ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2011

No. 10-5280

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

SIERRA CLUB and VALLEY WATCH, INC.,
Appellants,

v.

LISA PEREZ JACKSON, in her official capacity as Administrator,
United States Environmental Protection Agency,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

IGNACIA S. MORENO
Assistant Attorney General

KATHERINE J. BARTON
JOHN E. ARBAB
Attorneys, Appellate Section
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-4046

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici.* Sierra Club and Valley Watch, Inc., were the plaintiffs in the district court. Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency, was the defendant in the district court. There were no amici in the district court. Sierra Club and Valley Watch, Inc. are the appellants in this Court. Lisa P. Jackson is the appellee in this Court. There are no amici in this Court.

B. *Rulings.* The decision under review is *Sierra Club v. Jackson*, 724 F. Supp. 2d 33 (D.D.C. 2010), issued by District Judge Ellen Segal Huvelle. App. 21-35.

C. *Related Cases.* The case on review was not previously before this Court. Counsel is not aware of any related case currently pending in this Court or in any other court.

s/ John E. Arbab
counsel for appellee Lisa P. Jackson

February 9, 2011

TABLE OF CONTENTS

Page

Page

TABLE OF CONTENTS

CASES: **Page**

* Authorities upon which we chiefly rely are marked with asterisks.

CASES (continued): **Page**

CASES (continued): **Page**

CASES (continued): **Page**

CASES (continued): **Page**

STATUTES, RULES AND REGULATIONS:

STATUTES, RULES AND REGULATIONS (continued): **Page**

Clean Air Act

STATUTES, RULES AND REGULATIONS (continued): **Page**

MISCELLANEOUS: **Page**

GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
EKPC	East Kentucky Power Cooperative
EPA	U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NOx	Nitrogen Oxides
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan

STATEMENT OF JURISDICTION

A. *Subject matter jurisdiction in the district court.* In this citizen suit against the Administrator of the U.S. Environmental Protection Agency ("EPA"), Sierra Club and Valley Watch, Inc. (collectively "Sierra Club") invoked the district court's jurisdiction under Section 304(a)(2) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a)(2), and 28 U.S.C. § 1331. App. 7 (¶ 2). However, the district court correctly concluded that it lacked subject matter jurisdiction over Sierra Club's complaint. *See* Argument, Section II, *infra*.

B. *Finality and jurisdiction of this Court.* The district court issued a final order granting EPA's motion to dismiss Sierra Club's complaint. App. 36. This Court's jurisdiction rests on 28 U.S.C. § 1291.

C. *Timeliness of appeal.* The final order of the district court was entered on July 20, 2010. App. 36. Sierra Club's notice of appeal was filed on August 27, 2010 (App. 5), within the 60-day period provided by Fed. R. App. P. 4(a)(1)(B).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE ISSUES

Section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), authorizes citizens to bring an action in district court against the EPA Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." Sierra Club's complaint seeks a court order, pursuant to the jurisdiction conferred by Section 304(a)(2), compelling EPA

to take enforcement action under CAA Section 167, 42 U.S.C. § 7477, to prevent the construction of three proposed facilities in the State of Kentucky. The complaint alleges that the EPA Administrator has a nondiscretionary duty to prevent the proposed construction of these facilities because Kentucky's State Implementation Plan or "SIP" is inconsistent with two requirements of the CAA's Prevention of Significant Deterioration program.

The questions presented are:

I. Whether Sierra Club's nondiscretionary duty claim based on the Kentucky SIP's alleged inconsistency with EPA's National Ambient Air Quality Standards for ozone is moot where, after the notice of appeal was filed, EPA published a final rule approving a revision to the SIP that cured the alleged deficiency.

II. To the extent that this case has not become moot on appeal, whether the district court properly dismissed the complaint on the ground that Section 167, 42 U.S.C. § 7477, confers discretionary enforcement authority on the EPA Administrator.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Sierra Club's complaint seeks an order from the district court requiring the EPA Administrator to take immediate measures necessary to prevent the construction of three proposed facilities in Kentucky, known as "Smith," "NewGas," and "Cash Creek." App. 19-20.

The complaint contains three virtually identical claims, one for each "plant." App. 17-19. The complaint alleges that each plant is "a proposed major emitting facility in an ozone attainment area with a [SIP] which does not meet the requirements of the [CAA]," and that the EPA Administrator "has not taken actions to prevent construction" of the proposed plants. App. 17 (¶¶ 45, 47); App. 18 (¶¶ 51, 53); App. 19 (¶¶ 58, 60).

More particularly, the complaint alleges that Kentucky's SIP is inconsistent with the CAA's Prevention of Significant Deterioration ("PSD") program in two respects: (1) the SIP does not require a proposed major source of nitrogen oxides (NOx) in an attainment area to demonstrate that it will not cause or contribute to a violation of EPA's National Ambient Air Quality Standards ("NAAQS") for ozone; and (2) Kentucky has erroneously interpreted its SIP as not requiring public notice in "Class I" areas[1/] concerning how a proposed facility will affect site-specific air quality standards. App. 16 (¶ 40); *see* App. 13 (¶ 25); App. 14-15 (¶¶ 33-34). The complaint further alleges that the Administrator's "failure to prevent construction" of the plants "constitutes a failure to perform an act or duty that is not discretionary with [the Administrator]" under Section 304(a)(2), 42 U.S.C. § 7604(a)(2). App. 17 (¶ 46); App. 18 (¶ 52); App. 19 (¶ 59).

The complaint alleges that the EPA Administrator has a mandatory duty to take enforcement action to prevent construction of the three facilities by virtue of

---

[1/] A "Class I" area is a national park or similar area. 42 U.S.C. § 7472(a).

Section 167, 42 U.S.C. § 7477. App. 17 (¶ 43); App. 18 (¶ 49); App. 19 (¶ 55). Section 167 is titled "Enforcement" and provides:

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

The complaint does not allege that construction on any of the facilities has begun.

For relief, the complaint requests that the court (a) declare that the EPA Administrator's failure to prevent construction of Smith, NewGas, and Cash Creek constitutes a failure to perform her nondiscretionary duties under Section 304(a)(2), and (b) order the Administrator to immediately take measures as necessary to prevent construction of the plants until such time as Kentucky's SIP meets the requirements of the CAA. App. 19-20.

EPA moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the ground that Section 167 does not impose a nondiscretionary duty to take enforcement action on the EPA Administrator. App. 3 (R. 9).[2/] The district court agreed with EPA, holding that Section 167 affords the EPA Administrator discretion to decline to initiate enforcement action. App. 21-35. Sierra Club's appeal followed.

[2/] "R." refers to the number of the pleading on the district court's docket sheet.

B. Statutory and Regulatory Background

As discussed above, Sierra Club's mandatory duty claims against the EPA Administrator are based on (1) an alleged inconsistency between Kentucky's SIP and the requirements of the CAA's PSD program in regard to EPA's NAAQS for ozone, and (2) Kentucky's allegedly erroneous interpretation of its SIP in regard to public notice in Class I areas. In this section, we briefly discuss the background statutory and regulatory provisions relevant to these allegations.

1. *National Ambient Air Quality Standards*. The CAA establishes a comprehensive program for controlling and improving the Nation's air quality through a cooperative system of shared federal and state responsibility. *See General Motors Corp. v. United States*, 496 U.S. 530, 532-33 (1990). Under the CAA, EPA promulgates National Ambient Air Quality Standards or "NAAQS," which establish nationally allowable concentrations for common or "criteria" air pollutants. 42 U.S.C. §§ 7408(a), 7409(a)-(b). *See General Motors Corp.*, 496 U.S. at 533; *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990).

Ozone is one of the criteria air pollutants for which EPA has promulgated a NAAQS. The ozone NAAQS relevant to this case was promulgated by EPA in 1997. 40 C.F.R. § 50.10.[3/] The CAA requires each state to adopt and submit to EPA for approval a SIP that provides for the implementation, maintenance, and enforcement

---

[3/] The cited regulation is EPA's 1997 8-hour ozone NAAQS. Although EPA promulgated a new ozone NAAQS in 2008 (*see* 40 C.F.R. § 50.15), Sierra Club's complaint is based only on the 1997 ozone NAAQS. App. 12 (¶ 18), App. 13 (¶¶ 21-23). *See also* Br. 9 n.2 (disavowing reliance on 2008 ozone NAAQS).

of the NAAQS within that state. 42 U.S.C. § 7410(a)(1), (k). *See General Motors Corp.*, 496 U.S. at 533; *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975). In 2005, EPA amended its regulations to include NOx as a precursor to ozone. *See* 70 Fed. Reg. 71,679 (Nov. 29, 2005) (col. 2).

2. *Prevention of Significant Deterioration.* The CAA's PSD program, 42 U.S.C. §§ 7470-7492, is "aimed at giving added protection to air quality in certain parts of the country 'notwithstanding attainment and maintenance of' the NAAQS." *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (quoting 42 U.S.C. § 7470(1)). *See Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 470-71 (2004) ("*ADEC*"). Accordingly, a SIP must "contain emission limitations * * * to prevent significant deterioration of air quality" in "attainment" areas, *i.e.*, areas that meet at least one NAAQS. 42 U.S.C. §§ 7407(d)(1)(A)(ii), 7471. *See Catawba County, N.C. v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009).

Under the CAA's PSD program, no "major emitting facility" can be constructed without a permit. 42 U.S.C. § 7475(a)(1). *See Environmental Defense*, 549 U.S. at 568. The "permitting authority" is generally a state agency in a state whose PSD program has been approved by EPA. 42 U.S.C. § 7479(3); *see ADEC*, 540 U.S. at 469-71. A PSD permit will not be issued unless the proposed facility meets specified requirements (*inter alia*) for the protection of air quality in "Class I areas," *i.e.*, national parks and similar areas. 42 U.S.C. §§ 7472(a), 7475(a)(5). The classification of an area determines the corresponding maximum allowable increases, or "increment," of air quality deterioration. *American Corn Growers Ass'n v. EPA*,

291 F.3d 1, 11 (D.C. Cir. 2002) (per curiam).[4/] A PSD permit also will not be issued unless a public hearing has been held with opportunity for interested persons to make their views known about "the air quality impact of such source." 42 U.S.C. § 7475(a)(2). *See CleanCoalition v. TXU Power*, 536 F.3d 469, 472-73 (5th Cir. 2008).[5/]

In 1989, EPA approved revisions to Kentucky's SIP, which included a PSD program. *See* 54 Fed. Reg. 36,307-36,311 (Sept. 1, 1989). In 2010, EPA approved a revision to Kentucky's SIP that incorporated NOx as an ozone precursor for purposes of the PSD program. *See* 75 Fed. Reg. 55,988-55,991 (Sept. 15, 2010).

3. Citizen suits under the CAA. Section 304, 42 U.S.C. § 7604, is the CAA's citizen suit provision. This provision specifies the circumstances under which private citizens may commence civil actions for injunctive relief and penalties directly against persons who are in violation of the CAA, or alleged to be in violation of the statute. *Id.* § 7604(a)(1), (3). Section 304(a)(2) authorizes citizen suits against the EPA Administrator under the following circumstance:

[4/] All PSD areas are categorized as Class I, II, or III. Only a relatively small "increment" is permissible in Class I areas. *American Corn Growers*, 291 F.3d at 11.

[5/] Sierra Club also refers (Br. 6) to "Title V" permits. Title V of the CAA, 42 U.S.C. §§ 7661-7661f, requires facilities that are major sources of pollutants to obtain an operating permit from an EPA-approved state permitting program. *See MacClarence v. U.S. EPA*, 596 F.3d 1123, 1125-1126 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1260-61 (11th Cir. 2008).

> [A]ny person may commence a civil action on his own behalf –
>
> * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator[.]

42 U.S.C. § 7604(a)(2). The citizen suit provision further states: "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, * * * to order the Administrator to perform such act or duty[.]" *Id.* § 7604(a).

C. Statement of Facts

Because the district court resolved the claims against EPA on a motion to dismiss, the court assumed that the factual allegations in Sierra Club's complaint are true. *See* App. 23; *Jerome Stevens Pharmaceuticals, Inc. v. FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005). Filed on November 4, 2009, the complaint alleges that Smith, NewGas, and Cash Creek are proposed plants that would be located in Kentucky counties designated as areas that have attained EPA's 1997 ozone NAAQS. App. 6 (¶ 1); App. 13 (¶¶ 21-23). The complaint alleges that the three plants will emit large quantities of NOx, which "in combination with other pollutants and sunlight, create ground-level ozone." App. 10 (¶ 10). The complaint alleges that Kentucky has proposed "new regulations that would change state rules to require NOx as an ozone precursor," but that "these changes have not yet been incorporated into the Kentucky SIP." App. 14 (¶ 29); *see* App. 8 (¶¶ 4-5).

The complaint also alleges that Kentucky's Division for Air Quality "did not publish public notice of increment consumption for Smith, NewGas, and Cash Creek

in nearby Class I areas." App. 15 (¶ 36). The complaint alleges that the sponsor of the Cash Creek plant "received a final air permit from Kentucky Division for Air Quality authorizing construction in January 2008," and that subsequently, "[t]he applicant submitted a significant revision permit application," which was deemed "administratively complete" on November 25, 2008. App. 16-17 (¶ 41). Finally, the complaint alleges that the EPA Administrator "has not taken actions to prevent construction" of the three proposed plants. App. 17 (¶ 45); App. 18 (¶ 51); App. 19 (¶ 58). The complaint does not allege that construction has begun on any of the three plants.

D. The District Court's Decision

The district court granted EPA's motion to dismiss, holding that Section 167, 42 U.S.C. § 7477, vests the EPA Administrator with unreviewable discretion over whether to initiate enforcement action. App. 21-35. The court explained that, under *Heckler v. Chaney*, 470 U.S. 821 (1985), there is a "presumption that statutory enforcement provisions are discretionary." App. 26. The court rejected Sierra Club's contention that Section 167 operates to rebut that presumption. *Id.* For Section 167 to have that effect, the court concluded, the statute must provide a "meaningful standard" by which a court could assess a claim that the Administrator had a nondiscretionary duty to take enforcement action. The court concluded that Section 167 contains no such standard. App. 27-31. In addition, the court concluded that Section 167 contains a "condition precedent," which also demonstrates that the provision confers discretionary enforcement authority on the Administrator. That

condition precedent is a finding by EPA that the proposed facility falls in one of the two prohibited categories stated in the text of Section 167. The court found that EPA has not made that administrative finding here. App. 31-34. The court therefore dismissed the complaint for lack of subject matter jurisdiction. App. 35.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of a complaint for lack of subject matter jurisdiction. *Jerome Stevens Pharmaceuticals*, 402 F.3d at 1250. The Court assumes the truth of the allegations in the complaint. *Id.*

SUMMARY OF ARGUMENT

I. This appeal is partially moot. Sierra Club's nondiscretionary duty claim based on the Kentucky SIP's failure to include NOx as an ozone precursor has become moot on appeal due to EPA's September 15, 2010 final rule, which cured that deficiency. The Court therefore lacks jurisdiction over that claim. Moreover, any claim related to the Smith plant is moot because the state agency has now removed its prior authorization for construction of that plant.

II. To the extent that this case has not become moot on appeal, the district court correctly concluded that it lacked subject matter jurisdiction over Sierra Club's complaint. Sierra Club's claims do not clearly fall within the limited waiver of sovereign immunity provided by the CAA for nondiscretionary duty suits against the EPA Administrator. That is because Section 167 does not place a nondiscretionary duty on the Administrator to take enforcement action.

The district court correctly rejected Sierra Club's argument that the term "shall" in Section 167 evinces the requisite clear and unambiguous congressional intent to impose on EPA a mandatory duty to take enforcement action to prevent construction of every major emitting facility that is subject to Section 167. The Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), held that there is a presumption that an agency's enforcement decisions are unreviewable, discretionary actions. Sierra Club has not rebutted this presumption. The language of Section 167 and the structure of the CAA reveal that Congress intended for the Administrator's prosecutorial decisions to be discretionary. The legislative history confirms that Congress intended the Administrator to retain prosecutorial discretion under Section 167. Moreover, Sierra Club's interpretation of Section 167 would yield untenable results and would enmesh district courts in resolving issues that are not appropriate for determination in the context of nondiscretionary duty actions, which are supposed to be limited to instances of clear-cut defaults by the Administrator. The district court not only correctly interpreted the statute, it also reached the most sensible result. The judgment should be affirmed.

ARGUMENT

I. SIERRA CLUB'S NONDISCRETIONARY DUTY CLAIMS HAVE BECOME MOOT IN PART ON APPEAL.

A. A final rule published by EPA on September 15, 2010 has rendered Sierra Club's appeal moot in part.

As discussed *supra* at 3-4, Sierra Club's complaint alleges, in part, that the EPA Administrator has a nondiscretionary duty to prevent the construction of the three proposed plants at issue because Kentucky's SIP does not require major sources of NOx emissions to demonstrate that they will not cause or contribute to a violation of EPA's 1997 ozone NAAQS. App. 16 (¶ 40). The factual linchpin of that claim is an allegation that "Kentucky's SIP has never been amended to incorporate NOx as a precursor to ozone under the PSD program." App. 13 (¶ 25). Due to subsequent regulatory developments, this mandatory duty claim has become moot on appeal.

Sierra Club's complaint alleges that, at the time the complaint was filed in November 2009, Kentucky had proposed "new regulations that would change state rules to require NOx as an ozone precursor," but that "these changes have not yet been incorporated into the Kentucky SIP." App. 14 (¶ 29); *see* App. 8 (¶¶ 4-5). These allegations were demonstrably no longer true beginning shortly after Sierra Club filed its notice of appeal on August 26, 2010. As noted *supra* at 7, on September 15, 2010, EPA published a final rule that approved a revision to Kentucky's SIP. *See* 75 Fed. Reg. 55,988-55,991 (Sept. 15, 2010). In that rule, which became effective October 15, 2010, EPA took "final action to approve Kentucky's SIP revision * * *, *which incorporates NOx as an ozone precursor for*

*PSD * * * purposes into the Kentucky SIP*." *Id.* at 55,990 (col. 2) (emphasis added). EPA stated that it "is approving these revisions into the Kentucky SIP because they are consistent with the CAA and its implementing regulations." *Id.*

In short, EPA's September 15, 2010 final rule cured the alleged deficiency in Kentucky's SIP: after the final rule was promulgated, it was no longer true – as Sierra Club's complaint alleges – that the SIP "has never been amended to incorporate NOx as a precursor to ozone under the PSD program." App. 13 (¶ 25). In fact, EPA's final rule amended the SIP and fixed that specific problem.

Given EPA's September 15, 2010 final rule, Sierra Club's mandatory duty claim based on the Kentucky SIP's alleged failure to incorporate NOx as a precursor to ozone has become moot on appeal. As this Court concluded in analogous circumstances, "substantial changes" brought about by new agency rules that are promulgated while a case is on appeal will moot particular claims where "[a]ny opinion regarding the former rules would be merely advisory." *National Mining Ass'n v. U.S. Dep't of the Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001).

That is the situation here. A decision by this Court addressing whether the EPA Administrator has a nondiscretionary duty to take enforcement action to prevent the construction of the three proposed plants at issue, on the ground that Kentucky's SIP does not incorporate NOx as a precursor to ozone for PSD purposes, would be a "merely advisory" opinion: by virtue of EPA's September 15, 2010 final rule, Kentucky's SIP now *does* incorporate NOx as a precursor to ozone. Accordingly, it would be wholly academic for a court to decide whether the Administrator would

have had a mandatory duty to take enforcement action to prevent construction of the proposed plants on the hypothetical assumption that Kentucky's SIP does not include NOx as an ozone precursor for PSD purposes.

The situation here is much like *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998), where petitioners challenged EPA's decision (*inter alia*) to permit California to enforce its own automobile on-board emissions diagnostic device regulations. *Id.* at 452. California subsequently revised its regulations in certain respects. *Id.* at 458. This Court held that, in light of those revisions, petitioners' challenges "based on the assumption that California's regulations would require access to an off-site computer for maintenance beginning with 1999 model-year cars are moot." *Id.*

The Court explained that "[t]he elimination of that requirement constitutes 'a fundamental change in the state of affairs' that has warranted resort by the court to the mootness doctrine in similar circumstances." *Id.* at 459 (quoting *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1104 n.18 (D.C. Cir. 1979)). So too here: EPA's September 15, 2010 final rule has rendered moot Sierra Club's mandatory duty claim based on the allegation that Kentucky's SIP does not incorporate NOx as a precursor to ozone for PSD purposes, because the final rule is a "fundamental change in the state of affairs" that has eliminated the factual assumption underlying that claim.

Moreover, EPA's final rule is a mooting event on appeal because the rule makes it impossible for a court to grant Sierra Club "any effectual relief" on this

claim. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Presently, Kentucky's SIP is in compliance with the CAA's requirement that NOx is to be treated as a precursor to ozone under the PSD program. Accordingly, even if this Court determined that Section 167 imposed a mandatory duty and remanded the case, the district court could not now order the Administrator to take enforcement action as necessary to prevent the construction of the three plants on the ground that they are to be built in an attainment area that is covered by a SIP that does not treat NOx as an ozone precursor; the SIP now *complies* with the CAA in that respect.

It is also significant that each of the claims in Sierra Club's complaint rests on the theory that EPA is in violation of "its non-discretionary duty to prevent construction of a proposed major emitting facility *in an attainment area with a [SIP] that does not meet the requirements of the [CAA]*." App. 17 (¶ 47), App. 18 (¶ 53), App. 19 (¶ 60) (emphasis added). As framed by the complaint, Sierra Club does *not* allege or seek relief on the theory that EPA has a nondiscretionary duty to prevent construction of the proposed plants due to a defect in a permit issued by Kentucky to the sponsor of a plant under the prior SIP. Nor is such an argument made in Sierra Club's opening brief.

However, in its reply brief, Sierra Club may resist mootness by referring to PSD permits issued by Kentucky for the Cash Creek and NewGas plants under the prior SIP. *See* App. 15 (¶ 35); Br. 9. The suggestion that such a defective-permit claim now prevents a mootness finding would be contrary to Sierra Club's specific

representation in its opening brief that its complaint did *not* allege a mandatory duty claim based on "a defective PSD permit." Br. 21.

Moreover, as a matter of law, such a "defective PSD permit" claim could not be injected into this case at this stage, and therefore cannot serve as a basis for judicial relief. In its notice of intent to sue letters served on the Administrator prior to filing its complaint, Sierra Club did not assert that a defective permit triggered a mandatory duty on the Administrator to prevent the construction of the plants at issue. *See* App. 7-8 (¶¶ 4-5). Rather, Sierra Club's notice letters advised the Administrator that Sierra Club intended to sue her "for failure to prevent construction of three major emitting facilities in an attainment area with a SIP that does not meet [CAA] requirements." App. 8 (¶ 5). The CAA citizen suit provision specifies that "[n]o action may be commenced" in federal court absent proper notice of a claim. 42 U.S.C. § 7604(b). As the Supreme Court held in an identical statutory context, "the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA [Resource Conservation and Recovery Act] citizen suit provision." *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989); *see id.* at 23 (explaining that RCRA citizen suit provision "was modeled upon § 304" of the CAA). Accordingly, a court could not now grant Sierra Club relief on a "defective PSD permit" claim in this case.

For these reasons, this Court should dismiss Sierra Club's appeal as moot in part; that is, as moot to the extent that the complaint asserts a mandatory duty claim based on the assumption that Kentucky's SIP does not incorporate NOx as a precursor

to ozone. *See American Bankers Ass'n v. National Credit Union Administration*, 271 F.3d 262, 274 (D.C. Cir. 2001) (dismissing particular challenge as moot due to agency's deletion of contested provision and affirming district court's decision in all other respects); *cf. Motor & Equipment Mfrs. Ass'n*, 142 F.3d at 467 (dismissing "so much of the petitions as are moot" and denying other portions of the petitions on the merits).[6/]

B. Kentucky's removal of authorization for construction of the Smith plant has rendered Sierra Club's appeal moot in part.

Sierra Club notes that on December 29, 2010, the Kentucky Division for Air Quality amended the proposed Smith plant's PSD permit "to remove authorization for the construction and operation of Smith."[7/] Br. 2. Due to this development, Sierra Club concedes that "there is currently no need for EPA to prevent construction of Smith," but argues that this part of its appeal is not moot because "the issue is capable of repetition yet evading review." Br. 3. Sierra Club's argument for application of that exception to the mootness doctrine lacks merit.

A case is moot to the extent that an issue presented is "no longer live."

[6/] Alternatively, this Court could consider vacating the district court's judgment in part as moot and remanding the case with appropriate instructions. *See National Mining Ass'n*, 251 F.3d at 1014 (ordering district court to dismiss particular claims as moot and affirming other rulings). Because, however, the case has become only partially moot on appeal, there is no basis to vacate the district court's judgment in full. *Cf. The Humane Society of the United States v. Kempthorne*, 527 F.3d 181, 184-85 (D.C. Cir. 2008).

[7/] For purposes of the present mootness discussion, we assume *arguendo* that, at some point after Sierra Club filed its complaint, the Smith plant obtained a PSD permit from the state agency.

Larsen v. U.S. Navy, 525 F.3d 1, 3 (D.C. Cir. 2008) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). A federal court lacks jurisdiction "to give opinions on moot questions or abstract propositions." *Church of Scientology*, 506 U.S. at 12 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Here, there is no continuing, live controversy between Sierra Club and EPA concerning the Smith plant: according to Sierra Club itself, the sponsor of that plant, East Kentucky Power Cooperative ("EKPC"), no longer has the necessary authorization to build and operate the plant, and "there is currently no need for EPA to prevent construction of Smith." Br. 3.

In these circumstances, this Court should not address the hypothetical question of whether, if EKPC in the future were to obtain the necessary authorization to build and operate the Smith plant, the EPA Administrator would then have a nondiscretionary duty to prevent the plant from being built. Such a ruling "would be merely advisory" (*National Mining Ass'n*, 251 F.3d at 1011) and would constitute the type of decision on "abstract propositions" that federal courts lack jurisdiction to issue. *Church of Scientology*, 506 U.S. at 12. Indeed, outside the context of mandatory duty cases, courts have held that a sponsor's decision not to go forward with a proposed project, or its inability to go forward due to lack of a permit or similar circumstance, is a mooting event on appeal.[8/]

[8/] *See*, *e.g.*, *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 331-32 (7th Cir. 1993) (sponsor of proposed radio tower decided not to go forward with project and withdrew application for FCC permit); *Friends of Keeseville, Inc. v. FERC*, 859 F.2d (continued...)

Contrary to Sierra Club's contention, this portion of its appeal does not present an issue that is "capable of repetition yet evading review." Br. 3. *See generally*, *e.g.*, *S. Co. Servs. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005). The "capable of repetition" prong of Sierra Club's argument is based on the premise that EKPC is free to apply for a new permit "after 2012 to build and operate the same or similar project." Br. 3. But Sierra Club does not provide any support for that factual assertion.

EPA is aware of a press release issued on November 18, 2010 by EKPC.[9/] The press release states that EKPC has decided to cancel plans for the Smith plant due to "decreased demand for electricity caused by the poor economy." The press release also describes a settlement agreement in which EKPC agreed "not to seek the PSC's [Kentucky Public Service Commission's] approval for another coal-fueled plant before 2012." However, there is nothing in the press release to support Sierra Club's assertion that any future proposal by EKPC would be for "the same or similar project." Br. 3. Indeed, that assertion is difficult to square with the fact that, under EPA's September 15, 2010 final rule approving revisions to Kentucky's SIP, any PSD

[8/](...continued)
230, 232-33 (D.C. Cir. 1988) (sponsor of proposed hydroelectric power project had its permit cancelled by agency for failure to submit required report); *Hollister Ranch Owners' Ass'n v. FERC*, 759 F.2d 898, 902 (D.C. Cir. 1985) (authorization for liquid natural gas terminal expired when sponsors failed to meet agency's deadline for completion of project; "[s]uch expiration is perhaps the most classic way in which a challenge to an order can become moot").

[9/] The press release is available at http://www.ekpc.coop/pressrelease.html (as visited Feb. 9, 2011). From this link, the press release can be found by clicking on "2010"; it is the first item on the list (which is arranged in reverse chronological order).

permit for a (putative) future Smith plant would be issued pursuant to a SIP that treats NOx as a precursor to ozone for purposes of evaluating the plant's effect on attainment or maintenance of the ozone NAAQS.

Moreover, even if the portion of Sierra Club's appeal related to the Smith plant presents an issue that is capable of repetition, it would not "evad[e] review," as Sierra Club contends. Br. 3. Rather, as the instant case demonstrates, if EKPC were to propose the construction of the Smith plant (or another plant) in the future, Sierra Club could bring a fresh mandatory duty action in district court against the EPA Administrator, assuming that it had a factual and legal basis for such a suit.

Sierra Club seems to suggest that such a future case would "evade review" because a (hypothetical) future PSD permit for the Smith plant would remain in effect for only nine months, which is not sufficient time for a court to address the nondiscretionary duty issue. *See* Br. 3. That argument is meritless: according to Sierra Club itself, nine months simply happens to be the period of time during which the Smith plant's previous PSD permit was in effect prior to being amended by the Kentucky Division for Air Quality in December 2010. *See* Br. 2-3. But Sierra Club offers no basis for a conclusion that any future permit would necessarily be of such duration.

In any event, the instant case demonstrates that nine months is ample time for a district court to resolve a fresh complaint from Sierra Club alleging that the EPA Administrator has a nondiscretionary duty to prevent the construction of a (hypothetical) future proposed Smith plant. It took the district court just under six

months to decide that question here.[10/] If there were some exigency that warranted an even prompter decision from the courts in a future case, Sierra Club could ask for expedited review.

II. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT ON THE GROUND THAT CAA SECTION 167 CONFERS DISCRETIONARY ENFORCEMENT AUTHORITY ON THE EPA ADMINISTRATOR.

To the extent that this case has not become moot on appeal, the judgment of the district court should be affirmed. The court correctly held that CAA Section 167, 42 U.S.C. § 7477, confers discretionary enforcement authority on the EPA Administrator.

A. The CAA does not clearly and unambiguously waive sovereign immunity for Sierra Club's claim seeking to compel EPA to take enforcement action.

EPA may be sued only to the extent that there has been a waiver of sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued[.]"). "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) (the existence of consent to be sued is a prerequisite for jurisdiction). Waivers of sovereign immunity must be clearly and unambiguously stated in statutory text; any ambiguities must be strictly construed in favor of the sovereign. *See*, *e.g.*, *Lane v. Pena*, 518 U.S.

[10/] *See* App. 3 (R. 9: EPA's motion to dismiss filed January 29, 2010); App. 3 (R. 16: order granting motion to dismiss filed July 20, 2010).

187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

In this case, the CAA citizen suit provision waives sovereign immunity for suits against the EPA Administrator only where she fails to take a nondiscretionary action. In pertinent part, Section 304(a)(2) allows a suit against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). Only in that circumstance has Congress granted the district courts jurisdiction to hear citizen suits against EPA; as the citizen suit provision states, "[t]he district courts shall have jurisdiction * * * to order the Administrator to perform such act or duty[.]" *Id.* § 7604(a).

As a threshold matter, Sierra Club errs in contending (Br. 1, 12) that the district court should have resolved this case under Fed. R. Civ. P. 12(b)(6) – whether the complaint failed to state a claim on which relief can be granted – rather than under Fed. R. Civ. P. 12(b)(1) – whether the court lacked subject matter jurisdiction over the complaint. As just discussed, Section 304(a)(2) is a limited waiver of sovereign immunity, which is jurisdictional in nature, and Section 304(a) is specifically phrased in terms of vesting the district courts with "jurisdiction" to hear Section 304(a)(2) nondiscretionary duty suits. Accordingly, a motion to dismiss is properly framed as testing whether the district court has subject matter jurisdiction over the complaint, not whether the complaint states a claim.

Sierra Club cites *Oryszak v. Sullivan*, 576 F.3d 522 (D.C. Cir. 2009), in support of its contrary view. Br. 1, 12. But *Oryszak* is not on point. It arose under the

Administrative Procedure Act ("APA"), which this Court explained is "not a jurisdiction-conferring statute." 576 F.3d at 524. The Court explained that if in an APA case the challenged agency decision is "committed to agency discretion," the plaintiff "cannot state a claim." *Id.* at 525. Sierra Club's complaint, however, is not pled as an APA case, even in part. The complaint does not mention the APA. Moreover, CAA Section 304(a) *is* a jurisdiction conferring statute; as demonstrated above, that provision specifically vests the district courts with "jurisdiction" over certain types of citizen suits. Therefore, if the plaintiff's citizen suit against the EPA Administrator does not fall within the limited waiver of sovereign immunity in Section 304(a)(2), the district court lacks subject matter jurisdiction to hear it. The Court has recognized this jurisdictional principle in similar statutory settings.[11/]

Further, the courts of appeals have reached the same conclusion as to jurisdiction in respect to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(2), which is identical to CAA Section 304(a)(2). *See Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) (holding that "if the Administrator acted within her discretion, the district court properly dismissed for lack of jurisdiction");

[11/] *See Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 666 (D.C. Cir. 2006) (under Federal Torts Claims Act, dismissal for lack of subject matter jurisdiction is proper where case did not fall within statute's waiver of sovereign immunity); *Loughlin v. United States*, 393 F.3d 155, 162 (D.C. Cir. 2004) (under Federal Torts Claims Act, discretionary function exception to waiver of sovereign immunity "is a barrier to subject matter jurisdiction"); *Auster v. Ghana Airways, Ltd.*, 514 F.3d 44, 48 (D.C. Cir. 2008) (under Foreign Sovereign Immunities Act, district court "should have dismissed the entire case for lack of subject matter jurisdiction" where defendants were immune from suit).

Sierra Club v. Train, 557 F.2d 485, 488 (5th Cir. 1977) (holding that if Administrator's duty to take enforcement action is discretionary, district court lacks subject matter jurisdiction over the suit).[12/]

Turning now to the substantive issues, this Court has explained that, in Section 304(a)(2), "Congress provided for district court enforcement * * * in order to permit citizen enforcement of *clear cut* * * * defaults by the Administrator." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (internal quotation marks omitted; emphasis added). This provision requires a court to find that the CAA places "a clear-cut nondiscretionary duty" on the Administrator. *Id.* As explained in *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349 (9th Cir. 1978), the CAA citizen suit provision:

> was intended to provide relief only in a *narrowly-defined class of situations* in which the Administrator failed to perform a mandatory function; it was not designed to permit review of the performance of those functions, nor to permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised.

Id. at 1355 (internal quotation marks omitted; emphasis added). Thus, in order for this Court to determine that Section 304(a)(2) provided the district court with jurisdiction over Sierra Club's complaint, the Court would have to determine that

---

[12/] At the end of the day, even if Sierra Club were correct that the district court should have resolved this case under Rule 12(b)(6), this Court, as it did in *Oryszak*, should simply affirm the judgment below on the ground that Sierra Club's complaint failed to state a claim on which relief can be granted against the Administrator. *See* 576 F.3d at 526.

CAA Section 167 clearly and unambiguously divests EPA of *all* discretion to decline to take enforcement action. As we show, it does not.

B. The "shall/may" language in Section 167 does not demonstrate that Congress deprived the EPA Administrator of all prosecutorial discretion.

CAA Section 167 provides:

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

42 U.S.C. § 7477. Sierra Club argues (Br. 20) that Congress' use of "shall" (as applied to the Administrator), followed closely by "may" (as applied to states), clearly demonstrates that Congress intended to impose a nondiscretionary duty on the Administrator to take enforcement action under Section 167. That contention is incorrect.

Sierra Club's contention runs counter to the presumption that agency decisions regarding enforcement are discretionary and are, therefore, unsuitable for judicial review. In *Heckler v. Chaney*, 470 U.S. 821, the Supreme Court reaffirmed the long-recognized principle that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. The Court explained the policy reasons for this general rule:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id. As this Court concluded: "*Chaney* sets forth the general rule that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion. Such matters are not subject to judicial review." *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001). *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032-33 (D.C. Cir. 2007) (applying *Heckler v. Chaney* and holding that EPA possesses discretionary enforcement authority under statutory provisions at bar).

The "shall"/"may" language in Section 167 is insufficient to rebut the *Heckler v. Chaney* presumption that agency decisions which refuse enforcement are discretionary in nature. Sierra Club (Br. 20) relies on a principle of statutory construction that "when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense – the one act being permissive, the other mandatory." *Olijato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 662 (D.C. Cir. 1975) (internal quotation marks omitted). Sierra Club therefore maintains that "shall" in Section 167 is mandatory in nature. That argument lacks merit.

To begin with, *Olijato Chapter* did not involve the EPA Administrator's

enforcement authority. Rather, *Olijato Chapter* addressed a CAA provision involving the Administrator's regulatory authority, that is, to revise standards of performance for certain new stationary sources of pollutants. 515 F.2d at 662. The Court concluded that "[t]he decision to revise a standard of performance is in fact discretionary with the Administrator." *Id.* In so concluding, the Court applied the "normal inference" noted above, *i.e.*, that "may" is permissive and "shall" is mandatory when used in the same rule. *Id.* However, the Court did not address, much less hold, that the same "normal inference" applies when interpreting a statutory provision that deals with the Administrator's enforcement authority. That issue was simply not before the Court.

In addition, *Heckler v. Chaney* undercuts Sierra Club's view that "shall" in Section 167 must be mandatory. In *Chaney*, the Supreme Court *rejected* plaintiffs' argument that the word "shall" in the statute at issue mandated criminal prosecution of every violator because they adduced no indication in case law or legislative history that such was Congress' intention. *See* 470 U.S. at 835. As the district court correctly concluded (App. 26 n.1), the presence of the term "shall" in an enforcement statute does not overcome the *Heckler v. Chaney* presumption that enforcement decisions are discretionary.

Moreover, the maxim that the word "shall" is normally interpreted to impose a mandatory duty is not controlling "when duties within the traditional realm of prosecutorial discretion are involved." *City of Seabrook v. Costle*, 659 F.2d 1371, 1374-75 n.3 (5th Cir. 1981) (citing cases). *See*, *e.g.*, *Sierra Club v. Whitman*, 268 F.3d

at 904-05 (holding that use of "shall" in Clean Water Act, 33 U.S.C. § 1319(a)(3), does not impose mandatory duty on EPA Administrator to take enforcement action); *California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997) (holding that use of "shall" in several provisions of federal immigration statutes does not rebut *Heckler v. Chaney* presumption that agency refusals to initiate investigative or enforcement proceedings are committed to absolute agency discretion); *City of Seabrook*, 659 F.2d at 1375 (use of "shall" in CAA, 42 U.S.C. § 7413(a)(1), does not impose mandatory duty on EPA Administrator "to make a finding on every alleged violation of a SIP"). In interpreting CAA Section 167, there is no sound basis for a court to depart from the principle that "shall" when used in an enforcement provision is unlikely to be mandatory in nature.

In addition, as Sierra Club recognizes (Br. 5), the CAA "employs a model of cooperative federalism." *See General Motors Corp.*, 496 U.S. at 532 (describing CAA as making "the States and the Federal Government partners in the struggle against air pollution"); *MacClarence*, 596 F.3d at 1125 (describing CAA as "[b]uilt on a scheme of 'cooperative federalism'"). Accordingly, it is natural that in Section 167, Congress used "may," rather than "shall," in reference to the enforcement authority of the states. That being so, the use of "shall" in reference to the Administrator's enforcement authority is readily understood to mean what "shall" ordinarily means in the context of an enforcement statute, *i.e.*, it is permissive in nature. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992). If Congress intended a distinction between "shall" and "may" in the context of this enforcement

provision, it may be that, once the condition precedent in Section 167 is satisfied, the Administrator is required to act "as necessary," but the states are not. Even that interpretation of Section 167, however, leaves it within the discretion of the Administrator to decide whether the condition precedent is satisfied and whether enforcement measures are necessary. *See infra* at 30-43.

Sierra Club cites only one case in support of its contention that Congress' use of "shall" in CAA Section 167 must be read as mandatory: a district court's decision in *Save the Valley v. Ruckelshaus*, 565 F. Supp. 709 (D.D.C. 1983). Br. 21, 23. However, a district court's decision is not binding on this Court. Moreover, *Save the Valley* has little persuasive value, because it was decided prior to *Heckler v. Chaney* and did not actually analyze the text of Section 167. Rather, focusing on CAA Section 165(a)(3), 42 U.S.C. § 7475(a)(3), the court concluded that "the Administrator must prevent any construction not specifically presented and approved during the permit process." 565 F. Supp. at 710. The court viewed that conclusion as flowing from the "plain language" of Section 165(a)(3). *Id.* Whether that holding is sound, this case does not present such an issue. Sierra Club's complaint does not allege that any of the plants at issue will be constructed in a manner at variance from its permit. Nor does Sierra Club raise such a claim in its opening brief. In short, this Court should decline to follow *Save the Valley*, to the extent that it is even germane to this case.

C. The phrase "such measures * * * as necessary" in Section 167 demonstrates that Congress did not deprive the EPA Administrator of all prosecutorial discretion.

Section 167's use of the phrase "such measures * * * as necessary" further supports a conclusion that the term "shall" is not mandatory and does not rebut the *Heckler v. Chaney* presumption that agency decisions not to take enforcement action are discretionary and thus unsuitable for judicial review. The question of whether "shall" has a mandatory connotation must be decided in light of the qualifying phrase "such measures * * * as necessary" that appears in the same sentence. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (noting "cardinal rule" that statutory language must be read in context since a phrase gathers meaning from the words around it).

In *Heckler v. Chaney*, the Supreme Court explained that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. Applying that principle in addressing whether an agency action is "committed to agency discretion by law" under the APA, this Court has held: "Enforcement decisions are generally within this exclusion, because 'a court would have no meaningful standard against which to judge the agency's exercise of discretion' in deciding how to enforce the statutory provisions." *Ass'n of Irritated Residents*, 494 F.3d at 1030 (quoting *Chaney*, 470 U.S. at 830).

In this case, the district court correctly concluded that Section 167 lacks a

"meaningful standard" by which a court could assess a claim that the Administrator had a nondiscretionary duty to take enforcement action. App. 26; *see* App. 27-31. Section 167 provides that "[t]he Administrator shall * * * take *such measures*, including issuance of an order, or seeking injunctive relief, *as necessary*" to prevent construction of a proposed major emitting facility under certain circumstances. 42 U.S.C. § 7477 (emphasis added). The phrase "take such measures * * * as necessary" does not provide the requisite meaningful standard for judicial review: such measures "as necessary" plainly vests the Administrator with discretion to decide, in a given case, which among several enforcement measures is necessary to prevent construction of a proposed facility, or that enforcement measures are not necessary at all; and Section 167 does not meaningfully guide a court in reviewing any of these discretionary decisions by the Administrator.

For example, suppose that to prevent construction of Plant X, EPA decides that it is not necessary to issue an administrative order, bring a civil action for injunctive relief in district court, or take any other enforcement measure for the time being – but rather, that as a first step, it is appropriate to attempt negotiations with the sponsor of Plant X or with the relevant state permitting agency (or both). Section 167 provides no meaningful standard by which a court could assess a claim that, in the case of Plant X, the Administrator had a nondiscretionary duty to issue an administrative order, bring a civil suit, or take some other enforcement measure, rather than first attempt negotiations.

In short, the statutory phrase "such measures * * * as necessary" indicates that

there may be any number of reasons why an enforcement measure is unnecessary in a given case; but Section 167 does not meaningfully guide a court in evaluating those reasons if judicial review is sought of the Administrator's failure to take enforcement action. The Court's conclusion in *Ass'n of Irritated Residents* concerning the enforcement provisions at issue in that case holds true of Section 167 as well: "None of the statutes' enforcement provisions give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another." 494 F.3d at 1033. The Administrator's choice not to take enforcement action under Section 167 is therefore not appropriate for judicial review, just as EPA's civil enforcement decision (embodied in settlement agreements with regulated entities) was found to be "committed to the discretion of the agency" in *Irritated Residents. Id.*

In fact, Section 167 is analogous to 10 U.S.C. § 2705(a), which provides that the Secretary of Defense "shall take such actions as necessary to ensure" that regional offices of EPA and others receive prompt notification about releases of hazardous substances at facilities under the Secretary's jurisdiction. As a district court has concluded, it is plain that "no mandatory directive exists" in this statutory provision. Rather, because "a determination of what is 'necessary' in any given situation is an inherently varied and speculative inquiry, which may vary from one person to another, * * * this statute is, indeed, discretionary[.]" *Sanchez v. United States*, 707 F. Supp. 2d 216, 231 (D.P.R. 2010) (finding claims based on Section 2705 barred by discretionary function exception in Federal Torts Claims Act). The *Sanchez*

court's eminently reasonable interpretation of 10 U.S.C. § 2705(a) is even more true of CAA Section 167 because (unlike the former) the latter is an *enforcement* provision, which carries with it the *Heckler v. Chaney* presumption that prosecutorial decisions are discretionary in nature and generally not appropriate for judicial review.

Sierra Club advances a number of arguments to show that Section 167 does provide a "meaningful standard" by which a court could assess a claim that the Administrator had a nondiscretionary duty to take enforcement action. *Heckler v. Chaney*, 470 U.S. at 830. These arguments, however, lack merit.

First, Sierra Club contends (Br. 25) that the phrase "as necessary" does not actually modify "shall" but rather modifies only the term "measures," because "as necessary" is closer to "measures" than to "shall" in the statutory text. Sierra Club therefore argues (*id.*) that "as necessary" describes "what actions EPA may take, not whether EPA has to take some action." However, Sierra Club offers no reason for reading "as necessary" as modifying only the term it is closest to. Such a reading is contrary to the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word * * * must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div. v. UAW*, 523 U.S. 653, 657 (1998) (internal quotation marks omitted). *See General Dynamics Land Sys.*, 540 U.S. at 596. Here, the context in which "shall" is used includes the phrase "as necessary."

Reading "shall" in its statutory context, the most natural reading of Section 167 is that the Administrator shall take whatever measures she deems necessary to prevent

construction of a facility in the circumstances described by the remainder of the provision – meaning that the Administrator has discretion to decide that no measures are necessary. Sierra Club, however, essentially reads the phrase "as necessary" out of the statute; on its view, the Administrator "shall" take some enforcement measure in every case, and some enforcement measure must be necessary in every case. The mere syntactical fact that "as necessary" appears closer to "measures" than to "shall" in the statutory text is not a sound basis for interpreting Section 167 as Sierra Club does.

Moreover, Sierra Club's interpretation does not square with ordinary English usage, which is a further reason to reject it. *See New York Times Co. v. Tasini*, 533 U.S. 483, 503 (2001) (rejecting a statutory interpretation as not "consistent with ordinary English"). For example, if someone makes the statement "I shall buy my wife such gifts as necessary to make her happy on her birthday," the speaker would likely be understood as leaving himself discretion about what gifts, if any, to purchase for the occasion. The speaker would not likely be understood as having committed himself to purchasing at least one gift, on the theory that "as necessary" in his statement appeared closer to "gifts" than to "shall." Perhaps there may be contextual or other reasons for interpreting the speaker's statement as a commitment to purchase at least one gift, but not simply because, as a matter of syntax, "as necessary" is closer to "gifts" than to "shall" in his statement.

Second, Sierra Club errs in contending (Br. 21) that Section 167 "creates judicially manageable standards to apply." As the cases cited by Sierra Club illustrate

(Br. 21-22), Sierra Club is confusing the requirement of a "meaningful standard against which to judge the agency's exercise of discretion" not to take enforcement action (*Heckler v. Chaney*, 470 U.S. at 830) with the existence of *substantive law* that a court would apply in determining whether a particular SIP or a PSD permit complies with the requirements of the CAA. It is the same confusion that would be reflected in an argument that substantive criminal law developed under the provisions of Title 18 of the U.S. Code provides a meaningful standard against which to judge a prosecutor's decision not to initiate criminal proceedings. *See* 470 U.S. at 836.

The latter type of substantive CAA challenges are *not* properly brought in the guise of nondiscretionary duty suits against the EPA Administrator in district court. Rather, as specified in the jurisdictional provisions of Section 307(b), 42 U.S.C. § 7607(b), substantive challenges to SIPs and PSD permits are brought via petition for review in a court of appeals. *See*, *e.g.*, *ADEC*, 540 U.S. 461 (EPA's challenge to Alaska's issuance of PSD permit); *Kentucky Resources Council v. EPA*, 467 F.3d 986 (6th Cir. 2006) (environmental group's challenge to EPA's approval of revisions to Kentucky's SIP). Sierra Club's "judicially manageable standards" argument should be rejected because it would in effect work an end-run around Section 307(b)'s allocation of these types of cases to the courts of appeals. If Sierra Club's interpretation were adopted, such cases might improperly be brought by artful pleading in district court as nondiscretionary duty suits against the EPA

Administrator.[13/]

Sierra Club similarly contends (Br. 24) that it is "well established" that the phrase "as necessary" is "a judicially manageable standard" in the context of deciding whether SIP provisions are "as necessary" to maintain the NAAQS. That observation is beside the point because the issue here is how the phrase "such measures * * * as necessary" *in Section 167* bears on the EPA Administrator's enforcement authority. That courts may have articulated "judicially manageable standards" for deciding the substantive issue of whether SIP provisions are necessary to maintain the NAAQS has no bearing on the separate question of the Administrator's enforcement discretion under Section 167. EPA has issued detailed regulations in administering the provisions of the CAA relating to SIPs and the NAAQS, but no such body of law exists concerning the circumstances under which it is necessary for EPA to take enforcement action.

In fact, the case cited by Sierra Club in support of this particular argument makes the point that even a "fairly clear" substantive CAA requirement can become "less clear" in view of "the complexity of the task of achieving the pollution

---

[13/] Sierra Club is correct (Br. 22) that district courts have experience in deciding whether a facility is being constructed or modified without a PSD permit. But in such a case, the CAA citizen suit provision authorizes Sierra Club to bring an action in district court against the sponsor of the facility. 42 U.S.C. § 7604(a)(3). It does not follow, however, that Sierra Club is authorized to bring the same dispute in district court as a nondiscretionary duty suit against EPA. Again, Sierra Club is confusing the requirement of a "meaningful standard against which to judge the agency's exercise of discretion" not to take enforcement action (*Heckler v. Chaney*, 470 U.S. at 830) with the existence of substantive law that a court would apply in determining whether a facility is being constructed or modified without a PSD permit.

reductions required by the Act." *Hall v. U.S. E.P.A.*, 263 F.3d 926, 935 (9th Cir. 2001). Accordingly, to the extent that an analogy to cases like *Hall* is apt (and it is not), *Hall* undermines Sierra Club's argument that substantive provisions of the CAA can be used to establish that the Administrator failed to perform "a *clear-cut* nondiscretionary duty." *Sierra Club v. Thomas*, 828 F.2d at 791 (emphasis added).

Third, Sierra Club errs in contending (Br. 22-23) that, at least in the instant case, the district court did not need "judicially manageable standards" to apply because EPA had already determined that Kentucky's PSD program in its SIP was defective. For the reasons stated in Section I-A, *supra*, Sierra Club's nondiscretionary duty claim based on this ground is moot. But in any event, as we have also shown, even if the issue were still live, Section 167 does not provide a court with a "meaningful standard against which to judge the agency's exercise of discretion" not to take enforcement action. *Heckler v. Chaney*, 470 U.S. at 830. That is, even if the Kentucky SIP's failure to include NOx as an ozone precursor for purposes of the PSD program had not been fixed by EPA's September 15, 2010 final rule, the Administrator still would have possessed unreviewable discretion to decide that no enforcement "measures" are "necessary" to prevent construction of the proposed Smith, New Gas, and Cash Creek plants. 42 U.S.C. § 7477.

Fourth, shifting gears somewhat, Sierra Club argues (Br. 25-28) that Section 167 is no different from CAA provisions like 42 U.S.C. § 7409(d)(1), which can give rise to what Sierra Club calls "missed deadline mandatory duty cases" in district court. However, the dissimilarity between Section 167 and such "missed

deadline" provisions is obvious: Section 167 contains no deadline, and Sierra Club does not contend otherwise.

Moreover, the CAA provision cited by Sierra Club states that the Administrator "shall complete a thorough review" of certain criteria and standards and "shall make such revisions * * * as may be appropriate." 42 U.S.C. § 7409(d)(1). Sierra Club concedes (Br. 26) that the phrases "thorough review" and "as may be appropriate" indicate that "EPA has discretion in how it will take action," but Sierra Club nonetheless contends that "the 'shall' in the provision still creates a mandatory duty." However, Sierra Club's interpretation of the "shall" – by which it must mean the first "shall" – is premised on the fact that 42 U.S.C. § 7409(d)(1) contains a statutory deadline ("[n]ot later than December 31, 1980, and at five-year intervals thereafter") – which is absent from Section 167. *Cf. Sierra Club v. Thomas*, 828 F.2d at 791 ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline.").

Sierra Club relatedly argues (Br. 27) that in "missed deadline" cases, district courts are capable of resolving disputes that may arise concerning "how long the court should give the defendant agency to come into compliance with the deadline" even though the CAA "provides no guidance" on that remedial issue. It is difficult to see the relevance of this argument. A case arising under Section 167 is not analogous to a "missed deadline" case, given that Section 167 contains no "deadline." Moreover, Sierra Club puts the cart before the horse. In a "missed deadline" case, the

court exercises its equitable discretion to craft a remedy *after* first having found that the EPA Administrator failed to carry out a mandatory duty. That a remedy is available is not relevant to a court's determination of whether such a duty exists to begin with.

D. Section 167 contains a condition precedent, which further demonstrates that Congress did not deprive the EPA Administrator of all prosecutorial discretion.

Section 167 is aimed at preventing the construction of a major emitting facility "[1] which does not conform to the requirements of this part, or [2] which is proposed to be constructed in any area designated * * * as attainment and which is not subject to [a SIP] which meets the requirements of this part." 42 U.S.C. § 7477 (brackets added). The district court correctly concluded that these statutory phrases constitute a "condition precedent," which further demonstrates that Section 167 confers discretionary enforcement authority on the Administrator. App. 31-34.

When read in context with the rest of Section 167 (*see Dynamics Land Sys.*, 540 U.S. at 596; *Textron*, 523 U.S. at 657), it is eminently reasonable to interpret these statutory phrases as a condition precedent to any duty of the EPA Administrator to take "such measures * * * as necessary." EPA cannot properly issue an order or bring a civil action to prevent construction of a major emitting facility without first determining that there are factual and legal grounds for doing so. Those grounds are informed by the statutory phrases "which does not conform to the requirements of this part," and "which is proposed to be constructed in any area designated * * * as attainment and which is not subject to [a SIP] which meets the requirements of this

part." Indeed, EPA must develop an administrative record to support the issuance of an administrative order because the order would be subject to a petition for review in a court of appeals. *See* 42 U.S.C. § 7607(b)(1). Accordingly, unless and until EPA makes a finding that a particular facility falls within one of these categories, EPA need not proceed to consider the further question of whether any "measures" are "necessary" to prevent construction of that facility.

Sierra Club argues (Br. 7) that Section 167 "does not require EPA to make any administrative findings." That interpretation is untenable. If the Administrator's duty to take enforcement action is triggered *without* an administrative finding that the facility at issue falls within one of the categories described in Section 167, then Sierra Club could invoke the district court's jurisdiction to hear a citizen suit against the Administrator simply by *alleging* in the complaint that the facility at issue falls into one of those categories. EPA would be required to expend precious agency resources litigating those questions – not just in Kentucky (where this case arose) but throughout the United States – thereby distracting EPA from its administrative priorities. The scope of this interference with EPA's administrative priorities is potentially vast, given that on Sierra Club's interpretation, such a citizen suit could be filed against EPA as to any proposed construction of a new major emitting facility *or* modification of an existing facility. Section 167 should not be interpreted to allow parties to force EPA's hand in this fashion. As the court stated in *Dubois v. Thomas*, 820 F.2d 947 (8th Cir. 1987), "[o]nly if the Administrator has discretion to allocate its own resources can a rational enforcement approach be achieved." *Id.* at 948.

Sierra Club offers only one reason for not construing Section 167 as containing a condition precedent (Br. 30): in contrast to other statutory provisions, Section 167 "does not mention 'finding,' 'determination,' or any derivatives thereof." That contention lacks merit because, as the district court correctly concluded (App. 33), to establish a condition precedent, a statutory provision need not use any particular "magic words."[14/]

Other enforcement provisions in the CAA have been found to grant the Administrator discretionary authority. *See N.Y. Public Interest Research Group v. Whitman*, 321 F.3d 316, 330-31 (2d Cir. 2003) (42 U.S.C. § 7661a(i)(1), addressing adequate administration and enforcement of Title V program by states); *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (42 U.S.C. § 7415(a), addressing endangerment of health in a foreign country from air pollutants emitted in the United States); *City of Seabrook*, 659 F.2d at 1374-75 (42 U.S.C. § 7413(a)(2), addressing widespread violations resulting from a state's failure to enforce its SIP effectively). While it is true that these provisions contain terms like the Administrator's "determination" or her having "reason to believe," which are absent from Section 167, there is nothing in the CAA from which to

---

[14/] The publication cited by Sierra Club (Br. 29) describes the Administrator's duty in Section 167 as permissive: EPA "has additional authority to issue an order, or to seek injunctive relief in federal district court, as necessary[.]" John S. Rudd, *Civil Enforcement*, in *The Clean Air Act Handbook* 496 (Robert J. Martineau, Jr. & David P. Novello, eds., 1998). That description of the Administrator's duty is inconsistent with Sierra Club's argument that Section 167 contains no condition precedent.

conclude that Congress viewed the enforcement authority in Section 167 as different in kind. In fact, the legislative history of Section 167 is to the contrary. *See infra* at 43-44.

Section 167 is a provision as to which "the negative pregnant argument should not be elevated to the level of interpretive trump card." *Field v. Mans*, 516 U.S. 59, 67 (1995). As discussed above, Sierra Club's interpretation would yield untenable results. Moreover, citizen suits of the type that would become permissible under Sierra Club's interpretation of Section 167 would plainly raise issues other than "clear-cut * * * defaults by the Administrator"– which is the only type of action that is properly brought in district court against the Administrator under the citizen suit provision. *Sierra Club v. Thomas*, 828 F.2d at 791. The district court would be called upon to determine in the first instance whether a facility does or does not fall into one of the Section 167 categories: in the former situation, the facility sponsor would likely challenge any EPA action; in the latter situation, the challenge would likely be brought by a party opposed to construction of the facility. Such issues are highly unlikely to be "clear cut" given the complexity of the CAA's statutory and regulatory scheme. *Cf. Our Children's Earth Found. v. U.S. E.P.A.*, 527 F.3d 842, 849-51 (9th Cir. 2008) (Clean Water Act). For these reasons, Sierra Club's interpretation of Section 167 as containing no condition precedent would threaten to turn the CAA's citizen suit provision on its head.

That Sierra Club's approach is untenable is especially evident when one considers the nondiscretionary duty claim in its complaint regarding public notice in

Class I areas. *See* App. 15 (¶ 34); App. 16 (¶ 40). If Sierra Club's reading of Section 167 is correct, any person could seek to compel EPA to take action on the basis of an allegation that Kentucky has erroneously *interpreted* its SIP, even though – so far as the complaint reveals – the SIP is facially consistent with the CAA regarding notice in Class I areas. That reading cannot be squared with the text of Section 167, which does not authorize the Administrator to prevent construction of facilities where a state is erroneously interpreting a facially valid SIP. Moreover, Sierra Club's approach would effectively create jurisdiction in the *federal* district courts to conduct *Chevron*-type review of a state agency's interpretation of its own SIP. If one thing is clear, it is that Congress did not intend Section 167 or the citizen suit provision to be used in that fashion. It is also clear that a mandatory duty allegation based on a state's erroneous interpretation of a facially valid SIP is not the type of claim presenting a "clear cut default" by the Administrator – which, again, is the only type of claim that is properly brought as a nondiscretionary duty citizen suit. *Sierra Club v. Thomas*, 828 F.2d at 791.

E. The legislative history of Section 167 and the citizen suit provision itself support a conclusion that Congress did not deprive the EPA Administrator of all prosecutorial discretion.

Finally, we discuss two additional reasons that support a conclusion that Congress did not strip the Administrator of all prosecutorial discretion in Section 167.

First, the legislative history confirms as much. When Section 167 was added to the CAA in the 1977 amendments to the statute, the accompanying report of the Senate Committee on Environment and Public Works explained that under the new

authority granted by that provision, the Administrator "*could go* to court to stop a permit for activities which would exceed the increments of pollution." The Senate Report also explained that "potential activity" outside national parks and similar areas "*could be* prohibited if it would impair the air quality values associated with those Federal lands." S. Rep. No. 95-127, at 12 (1977) (emphasis added), *reprinted in* 3 *A Legislative History of the Clean Air Act Amendments of 1977*, at 1386 (Comm. Print 1979). The Senate Report's use of the phrases "could go to court" and "could be prohibited" confirms that Congress intended that the Administrator's duty be permissive.

Similarly, when Section 167 was amended in 1990, the accompanying conference report explained: "The conference agreement revises and strengthens EPA enforcement authority regarding violations of State Implementation Plans and permits, *including authority* to bring civil actions for injunctive relief and penalties * * *. These authorities *can also be* used by EPA when States fail to enforce SIPs or permit requirements." H.R. Rep. No. 101-952, at 347 (1990) (Conf. Rep.) (emphasis added), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1990*, at 1797 (Comm. Print 1993). Again, the Conference Report's explanation that the amendment strengthens EPA's "authority" and that this authority "can also be used" confirms that Congress intended EPA's duty to be permissive.

Second, the CAA citizen suit provision itself, which allows citizens to file suit against alleged violators as well as against the EPA for failure to perform a nondiscretionary duty, also indicates that enforcement is discretionary. 42 U.S.C.

§ 7604. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), the Supreme Court explained that "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 60 (discussing Clean Water Act). Accordingly, CAA Section 304(b) bars citizen suits against the category of alleged violators described in Section 304(a)(1), 42 U.S.C. § 7604(a)(1), when EPA "has commenced and is diligently prosecuting a civil action in a court of the United States or a State[.]" 42 U.S.C. § 7604(b)(1)(B).

However, if as Sierra Club contends, EPA were required to take enforcement action in every case under Section 167, then citizen suits against the category of alleged violators described in Section 304(a)(1) would become largely superfluous: the Administrator's suit would pretermit the citizen suit in that category of cases. 42 U.S.C. § 7604(a)(1). *See Dubois*, 820 F.2d at 949. This consideration further counsels against adopting Sierra Club's interpretation.[15/]

In sum, the language and structure of the CAA, together with the legislative history, shows that the EPA Administrator's enforcement authority in Section 167 is discretionary. When this language, structure, and legislative history is coupled with the general presumption under *Heckler v. Chaney* that enforcement decisions are

---

[15/] Moreover, there are other avenues of redress available to parties like Sierra Club. In addition to citizen suits against the facility owner, Sierra Club can challenge a state agency's issuance of PSD permits in state court. Such judicial review is available in Kentucky, where this case arose. Ky. Rev. Stat. Ann. § 224.10-470 (LexisNexis Supp. 2010). It can also petition EPA to lodge objections to issuance of Title V permits with the state agency. 42 U.S.C. § 7661d(b)(2). The availability of these types of relief further counsels against adopting Sierra Club's interpretation of Section 167.

discretionary, it simply cannot be concluded that Congress intended to impose on EPA a mandatory duty to bring an enforcement action for every violation of Section 167's requirements. The district court not only correctly interpreted the statute, it also reached the most sensible result.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

KATHERINE J. BARTON
s/ JOHN E. ARBAB
Attorneys, Appellate Section
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-4046

February 9, 2011
90-5-2-4-18654

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief for the Appellee is proportionately spaced, has a typeface of 14 points, and contains 12,388 words according to WordPerfect X3.

s/ John E. Arbab
Attorney, Appellate Section
U.S. Department of Justice
Environment & Natural Res. Division
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-4046

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2011, I electronically filed the foregoing Brief for the Appellee with the Clerk of the Court using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ John E. Arbab
Attorney, Appellate Section
U.S. Department of Justice
Environment & Natural Res. Division
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-4046

ADDENDUM

Brief for the Appellee

Sierra Club v. Jackson

No. 10-5280

Page

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME TWENTY-SIX

TITLE 42—THE PUBLIC HEALTH AND WELFARE
§§ 4401–8146

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

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

(e) Area classification plan not required

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

(f) PM–10 increments

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

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

AMENDMENTS

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

§ 7477. Enforcement

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

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

AMENDMENTS

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

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

§ 7478. Period before plan approval

(a) Existing regulations to remain in effect

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

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

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

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

AMENDMENTS

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

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging

95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.[1]

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have

[1] So in original. The period probably should be ", or".

under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or[2]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),,[3] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise);[4] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.[5]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection[6] to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

(July 14, 1955, ch. 360, title III, §304, as added Pub. L. 91–604, §12(a), Dec. 31, 1970, 84 Stat. 1706; amended Pub. L. 95–95, title III, §303(a)–(c), Aug. 7, 1977, 91 Stat. 771, 772; Pub. L. 95–190, §14(a) (77), (78), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101–549, title III, §302(f), title VII, §707(a)–(g), Nov. 15, 1990, 104 Stat. 2574, 2682, 2683.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

Section was formerly classified to section 1857h–2 of this title.

PRIOR PROVISIONS

A prior section 304 of act July 14, 1955, was renumbered section 311 by Pub. L. 91–604 and is classified to section 7611 of this title.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, §707(a), (f), in closing provisions, inserted before period at end ", and to apply any appropriate civil penalties (except for actions under paragraph (2))" and inserted sentences at end giving courts jurisdiction to compel agency action unreasonably delayed and requiring 180 days notice prior to commencement of action.

Subsec. (a)(1), (3). Pub. L. 101–549, §707(g), inserted "to have violated (if there is evidence that the alleged violation has been repeated) or" before "to be in violation".

Subsec. (b). Pub. L. 101–549, §302(f), substituted "section 7412(i)(3)(A) or (f)(4)" for "section 7412(c)(1)(B)" in closing provisions.

Subsec. (c)(2). Pub. L. 101–549, §707(c), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "In such action under this section, the Administrator, if not a party, may intervene as a matter of right."

Subsec. (c)(3). Pub. L. 101–549, §707(d), added subsec. (c)(3).

Subsec. (f)(3). Pub. L. 101–549, §707(e), struck out "any condition or requirement of section 7413(d) of this title

[2] So in original. The word "or" probably should not appear.

[3] So in original.

[4] So in original. The semicolon probably should be a comma.

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

[6] So in original. Probably should be "this section".

(relating to certain enforcement orders)" before ", section 7419 of this title", substituted "subchapter VI of this chapter" for "part B of subchapter I of this chapter", and substituted "; or" for period at end.

Subsec. (f)(4). Pub. L. 101–549, § 707(e), which directed that par. (4) be added at end of subsec. (f), was executed by adding par. (4) after par. (3), to reflect the probable intent of Congress.

Subsec. (g). Pub. L. 101–549, § 707(b), added subsec. (g).

1977—Subsec. (a)(3). Pub. L. 95–190, § 14(a)(77), inserted "or modified" after "new".

Pub. L. 95–95, § 303(a), added subsec. (a)(3).

Subsec. (e). Pub. L. 95–95, § 303(c), inserted provisions which prohibited any construction of this section or any other law of the United States which would prohibit, exclude, or restrict any State, local, or interstate authority from bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court against the United States or bringing any administrative enforcement action or obtaining any administrative remedy or sanction against the United States in any State or local administrative agency, department, or instrumentality under State or local law.

Subsec. (f)(3). Pub. L. 95–190, § 14(a)(78), inserted ", or" after "(relating to ozone protection)", substituted "any condition or requirement under an" for "requirements under an", and struck out "or" before "section 7491".

Pub. L. 95–95, § 303(b), added par. (3).

EFFECTIVE DATE OF 1990 AMENDMENT

Section 707(g) of Pub. L. 101–549 provided that: "The amendment made by this subsection [amending this section] shall take effect with respect to actions brought after the date 2 years after the enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990]."

EFFECTIVE DATE OF 1977 AMENDMENT

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

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions in subsec. (g)(1) of this section, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the 6th item on page 165 of House Document No. 103–7.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

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

§ 7605. Representation in litigation

(a) Attorney General; attorneys appointed by Administrator

The Administrator shall request the Attorney General to appear and represent him in any civil action instituted under this chapter to which the Administrator is a party. Unless the Attorney General notifies the Administrator that he will appear in such action, within a reasonable time, attorneys appointed by the Administrator shall appear and represent him.

(b) Memorandum of understanding regarding legal representation

In the event the Attorney General agrees to appear and represent the Administrator in any such action, such representation shall be conducted in accordance with, and shall include participation by, attorneys appointed by the Administrator to the extent authorized by, the memorandum of understanding between the Department of Justice and the Environmental Protection Agency, dated June 13, 1977, respecting representation of the agency by the department in civil litigation.

(July 14, 1955, ch. 360, title III, § 305, as added Pub. L. 91–604, § 12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 95–95, title III, § 304(a), Aug. 7, 1977, 91 Stat. 772.)

CODIFICATION

Section was formerly classified to section 1857h–3 of this title.

PRIOR PROVISIONS

A prior section 305 of act July 14, 1955, as added Nov. 21, 1967, Pub. L. 90–148, § 2, 81 Stat. 505, was renumbered section 312 by Pub. L. 91–604 and is classified to section 7612 of this title.

Another prior section 305 of act July 14, 1955, ch. 360, title III, formerly § 12, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 401, was renumbered section 305 by Pub. L. 89–272, renumbered section 308 by Pub. L. 90–148, and renumbered section 315 by Pub. L. 91–604, and is classified to section 7615 of this title.

AMENDMENTS

1977—Pub. L. 95–95 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1977 AMENDMENT

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

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95–95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95–95, see section 406(a) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

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

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or

Federal Register

9–15–10 Wednesday
Vol. 75 No. 178 Sept. 15, 2010

Pages 55941–56466

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 116 (Reg 6)—Control of Air Pollution by Permits for New Construction or Modification				
*	*	*	*	*
Subchapter B—New Source Review Permits				
*	*	*	*	*
Division 6—Prevention of Significant Deterioration Review				
Section 116.160	Prevention of Significant Deterioration Requirements.	6/2/2010	9/15/2010 [Insert FR page number where document begins].	
*	*	*	*	*

* * * * *

[FR Doc. 2010–22672 Filed 9–14–10; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2009–1014–201026; FRL–9201–1]

Approval and Promulgation of Implementation Plans; Commonwealth of Kentucky; Prevention of Significant Deterioration and Nonattainment New Source Review Rules: Nitrogen Oxide as Precursor to Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a revision to the Commonwealth of Kentucky's State Implementation Plan (SIP), submitted to EPA by the Kentucky Energy and Environment Cabinet, through the Kentucky Division for Air Quality (KDAQ), on February 5, 2010. The revision modifies Kentucky's prevention of significant deterioration (PSD) and nonattainment new source review (NNSR) permitting regulations in Kentucky's SIP to address permit requirements promulgated in the 1997 8-Hour Ozone National Ambient Air Quality Standards (NAAQS) Implementation Rule—Phase II (hereafter referred to as the "Ozone Implementation NSR Update"). The Ozone Implementation NSR Update revised permit requirements relating to the implementation of the 1997 8-hour ozone NAAQS, specifically, incorporating nitrogen oxides (NO_X) as a precursor to ozone. EPA's approval of Kentucky's provisions to include NO_X as an ozone precursor into the Kentucky SIP is based on EPA's determination that Kentucky's SIP revision related to these provisions complies with Federal requirements. EPA is also addressing the general adverse comments received on EPA's proposal to approve NO_X as an ozone precursor for permitting purposes into the Kentucky SIP.

The February 5, 2010, SIP revision also included provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program in the Kentucky SIP. EPA also received adverse comments for its proposal to approve these provisions. At this time, EPA is not taking final action on Kentucky's provisions to exclude facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program. EPA will consider the comments received regarding these provisions and take any final action for these provisions in a separate rulemaking.

DATES: *Effective Date:* This rule will be effective October 15, 2010.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2009–1014. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Bradley can be reached via telephone at (404) 562–9352 and electronic mail at *bradley.twunjala@epa.gov.* For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams can be reached via telephone at (404) 562–9214 and electronic mail at *adams.yolanda@epa.gov.* For information regarding 8-hour ozone NAAQS, contact Ms. Jane Spann, Regulatory Development Section, at the

same address above. Ms. Spann can be reached via telephone at (404) 562–9029 and electronic mail at *spann.jane@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

On February 5, 2010, the Commonwealth of Kentucky, through KDAQ, submitted a revision to the Kentucky SIP which relates to Kentucky's Air Quality Regulations, Chapter 51—401 Kentucky Administrative Regulation (KAR) 51:001 "Definitions for 401 KAR Chapter 51," 401 KAR 51:017 "Prevention of Significant Deterioration of Air Quality," and 401 KAR 51:052 "Review of New Sources in or Impacting upon Nonattainment Areas." The SIP revision addressed various issues.[1] This final action addresses only *one* component of the February 5, 2010, submittal—the Ozone Implementation NSR Update requirements, as contained in 40 Code of Federal Regulations (CFR) 51.165 and 51.166, and promulgated on November 29, 2005, as part of EPA's Ozone Implementation NSR Update.

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million—also referred to as the 1997 8-hour ozone NAAQS. On April 30, 2004, EPA designated areas as attainment, nonattainment and unclassifiable for the 1997 8-hour ozone NAAQS. As part of the 2004 designations, EPA also promulgated an implementation rule for the 1997 8-hour ozone NAAQS in two phases. Phase I of EPA's 1997 8-hour ozone implementation rule (Phase 1 Rule), published on April 30, 2004, and effective on June 15, 2004, provided the implementation requirements for designating areas under subpart 1 and subpart 2 of the CAA. *See* 69 FR 23857.

On November 29, 2005, EPA promulgated the second phase for implementation provisions related to the 1997 8-hour ozone NAAQS—also known as the Phase II Rule. *See* 70 FR 71612. The Phase II Rule addressed control and planning requirements as they applied to areas designated nonattainment for the 1997 8-hour ozone NAAQS which included NSR requirements. Specific to this rulemaking, the Phase II Rule made changes to Federal regulations 40 CFR 51.165 and 51.166, which govern the NNSR and PSD permitting programs. The revisions to the NSR permitting requirements in the Phase II Rule are also known as the Ozone Implementation NSR Update.

Specifically, the Phase II Rule requirements included, among other changes, a new provision stating that NO_X is an ozone precursor. See 70 FR 71612, (page 71679) (November 29, 2005). In the Phase II Rule, EPA stated as follows:

> "The EPA has recognized NO_X as an ozone precursor in several national rules because of its contribution to ozone transport and the ozone nonattainment problem. The EPA's recognition of NO_X as an ozone precursor is supported by scientific studies, which have long recognized the role of NO_X in ozone formation and transport. Such formation and transport is not limited to nonattainment areas. Therefore, we believe NO_X should be treated consistently as an ozone precursor in both our PSD and nonattainment NSR regulations. For these reasons we have promulgated final regulations providing that NO_X is an ozone precursor * * *"

In the Phase II Rule, EPA established that states must submit SIPs incorporating required changes (including the addition of NO_X as a precursor for ozone) no later than June 15, 2007. *See* 70 FR 71612 (page 71683).

On February 5, 2010, Kentucky submitted a revision to include NO_X as a precursor for ozone for PSD and NNSR permitting purposes in order to comply with the Phase II Rule.

II. Today's Action

EPA has determined that Kentucky's February 5, 2010, SIP revision revising Kentucky's PSD and NNSR permit programs is consistent with changes to the Federal NSR requirements (40 CFR 51.165 and 51.166, and the Phase II Rule) relating to the incorporation of NO_X as an ozone precursor. The revision, which became state-effective on February 5, 2010, is included in Kentucky's PSD and NNSR programs and meets the requirements of the Phase II Rule by identifying NO_X as a precursor for ozone.[2]

EPA received comments on its proposal to approve the Kentucky SIP revision to incorporate NO_X as a precursor for ozone, on April 29, 2010, from the Law Office of Robert Ukeiley on behalf of the Sierra Club and Valley Watch, Incorporated. The comments opposed approval of the SIP revision. EPA's responses to these comments can be found in Section III of this rulemaking.

III. Comments and Responses

On April 29, 2010, EPA received a letter providing comments on EPA's proposal to approve Kentucky's February 5, 2010, SIP revision to include NO_X as a precursor for ozone for PSD and NNSR purposes. Below is a summary of the comments and EPA's response.

Comments:[3] The comments acknowledged that "[t]his revision is long overdue;" however, the comments further stated that, "EPA should not approve Kentucky's revision just because it is "line-by-line" consistent with the federal rules."

The comments expressed concerns regarding Kentucky's implementation of modeling requirements for ozone, particularly in reference to certain coal-fired utilities in Kentucky (that were specifically identified in the letter), and for those reasons, the Commenter appears to oppose the SIP revision. The Commenter explains that "[t]his proposed rulemaking is EPA's opportunity to provide Kentucky with much-needed direction on how to ensure air quality does not further degrade." One basis for the Commenter's concerns appears to be his position on Kentucky's attainment status for the ozone NAAQS as well as some permitting activities. The Commenter explains his position on Kentucky's alleged noncompliance with ozone requirements particularly with regard to issuing permits for major new sources of air pollution. The concerns seemed focused on ozone related modeling and monitoring. Further, the Commenter explains his concerns regarding ozone preconstruction monitoring at certain stationary sources.

The Commenter concludes by explaining that "[t]he proposed SIP

[1] Kentucky's February 5, 2010, SIP revision also included provisions for excluding facilities that produce ethanol through a natural fermentation process from the definition of "chemical process plants" in the NSR major source permitting program. In an action published on April 1, 2010 (75 FR 16388), EPA proposed to approve the aforementioned revisions into the Kentucky SIP. At this time, EPA is not taking action on the ethanol provisions. On a separate, unrelated issue, the rule revisions provided in Kentucky's February 5, 2010, submittal also requested the removal of certain provisions for clean units (CU) and pollution control projects (PCP), which were vacated by the United States Court of Appeals for the District of Columbia Circuit. EPA has not previously taken action to approve that portion of Kentucky's submittal (regarding the vacated rules) and EPA is not now taking action on those provisions.

[2] The Kentucky rules were formatted to conform to Kentucky rule drafting standards (KRS Chapter 13A), but in substantive content the rules are the same as the Federal rules.

[3] A full text of the comments is available in the Docket for this action. Electronic docket information can be found in the "Addresses" portion of this notice. The comments are summarized in this document; however, EPA considered all the comments expressed in the letter.

revision is EPA's opportunity to work with the state of Kentucky to design a program that will help Kentucky achieve present and future attainment with ozone standards." The Commenter requests that EPA (1) not approve the SIP revision until Kentucky agrees to make serious efforts at attaining and assuring continuing attainment with the ozone standards; and (2) use its powers under CAA Section 167 to prevent construction of three major sources of ozone precursor pollution (identified in the letter).

Response: EPA's Phase II Rule required states to add NO_X as a precursor for ozone to their SIPs. EPA explained the basis for that decision in the Phase II Rule, which is part of the CAA program to improve air quality and reduce ground-level ozone. The air quality benefits were the primary basis for EPA's final action in the Phase II Rule requiring states to incorporate NO_X as a precursor for ozone in their SIPs. See 68 FR 32802 (proposal); 70 FR 71612, 71674, 71679 (final Phase II Rule). The Commenter acknowledges that this action is "overdue" and recognizes that NO_X is in fact a precursor for ozone. While the comments are adverse in the sense that they request that EPA not approve the SIP revision, the comments provide no scientific or legal basis for EPA to disapprove Kentucky's February 5, 2010, SIP revision. The comments are focused on concerns about Kentucky's major source air program, and include no specific information explaining why adding NO_X as a precursor to ozone in Kentucky's PSD and NNSR programs is contrary to the CAA or its implementing regulations.

Notably, the Commenter has raised similar concerns in response to other actions (*e.g.,* permit revisions and other SIP revisions), including a lawsuit against EPA seeking EPA to use Clean Air Act Section 167 at certain coal-fired utilities in Kentucky. In a letter dated April 17, 2009 (which was resubmitted on January 20, 2010), the Commenter provided adverse comments to EPA regarding a separate (and unrelated) proposed approval actions for four Kentucky 110(a)(1) maintenance plans, stating

> "the Kentucky PSD program only requires that sources conduct ambient monitoring and impact analysis when a source is over 100 tons per year of [volatile organic compounds]. See 401 KAR 51:017 § 7(5)(a). The Kentucky PSD program illegally leaves out major sources of NO_X. Id."

In that separate action, the Commenter supported disapproval based on NO_X not being listed as an ozone precursor in the Kentucky SIP. Nonetheless, in this action to incorporate NO_X as a precursor for ozone, the same Commenter is opposing the action. Commenter appears to be trying to achieve changes not directly related to the SIP revision at issue, but more specifically focused on certain major stationary sources identified in the letter. These other actions have their own independent regulatory processes wherein Commenter has other opportunities to raise concerns and seek changes.

EPA's action to approve NO_X as a precursor for ozone in Kentucky supports the improvement of air quality in Kentucky, in part because of the associated modeling and monitoring requirements. EPA's approval of this SIP revision ensures that Kentucky's PSD and NNSR permit programs are consistent with the Federal NSR permit requirements (40 CFR 51.165 and 51.166) relating to the incorporation of NO_X as an ozone precursor set forth in the Phase II Rule.

IV. Final Action

Pursuant to Section 110 of the CAA, EPA is taking final action to approve Kentucky's SIP revision submitted February 5, 2010, which incorporates NO_X as an ozone precursor for PSD and NNSR purposes into the Kentucky SIP. The revision included in Kentucky's PSD and NNSR programs is equivalent to the provision in the Ozone Implementation NSR Update. EPA is approving these revisions into the Kentucky SIP because they are consistent with the CAA and its implementing regulations.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 15, 2010. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Volatile organic compounds.

Dated: September 1, 2010.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart S—Kentucky

■ 2. Section 52.920(c) Table 1 is amended by revising the entries for "401 KAR 51:001," "401 KAR 51:017," and "401 KAR 51:052" to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 1—EPA-APPROVED KENTUCKY APPROVED KENTUCKY REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
* *	*	*	*	* *
Chapter 51 Attainment and Maintenance of the National Ambient Air Quality Standards				
401 KAR 51:001	Definitions for 401 KAR Chapter 51.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140," in 401 KAR 51:001 Section 1 (118)(1)(b)(i) and the phrase "except ethanol production facilities producing ethanol by natural fermentation under NAICS codes 325193 or 312140," in 401 KAR 51:001 Section 1(118) (2)(c)(20).
* *	*	*	*	* *
401 KAR 51:017	Prevention of significant deterioration of air quality.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140;" in 401 KAR 51:017 Section 7(1)(c)20.
401 KAR 51:052	Review of new sources in or impacting upon non-attainment areas.	2/5/2010	9/15/2010 [Insert citation of publication].	Except the phrase "except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification System (NAICS) codes 325193 or 312140," in 401 KAR 51:052 Section 2 (3)(t).
* *	*	*	*	* *

* * * * *

[FR Doc. 2010–22856 Filed 9–14–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0121; FRL–8839–3]

Ammonium Formate; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of ammonium formate (CAS Reg. No. 540–69–2) when used as an inert ingredient (complexing or fixing agent with copper compounds) in pesticide formulations for certain pre-harvest uses. Phyton Corporation submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of ammonium formate.

DATES: This regulation is effective September 15, 2010. Objections and requests for hearings must be received on or before November 15, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0121. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information