ATTACHMENT C

For Opinion See 31 F.3d 1179

United States Court of Appeals, District of Columbia Circuit.
SANTA BARBARA COUNTY AIR POLLUTION CONTROL DISTRICT, Acting By and Through Its Board of Directors, Petitioner,
v.
Carol M. BROWNER, Administrator, U.S. Environmental Protection Agency, and U.S. Environmental Protection Agency, Respondents.
WESTERN STATES PETROLEUM ASSOCIATION Intervenor. on behalf of, Respondents.
No. 92-1569.
December 23, 1993.

Petition for Review of Final Rule of the Administrator

Brief of Petitioner

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***iv** TABLE OF CONTENTS

***vi** TABLE OF AUTHORITIES

Preamble to OCS Rule, 57 Fed.Reg. 40791 ... passim

STATEMENT OF ISSUES

1. Was it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the Administrator of the Environmental Protection Agency to adopt provisions in 40 CFR Section 55.2 to exclude vessels from the definition of "OCS source" when such vessels are not permanently or temporarily attached to the sea bed or erected thereon or not physically attached to an OCS facility?

2. Was it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the Administrator to adopt emission offset requirements in 40 CFR Section 55.5 which are not the same as those of the corresponding onshore area for sources within 25 miles of the state's seaward boundar?

3. Was it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the Administrator to adopt delegation provisions in 40 CFR Section 55.11 which prohibit the delegation of authority by the Administrator to the states or local districts for areas of the OCS beyond 25 miles of the state seaward boundary?[FN1]

FN1. In Petitioner's Statement of Non-Binding Issues, a fourth issue was identified that Petitioner has since chosen not to pursue.

STATUTES AND REGULATIONS

Section 328 of the Clean Air Act, 42 U.S.C. Section 7627, is set forth in Appendix A to this brief. Also contained in the Appendix for the Court's convenience are excerpts from the Congressional Record. The final OCS rule will be contained in the Joint Appendix.

JURISDICTION

Pursuant to Section 328(a), each requirement adopted by the Administrator for the OCS is a standard under Section 111 of the Clean Air Act. Jurisdiction to review actions of the Administrator in promulgating standards under Section 111 is established by Section 307(b) of the Clean Air Act, 42 U.S.C. Section 7607(b).

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

This case concerns the failure of the Administrator of the Environmental Protection Agency ("EPA") to include provisions in a final rule issued on September 4, 1992 which apply "the same" air quality requirements to Outer Continental Shelf ("OCS") sources as are applied in the adjacent corresponding onshore area of the state, even though Congress added Section 328 to the Clean Air Act in 1990, 42 U.S.C. Section 7627, which specifically requires such a result. In particular, EPA adopted a rule which does not fulfill the fundamental mandate of Section 328 to apply "the same" requirements to OCS sources as are or will be applicable in California for air pollution from marine vessels in transit and for offsets. The Administrator's failure to provide for the regulation of in transit marine vessels is particularly distressing given the plain language of the statute, its legislative history, and the large amount of pollution generated by OCS vessels. Additionally, despite the plain language of Section 328 that requires the delegation of authority the Administrator has under the Act to implement and enforce OCS requirements, the Administrator refused to include in the OCS rule any provision which would allow for the consideration of delegation of authority for OCS sources located more than 25 miles from a state's seaward boundary.

I. REGULATION OF OUTER CONTINENTAL SHELF AIR POLLUTION UNDER SECTION 328 OF THE CLEAN AIR ACT.

Among the many sweeping revisions to the Clean Air Act ("Act") adopted by Congress in 1990 was Section 328, 42 U.S.C Section 7627, which transferred to the Environmental Protection Agency

("EPA") from the Department of Interior ("DOI") the authority to regulate air pollution from OCS sources adjacent to all states of the United States along the Pacific, Atlantic and Arctic Coasts, including Florida but excepting the OCS adjacent to the other states on the Gulf of Mexico. Section 328 further directed the Administrator to adopt a rule ("OCS rule") regulating pollution from OCS sources within one year of the adoption of the 1990 Clean Air Act Amendments.

Section 328 sets forth two basic requirements for the OCS rule. First, the Administrator is required to promulgate requirements for all OCS sources that will achieve the attainment and maintenance of federal and state air quality standards. Second, for OCS sources within 25 miles of the seaward boundary of any state covered by the OCS rule

"such requirements shall be *the same* as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting."

42 U.S.C. Section 7627(a), emphasis added.

On September 4, 1992, the Administrator promulgated the final OCS rule as 40 CFR Part 55, at 57 Federal Register, No. 173, 40791. This action fulfilled the Administrator's duty to issue the OCS rule, however, the Administrator failed in two key respects to apply "the same" requirements to OCS sources that are applied in the corresponding onshore area of the state. These deficiencies concern the Administrator's failure to provide for the regulation of air pollution from marine vessels in transit and the failure to apply onshore mitigation requirements regarding "offsets," even though the plain and unmistakable language of the Act require such a result. Additionally, the Administrator did not include in the OCS rule any provisions for the delegation of authority to the states for areas of the OCS beyond 25 miles of the states' seaward boundary, even though the plain language of Section 328 requires that such applications be granted if they are "adequate."

II. AIR POLLUTION FROM OCS DEVELOPMENT HAS SEVERELY IMPACTED SANTA BARBARA COUNTY.

Santa Barbara County has a long history of dealing with OCS development and its associated impacts. In the 1980's alone, Exxon, U.S.A. and Chevron, U.S.A., as operators and part owners, each constructed separate OCS projects consisting of a total of six OCS platforms adjacent to Santa Barbara County. These OCS platforms supplemented an already considerable number of OCS facilities off the coast of Santa Barbara County, which now number 19 in all. Additionally, four more platforms are just to the southeast and adjacent to Ventura County, but still close to Santa Barbara County. (See Map at p. 6, *infra.)* Of the existing 27 OCS facilities adjacent to the State of California, 23 are either adjacent to or near Santa Barbara County.

Air pollution from OCS sources adjacent Santa Barbara County is significant. During the rulemaking process, EPA's own analysis showed that OCS facilities adjacent to Santa Barbara County, including marine vessels, generate 1,470 tons of oxides of nitrogen ("NOx") and 685 tons of hydrocarbons per year. Costs Associated with EPA Air Quality Regulations for Outer Continental Shelf Sources, September 1992, at A-39, JA 532. Additionally, of the 1,470 tons of NOx generated annually, *45 percent (673 tons) of the OCS total is from support marine vessels associated with oil and gas development. Ibid.* OCS development requires a substantial amount of shore-based support, including equipment, crews and supplies, almost all of which is transported by crew and supply boats. AT. Kearney, Control Costs Associated With Air Emission Regulations for OCS Facilities, Sept. 30, 1991, at 21, JA 079. For OCS facilities adjacent to Santa Barbara County, the crew and supply boats primarily originate out of Port Hueneme located in Ventura County to the south, resulting in vessel trips of a minimum of 37 miles and a maximum of 130 miles. Kearney,

Exhibit 12, at 52, JA 110. The resulting pollution from crew and supply boats associated with *an individual* platform was estimated to range from 26.2 to 92 tons of NOx per year. *Ibid.*

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLETABLE

Santa Barbara County is a designated nonattainment area for both the state and federal ozone standards.[FN2] As such, the Santa Barbara County Air Pollution Control District ("Santa Barbara APCD") is required to adopt air quality attainment plans which provide for the regulation of onshore businesses, at significant expense, to reduce air pollution and meet the federal and state standards. The most recent federal mandate Santa Barbara APCD is required to meet is set forth in Section 182a of the Act, 42 U.S.C. Section 7511a, which requires the submission of an attainment demonstration by November, 1993.

> FN2. Ozone is a pollutant that is not itself emitted but is formed out of the chemical reaction in sunlight of NOx and reactive hydrocarbons.

Santa Barbara APCD has already required the application of controls on marine vessels for several oil and gas projects and these have been found to be highly cost-effective and have even resulted in substantial cost savings for the marine vessel operators by reducing fuel consumption. The California legislature has also adopted California Health and Safety Code Section 43013(b), which mandates that the California Air Resources Board develop a rule to regulate air pollution from marine vessels by December 31, 1994. See Appendix A. The OCS rule adopted by the Administrator prohibits the application of such state requirement to OCS vessels. Therefore, even though vessels in California State waters will be regulated, OCS vessels need not comply under the OCS rule adopted by the Administrator.

III. PAST REGULATION BY THE DEPARTMENT OF INTERIOR WAS NONEXISTENT AND DIVISIVE.

Prior to the adoption of the Section 328 and the OCS rule, OCS development adjacent to California was regulated by DOI pursuant to Section 5(a)8 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. Section 1334(a)(8). DOI generally did little to safeguard air quality, despite persistent and strong objections and many lawsuits from the State of California and others. This was reflected in the legislative history for Section 328 as one of the reasons the amendment to the law was needed. The following is an excerpt from a report submitted into the Congressional Record by Congressman Lagomarsino.

Under current federal regulation, these major sources of air pollution are not required to be mitigated or controlled. Large discrepancies exist in the regulation of air pollution from virtually identical onshore and OCS sources. In some areas, EPA requires stringent pollution controls onshore and within state waters to improve coastal air quality, while the Interior Department allows unmitigated OCS pollution under the provisions of the Outer Continental Shelf Lands Act.

136 Cong. Record, No. 149, Oct. 26, 1990, at H 12889.

EPA also acknowledged the problem in the Preamble to the Draft OCS rule, stating that California had been strongly critical of DOI's regulation of OCS development because DOI refused to incorporate basic air quality mitigation requirements into OCS projects, even though virtually identical projects in California state waters were providing such mitigation.

Historically in California, the onshore community felt that OCS emission sources were not bearing a fair share of the burden of air pollution control. Onshore sources were subject to increasingly stringent controls while virtually identical sources operated on the OCS with very few controls and little mitigation. The onshore community generally disagreed with the DOI argument [that] the distance of OCS sources from shore reduced their effects on onshore

air quality and therefor [sic] reduced the need for controls and offsets. The result was a confrontational atmosphere in which the onshore community felt that OCS activity was encouraged at the expense of air quality or economic growth onshore. Start-up of OCS sources was often delayed by years due to extended litigation and negotiations on air quality issues. As a result, a trend developed for new OCS platforms constructed adjacent to California to apply controls to reduce emissions and obtain offsets to mitigate the impacts of remaining emissions.

56 Fed. Reg. No. 234 (Dec. 5 1991) 63774 63775 (col. 2) JA 145.

The problem for areas such as Santa Barbara County was that OCS development was causing or contributing to violations of the federal and state ozone standards. This was an extremely unfair result given the fact that onshore businesses, including oil and gas development in California coastal waters, were being stringently regulated in order to bring the County into attainment with the federal and state standards. This problem was cited in the report submitted into the Congressional Record by Congressman Lagomarsino as a primary concern that led to the adoption of Section 328 and its mandate that “the same” requirements that apply within the state also apply to adjacent OCS sources.

Of primary concern is the fact that OCS air pollution is causing or contributing to the violation of federal and state ambient air quality standards in some coastal regions, with the potential that unmitigated OCS pollution will prevent certain coastal regions from attaining federal and state clean air standards. In Santa Barbara and other coastal regions, unmitigated OCS emissions could entirely negate the effect of all onshore emission reductions relied upon to achieve federal and state clean air standards. The adoption of more stringent regulations onshore to compensate for the effect of these unmitigated OCS emissions could only be done, if at all, with great cost to onshore industries and with substantial disruption to life-styles of coastal residents. The magnitude of OCS pollution and the fact that the prevailing winds bring much of this pollution onshore has lead the Environmental Protection Agency to express concern about the onshore air quality impacts from OCS development.

136 Cong. Record, No. 149, Oct. 26, 1990, at H 12889, (col. 3).

The impact of OCS development on California air quality is more than just an issue of equity or interference with Santa Barbara County's efforts to attain the federal and state ozone standards. Any air shed can accommodate only a limited amount of pollution and still meet federal and state air quality standards. In spite of this limitation, DOI's practice of permitting OCS development without significant mitigation not only shifted the cost of meeting air quality standards to onshore sources, it also jeopardized the possibility of new or expanded growth of onshore businesses because of the large amount of pollution generated by OCS sources. This was acknowledged in the report inserted into Congressional Record in the House.

Coastal economic development goals can only be achieved through the permitting and regulation of many low-polluting facilities. While keeping within allowable air quality standards, over ten times as much low-polluting development can be permitted, as compared to highly polluting development. Application of the same requirements of all offshore and onshore projects will preclude a few “dirty” projects from using up an air basin's remaining capacity to absorb pollutant [sic] and thereby impede future development.

136 Cong. Record. No. 149, Oct. 26, 1990, at H 12889. (col. 3).

In the same report, it was also acknowledged that the pollution problem caused by OCS development related to both the platforms and associated marine vessels and that existing control technology can significantly reduce this pollution.

Uncontrolled operatonal emissions from an OCS

platform and associated Marine vessels can exceed 500 tons of oxides of nitrogen (NOx) and 100 tons of reactive hydrocarbons annually. Uncontrolled platform construction emissions can exceed 350 tons of NOx while drilling an exploratory OCS well can cause emissions in excess of 100 tons NOx. Existing pollution . control technology can significantly reduce these pollution levels.

Ibid.

In this context, Congress adopted Section 328 to bring fairness and relief to coastal states that were being unfairly impacted by air pollution from OCS development. The concept is simple and fair -- OCS sources shall comply with "the same" requirements as applied in the corresponding onshore area of the state. With the adoption of Section 328, Congress sought to bring to an end years of dispute and confrontation. The only thing remaining was for the Administrator to adopt an OCS rule that achieved this goal.

IV. THE RULEMAKING PROCESS.

To accomplish the goal of requiring OCS sources to comply with state air quality requirements, EPA primarily relied on incorporating state and local regulations into federal law. See Appendix A to 40 CFR Part 55--Listing of State and Local Requirements Incorporated by Reference into Part 55, by State. JA 558. The bulk of the OCS rule addresses procedural requirements, such as designation of corresponding onshore areas ("COA"), exemption requests, delegation, and consistency updates. On two substantive points, EPA has adopted a rule that departs from the requirements of the state -- regulation of marine vessels in transit and offsets. On a procedural issue, EPA has also adopted provisions for delegation that depart from the requirements of the Act by precluding any consideration of delegation of authority to the states for OCS facilities located more than 25 miles from the state's seaward boundary, even though Section 328 plainly states that such a delegation shall occur if a state's program is found to be "adequate" by the Administrator.

A. The Exclusion of Marine Vessels from Complying with "the same" Control Requirements as Applied in the State.

Section 328(a)(4)(C) identifies what is *included* in the term "OCS source." This provision is *nonexclusive*, and makes clear the fact that all activities previously regulated or authorized under the OCSLA are now regulated under Section 328 of the Clean Air Act. It does not undermine the fundamental requirement of Section 328(a), which is that OCS sources shall comply with the same requirement as would be applicable if the source were located in the corresponding onshore area of the state. Section 328(a)(4)(C) provides, in part:

(C) Outer Continental Shelf source. The terms "Outer Continental Shelf source" and "OCS source" include any equipment, activity, or facility which--

(i) emits or has the potential to emit any air pollutant,

(ii) is regulated or authorized under the Outer Continental Shelf Lands Act, and

(iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf. [FN3]

> FN3. The rest of the Section 328(a)(4)(C) provides:
> "Such activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and *transportation.* For purposes of this subsection, *emissions from any vessel* servicing or associated with an OCS source, *including emissions* while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source." (emphasis added.)

42 U.S.C. § 7627(a)(4)(C), emphasis added.

Despite the plain language of Section 328(a)(4)(C), EPA adopted a definition of "OCS source" in the OCS rule that is both exclusive and inconsistent with the legislative history. EPA's definition states, in part:

OCS source means any equipment, activity, or facility which:

(1) emits or has the potential to emit any air pollutant;

(2) is regulated or authorized under the Outer Continental Shelf Lands Act ("OCSLA") (43 U.S.C. § 1331 *et seq.*); and

(3) is located on the OCS or in or on waters above the OCS.[FN4]

> FN4. The OCS rule goes on to provide as follows:
> The definition shall include vessels only when they are:
> (1) permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing or producing resources therefrom, within the meaning or § 4(a)(1) of OCSLA (43 U.S.C. §1331 *et seq.*); or
> (2) physically attached to an OCS facility, in which case only the stationary source aspects of the vessels will be regulated.

40 CFR § 55.2, 57 Fed.Reg. at 40807, emphasis added. JA 551.

After blatantly changing the statutory definition of Section 328 from a non-exclusive provision to an exclusive one, ("means" substituted for "include"), EPA then determined that the OCSLA did not "authorize or regulate" marine vessels in transit and, therefore, any state requirements for the control of air pollution from marine vessels in transit would not be applied to OCS vessels. In the Preamble to the OCS rule, EPA states:

Only the vessel's stationary source activities may be regulated, since when vessels are in transit, they are specifically excluded from the definition of OCS source by statute. In addition, only the stationary source activities of vessels at dockside will be regulated under Title I of the Act (which contains NSR and PSD requirements), since EPA is prohibited from directly regulating mobile sources under that title. See NRDC v. EPA, 725 F.2d 761 (DC Cir. 1984.) Part 55 thus will not regulate vessels en route to or from an OCS source facility as "OCS sources," nor will it regulate any of the non-stationary source activities of vessels while at dockside. Section 328 does not provide EPA authority to regulate the emissions from engines being used for propulsion of vessels. Any state or local regulations that go beyond these limits will not be incorporated into the OCS rule.

Preamble to OCS rule, 57 Fed.Reg. at 40793-40794 (col. 1) JA 537-538.

EPA did take the position in rulemaking that it could regulate emissions from marine vessels pursuant to Title II of the Clean Air Act and that, if such a regulation was adopted, the OCS rule will be revised. On this issue, EPA stated:

If the mobile source emissions of vessels are regulated under future regulations developed pursuant to title II of the Act, the OCS rule will be revised accordingly.

Ibid.

Santa Barbara APCD strongly supports an EPA regulation of marine vessels under Title II. However, there is no assurance EPA will ever adopt such a regulation or, if it does, when it will be adopted. Additionally, EPA's comment in the Preamble that such a regulation would be incorporated into the OCS rule appears impossible because the OCS rule definition for "OCS source" does not include vessels in transit. Therefore, the definition of "OCS source" in the rule appears to squarely block incorporation of any Title II requirements into the OCS rule because of the narrow definition adopted by EPA. EPA's rule is, therefore, at odds with EPA's

own statement of intent.

The failure to allow for the inclusion of Title II requirements in the OCS rule is even more problematic for California, which is allowed under Section 209 of the Act to impose more stringent requirements than those of EPA for "non-road" engines (including marine vessels), provided a waiver is obtained from EPA. 42 U.S.C. § 7543(e). With such a waiver, California can proceed with the regulation of vessels well before EPA develops a national marine vessel rule. Additionally, the State may also have more stringent regulations than those adopted by EPA, assuming EPA eventually adopts a marine vessel rule.[FN5] Under the OCS rule definition adopted by EPA California's requirements cannot be incorporated into the OCS rule, even though such requirements are adopted pursuant to Title II of the Act and Section 328 clearly states that the same requirements applied in the state shall be applied to OCS sources. The result is that air pollution from vessels in transit on the OCS will not have to be controlled pursuant to the OCS rule even though vessels in state waters will be subject to control requirements.[FN6] The inequity will continue.

> FN5. The Section 209 waiver process has been used by California to regulate automobile emissions much more stringently than the rest of the nation.
>
> FN6. In many instances, vessels operating on the OCS will originate in California and, therefore, be subject to any rule adopted by California, as least while in State waters. Unfortunately, this does not resolve the problem. First, many of the types of controls may effect operational parameters of vessels, such as simple timing retard of ignition in the engine. Such restrictions can be ignored or altered on the OCS if no regulatory requirement prohibits such conduct. Second, if such controls are implemented on the OCS without a regulatory mandate, the operator may claim any reduction as a "voluntary reduction" and attempt to use it as an "offset." Any offset credit would simply transfer the pollution to a new source rather than eliminating it altogether.

B. The OCS Rule's Offset Requirements Allow a Substantial and Unfair Advantage to OCS Sources.

Section 328 plainly and unmistakably requires, for OCS sources within 25 miles of a state's seaward boundary, the requirements "shall be the same as if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for... *offsets* ..." 42 U.S.C § 7627(a).

Despite the clear language of the Act, EPA adopted substantive requirements for offsets which substantially depart from onshore requirements. In 40 CFR Section 55.5(d), the OCS rule requires, in part:

(d) *Offset requirements.* Offsets *shall* be obtained based on the requirements imposed in the COA, and *in accordance with the following provisions:*

(2) To determine whether an offset is on the landward or seaward side of a proposed source or modification, a straight line shall be drawn through the proposed source or modification parallel to the coastline. Offsets obtained on the seaward side of the line will be considered seaward of the source, and offsets obtained on the landward side will be considered landward.

(3)Offsets obtained between the site of the proposed source or modification and the state seaward boundary shall be obtained at the base ratio for the COA. *No discounting or penalties associated with distance between the proposed source and the source of emissions reductions shall apply.*

(4) Offsets obtained on the landward side of the state seaward boundary will be subject to onshore discounting and penalties associated with distance as required in the COA to be applied in the following manner. A straight line shall be drawn from the

site of the proposed source or modification to the source of the offsets. *The point at which this lines crosses the state seaward boundary shall be treated as the site of the proposed source or modification for the purpose of determining the amount of offsets required.*

EPA stated in the Preamble that the rationale for imposing these requirements is that it "would provide an incentive for OCS sources to obtain their offsets from the landward side of the OCS source." 57 Fed.Reg. at 40796, (col. 2), JA 540. The basic effect of this provision, however, is that it limits the ability of the COA to apply "distance discounting," which is a procedure whereby the offset ratio is increased as the distance increases between the offset source and the new source.[FN7] For example, these offset provisions of Section 55.5(d)(3) prohibit the application of higher offset ratios, regardless of distance, if the offsets are obtained on the landward side of the new source but still on the OCS. This inequitable arrangement means that distance discounting that is applied to sources in the state cannot, in such instances, be applied to OCS sources.

> FN7. Typically, there is a base offset trading ratio, which under Santa Barbara's Rule 205C is 1.2:1. For example, for every 1 ton of new pollution generated by the new source that requires offsets (which is 25 tons or more), an existing source must reduce its pollution by 1.2 tons. For example, a new source that would generate 50 tons of NOx per year would require 60 tons of offsets at the base ratio of 1.2:1. This ratio increases if the offset source is located more than 15 miles from the new source.

C. The Delegation Provisions of the OCS Rule Do Not Allow For Consideration of an Application for Delegation For OCS Sources Farther Than 25 Miles From a State's Seaward Boundary.

Section 328(a)(3) provides that "each State adjacent to an OCS source" may submit regulations for implementing and enforcing the requirements of Section 328 and, if the Administrator finds such regulations "adequate, the Administrator shall delegate to that State any authority the Administrator has under this Act to implement and enforce such requirements." 42 U.S.C. § 7627(a)(3).

During rulemaking, several commenters requested that EPA adopt an OCS rule that at least allowed for the *consideration* of such applications; however, EPA refused for what are essentially policy reasons. EPA did not dispute the plain language of the statute; rather, EPA only stated that it was "more efficient to have the federal government retain authority than to have a state agency try to implement and enforce purely federal requirements." Preamble to OCS rule, 57 FedReg. at 40801-40802 JA 545-546

There are currently no OCS sources located more than 25 miles from the seaward boundary of the State of California. This is primarily due to the depth of the water, however, petroleum exploration and production in such waters will be possible with the development of new technology. Santa Barbara APCD's objection is that EPA intends that the OCS rule prohibit, on its face, any delegation of such authority. Therefore, if Santa Barbara wishes to challenge this provision timely, it must do so within 60 days of promulgation as required by Section 307(b) of the Clean Air Act 42 U.S.C. Section 7607(b).

SUMMARY OF ARGUMENT

Pursuant to Section 328 of the Clean Air Act, EPA is required to adopt a rule for OCS sources which applies "the same" requirements for air quality "as would be applicable if the source were located in the corresponding onshore area ..." Section 328 further requires the Administrator to delegate any authority to implement and enforce such requirements to a state if that states adopts and submits to EPA regulations and requirements that are found "adequate."

EPA has adopted an OCS rule that fails to provide for the application of state requirements for emissions from marine vessels in transit. This is contrary to the plain and unmistakable language of Section 328 to apply "the same" requirements to OCS sources that are applied in the corresponding onshore area of the state. Since the statute is not ambiguous, EPA has no discretion. Rather, as stated by the Supreme Court in *Chevron, U.S.A., INC. v. Natural Resources Defense Council ("Chevron v. NRDC")*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) where the intent of Congress is clear, "that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Since the language of Section 328 is plain and unmistakable that "the same" requirements shall be applied to OCS sources as are applied to sources in the state.

EPA has attempted to avoid regulating marine vessels in transit under Section 328 by narrowly reading the definition of "OCS source" found in Section 328(a)(4)(C). EPA's narrow interpretation is unreasonable because this provision simply states that the term "OCS source *includes* ... activities ... authorized or regulated under the [OCSLA]." In contrast, EPA has adopted a definition in the OCS rule that states "OCS source means ... activities ... authorized or regulated under the [OCSLA.]" This Court and others have previously held that where Congress uses nonrestrictive terms in a statute, the statute is unambiguous and EPA may not restrict the scope of that statute through administrative interpretation. Natural Resources Defense Council v. Reilly, 983 F.2d 259, 268 (D.C. Cir. 1993). Therefore, EPA's departure from the unambiguous terms of Section 328 cannot be sanctioned.

The legislative history also clearly supports a conclusion that Congress intended that vessels in transit be regulated under Section 328. In particular, the Conference Report states that the provisions of Section 328 will "ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions." 136 Congressional Record, No.# 150, Oct. 27, 1990, at S 16983, (col. 1).

Petitioner strongly submits that the language of the statute is unambiguous and further inquiry beyond this point is not needed. If the Court does conclude that some ambiguity exists in Section 328 regarding the regulation of marine vessels in transit, Santa Barbara APCD. submits that the clear legislative history as set forth in the Conference Report demonstrates that Congress intended that emissions from marine vessels be controlled and, therefore, the interpretation adopted by EPA is not one that Congress would sanction. Chevron v. NRDC, supra, 467 U.S. at 845, 104 S.Ct. at 2783. On this basis, EPA's narrow reading of the application of Section 328 cannot be allowed to stand.

With regard to offsets, EPA has departed from the explicit language of Section 328 which states that "the same" requirements applied in the state shall be applied to OCS sources "and shall include, but not be limited to, State and local requirements for ... offsets ..." Despite this plain and unambiguous language, EPA has adopted substantive provisions in the OCS rule that limit the application of state requirements for offsets, to the advantage and benefit of OCS sources. This departure from the requirements of Section 328 clearly fails to pass the first prong of the analysis of the Supreme Court in *Chevron v. NRDC*, and must be set aside.

The Administrator has also failed to follow the requirements of Section 328 with regard to delegation. Section 328(a)(3) plainly and unambiguously states that each "State adjacent to an OCS source" included under Section 328(a) may be delegated authority to implement and enforce OCS requirements if the "Administrator finds that the State regulations are adequate." Despite this language, EPA has simply concluded that delegation is not appropriate for OCS sources beyond 25 miles of the seaward boundary of a state. To this end, EPA has adopted an OCS rule that, on its face, does not allow for delegation of authority for such OCS sources. Since

this is contrary to the plain and unambiguous language of the statute, it fails the first prong of the Supreme Court's analysis in Chevron v. NRDC and must be set aside.

ARGUMENT

I. STANDARD OF REVIEW.

Under the Clean Air Act, EPA's adoption of a rule may not stand if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 42 U.S.C. § 7607(d)(9). This Court's review of EPA's construction of the Act is subject to the analysis laid out by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council ("Chevron v. NRDC"),* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As stated by the Supreme Court, two questions present themselves in this analysis. '
When a court reviews an agencys construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron v. NRDC, 467 U.S. at 842-843, 104 S.Ct. at 2781-2782. The Supreme Court ***21** further stated that if a "court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is law and must be given effect." *Chevron v. NRDC,* 467 U.S at 843 n. 9, 104 S.Ct. at 2881-2782 n. 9. Where the language of the statute is "plain and unmistakable," a court need not proceed beyond the first step of the Chevron analysis. *American Petroleum Institute v. Reilly,* 983 F.2d 259, 266 (D.C. Cir. 1993). Only if the statute is ambiguous or silent may an agency charged with administering that statute then interpret it, "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron v. NRDC,* 467 U.S at 845, 104 S.Ct. at 2783, quoting *United States v. Shimer,* 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961).

Santa Barbara County APCD submits that for all of the issues presented in this case, EPA's actions do not satisfy the first prong of the Supreme Court's analysis in *Chevron* and, therefore, must be set aside.

II. EPA's FAILURE TO PROVIDE FOR THE REGULATION OF MARINE VESSELS IN TRANSIT IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 328 AND ITS LEGISLATIVE HISTORY.

A. EPA's Action Fails to Meet the First Prong of the Chevron Analysis.

1. Section 328 Commands That All Requirements of the State be Applied to OCS Sources Within 25 Miles of the State's Seaward Boundary, Including Emissions Controls and Emission Limitations.

When Congress enacted Section 328 of the Clean Air Act in 1990, this provision was intended to end years of disputes and inequities regarding the regulation of OCS air pollution sources. In Section 328 Congress required that the air pollution control requirements for OCS sources "shall be the same" as those that would apply if the source were located in the corresponding onshore area. Section ***22** 328 also clearly states that such requirements "shall include" but are not limited to those for emission controls, emission limitations, and offsets.
Section 328. Air Pollution from Outer Contin-

ental Shelf activities

(a) General Provisions. (1) Applicable requirements for certain areas. Not later than 12 months after the enactment of the Clean Air Act Amendments of 1990, following consultation with the Secretary of the Interior and the Commandant of the United States Coast Guard, the Administrator, by rule, shall establish requirements to control air pollution from Outer Continental Shelf sources located offshore of the States along the Pacific, Arctic and Atlantic Coasts, and along the United States Gulf Coast off the State of Florida eastward of longitude 87 degrees and 30 minutes *("OCS sources")* to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I [42 U.S.C. §§ 7470 et seq.]. For such sources located within 25 miles of the seaward boundary of such States, such *requirements shall be the same* as would be applicable if the source were located in the corresponding onshore area, and *shall include, but not be limited to State and local requirements for emission controls, emission limitations, offsets*, permitting, monitoring, testing, and reporting.

42 U.S.C. § 7627(a), emphasis added.

The first and primary task for determining the intent of Congress is to employ traditional tools of statutory construction. *Chevron v. NRDC,* 467 U.S at 843 n. 9, 104 S.Ct. at 2881-2782 n. 9. Under accepted canons of statutory interpretation, a court must interpret statutes as a whole, giving effect to each word. *Boise Cascade Corp: v. Environmental Protection Agency* 942 Fed.2d 1427 (9th Cir. 1991.)

The plain and unmistakable language of Section 328 requires the Administrator to control air pollution from any source on the OCS to the same extent as "if the source were located in the corresponding onshore area." "OCS sources" refers to sources of air pollution on the OCS adjacent to one of the states described in Section 328(a), (which is all coastal states except those located on the ***23** Gulf of Mexico, but including Florida). The plain and ordinary meaning of this language is that all requirements of the COA apply to sources of air pollution on the OCS. No exception is made for marine vessels, therefore, if the COA has requirements for the control of air pollution from marine vessels in transit, those requirements shall be applied, "as if the source were located in the [COA]."

2. The Provision in Section 328 That States Which Activities are included in the Term "OCS Source" Cannot Be Reasonably Read to Exclude Marine Vessels in Transit.

During rulemaking and in the final OCS rule, EPAs position has been that it cannot apply state requirements for the control of air pollution from vessels in transit because of the provisions of Section 328(a)(4)(C).

Section 328(a)(4)(C) describes which activities are "include[d]" in the term "OCS source." This provision not only describes what is included in the term, it also describes when a vessel's emissions "shall" be considered as "direct emissions" from an OCS source. The requirement that certain vessel emissions shall be included as direct emissions for an associated OCS source has the effect of requiring this result, even if the state's requirements do not similarly include such a provision. In this regard, Section 328 sets a minimum requirement, regardless of the provisions of the states.

(C) Outer Continental Shelf source. The terms "Outer Continental Shelf source" and "OCS source" *include* any equipment, activity, or facility which--

(i) emits or has the otential to emit an air ollutant

(ii) is regulated or authorized under the Outer Continental Shelf Lands Act, and

(iii) is located on the on the Outer Continental Shelf or in r on waters above the Outer Continental Shelf.

Such activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. *For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions* ****24*** *while at the OCS source or en route to or from the OCS source within 25 miles*

of the OCS source, shall be considered direct emissions from the OCS source.

42 U.S.C. § 7627(a)(4)(C), emphasis added.

The plain and unambiguous language of Section 328(a)(4)(C) does not limit the definition of "OCS source" set forth in Section 328(a); rather, 328(a)(4)(C) simply states what this term "includes." In particular, and significantly, it does not exclude, marine vessels or any other OCS source of air pollution that would be subject to the requirements of the adjacent state through Section 328(a). If Congress had wished to limit the term "OCS source" to those activities identified in Section 328(a)(4)(C), it would have stated that "OCS source *means* --." In contrast, for the terms "Outer Continental Shelf," "Corresponding onshore area," and "new OCS source" in the very same subsection of Section 328, Congress chose to use the word "means" for purposes of definition. See 42 U.S.C. § 7627(a)(4)(A) (B) & (D). Clearly, Congress expressed a different intent when it chose to use a different word -- OCS sources " *include* " -- when identifying OCS sources subject to onshore requirements. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991), the "use of different words in the same sentence of a statute signals that Congress intended to distinguish between them."

It is also well founded that where Congress has chosen to use a non-exclusive term in a statute, EPA may not ignore the use of that term and limit the scope of the statute. For example, this Court has recently stated that the "use of the plural defeats any implication that Congress intend EPA to consider only [the singular]." *Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 268 (D.C. Cir. 1993), invalidating EPA's consideration of only one technology where the Act clearly required EPA to evaluate vapor recovery "systems." Where Congress has used language that shows it intended to not restrict the scope of a statute, there is no ***25** ambiguity and EPA may not interpret the statute narrowly. *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1320 (9th Cir. 1990), invalidating EPA's interpretation of the Clean Water Act because "[b]y using the plural 'lists,' Congress foreclosed EPA from restricting the scope of paragraph C to waters on the B list. Since the *language of paragraph C is unambiguous*, there is no need to resort to extrinsic sources to interpret the statute." (emphasis added.)

Where the language of the statute is "plain and unmistakable," a court need not proceed beyond the first step of the Chevron analysis. *American Petroleum Institute v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993). Congress plainly chose a non-exclusive word to describe what sources are included in the term "OCS sources." *There is no ambiguity*. Therefore, the plain and unmistakable terms of Section 328(a) must be given effect and EPA is required to apply all state requirements for air pollution control to OCS sources, including those for marine vessels in transit.

3. The Legislative History Shows that Congress Intended that Emission Controls be Applied to Marine Vessels in Transit.

If necessary, when construing a statute, a court will look at the legislative history as well as the words of the statute to "divine the intent of Congress, which of course binds both agency and court." *Natural Resources Defense Council v. Environmental Protection Agency* 822 F.2d 104, 111 (D.C. Cir. 1987). Santa Barbara APCD submits that the language of Section 328 is clear and unambiguous and, therefore, there is no need to resort to the legislative history. If such an inquiry is made, however, it further supports Santa Barbara APCD's position.

The legislative history on this issue is short, but unmistakably clear. The Clean Air Conference Report was inserted into the Congressional Record in the Senate by Senator Baucus, who prefaced his action by stating: "Mr. President, ***26** I ... would like to insert in the RECORD at this point an explanation that is much more detailed than the statutory language." There was no objection and the following analysis was submitted as part of the Conference

Report:
Marine vessels emissions, including those from crew and supply boats, construction barges, tugboats, and tankers, which are associated with an OCS activity, will be *included as part of the OCS facility emissions for the purpose of regulation.* Air emissions associated with stationary and *in transit* activities of the vessels will be included as apart of the facility's emissions for vessel activities within a radius of 25 miles of the exploration, construction, development or production location. *This will ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions.*

136 Congressional Record, No.# 150, Oct. 27, 1990, at S 16983, (col. 1), emphasis added. One day earlier, the same analysis, as it pertained to OCS activities, was also inserted into the Congressional Record for the House by Congressman Lagomarsino. 136 Congressional Record, No.# 149, Oct. 26, 1990, at H 12890.

These statements in the Congressional Record point to the fact that Congress intended vessel emissions shall be included as part of the OCS facility's emissions for the "purpose of regulation" and that such emissions will be "controlled and offset." This statement of intent together with the unambiguous language of the statute prohibits EPA from adopting a regulation that does not accomplish this result.

B. If Section 328 Were Found to be Ambiguous, EPA's Interpretation is Not One Congress Would Have Sanctioned.

Santa Barbara APCD strongly urges the Court to find that there is no ambiguity in Section 328 and that all state requirements for the control of air pollution from the OCS shall be applied, including those for marine vessels. Petitioner believes that no further inquiry beyond the plain language of Section 328 ***27** is necessary. If the Court does proceed to the second prong of the *Chevron v. NRDC* analysis, petitioner submits EPA's interpretation still cannot stand.

If a statute is ambiguous or silent on an issue, the agency charged with administering that statute may reasonably interpret it, "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron v. NRDC,* 467 U.S at 845, 104 S.Ct. at 2783, quoting *United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961).

EPA's conclusion that it may not regulate emissions from vessels in transit is based entirely on the reference in Section 328(a)(4)(C) that "OCS source" includes any equipment, activity, or facility which-- "(ii) is authorized or regulated under the [OCSLA]." As stated earlier the last art of this definition states that:
Such activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel . servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source, to be included as direct emissions from the OCS source.

42 U.S.C. § 7627(a)(4)(C). EPA's response to this language is that EPA will include emissions from vessels in transit in the OCS source's "potential to emit" calculations. In the Preamble, EPA states:
All vessel emissions related to OCS activity will be accounted for by including vessel emissions in the "potential to emit" of an OCS source. Vessel emissions must be included in offset calculations and impact analyses, as required by Section 328 and explained in the NPR.

57 Fed.Reg. at 40794, (col. 1), JA 538.

The problem with EPA's interpretation is that while it allows for the provision for offsets for vessel emissions associated with an OCS source, within 25 ***28** miles of that source, this interpretation does not allow for the imposition of "emission controls" or

"emission limitations," as required by Section 328(a). As such, EPA's rule allows for the offsetting *but not the control* of in-transit vessel emissions.[FN8] This interpretation is plainly at odds with the Conference Report, which states:

> FN8. The failure to require emission controls is significant because offsets are only applied to *new projects.* Without the authority to impose emission limitations on existing vessels, the substantial amount of pollution currently being generated from OCS vessels cannot be regulated.

Air emissions associated with stationary and *in transit* activities of the vessels will be included as part of the facility's emissions for vessel activities within a radius of 25 miles of the exploration, construction, development or production location. *This will ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions.*

136 Congressional Record, No.# 150, Oct. 27, 1990, at S 16983, emphasis added. At a minimum, this legislative history, which is in the Congressional Record for both the House and the Senate, states the intent of Congress that the definition of "OCS source" set forth in Section 328 shall allow for the "control and offset" of emissions from vessels in transit. A plainer interpretation is that this statement shows that Congress never intended to limit the application of the air pollution control requirements of the state to only stationary sources; rather, this statement shows that Congress meant what it said when it stated "OCS source *includes,"* but obviously is not limited to, activities identified in Section 328(a)(4)(C).

EPA's comment on the legislative history was that "[i]t could be argued that project emissions are controlled if they are offset, and the amount of offsets is irrelevant." Response to Comments at 6, JA 430. This response ignores that Congress used both terms, "offsets" and "controls," in Section 328(a) and in the legislative history. The "use of different words in the same sentence of a statute ***29** signals that Congress intended to distinguish between them." *Boise Cascade Corp. v. EPA, supra,* 942 F.2d. at 1432. Plainly, Congress knew the difference between the two terms.

Based on this legislative history, Santa Barbara APCD submits that EPA's interpretation is not one Congress would sanction because the OCS rule only provides for offsets, but not emission controls, to mitigate in-transit vessel air pollution. If EPA's interpretation is not one that would be sanctioned by Congress, it must be set aside. *Chevron v. NRDC,* 467 U.S at 845, 104 S.Ct. at 2783.

III. EPA's FAILURE TO APPLY THE OFFSET REQUIREMENTS OF THE CORRESPONDING ONSHORE AREA FAILS TO MEET THE FIRST PRONG OF THE *CHEVRON* ANALYSIS.

In the OCS rule at 40 CFR Section 55.5(d), EPA has adopted detail requirements for offsets. Typically, the rules of the state set a minimum offset requirement for sources that "trigger" offsets. This base ratio in Santa Barbara is 1.2:1, i.e., for every new ton of pollution generated, the new source must reduce pollution at another source as mitigation ("offset") by at least 1.2 tons. Santa Barbara APCD Rule 205C. It is also typical that the offset ratio *increases* as the distance between the new source and the offset source increases. The increase is necessary because the effectiveness of the mitigation decreases when it is located farther away from the new source.

Section 328(a) explicitly mandates that OCS sources within 25 miles of the state's seaward boundary shall comply with the state requirements, including those for offsets.

For such sources located within 25 miles of the seaward boundary of such States, *such requirements shall be the same* as would be applicable if the source were located in the corresponding onshore area, *and shall include,* but not be limited to, State and local requirements for emission controls, emission limitations, *offsets,* permitting, monitoring,

testing, and reporting.

***30** There is no ambiguity in the statute. There is no gap in the statute. Despite this explicit requirement in the Act, EPA significantly modified the offset requirements for OCS sources. In 40 CFR Section 55.5(d), the OCS rule requires, in part, the following:

(d) *Offset requirements. Offsets shall be obtained* based on the requirements imposed in the COA, and *in accordance with the following provisions:*

The "following provisions" referenced in Section 55.5(d), above, go on to restrict the application of distance discounting. See discussion at pp. 15-16, *supra.*

There are two problems with EPA's requirements for offsets. One, they establish significant relief from offset requirements for OCS sources by restricting the application of distance discounting may be applied by the COA.[FN9] Second, and most significant for this Court, EPA has departed from the clear directive of Section 328(a) that the Administrator shall apply "the same" requirements to OCS sources as would apply if that source were located in the COA. Instead of applying state requirements, EPA has developed its own supplemental requirements that serve to reduce the amount of mitigation OCS sources must provide, even though if the same source were located in the state, no such reduction would be allowed.

> FN9. Notwithstanding the departure from the State requirements, the significant substantive problem with EPA's formula is that it prohibits distance discounting when offsets are obtained between the OCS source and the state's seaward boundary but makes no allowance for the fact that this would allow a new source to obtain offsets from another OCS source fifty miles or more away and at the base offset ratio of the COA.

Where Congress has directly spoken on an issue, and its intent is clear, "that is the end of the matter, for the court as well as the agency, must give effect to the unambiguous expressed intent of Congress." ***31***Chevron v. NRDC,* 467 U.S. at 842-843, 104 S.Ct. at 2781-2782. As such, whatever good intentions or policies EPA may have been trying to implement, this provision cannot stand and must be invalidated with directions to EPA that it adopt an OCS rule that requires application of the offset requirements of the COA.

IV. EPA's FAILURE TO ALLOW FOR DELEGATION OF AUTHORITY FOR OCS AREAS BEYOND 25 MILES OF THE SEAWARD BOUNDARY OF A STATE FAILS TO MEET THE FIRST PRONG OF THE CHEVRON ANALYSIS.

In Section 328(a)(3), Congress has provided a statutory mechanism in the Act for any state adjacent to an OCS source covered by Section 328(a) to promulgate and submit requirements to the Administrator for implementing and enforcing OCS requirements. Further, if the Administrator finds that the state regulations are "adequate," the Administrator is required to delegate to the state any authority the Administrator has under the Act to implement and enforce those requirements.

(3) State procedures. Each State *adjacent to an OCS source included under this subsection* may promulgate and submit to the Administrator regulations for implementing and enforcing the requirements of this subsection. If the Administrator finds that the State regulations are adequate, the Administrator shall delegate to that State any authority the Administrator has under this Act to implement and enforce such requirements. Nothing in this subsection shall prohibit the administrator from enforcing any requirement of this section.

42 U.S.C § 7627(a)(3), emphasis added.

Pursuant to the plain and unambiguous language of the statute, any state "adjacent to an OCS source included under [Section 328(a)]" may seek a delegation of authority from EPA to implement and enforce any authority the Administrator has under the

Act to implement and enforce such requirements.

In 40 CFR Section 55.11, EPA has provided for delegation for ***32** adjacent OCS sources within 25 miles of a state's seaward boundary. For adjacent OCS sources beyond 25 miles of a state's seaward boundary, the OCS rule is silent. It provides, in part:

§ 55.11 Delegation.

(a) The governor or the governor's designee of any state *adjacent to an OCS source* subject to the requirements of this part may submit a request to the Administrator for authority to implement and enforce the requirements of this OCS program *within 25 miles of the state seaward boundary*, pursuant to section 328(a) of the Act.

57 Fed. Reg. at 40812, (col. 3) JA 556 (emphasis added.) Although the OCS rule does not explicitly prohibit delegation of authority for OCS sources located farther than 25 miles from the state's seaward boundary, EPA made it clear during the rulemaking process and in the Preamble to the OCS rule and Response to Comments that EPA's intent was to not allow for the consideration of an application for delegation for sources beyond 25 miles of a state's seaward boundary. In the Preamble, EPA states:

Several commenters questioned why EPA was not delegating authority for sources beyond 25 miles from the states' seaward boundaries. They pointed out that the statute required EPA to delegate all of its authority under section 328 if the state program was adequate. However, for sources beyond 25 miles, only federal requirements were incorporated into this part. In this situation, EPA believes that it is more efficient to have the federal government retain authority than to have a state agency try to implement and enforce purely federal requirements. The state agency would have to treat sources within 25 miles with one set of rules and procedures and sources beyond 25 miles with a second set of rules and procedures.

57 Fed.Reg. at 40801-40802, (col. 3), JA 545-546. In the Response to Comments, EPA similarly stated that delegation of authority for areas beyond 25 miles "is not appropriate." Response to Comments, Final Rulemaking, Sept. 1992 at 54, JA 478.

This interpretation by EPA is inconsistent with the plain language of ***33** Section 328. Rather, Section 328 states that delegation may be sought by any state "adjacent to an OCS source." If Congress had wished to limit delegation to sources within 25 miles of the state, it could have done so. The plain and unmistakable language of the Act clearly allows states to apply and be considered for delegation of authority for sources beyond 25 miles. Where Congress has directly spoken on an issue, and its intent is clear, "that is the end of the matter, for the court as well as the agency, must give effect to the unambiguous expressed intent of Congress." *Chevron v. NRDC*, 467 U.S. at 842-843, 104 S.Ct. at 2781-2782.

Santa Barbara APCD also submits that EPA's rationale that it is "more efficient" to have the federal government retain authority over "purely federal requirements" is inconsistent with other EPA delegations of authority for new source performance standards ("NSPS") and national emission standards for hazardous air pollutants ("NESHAP") under Sections 111(c) (42 U.S.C. § 7411) and 112(d) (42 U.S.C. § 7412(d)) of the Clean Air Act. In both of these instances, state and local governments implement and enforce requirements that are "purely federal."

Santa Barbara APCD does not dispute that EPA will have discretion in considering any application for delegation to determine if it is "adequate." However, this discretion should not be extended so far as to allow EPA to refuse to even consider such an application, regardless of its merit. Therefore, EPA should be directed by this Court to further consider this issue and promulgate requirements that allow for a delegation of authority for OCS sources located adjacent to a state more than 25 miles from the state's seaward boundary.

CONCLUSION

For the reasons stated herein, Santa Barbara APCD submits that EPA has adopted an OCS rule, critical portions of which depart from the clear and unmistakable intent of Congress as expressed by the plain language of Section 328 ***34** of the Act and its legislative history. Petitioner requests that this Court rule invalid the provisions of the OCS rule which: exclude the regulation of marine vessels in transit; require the provision of offsets in a manner inconsistent with those of the corresponding onshore area; and fail to provide for delegation of authority for OCS sources located more than 25 miles from a state's seaward boundary. Petitioner further requests that EPA be directed to adopt modifications to the OCS rule consistent with the determinations of this Court.

Appendix not available.

SANTA BARBARA COUNTY AIR POLLUTION CONTROL DISTRICT, Acting By and Through Its Board of Directors, Petitioner, v. Carol M. BROWNER, Administrator, U.S. Environmental Protection Agency, and U.S. Environmental Protection Agency, Respondents. WESTERN STATES PETROLEUM ASSOCIATION Intervenor. on behalf of, Respondents.
1993 WL 13650745 (C.A.D.C.) (Appellate Petition, Motion and Filing)

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