business

Texas Association of Manufacturers

Intervenor for Petitioners:

None

Respondent:

United States Environmental Protection Agency ("EPA")

Lisa Perez Jackson, Administrator, EPA

Intervenors for Respondent:

Conservation Law Foundation

Environmental Defense Fund

Natural Resources Defense Council

Sierra Club

Amici Curiae:

American Chemistry Council

American Petroleum Institute

National Association of Manufacturers

National Oilseed Processors Association

American Fuel & Petrochemical Manufacturers

Prior Amici Curiae

National Fuel & Petrochemical Manufacturers (terminated Jan. 31, 2012)

Each of these consolidated cases is a petition for review of agency action; there were no proceedings before the District Court, and therefore the requirement to

furnish a list of all parties and amici who appeared before the District Court is inapplicable.

B. Rulings Under Review

The rulings under review are final actions promulgated by the EPA entitled the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec. 30, 2010), and the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program*, 76 Fed. Reg. 25,178 (May 3, 2011).

C. Related Cases

To the knowledge of undersigned counsel, there are no other cases related to this case other than the following consolidated cases:

Chase Power Development, LLC v. U.S. Environmental Protection Agency et al., No. 11-1062

State of Texas et al. v. U.S. Environmental Protection Agency, No. 11-1128

Utility Air Regulatory Group v. U.S. Environmental Protection Agency, No. 11-1247

Chase Power Development, LLC v. U.S. Environmental Protection Agency et al., No. 11-1249

The SIP/FIP Advocacy Group et al. v. U.S. Environmental Protection Agency, No. 11-1250

DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the following Petitioners and Amici provide the following disclosures:

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

The SIP/FIP Advocacy Group has no parent companies, and no publicly held company has a 10% or greater ownership interest. It is composed of a group of trade associations whose member companies represent a cross-section of American industry, and who operate facilities in the State of Texas and are therefore affected by the SIP program at issue in this case. None of the members of the SIP/FIP Advocacy Group have issued shares or debt securities to the public. The members of the SIP/FIP Advocacy Group are "trade associations" within the meaning of Circuit Rule 26.1.

The Texas Chemical Council has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It is a trade association with member companies representing the chemical industry operating in Texas. The Texas Chemical Council has not issued shares or debt securities to the public. The Texas Chemical Council is a "trade association" within the meaning of Circuit Rule 26.1.

The Texas Association of Business has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It is a trade association with member companies representing a cross-section of Texas industry. The Texas Association of Business has not issued shares or debt securities to the public. The Texas Association of Business is a "trade association" within the meaning of Circuit Rule 26.1.

The Texas Association of Manufacturers has no parent companies, and no publicly-held company has a 10% or greater ownership interest. It is a trade association with member companies representing a cross-section of Texas manufacturing companies and facilities. The Texas Association of Manufacturers has not issued shares or debt securities to the public. The Texas Association of Manufacturers is a "trade association" within the meaning of Circuit Rule 26.1.

The National Association of Manufacturers ("NAM") states that it is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in NAM.

The American Chemistry Council ("ACC") states that it is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. ACC represents its members companies' interests in legislative, administrative, and judicial proceedings involving issues that impact the business of chemistry. ACC's members are regulated under the Clean Air Act. ACC has no parent company, and no publicly held company has a 10% or greater ownership interest in ACC.

The American Petroleum Institute ("API") states that it is a national trade association representing all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

The National Oilseed Processors Association ("NOPA") states that it is a national trade association that represents 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 64 plants located throughout the country, including 59 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10% or greater ownership interest in NOPA.

The American Fuel & Petrochemical Manufacturers ("AFPM"), f/k/a National Petrochemical & Refiners Association, states that it is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home-heating oil, jet fuel, asphalt products and the chemicals that serve as "building blocks" in making plastics, clothing, medicine and computers. AFPM has no parent company, and no publicly held company has a 10% or greater ownership interest in AFPM.

Dated: June 18, 2012

Respectfully submitted,

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TABLE OF ABBREVIATIONS

APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
GHG	Greenhouse Gases
LBEC	Las Brisas Energy Center
NAAQS	National Ambient Air Quality Standard
OMB	Office of Management and Budget
PM	Particulate Matter
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
TACB	Texas Air Control Board
TCEQ	Texas Commission on Environmental Quality

INTRODUCTION

For nearly two decades, Texas maintained and implemented an EPA-approved major source preconstruction permitting program. This program made Texas the sole permitting authority for new major sources in the State, and allowed it to manage its air quality resources and issue permits in a timely manner. But when EPA set out to impose its greenhouse gas ("GHG") regulatory agenda, it determined that Texas' permitting program, and the procedural regularities required for its revision, were obstacles to the Agency's chosen regulatory timetable. EPA's solution: to disapprove retroactively Texas' Clean Air Act ("CAA") state plan submission decades after EPA originally approved it, and to base its disapproval on information about Texas' procedures for revising its plan that EPA knew of when it originally approved the submission. Having disapproved Texas' plan, in December 2010, EPA promulgated the same federal GHG-permitting authority that it had represented to this Court only two months earlier could not be implemented until December 2011 "at the earliest." Att. 1 to Decl. of Regina McCarthy (Oct. 28, 2010) ("McCarthy Decl."), J.A. __.

EPA claims to find authority for these actions in CAA § 110(k)(6). But "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). According to its text and structure, CAA § 110(k)(6) is nothing more than a limited error-correction provision meant to deal with minor clerical or technical errors, not

carte blanche for EPA to revoke decades-old decisions that were statutorily compelled at inception but failed to predict changed EPA policy. Likewise, EPA's assertion of inherent authority is incompatible with the Act's specific limitations on EPA's discretion. And EPA's decision to act without notice and comment—itself unjustified and unlawful—only confirms the arbitrary nature of the Agency's actions.

Regardless of whether this Court ultimately upholds EPA's GHG regulations—a decision it likely will reach before the conclusion of this litigation—EPA was bound to follow the Act's procedural regularities in implementing those actions. Its failure to do so, if upheld, could legitimize EPA in the future to divest states of their lawful regulatory authority whenever it is convenient or conducive to EPA's policy goals. The only way this Court can uphold the integrity of the CAA's procedural protections, which act to safeguard *all parties* from *ad hoc* and arbitrary agency actions, is to vacate the actions under review.

JURISDICTIONAL STATEMENT

Pursuant to 42 U.S.C. § 7607(b)(1), this Court has jurisdiction over the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec. 30, 2010) ("Interim Final Rule"), and the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program*, 76 Fed. Reg. 25,178 (May 3, 2011) ("Final Rule"). Timely petitions for review of the Interim

Final Rule were filed by Petitioners Texas and Chase Power Development, LLC ("Chase Power"), and timely petitions for review of the Final Rule were filed by all Petitioners. The bases for Petitioners' standing and the response of Petitioners Texas and Chase Power to EPA's claims that their challenges to the Interim Final Rule are moot are discussed *herein*. *See infra* at 17-19, 50-57.

STATEMENT OF ISSUES

1. CAA § 110 establishes a comprehensive mechanism for states to implement the Act through state implementation plans ("SIPs") and for EPA to act on their SIP submissions. One subsection, CAA § 110(k)(6), allows EPA in limited circumstances to make minor "corrections" to an action approving or disapproving a state's SIP submission. Did EPA exceed its limited authority by retroactively disapproving Texas' Prevention of Significant Deterioration ("PSD") SIP submission based on EPA's changed interpretation of the CAA?

2. CAA § 110 establishes a comprehensive mechanism for states to implement the Act through SIPs and for EPA to request and act on states' SIP submissions. Did EPA act unlawfully by claiming inherent authority to reverse its decades-old decision to approve Texas' PSD SIP submission in a manner that is contrary to this statutory mechanism?

3. CAA § 110(k)(3) requires EPA to approve a SIP submission that meets the Act's minimum requirements. In 1992, EPA made the considered decision that Texas' PSD SIP submission met all applicable CAA and regulatory requirements and

thus approved it. Did EPA err by revoking its 1992 decision to approve Texas' PSD SIP submission based on criteria that are not required by the CAA or EPA's regulations?

4. In December 2010, EPA disapproved retroactively Texas' decades-old PSD SIP submission without notice and comment procedures, claiming that its failure to follow such procedures was justified by the "good cause" provision in the Administrative Procedure Act ("APA"). But EPA had known about all of the purported deficiencies in Texas' PSD SIP submission for over two decades before its retroactive disapproval. Was EPA's decision to disregard the APA's rulemaking requirements based on information it had known for decades erroneous?

5. During the pendency of EPA's Interim Final Rule, Texas issued three PSD permits applicable to pollutants other than GHG, including a permit to Petitioner Chase Power. If the Interim Final Rule is vacated, these sources may begin actual construction without GHG limits, and, if EPA contests the right to construct, it must do so in the district court. Given these continuing consequences and the likelihood this situation could recur, is Petitioners' challenge to the Interim Final Rule moot?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the attached Addendum.

STATEMENT OF THE CASE

A. Congress Intended That States Would Implement PSD Programs Through Their SIPs

1. The CAA's Cooperative Federalism Framework

The CAA "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). Under this partnership, "air pollution prevention … at its source is the *primary* responsibility of states and local governments[.]" 42 U.S.C. § 7401(a)(3) (emphasis added). Accordingly, "the states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions." *United States v. Gen. Motors Corp.*, 876 F.2d 1060, 1062 (1st Cir. 1989).

States implement the CAA primarily through SIPs. Among the programs that states are required to implement through their SIPs is the PSD program, which is a preconstruction review and permitting program. *See* 42 U.S.C. § 7471. As its name suggests, the program seeks to prevent air quality from deteriorating such that areas meeting federal ambient air quality standards would no longer meet such standards.

A SIP compiles the state's laws and regulations for complying with the national ambient air quality standards ("NAAQS"). *See* 42 U.S.C. § 7410(a). "The SIP basically embodies a set of choices regarding such matters as transportation, zoning and industrial development that the state makes for itself in attempting to reach the

NAAQS with minimum dislocation." *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 780-81 (3d Cir. 1987) (Becker, J.). Because decisions about the allocation of air quality resources implicate quintessentially local concerns, Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments and the people they represent will be free to carry out the reasoned weighing of environmental and economic goals and needs." H.R. Rep. No. 95-294, at 146 (May 12, 1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1225.

2. The SIP Submission, Approval, And Revision Process

CAA § 110 establishes the framework for SIP development, submission, and revision. In order to ensure the ability of states to plan for attainment and to maintain state primacy in air pollution control, Congress required that EPA provide states and regulated entities with advance notice about the requirements that plan submissions would need to meet and denied EPA authority to accept or reject those submissions based on *ad hoc* criteria. Most notably, Congress expressly required EPA to publish regulations to guide state implementation of the program through SIPs. *See* 42 U.S.C. § 7471. EPA, in turn, has promulgated regulations at 40 C.F.R. Part 51 that implement CAA § 110 and that set forth minimum standards for approvable SIPs. Construing properly the statutory scheme created by Congress, EPA has long maintained that "any fundamental changes in the administration of PSD would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.166, and subsequent SIP revisions." *See* 54 Fed. Reg. 52,823, 52,824/3 (Dec. 22,

1989).

The SIP submittal and approval process is detailed and circumscribes EPA's discretion. First, the states must formulate and adopt a plan that meets the criteria set forth at CAA § 110 and 40 C.F.R. Part 51. *See* 42 U.S.C. § 7410(k)(1)(A) (requiring that EPA "promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission"). State SIP submissions are subject to a lengthy state-level administrative process before they even reach EPA, including "reasonable notice and public hearing." 42 U.S.C. § 7410(a)(2), (*l*); 40 C.F.R. § 51.102. After EPA receives a state's submission, it has six months to determine whether the submission is complete, *see* 42 U.S.C. § 7410(k)(1)(B), and must approve or disapprove a complete submission in the subsequent twelve months, *see* 42 U.S.C. § 7410(k)(2). EPA has no choice but to "approve such submittal as a whole if it meets all of the applicable requirements" of the Act. 42 U.S.C. § 7410(k)(3).

As with plan submissions, the Act "places primary responsibility on the states for [plan] revision." *Bridesburg*, 836 F.2d at 781. The Act provides three mechanisms for revising approved SIPs, each applicable in different circumstances. The first applies when EPA amends its minimum plan requirements. Because the plan revision process is time-consuming and costly, and respectful of the states' sovereign dignity, Congress provided states up to three years to revise their plans after EPA adopts or revises a NAAQS. 42 U.S.C. § 7410(a)(1). Mindful of Congress' decision to provide time for states to respond to fundamental changes to SIP requirements and the Act's

failure to specify a deadline for plan revisions following EPA's revisions to the PSD program, EPA adopted this three-year deadline for that program. *See* 40 C.F.R. § 51.166(a)(6)(i).

Second, under CAA § 110(k)(5), EPA may call for SIP revisions of plans that are "substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately … interstate pollutant transport … or to otherwise comply with any requirement of this chapter[.]" 42 U.S.C. § 7410(k)(5). To ensure that CAA § 110(k)(5) would not inappropriately displace the standard SIP revision procedures in § 110(a), Congress limited the scope of § 110(k)(5) to deficiencies regarding "requirements of this chapter to which the State was subject when it developed and submitted the plan[.]" 42 U.S.C. § 7410(k)(5); *see also* § 7410(i) (generally prohibiting imposition of new stationary source requirements outside the § 110(a) process). Significantly, even when EPA may require plan revisions under CAA § 110(k)(5), Congress ensured that states would have sufficient time to act and to meet state law procedural requirements for rulemaking by providing that states would not be required to act immediately, but that EPA should "establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions." 42 U.S.C. § 7410(k)(5).

Third and finally, CAA § 110(k)(6) provides a limited authority for EPA to "correct" its actions on SIP submissions that were in error when those actions were taken. CAA § 110(k)(6) provides that "the Administrator may in the same manner as

the approval, disapproval, or promulgation [of a SIP] revise such action as appropriate[.]" 42 U.S.C. § 7410(k)(6). Representative Henry Waxman, who was Chairman of the House Energy and Commerce Committee's Subcommittee on Health and Environment during the passage of the CAA Amendments of 1990, explained his intent regarding this provision in a post-enactment article, stating that it was "included to enable EPA to deal promptly with clerical errors or technical errors," but not "to offer a route for EPA to reevaluate its policy judgments."[1]

B. Texas Submits Its PSD SIP And EPA Approves It

Texas has had an approved SIP since 1972. *See* 37 Fed. Reg. 10,842, 10,895-98/1 (May 31, 1972). In 1983, Texas was delegated authority to implement the PSD program. *See* 48 Fed. Reg. 6,023/2 (Feb. 9, 1983). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the State full authority to implement the PSD program. *See* 57 Fed. Reg. 28,093/3 (June 24, 1992).

[1] Hon. Henry A. Waxman et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 Envt'l L. 1843, 1925 (1991).

The Texas PSD SIP submission and approval proceedings produced an unusually well-developed record on how the State would address the applicability of newly-regulated pollutants to the PSD program. During the SIP submission process, Texas unambiguously and consistently explained to EPA that the PSD provisions in its SIP are not "prospective rulemaking" and do not incorporate future EPA interpretations of the Act or its regulations. *See* 76 Fed. Reg. at 25,184/2 n.21, J.A. __; Letter from William B. Hathaway, EPA Region 6, to Allen Eli Bell, TACB, 2 (July 3, 1986), J.A. __. In this regard, Texas' position preventing prospective incorporation by reference is required by state law, which disfavors such actions. *See Trimmier v. Carlton*, 296 S.W. 1070 (Tex. 1927). Just as importantly, Texas' position was no impediment to EPA approval—many SIPs do not, for example, automatically update to incorporate EPA's changed regulations. *See* 68 Fed. Reg. 8,845/2 (Feb. 26, 2003) (Kansas SIP); Fla. Stat. § 120.54(1)(i) (2011) (Florida state rulemaking provision); Idaho Code Ann. § 67-5229(3) (Idaho state rulemaking provision); Or. Admin. R. § 340-200-0040(2) (Oregon SIP).

While EPA was considering Texas' PSD SIP submission, it was also in the process of revising the particulate matter NAAQS. When Texas initially submitted its PSD SIP in 1985, EPA had not promulgated the NAAQS for particulate matter smaller than 10 microns ("PM_{10}"). After EPA promulgated that standard in 1987, *see* 52 Fed. Reg. 24,634/1 (July 1, 1987), EPA continued to permit new sources with respect to their PM_{10} emissions, and Texas began to revise its PSD SIP submission so

that these substances would be regulated under the relevant SIP provisions. *See* 76 Fed. Reg. at 25,184/2 n.24, J.A. __. It took Texas approximately fifteen months to revise its SIP submission to include the new NAAQS pollutant, and EPA another four years to approve the submission. *See* 57 Fed. Reg. 28,093/3 (June 24, 1992). Thus, EPA had first-hand experience with Texas' process for incorporating new pollutants into its SIP-approved PSD program.

And Texas' actions were wholly consistent with EPA's contemporaneous view of the Act. EPA directly addressed the question of PM_{10}'s applicability in states with SIP-approved PSD programs by requiring states that could not reinterpret their SIPs to enforce them by their terms: "In States where an approved PSD SIP currently exists, each State should revise its rules to fully address the new PM_{10} indicator by May 1, 1988. Until the new PSD procedures are approved by EPA as SIP revisions, States must continue to implement their existing PSD rules for particulate matter." Memorandum from Darryl D. Tyler, Director, Control Programs Development Division, to Regional Air Directors 3 (Aug. 5, 1987), J.A. __. Even today, EPA asserts discretion to issue PSD permits that do not include emission limits for newly-regulated pollutants. *See* EPA, Supplemental Statement of Basis: PSD Permit Application for Avenal Energy Project, March 2011, at 2-3, J.A.__.

C. EPA Imposes A New Greenhouse Gas Regulatory Program

EPA historically has taken the position that GHGs are not regulated under the CAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP

in 1992. Beginning in December 2009, however, EPA finalized four actions regulating GHG under the CAA. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009); 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule"); 75 Fed. Reg. 25,324 (May 7, 2010); 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule").[2]

As part of these rules, EPA determined that, once GHGs were actually being controlled under any part of the Act, they were "subject to regulation" under the PSD program. 75 Fed. Reg. 17,004, 17,006/1-17,007/3 (Apr. 2, 2010). Specifically, EPA took the position that, beginning on January 2, 2011, GHG control requirements would be required under the PSD program as outlined in EPA's rules. *Id.*

EPA's regulation of GHGs under the CAA presented significant difficulties for the Agency and states, particularly with regard to the PSD program. For one thing, the most common GHG, CO_2, is emitted in quantities that dwarf the major source thresholds for program applicability. As a result, under EPA's interpretation of the Act,[3] PSD requirements could have expanded from approximately 300 issued permits

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[2] Petitioners in this case have also commenced challenges to the rulemakings EPA initiated in 2009.

[3] Petitioners and certain members of Petitioners are currently challenging, in separate litigation pending in this Court, EPA's statutory interpretation that GHGs can be subject to or trigger PSD permitting requirements and nothing in this brief should be construed to concede that point.

annually to more than 80,000. To avoid this result, EPA rewrote the Act's statutory emission rate applicability thresholds to exclude most of this new construction activity from the PSD program by newly defining the statutory term, "subject to regulation." 75 Fed. Reg. at 31,606/1-31,607/3.

Furthermore, EPA's position on the timing of GHG regulations created practical difficulties about how EPA could rush its regulatory regime into place in states with approved SIPs, rather than allowing them the opportunity to make orderly SIP revisions. EPA's solution was to threaten a construction moratorium under which states that were unable to reinterpret retroactively their existing SIPs or to complete SIP revisions within a matter of weeks would be unable to permit construction of GHG-emitting sources—unless, of course, they ceded permitting authority to EPA. *See* 75 Fed. Reg. at 31,582-31,583.

Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. *See* Letter from Greg Abbott and Bryan W. Shaw to Lisa Jackson and Alfredo Armendariz (Aug. 2, 2010), at 1-2, J.A. __. Texas also explained the position it was taking in litigation challenging EPA's GHG rules, that the PSD program properly only encompassed NAAQS pollutants, but confirmed as a regulatory matter that its approved PSD program "encompasses all 'federally regulated new source review

pollutants,' including 'any pollutant that otherwise is subject to regulation under the [CAA].'" *See id.* at 2-3 (quoting 30 Tex. Admin. Code § 116.12(14)(D)).

Following promulgation of the Tailoring Rule, EPA issued a proposed "SIP call" finding the SIPs of thirteen states, including Texas', "substantially inadequate." *See* 75 Fed. Reg. 53,892, 53,899/2-53,900/1 (Sept. 2, 2010). EPA proposed to require these states in their SIP-approved PSD programs to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a FIP that would apply specifically to states that did not or could not agree to "reinterpret" their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines that would fall no later than December 1, 2011. *See id.* at 53,900/2-3. EPA finalized its GHG SIP Call on December 13, 2010 and required Texas to submit revisions to its SIP by December 1, 2011. 75 Fed. Reg. 77,698, 77,705 (Dec. 13, 2010). The GHG SIP Call is the subject of litigation in *Utility Air Regulatory Group v. EPA ("UARG")*, No. 11-1037 (D.C. Cir.).

D. EPA Retroactively Disapproves Texas' Decades-Old PSD SIP Submission

Consistent with EPA's position in the proposed GHG SIP Call and FIP, EPA Assistant Administrator McCarthy promised this Court in an attachment to her sworn statement that a "FIP cannot be promulgated until December 2, 2011 at the earliest" for Texas. Att. 1 to McCarthy Decl., J.A. __. Contemporaneous with this statement to the Court, however, EPA was secretly "planning additional actions" to ensure (as EPA characterized it) that GHG sources in Texas could receive GHG PSD permits as

of January 2, 2011. EPA-HQ-OAR-2010-0107-0127 at 11, J.A. __ (EPA's Nov. 16, 2010, submission to the Office of Management and Budget ("OMB")); *see also* 75 Fed. Reg. 77,698, 77,700/2.

Rather than inform the public about these "additional actions," on December 30, 2010, EPA published an interim final rule partially disapproving Texas' SIP, imposing the GHG FIP, and purporting to be effective as of its date of publication. *See* 75 Fed. Reg. at 82,430/1-2, J.A. __. EPA eschewed notice and comment rulemaking procedures and instead purported to rely on APA § 553(b)(3)(B)'s "good cause" exception, finding that notice and comment is "impracticable" and would be "contrary to the public interest." *Id.* at 82,458/2 (quoting 5 U.S.C. § 553(b)(3)(B)), J.A. __. The effect of EPA's action was that major source preconstruction permitting authority was divided "between two authorities—EPA for GHGs and the state [of Texas] for all other pollutants," *id.* at 82,457/2, J.A. __, making EPA the final decision-maker of whether new sources could be constructed in Texas.

As substantive grounds for the Interim Final Rule, EPA argued that CAA § 110(k)(6) authorized it to change its decades-old approval of Texas' PSD SIP submission into a partial approval and partial disapproval. EPA asserted it had erroneously approved Texas' PSD SIP submission because the SIP did not address appropriately the applicability of newly-regulated pollutants to the PSD program in the future. 75 Fed. Reg. at 82,431/2-82,432/1, J.A. __. Alternatively, EPA argued

that it had inherent authority to disapprove the decades-old submission on these same grounds.

EPA claimed that its action was independent of the GHG SIP Call because that action was aimed at a "narrower" issue of "appl[icability] to GHGs," whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported "failure to address, or assure legal authority for, application of PSD to all pollutants newly subject to regulation." 75 Fed. Reg. at 82,455/1 n.85, J.A. __. But rather than remedy the purported deficiency in Texas' decades-old PSD SIP submission, EPA imposed the same GHG SIP Call FIP on Texas that it had represented to the Court could not "be promulgated until December 2, 2011 at the earliest." Att. 1 to McCarthy Decl., J.A. __. EPA did not attempt to tailor the FIP to any purported deficiencies in Texas' previously-approved SIP submission.

Concurrently, EPA requested comment on whether to promulgate a final rule, in addition to the Interim Final Rule, disapproving Texas' PSD SIP submission and imposing a FIP for PSD regulation of GHG emissions. *See* 75 Fed. Reg. 82,365 (Dec. 30, 2010). Texas and other commenters submitted detailed comments explaining why this action was unlawful and unwise. *See, e.g.*, EPA-HQ-OAR-2010-1033-0232 (Comments of Petitioner Texas) (Feb. 14, 2011), J.A. __; EPA-HQ-OAR-2010-1033-0228 (comments of Petitioner UARG) (Feb. 14, 2011); EPA-HQ-OAR-2010-1033-0227 (comments of Petitioner National Association of Manufacturers, et al.) (Feb. 14, 2011), J.A. ___. On May 3, 2011, EPA rejected these concerns and published the

Final Rule disapproving retroactively Texas' decades-old PSD SIP submission and promulgating the FIP. *See* 76 Fed. Reg. 25,178. EPA did not change its rationale between the Interim Final Rule and Final Rule—indeed, most of the Final Rule appears to be a "cut-and-paste" from its previous rule.

STATEMENT OF STANDING

Petitioners satisfy the three elements of Article III standing—injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Petitioner Texas' injury is plain. EPA's decisions to disapprove retroactively Texas' PSD SIP submission and to impose a FIP installing EPA as the permitting authority for major industrial sources with regard to GHGs injure the State's quasi-sovereign interest in regulating air quality within its borders. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., as Circuit Justice); *Cal. State Bd. of Optometry v. FTC*, No. 89-1190, 1989 WL 111595 at *1 (D.C. Cir. Aug. 15, 1989).

Members of Petitioners the SIP/FIP Advocacy Group, Texas Chemical Council, Texas Association of Business, and Texas Association of Manufacturer and members of Petitioner UARG are adversely affected by EPA's rule. It imposes on them binding requirements regarding permitting and regulation of GHGs under the PSD program. These requirements create significant costs and other burdens for affected facilities. Members of these Petitioners therefore would have individual standing as a result of concrete and particularized injury that is fairly traceable to

EPA's rule and as to which there is a substantial probability of redress by a decision that holds the rule invalid. These Petitioners have associational standing here because: (1) individual members of each would have standing in their own right; (2) the interests these Petitioners seek to protect here are germane to the purpose of advancing their members' interests in lawful and reasonable regulatory decisions under the CAA; and (3) neither the claims asserted nor the relief requested requires individual members' participation. *See, e.g.*, *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006), *clarified on reh'g on other grounds*, 489 F.3d 1245 (D.C. Cir. 2007).

Chase Power's injury arises from EPA's promulgation of the Interim Final Rule. Chase Power is engaged in the development of the Las Brisas Energy Center ("LBEC"), a 1,200 megawatt, petroleum coke-fueled power generating station in Corpus Christi, Texas. It received from the Texas Commission on Environmental Quality ("TCEQ") a signed PSD permit for the LBEC in the interim between EPA promulgating the Interim Final Rule and the Final Rule, calling into question whether TCEQ issued a complete PSD permit for the LBEC and delaying construction of the LBEC.

A decision vacating the actions under review will redress Petitioners' injuries. When the complainant is the object of government action, "there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it." *Lujan*, 504 U.S. at 561-62. A judgment that EPA acted

unlawfully and vacating the decisions under review will redress the harm that EPA has caused by vacating the actions by which EPA supplanted Texas' right to regulate air quality. It would also allow Chase Power to begin actual construction in reliance on preconstruction permits that Texas has issued during the pendency of the Interim Final Rule.

SUMMARY OF ARGUMENT

Since 1992, Texas has maintained and implemented an EPA-approved PSD permitting program. But in December 2010, only two months after the Assistant Administrator represented to this Court that EPA could not impose a FIP to replace a SIP that did not conform to newly enacted GHG regulations until December 2011 "at the earliest," Att. 1 to McCarthy Decl., J.A. __, EPA moved without notice and comment to disapprove retroactively Texas' 1992 SIP submission based on information that EPA knew of when it approved the SIP and implemented its GHG FIP. EPA then published a final rule on the same grounds. EPA's actions are unlawful and arbitrary and capricious, and should be vacated.

CAA § 110 establishes a comprehensive regulatory process for SIP submittals, approvals, and revisions that displaces any authority EPA otherwise might have to act on SIP submissions. By every indication, Congress intended SIPs to be a durable manifestation of cooperative federalism, not something to be displaced at EPA's whim. In this regard, CAA § 110(k)(6), EPA's ostensible source of authority, was explained by one lawmaker as merely "enabl[ing] EPA to deal promptly with clerical

errors or technical errors." Waxman, *supra*, at 1925. But the decisions under review attempt to transform Subsection 110(k)(6) into a source of unlimited revisory power that could be used to override any SIP any time EPA purports to find fault with it or shifts its policy direction. There is no limiting principle to EPA's interpretation underlying its unlawful and arbitrary actions, and the Court should vacate those actions.

EPA's actions disapproving Texas' PSD SIP submittal are also erroneous because the submittal met all requirements of the Act. EPA may not revoke its earlier approval decision based on a shift in the Agency's policy judgment. The Court should vacate the actions and preclude EPA from circumventing the procedural requirements of the CAA's SIP revision process.

Finally, EPA's decision to disregard the procedural requirements of notice-and-comment rulemaking fatally undermines the Interim Final Rule. Notwithstanding EPA's self-serving denials, the purported deficiency in Texas' decades-old PSD SIP submission—its failure to predict EPA's future interpretations of the Act and to apply its PSD program to pollutants that become subject to regulation long after its submission and approval—were fully known to EPA in 1992. Even if EPA's claims were consistent with the administrative record, it still would have known about the purported deficiency in Texas' PSD SIP submission by early August 2010, which allowed EPA more than enough time to undertake notice-and-comment rulemaking.

EPA's decision to shield its actions from the public until the last possible minute is unlawful and merits vacatur of the Interim Final Rule.

STANDARD OF REVIEW

EPA's actions disapproving retroactively Texas' PSD SIP submission are rules within the meaning of APA §§ 551(4) and 553. They are subject to review under the APA's legal standards, 5 U.S.C. § 706, including standards proscribing agency actions that are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law. EPA's actions imposing the FIP constitute "promulgation or revision of an implementation plan by the Administrator" under CAA § 110(c). 42 U.S.C. § 7607(d)(1)(B). Thus, this Court reviews the FIP pursuant to the standards in CAA § 307(d), 42 U.S.C. § 7607(d)(9), including standards proscribing EPA actions that are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law.

EPA's legal interpretations of the CAA are subject to the standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The Court first must ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress' is clear, that is the end of the matter" and Congress' decision controls. *Id.* at 842-43. If "the statute is silent or ambiguous with respect to the specific issue," then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

EPA's non-factual determinations and explanation for its actions are reviewed under the arbitrary-and-capricious test, which requires an agency to "articulate a

satisfactory explanation for its action" and forbids it from "entirely fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court considers only the regulatory rationale the agency actually offered in reaching its decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Review under the CAA's "arbitrary and capricious" standard is the same as under the APA. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995).

ARGUMENT

A. CAA § 110(k)(6) Does Not Authorize EPA To Rescind Its Approval Of The Texas SIP

EPA's central justification for the Texas FIP is that the PSD SIPs it previously approved without providing for "automatic application of PSD to newly regulated pollutants" like GHGs may now be retroactively disapproved and supplanted by a FIP that changes fundamentally the scope of that EPA-approved SIP.[4] The Texas PSD SIP that EPA approved in 1992, of course, did not apply to GHGs or the tens of thousands of sources that emit GHGs in amounts of at least 100 or 250 tons per year. Now, EPA asserts it can "correct" the putative "error" it made years ago when

[4] 76 Fed. Reg. at 25,182/3, J.A. __; 75 Fed. Reg. at 82,443/3, J.A. __.

it approved a SIP that did not foresee regulation of those thousands of GHGs—an approval made at a time when EPA itself did not even consider GHG sources a CAA "pollutant"—thereby transforming the long-ago SIP "approval" into a long-ago SIP "disapproval" and allowing EPA to impose a fundamentally different and significantly more expansive permitting program. This Orwellian magic, EPA claims, is authorized by CAA § 110(k)(6). But, under the CAA and basic principles of administrative law, EPA cannot use § 110(k)(6) to rewrite history to justify EPA's promulgation of a fundamental change in the Texas PSD program.

1. PSD SIPs Are Not Required To Contain Provisions That Trigger Implementation Of Future PSD Requirements Independent Of The CAA § 110 SIP Revision Process

EPA's 40 C.F.R. part 51 rules establish minimum requirements for SIP PSD programs. Revision of SIP-approved PSD programs has always been required as the means to implement new Part 51 requirements that change the nature or scope of an approved PSD SIP program. Nothing in the Act or 40 C.F.R. § 51.166 even contemplates, much less authorizes, provisions in PSD SIPs that require implementation of unknown and unascertainable future changes to the scope and applicability of PSD without following the SIP-revision process. No legal basis exists for an interpretation of an EPA-approved PSD SIP as requiring—outside the SIP revision process (*i.e.*, without new public hearings and EPA approval)—either that GHGs be treated in the same way as other PSD-regulated pollutants (which, by extending PSD to thousands of additional sources that were never previously subject

to PSD and that would become subject to PSD only due to their GHG emissions, would transform approved PSD programs into something unrecognizable) or that EPA's elaborate Part 51 GHG Tailoring Rule be incorporated in the SIP. [5]

EPA's underlying premise is that, by generally referencing "regulated pollutant," a PSD SIP would require that new, substantive PSD requirements, such as the Tailoring Rule's detailed definition of "greenhouse gases" and related provisions governing PSD applicability become a part of the approved SIP program without SIP revision. This contravenes fundamental principles of administrative law and the CAA itself. Under the APA, for example, "incorporations by reference" must be approved by the Director of the *Federal Register* and cannot be updated or changed without new public notice-and-comment proceedings. *See* 1 C.F.R. pt. 51; 1 C.F.R. § 51.11; *see also 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

[5] EPA itself admitted, in promulgating the Tailoring Rule, that it was "not too much to say that applying PSD requirements literally to GHG sources" would "result in a program that would have been unrecognizable to the Congress that designed PSD." 75 Fed. Reg. at 31,555. It was for that very reason that EPA found it necessary to amend 40 C.F.R. § 51.166 to define the theretofore-undefined phrase "subject to regulation," while at the same time establishing new GHG definitions and emission thresholds in an intricate series of new regulatory provisions comprising five distinct subparagraphs (subdivided into six separate clauses) occupying 11 column-inches in the *Federal Register*. *See id.* at 31,606.

by "reasonable notice and public hearing," neither EPA nor any state could "interpret" a federally-enforceable SIP PSD program to require the program's expansion to include a pollutant like GHGs where that expansion would transform the PSD program into something fundamentally different from the one adopted by the state and approved by EPA.

In sum, because there was not (and could not have been) any requirement that, to be "approvable," the Texas SIP in 1992 had to include general provisions that would allow Texas in the future to expand the PSD program—without following the SIP revision process—to cover potentially thousands of GHGs sources to which that program historically did not (and could not) apply, EPA's approval of that SIP at that time could not have been "in error." Thus, the predicate for EPA's invocation of CAA § 110(k)(6)—to correct, years after the fact, an "error" that EPA now asserts it made—simply does not exist.

2. CAA § 110(k)(6) Is An Error Correction Provision Of Limited Scope And Effect That Does Not Authorize EPA Action To Effect New Policy Judgments

The CAA Amendments of 1990 made a number of modifications to CAA § 110, reorganizing certain of its provisions; enlarging some of the timeframes for state

and EPA action; adding a new subsection (k) that, among other things, explicitly provides for the "SIP call" procedure for which the Act implicitly provided before those Amendments;[6] and otherwise making conforming changes to reflect these revisions and the section's reorganization.[7] Paragraph (k)(6) was enacted as part of the 1990 Amendments' general reorganization of § 110.

Entitled "Corrections," paragraph (k)(6) provides that "[w]henever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error," the Administrator "may

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[6] Paragraph (k)(5) of Clean Air Act § 110, added as part of the 1990 Amendments' general reorganization of Clean Air Act § 110, provides that "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate," the Administrator "shall require the State to revise the plan as necessary to correct such inadequacies." This language parallels that in Clean Air Act § 110(a)(2)(H)(ii), as it read before the 1990 Amendments (*i.e.*, requiring the Administrator to approve a SIP if she finds that, among other things, the SIP "provides for revision, after public hearing, of such plan … (ii) … whenever the Administrator finds … that the plan is substantially inadequate."). 42 U.S.C. § 7410(a)(2)(H)(ii) (1988).

[7] *See, e.g.*, *Virginia v. EPA*, 108 F.3d 1397, 1406 (D.C. Cir. 1997) ("Enacted more than a quarter of a century ago, section 110 has gone through many changes, but its basic structure has survived."), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997); *see also Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995) ("*NRDC v. Browner*")("In 1990, Congress amended the Act to revise the timing and content of the SIP requirements.").

in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State." 42 U.S.C. § 7410(k)(6). The provision states that "[s]uch determination and the basis thereof shall be provided to the State and public." *Id.*

Paragraph (k)(6) did not give EPA new authority but instead affirmed and clarified EPA's inherent authority to make corrections. Shortly before the 1990 Amendments' enactment, *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777 (3d Cir. 1987), addressed the scope of EPA's "correction" authority. Thus, as EPA observes, the "timing of the enactment" of § 110(k)(6) occurred "against the backdrop of the *Bridesburg* case."[8] 76 Fed. Reg. at 25,180/2-3.

In *Bridesburg*, citizens groups challenged EPA's removal from the Pennsylvania SIP of certain state and local odor control regulations that the Agency had approved as part of that SIP 13 years earlier. The groups had sued in federal district court under CAA § 304(a), seeking to enforce the odor regulations. While that suit was pending, EPA rescinded those regulations. EPA explained that its previous approval

[8] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982) (observing that legislators may be "assumed [to be] familiar with the judicial decisions construing" statutory language undergoing revision (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)).

of the regulations as part of the SIP had been "inadvertent," that it had lacked authority under the CAA to have "include[d] odor regulations in a SIP" to begin with,[9] and that its subsequent removal of those SIP provisions was "merely a correction of [that] EPA error made thirteen years before." 836 F.2d at 779-780.

The Third Circuit accepted the citizen groups' argument that EPA had acted improperly by not treating the change as a SIP revision under § 110. *Id.* at 784. "[A]ll parties agree," the court observed, that if "EPA has effected a 'revision' in the Pennsylvania SIP … within the meaning of" CAA §§ 110(a)(2) and (c)(1), then EPA had "done so improperly, for it should have proposed the revision to the state for the state to conduct a hearing." *Id.* In finding that EPA had acted improperly, the Third Circuit explained the CAA "does not provide any authority" to EPA for "modifying an existing SIP other than through the revision provisions." *Id.* at 785. "Faced with

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[9] EPA lacked authority under the Clean Air Act to include odor control regulations in a SIP, EPA correctly argued, because such regulations "bore 'no relation to attainment or maintenance'" of any NAAQS. *Bridesburg*, 836 F.2d at 782 (internal citation omitted). Under Clean Air Act § 110(d), as it read at the time *Bridesburg* was decided and before the 1990 Amendments, an "applicable implementation plan" was defined as "the … plan … which has been approved under subsection (a) [of § 110] … *and which* implements the *requirements of this section*." 42 U.S.C. § 7410(d) (1988) (emphasis added). At the time of the *Bridesburg* decision, EPA's position was that the odor control regulations did not "implement[]" any "requirement[]" of Clean Air Act § 110.

this problem," the court noted, EPA had sought to characterize the change as being merely "corrections" to the SIP and EPA's "original [SIP] approvals as 'inadvertent.'" *Id.* at 785-786.

The *Bridesburg* court was unpersuaded, observing that EPA had "approved [the odor] provisions some thirteen years ago," and then "twice approved modifications of the odor provisions without suggesting that odor regulations as a whole are unauthorized." *Id.* at 786. While implicitly acknowledging EPA's claim that it possessed "correction" authority, the court rejected EPA's suggestion that its prior (and repeated) approvals had in fact been "inadvertent." EPA could credibly advance an "inadvertence" claim, the court said, only if EPA's "policy at these times" had been that "odor regulations do not contribute to attainment of the NAAQS" and that EPA "would not approve them." *Id.* But the "record reveals that no such EPA policy existed" at the time of SIP approval. *Id.*

It is evident that, in adding paragraph (k)(6) to § 110 in 1990, Congress did no more than clarify that EPA did possess the limited "error correction" authority the Third Circuit in *Bridesburg* assumed EPA had under CAA § 110's allocation of authority. The legislative history confirms this, explaining that paragraph (k)(6) "explicitly authorizes EPA on its own motion … to correct any errors it may make in taking any action, such as issuing any designation or classification, or approving or disapproving any plan." H. Rep. No. 101-490, Pt. 1, at 220 (1990), *reprinted in* 2 Leg. Hist. at 3244. The reference to "*explicit[]* authori[ty]" under paragraph (k)(6) to

"correct … errors" reveals congressional recognition that, before the provision's enactment, EPA already had *implicit* authority to "correct" errors of the sort addressed by the new provision.

Subsequent to enactment of CAA § 110(k)(6), Representative Waxman, who chaired a key subcommittee that considered the 1990 Amendments and who has advocated *for broad federal authority* under the Act, described paragraph (k)(6) in terms that confirm that EPA's authority to alter state plans under that provision is narrowly circumscribed. Using language that mirrors the legislative history, Congressman Waxman explained his view that paragraph (k)(6) "explicitly authorizes EPA on its own motion to correct any errors it may make in taking any action, such as issuing any designation or classification, or approving or disapproving any plan." Waxman, *supra*, at 1924-1925.[10] Of critical importance, even Congressman Waxman understood that CAA § 110(k)(6) was "*not intended to offer a route for EPA to reevaluate its policy judgments*," but was "included to enable EPA to deal promptly" with situations in which "*clerical*" or "*technical*" corrections were needed. *Id.* (emphases added).

[10] This Court has cited Representative Waxman's analysis of the legislation when it has interpreted provisions enacted or revised in the 1990 Amendments. *See, e.g.*, *S. Coast Air Quality Mgmt. Dist.*, 472 F.3d at 886; *Natural Res. Def. Council, Inc. v. Reilly*, 983 F.2d 259, 272 n.22 (D.C. Cir. 1993).

At issue here are not clerical or technical corrections but a reversal of a policy judgment made years ago. Section 110(k)(6) provides *no* authority to effect new policy judgments. EPA's reliance on that provision here is unlawful.

3. EPA's Resort To CAA § 110(k)(6) To Change Its Prior Considered Decision On The Texas SIP Is Unlawful

In promulgating the final rule, EPA contended that, because CAA § 110(k)(6) "nowhere … define[s] what qualifies as 'error,'" the term "should be given its plain language, everyday meaning, which includes all unintentional, incorrect *or wrong* actions or mistakes." 76 Fed. Reg. at 25,180 (emphasis added). The magnitude of EPA's claim is extraordinary. EPA construes paragraph (k)(6) as authorizing it to revisit and reverse any past EPA action on a SIP submittal, no matter how long ago it was taken, and without regard to the fact that EPA believed its decision was correct at the time.

As explained below, EPA's interpretation of § 110(k)(6) contradicts Congress' unambiguously expressed intent and thus fails as a matter of *Chevron* step one. *See, e.g.*, *NRDC v. Browner*, 57 F.3d at 1125 (under the "framework set forth in *Chevron*," the court "must first exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue.")(internal quotation marks omitted). EPA's reading of § 110(k)(6) is fundamentally inconsistent with the CAA's basic structure as it pertains to EPA's review, approval, and disapproval of

SIPs. That structure, and the congressional intent that it reveals, must guide construction of the text of paragraph (k)(6).

a. EPA's Reading Of CAA § 110(k)(6) Is Contrary To The Structure Of CAA § 110

EPA's reliance on CAA § 110(k)(6) to transform EPA's full approval of Texas' decades-old SIP submission into a disapproval constitutes an assertion of revisionist power that contradicts the Act. EPA attempted here to circumvent the CAA's procedural requirements and protections for states with EPA-approved SIPs, thereby defeating Congress' intent in crafting a SIP revision process that respects states' role in implementing air-quality policy. The interpretation of § 110(k)(6) on which EPA relied here essentially gives it unlimited discretion to revisit and reverse earlier approvals of SIP submissions without the new public hearings and new state submittals that Congress required and intended. Such an approach is incompatible with CAA § 110's highly-circumscribed process for SIP submission, approval, and subsequent revisions.

Under CAA § 110(k)(1)(B), EPA is allowed a maximum of six months after it receives a SIP revision to determine whether the minimum criteria for SIP completeness have been satisfied. Beginning on the date it determines the SIP submission is complete (or, if earlier, the date that is six months after it receives the submission), EPA has 12 months to approve or disapprove the submission. 42 U.S.C. § 7410(k)(2). In making this determination, EPA has *no discretion* to disapprove a plan

that meets the CAA's minimum requirements, even if EPA disagrees with the state's choices reflected in the plan. 42 U.S.C. § 7410(k)(3); *see Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

To interpret § 110(k)(6) as allowing EPA to substitute *disapproval* of a SIP submission for EPA's *approval* of that same submission, and to do so years after EPA received the submission, would circumvent Congress' command that EPA make a binding decision to approve or disapprove a SIP within not more than 18 months. *See also Bridesburg*, 836 F.2d at 786 (holding that an action revising a SIP outside of the statutory period was not an error-correction action). As discussed herein, § 110's text and structure establish that, in exercising its powers under § 110(k)(6), EPA may only correct clerical errors or clarify prior actions. The contrary, expansive construction of this power for which EPA now argues contradicts § 110's comprehensive scheme governing initiation of SIP revisions and EPA action on those revisions.

Section 110(k)(5) allows for EPA to "call" for revisions to SIPs that have become "substantially inadequate … to … comply with any requirement of" the CAA. Consistent with the Act's default SIP process, EPA's § 110(k)(5) authority is expressly limited. First, EPA must find that the inadequacy in the SIP is "substantial[]." Second, EPA may only "subject the State to the requirements of [the CAA] to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate." 42 U.S.C. § 7410(k)(5). EPA's

call for SIP revisions may not, therefore, require a state to follow any regulatory requirements that did not apply when the state submitted its SIP for EPA's approval. New requirements must undergo § 110(a)'s SIP adoption and submittal process.

If the interpretation of § 110(k)(6) on which EPA relied here were correct, it would render § 110(k)(5) superfluous. Statutes must be construed so as not to render terms mere surplusage. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Rather than issue a SIP call under § 110(k)(5), EPA would simply be able to declare any earlier SIP approval "in error" and simultaneously disapprove the SIP, without finding it "substantially inadequate," without providing the state any opportunity to cure the inadequacy, and without any public hearings at the state level. Congress would not have simultaneously both (i) required procedural protections for states with "substantially inadequate" SIPs, and for those states' citizens, and (ii) authorized EPA to evade those procedural requirements by unilaterally transforming approval into disapproval on the grounds that the "approval" of a substantially inadequate SIP was "error." Congress cannot be thought to have enacted a paragraph (k)(5) requiring findings and procedures, and then render that provision unnecessary by enacting the immediately following subparagraph. Yet that is the position EPA asks this Court to endorse by affirming its actions here. That position is contrary to the statute and must be rejected.

b. EPA's Reading Of CAA § 110(k)(6) Contravenes Its Plain Text

As Texas explained at length in its comments on EPA's proposed rule, the interpretation of CAA § 110(k)(6) on which the Agency relied in support of its action here also contravenes the provision's text.[11] Paragraph (k)(6) contains four express limitations on EPA's authority. First, the action EPA is "correcting" must have been "in error." Second, EPA must act "in the same manner" as it did in its prior action. Third, EPA may only "revise"—not rescind or revoke or reverse—"such action" as it previously undertook. Finally, EPA may act only "as appropriate."

Applying traditional canons of statutory construction, which, *inter alia*, call for the structural analysis discussed above, these textual features of CAA § 110(k)(6) underscore that "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. CAA § 110(k)(6) provides no authority to reverse a SIP action based on policy changes occurring years after EPA approval.

i. EPA Misconstrued "Was In Error"

EPA argued that, because the "term 'error' in CAA section 110(k)(6) is not defined," it should be given its "ordinary, everyday meaning," and cited various

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[11] *See* EPA-HQ-OAR-2010-1033-0232 at 42-51 (Comments of Petitioner Texas), J.A. __-__.

dictionary definitions for the proposition that this "ordinary" meaning is a "broad" one. 76 Fed. Reg. at 25,198, J.A. __. But paragraph (k)(6) authorizes EPA to act only where its past action "*was* in error," not where that action "*is* in error." Congress' use of the past tense limits EPA's authority under paragraph (k)(6) to correcting actions that were erroneous at the time they were made, not to correcting actions that *years later* allegedly became deficient due to new regulatory requirements or agency interpretations.

The purported "error" at issue here—approval of a SIP submittal that indisputably was determined by EPA to be approvable at the time it was submitted—cannot be "error" within the meaning of § 110(k)(6). If it were, then EPA could give "error" so broad a meaning as to authorize any unilateral change in a SIP whenever EPA changed policy, depriving the statutory phrase "was in error" of any limiting effect and negating Congress' comprehensive scheme in CAA § 110(a), (c), and (k)(5) for SIP promulgation and revision. This result, in turn, would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

ii. EPA Misconstrued "In the Same Manner"

EPA may act under § 110(k)(6) only "in the same manner" as it did in promulgating its original SIP approval. This phrase reinforces the interpretation of

"error" as precluding use of paragraph (k)(6) to revisit past SIP approvals through application of new criteria.

Courts have consistently interpreted the term "in the same manner" to incorporate substantive, in addition to procedural, requirements. *See, e.g.*, *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 714 (7th Cir. 1998); *United States v. Township of Brighton*, 153 F.3d 307, 324 (6th Cir. 1998). Accordingly, when a SIP is subject to EPA's error-correction power—*e.g.*, because of an error in the SIP's supporting technical documentation—EPA must subject the corrected SIP to the same standards that governed original approval of the SIP.

Subsection (k)(6) further contemplates that EPA will *act* "in the same manner" that it did previously—*i.e.*, will take the same kind of action. If EPA is unable to act "in the same manner"—because the deficiency is substantive in nature and renders a past SIP submission inadequate—then EPA may not invoke paragraph (k)(6) but must instead call for SIP revision under paragraph (k)(5).

Here, EPA failed to act "in the same manner," both procedurally and substantively. EPA applied different standards to Texas' SIP today than those that were in place in 1992, and it made its decision on a different record than the one supporting its 1992 action. Any EPA action to correct an "approval" must result in a corrected "approval," not in a "disapproval."

iii. EPA Ignored The Significance Of "Revise Such Action"

Paragraph (k)(6) affords EPA no discretion to "revise" an approval by turning it into a disapproval but instead limits the Agency to revising the contents of "such action" that it previously undertook. In this regard, the phrase "such action" is not an empty semantic vessel but as a matter of grammar refers back to the only "action" mentioned previously in the provision: "the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification."

To "revise" is to "go or read over to correct errors or make improvements." *Webster's Third New International Dictionary* at 1944 (1971). EPA does not "revise" an action that involves "approval" of a SIP by taking the polar opposite action: *i.e.*, "disapproval" of the SIP. Rather, EPA must take the same *type* of action, a reading that is reinforced by the requirement that EPA act "in the same manner as the [original action]." EPA may not, under paragraph (k)(6), evaluate a prior SIP approval, rescind that approval, and replace it with a disapproval.

In other words, § 110(k)(6) authorizes not revisiting an action but correcting minor mistakes in an action. For example, where EPA may have approved a SIP that contained a typographical error—*e.g.*, inadvertent use of the wrong metric in describing an emission limit—EPA may under § 110(k)(6) "revise" its prior approval by correcting that error. And it may do this without further submission from the

state, because in such circumstances taking such error-correcting action does not contradict the CAA's principle of state primacy.

By contrast, here EPA used CAA § 110(k)(6) to change the nature of its decision by substituting a SIP disapproval for a long-ago SIP approval. This was not authorized by paragraph (k)(6).

iv. EPA Ignored "As Appropriate"

EPA may act under CAA § 110(k)(6) only "as appropriate." As does § 110(k)(5)'s "as necessary" language, this language serves to "keep EPA within bounds." *Virginia*, 108 F.3d at 1410. EPA acts "appropriate[ly]" in revising an earlier action under § 110(k)(6) only where it corrects an error that was committed in undertaking that earlier action, not where it seeks to effect a policy change.

B. EPA Has No Inherent Authority To Disapprove Retroactively Texas' Decades-Old PSD SIP Submission

EPA's alternative basis for its decisions, that it has inherent authority to disapprove retroactively Texas' decades-old PSD SIP submission, is fatally flawed. *See* 75 Fed. Reg. at 82,436/1, J.A. __; 76 Fed. Reg. at 25,200/1, J.A. __. EPA's decision is directly contrary to precedent from a sister court of appeals, which holds that EPA has no inherent authority to revise SIPs. *See Bridesburg*, 836 F.2d 777. And as described above, CAA § 110 establishes a comprehensive scheme for SIP submissions, approvals, and revisions. As such, the CAA displaces any inherent authority EPA might otherwise have had in this area.

"An agency cannot … exercise its inherent authority in a manner that is contrary to a statute … [and] in situations where a statute does expressly provide for reconsideration of decisions, the agency is obligated to follow the procedures for reconsideration set forth in the statute." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (citation omitted). The Third Circuit held that the CAA was just such a statute in *Bridesburg*, 836 F.2d at 787. There, the court rejected EPA's attempt to assert inherent "authority to correct an inadvertent mistake" relating to the content of an approved SIP. The *Bridesburg* court held that because CAA § 110 limits the time by which EPA must approve or disapprove a SIP, the statute also places "at least reasonable limits on the Administrator's authority to reconsider [a SIP action]." *Id.* at 786. Accordingly, the court held that "[a] change after thirteen years is a fortiori a revision" that must be accomplished through appropriate statutory means. *Id.*[12]

The Third Circuit's decision unquestionably is correct in light of the Act's detailed procedural scheme for the adoption, submission, approval or disapproval,

[12] Similarly, this Court held in *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008), that EPA lacked inherent authority to reconsider its decisions under the Clean Air Act where "Congress has provided a mechanism capable of rectifying mistaken actions." The Clean Air Act § 110 SIP revision process and the Clean Air Act § 110(k)(5) SIP Call procedure are just such mechanisms.

and revision of SIPs. *See* 42 U.S.C. § 7410(a), 7410(k); *see also supra* at 25-34. "In sum, the Clean Air Act is a comprehensive statute that attempts to enumerate all of the EPA's powers concerning SIPs," displacing any inherent authority EPA might otherwise have to disapprove Texas' submission outside the four corners of CAA § 110. *Bridesburg*, 836 F.2d at 787.[13] EPA's actions here to the contrary were unlawful, and this Court should vacate them.

C. The EPA Actions Under Review Are Erroneous Because Texas' SIP Submission Met All Relevant CAA Requirements

EPA's retroactive disapproval of Texas' decades-old PSD SIP submission was not only unlawful, it was simply incorrect—Texas' PSD SIP submission was not, in fact, deficient. EPA correctly determined in 1992 that the submission met all the relevant criteria established by the CAA and its regulations. Far from erroneous, EPA's decision approving Texas' SIP was legally required. *See* 42 U.S.C. § 7410(k)(3).

EPA based the here-challenged actions on two purported deficiencies in Texas' previously-approved PSD SIP submission: Texas' alleged failure to "address the application of PSD to pollutants newly subject to regulation, including non-NAAQS

[13] Any inherent authority EPA may have had at the time of *Bridesburg* was unambiguously extinguished by the enactment of Clean Air Act § 110(k)(6)'s limited error-correction provision in 1990.

pollutants," and Texas' alleged failure to "provide assurances that the state had adequate legal authority to apply PSD to such pollutants." 75 Fed. Reg. at 82,449/1-82,450/1, J.A. __; *see also* 76 Fed. Reg. at 25,198/2, J.A. __. But EPA's attempts to link these purported deficiencies to actual CAA and regulatory requirements are unavailing.

First, EPA attempts to tie these purported historic deficiencies to CAA §§ 110(a)(2)(J) and 161, which provide, respectively, that SIPs must "meet the applicable requirements of … part C" of Title I of the Act, 42 U.S.C. § 7410(a)(2)(J), and that SIPs "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" to which PSD applies. 42 U.S.C. § 7471 (emphasis added). *See* 76 Fed. Reg. at 25,198, J.A. __. But EPA never identified what PSD SIP "requirements" or "regulations," in place at the time Texas made and EPA approved its submittal, were violated. The reason EPA chose not to do so is apparent from the face of its Part 51 regulations: they require in relevant part only that SIP submissions demonstrate "authority" to "[p]revent construction, modification, or operation of a facility … which directly or indirectly results or may result in emissions of any air pollutant at any location *which will prevent the attainment or maintenance of a national standard*." 40 C.F.R. § 51.230(d) (emphasis added). The regulations do not require legal authority for applying the PSD program to pollutants, like GHGs, for which EPA has not promulgated a national standard that may be attained or

maintained. EPA may not disregard its regulations and require enhanced legal authority requirements retroactively for Texas' decades-old PSD SIP submission.

Second, EPA attempts to tie these purported deficiencies to CAA § 110(a)(2)(E)(i), which requires that SIPs "provide … necessary assurances that the State … will have adequate personnel, funding, and authority under State … law to carry out *such implementation plan*." *See, e.g.*, 76 Fed. Reg. at 25,179/1 (emphasis added). But EPA's real complaint is that Texas' plan somehow did not "do enough" to provide for *changing* its plan to accommodate the inclusion of new regulatory developments apart from the procedurally regular SIP revision process, not that Texas lacked assurances for *implementing* the plan itself. EPA's reading is, thus, contrary to this section's plain language.

Moreover, EPA's interpretation is nonsensical. Besides stating that "automatic updating" is not required, *see* 76 Fed. Reg. at 25,198/1, J.A. __, EPA made no attempt to specify what assurances it believes states were required to provide in their SIP submissions. Nor did EPA explain how a state could possibly provide assurances that, for example, its legislature will revise state laws to EPA's liking within a certain period of time. Such assurances would be impossible for many states' political bodies to make.

Beyond the statutory problems with EPA's argument, EPA's claim that it did not know the process by which Texas would revise its plan to include new pollutants is belied by the administrative record. Texas has in the past used the CAA § 110 SIP

revision process, including the state-level administrative processes of CAA § 110(a) and the submission procedures now contained in CAA § 110(k), to include new pollutants in its PSD program, and EPA was aware that the process could take well over a year even where there was no dispute between EPA and Texas about the necessity of the revision. *See* 52 Fed. Reg. 24,634/1 (July 1, 1987); 57 Fed. Reg. 28,093 (June 24, 1992).

EPA's suggestion that Texas' PSD SIP submission was insufficient because the State's recent communications with EPA evidence a lack of appropriate assurances to implement the PSD program for non-NAAQS pollutants is similarly specious. *See, e.g.*, 75 Fed. Reg. at 82,458, J.A. __, 76 Fed. Reg. at 25,196-25,197, J.A. __. Texas' communications were made during ongoing litigation where the petitioners made this argument; on the regulatory side, Texas' PSD SIP has always included the ability to apply controls to non-NAAQS pollutants and Texas-issued PSD permits include all appropriate limits for those substances. Thus, Texas' statements have nothing to do with a PSD SIP submission that Texas made over 20 years earlier.

Therefore, even assuming *arguendo* that EPA has statutory authority to disapprove retroactively Texas' decades-old PSD SIP submission, the Agency's actions were arbitrary and capricious and should be vacated.

D. In Promulgating Its Interim Final Rule, EPA Unlawfully Disregarded Notice-And-Comment Rulemaking Requirements Despite Knowing Of The Purported Deficiency In Texas' PSD SIP Submission For Over 20 Years

Despite knowing about the purported deficiencies in Texas' PSD SIP submission for over 20 years, EPA hid its plan to disapprove retroactively that submission until it rushed out an "interim" rule the very last day the *Federal Register* was published in 2010. The Court should not countenance EPA's decision to cut stakeholders out of the administrative process based on EPA's flimsy claims that doing so was in the public interest.

The APA and CAA § 307(d) require EPA to undertake notice-and-comment rulemaking before, respectively, taking final action approving or disapproving a SIP submission or imposing a FIP. *See* 5 U.S.C. § 553; 42 U.S.C. § 7607(d). The notice-and-comment rulemaking process is not a mere formality, but is "one of Congress's most effective and enduring solutions to the central dilemma [of] reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.'" *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946)). Moreover, "in the implementation of the Clean Air Act, where the heaviest responsibilities rest upon state governments and where federalism concerns are implicated, the usefulness and desirability of the APA's notice-and-comment

provision may be magnified." *New Jersey v. EPA*, 626 F.2d 1038, 1047 (D.C. Cir. 1980). Thus, "the various exceptions to the notice-and-comment provisions of [the APA] will be narrowly construed and only reluctantly countenanced," *id.* at 1045 (citing cases), and this Court has indicated that it "owe[s] EPA's findings no particular deference." *Mack Trucks, Inc. v. EPA*, No. 12-1077, slip op. at 10 (D.C. Cir. June 12, 2012).

EPA's two grounds for acting without notice and comment were that public participation "would be contrary to the public interest" because "no major stationary source emitting GHG at or above the levels set in the Tailoring Rule will be able to construct or modify," and that notice and comment was "impracticable" because it had "insufficient time to seek public comment before acting." 75 Fed. Reg. at 82,458, J.A. __. Both claims ignore the elephant in the room—that EPA had actually known the process for revising Texas' SIP to incorporate new pollutants for over 20 years. Its claims to the contrary are simply not consistent with the administrative record.

As described above, Texas revised its PSD SIP submission to include a newly-regulated pollutant, PM_{10}, through the SIP submission and approval process. *See supra* at 10-11. This was how EPA intended states with SIP-approved PSD programs to act. *See supra* at 11. It was also consistent with EPA's current actions vis-à-vis the Avenal facility, which are inconsistent with this action and the GHG SIP Call. *See id.* EPA may claim like Captain Renault that it is "shocked—shocked—to find out that

gambling is going on in here," but that is no excuse for disregarding procedural regularities when Texas insisted on being afforded its statutory procedural rights.

Even if the Court credits EPA's self-serving view of its original approval of Texas' SIP, EPA had five months to seek notice and comment on the Partial SIP Disapproval and FIP from the August 2, 2010 letter that EPA claimed "provides the … clearest articulation" of Texas' legal position. 75 Fed. Reg. at 82,447. In fact, EPA apparently knew that it would be disapproving retroactively Texas' PSD SIP submission no later than November 16, 2010—*six weeks before the Interim Final Rule*—when EPA made a formal submission to OMB explaining that it is "planning additional actions to ensure that GHG sources in Texas can be issued permits as of January 2, 2011." EPA-HQ-OAR-2010-0107-0127, J.A. __. Given that this statement was made in the context of a completed rule submission, EPA undoubtedly decided to act far earlier.

Instead of exposing its plans to public scrutiny, Assistant Administrator McCarthy represented to this Court only weeks earlier that a "FIP cannot be promulgated until December 2, 2011 at the earliest" for Texas. Att. 1 to McCarthy Decl., J.A. __. Then, EPA kept silent until the last day the *Federal Register* was published in 2010, when it published its interim final rule to disapprove retroactively Texas' decades-old PSD SIP submission.

"If the admonition to construe the good-cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where"

reconciliation of EPA's action and the statute is possible. *New Jersey v. EPA*, 626 F.2d at 1047. Under these circumstances, EPA could have conducted a notice-and-comment rulemaking during this period, and in fact could have provided a comment period consistent with the comment period it provided in the rulemaking that resulted in the Final Rule. *See* 75 Fed. Reg. at 82,366; *see also Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (approving the view of the Administrative Conference of the United States "that the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days"). EPA's failure to do so was not justified, much less necessary to protect the public interest, but instead unquestionably an "emergency" of EPA's own making that is not good cause for disregarding the APA's and the CAA's procedural requirements. *See, e.g.*, *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (good cause exception is inapplicable "when an alleged 'emergency' arises as the result of an agency's own delay").

Furthermore, EPA's public interest justifications that without the Interim Final Rule "sources would be subject to delays in construction or modification, causing economic harm to those sources and to others secondarily affected" and that the Interim Final Rule "serve[d] the necessary function of ensuring that a permitting

authority is available to issue permits for these sources, and thus that large sources in Texas do not face a *long delay* in their ability to construct or modify" are unsupported factually and legally.[14] First, as a matter of fact and discussed above, EPA had more than enough time to pursue notice-and-comment before January 2, 2011. Even assuming *arguendo* that it did not, notice-and-comment could have been accomplished in as little as 30 days and would not have resulted in the long delay EPA claimed would occur without the Interim Final Rule. *See Petry*, 737 F.2d at 1201. Second, circumventing public notice-and-comment left the record devoid of any factual support for EPA's speculations as to the timing of any potential projects or economic impacts. In fact, the record actually contradicts EPA's speculation because "EPA . . . did not issue any PSD permits in Texas pursuant to the Interim Final FIP." Respondent EPA's Motion to Dismiss at 13. Third, as matter of law, EPA's last minute action is founded in its claim that large sources would not be able to rely on a PSD permit issued by Texas. But, as discussed below, EPA's claim presupposes a result that must be considered in the context of individual PSD permits.

[14] 75 Fed. Reg. at 82,458 (emphasis added), J.A. __.

E. Petitioners' Challenges To The Interim Final Rule Are Not Moot Because They Present A Live Controversy

Petitioners' challenges to EPA's Interim Final Rule are not moot. EPA, through the Interim Final Rule, divested Texas of the authority to issue "complete" PSD permits for a four-month period that was not covered by the Final Rule. During that period, the TCEQ issued several PSD preconstruction permits, including the permit to Petitioner Chase Power. If the Court vacates the Interim Final Rule, these permits would contain all emission limits authorized by law at the time of their issuance and sources could begin construction under their terms. Moreover, the Petitioners' challenges to the Interim Final Rule are not moot because EPA's action is of the kind capable of repetition yet evading review. Texas and other states generally cannot promulgate automatically-updating SIPs, and this issue likely will recur any time that EPA promulgates new CAA requirements or reinterprets the Act. The Court should, therefore, decide the Petitioners' live challenges to the Interim Final Rule.

1. Petitioners Continue To Suffer Ongoing Harm As A Direct Consequence Of EPA's Interim Final Rule

A case only becomes moot "if interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1277 n.2 (D.C. Cir. 1998) (internal quotation marks omitted). Accordingly, "the burden of demonstrating mootness is a heavy one." *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004). Because the expiration of

the Interim Final Rule did not "completely and irrevocably eradicate[]" the effects caused by the Interim Final Rule, EPA cannot meet this heavy burden.

The Interim Final Rule harms Petitioner Chase Power and the other entities to which Texas issued PSD preconstruction permits during the Interim Final Rule's pendency. *See* Decl. of Michael Wilson, J.A. __. It was, after all, the Interim Final Rule, and not the Final Rule, that was in place on April 18, 2011, when Chase Power received from TCEQ the signed PSD permit for the LBEC. The question of whether EPA had lawfully disapproved TCEQ's role as the sole permitting authority, and hence whether TCEQ could issue a complete PSD permit under its PSD SIP, makes this controversy live. *See Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) ("[W]e agree that the question of the validity of the PSD permits issued under the noncompliant SIP … raise[s] sufficient current controversy to save this litigation from mootness …").

Texas also has an ongoing interest in the legal enforceability of the PSD permits that it issued during the Interim Final Rule's pendency. Abrogating the validity of state-issued environmental permits upsets "principles that preserve the integrity of States in our federal system" and the finality of actions taken under state law. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 502, 513 (2004) (Kennedy, J., dissenting). The result is "to confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect."

Id. at 518; *see also Alaska Dep't*, 540 U.S. at 491 (also recognizing states' interest); *New Motor Vehicle Bd.*, 434 U.S. at 1351 (Rehnquist J., in chambers) (when a state is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

EPA's arguments in favor of mootness are legally unfounded. First, EPA has claimed that the promulgation of a final rule to replace an interim rule during the pendency of a challenge to the interim rule always renders the case moot. *See* Respondent EPA's Motion to Dismiss for Mootness at 12. EPA's claim is false:

> [T]he provision of post-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue. In this case, the fact that EPA provided notice and comment procedures after the postponement does not cure the failure to provide them before the postponement.

Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 768 (3d Cir. 1982); *see also Am. Mar. Ass'n. v. United States*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985) (holding that a challenge to the interim rule was not mooted even though "aspects of th[e] litigation could also be resolved in a petition to review the final rule"); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 377 (D.C. Cir. 1983) (concluding that a final rule did not moot a claim based on an interim rule prescribed without notice and comment, where the final rule built on the rationale in the interim rule); *Natural Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 206, 206 n.14 (2d Cir. 2004) (same). To hold otherwise "would allow EPA to … [take] an action without

complying with the APA, and then establish[] a notice and comment procedure on the question of whether that action should be continued." *Natural Res. Def. Council*, 683 F.2d at 768. And this, the court feared, would essentially "allow agencies to circumvent … the APA." *Id.* Likewise, allowing EPA to make up for its lack of notice and comment in the Interim Final Rule with *post hoc* notice and comment on the Final Rule would effectively allow EPA to regulate without regard for the procedural requirements of the CAA and the APA.

Second, EPA has argued that the Interim Final Rule does not injure Texas or its citizens because any PSD permits that TCEQ issued during the Interim Final Rule's pendency would be held invalid because they would lack emission limitations for GHGs. *See* Respondent EPA's Motion to Dismiss for Mootness at 16-18. In fact, as noted above, EPA arbitrarily declared that the Interim Final Rule was in the public's interest to prevent a gap in PSD permitting authority. However, EPA's claims regarding individual permits are the subject of administrative proceedings outside this Court's jurisdiction and the CAA requires any suit to enjoin construction of these permitted sources or to enforce against them to be brought in the district court. *See* 42 U.S.C. §§ 7413(b), 7477. EPA presses this claim in this Court, however, because precedent elsewhere is unfavorable. EPA's position, for example, is directly contrary to the Seventh Circuit's decision in *United States v. Cinergy Corp.*, 623 F.3d 455, 458-459 (7th Cir. 2010), which holds that "the agency must live with" the content of an approved SIP and that the "Clean Air Act does not authorize the imposition of

sanctions for conduct that complies with a [SIP] that the EPA has approved." Moreover, EPA's own action in issuing the PSD permit for the Avenal facility after January 2, 2011 without GHG limits is inconsistent with its claim in this matter that the PSD permitting authority does not have discretion in the context of a particular PSD permit. *See supra* at 11. The Court should refuse EPA's attempt to have this controversy declared dead based on grounds that the CAA requires to be raised in the district court.[15]

In sum, Chase Power and Texas continue to suffer significant harm from EPA's Interim Final Rule. This Court can redress these injuries by finding EPA's Interim Final Rule invalid, thereby affirming Texas' authority to issue complete PSD permits in the period from January through April 2011, and, with it, Chase Power's permit. *Cf. Natural Res. Def. Council, Inc.*, 683 F.2d at 767 ("In this case, placing petitioner in the position it would have occupied had the APA been obeyed requires that this court order EPA to reinstate all of the amendments, effective March 30,

[15] Although the issue is not before the Court in this action, EPA's argument is also incorrect as a matter of law. *See* State Petitioners' Reply Brief, at 11-17, *UARG v. EPA*, No. 11-1037 (D.C. Cir.) (explaining that EPA's argument, if accepted, "precludes state plans from having any role in administering the [PSD] program" and is therefore inconsistent with numerous statutory provisions).

1981, and rule that the further postponement of the four amendments as of January 31, 1982, was ineffective.").

2. Alternatively, Petitioners' Claims Satisfy The Exception To Mootness For Actions Capable Of Repetition Yet Evading Review

Petitioners' challenges to EPA's Interim Final Rule present a live controversy that this Court can resolve. But even if the Court were to find that Petitioners' claims are now moot, the Court should reach the merits because EPA's interim rulemaking is an action "capable of repetition yet evading review." *Honeywell Int'l., Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576-77 (D.C. Cir. 2010). The issue of whether EPA may ignore the APA's and CAA's notice-and-comment requirements to displace an approved SIP is likely to recur, because Texas and other states cannot promulgate automatically-updating SIPs, but evades review because of the temporary nature of an interim final rule.

"[W]hen questions are likely to arise repeatedly, 'their consideration ought not to be … defeated[] by short term orders, capable of repetition, yet evading review.'" *Seatrain Int'l v. Fed. Mar. Comm'n*, 598 F.2d 289, 292 (D.C. Cir. 1979) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)). This doctrine applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Pharmachemie BV v. Barr Labs, Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002).

The Interim Final Rule was effective for too short a period to be litigated prior to its expiration. The Court has repeatedly recognized that, as a matter of law, "orders of less than two years' duration ordinarily evade review" for purposes of mootness analysis. *See, e.g.*, *McBryde v. Comm. to Review Circuit Council Conduct and Disability*, 264 F.3d 52, 55-56 (D.C. Cir. 2001). And, because EPA's regular revision of PSD requirements presents ample opportunity for repetition, Texas may reasonably expect that EPA will in the future act on its SIP while evading notice-and-comment requirements because Texas may not, under its law, promulgate an automatically-updating SIP, *see Trimmier v. Carlton*, 296 S.W. 1070 (Tex. 1927), and because of the uncertainty as to what other or additional "assurances" it may provide to EPA to prevent the Agency from arrogating Texas' regulatory authority, *see supra* at 43-44.

As a result, under EPA's new position that PSD requirements are self-executing and that any delay in implementing them triggers a lapse in permitting authority that is "good cause" to evade notice-and-comment requirements, Texas will be ensnared by EPA's implementation of new PSD requirements in every instance. This Court has held that an agency's continuity of the policy underlying a challenged action, which may be evidenced by its defense of the action, renders it "more likely" that the action will recur. *See, e.g.*, *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) (no dismissal for mootness where suspension order, since reversed, established "clear policy" that might again be applied against plaintiff). *Accord Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) ("When a complaint identifies

official conduct as wrongful and the legality of that conduct is vigorously asserted … , the complainant may justifiably project repetition"). Here, EPA has established a policy—disregarding notice-and-comment requirements where a SIP does not address newly-regulated pollutants—and now aggressively defends it by arguing that it is consistent with EPA's long-standing practice.

Accordingly, there is every reason to believe that EPA's wrongful conduct will recur, unless checked by judicial review.

CONCLUSION

For the foregoing reasons, the Court should vacate the Interim Final Rule and Final Rule.

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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 Petitioners' Brief contains 13,858 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limited set by the Court. I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Dated: June 18, 2012

/s/ Mark W. DeLaquil
Mark W. DeLaquil

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioners' Brief and Addendum was filed electronically with the Court by using the CM/ECF system on the 18th day of June 2012. Participants in the case who are registered CM/ECF users will be served through the CM/ECF system. Two (2) copies of the foregoing Petitioners' Brief and Addendum will also be served on all parties by U.S. mail, first-class, postage-prepaid.

/s/ Mark W. DeLaquil
Mark W. DeLaquil

ADDENDUM

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

FEDERAL STATUTES

I. 5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

II. 42 U.S.C. § 7401

(a) Findings
The Congress finds--

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

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

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

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

(b) Declaration
The purposes of this subchapter are--

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

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

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

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

(c) Pollution prevention

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

III. 42 U.S.C. § 7410

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

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

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

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

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

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

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

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

(D) contain adequate provisions--

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

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

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

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

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

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

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

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

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

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

(H) provide for revision of such plan--

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

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

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

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

(K) provide for--

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

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

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

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

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

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

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

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or

persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

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

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

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

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

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

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

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which

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

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

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

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

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

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

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

(c) Preparation and publication by Administrator of proposed regulations setting

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

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

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

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

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

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

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

(D) For purposes of this paragraph--

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

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

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

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

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

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

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

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

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

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards, and such revised plan shall, for the purpose of implementing such comprehensive public transportation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and which the Administrator has not approved or disapproved under this section within 12 months of submission

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

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

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

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

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

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

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action

modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

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

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

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

(B) Completeness finding

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

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A),

the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

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

(3) Full and partial approval and disapproval

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

(4) Conditional approval

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

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any

finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

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

(l) Plan revisions

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

(m) Sanctions

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

applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

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

(2) Attainment dates

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

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

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

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

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

Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

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

(p) Reports

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

IV. 42 U.S.C. § 7413

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)--

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by--

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may--

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer

than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may--

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies; [FN1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or

subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter (relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such

person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly--

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter [FN2] shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death

or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury--

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant; except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent. The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person--

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made. The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index, as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any

court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order--

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator, the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollution control agency has

notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term "operator", as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4)

of this section, the term "a person" shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term "a person" shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

V. 42 U.S.C. § 7471

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.

VI. 42 U.S.C. § 7607

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [FN1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [FN2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

> **(1)** A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,, [FN2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title,

any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [FN2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if

any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [FN3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine. The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph

on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and

related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [FN4] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

FEDERAL REGULATIONS

VII. 1 C.F.R. § 51.11

(a) An agency that seeks approval for a change to a publication that is approved for incorporation by reference must--

(1) Publish notice of the change in the Federal Register and amend the Code of Federal Regulations;

(2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and

(3) Notify the Director of the Federal Register in writing that the change is being made.

(b) If a regulation containing an incorporation by reference fails to become effective or is removed from the Code of Federal Regulations, the agency must notify the Director of the Federal Register in writing of that fact within 5 working days of the occurrence.

VIII. 40 C.F.R. § 51.166

(a)(1) Plan requirements. In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

(6) Amendments.

(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of

the Act, shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the Federal Register. With regard to a revision to an implementation plan by reason of an amendment to paragraph (c) of this section to add maximum allowable increases or other measures, the State shall submit such plan revision to the Administrator for approval within 21 months after such amendment is published in the Federal Register.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(7) Applicability. Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

(iv) Each plan shall use the specific provisions of paragraphs (a)(7)(iv)(a) through (f) of this section. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(7)(iv)(a) through (f) of this section.

(a) Except as otherwise provided in paragraphs (a)(7)(v) and (vi) of this section, and consistent with the definition of major modification contained

in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(40) of this section) and the baseline actual emissions (as defined in paragraphs (b)(47)(i) and (ii) of this section) for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(47)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(7)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) The plan shall require that for any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

(vi) [Reserved]

IX. 40 C.F.R. § 51.230

Each plan must show that the State has legal authority to carry out the plan, including authority to:

(a) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.

(b) Enforce applicable laws, regulations, and standards, and seek injunctive relief.

(c) Abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons, i.e., authority comparable to that available to the Administrator under section 305 of the Act.

(d) Prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard.

(e) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources.

(f) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations.

STATE REGULATIONS

X. 30 Tex Admin. Code § 116.12

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in § 101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) 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 actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) De minimis threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A)-(D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), § 111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, § 112 or added to the list under FCAA, § 112(b)(2), which have not been delisted under FCAA, § 112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, § 108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, § 7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) § 51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR § 51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR § 51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations § 51.166(b)(1) and (23), respectively.

Figure: 30 TAC §116.12(18)(A)

TABLE I
MAJOR SOURCE/MAJOR MODIFICATION
EMISSION THRESHOLDS

POLLUTANT designation[1]	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_X)[3]	100	40	1.10 to 1
I marginal	100	40	1.15 to 1
II moderate	50	25	1.20 to 1
III serious	25	25	1.30 to 1
IV severe			
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations as defined in §101.1(70) of this title.

[2] The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_X and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

[3] VOC and NO_X are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

[4] The offset ratio is specified to be greater than 1.00 to 1.
VOC = volatile organic compounds
NO_X = oxides of nitrogen
NO_2 = nitrogen dioxide
CO = carbon monoxide
SO_2 = sulfur dioxide
PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the NAAQS for nitrogen dioxide (NO_2).

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, § 2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, § 7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is

creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, § 7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in § 116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must

not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under § 116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations § 51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations § 60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§ 7401 et seq.

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.