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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	)	APPEAL NUMBER: PSD 03-04
INDECK-ELWOOD LLC	)	PERMIT NUMBER: 197035AAJ

AMENDED PETITION FOR REVIEW

The American Lung Association of Metropolitan Chicago, Citizens Against Ruining the Environment (Lockport), the Clean Air Task Force, Lake County Conservation Alliance and the Sierra Club (Petitioners), respectfully petition the Environmental Appeals Board to review the above-referenced Indeck-Elwood LLC (Indeck) Prevention of Significant Deterioration (PSD) permit (attached as Ex. A). Indeck seeks permission to build a giant 660 megawatt coal-burning power plant in the Greater Chicago severe ozone nonattainment area. In addition to adding more air pollution to a region where 660,000 asthmatics already struggle to breathe, Indeck plans to construct its power plant immediately adjacent to the 19,000-acre Midewin National Tallgrass Prairie, the nation's first national prairie preserve and home to dozens of protected plants and animals.

Petitioners seek EAB's review because, as described in detail below, Indeck's PSD permit contains multiple substantive and procedural deficiencies that unlawfully place Chicago-area residents and the Midewin's sensitive soils and vegetation at risk from harmful and unnecessary levels of air pollution.

EAB review of Indeck's PSD permit would also be timely because Illinois has at least five new coal-burning power plant proposals in various stages of the PSD permitting

process. These power plants are part of the "Illinois Coal Revival Program,"[1] a state-sponsored program designed to reinvigorate Illinois' ailing coal-mining industry. Indeck's PSD permit presents the EAB with its first opportunity to assess how Illinois regulators are balancing their obligations to enforce the Clean Air Act amidst the excitement of the Coal Revival Program. A 1500-megawatt coal-burning power plant proposed by the Peabody Corporation is expected to be unveiled within weeks. The others' draft permits are not far behind. EAB's review of Indeck's permit would be particularly timely to help remind State regulators about the importance of complying with PSD permitting protections, *before* issuing permits, and thereby help to avoid significant delay and unnecessary disputes over the other looming proposals.

INTRODUCTION

More than thirty years after passage of the Clean Air Act the Greater Chicago region – home to approximately eight million residents – still has not attained the federal one-hour ozone National Ambient Air Quality Standard (NAAQS). The region will soon be designated nonattainment for the 8-hour ozone and small particulate matter (PM 2.5) NAAQS. Most troubling – beyond the failure to meet federal air quality standards after three decades – is the State's lack of progress in fighting ozone pollution over the last ten years. According to the Illinois Environmental Protection Agency (IEPA), the highest ozone levels recorded each year since 1993 represents a "fairly flat 10-year trend,"[2] and the total number of days when air pollution levels violate the ozone standard is "generally

[1] Highlights of Illinois Coal Revival Program available at the Office of Coal Development's website: www.commerce.state.il.us/coal/RevivalSummaries.html (visited 11/14/03).

[2] IEPA, *Illinois Annual Air Quality Report 2002*, 9, Sept. 2003. Rep. No. IEPA/BOA/03-015 (*IEPA 2002 Air Quality Report*) available at www.epa.state.il.us/air/air-quality-report/2002/index.html.

flat."[3] Last year, a "flat trend" translated into 20 days when Chicago-area residents breathed harmful air pollution levels violating the 8-hour ozone NAAQS. Chicago is located in Cook County, the State's most populous county. Cook County has exceeded the new soot standard (annual PM 2.5) every year since monitoring began in 2000.

Existing air pollution levels are exacting a high toll on the lives of Chicago-area residents. The Chicago Tribune has declared the Chicago region "No. 1 in a U.S. Epidemic" because more residents die from asthma than in any other place in the United States. *Asthma's Grip Tightens*, Chicago Tribune Magazine at 10 (Apr. 27, 2003). The label fits for more reasons. In the six counties of northeastern Illinois, including Cook County, there are 660,000 asthmatics suffering more frequent and more severe asthma attacks whenever air pollution levels rise.[4] At least 70,000 of these asthmatic residents end up in area hospitals struggling to breathe *each year*. Other problems caused by air pollution include emphysema, bronchitis, lung cancer and premature death. The healthcare costs of this pollution is staggering. Consider that an asthma-related hospitalization typically costs between $3,500 and $12,000.[5]

The Chicago region already hosts nine dirty coal-burning power plants – power plants that according to a 2002 Harvard School of Public Health study are responsible – based just on their SO2 emissions -- for 21,500 asthma attacks and 320 premature deaths annually.[6] Indeck's additional 9,600 tons of annual air pollution[7] would add more asthma attacks and more premature deaths. In 2003 IEPA modeled the implications for ozone

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[3] *Id.* at 10.
[4] American Lung Association, *State of the Air: 2003* available at http://lungaction.org/reports/stateoftheair2003.html (*ALA 2003 Report*).
[5] www.state.il.us/agency/hcccc/default.htm (last visited 11/13/03).
[6] Levy, JI., et al., 2002, *Using CALPUFF to evaluate the impacts of power plant emissions in Illinois: model sensitivity and implications*. Atmospheric Environment 36(6) 1063-1075.
[7] Ex. A, Final Permit, Table I.

levels in Illinois should Indeck and the other four coal plant proposals proceed: "[T]he new coal fired power plants would increase the levels of ozone in the air."[8]

STATEMENT OF FACTS

On March 21, 2002 Indeck-Elwood LLC submitted a PSD permit application to IEPA seeking permission to build a 660 MW coal-burning power plant. Indeck proposes to site its power plant west of the City of Elwood in Will County, 55 miles directly south of the Chicago Loop. With a single 495-foot smoke stack and prevailing southerly winds during summer months Indeck's pollution will blow over Chicago and then points north along the shores of Lake Michigan.[9]

On April 4, 2003 Illinois Governor Rod Blagojevich announced the State would award Indeck $50 million in state subsidies if it agreed to burn Illinois coal.[10] IEPA Director, Renee Cipriano, joined in the excitement: "We are pleased to see utilization of this modern technology to allow Illinois coal resources to be used without compromising our environment."[11] IEPA's blessing of Indeck "modern technology" occurred two days *before* the agency released Indeck's draft PSD permit for public review on April 6, 2003.

On May 22, 2003 IEPA held its only public hearing on Indeck's PSD permit. Disregarding the significant public interest in Indeck's proposal and increasing questions about its impact on the adjacent Midewin National Tallgrass Prairie, IEPA elected to hold the hearing in a small hall in the City of Elwood. By 6:45 pm the scheduled 7 pm hearing was packed with a hundred residents, leaving approximately the same number standing

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[8] IEPA, *Project Summary for a Construction Permit Application From Indeck-Elwood, LLC*, at 14. (emphasis added) (attached at Ex. C).
[9] *See e.g.* 9/8/2002 ozone animation over the Midwest at www.epa.gov/airnow/showmaps.html?http://www.epa.gov/airnow/2002/20020908/8p-mw.gif.
[10] Ex. N, Press Release, *Blagojevich announces plans for "clean coal" power plant to create jobs and burn Illinois coal*, (Apr. 4, 2003), also available at www.illinois.gov/pressreleases/printpressrelease.cfm?SubjectID=1&RecNum=2056.
[11] *Id.*

outside. While some people waited until others had testified and freed up a seat, many simply left. IEPA rejected requests to host another hearing at a larger and more convenient location.[12]

Petitioners submitted timely comments on the draft PSD permit to IEPA by the close of the public comment period on June 28, 2003. On October 14, 2003 IEPA notified Petitioners by mail that it had issued the permit and included its Responsiveness Summary (attached as Ex. B).[13]

JURISDICTION AND STANDING

In April 1980 US EPA Region 5 delegated full authority to the State of Illinois to implement and enforce the federal PSD program. *See Prevention of Significant Deterioration; Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580 (Jan. 29, 1981) (setting forth the delegation agreement between the State of Illinois and US EPA). The Delegation Agreement expressly delegates to Illinois the "administrative, technical and enforcement elements of the source review provisions of 40 C.F.R. § 52.21 [Prevention of Significant Deterioration]." In turn, 40 C.F.R. § 52.21(q) obligates Illinois to "follow the applicable procedures of 40 C.F.R. part 124 in processing applications under this section."

PSD permits issued pursuant to a delegation agreement are considered federally-issued permits for purposes of review by the EAB. 40 C.F.R. § 124.41. The EAB is

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[12] Ex. O, *see e.g.* Letter from Mrs. Deanna Colbert to IEPA (June 18, 2003) ("The hearing was limited to 100 people because of the size of venue chosen. Unfortunately I was not among the first 100 to arrive, so I was told I could not attend and must stand outside."); see also, Ex. D, Comments of the Sierra Club and American Lung Association (June 26, 2003) (stating "we are aware of at least two dozen residents who were initially denied entry to the hearing hall * * * Other residents simply left. * * * [Another] hearing should be held at a location that can reasonably accommodate a large number of affected and interested residents.") at 4-5.

[13] Ex. B, IEPA, *Responsiveness Summary for Public Questions and Comments on the Construction Permit Application for Indeck-Elwood LLC*, October 2003 (referred to as "RS __" followed by a number indicating the comment number, not the page number).

authorized under part 124 regulations to review "any conditions of [a final PSD] permit decision." 40 C.F.R. § 124.19(a). Indeck's PSD permit is by its terms an "approval * * * issued pursuant to the * * * federal regulations promulgated * * * at 40 C.F.R. § 52.21 for Prevention of Significant Deterioration of Air Quality." Ex A at 1.

Each of the Petitioners have standing as defined by 40 C.F.R. § 124.19(a) because they participated in the permit process by filing timely comments and testifying at the public hearing.[14] Consequently, EAB has jurisdiction to hear Petitioners' timely request for review of the Indeck PSD permit.

SUMMARY OF THE ARGUMENT

A. A BACT determination must be based on a case-by-case analysis, tailor-made for each pollutant, and based on detailed, accurate and site-specific information. Without considering the BACT implications and without any opportunity for public comment IEPA inserted into Indeck's final permit Source-Wide Condition 9 which "allows the construction of a power plant that has less capacity than that addressed by the application." This Condition is clearly erroneous and unlawful.

B. A PSD permit may not be issued until an analysis has been completed assessing the "impairment to * * * soils and vegetation that would occur as a result of the source." 40 C.F.R. § 52.21(o). This analysis must begin with "an inventory of soils and vegetation types found in the impact area." NSR Manual at D.4. Indeck has conducted no inventory and its "assessment" did not consider the Midewin's sensitive soils and vegetation. Indeck's final permit does includes Source-Wide Condition 7a requiring it to "compile information on soil conditions" and "the condition of vegetation" during and after construction. Post-permit issuance BACT review, however, is erroneous and unlawful.

C. A BACT determination must consider "clean fuels" in establishing the "maximum reduction" possible for each regulated pollutant. 42 U.S.C. § 7479(3). Indeck's SO2 BACT analysis is based on the exclusive use of bituminous Illinois coal and does not credibly consider low-sulfur coal in its analysis, even though such coal is regularly burned in Illinois.[15] Moreover, Indeck's permit contains no meaningful restrictions on the sulfur content of the coal it may burn. This is erroneous and unlawful.

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[14] *See e.g.* Ex. D, Comments of Sierra Club and American Lung Association (June 26, 2003).

[15] Report of the Illinois Energy Cabinet (February 2002), available at http://www.illinoisbiz.biz/coal/pdf/IllinoisEnergyPolicyReport-Feb02.pdf ("Of the 38 million tons of coal burned in 1999 only 30 percent comes from Illinois mines.") at 63.

D. A BACT determination must be based on a case-by-case analysis, tailor-made for each pollutant and based on detailed, accurate and site-specific information. Indeck's permit authorizes it to use "fuel from different suppliers in the boilers without prior notification to the Illinois EPA." Ex. A, US Condition 1.14. Furthermore, Indeck is free to burn "any solid fuel" as long it notifies IEPA thirty days earlier. Ex. A, US Condition 1.12. Such loose BACT emission limits are erroneous and unlawful.

E. A BACT emission limit or condition "must be met on a continual basis at all levels of operation, * * * demonstrate protection of short term ambient standards, * * * and be enforceable as a practical matter." NSR Manual at B.56. Furthermore, "any [SIP] provision that allows for an automatic exemption from excess emissions in prohibited."[16] Indeck's permit contains such a prohibited exemption. Ex. A, Table I, Fn. 2. ("Short-term emission rates do not apply during startup, shutdown or malfunction.").

F. US EPA has ruled that "the definition of PM-10 includes CPM [condensable particulate matter]."[17] Indeck's PM permit limits "do not address condensable particulate matter." Ex. A, Table I, Fn. 3. Without an enforceable CPM limit the permit is unlawful.

G. The NOx BACT limit does not represent the "maximum degree of reduction" because it defers finalizing the limit until 2010. Ex. A, US Condition 1.2.b.iii. This is unlawful.

H. IEPA is required to "establish an enforceable emission limit for each subject emission unit * * * [and] for each pollutant subject to review that is emitted from the source." NSR Manual at B.56 (emphasis added). Fluorides is a regulated pollutant. IEPA's refusal to set a BACT emission rate for fluorides is clearly erroneous and unlawful.

I. Clean Air Act Section 165(a)(2) requires consideration of alternatives to the proposed source. IEPA erroneously concludes it has no obligation to consider alternate sites for Indeck's proposed source even if the issue is squarely raised during the comment period.

J. Section 7 of the Endangered Species Act requires every federal agency to consult with the U.S. Fish and Wildlife Service whenever a proposed federal action may affect an endangered species. 16 U.S.C. § 1536. The FWS requested Region 5 consult prior to issuance of Indeck's permit to prevent harm to two endangered species that are threatened by Indeck's proposal. Region 5's decision to decline to consult and ensure the two species are protected was unlawful and clearly erroneous.

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[16] Herman Memo, *State Implementation Plans (SIP): Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown* (Aug. 11, 1999) at 5.

[17] Ex. L, Letter. from Thompson Pace, US EPA, to Sean Fitzsimmons, IA DNR (Mar. 31, 1994).

ARGUMENT

A. IEPA Unlawfully Inserted A New Condition Into Indeck's Final Permit Authorizing Indeck to Construct a Smaller Facility Without Public Notice Or A New BACT Analysis

Source-Wide Condition 9 states:

> This permit allows the construction of a power plant that has less capacity than that addressed by the application *without obtaining prior approval* by the Illinois EPA, as follows. This condition does not affect the Permittee's obligation to comply with the applicable requirements for the various emission units at the plant:
>
> a. The reduction in the capacity of the plant shall *generally act* to reduce air quality impacts, as emissions from individual emission units are reduced, heights of structures are reduced, but heights of stacks are not *significantly* affected.
>
> b. The reduction in the capacity of the plant shall result in a pro-rata reduction in the emission limitations established by this permit for the CFB boilers that are based on the capacity of the boilers.
>
> c. The Permittee shall notify the Illinois EPA prior to proceeding with any *significant* reduction in the capacity of the plant. In this notification, the Permittee shall describe the proposed change and explain why the proposed change will act to reduce impacts, with detailed supporting documentation.
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> d. Upon written request by the Illinois EPA, the Permittee shall promptly have dispersion modeling performed to demonstrate that the overall effect from the reduced capacity of the plant is to reduce air quality impacts, so that impacts from the plant *remain at* or below those predicted by the air quality analysis accompanying the application. (emphasis added).

Ex. A, SW Condition 9 (emphasis added). Simply, this Condition allows Indeck to construct a different facility than the facility proposed in the application, reviewed by the IEPA, described in the draft permit, commented on by members of the public and authorized in the final PSD permit. Indeck is allowed to construct this yet-to-be-determined facility merely by providing notice to the IEPA, but without obtaining further IEPA approval, without modifying its existing permit and without any opportunity for public notice and comment. Decisions about the significance of changes and, in turn, the

obligation to even notify the IEPA, are entirely vested in Indeck, without reference to any legal standard or definition. Perhaps most troubling, under Source-Wide Condition (9)(d), Indeck could reduce the capacity of the facility with no reduction whatsoever in air quality impacts.

Notably, this Condition was not part of the draft permit. Consequently, there was no opportunity for members of the public to comment on this specific Condition. On page 54 of the Responsiveness Summary, the IEPA lists this new provision as one of the several "significant changes" between the draft and final permits; however, the Responsiveness Summary contains no further discussion about the origins or justification for this Condition. For these reasons, the Petitioners request the EAB to subject Source-Wide Condition 9 to the most careful, stringent scrutiny.

There are several reasons why the EAB, members of the public, local officials and the U.S. EPA should oppose this Condition in any PSD permit, including the PSD permit issued to Indeck. The Petitioners request the EAB to consider the legal adequacy of Source-Wide Condition 9 in light of the following legal and policy considerations, all of which are fundamental to the execution of a credible PSD program.

1. This Condition allows Indeck to construct a different facility than the facility that was subject to public notice, a public hearing, public comment and subsequent review on appeal. Public participation is a fundamental component of the PSD program; allowing a permittee to bait-and-switch defeats this purpose. This is even more troubling when the permitting authority itself allows this to occur.

2. This Condition allows Indeck to avoid the legally mandated mechanism for changing the characteristics of a permitted facility. If Indeck seeks to alter the facility for

which it received PSD approval, this should be done through a modification, not through a blanket permit authorization.

3. This Condition allows IEPA to abdicate its responsibility to conduct a credible review of any proposed changes in the facility. The Condition only requires Indeck to notify IEPA, it does not require IEPA approval or even allow for IEPA review of the measures the applicant will undertake to operate with reduced capacity.

4. It is impossible for IEPA to make a credible BACT determination without detailed facility information. The "anything smaller is OK" standard contained in the Condition is clearly inadequate for making any credible BACT determinations about the facility that will actually be constructed.

5. IEPA has assigned specific allowable emissions to this facility, and will incorporate these emissions into its PSD permitting decisions for other new and modified sources to ensure regional air quality is not degraded. It is inappropriate for an applicant to be approved for a facility with the highest potential emissions, coupled with unconditional approval to construct a smaller facility, because this is inherently unfair to other new and modified sources. This permitting practice also undercuts the IEPA's ability to develop credible models or projections of regional air quality.

6. The inclusion of this Condition in the final but not draft permit, without justification by IEPA, may be in the pecuniary interests of Indeck. It may demonstrate how far IEPA is willing to stretch its discretion to benefit this politically-favored project. However, this Condition is not legally adequate, defeats the fundamental purposes of the PSD program, allows the IEPA to abdicate its responsibilities, while giving the permittee flexibility not authorized under federal or state law.

7. IEPA has previously argued to the EAB that size does matter in the BACT analysis and that a size discrepancy between a proposed source and a smaller source that a permittee may wish to construct is a basis for denying a PSD permit. *See In re West Suburban Recycling and Energy Center*, 6 E.A.D. 692 (Dec. 11, 1996). EAB responded "[w]e agree that a discrepancy between the source described in a federal PSD permit application and the source which the applicant actually intends to build may be relevant in determining compliance with federal PSD requirements." *Id., see also, In re CertainTeed Corp.*, 1 E.A.D. 743, 747-49, notes 11 & 12 (Adm'r 1982) (explaining that federal PSD permits and BACT determinations are "tailor-made for each pollutant emitting facility" and must be based on detailed, accurate, and site-specific information). This provision is simply breathtaking. IEPA knows it is illegal – it is directly contrary to IEPA's own "Standard Permit Condition No. 2" which plainly prohibits such behavior:

> There shall be no deviations from the approved plans and specifications unless a written request for modification, along with plans and specifications as required, shall have been submitted to the [IEPA] and a supplemental written permit issued.

See IEPA, *Standard Conditions for Construction/Development Permits Issued By the Illinois Environmental Protection Agency.*[18] This provision in particular (and there are others) "is uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority – to protect states from industry pressure to issue ill-advised permits." *State of Alaska v. US EPA*, 298 F.3d 814, 823 (9th Cir. 2002).

[18] Available at http://www.epa.state.il.us/air/stateforms/166-apc.pdf. Indeck's permit includes such standard a provision but is superseded by SW Condition 6 ("Standard conditions for issuance of construction permits attached hereto shall apply to this project unless superseded by provisions of other permit conditions.").

B. The BACT Permit Limits Are Unlawful Because Indeck Failed To Assess How Its Emissions May Impair The Midewin's Soils and Vegetation Or Identify Any Necessary Mitigation Measures

Within hundreds of feet of the site where Indeck proposes to construct its power plant is the Nation's first national prairie preserve – the 19,000-acre Midewin National Tallgrass Prairie. Congress established the Midewin in 1996 for the purposes of restoring a prairie ecosystem over the landscape of the former Joliet Army Ammunition Plant. P.L.104-106 (1996). As a unique management unit of the National Forest System its purposes include "(1) To * * * conserve and enhance the native populations and habitats of fish, wildlife, and plants; (2) to provide opportunities for scientific, environmental, and land use education and research [and] (4) [t]o provide a variety of recreational opportunities." Il. Land Cons. Act, P.L. 104-106, Sec. 2914(c). Midewin hosts 348 native species of plants, 108 species of breeding birds, 40 aquatic species and 27 different types of mammals.[19]

Curiously, Indeck did not mention the Midewin anywhere in its application or other materials. Instead, it simply asserted that the surrounding landuse "[b]eyond the immediate vicinity of the project is rural." PSD Appl'n, Vol. II at 2-5. IEPA perpetuated this silence and did not mention the Midewin in its public notice about the hearing,[20] the draft permit,[21] its 17-page project summary (Ex. C), any other printed materials, or its oral presentation at the public hearing[22] until prompted to do so by the public. The public's frustration at IEPA's unwilling to discuss the existence of the Midewin during this proceeding was raised in public comments. *See e.g.*, Ex. B, RS 51, 53, 56, 63 & 142.

[19] http://www.fs.fed.us/mntp/natural_features.htm.
[20] Available at: http://www.epa.state.il.us/public-notices/2003/indeck-elwood/index.html.
[21] *Id.*
[22] See transcript, available at www.epa.gov/region5/air/permits/ilonline.htm (search on "Indeck").

Indeck's modeling indicates that the zone of maximum impact from its air pollution ranges between 282-1,000 meters beyond the fence line. PSD Appl'n, Vol. II, Table 2-11 at 2-12. Right across Indeck's fence line is the Midewin's Drummond Dolomite Prairie, "the rarest and most unique natural community found at the Midewin." US Department of Agriculture, *Midewin Land and Resource Management Plan, Final Environmental Impact Statement*, App. at B-4.[23] The dolomite prairie is also habitat for numerous rare species, including the leafy prairie clover (*Dalea foliosa*), a plant listed as endangered under the federal Endangered Species Act of 1973. *Id.*

The Clean Air Act requires IEPA to consider and protect natural resources like the Midewin. Among the purposes of the PSD program are to "preserve, protect and enhance the air quality in * * * areas of natural, recreational, scenic or historic value." 42 U.S.C. § 7470 (emphasis added). To preserve and protect such areas the Act mandates that "[n]o major emitting facility * * * may be constructed * * * unless -- * * * (2) * * * the required analysis has been conducted in accordance with regulations promulgated by the Administrator." 42 U.S.C. § 7475(a). One such PSD regulation requires that the applicant "shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source." 40 C.F.R. § 52.21(o). US EPA has further explained that such an analysis "should be based on an inventory of soils and vegetation types found in the impact area [and] [t]his inventory should include all vegetation with any commercial or recreational value, and may be available from conservation groups, State agencies, and universities." NSR Manual at D.4 (emphasis added).

An air quality impact analysis is critical because "[i]njury to vegetation is one of the earliest manifestations of photochemical air pollution, and sensitive plants are useful

[23] http://www.fs.fed.us/mntp/plan/FEIS_V2-B.pdf.

biological indicators of this type of pollution." *2002 IEPA Air Quality Report* at 1. In 1997 US EPA revised the secondary NAAQS for ozone precisely because the 1-hour standard "does not provide adequate protection to vegetation from the adverse effects of O3." 62 Fed. Reg. 28855, 38875 (July 18, 1997). Moreover, ozone "concentrations within the range of 0.05 to 0.10 ppm have the potential over a longer duration of creating chronic stress on vegetation that can result in reduced plant growth and yield * * * and injury from other environmental stresses." *Id.* Even more alarming, "[a]dverse effects on sensitive vegetation have been observed from exposure to photochemical oxidant concentrations of about 100 ug/m3 (0.05 ppm) for 4 hours." *2002 IEPA Annual Air Quality Report* at 1.

Ozone is not the only pollutant that harms vegetation. There "are sensitive vegetation species ... which may be harmed by long-term exposure to low ambient air concentrations of regulated pollutants for which there are no NAAQS." NSR Manual at D-4. US EPA gives the appropriate example of "exposure of sensitive plant species to 0.5 micrograms per cubic meter of fluorides (a regulated, non-criteria pollutant) for 30 days has resulted in significant foliar necrosis." *Id.* This example is appropriate because Indeck seeks to emit 50.2 tons of fluorides without a BACT limit. Ex. A, Table I.

1. Indeck did not conduct an inventory of the Midewin's soils and vegetation within the impact area before IEPA issued its PSD permit

There is no dispute on this issue. Neither Indeck nor IEPA conducted an inventory of the Midewin's soils and vegetation. Moreover, Indeck's "analysis" did not consider any site-specific information about the landuses around its proposed facility. PSD Appl'n, Vol II at 2-20. In short, neither party considered this national resource before the permit issued.

IEPA effectively concedes as much. The final permit includes a previously-unseen provision requiring Indeck to "compile information on soils conditions (pH, nutrient levels, trace element content, buffering capacity, etc.) and the condition of vegetation * * * in the Midewin Tallgrass Prairie." Ex. A, SW Condition 7. Furthermore, the initial report "shall be submitted prior to the start up of the plant." This approach turns the PSD permitting process on its head: It authorizes Indeck to proceed with construction and then complete the necessary BACT analysis. This is patently unlawful because "no major emitting facility * * * may be constructed * * * unless * * * the required analysis has been conducted." 42 U.S.C. § 7475(a) (emphasis added).

Moreover, because the Midewin was not mentioned in any of Indeck's application materials, the draft permit, or any IEPA documents Petitioners could locate, the new provision is also not a "logical outgrowth" of the draft permit. *In re Orange Recycling and Ethanol Production Facility*, 2001 EPA CAA Title V LEXIS 4, 2001 (May 2, 2001) (there are "well-recognized limits to the concept of 'logical outgrowth'"); *Shell Oil Company v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (remanding final RCRA rule because "interested parties could not be expected to divine the EPA's unspoken thoughts.").

2. It was clear error for IEPA to not require a soils and vegetation analysis because there is overwhelming evidence that Indeck's emissions threaten the Midewin

There are at least three types of likely impacts that neither Indeck nor IEPA have addressed: a) regulated pollutants that do not have ambient air quality standards; b) Indeck's contribution to ozone exceedences or at least delaying timely attainment; and c) existing ambient air quality standards are not protective of sensitive vegetation and soils.

a. Regulated pollutants lacking ambient air quality standards

Indeck's permit authorizes 50.2 tons of annual fluoride emissions. Ex. A., Table I. US EPA has concluded that "exposure of sensitive plant species to 0.5 micrograms per cubic meter of fluorides (a regulated, non-criteria pollutant) for 30 days has resulted in significant foliar necrosis." NSR Manual at D-4. Nevertheless, IEPA refused to establish a BACT limit for fluorides without any consideration about the Midewin.

Midewin's soils and vegetation are also threatened by the plant-growth killing chemicals Indeck proposes to use in its cooling towers. Indeck is permitted to emit 8.4 tons of annual particulate emissions from its cooling towers. Ex. A, US Condition 3.7. PM is emitted as mineral deposits present in the mist that escapes from the cooling towers. Ex. A, US Condition 3.1. In addition to water droplets and minerals this mist will contain various plant-growth killing and corrosion-inhibiting chemicals because "[a]s these materials are added to the water in the cooling towers, they would be present in the particulate matter emissions emitted from the cooling towers." Ex. B, RS 10. IEPA rejected requests to compel Indeck to disclose the type and amount of chemicals it proposes to use and consider alternatives. It is sufficient, says IEPA, that "Indeck has provided general information on the types of water treatment chemicals that it expects to use in the cooling towers." Ex. B, RS 10.

b. Indeck's contribution to ozone exceedences or at least delaying timely attainment

Ozone levels in Will County – the county where Indeck seeks to locate -- regularly exceed the 8-hour ozone NAAQS, without Indeck's additional pollution. In 2002 Will County's two ozone monitors recorded six days when ozone levels exceeded the 8-hour ozone NAAQS of 0.08 ppm. *IEPA 2002 Air Quality Report* at Table B1. The highest 8-

hour reading recorded in Will County (Braidwood) occurred on July 14, 2002 at a level of 0.095ppm (*id.*), or nearly twice the level and for twice the duration at which "[a]dverse effects on sensitive vegetation have been observed." *Id.* at 1.

Earlier this year IEPA modeled the ozone implications of building five additional giant coal-burning power plants in Illinois, including Indeck's proposal. No surprise, "[t]he additional modeling that has been conducted shows that the new coal fired power plants would increase the levels of ozone in the air." Ex. C at 14 (emphasis added). Indeck's soils and vegetation "analysis" did not consider how its contribution to existing ozone levels threatens the Midewin's soils and vegetation. Ex. M at 2-20 – 2-23. In fact, Indeck's assessment does not consider the Midewin whatsoever.

c. Ambient air quality standards are not necessarily protective of the Midewin

Indeck asserts its analysis shows its pollution will not exceed applicable ambient air quality standards. Whether or not this is true, ambient air quality standards are not necessarily protective of the Midewin's sensitive soils and vegetation. This is one of the many concerns that the Illinois Department of Natural Resources raised about Indeck's proposal: "Although the predicted impacts from this facility do not violate PSD increments or exceed sensitive vegetation levels, the Department is concerned that the Midewin, and the protected species it protects, may be adversely impacted." Letter from Stephen Davis, IDNR to David Kolaz, IEPA (Sept. 30, 2003) (attached as Ex. E) (September IDNR Letter).

3. The three expert state and federal resource agencies that have assessed Indeck's proposed power plant have raised substantial concerns about its impacts on the Midewin.

The US Forest Service's Midewin Prairie Supervisor informed IEPA:

> With the limited information available, I must conclude that the release of [various air pollutants] will adversely affect the resources at the Midewin. * * * The potential source of acid, or precursors of acidic deposition are a direct threat to sensitive habitat on Midewin. * * * Restoration sites in the vicinity of the proposed power plant have sensitive flora that require high-quality conditions of soil and water. * * * Some of affected habitats are occupied by Federal threatened, endangered, or sensitive species. * * * In conclusion, I ask that you fully consider the environmental impacts on the Midewin National Tallgrass Prairie.

Letter from Midewin Prairie Supervisor to IEPA (June 19, 2003) (emphasis added) (attached as Ex. F). The Illinois Department of Natural Resource agrees:

> Restoration sites in the vicinity of the proposed power plant have sensitive flora that require high-quality soil and water conditions. * * * Indeck-Elwood's proposed emissions of hydrogen chloride, NOx, and SO2 emissions would appear to be acidic or precursors for acidic deposition and could cause direct effects to sensitive habitat types at the Midewin.

Ex. E, September IDNR Letter. The US Fish and Wildlife Service has also weighed in with concerns. It urged US EPA Region 5 to commence consultation under Section 7 of the Endangered Species Act of 1973 to ensure that the issuance of Indeck's PSD permit does "not jeopardize the continued existence of [two] federally listed species" at the Midewin. Letter from John Rogner, USFWS, to Thomas Skinner, EPA Region 5 Adm'r (Sep. 30, 2003) (attached as Ex. G). The US Fish and Wildlife Service's concerns revolve around two federally-listed plant species in the Midewin, the eastern prairie fringed orchid (*Platanthera leucophaea*) and leafy prairie clover (*Dalea foliosa*). *Id.* The Service went so far as urging US EPA Region 5 to "ensure that Illinois

Environmental Protection Agency does not issue permits until this consultation is completed." *Id.*

Petitioners are not aware that any of these expert resource agencies have changed their opinion or otherwise is satisfied that Indeck's permit is protective of the Midewin's soils and vegetation, including its rare and endangered species. In fact, on the same day IEPA issued Indeck its PSD permit, IDNR sent a letter to IEPA concluding:

> it is the Biological Opinion of the Department that the proposed action may, in conjunction with other cumulative impacts, jeopardize one or more listed species, may adversely affect a listed species' essential habitat and may degrade or adversely modify the Natural Areas.

Ltr. from Tom Flattery, IDNR to David Kolaz, IEPA (Oct. 10, 2003) (attached at Ex. H).

C. The SO2 Limits Do Not Reflect BACT Because Indeck Did Not Credibly Consider The Use of Low-Sulfur Coal

BACT requires "the maximum degree of reduction [of each regulated pollutant] * * * through * * * available methods, systems, and techniques, including * * * clean fuels." 42 U.S.C. § 7479(3) (emphasis added). BACT, moreover, is an emission limitation rather than a particular pollution control technology. Clean fuels are a recognized method of pollution prevention and "[t]he Manual states that it is legitimate to look at inherently lower-polluting processes in the BACT analysis." *In re Knauf Fiber Glass, GmBH*, 8 E.A.D. 121, 136 (EAB 1999). A perfect example is IEPA's inclusion in Indeck's final permit requiring that the fuel oil used in ancillary engines be very low-sulfur oil. Ex. A, SW Condition 5.b.iii.

In sharp contrast, Indeck did not credibly consider as part of its BACT analysis the emission reductions that could result from restricting its fuel choice to low-sulfur coal. Instead, Indeck simply stated that it proposes to burn Illinois Washed No. 6

bituminous coal with "a typical sulfur content of 2.74 percent." PSD Appl'n, Vol. I at 5-12 (attached as Ex. I). Indeck also expects to burn "[o]ther Illinois coals * * * with expected sulfur contents ranging from 1.35 to 3.5" and "supplemental fuel, such as petcoke and waste coal." *Id.* Petcoke has "a typical sulfur content of approximately 6 percent." *Id.* Nothing in Indeck's permit prohibits the burning of such wide-ranging levels of sulfur-bearing coal. IEPA did not respond to comments on this issue.[24]

Without credible consideration of low-sulfur coal as a readily available "clean fuel," the BACT limit does not reflect the "maximum degree" of sulfur reduction. 42 U.S.C. § 7479(3). The lack of a reasoned SO2 BACT analysis considering low-sulfur fuel explains why Indeck's SO2 limit is significantly higher than other coal-burning power plants that are using a variety of add-on controls and cleaner coals.

[24] Ex. O, *see e.g.* Comments of CARE (June 17, ,2003) (stating "Illinois coal is notoriously known as being the worst coal in the nation. This facility is not using the most stringent technology available."); Comments of Mr. & Mrs. Huckins (June 20, 2003) (stating "[a]t the May 22nd meeting, we were informed that Indeck Energy has now proposed to burn ILLINOIS HIGH SULFUR COAL which is very bad for everyone. (Health Risks) Previously the IEPA had ruled back in the late 60's early 70's that all Illinois power plants had to change to a LOW sulfur coal due to the Health concerns and the Environment. So all of the Illinois power plan that were burning coal had to go West to Montana & Wyoming to receive coal that was burning at much higher cost. It amazes us that all of a sudden that all of a sudden this ban on using this High Sulfur Coal from Illinois has been lifted, and now all is OK? How can this be? Has something changed as to our breathing clean fresh air?" (emphasis in original); Comments of Ms. Colbert (June 18, 2003) (stating "Illinois has already deemed the local coal unsafe to burn and force existing power plants to burn western coal."); Petition Against Indeck's Proposed Power Plant signed by City of Elwood Residents (undated) ("Reasons Against: Air Pollution * * * Burning Illinois Coal Will Not Meet IL Pollution Standards.").

For example, the following table from the draft PSD permit for the proposed Elm Road Generating Station in Wisconsin provides examples of SO2 emission rates significantly lower than Indeck's proposed limit of 0.15 lbs/mmBtu (30-days).

Source	State Agency	Emission Limitation (pound per million Btu)	% SO2 Reduction
Deseret Generating Station	Utah	0.0976 (annual)	90%
SEI Birchwood, Inc.	Virginia	0.10 (30 - day)	94%
Hawthorne Generating Station	Missouri	0.12 (30 - day)	92%
Great Plains Power – Weston Bend	Missouri	0.126 (30-day)	92%
Thoroughbred Generating Company	Kentucky	0.167 (30-day)	90%+
ERGS (proposed)	Wisconsin	0.150 (30-day)	96%+

It is not secret that Illinois and especially its Chief Executive are engaged in "an aggressive effort to revive the state's sluggish coal industry."[25] This includes spending up to $500 million to persuade companies to burn the state's high sulfur coal. Petitioners are not asking EAB to second-guess the wisdom of Illinois spending its scarce tax resources on such questionable projects. Instead, all we ask is that EAB ensure that in the State's haste to promote Illinois coal, Illinois not forget that concern for Illinois' coal mining industry "is not an accepted justification in the top-down [BACT] approach." *State of Alaska v. US EPA*, 298 F.3d 814, 823 (9th Cir. 2002).

Should cleaner coals be more expensive than burning dirtier coals the adverse cost impact, if any, of not burning the dirtier fuels should be addressed in the BACT cost impact analysis. Moreover, any subsidies the State provides, such as the $50 million Indeck is promised by the State, must be factored into the BACT analysis. For example,

[25] See n. 10.

Indeck rejected various pollution controls, including additional SO2 controls, because it concluded such controls were too expensive. Ex. I at 5-14. This calculation would have, and should have, come out different if Indeck had included the state's subsidies in its cost analysis. This issue was raised by the public and IEPA ducked. Ex. B, RS 94 ("any State subsidy or incentive for the proposed plant should not be a significant factor in the control technology determination for the plant.").

The lack of a well-designed SO2 BACT limit also presents problems for IEPA to carefully protect ambient air quality and manage PSD increments. This is of special concern because as described above, the ambient SO2 levels with Indeck's expected emissions are approaching the short-term SO2 NAAQS.

Finally, IEPA failed to respond to commentators who were concerned about Indeck's proposal to burn high-sulfur Illinois coal when other less-polluting coals were readily available.[26] In a PSD permit proceeding IEPA is required to "briefly describe and respond to all significant comments." 40 C.F.R. § 124.17(a)(2). It has failed to do so. The failure to respond to this comment, a significant issue through the entire proceeding, is clearly erroneous and unlawful.

D. The Permit Unlawfully Allows Indeck To Burn Any Solid Fuel Without Defining Such Term Or Considering Alternate Fuels In Its BACT Analysis

Indeck's permit does not restrict the types of fuels it may burn. In fact, as long it provides IEPA with 30 days notice Indeck is free to burn "any solid fuel." Ex. A, US Condition 1.12.b. The term "any solid fuel" is not defined. Furthermore, Indeck is authorized "to use fuel from different suppliers in the boilers without prior notification to the Illinois EPA or modification of this permit." Ex. A, US Condition 1.14.a. Indeck

[26] See n.25.

requested this provision because it would like the "flexibility" to burn other solid fuels, such as petcoke and waste coal. The final permit does not, however, limit Indeck to just petcoke and waste coal. This issue was raised during the comment period. Ex. B, RS 137. IEPA dismissed the comment: "Provisions allowing the use of supplemental fuels is appropriate for a solid fuel fired boiler. This is demonstrated by other new coal-fired boilers that use fuels such as petroleum coke." *Id.*

IEPA's conclusion is directly counter to its obligation to establish case-by-case and carefully-tailored BACT limits. 42 U.S.C. § 7479(3). Its analysis must be tailor-made for each pollutant and each PSD permit decision must be based on detailed, accurate and site-specific information. The "alternate fuel" provisions in Conditions 1.12 and 1.4 are neither tailor-made nor detailed. Tailor-made would establish the air maximum air pollution reductions possible using different types and combinations of fuels and establish that as BACT. Detailed would establish meaningful restrictions on fuel choice. Without such reasonable safeguards the BACT determination is erroneous and unlawful.

E. Indeck's Permit Provision Exempting All Shutdown, Startup and Malfunction Events From Short Term Emission Limits Is Unlawful

A PSD permit must include stringent requirements to ensure compliance with the CAA during startup, shutdown and malfunction (SSM) and must be consistent with US EPA's guidance. Memo from Kathleen Bennett, *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions*, Sept. 28, 1982 ("Bennett Mem."); Memo from Steven Herman, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999) ("Herman Mem.").

Automatic *exemptions* for excess emissions during startup, shutdown and malfunction are prohibited. Bennett Mem. at 1. The U.S. EPA is particularly intolerant of excess emissions during start-up and shutdown. "Start-up and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the design and implementation or the operating procedure for the process and control equipment. Accordingly, it is reasonable to expect that careful planning will eliminate violations of emission limitations during such periods." *Id.* at 3.

Instead of requiring Indeck to carefully plan to minimize violations of short term emission limits IEPA simply exempts Indeck from complying with short-term emission limits during SSM events altogether. Ex. A, Table I, Fn 2. ("Short-term emission rates do not apply during startup, shutdown or malfunction."). This is directly contrary to the purpose and requirements of BACT.

BACT emission limits must meet at least three criteria: a) be met on a continual basis at all levels of operation; b) demonstrate protection of short term ambient standards; and c) be enforceable as a practical matter. NSR Manual B.56. Indeck's emission limits, as eviscerated by the SSM provision, do not meet any of these requirements. Indeck's emission limits are not required to be met on a continual basis because all short-term limits are suspended whenever Indeck declares it is having a SSM event. Ex. A, Table I, Fn. 2. There are multiple consequences of having no short-term permit limits, such as the absence of authority to bring an enforcement case seeking injunctive relief to address the underlying reason for the SSM event, as appropriate.

The SSM provision that allegedly establishes some safeguards during SSM events is unenforceable. Ex A, US Condition 1.6. For example, during an SSM event, this

provision requires Indeck to "shutdown the boiler within 90 minutes" but fails to specify when the 90 minute-period begins. Ninety minutes after Indeck has violated its emission limit? Similarly, the phrase "unless the malfunction is expected to be repaired within 120 minutes" begs the question, expected by whom? The requirement to shutdown "when it is apparent that repair will not be accomplished within 120 minutes" raises two more concerns: When it something "apparent"? And, there is no trigger for the 120 minutes – when does such a time period begin? 120 minutes after there has been a violation? 120 minutes after the neighbors complain?

The wholesale elimination of short-term emission limits during Indeck's SSM events also violates BACT because Indeck has not demonstrated that it can protect short-term ambient air quality standards without such limits. *See e.g.* Memo from Gerald Emison, OAQPS to David Kee, Region 5 (Oct. 24, 1986). In this memo Mr. Emison responds to a Region 5 statement that PSD permits must contain short-term emission limits to ensure protection of ambient air quality standards: "I concur with your position and emphasize to you that this position reflects our national policy."[27]

Moreover, Indeck's analysis contradicts any alleged need for such a broad waiver. For example, Indeck expects that "PM/PM10 emissions during all phases of start up will be less than or equal to the proposed BACT emission rate due to the firing of natural gas and the presence of the baghouse." PSD Appl'n, Vol. 1 at 4-3. Indeck also states that startup takes twelve hours. Furthermore, Indeck expects that by the ninth hour of its 12-hour startup process "the SO2 emission rate will reach the proposed BACT emission rate." Without agreeing these limits represent BACT, IEPA could fashion a BACT

[27] Available at http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/shrtterm.pdf.

startup provision that provides: 1) no waiver of the PM BACT limits, 2) the SO2 short-term BACT limit is waived only for the first nine hours immediately proceeding commencement of start up, and 3) the maximum duration of any short-term BACT waiver shall not exceed twelve hours.

There are other reasonable "work practice" options to reasonably constrain SSM events without throwing out all short-term limits. Indeck states an important way to minimize startup emissions is to use natural gas for the first seven hours until the boiler temperature exceeds 900 degree Fahrenheit and at that point begin firing coal. Ex. I at 4-3. IEPA received a comment suggesting that such a requirement be put into the permit, *i.e.*, no firing coal until the boiler temperature exceeds 900 degrees. Ex. D, SC/ALA Comments at X.vi. IEPA neither adopted nor responded to this comment. *See* Ex. A, US Condition 1.2.e. ("The Permittee shall use reasonable practices to minimize emissions * * * including * * * (i) Use of natural gas, during startup to heat the boiler prior to initiating firing of solid fuel.").

Based on the vague SSM provision it is wholly conceivable that Indeck could operate completely uncontrolled for extended periods of time during SSM events. Petitioners did not locate any analysis in Indeck's application in which it concluded that uncontrolled emissions for a significant period of time would not violate short-term ambient air quality standards, including PSD increments and NAAQS.

There are better, more protective ways to address Indeck's need for flexibility during SSM events than eliminating all short-term BACT limits. A PSD permit must ensure continuous, enforceable limits in place at all times. IEPA's meat-cleaver approach violates BACT and is unnecessary to provide Indeck some limited flexibility.

Finally, the permit requires Indeck to develop a plan to "address start up, normal operation, and shutdown and malfunction events" (Ex. A, US Condition 1.6) without subjecting such plan to public scrutiny as mandated by 40 C.F.R. §§ 52.21, 124. In the absence of a formal permit modification proceeding, such a SSM plan is not federally enforceable and is therefore unlawful.

F. Indeck's Proposed PM Emission Limits Do Not Reflect BACT

There are at least two errors in Indeck's PM BACT determination. First, the permit limit does not represent BACT. Second, Indeck's PM BACT analysis neither considered nor established an emission limit for CPM. Both issues were raised in comments. Ex. B, RS 18 & 19.

1. The proposed PM limit does not represent BACT.

The CAA and implementing regulations both define BACT as an emission limit, not a control technology. *See* 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(b)(12). The *NSR Manual* sets forth a "top-down" five-step process for determining the BACT emission limit. The first step is to identify all available control options for a targeted pollutant. Indeck appropriately identifies fabric filters and electrostatic precipitators as two commonly-available PM control options. Ex. I, PSD Appl'n at 5-16. Step two is to analyze the option's technical feasibility. Indeck lists various permitted CFB projects to demonstrate that such controls are technically feasible. Ex. I, PSD Appl'n, at Table 5-1.

It is in the remaining three "top-down" steps where Indeck's BACT analysis falls apart. Step three of BACT requires the ranking of all technically feasible options in order of effectiveness, *i.e.* starting with the most stringent emission rate first. Indeck does not rank the eleven power plants. However, it is simple enough to do so from Indeck's own

chart listing the PM emission rates for eleven CFB facilities. The four lowest emission rates for sources using fabric filters are as follows:

> Northampton Generating Station, PA – PM emission rate = 0.0088 lbs/mmBTU
> Reliant Energy Seward, PA – PM emission rate = 0.010 lbs/mmBTU
> York Energy, PA – PM emission rate = 0.011 lbs/mmBTU
> JEA Northside, FL – PM emission rate = 0.011 lbs/mmBTU (3-hour)

Ex. I, PSD Appl'n at Table 5-1. Step four is to evaluate the energy, environmental, and economic impacts. Petitioners were unable to identify any records indicating that Indeck conducted an assessment of the energy, environmental and economic impacts of selecting a fabric filter versus ESP, and whether there are any impacts associated with achieving the lower emission rates for the best-performing source. At step five the permit applicant is required to select BACT as the most effective pollution control option not eliminated in a preceding step.

Despite the straightforward nature of the BACT process, Indeck did not select, and IEPA did not compel, adoption of the best-performing PM emission rate, *i.e.* that achieved by the Northampton Generating Station in Pennsylvania. This discrepancy was raised during the public comment period. Ex. B, RS 18. IEPA rejected the comment, without any analysis:

> The [Indeck] BACT limit is consistent with limits set for other new coal-fired utility boilers, including those at the proposed Thoroughbred Generating Station in Kentucky and proposed Boiler 4 at the Council Bluffs Energy Center in Iowa. The emission limit set for PM, 0.015 lb/mmbtu, is appropriate.

IEPA's response is problematic on two counts. First, the agency rejects more stringent PM limits by reference to two proposed power plants that were not part of Indeck's BACT analysis. *See* PSD Application, Vol. 1, Tbl. 5-1. The public was not on notice that IEPA was considering two other power plant proposals in its analysis.

Second, IEPA's non-responsive response does nothing to correct, or explain, Indeck's faulty BACT analysis. Apparently IEPA did not even consider requiring Indeck to achieve, at a minimum, the PM emission limits achieved at the Northampton power plant, absent other compelling considerations. Failure to do is clearly erroneous and unlawful.[28] IEPA's unwillingness to revisit the PM BACT determination is all the more shocking because Indeck informed IEPA over a year ago that its CFB boiler vendor guarantees a PM emission rate that is almost 30 percent more protective – a PM emission limit of 0.011 lbs/mmBtu[29]-- than the limit of 0.015 lbs/mmBtu IEPA is requiring. Ex. A, Table I.

There are other substantial co-benefits were Indeck to meet a more stringent PM BACT limit. As Indeck described in its October 25, 2002 submission "the proposed fabric filters will not only control PM/PM10 emissions but will also provide a degree of control of acid mist and mercury." Ex. K at 6. The fabric filter is the primary method Indeck is relying on to meet its Section 112(g) case-by-case MACT obligations for mercury, but still it proposes to emit a hundred pounds of mercury annually. *Id.* at 5. Consequently, if Indeck were to conduct a BACT analysis as described in the NSR manual, one factor weighing heavily in favor of adopting the more stringent Northampton PM BACT limits is the co-benefits involved in reducing mercury and other hazardous air pollutants.

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[28] Ex. J, Letter from David Campbell, US EPA to Edward Andrews, WV DEP (undated). The letter provides comments to the West Virginia DEP regarding the proposed Longview PSD permit. USEPA urges more stringent PM BACT limits based on recent performance testing at Northampton which indicate an even lower PM rate should be considered. Based on recent performance testing (for both filterable and condensable) Northampton is achieving a PM limit of 0.0045 lbs/mmBTU (*i.e.* three times better than Indeck's proposed limit). Should the EAB remand Indeck's permit for further analysis such information should be incorporated in a revised BACT PM determination.

[29] Ex. K, Letter from Indeck (Oct. 25, 2002), *Supplemental Information PSD Permit Application Indeck-Elwood Energy Center*, Attach. B, Platts POWER Magazine, *Northside CFB repowering halves power cost, reduces emissions,* (Sept. 2002), Pg 5 of the article provides Table 1 with guaranteed emission rates on new CFB boilers supplied by Foster Wheeler Energy Corp.

Mercury pollution is a significant issue considering that Illinois has issued a mercury fish consumption advisory for every waterbody in the state and coal-burning power plants contribute over 80 percent of the state's annual mercury emissions.

2. Indeck's BACT analysis did not consider possible controls for condensable particulate matter and the permit fails to include a limit on CPM emissions.

Indeck's vendor informed Indeck that it could expect the following CPM emissions from its boilers:

> [T]the total PM/PM10 emission rate, including both filterable and condensable matter, is estimated at 0.050 lb/mmBtu. Accounting for condensable particulate matter, the total PM/PM10 potential emissions is 1,280 tons per year. Of this total PM/PM10 emission rate, 896 tpy is attributable to condensable particulate matter.

Ex. K. US EPA has taken the position, for at least nine years, that CPM is part of a source's PM emissions and must be considered in a BACT analysis. In a March 31, 1994 letter to the Iowa Department of Natural Resources US EPA responds to a series of questions, the first two relevant here:

> Iowa DNR: Does the Environmental Protection Agency (EPA) definition for PM-10 include condensable particulate matter (CPM)?
>
> US EPA: Yes, the definition of PM-10 includes CPM.
>
> Iowa DNR: Are the States required to compute PM-10 as the sum of in stack and condensable PM-10?
>
> US EPA: Since CPM is considered PM-10 and, when emitted, can contribute to ambient PM-10 levels, applicants for PSD permits must address CPM if the proposed emission unit is a potential CPM emitter.

Letter from Thompson Pace, OAQPS, US EPA to Sean Fitzsimmons, Iowa DNR (Mar. 31, 1994) (attached as Ex. L).

Despite this seemingly clear requirement and the fact that CPM makes up 70 percent of Indeck's expected CPM emissions, IEPA issued Indeck a permit with BACT limits that "do[es] not address condensable particulate matter." Ex. A, Table I. IEPA offers three unpersuasive arguments in refusing to establish CPM permit limits: 1) CPM "will be effectively controlled by the combination of a fluidized bed boiler and a baghouse;" 2) "there is limited information available upon which to base a numerical BACT limit for the condensable fraction;" and 3) Indeck's modeling included CPM and did not indicate violations of increments or NAAQS. Ex. B, RS 19.

1. If CPM can be "effectively controlled" IEPA must establish a permit limit for this pollutant. NSR Manual B.56. ("To complete the BACT process, the reviewing agency must establish an enforceable emission limit for each subject emission unit at the source and for each pollutant subject to review that is emitted from the source.") (emphasis added). The only exception to establishing an emission limit is if "technological or economic limitations in the application of a measurement methodology to a particular emission unit would make an emission limit infeasible." *Id.* EPA has established a method for CPM measurement. Ex. L ("States must use Method 202 [to measure CPM]"). Consequently, IEPA position that CPM can be controlled undermines its position and at the same time underscores its obligation to issue Indeck a PM limit that includes CPM.

2. IEPA's position that there is "limited information" on which to base a CPM limit is contradicted by IEPA's decision to require Indeck to conduct CPM emission testing (Ex. A, US Condition 1.8.b) and the fact that other power plants have CPM limits.

The first power plant Indeck lists in its BACT table, (Ex. I, Table 5-1 *Summary of PSD Permitted CFB Boiler Projects Since 1995)*, is the Northampton Generating Station in Pennsylvania. According to US EPA Region III, this facility has a permit limit of 0.0088 lbs/mmBtu and "[c]ompliance testing in February 2001 accounting for both filterable and [sic] condensable PM reports 5.75 lbs PM/hr equivalent to 0.0045 lbs/MMBTU." Ex. J, Enc. 1 at 13. US EPA Region III is making this point because it is concerned that the proposed PM BACT limit (including CPM) for the proposed Longview power plant in West Virginia is inadequate. Ex. J, Enc. 1 at 12 ("WVDEP has chosen a draft BACT limit for total PM/PM10, filterable and [*sic*] condensible PM, of 0.018/MMBTU.").

3. Whether or not air quality modeling demonstrates violations of PSD increments or NAAQS is irrelevant in determining whether or not Indeck must have a PM BACT limit that includes CPM. The obligation to protect ambient air quality standards is a separate and distinct requirement from the obligation to install BACT. *Compare* 42 U.S.C. § 7475(a)(3)(ambient air quality standards) and 42 U.S.C. § 7475(a)(3)(requirement for BACT). These two provisions also serve two different purposes. Section 165(a)(3) protects ambient air quality and ensures new sources do not interfere with attainment plans. Section 165(a)(4) is a technology-forcing provision designed to continually reduce emission rates for new and modified sources.

G. The NOx Limit Does Not Reflect BACT

Indeck's NOx limit provides a limit of "0.10 lb/million BTU, or such lower limit as set by the Illinois EPA following the Permittee's evaluation of NOx emissions and the SNCR system in accordance with Conditions 1.15." Ex. A, US Condition 1.2.b.iii. The permit initially provides that the "demonstration period for the boiler shall be the first two

years of operation." *Id.* Following the evaluation of various operating parameters "[t]his permit will be revised to set lower emission limit(s) for NOx emission * * * if as a result of this evaluation" IEPA "finds that the boilers can consistently comply with such limit(s)." Ex. A, US Condition 1.15.a.ii. However, the permit goes on to provide that this deadline for Indeck to complete its evaluation of a lower NOx emission limit "may be extended for an additional year," *i.e.* for a total of three years after operation commences. Ex A, US Condition 1.15.e.ii. One of the reasons the permit states Indeck may seek the extra year is if it is necessary to "coordinate this evaluation with the ambient assessment required Source-Wide Condition 7," the illegal provision requiring after-the-fact analysis of Indeck's pollution on the Midewin's soils and vegetation.

This provision effectively defers Indeck's BACT determination until seven years after the PSD permit is issued, instead of before permit issuance, as the law requires. 42 U.S.C. § 7475(a) ("No major emitting facility * * * may be constructed in any area * * * unless * * * the proposed facility is subject to the best available control technology.") (emphasis added). With this schedule and assuming Indeck completes construction as it predicts by 2007, plus the three years afforded to evaluate the NOx emissions would mean no BACT determination is completed until 2010. This is plainly illegal. Indeck cannot be issued a permit without first completing and being subject to a valid BACT determination. If Indeck wishes to meet BACT today and then re-open BACT in 7 years it is free to do so. It cannot, however, not be subject to BACT while it takes four years to build a power plant and then study its emissions for another three years.

Indeck's interim NOx permit limit of 0.10 lbs/mmBtu does not represent BACT either. Indeck's vendor, Foster Wheeler Energy Corporation, "guarantees" a NOx limits

of 0.09 lbs/mmBTU. Ex. K. In the same submission, Indeck includes the PSD permit and BACT determination prepared by the Florida DEP for a CFB power plant with boilers constructed by Indeck's vendor. In that permit Florida established a NOx limit of 0.09 lbs/mmBtu on the basis that "JEA has obtained guarantees from Foster Wheeler US to meet the Department's BACT NOx * * * limits on the CFB boilers. *Id.*

H. IEPA Unlawfully Failed To Conduct A BACT Determination For Fluorides And Set A Fluorides Emission Limit

Section 165(a)(4) provides that "[n]o major emitting facility * * * may be constructed" in a clean air area "unless * * * the proposed facility is subject to the best available control technology." 42 U.S.C. § 7475(a)(4). A PSD permit satisfies the BACT requirement if it provides the "maximum degree of reduction of each pollutant" that "is achievable for [the] facility" through specific measures "for control of each such pollutant." 42 U.S.C. § 7479(3). That determination must "tak[e] into account energy, environmental and economic impacts and other costs." *Id.* At the conclusion of a BACT analysis a permitting agency "must establish an enforceable emission limit for each subject emission unit * * * and for each pollutant subject to review that is emitted from the source." NSR Manual at B.56.

Fluoride is a PSD-regulated pollutant. Indeck's estimated annual emissions of fluorides is 50.2 TPY. Ex. A, Table I. IEPA did not establish a BACT limit for fluorides. This failure was raised in the comment period. Ex. B, RS 17. IEPA's failure to establish a BACT limit for fluorides is clearly unlawful. Given the vicinity of the Midewin IEPA's refusal is particularly arbitrary because, as USEPA has explained, "exposure of sensitive plant species to 0.5 micrograms per cubic meter of fluorides * * * for 30 days has resulted in significant foliar necrosis." NSR Manual at D-4.

I. IEPA Erroneously Concluded That It Has No Obligation To Consider Alternate Locations For Indeck's Proposed Power Plant

The Clean Air Act establishes the obligation on a permitting agency to consider, and an opportunity for the public to comment on, alternative locations to site major new sources of air pollution. For attainment areas, section 165(a)(2) prohibits construction of a new major emitting facility unless "a public hearing has been held with opportunity for interested persons * * * to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a) (emphasis added).

On the basis of this authority, Petitioners requested IEPA consider the benefits of Indeck constructing its proposed power plant at a site not immediately adjacent to the Midewin National Tallgrass Prairie. IEPA reject this request on the basis that CAA section 165(a)(2) only addresses "information on the existing air quality at the site of the proposed plant" and "there is no legal requirement that a draft PSD permit must address alternatives to the proposed project. * * * [N]or would it be appropriate for a permit to address an alternative project that was not actually the subject of the project." Ex. B, RS 121. IEPA also asserted that "it was not under any legal obligation nor did it act improperly by not thoroughly describing the site of the proposed plant and surrounding areas and land uses." Ex B, RS 140.

Petitioners respectfully disagree. Section 165(a) requires the public be given a reasonable opportunity to comment on four issues: (1) the air quality impact of such source"; (2) "alternatives" to "such source"; (3) "control technology requirements"; and (4) other appropriate considerations." 42 U.S.C. § 7475(a)(2). In combination with the permitting authority's obligation to respond to all reasonable comments, the permitting

agency must consider alternatives "to such source," including alternate sites, when the issue is appropriately raised by the public.

Without more information Petitioners do not assert that section 165(a) compels IEPA to require Indeck to locate elsewhere, only that this provision requires that the decision maker and interested public are informed about reasonable alternate sites before a PSD permit is granted. Why else would Congress require a public hearing to consider "alternatives" to the proposed source? 42 U.S.C. § 7475(a)(2).

J. US EPA Region 5 Has Failed To Consult With The FWS Regarding Two Endangered Species As Required by Section 7 of the ESA

In this section Petitioners describe how the U.S. Fish and Wildlife Service (FWS) has determined that granting of Indeck's PSD permit is a federal action that "may affect" two endangered species, that Region 5 has declined to consult with the FWS as required by Section 7 of the Endangered Species Act (ESA), and consequently there is no assurance that Indeck's PSD permit is protective of the endangered species. This issue is an "important policy consideration" that the Board should review. 40 C.F.R. § 124.19(a)(2).

1. The Granting of Indeck's Permit May Affect Two Endangered Plant Species

The record contains ample evidence that Indeck's proposed power plant threatens two endangered species. On June 19, 2003 the US Forest Service Supervisor for the Midewin National Tallgrass Prairie wrote that Indeck's proposal "could cause direct effects to sensitive habitat types at the Midewin" and "[s]ome of the affected habitats are occupied by Federal threatened, endangered, or sensitive species." Letter from Logan Lee, Prairie Supervisor, US Forest Service to Dan Merriman, Hearing Officer, IEPA, Ex. F at 2. A week later Petitioners Sierra Club and American Lung Association of

Metropolitan Chicago commented that "USEPA must still meet its Section 7 obligations." Comments of SC/ALA, Ex. D at 16.

On September 30, 2003 the Illinois Department of Natural Resources warned the IEPA that the emissions from the proposed power plant "are a potential direct threat to sensitive habitat areas in the Midewin," that the Midewin "supports numerous State and Federal listed plant and animal species * * * [including] Leafy Prairie Clover (*Dalea foliosa*)" and "[t]he Federal government * * * lists the Leafy Prairie Clover as endangered." Letter from Stephen Davis, Chief, Resource Review & Coordination Div., IDNR to David Kolaz, Chief, Bureau of Air, IEPA, Ex. E at 1.

On that same day, September 30th, the FWS sent a letter to Region 5 urging the agency to consult regarding two endangered species, the eastern prairie fringed orchid (*Platanthera leucophaea*) and leafy prairie clover (*Dalea foliosa*), and summarizing Region 5's ESA obligation:

> Section 7 of the Act prohibits Federal agencies from making irreversible or irretrievable commitments of resources prior to completion of the consultation process. Therefore, to avoid a possible violation of section 7 of the Act, we recommend that the Federal agencies not undertake or authorize any actions related to this project until this consultation is completed. We recommend that the U.S. Environmental Protection Agency ensure that the Illinois Environmental Protection Agency does not issue permits until after this consultation is completed.

Ex. G at 2.

On October 10, 2003 Region 5 responded that "the eastern prairie fringed orchid and leafy prairie clover are present in the area surrounding the Indeck Elwood site at the Midewin National Tallgrass Prairie," but declined to consult.[30] Letter from Cheryl

[30] Region 5's letter indicates that the FWS may have gone along with Region 5's determination that US EPA lacks discretionary authority and therefore consultation is unnecessary. The FWS did, however, determine that Indeck's proposal may affect two endangered species. It would be arbitrary and capricious,

Newton, Acting Air & Radiation Director, Region 5, US EPA to John Rogner, Field Supervisor, FWS (Oct. 10, 2003) (Newton Ltr. attached as Ex. P) ("EPA consultation * * * was not appropriate because EPA lacks discretionary authority."). That same day IEPA issued Indeck its construction permit.

2. US EPA Is Obligated To Comply With Section 7's Consultation Requirements

Section 7 of the ESA requires every federal agency "to insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). To accomplish this substantive requirement, Section 7 imposes a procedural duty on each federal agency to consult with the FWS (or the National Marine Fisheries Services in cases involving marine species) before engaging in any discretionary action which "may affect" a protected species. 50 C.F.R. § 402.14(a); *see* 16 U.S.C. § 1536(a)(2); *Natural Res. Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995).

Federal agencies are required to review their actions "at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). In addition, the FWS may, as occurred here, independently request a federal agency to enter into consultation "if [the FWS] identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation." *Id.* "The purpose of the consultation procedure is to allow the Service to determine whether the federal action is likely to jeopardize the survival of a protected species or

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therefore, for Region 5 to forgo consultation unless the FWS formally provides Region 5 with a written concurrence of "no adverse effect." *Natural Res. Defense Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) ("[R]egardless of the NMFS [the FWS's counterpart for protection of marine species] position that formal consultation is 'unnecessary,' the [action agency] had a clear legal duty to at least request a formal consultation. *See* 40 C.F.R. §§ 402.13, 402.14.").

result in the destruction or adverse modification of its critical habitat and, if so, to identify reasonable and prudent alternatives which will avoid the action's unfavorable impacts." *Sierra Club v. Babbitt*, 65 F.3d at 1505; *see* 16 U.S.C. § 1536(b)(3)(A).

There are only two recognized exceptions to the requirement of formal consultations in cases where an agency action "may affect" listed species. These are: (1) when, as a result of the preparation of a biological assessment under 50 C.F.R. § 402.12, or as a result of informal consultation with the Service under § 402.13, "the federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat;" and (2) when a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion. 50 C.F.R. § 402.14(b) (emphasis added). The Ninth Circuit has summarized an agency's Section 7's obligations:

> Before initiating any agency action in an area that contains threatened or endangered species or a critical habitat, the agency must (1) make an independent determination of whether its action "may affect" a protected species or habitat, or (2) initiate a formal consultation with the agency that has jurisdiction over the species. * * * If an agency determines that an action "may affect" critical species or habitats, formal consultation is mandated. 50 C.F.R. § 402.14(a). Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, and (2) the relevant Service (FWS or NMFS) concurs with that determination. 50 C.F.R. § 402.14(b).

Houston, 146 F.3d at 1126 (emphasis in original.). Accordingly, if an agency proposes to authorize an activity in an area that "contains threatened or endangered species" it may forego Section 7 consultation only if it determines that its action will not "affect" listed species, and the FWS expressly concurs with that determination. Section 7 further prohibits the "irreversible or irretrievable commitment of resources" during and "before * * * initiat[ing] formal consultation." *Houston*, 146 F.3d at 1125; 1128 n.6.

3. Issuance of Indeck's PSD Permit Is A Federal Action

Section 7 of the ESA applies to all "federal action." 16 U.S.C. § 1536(a). In *TVA v. Hill*, 437 U.S. 153 (1978), the Court stated:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that action authorized, funded, or carried out by them do not jeorpardize the continued existence" of an endangered species. * * * This language admits of no exception.

Id., at 173. "Agency action" is broadly defined in the regulations:

> Action means all activities or program of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies * * *. Examples include, but are not limited to: * * * the granting of licenses, contracts, leases, easements, rights-of-way, permits * * *).

50 C.F.R. § 402.02. (emphasis added). The Board has stated that a PSD permit issued by a delegated permitting agency is a US EPA (*e.g.* federal) permit:

> Because the [delegated agency] acts as EPA's delegate in implementing the federal PSD program, the permit is considered an EPA-issued permit for purposes of federal law.

Three Mountain Power, LLC PSD Appeal 01-05, 3 at n.1 (EAB, May 30, 2001), *see also In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996) ("A permit issued by a delegate is still an 'EPA-issued permit' * * *."). Clearly, the issuance of Indeck's "EPA-issued" PSD permit is a federal "agency action."

4. US EPA Has Ample Discretion To Protect Endangered Species

Region 5 erroneously contends, without any analysis, that it lacks the "discretionary authority" to protect endangered species and absent such authority the ESA does not apply. Newton Ltr., Ex. P at 1. Region 5 is simply mistaken that it cannot protect endangered species within the authorities afforded by the CAA's PSD provisions. First, Region IX has demonstrated otherwise. It regularly consults with the FWS *prior* to

issuance of a PSD permit by a delegated permitting agency. *See e.g. Metcalf Energy Center*, PSD Appeal No.01-07 & 01-08 (EAB, Aug. 10, 2001). As described in *Metcalf*, Region IX works with the delegated permitting agency to include in a PSD permit any conditions necessary to ensure that the agency's ESA and PSD obligations are simultaneously satisfied. *Id.* at 7 & 41 n.19.

Second, the Clean Air Act requires protections of soils, vegetation and natural areas, requirements clearly broad enough to afford the agency with the authority it needs to protect endangered plant species. One of stated purposes of the Clean Air Act's PSD program is to "preserve, protect and enhance the air quality in * * * areas of natural * * * value." 42 U.S.C. § 7470 (emphasis added). CAA section 165(e) further requires:

> an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation * * * in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility * * * and such other factors as may be relevant in determining the effect of emissions from a proposed facility.

42 U.S.C. § 7475(e)(3)(B). Specifically, each PSD permit applicant "shall provide an analysis of the impairment to * * * soils and vegetation that would occur as a result of the source." 40 C.F.R. § 52.21(o). This analysis begins with an "an inventory of soils and vegetation types found in the impact area." NSR Manual at D.4. This mandatory analysis is then factored into two substantive PSD program requirements: 1) the establishment of BACT limits (42 U.S.C. § 7475(a)(4)), and 2) the consideration of "alternatives" to the proposed source. *Id.* at § 7475(a)(2)

BACT permit limits are required to achieve "the maximum degree of reduction of each pollutant" taking into account, on a case-by-case basis, "energy, environmental, and economic impacts * * *." 42 U.S.C. § 7479(3) (emphasis added).

Congress granted the agency substantial discretion to ensure BACT limits are protective, going so far as allowing rejection of a proposed major source of air pollution altogether:

> [W]hen an analysis of energy, economics, or environmental considerations indicates that the impact of a major facility could alter the character of that community, then the State could, after considering those impacts, reject the application or condition it within the desires of the State or local community.

S. Rep. No. 127, 95th Cong., 1st Sess. 31 (1977) *reprinted in* Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977* at 1405 (1978).

The PSD program also requires that before a permit can be issued a public hearing must be held that provides an opportunity for interested persons, including US EPA representatives, to appear and

> submit written or oral presentations on the air quality impacts of such sources, alternatives thereto, control technology requirements, and other appropriate considerations.

42 U.S.C. § 7475(a)(2) (emphasis added); *see also In re Ecoelectrica, L.P*, (E.A.D. 1997) ("purposes of the statutory PSD provisions include 'assuring that any decision to permit increased air pollution in an attainment area is made only after careful evaluation of all the consequences of such a decision'") (*citing* 42 U.S.C. § 7470(5)). Because each PSD permit must contain BACT limits protective of vegetation and that "alternatives to" the proposed source are carefully considered, US EPA has the discretion, and indeed the obligation, to address the FWS's concerns and ensure that Indeck's PSD permit contains provisions of the two endangered plant species.

The US EPA has plenary authority over state-delegated PSD programs because even though "the [permitting authority] acts as EPA's delegate in implementing the federal PSD permit program, the permit is considered an EPA-issued permit for purposes

of federal law, and is subject to review by EPA's Environmental Appeals Board." *Three Mountain Power, LLC*, PSD Appeal No. 01-05, 3 (EAB, May 30, 2001), *see also, In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996) ("For purpose of part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit.' * * *.").

The PSD delegation agreement between Region 5 and IEPA also establishes ample opportunity for Region 5 to give protect endangered species. For example, the delegation agreement provides that "USEPA shall send any comments on the pending application to the IEPA within the public comments period." *USEPA-IEPA Agreement for Delegation of Authority of the Regulations for Prevention of Serious Deterioration of Air Quality (40 C.F.R. 52.21)* 3 (Dated March 1980 and amended in 1981) (attached as Ex. Q). And in the highly-unlikely event IEPA would refuse to include conditions protective of endangered species then US EPA could terminate the agreement. *Id.* ("This delegation may be terminated by either the USEPA or the IEPA, provided that 30-days written notice is provided to the other party.").

Finally, Region 5's lack-of-authority determination conflicts with the United States' position that two provisions of the Clean Air Act, Sections 113(a)(3) and 167, authorize the US EPA to block the issuance of a PSD permit that does not meet minimum PSD requirements, even when the PSD permit is issued by a state acting *under a SIP-approved program*. *See* Brief for Respondents, *Alaska Dep't of Environmental*

Conservation v. Environmental Protection Agency, No. 02-658, (U.S. Supreme Court) (attached as Ex. R[31]).

The FWS regulations list "permits" as a federal action subject to Section 7 precisely because an individualized permit decision inherently involve a certain amount of discretionary authority. A PSD permit is no exception.

5. The Board Should Review This Significant Policy Issue

The agency's duty to consult prior to issuance of a state-delegated PSD permit presents an "important policy consideration which the Environmental Appeals Board should in its discretion, review." 40 C.F.R. § 124.19(a)(2). Region 5 has taken a position directly counter to Region IX's established practice of regularly consulting with FWS prior to issuance of state-delegated PSD permits. This regional inconsistency not only bewilders the public (and likely industry), it also confuses the delegated permitting agencies US EPA has entrusted with the day-to-day administration of the PSD program. For example, in response to Petitioners' comments urging consultation with the FWS, IEPA, which has administered the Illinois PSD program for over two decades, took the understandable, but inappropriate, step of requesting consultation directly with the FWS. *See* Rogner Ltr., Ex G at 1. The FWS declined the request because the duty to consult rests with the responsible federal agency, not the state. *Metcalf* at 41 ("EPA may not delegate its responsibility to ensure that the [permitting agency's] PSD permitting actions comply with the ESA.")

Board review and clarification of Region 5's consultation obligations would also confirm that the Board is an appropriate venue for interested parties to raise ESA issues

[31] Available at http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2002-658.mer.aa.pdf.

that are intertwined with a PSD permit.[32] The alternative is for citizens to challenge such issues directly in federal court. On December 8, 2003 Petitioner Sierra Club did file a petition for review with the U.S. Court of Appeals for the Seventh Circuit challenging, among other things, Region 5's lack-of-authority determination. *See Petition For Review, Sierra Club v. US EPA* (Case No. 03-4174)(attached as Ex. Q). Other legal options include commencing a civil action in a U.S. District Court to, *inter alia*, "enjoin any person, including the United States * * * who is alleged to be in violation of any provision" of the Act, "or regulation issued under the authority thereof * * *." 16 U.S.C. § 1540(g); *see also*, *Houston*, 146 F.3d at 1126 (finding agency failure to consult enforceable under the Administrative Procedures Act, 5 U.S.C. § 706).[33]

This case also presents the Board with the opportunity to answer the question it posed, but did not answer, regarding its jurisdiction to hear this issue. *Metcalf* at 42 n.19 ("We note but do not decide here the question of the Board's jurisdiction to review ESA-related issues in the context of this [PSD] proceeding."). The Board explained its hesitancy by pointing to the fact that the PSD regulations do not expressly provide for consideration of ESA issues. *Id.* ("Unlike the regulations governing issuance of certain Clean Water Act permits * * * which expressly refer to ESA procedures in issuing permits under that statute * * * there are no comparable regulations governing issuance of PSD permits."). Because the CAA provides US EPA with the authority (and obligation)

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[32] In requesting EAB review Petitioners are not conceding that the Board is the sole venue for challenging US EPA's failure to consult. Petitioners would, however, request a stay of the Court of Appeals proceeding and withhold commencing any further legal action should the Region agree to a remand of the entire construction permit while it consults with the FWS, strengthen Indeck's permit to address the FWS's concerns, and provides additional public participation opportunities to consider and comment on any resulting permit changes.

[33] If US EPA does not ensure endangered species are protected prior to issuance of the Indeck permit it may be exposing IEPA to liability for "taking" endangered species under Section 9 of the ESA. *See e.g., Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998) (liability of state instrumentality); *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997) (same).

to consider vegetation impacts in each PSD permit, the Board would be within its authority to require the Regions to comply with the ESA's procedural and substantive safeguards for endangered species of vegetation. The types of foreseeable permit conditions necessary to protect endangered species, such as, for example, more protective BACT, would also familiar issues for this Board.

The absence of an express provision in the PSD regulations requiring consideration of ESA issues is not determinative of the Board's jurisdiction. The Board hears environmental justice claims in the context of a PSD appeal, even though "EPA has not issued formal rules or written guidance on environmental justice with respect to PSD permitting." *In re Ecoelectrica, L.P.*, 67 n.15. (E.A.D. 1997) (The Board "examined the Region's application of Executive Order 12898 in this case, and we are satisfied that the Executive Order was not violated in any respect.").

Just as E.O. 12898 requires each Federal agency to incorporate environmental justice into its overall mission, the Supreme Court has held that the ESA requires federal agencies to give the highest priority to the conservation of endangered species:

> § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary mission" of federal agencies.

TVA v. Hill, 437 U.S. 153, 185.

In short, under a state-delegated PSD permitting scheme, US EPA retains broad authority, including the ultimate authority to deny a non-conforming permit. This authority comes with it the obligation to consult with the FWS and prohibits the agency from making any "irreversible or irretrievable commitment of resources," including

issuing a permit, during the pendency of the consultation process. 16 U.S.C. § 1536(d); *Houston*, 146 F.3d at 1125. Region 5's decision to decline to consult with the FWS and ensure the two endangered species that the FWS has identified as at risk from Indeck's proposal are protected before Indeck's permit issued was unlawful and clearly erroneous.

CONCLUSION

We respectfully urge EAB to review and remand this defective permit. Indeck should not be prejudiced with a short delay to fix its permit because IEPA has not yet issued or scheduled a public hearing for Indeck's draft water discharge permit. Without a final water permit, which includes storm water provisions, Indeck is prohibited from engaging in site preparation or clearing activities. It is hard to imagine how Illinois residents will be prejudiced by a modest delay as IEPA repairs a plainly unlawful and unprotective permit. There is no shortage of power in Illinois. Ex. B, RS 3 (IEPA states "Illinois does have adequate generating capacity to meet the demand for power.").

Respectfully submitted, this 18th day of December, 2003

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

OCT 10 2003

REPLY TO THE ATTENTION OF
(A-18J)

(1309)

John D. Rogner
Field Supervisor
Fish and Wildlife Service
Chicago Ecological Services Field Office
1250 South Grove Avenue
Suite 103
Barrington, Illinois 60010

Dear Mr. Rogner:

Thank you for your September 30, 2003, letter to Tom Skinner, Region 5, in which you outline the possible effects on two endangered species from the proposed issuance of an air pollution control construction permit to Indeck Elwood Energy Center by the Illinois Environmental Protection Agency (IEPA). I have been asked by the Regional Administrator to respond to your letter. We understand that the eastern prairie fringed orchid and leafy prairie clover are present in the area surrounding the Indeck Elwood site at the Midewin National Tallgrass Prairie. Your letter mentioned a possible consultation between the Environmental Protection Agency (EPA) and the Fish and Wildlife Service (FWS) on this matter pursuant to Section 7 of the Endangered Species Act.

In follow-up conversations with you and your staff, we agreed that EPA consultation with FWS on the construction permit to be issued by IEPA was not appropriate because EPA lacks discretionary authority. Instead, IEPA agreed to take the lead in working with you informally to insure the two plants are protected. The EPA will assist this effort as needed. We recognize that this is a unique opportunity to work collectively with you and other State and Federal agencies to advance the goals of the Endangered Species Act, and we look forward to helping move this effort forward.

Ex. P

As always, we are acutely interested in information forwarded by FWS on endangered species in Region 5 and are committed to continue working cooperatively with you on these issues.

Sincerely yours,

for

Cheryl L. Newton, Acting Director
Air and Radiation Division

cc: David Kolaz
Illinois Environmental Protection Agency

USEPA-IEPA Agreement
for Delegation of Authority of the Regulations
for Prevention of Significant Deterioration
of Air Quality (40 CFR 52.21)

The undersigned, on behalf of the Illinois Environmental Protection Agency (IEPA) and the United States Environmental Protection Agency (USEPA), hereby agree to the delegation of authority for the administrative, technical and enforcement elements of the source review provisions of 40 CFR 52.21, Prevention of Significant Deterioration (PSD) from the USEPA to the IEPA, subject to the terms and conditions below. This delegation is enacted pursuant to 40 CFR 52.21(v), Delegation of Authority.

General

1. The IEPA shall review all applications for approval of proposed sources in Illinois which may be subject to 40 CFR 52.21. This review will be conducted as an integral part of the Illinois construction permit program. The IEPA will take final action upon a complete application, either approval or disapproval, within 180 days of receipt unless the applicant waives the right to action within this time.

2. Permits issued under this delegation shall contain language stating whether IEPA, acting upon the behalf of the USEPA, finds that the proposed source fulfills the requirements of 40 CFR 52.21.

3. The IEPA shall keep records of actions performed under this delegation for a period of at least three years. The USEPA shall have access to these records.

   The IEPA shall send a copy of the final action (either approval or disapproval) on any application subject to 40 CFR 52.21 to the Regional Administrator of the USEPA at the time of issuance. Copies of other records will not be routinely forwarded to the USEPA, in order to avoid duplication of records.

4. The primary responsibility for enforcement of 40 CFR 52.21 as it pertains to source review in the State of Illinois shall rest with the IEPA. The IEPA shall enforce the appropriate provisions of 40 CFR 52.21 unless more stringent State regulations apply.

5. The IEPA shall inform the USEPA of any judicial action referred to in section II B, paragraph 5 of the "Request by the State of Illinois for Delegation of Authority for PSD."

Ex. Q

Program Supervision

1. The USEPA shall develop and maintain a system for transmitting policy documents and interpretations relating to 40 CFR 52.21 to the IEPA.

2. At the beginning of the public comment period for a source subject to 40 CFR 52.21, the IEPA shall send to the Regional Administrator of the USEPA a copy of 1) the public comment notice, and 2) the preliminary decision of the IEPA on the application including reasons for the decision and any conditions imposed by the IEPA. The USEPA shall send any comments on the pending application to the IEPA within the public comment period. USEPA acceptance of the IEPA's proposed action on an application shall be assumed if written comments are not received within the public comment period.

   The notice for public comment shall include the degree of increment consumption that is expected from the source or modification.

3. The IEPA shall send the USEPA, as a part of its regular quarterly report on compliance status, a listing of the status of sources in Illinois subject to 40 CFR 52.21, including:

   a. The stage of review of any proposed source whose application is under review,
   b. the stage of construction and compliance status, as appropriate, of any source whose application has been acted upon but which is not yet operational, and
   c. the compliance status of any source which is operational.

4. The USEPA shall examine the procedures used by the IEPA to implement the provisions of 40 CFR 52.21, at times mutually agreeable to both agencies, semiannually or on a less frequent basis.

5. In disputes between the IEPA and the regional office of the USEPA, the IEPA may raise the unresolved issue with higher levels within the USEPA for a final decision.

6. If the USEPA finds that the IEPA persistently is not implementing source review in accordance with the provisions of 40 CFR 52.21 or not fulfilling the terms and conditions of this agreement, the USEPA may revoke this delegation in whole, after consultation with the IEPA. Such revocation shall be effective as of the date of written notice of such revocation to the IEPA.

7. The IEPA will not accept dispersion modeling which is not consistent with the USEPA Guidelines on Air Quality Models. The IEPA will consider new information on dispersion modeling and other aspects of PSD as periodically issued by USEPA.

8. The IEPA, in accordance with the provisions of 40 CFR 52.21(v)(4), shall submit to the Administrator for approval determinations of best available control technology for new and modified sources proposing to construct in a Class III area if the source would consume increment greater than the Class II increment and if no new source performance standard has been promulgated for such source category.

Terms of the Delegation

1. This delegation is effective thirty days from the date of execution of this Agreement and shall remain in effect until terminated by either party, revoked by the USEPA, or superceded by the approval of a State Implementation Plan for Illinois fulfilling the requirements of Part C of the Clean Air Act, as amended, "Prevention of Significant Deterioration."

2. This delegation covers any revisions which are promulgated for 40 CFR 52.21. The term "40 CFR 52.21" as used in the delegation request and throughout this Agreement, includes such regulations as are in effect on the date this Agreement is executed, and any revisions which are promulgated after that date.

3. This delegation covers the review of applications subject to 40 CFR 52.21 received after the effective date of this agreement and the surveillance of sources for which review, pursuant to 40 CFR 52.21, has been completed. The responsibility for review for any applications, which are under review by the USEPA on the effective date of this agreement, shall be transferred to the IEPA upon the written request of the applicant and the IEPA.

4. This delegation may be amended at any time by the formal written agreement of both the IEPA and the USEPA, including amendments to add, change, or remove conditions or terms of this Agreement.

5. This delegation may be terminated by either the USEPA or the IEPA, provided 30-days written notice is given to the other party.

Signed:

[signature] (name) Director IEPA (title) 3/8/80 (date)

Illinois Environmental Protection Agency

[signature] (name) _____ (title) FEB 28 1980 (date)

United States Environmental Protection Agency

000922

USEPA-IEPA Agreement to Amend USEPA-IEPA Agreement for Delegation of Authority of the Regulations for Prevention of Significant Deterioration of Air Quality (40 CFR 52.21)

The undersigned, on behalf of the Illinois Environmental Protection Agency (IEPA) and the United States Environmental Protection Agency (USEPA), hereby agree to amend the terms of the delegation as described in Paragraph 3, Terms of the Delegation, USEPA-IEPA Agreement for Delegation of Authority of the Regulations for Prevention of Significant Deterioration of Air Quality (40 CFR 52.21).

Pursuant to Paragraph 4 of the Terms of the Delegation, the undersigned agree that Paragraph 3 of the Terms of the Delegation shall be amended to give IEPA authority to amend or revise USEPA-issued permits in accordance with 40 CFR 52.21. Accordingly, Paragraph 3 of the Terms of the Delegation is amended to read as follows:

3. This delegation covers (1) the review of applications subject to 40 CFR 52.21 received after the effective date of this agreement; (2) the surveillance of sources for which review, pursuant to 40 CFR 52.21, has been completed; and (3) amendments to or revisions of permits in accordance with 40 CFR 52.21 which have been issued by USEPA. The responsibility for review of any applications, which are under review by the USEPA on the effective date of this agreement, shall be transferred to the IEPA upon the written request of the applicant and the IEPA.

Signed:

Richard J. Carlson, Director
Illinois Environmental Protection Agency

4-14-81
(date)

Valdas V. Adamkus, Regional Administrator, Region V
United States Environmental Protection Agency

11/16/81
(date)

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000923

No. 02-658

In the Supreme Court of the United States

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over this pre-enforcement challenge to the Environmental Protection Agency's administrative orders.

2. Whether, if the Environmental Protection Agency (EPA) finds that a state permitting authority has not made a reasonable determination of the best available control technology as required by Section 165 of the Clean Air Act, 42 U.S.C. 7475(a)(4), the EPA has authority under Sections 113(a)(5) and 167 of the Act, 42 U.S.C. 7413(a)(5) and 7477, to issue a finding of noncompliance and administrative orders to prevent construction of a major emitting source.

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In the Supreme Court of the United States

No. 02-658

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 298 F.3d 814. A prior order of the court of appeals addressing its subject matter jurisdiction (Pet. App. 17a-23a) is reported at 244 F.3d 748.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002, and was granted on February 24, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth at App., *infra*, 1a-18a.

STATEMENT

1. Under the Clean Air Act, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). The Environmental Protection Agency (EPA), for example, establishes national ambient air quality standards (NAAQS) for certain air pollutants, and States play a "statutory role as primary *implementers* of the NAAQS." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 470 (2001); see 42 U.S.C. 7408, 7409. Each State must draft and submit to EPA for approval a state implementation plan (SIP) that, *inter alia*, provides for the attainment and maintenance of the NAAQS. See 42 U.S.C. 7407(a), 7410; see *Train* v. *NRDC*, 421 U.S. 60, 93-94 n.28 (1975).

This case involves particular provisions of the Act applicable to construction of major facilities in areas that are designated as "attainment" or "unclassifiable," *i.e.*, areas of the country—such as much of Alaska—where the NAAQS for a given pollutant are satisfied or for which insufficient data exist to know whether they have been satisfied. See Pet. App. 3a. The key goal of the Act in such areas is to preserve existing air quality, and a State's SIP therefore must "contain emission limitations and such other measures as may be necessary * * * to prevent significant deterioration of air quality" in those areas. 42 U.S.C. 7471; see 42 U.S.C. 7410(a)(2)(D)(i)(II). Under the Act's prevention-of-significant-deterioration—or PSD—program, no "major emitting facility"—*i.e.*, no facility that would emit substantial quantities of pollutants, see 42 U.S.C. 7479(1)—may be constructed in a clean air area unless it satisfies certain statutory requirements. 42 U.S.C. 7475.

Before such a facility may be constructed, its operator must secure a PSD permit "setting forth emission limitations for such facility which conform to the requirements" of the Act. 42 U.S.C. 7475(a)(1). One substantive requirement that

must be reflected in the PSD permit is that the new facility must not "cause, or contribute to * * * air pollution" in excess of certain "maximum allowable increase[s]"—or increments—in the levels of particular pollutants in clean air areas. 42 U.S.C. 7475(a)(3) (permit requirement), 7473 (definition of increment). Another requirement is that the facility must not cause or contribute to air pollution exceeding any NAAQS or other "applicable emission standard or standard of performance" under the Act. 42 U.S.C. 7475(a)(3).

To prevent significant deterioration of air quality in a clean air area, a facility also may not "be constructed * * * unless * * * the proposed facility is subject to the best available control technology [BACT] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." 42 U.S.C. 7475(a)(4); see *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 407 (D.C. Cir. 1979). BACT is defined under the Act, in pertinent part, as

> an emission limitation based on the maximum degree of reduction of each pollutant * * * emitted from * * * any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility.

42 U.S.C. 7479(3). Thus, BACT is an "emission limitation" that must be "based on the maximum degree of reduction * * * achievable" for the facility, as determined by the permitting agency and taking into account the specified factors.

In determining what is BACT for a given source, permitting authorities commonly follow the "top-down" approach. Pet. App. 13a (citing EPA, *New Source Review Workshop Manual* (Draft 1990)). Under that approach, "the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically

feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable." Pet. App. 18a.

The Act directs state permitting authorities to keep EPA informed of every PSD permit application and "of every action related to the consideration of such permit." 42 U.S.C. 7475(d)(1). Although EPA often offers comments to state permitting authorities on permit applications, EPA does not become more formally involved in PSD permit decisions in the vast majority of instances. Two provisions of the Act, however, authorize EPA to enforce the statutory PSD requirements. Section 113(a)(5) provides that if EPA "finds that a State is not acting in compliance with any requirement or prohibition" of the Act "relating to the construction of new sources or the modification of existing sources," 42 U.S.C. 7413(a)(5), EPA may (A) "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies," (B) "issue an administrative penalty order," or (C) "bring a civil action" in federal district court for an injunction or other relief. 42 U.S.C. 7413(a)(5). Section 167, which is directed solely to the PSD program applicable to new sources in clean air areas, provides that EPA "shall * * * 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" the Act specifically intended to prevent significant deterioration. 42 U.S.C. 7477.

2. Teck Cominco Alaska, Inc. operates the "Red Dog Mine" in northwest Alaska, which is the largest producer of zinc concentrates in the world. Pet. App. 3a. Many workers are housed within its boundaries, and native Alaskans reside in the nearby villages of Kivalina and Noatak. *Id.* at 4a; J.A. 166; R. 86-018, 46-001. Cominco first obtained a PSD permit from petitioner for the mine in 1988. Pet. App. 4a; J.A. 166. The mine produces its own electricity. In order to ensure

that emissions of nitrogen oxides (NOx) from its power generators remained within permissible limits, that permit, as later amended, included restrictions that limited the operations of the mine's five original diesel-fired power generators (designated MG-1 through MG-5) and one generator added later (designated MG-6). J.A. 78-79, 166-167, 194-195.

In 1996, Cominco initiated an expansion project to increase zinc production by 40%. Pet. App. 4a; R. 85-007; J.A. 167. The State of Alaska provided just under half of the funding. R. 85-007. The project was to increase the mine's workforce from 406 to 476. *Ibid.* Because the expansion would significantly increase emissions of air pollutants (including up to 1,100 additional tons per year of NOx) from the power generators, Cominco was required to apply for a new PSD permit. Cominco submitted its application in June 1998. Pet. App. 4a; J.A. 167-169. As amended in 1999, Cominco's application sought permission to build a new generator (designated MG-17) to add to the six existing ones. Pet. App. 4a; J.A. 167, 196. Cominco argued that petitioner should determine that BACT for that generator is a technology known as "Low NOx." Pet. App. 4a; J.A. 84.[1]

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[1] BACT review is required if modification of a particular facility would lead to a specified increase in emissions. See R. 83-016 (Table 2.3-1 showing Alaska PSD permit needed if NOx emissions will be increased by 40 tons per year or greater); 40 C.F.R. 51.166(b)(23)(i) (state SIPs must have 40-ton-per-year threshold for NOx increase). Initially, as a result of Cominco's planned increases in electricity generation from those generators that would lead to increased emissions, there was disagreement about the content of a BACT determination for MG-5 and the need for a BACT determination for MG-1, MG-3, and MG-4. See J.A. 128-129. In October 1999, Cominco revised its proposal to install Low NOx on those generators and thereby increase electricity production while not increasing emissions. See J.A. 149. The revision required Cominco to abide by the emission limitations in the pre-existing permits for those generators. See p. 9, *infra*. The case now concerns only the BACT limitation on the new generator, MG-17.

Petitioner's staff initially disagreed with Cominco's BACT proposal, concluding that a different and more stringent technology, selective catalytic reduction (SCR), should be required as BACT. J.A. 108, 196; Pet. App. 4a. SCR is similar to the catalytic converter technology used in automobiles. See, *e.g.*, 65 Fed. Reg. 35,430, 35,470 nn.100-101 (2000). In May 1999, however, petitioner released a draft PSD permit decision granting Cominco permission to build MG-17 with Low NOx—rather than SCR—installed on it. See Pet. App. 4a; J.A. 55-95. Purporting to follow the "top-down" approach (see pp. 3-4, *supra*), petitioner acknowledged that SCR would provide the most stringent level of control, while also being "technically and economically feasible" on MG-17. J.A. 61-62, 65, 83-84, 283-284. In particular, petitioner noted that the costs of SCR (variously estimated at that time to be between $1586 and $5643 per ton of NOx removed) were "well within what [petitioner] and EPA consider[] economically feasible." J.A. 84. Nevertheless, petitioner proposed to select the less effective Low NOx as BACT for MG-17 due solely to "other considerations." J.A. 65 n.1. Those "other considerations" consisted of Cominco's proposal to retrofit some of its existing generators with Low NOx as well. See note 1, *supra*; J.A. 87-88; Pet. App. 4a.

In July 1999, EPA, following up on comments submitted by the National Park Service (NPS), which was concerned about the effect of increased NOx emissions on air quality and vegetation at Cape Krusenstern National Monument and Noatak National Preserve, raised concerns with petitioner about its draft permit decision. Pet. App. 4a-5a; J.A. 96-98, 257, 284-285. EPA pointed out that petitioner itself had found that SCR offered "the most stringent level of control" and was "economically and technologically feasible." J.A. 96. And EPA reminded petitioner that "the PSD program does not allow the imposition of a limit that is less

stringent than BACT" on MG-17, "even if equivalent emission reductions are obtained by imposing new controls on other emission units." J.A. 97; see Pet. App. 5a.

After receiving EPA's comments, petitioner issued a revised draft permit decision dated September 1999. Petitioner again found SCR to offer the most stringent level of control, to be technologically feasible, and not to be eliminated by consideration of environmental and energy impacts. J.A. 107, 287. The revised decision also acknowledged that "the emission reductions achieved by the applicant's proposal to retrofit the existing, unmodified engines * * * cannot be used to temper the stringency of BACT" on MG-17—*i.e.*, that BACT had to be determined for MG-17 alone, without regard to controls petitioner might choose to place on other generators. J.A. 111-112, 286.

The revised draft decision nonetheless continued to state that Low NOx qualified as BACT for MG-17, purporting to base that determination on the costs of SCR, which it now found to be only $2100 per ton of NOx removed. Pet. App. 5a, 14a-15a; J.A. 113, 117, 286-288. The revised draft asserted that the costs of SCR were "significantly higher" than those associated with "recent BACT decision[s] for similar installations," although petitioner acknowledged that it had imposed BACT costs of up to "$7,000 por ton of NOx removed" on other sources. J.A. 115-116; R. 29-052. The revised draft hypothesized that Cominco "would probably buy power from a rural Alaskan utility" if it did not generate its own power and stated that the cost increase of SCR would be "a disproportionate cost increase when viewed as an electric utility." J.A. 116. Petitioner concluded its analysis:

> Another perhaps *better way* to determine if the cost of BACT is excessive, is for the applicant to present detailed financial information showing its effect on the operation. However, the applicant did not present this information. Therefore, *no judgment can be made as to the*

> *impact* of [the costs of SCR] on the operation, profitability, and competitiveness of the Red Dog Mine.

J.A. 116 (emphasis added).

EPA again submitted detailed comments to petitioner. See J.A. 118-130, 288-291. EPA's view was that petitioner's BACT determination for MG-17 was "clearly erroneous" and not "supported by * * * available information." J.A. 129. EPA emphasized, for example, the complete absence of facts establishing that "requiring Cominco to install and operate the more effective control strategies would have any adverse economic impacts upon Cominco specifically." J.A. 127.

In October 1999, the parties met to discuss the pending PSD permit. Pet. App. 5a; J.A. 292. Many outstanding issues were ultimately resolved. J.A. 294. For example, Cominco now "agreed to restrict the emission increases associated with MG-5 to avoid modification and BACT review" of that generator. J.A. 197. Although only the validity of petitioner's determination of BACT for the MG-17 generator remained in dispute, it was an issue of significance. With SCR, the MG-17 generator would emit only 53 tons of NOx per year. With Low NOx, MG-17 would emit 531 tons of NOx per year—a 10-fold difference. J.A. 100, 198.

After further correspondence and discussions, see J.A. 136-140, 292-294, EPA issued a "Finding of Noncompliance and Order" to petitioner. Pet. App. 5a, 26a-37a; J.A. 294-296. Invoking Section 113(a)(5) of the Clean Air Act, EPA found that petitioner would violate the requirements of the Act and the Alaska SIP if it issued the permit as then drafted. Pet. App. 35a; J.A. 295-296. In a cover letter, EPA explained that petitioner's "record simply does not support its decision that BACT for * * * MG-17 is low NOx controls." J.A. 150. EPA noted that petitioner's own analysis "indicates that SCR is technically feasible." J.A. 149. EPA also "d[id] not believe that the cost-effectiveness analysis in the final technical analysis report demonstrates that the installation of

SCR is economically infeasible" and noted that the costs of SCR "are well within the range of costs EPA has seen permitting authorities nationwide accept as economically feasible for NOx control, except where there are compelling site-specific factors that indicate otherwise." J.A. 150. EPA stated, however, that it remained "available to review and consider any additional information or analyses * * * to support a determination that SCR is not BACT." J.A. 150, 296-297. Similarly, pursuant to Section 167 of the Act, EPA's order directed petitioner not to permit construction of Cominco's MG-17 generator "unless [petitioner] satisfactorily documents why SCR is not BACT." Pet. App. 36a.

Later that same day, and notwithstanding EPA's order, petitioner issued a PSD permit with an emission limit on MG-17 based on a determination that Low NOx constituted BACT. Pet. App. 5a; J.A. 254, 297-298. Under the permit, the pre-existing emission limitations for the existing generators MG-1 through MG-6 were "retained" unchanged. J.A. 232; see J.A. 156 (2259 tons combined total for MG-1, MG-3, MG-4, and MG-5), 233 (limits for MG-2 and MG-6). The permit included no requirement that petitioner install Low NOx on any of those generators, although petitioner had the right both before and after the permit decision to do so to remain within the pre-existing emission limitations while producing more electricity. See J.A. 139.

There was one other significant departure from the September 1999 revised draft permit. Compare J.A. 194-211 with R. 29-042 to 29-055. Cominco still had not submitted any information on, and petitioner by its own admission therefore could make "no judgment" about, SCR's impact "on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207, 299. Nonetheless, petitioner's analysis purported to find "the foremost consideration to judge economic impacts of SCR" to be "the direct cost of SCR technology and its relationship to retaining the Mine's

world competitiveness." J.A. 208. Petitioner concluded that "[t]o support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, [petitioner] has rejected [SCR] controls based on excessive economic cost—$2.9 million capital cost, with annualized costs approaching $635,000." J.A. 208; see J.A. 298-299.

In early February 2000, EPA issued a finding of noncompliance based on petitioner's final December 1999 permit and BACT determination. Pet. App. 5a; J.A. 256-258, 299-300. On the same day, invoking Sections 113(a)(5) and 167 of the Act, EPA issued an "Administrative Order" to Cominco not to commence construction of MG-17 until it obtained a valid PSD permit. See Pet. App. 38a-50a; J.A. 301. In March 2000, EPA issued an "Amended Administrative Order" accommodating Cominco's request to conduct some limited, weather-sensitive construction. See Pet. App. 51a-64a; J.A. 302. In April 2000, EPA withdrew the original December 10, 1999, Order on the ground that "after [petitioner] issued the permit prohibited by the Order, the Order did not impose any continuing prohibitions or obligations applicable to [petitioner]." Pet. App. 19a; J.A. 300. EPA did not, however, withdraw the orders that generally prohibited Cominco from doing construction work on MG-17.

3. Petitioner and Cominco filed petitions for review of EPA's findings of noncompliance and orders. The Ninth Circuit held that the EPA's orders were final and that it therefore had jurisdiction under 42 U.S.C. 7607(b)(1). Pet. App. 18a-23a. Applying the test for finality in this Court's decision in *Bennett* v. *Spear*, 520 U.S. 154 (1997), the court held that EPA's orders were its "last word" on whether Low NOx is BACT for MG-17 and that "rights or obligations" of the parties were determined by the orders because "[t]he effect of the February 8 Order [to Cominco] is to halt construction at Cominco's Red Dog Mine facility at a considerable cost of both time and money to Cominco." Pet.

App. 20a. The court also noted that "legal consequences [would] flow" if Cominco chose to continue construction despite the orders because, if EPA instituted proceedings to enforce its orders in district court, "Cominco and its employees would be subject to criminal and civil penalties for the violation of its Orders, as well as for the violation of the [Clean Air Act]." *Id.* at 21a.

On the merits, the court denied the petitions. Pet. App. 1a-16a. The court noted that the enforcement powers EPA relied upon depend on EPA's finding either that the State is "not acting in compliance with any *requirement*" of the Clean Air Act under Section 113(a)(5) or that a proposed facility "does not conform to the *requirements* of" the Act under Section 167. *Id.* at 7a-8a (emphasis added) (quoting 42 U.S.C. 7413(a)(5) and 7477). The court observed that, under the Act, a State may issue a PSD permit to construct a new facility only if the proposed facility is "subject to the best available control technology for each pollutant." *Id.* at 8a. The court concluded that BACT is therefore a "requirement" of the Clean Air Act under both Section 113(a)(5) and Section 167 and that EPA's finding that petitioner had failed to subject MG-17 to BACT authorized EPA to issue orders under those Sections. *Id.* at 8a-9a.

Petitioner argued that the Act grants it discretion in determining what constitutes BACT, because the Act defines BACT as a limitation "based on the maximum degree of reduction of each pollutant * * * *which the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, *determines* is achievable for [the] facility." Pet. App. 9a (emphasis added) (quoting 42 U.S.C. 7479(3)). The court agreed that "the state has discretion to make BACT determinations as the permitting authority." *Id.* at 10a. But it explained that "neither Section 113(a)(5) nor Section 167 contains any exemption for [Clean Air Act] requirements

that involve the state's exercise of discretion." *Id.* at 11a. The court concluded that "[i]t does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute." *Ibid.*

The court also rejected the argument that, even if EPA has authority to reject a state BACT determination, EPA acted arbitrarily and capriciously in this case. See Pet. App. 13a-16a. The court found that the administrative record—which "all the parties effectively agreed * * * was adequate to resolve the issues on appeal"—supported EPA's finding of noncompliance. *Id.* at 7a. The court held that petitioner's own permit record "shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) [petitioner] failed to provide a reasoned justification for its elimination of SCR as a control option." *Id.* at 16a. The court noted that petitioner's "apparent motivation for the elimination of SCR— appreciation for Cominco's contribution to the local economy"—is "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits." *Ibid.*

SUMMARY OF ARGUMENT

I. The court of appeals rejected EPA's argument that it did not have jurisdiction in this case because EPA's orders were not "final action" and therefore were not subject to review under 42 U.S.C. 7607(b)(1). Upon further consideration, the government now believes that the court of appeals did have jurisdiction. EPA's orders embodied EPA's considered and final judgment on whether petitioner had adequately justified its conclusion that Low NOx was the best available control technology for the MG-17 generator. The orders also determined legal rights and obligations, because they in effect invalidated petitioner's permit, pursuant to

which Cominco could have otherwise begun construction of the MG-17 generator.

II. A. On the merits, EPA's orders were based on authority granted to EPA in Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, to prohibit construction of a new source when a State has failed to comply with a "requirement"—or the new source would not conform to a "requirement"—of the PSD program. The statutory BACT provisions constitute such a requirement. They mandate that permits for specified new sources (which include Cominco's MG-17) require use of the "best available control technology," 42 U.S.C. 7475(a)(4), which in turn is defined as "an emission limitation based on the maximum degree of reduction of each pollutant" that the "permitting authority * * * determines is achievable" for the facility, "taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. 7479(3).

B. Petitioner's core argument is that a State complies with the BACT provisions so long as it makes a determination—any determination—of emission levels under the rubric of BACT. That contention is inconsistent with the statutory terms, which do not merely allow a state permitting authority to determine whatever limit on omissions it wants, but instead require it to determine the "maximum degree of reduction in each pollutant * * * achievable" for the facility, taking into account specified factors. 42 U.S.C. 7479(3). If a State has not actually determined the "maximum reduction" that is "achievable," or if a State has employed an arbitrary methodology or relied on unsupported factual premises, the State has not complied with the BACT requirement. Although a State has substantial scope for exercising judgment and weighing competing considerations in making a BACT determination, that scope is not unlimited. If a State acts outside the scope of permissible judgment,

EPA may exercise the authority Congress granted it to issue a stop-construction order.

Petitioner's argument that a State has sole discretion to determine BACT would also undermine the statutory scheme. Congress vested EPA with enforcement authority in order to protect national interests in ensuring compliance with Clean Air Act requirements—interests that transcend state boundaries. Clean Air Act requirements were imposed in order to protect not only residents of the State that houses a new facility, but also residents of neighboring States into which the air pollution from that facility may migrate. Moreover, Congress wanted to limit the substantial competitive disadvantage that States that imposed reasonable BACT and other requirements would face if other States could adopt unreasonably permissive standards.

C. Petitioner's other arguments that it has absolute discretion to make whatever BACT determinations it wants are unsound. Although petitioner holds out the prospect of state-court review of its permitting decisions, Congress in Sections 113(a)(5) and 167 of the Act deliberately gave EPA its own independent authority to protect the multistate interests in preventing the significant deterioration of air quality in clean-air areas. In any event, petitioner's concession that BACT requirements in its permits are subject to state-court review is inconsistent with its core argument that such requirements are solely a matter of discretion for the state permitting authority. Petitioner is also mistaken in contending that EPA enforcement of the BACT requirement is unnecessary because new sources must not exceed the allowable increases in emission (increments) under the Clean Air Act. Although the increment requirement sets a maximum level of pollution from new facilities in the aggregate, the separate BACT requirement was included specifically to ensure that emissions from *each* new facility are reduced to the maximum extent achievable for the facility.

EPA review is also consistent with the statutory scheme of cooperative federalism. Under the PSD program, state permitting authorities have substantial latitude to exercise their own judgment about what constitutes BACT. Congress also, however, gave EPA substantive authority to ensure compliance with the BACT requirement where a State acts outside that area of reasonable judgment and discretion. It is petitioner's view, which would deprive EPA of *any* significant role in the BACT process, that violates the principles of cooperative federalism.

D. If there is any doubt about the meaning of the Clean Air Act in this case, EPA's construction of the Act to require permitting authorities to make reasonable BACT determinations is entitled to deference under *Chevron U.S.A, Inc.* v. *NRDC*, 467 U.S. 837 (1984). In conferring authority on the EPA to make findings and issue orders to ensure compliance with the Act's requirements, Congress necessarily conferred authority on EPA to construe and apply the Act. EPA's longstanding view that the Act requires BACT determinations to be reasonable was embodied in its orders and the administrative record in this case, as well as in notice-and-comment rulemaking and guidance to the States over the years.

III. Petitioner argues that, if EPA does have statutory authority to act on the basis of a State's unreasonable BACT determination, EPA nonetheless erred in finding that petitioner's BACT determination in this case was unreasonable. That factbound issue falls outside the question of statutory authority presented in the certiorari petition.

In any event, EPA correctly concluded that petitioner unreasonably determined that Low NOx was BACT was unreasonable. It is not disputed that the use of SCR on MG-17 would result in much lower emissions than would the use of Low NOx. Petitioner conceded that SCR was feasible based on energy and environmental impacts. Although petitioner

purported to rely on the greater costs of SCR in rejecting it as BACT, petitioner also acknowledged that it had been provided with no information concerning the effects of those greater costs on Cominco's mining operation, and that accordingly "no judgment can be made as to the impact of [the costs of SCR] on the operation, profitability, and competitiveness" of the mine. J.A. 207. EPA correctly found that petitioner's decision to base its BACT determination on a bare desire to save money for Cominco, unsupported by any evidence that doing so would in turn substantially affect Cominco's operations at the mine or the neighboring communities, was unreasonable.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION IN THIS CASE

The court of appeals held that EPA's orders in this case were "final action" and thus reviewable under 42 U.S.C. 7607(b)(1). See generally *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980). The court rejected EPA's arguments that the orders were non-final. Upon further consideration, the government now believes that the court of appeals correctly found that it had jurisdiction in this case.

1. It is well-settled that myriad "pragmatic considerations" are involved in a finality determination. See, *e.g.*, *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980). The finality of EPA's Orders turns on two factors that were highlighted in *Bennett* v. *Spear*, *supra*. Under *Bennett*, "[a]s a general matter," a final agency action (1) must be one that "mark[s] the 'consummation' of the agency's decisionmaking process," rather than one that is "merely tentative or interlocutory [in] nature," and (2) it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-178. See *Whitman*, 531 U.S. 477-479.

The first of the *Bennett* conditions is satisfied here, as the Ninth Circuit concluded. Pet. App. 20a. The second *Bennett* condition is also satisfied given the nature of the orders in this case. The Act required Cominco to obtain a permit and be subject to BACT prior to construction. 42 U.S.C. 7475(a)(1). Absent EPA's orders, petitioner's permit would have removed those obstacles to Cominco's construction of the MG-17 generator. The orders, however, "effectively invalidated" the state permit. Pet. App. 18a. They precluded Cominco from constructing the generator and from asserting its compliance with the state permit as a defense in any enforcement proceeding. Moreover, as the court of appeals noted, once EPA issued its stop-construction orders, Cominco was faced with the threat of penalties for their violation. *Id.* at 21a; see 42 U.S.C. 7413(b)(2) (civil penalties possible for violations of a "requirement or prohibition of any * * * order * * * issued * * * under" the Act), 7413(c) (criminal penalties possible for knowing violation of "any order under [Section 113(a)]" or "an order under section [167]"). Accordingly, the orders "alter[ed] the legal regime," *Bennett*, 520 U.S. at 178, and they constituted "final action of the Administrator" under 42 U.S.C. 7607(b)(1).

2. The court of appeals' jurisdictional conclusion is consistent with the Sixth Circuit's conclusion involving a similar order in *Allsteel, Inc.* v. *EPA*, 25 F.3d 312, 315 (6th Cir. 1994) (noting that EPA's order "directed Allsteel to stop all construction—a new obligation, not one directly imposed by statute").[2] Compare *Acker* v. *EPA*, 290 F.3d 892 (7th Cir. 2002) (order that identified past violations and directed company to comply with law in the future not final action); *Asbestec Constr. Servs., Inc.* v. *EPA*, 849 F.2d 765 (2d Cir. 1988) (order that identified past violations of the Act, di-

[2] Although the Sixth Circuit's opinion does not specify the nature of the federal-state dispute, the briefs in *Allsteel* reveal that it included the validity of Tennessee's BACT determination.

rected the recipient to provide certain information, and required compliance with regulations in the future not final action); but cf. *Solar Turbines, Inc.* v. *Seif*, 879 F.2d 1073 (3d Cir. 1989) (holding, prior to 1990 expansion of civil penalties to cover violations of orders under 167, that pre-enforcement review of stop-construction order was unavailable).

After the court of appeals decided this case and this Court granted certiorari, the Eleventh Circuit in *TVA* v. *Whitman*, No. 00-15936, 2003 WL 21452521 (June 24, 2003), expressly disagreed with the Ninth Circuit's jurisdictional holding in this case. See *id.* at *16. The Eleventh Circuit did not disagree with the Ninth Circuit's conclusion that, as a statutory matter, Section 307(b)(1), 42 U.S.C. 7607(b)(1), would authorize pre-enforcement review of a stop-construction order such as that at issue here. The court held, however, that the Act "is unconstitutional to the extent that mere noncompliance with the terms of [an EPA order] can be the sole basis for the imposition of severe civil and criminal penalties." 2003 WL 21452521, *at* *19. In the court's view, the statutory scheme "deprives the regulated party of a 'reasonable opportunity to be heard and present evidence' on the two most crucial issues: (a) whether the conduct underlying the issuance of the [order] actually took place and (b) whether the alleged conduct amounts to a [Clean Air Act] violation." *Id.* at *18. The Eleventh Circuit rejected the contention that EPA could remedy any procedural deficiency "by voluntarily undertaking an adjudication prior to the issuance of an [order]," finding that "there is simply no room for administrative discretion on this [procedural] point" in the Act. *Ibid.* The Eleventh Circuit concluded that EPA orders "lack finality because they do not meet prong two of the *Bennett* test." *Id.* at *19.

The Eleventh Circuit's holding is mistaken, for at least two reasons. First, contrary to the Eleventh Circuit's apparent conclusion, see, *e.g.*, 2003 WL 21452521, at *4, the un-

derlying merits of an EPA order are always subject to judicial review—either on petition for review, as in this case or, if not, in a subsequent action brought by EPA to enforce the order. See 42 U.S.C. 7607(b)(2) ("Action of the Administrator with respect to which review could have been obtained under [42 U.S.C. 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement."). The Act's authorization of penalties for violation of EPA "orders" is naturally read to refer only to *valid* orders. In any event, such a narrowing construction would certainly be appropriate to avoid holding a portion of the Act unconstitutional.[3]

Second, the Eleventh Circuit erred in holding that EPA cannot provide for administrative procedures that would remedy any constitutional deficiency. The mere fact that Congress has failed to specify what procedures must be followed before EPA may issue an order does not preclude EPA from adopting procedures that are constitutionally adequate. The Due Process Clause does not require that Congress specify adequate procedures every time it entrusts to an agency the responsibility to make a determination; the Clause requires only that, in each case, adequate procedures are provided. This Court has long held that an agency has

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[3] The Eleventh Circuit noted that EPA may issue orders under Section 113(a)(5) "on the basis of any available information," 42 U.S.C. 7413(a)(5), and the court appears to have believed that that language mandated an exceptionally lax standard of judicial review of EPA orders. See 2003 WL 2145251, at *5, *16, *18. The "any available information" clause, however, does not alter the standard of review when EPA's orders are challenged; it simply means that EPA need not apply judicial rules of evidence in determining whether there has been a violation of the Act that warrants issuance of an order. Cf. 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence."); Sentencing Guidelines § 1B1.4 (similar).

(13) TOTAL ALL COSTS

(14) COSTS PER MONTH

(15) COST (CENTS) PER MILE

general authority to provide appropriate process, even when a statute does not specify that that process must be used. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978) (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure"); *Cameron* v. *United States*, 252 U.S. 450, 460-463 (1920). The Eleventh Circuit erred in rejecting that principle. Moreover, neither the Due Process Clause nor the Administrative Procedure Act requires a formal evidentiary hearing in all circumstances, and Congress contemplated that many EPA orders under the Clean Air Act would be issued in less formal proceedings. See *PPG Indus., Inc.* 446 U.S. at 587-589.

3. The Eleventh Circuit's sole reason for holding that the EPA order in that case was nonfinal and thus unreviewable was that the Act's provision for such orders to be backed by civil and criminal penalties was unconstitutional. For the reasons given above, the Act's provisions for EPA orders do not violate the Due Process Clause.[4] Accordingly, the Eleventh Circuit's finality conclusion was erroneous, and the court of appeals in this case correctly held that the EPA orders were reviewable under Section 307(b)(1).[5]

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[4] Petitioner has not presented any question in this case about the adequacy of EPA's procedures under the Due Process Clause or the APA.

[5] The Clean Air Act itself vests courts of appeals with original jurisdiction to review certain enumerated actions of EPA and "any other final action" it takes. 42 U.S.C. 7607(b)(1). Thus, apart from constitutional or prudential limitations such as standing, "finality" is the only jurisdictional inquiry under the Act. See *Allsteel*, 25 F.3d at 314. Other environmental statutes, such as the Clean Water Act, 33 U.S. 1251 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, generally do not comprehensively provide for judicial review, and review accordingly often takes place in district courts pursuant to the APA. The APA provides that an agency action may be "final" yet still statutorily unreviewable on other grounds, such as if the statute under which the agency acts "preclude[s] judicial review." 5 U.S.C. 701(a)(1). Courts have

(13) TOTAL ALL COSTS

(14) COSTS PER MONTH

(15) COST (CENTS) PER MILE

II. THE CLEAN AIR ACT AUTHORIZES EPA TO ISSUE A STOP-CONSTRUCTION ORDER IF A STATE'S PSD PERMIT IS BASED ON AN ARBITRARY OR UNREASONED DETERMINATION OF BEST AVAILABLE CONTROL TECHNOLOGY

Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, both grant EPA authority to issue stop-construction orders to enforce a "requirement" of the Act. Both parties agree that it is a requirement of the Act that a permitting authority determine the best available control technology for a proposed facility and include corresponding emission limitations in its PSD permit. EPA rested its Orders in this case on the premise that a State fails to conform to that requirement if it bases emission limitations in a permit on an unreasonable BACT determination. That conclusion is correct, and petitioner's arguments for a contrary interpretation—under which the Act requires permitting authorities to make a BACT determination but does not require them to do so reasonably—are mistaken.

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generally found that pre-enforcement review of EPA orders under those other environmental statutes is precluded within the meaning of the APA. See, *e.g.*, *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 716 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 568 (7th Cir. 1990); *Ross Incineration Servs.* v. *Browner*, 118 F. Supp. 2d 837, 843-845, 847 (N.D. Ohio 2000); *Amoco Oil Co.* v. *EPA*, 959 F. Supp. 1318, 1323-1324 (D. Colo. 1997). The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, contains an express bar to pre-enforcement review. *Cf. Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885 (8th Cir. 1977) (finding pre-enforcement review under the Clean Air Act precluded prior to the 1977 addition of the "any other final agency action" language to Section 7607(b)(1)).

A. Under The Plain Language Of Sections 113(a)(5) And 167, EPA Has Authority To Prevent Construction Of A Facility Under A Permit That Does Not Comply With Requirements Of The Clean Air Act

"[T]he starting point in a case involving construction * * * of a statute, is the language of the statute itself." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993). Two provisions of the Clean Air Act expressly authorized EPA's orders in this case.

1. Under Section 113(a)(5), "[w]henever * * * the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may * * * *issue an order* prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. 7413(a)(5) (emphasis added); see 42 U.S.C. 7411(a)(4) (defining "modification"). Under that provision, even when a State rather than EPA has authority to issue PSD permits—and even though the State's decision to grant a PSD permit would be subject to judicial review in state court—Congress granted EPA itself a substantive role in overseeing state implementation. Cf. Pet. Br. 23 ("There are many 'requirements' in the Act, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167."). Indeed, Congress expanded EPA's oversight role under Section 113(a)(5) in 1990 specifically to include enforcement of the Act's PSD requirements. See p. 32, *infra*. Thus, if EPA finds that a State decision to issue a permit does not comply with a requirement of the PSD provisions of the Act, EPA may issue a stop-construction order under Section 113(a)(5).

2. EPA's authority under Section 167 rests on a similar foundation. Under Section 167, "[t]he Administrator shall * * * take such measures, *including issuance of an order*,

* * * as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part" of the Act. 42 U.S.C. 7477 (emphasis added). The term "this part" refers to the provisions of the Act concerning prevention of significant deterioration of air quality in clean air areas. See 42 U.S.C. 7470-7492. Section 167 thus specifically gives to EPA—in addition to the States that have permitting authority under the Act—a substantive enforcement role with respect to construction or modification of facilities in clean air areas.

B. A Permitting Authority That Has Not Reasonably Determined The Maximum Degree Of Reduction In Pollution Achievable For A Facility Has Not Complied With The Act's BACT Requirement

EPA's ability to act in this case thus turns (under Section 113(a)(5)) on whether the Alaska permitting authority has complied with the Clean Air Act's "requirements" and (under Section 167) on whether Cominco's proposed facility would conform to the Act's "requirements." Section 165(a)(4) provides that "[n]o major emitting facility * * * may be constructed" in a clean air area "unless * * * the proposed facility is subject to the best available control technology." 42 U.S.C. 7475(a)(4). Petitioner concedes (Br. 22) that that provision imposes a "BACT requirement" that "a state-issued PSD permit contain a BACT limitation." EPA's order to stop construction therefore was authorized under Section 113(a)(5) if the State was "not acting in compliance with" the statutory BACT requirement when it issued the PSD permit, and EPA's order was authorized under Section 167 if Cominco's construction of its MG-17 generator with Low NOx would "not conform to" that requirement.

The core disagreement in this case concerns the nature of the BACT requirement. Both parties agree that a state permitting authority has the responsibility in the first in-

stance to determine what is the best available control technology for a given proposed facility. The government's submission is that the Act requires the state permitting authority to make its BACT determination reasonably within the parameters of the statutory standards, and that, when the state authority fails to do so, EPA may enforce the Act's requirements under Sections 113(a)(5) and 167. Petitioner's view is that the state permitting authority has "sole discretion" to impose whatever emission limitations it wants under the BACT label (Br. 27) and that EPA's authority under Sections 113(a)(5) and 167 therefore does not include *any* substantive review of whether the State's BACT determination is reasonable or justifiable. Petitioner's position is mistaken.

1. The BACT requirement is fleshed out in a statutory definitional provision. That provision does not merely require that a State determine the "best" emission limitation, without further specification—a standard that, even had it been employed, still would not necessarily mean that petitioner had unreviewable discretion. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 411-413 (1971) (grant of authority to administrator to determine "prudent" alternative to highway route does not grant unlimited discretion). Rather, BACT is defined in pertinent part as

> an emission limitation based on the maximum degree of reduction of each pollutant * * *, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility through application of production processes and available methods, systems, and techniques * * * for control of each such pollutant.

42 U.S.C. 7479(3). Thus, a PSD permit satisfies the BACT requirement if it provides for the "maximum degree of reduction of each pollutant" that "is achievable for [the] facil-

ity" through specific measures "for control of each such pollutant." That determination must "tak[e] into account energy, environmental, and economic impacts and other costs." The "permitting authority"—in this case, petitioner—is the entity that must make that determination, just as it must make all other determinations necessary to deciding whether a proposed PSD permit would comply with the Act.

2. Petitioner's core argument is that the statutory BACT requirement is satisfied so long as the permitting authority takes into account the specified factors and makes some determination about emission limitations, no matter how implausible. See Pet. Br. 22 ("The only 'BACT requirement' pertinent here is that a state-issued PSD permit contain a BACT limitation, determined by the State 'on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.'"); *id.* at 27 ("Congress * * * vest[ed] the States with *sole discretion* to decide what constitutes BACT.") (emphasis added). In petitioner's view, EPA may invoke Sections 113(a)(5) and 167 only to enforce the requirement that the state permitting authority recite that it is determining the best available control technology and "tak[ing] into account" the specified factors. In petitioner's view, that is all a state permitting authority must do to satisfy the statutory BACT requirement.

Petitioner's argument is inconsistent with the plain language of the BACT definition. Under that definition, there are at least two ways in which a permitting agency might recite that it is determining BACT and taking into account the specified factors while still failing to satisfy the statutory BACT requirement.

a. First, the Act does not require merely that a permitting agency make some determination of indeterminate content regarding desirable emission reductions. Rather, the agency must make a determination of the "maximum degree of reduction of each pollutant * * * achievable" by the

facility. Despite a permitting agency's incantation of the statutory BACT definition, the agency's decision might make clear that it has not actually determined the "maximum degree of reduction * * * achievable" by a facility. In such a case, although the permitting agency has made *some* determination, it has not made a determination *of BACT*.

For example, the permitting authority's reasoning may demonstrate that it applied some lower standard than the "maximum degree of reduction * * * achievable"—perhaps seeking only a degree of reduction that requires no new equipment installation, the least expensive reduction in emissions, or the like. Applying such a standard would violate the statutory BACT requirement regardless of whether the permitting agency designated it as a BACT determination.

Similarly, the state agency's decision may make clear that it was based on a desire to provide economic support to a particular company or facility by relieving it of the need to lower its emissions. Providing economic support through expenditure of state funds or exemption from purely state-law regulations may be a worthwhile state goal in a given case, but a State's decision that it wants to support an employer is not a determination of the "maximum degree of reduction" of pollutants "achievable" for the facility.

As is spelled out in additional detail below, see pp. 44-50, *infra*, EPA objected to the permit in this case because petitioner made the very kinds of errors outlined above. Petitioner did find that SCR is more expensive than Low NOx. But petitioner also acknowledged that, because Cominco "did not present" detailed financial information about the effect of the costs of SCR on its operations, "no judgement can be made as to the impact [of those costs] on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207. Petitioner thus had no evidence concerning the effect of the costs of SCR on Cominco's operations or on

the local community. Indeed, petitioner pointed to no evidence supporting a conclusion that the higher costs would have *any* adverse effect. As a result, petitioner was not in a position to determine that SCR—which concededly would assure the "maximum degree of reduction" of NOx as a technological matter—would not be "achievable" for the MG-17 generator. At most, petitioner could determine that it wanted to provide additional economic "support" to the Red Dog mine. J.A. 208. But a State may not simply choose to support a local facility by relieving it of the requirement to use the *best available* control technology to reduce pollution. If it does so, EPA has authority under Sections 113(a)(5) and 167 to prohibit construction of the facility.

b. In addition, the permitting agency does not satisfy the Act's requirement that it make a genuine BACT determination based on the "maximum degree of reduction * * * achievable" merely by reciting a finding that a particular technology satisfies that standard, no matter how arbitrary or unreasoned that finding is. Congress's grant of authority to make a BACT determination was directed toward a particular purpose of fundamental importance under the Act—preventing significant deterioration of air quality in clean-air areas within the State and in other neighboring States. See 42 U.S.C. 7470(3) and (4). That purpose would not be advanced by a BACT determination that arbitrarily evaluated the evidence before the permitting authority or applied the statutory criteria in an arbitrary manner that excused the applicant from installing meaningful pollution controls. Accordingly, Congress's grant of authority to make BACT determinations is limited to the authority to make *reasonable* BACT determinations.

This Court reached an analogous conclusion in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). In that case, medical care providers brought suit under 42 U.S.C. 1983 to challenge Medicaid reimbursement rates set by a State, on

the ground that the rates violated a federal statute requiring States to provide for payment for medicaid services "though the use of rates * * * *which the State finds* * * * *are reasonable and adequate*" to meet certain costs. 496 U.S. at 503. The Court rejected the argument that the only right granted by the statute that was enforceable under 42 U.S.C. 1983 was "the right to compel compliance with the[] bare procedural requirement[]" that the State recite a finding that its rates are reasonable. 496 U.S. at 513. Noting that such a construction "would render the statutory requirement[] of findings * * * essentially meaningless," the Court explained that "[i]t would make little sense for Congress to require a State to make findings without requiring those findings to be correct." *Id.* at 514. Accordingly, the statute imposed a meaningful requirement that could be enforced under federal law.[6]

Similarly here, it would make little sense to require a state permitting agency to "determine" the best available control technology if the agency could do so without concern for the accuracy or statutory legitimacy of its analysis. If a permitting agency used an arbitrary methodology or disregarded clear evidence of actual costs in determining what is BACT, then the agency has not made a reasonable BACT determination and it has not complied with the statutory BACT requirement. That would be the case, for example, if a permitting agency simply decided that any technology that

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[6] The result in this case follows *a fortiori* from *Wilder*. *Wilder* involved the question whether the members of a particular class were intended to be beneficiaries of a right under a federal statute such that they could sue to enforce that right under Section 1983. As the Court concluded in *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the demanding standards governing implication of private rights of action under federal statutes apply to such uses of Section 1983 by private plaintiffs. No such demanding standard applies to the construction of EPA's express authority under Sections 113(a)(5) and 167 to enforce the requirements of the PSD provisions of the Clean Air Act.

imposes *any* economic cost—even one additional dollar—is not "achievable" for a facility, even though the facility is projected to be profitable and plainly could afford a modest additional cost for pollution control. Where, as in this case, a permitting authority has not made a reasonable determination of what is the best available control technology under the statutory standards, it has failed to comply with the statutory BACT requirement, and EPA has authority under Sections 113(a)(5) and 167 to issue a stop-construction order.

c. That does not mean that a permitting authority has no ability to exercise judgment and to weigh competing considerations when it makes a BACT determination. EPA itself has consistently recognized that the Clean Air Act gives state permitting authorities considerable latitude in making such determinations.[7] EPA has long taken the position that a State with an approved SIP "assumes primary responsibility for administering the PSD program," J.A. 268 (1988 EPA guidance document), and that "permitting decisions involve the exercise of judgment," J.A. 273 (1988 EPA guidance document). EPA also has recognized that "it is the state that must make the final decision on all issues relating to the specific permit" and that "[t]here is no suggestion in the Act's * * * provisions that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state." J.A. 281 (quoting 1993 EPA guidance document).[8]

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[7] See also, *e.g.*, Pet. App. 10a ("state has discretion to make BACT determinations"); *Northern Plains Res. Council v. EPA*, 645 F.2d 1349, 1358-1362 (9th Cir. 1981) (affirming BACT determination because permitting authority "exercised reasoned discretion"); *Alabama Power*, 636 F.2d at 409 ("permitting authority * * * may exercise reasonable discretion" in determining BACT).

[8] EPA recognized that scope of state authority in this case by making clear, for example, that petitioner could come into compliance by "satisfactorily document[ing] why SCR is not BACT for the Wartsila diesel generator." Pet. App. 36a, 48a, 61a. See also J.A. 150 (EPA is "available

Nonetheless, EPA too has enforcement responsibility under Sections 113(a)(5) and 167. Accordingly, EPA has consistently informed the States that it will exercise its authority under those provisions if a State's "BACT determination [is] not based on a reasoned analysis." J.A. 274 (1988 EPA guidance document). See also J.A. 282 (quoting 1993 EPA guidance document) (EPA may take action if a State has not "met all procedural norms, considered all available control technologies, and given a reasoned justification for the basis of its decision."); J.A. 281 (EPA may act "to ensure that the state exercises its discretion within the bounds of the law."). It has proven to be relatively rare that a state agency has put EPA in the position of having to exercise that authority.[9] But, if it does so, EPA may exercise its authority under Sections 113(a)(5) and 167 to remedy the failure.

3. a. Petitioner's argument that EPA has no authority to examine the substance of a State's BACT determination is also inconsistent with the structure and purposes of the Clean Air Act and, in particular, with its PSD provisions. Congress added those provisions in 1977. Under the 1977 amendments, as the Senate Report explained,

> [t]he Administrator's role is one of monitoring State actions. States have authority to issue construction permits to new major emitting facilities in clean air areas. The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the re-

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to review and consider any additional information or analyses * * * to support a determination that SCR is not BACT").

[9] There are only two other reported judicial decisions that involve stop-construction orders because of faulty BACT determinations. See *Allsteel*, *supra* (recital only that there was faulty PSD permit, but record reveals that fault was in part in BACT determination); *Solar Turbines*, *supra*.

> quirements of this section, *including use of best available control technology.*

S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977) (emphasis added).[10] As is evident, legislators expressly contemplated, without qualification, that the BACT requirement would fall within EPA's responsibility to "monitor[] State actions." *Ibid.* The Report even explains *how* EPA should exercise its oversight role: "[t]he Administrator should tell the States the basis for his review. When asked, he should become involved at an early date in particularly difficult permit applications so that the States and localities will know of any potential differences." *Ibid.*[11] See also H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 153 (1977) ("The Administrator *shall issue orders* and seek other action to prevent issuance of an *improper* permit.") (emphasis added).

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[10] Although the passage quoted in the text identifies one measure ("go[ing] to court") that EPA may take under 42 U.S.C. 7477 to prevent construction of a non-conforming facility, Section 7477 more generally authorizes EPA to "take such measures" as are necessary, specifically "including issuance of an order, *or* seeking injunctive relief."

[11] The record here shows that EPA followed this roadmap by communicating its concerns about Cominco's amended application. EPA's prompt actions here also belie predictions by petitioner and its *amici* that affirming the judgment below would necessarily allow EPA enforcement action initiated long after construction is completed. See, *e.g.*, Pet. Br. 35; Nat'l Envtl. Dev. Ass'n, et al. Br. 10; N.D., et al. Br. 15. This case, which involves *pre*-construction orders issued by EPA, furnishes no occasion to consider the circumstances under which EPA might appropriately act *post*-construction. Cf., *e.g.*, *United States* v. *Murphy Oil USA, Inc.*, 155 F. Supp. 2d 1117, 1123 (W.D. Wis. 2001) (rejecting source operator's reliance on state-issued PSD permit because operator failed to submit relevant information to permitting authority). As a matter of policy, EPA takes account of equitable concerns in issuing orders. See J.A. 278. District courts also may consider the equities in fashioning "appropriate relief," 42 U.S.C. 7413(b), and EPA's failure to act in a timely manner would in many cases be an important equitable factor for the court to consider. 42 U.S.C. 7413(b).

The legislative history of the 1990 amendments further confirms that Congress intended to give EPA a limited, but nonetheless substantive and source-specific role under the Clean Air Act. Contra Pet. Br. 33-34. Prior to 1990, EPA's authority under Section 113(a)(5) was limited to actions to remedy a State's noncompliance with a "plan provision" or other specified provisions of the Clean Air Act, and only in nonattainment areas. 42 U.S.C. 7413(a)(5) (1988). Under the 1990 amendments, Congress broadened Section 113(a)(5) to encompass a State's noncompliance with "any requirement" pertaining to new or modified major sources, including those located in clean air areas and therefore subject to PSD permits. H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 391 (1990). Petitioner's restrictive construction would contradict Congress's purposeful expansion of EPA's authority. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").[12]

b. Congress had good reason to give EPA such enforcement authority. First, Congress has always recognized that, because air pollution moves easily across state lines, the Clean Air Act implicates interests that surpass those of any particular State. Indeed, Congress declared in a statutory finding that one of the purposes of preventing significant deterioration of air quality even in clean air areas was "to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan *to prevent significant deterioration of air quality for any other State.*" 42 U.S.C. 7470(4) (emphasis added). The House Report on the 1977 amendments that added the PSD program discussed the extensive evidence that "[a]ir is no respecter of political boundaries" and explained that "while

[12] Also in 1990, Congress enacted an operating-permit program under which EPA has even greater source-specific responsibilities than under the preconstruction programs. See 42 U.S.C. 7661-7661f.

emissions may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded." H.R. Rep. No. 294, 95th Cong., 1st Sess. 135 (1977). Accordingly, "[a] policy of prevention of significant deterioration which controls a new source's emissions to the maximum extent practicable will help minimize the transport and buildup of pollutants from one area to another." *Ibid.* To accomplish that goal, Congress did not give each individual State carte blanche to include whatever emissions limitations it wished in PSD permits, but instead required those limitations to be based on the "*maximum* degree of reduction in each pollutant" that is "*achievable*," 42 U.S.C. 7479(3) (emphasis added). And it gave EPA enforcement authority in Sections 113(a)(5) and 167 to protect the national interests that extend beyond those of any particular State. Compare *Arkansas* v. *Oklahoma*, 503 U.S. 91, 105-107 (1992).

Second, Congress intended that there be a level playing field among the States. The House Report on the 1977 amendments explained that "[t]here exists a strong incentive * * * for industry to 'shop around' for States or localities with large clean air resources and weak pollution control standards." H.R. Rep. No. 294, *supra*, at 133. An important congressional purpose in enacting the PSD program—including its BACT requirement—was to limit the "substantial competitive disadvantage" that could be faced by other States:

> Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of 'economic-environmental blackmail' from new industrial plants that will play one State off against another with threats to locate

> in whichever State adopts the most permissive pollution controls. In other words, without national guidance on prevention of significant deterioration, the very States demonstrating a concern for preserving existing clean air seriously risk having their economic base undermined.

Id. at 134. Congress therefore granted EPA authority to ensure that BACT decisions were justifiable.

C. Petitioner's Remaining Arguments That A BACT Determination Is An Entirely Subjective Or Discretionary Decision That Is Not Subject To Review Are Mistaken

1. Petitioner argues that its selection of BACT cannot be reviewed by EPA because "[d]etermining the 'best' control technology is like asking different people to pick the 'best' car," and "[s]ubstituting one decisionmaker for another may yield a different result, but not in any sense a more 'correct' one." Pet. Br. 24. In petitioner's view, "[b]ecause there is no 'correct' BACT determination for any particular source, the EPA cannot conclude that a State failed to include the 'correct' BACT limitation in a PSD permit." *Id.* at 24-25.

Petitioner's claim that there is no "correct" BACT determination for a particular source may or may not be right, depending on the facts. In this case, for example, it appears that both petitioner and EPA would agree that there are no more than two genuine candidates for BACT—Low NOx and SCR. Depending on the technology involved, there will likely be cases in which there is only one possibility and other cases in which there are several more.

In any event, insofar as petitioner's submission is that a state agency's BACT determination can never be said to be correct or incorrect, petitioner's own argument that its BACT determination is subject to review in state court contradicts that submission. According to petitioner (Br. 35), EPA or any other person could, "if it believed that the State had failed to adequately justify its final permit decision, challenge that decision through the State's [judicial] review

process." Indeed, petitioner argues that "the need [for EPA] to correct 'unreasoned' state determinations * * * is hardly compelling, given the availability of state administrative and judicial review addressed to just that possibility." *Id.* at 36.

Petitioner's insistence that there could be state-court review of a BACT determination is at war with its core contention that the determination of the best available control technology is no more ascertainable than an individual's personal taste for one car over another. If a BACT determination contains the degree of unfettered discretion that petitioner asserts, then state-court review of the determination would also be doomed. Cf. *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"). The prospect of state judicial review that petitioner holds out would be a chimera. In fact, however, a number of federal and state courts have reviewed BACT determinations that were made by EPA as permitting authority and by state agencies, and none has ever suggested that the matter was altogether committed to the permitting authority's discretion by law and therefore unreviewable. Cf. 5 U.S.C. 701(a)(2).[13]

Thus, petitioner is correct when it argues that a BACT determination can be arbitrary or otherwise contrary to law and hence subject to review by another body (state court, federal court, or EPA), and petitioner is incorrect when it

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[13] See *Northern Plains*, 645 F.2d at 1350-1352, 1358-1362 (EPA-issued permit); *Sur Contra La Contaminacion* v. *EPA*, 202 F.3d 443, 448 (1st Cir. 2000) (EPA as permitting authority); *Citizens for Clean Air* v. *EPA*, 959 F.2d 839 (9th Cir. 1992) (EPA as permitting authority, with State agency as delegatee); *Plumbers & Steamfitters, Local 52* v. *Alabama Dep't of Envtl. Mgmt.*, 647 So. 2d 798 (Ala. Civ. App. 1994) (state permitting authority); *In re Pennsauken Solid Waste Mgmt. Auth.*, 569 A.2d 826 (N.J. Super. Ct. App. Div. 1990) (EPA as permitting authority, with state agency having been delegated some authority).

argues to the contrary that the determination of BACT is so subjective, discretionary, or indeterminate that it can never be said to be correct or incorrect. Congress anchored the BACT requirement in terms—"best available," "maximum degree of reduction * * * achievable," "production processes" and "techniques * * * for control," etc.—that impose substantive limitations on a permitting authority. If a state permitting authority applies those terms in an unjustifiable fashion, EPA may invoke Sections 118(a)(5) and 167.

2. Petitioner's claim that a determination of BACT is entirely subjective or discretionary is also based on a faulty understanding of the relationship among the various requirements of the PSD program. To obtain a PSD permit, the owner of a proposed facility must demonstrate that its emissions will not "cause, or contribute to" emissions in excess of an "increment"—a "maximum allowable increase or maximum allowable concentration for any pollutant." 42 U.S.C. 7475(a)(3). That "increment" requirement is independent of the requirement that the facility be "subject to the best available control technology for each pollutant." 42 U.S.C. 7475(a)(4). Accordingly, even if a proposed facility will not cause emissions in excess of the increments—indeed, even if all new facilities in the State will indisputably not cause emissions in excess of the increments—the state agency must still determine what is the "maximum degree of reduction of each pollutant * * * achievable" for each individual facility and limit its emissions accordingly.

The increment provisions of the Act do place an overall limit on the number and types of permits a State can grant in the aggregate. But, contrary to petitioner's argument that a State may determine BACT simply by dividing up the allowable increments among facilities as it sees fit, see Pet. Br. 17, 24, compliance with the overall increment limitations does

not establish that the State has satisfied the separate BACT requirement for each facility.[14]

3. Similarly unsupportive of petitioner's restrictive reading of EPA's oversight authority is Section 165(a)(8) of the Clean Air Act. See Pet. Br. 25. That provision contains another PSD permit requirement, one with limited applicability to "a source which proposes to construct in a class III area"—a classification that no State has ever used. 42 U.S.C. 7475(a)(8). That Congress required EPA affirmatively to "approve[] the determination" of BACT in a permit for that discrete subset of new sources (*i.e.*, sources in Class III areas that pollute in excess of the applicable increment for Class II areas) before the permit becomes effective does not mean it intended to bar EPA oversight of BACT determinations affecting all other clean air areas. Rather, it was logical for Congress to provide EPA with a general oversight role with respect to PSD permits while at the same time to increase the level of oversight, through a requirement of prior approval, in the special circumstances in Section 165(a)(8).

4. Petitioner contends (Br. 27) that precluding any substantive EPA review of a State's BACT determination would carry through the "basic division of responsibilities" between the federal and state governments that this Court

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[14] Petitioner errs in arguing that BACT determinations are categorically different from "objective" decisions about whether a facility will satisfy the increments. Nearly every part of a PSD permit decision involves the exercise of sometimes complex judgment on the part of the permitting authority, such as the determination of whether emissions from the new source would "cause, or contribute" to pollution in excess of the applicable increment. 42 U.S.C. 7475(a)(8); see 42 U.S.C. 7410(j) (owner of facility must show "to the satisfaction of the permitting authority" that facility will satisfy performance standards, including increments). Yet it is uncontested that "EPA has authority under the [Act] to prevent or to correct a violation of the increments." *Alabama Power*, 636 F.2d at 361; Pet. Br. 25.

recognized in *Train*. That case concerned the limits on a State's authority under the Clean Air Act to fashion an implementation plan (SIP) to reach the national ambient air quality standards that EPA had set. The Court explained that "[t]he Act gives the [EPA] no authority to question the wisdom of a State's choices of emission limitations [in a SIP] if they are part of a plan which satisfies the [Act's] standards." 421 U.S. at 79. Petitioner argues that a similar principle should grant States "sole discretion" (Br. 27) to determine BACT for a facility.

Even on its own terms, *Train* does not support petitioner's argument. *Train* recognized that, although States have a primary role in determining how to satisfy national ambient air quality standards, the EPA retains "a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." 421 U.S. at 79. It is just such a secondary, backstop role that EPA has played in this case. Cf. *id.* at 93-94 n.28 (noting that Congress "charged [EPA] with the administration of the Act[] and made [it] ultimately responsible for the attainment and maintenance of the national standards"). That scheme is in keeping with the plan of "cooperative federalism," *New York* v. *United States*, 505 U.S. 144, 167-168 (1992), that Congress put in place in the Clean Air Act. Indeed, it is petitioner's view, which would deprive EPA of *any* significant role in the BACT process, that violates the principles of cooperative federalism embodied in the Act.

In any event, *Train* addressed the provisions of the Act concerning state plans for implementing national ambient air quality standards set by EPA and EPA's ability to review such plans. See 42 U.S.C. 7410(a)(2). In that context, Congress gave the States substantial discretion to develop their own mix of emission limitations to meet the EPA-specified national standards in light of the States' own "particular

situation[s]," 421 U.S. at 79, while at the same time granting EPA authority to reject a state plan if the State has acted outside the range of discretion accorded it by proposing a plan that does not meet the national standards. This case concerns entirely different, source-specific requirements of the Act that were added in 1977, after *Train*, and bear no similarity in wording, structure, or context to the provisions at issue in *Train*. Nonetheless, the principles of cooperative federalism play out here as well. In the PSD program, Congress granted the States substantial latitude to exercise the judgment necessary to determine BACT under the governing standards in the Act, while also vesting EPA with authority in Section 113(a)(5) and Section 167 (which was especially directed toward the PSD program) to enforce the BACT requirement in the unusual case in which a State acts outside the range of permissible judgments.

5. Finally, petitioner argues (Br. 36) that EPA's exercise of authority in this case would "improperly shift[] the burden of persuasion from the EPA to the States," because federal-court review of whether EPA's action is supportable will replace state-court review of whether petitioner's decision was supportable. Petitioner's quarrel, however, is not with EPA's authority in this case, but with Congress's decision to enact Sections 113(a)(5) and 167, and thereby to vest EPA with oversight authority in cases in which a State has failed to comply with the Act's requirements. It naturally follows from those provisions that there will be at least some cases in which a state permitting authority's failure to comply with the requirements of the Act will be potentially subject to several alternative avenues of review: (a) review in state court, (b) exercise by EPA of its authority under Sections 113(a)(5) and 167 to issue a stop-construction order, followed by federal court review of EPA's action, or (c) an EPA suit for injunctive relief directly in federal court under those same provisions. Congress's enactment of Sections 113(a)(5)

and 167 demonstrates that it specifically intended the latter two forms of review, and petitioner's complaints about those features of the Act should be addressed to Congress.

Petitioner itself acknowledges that such parallel avenues of review properly may take place under Sections 113(a)(5) and 167. Petitioner notes that there are "many [Clean Air Act] requirements, including in the PSD provisions, that the EPA may enforce pursuant to Sections 113(a)(5) or 167." Pet. Br. 23. It is common ground that EPA may act, for example, if "the State issued a permit allowing emissions to exceed available increments," see Pet. Br. 25, even though decisions about whether a facility will exceed the increments may involve complex and controversial judgment calls. Petitioner thus acknowledges that in such a case, the state permitting agency's permit would be reviewable, as here, in alternative ways: either by judicial review in state court, or by EPA's exercise of its independent enforcement responsibility. If such a scheme is workable in the case of a state permit that allows emissions in excess of the allowable increments, it is equally workable here. Nor is it difficult for a federal court, reviewing an EPA order, to take into account that the state permitting authority retains discretion and that EPA's action may be sustained only if its determination that the state agency acted outside its zone of reasonable discretion is supported. See Pet. App. 10a; cf. *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 78 (1991) (courts must recognize "wide range of reasonableness" within which unions act in evaluating certain duty of fair representation claims).

D. The Court Should Defer To EPA's Interpretation That It Is A "Requirement" Of The Clean Air Act That States Make Reasonable BACT Determinations

If there is any doubt about the meaning of the Clean Air Act in this case, EPA's construction of the Act to require permitting authorities to make reasonable BACT determina-

tions is entitled to deference under *Chevron U.S.A, Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. This Court has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of * * * adjudication that produces regulations or rulings for which deference is claimed." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Just such a delegation is at issue here. EPA acted in this case pursuant to the express conferral of authority in Sections 113(a)(5) and 167 to make findings and issue orders when a State fails to "act[] in compliance with any requirement" of the Act, 42 U.S.C. 7413(a)(5), or a facility fails to "conform to the requirements of" the PSD program, 42 U.S.C. 7477. Indeed, Congress provided that States must transmit copies of PSD permit applications to EPA "and provide notice to [EPA] of every action related to the consideration of such permit," 42 U.S.C. 7475(d)(1), in part so that EPA may effectively exercise its authority under Sections 113(a)(5) and 167. Congress necessarily intended that EPA would have to construe and apply the Clean Air Act in taking action under those express delegations, and EPA's construction of the Clean Air Act underlying the orders is therefore entitled to *Chevron* deference.

Moreover, as explained above, see pp. 16-17, *supra*, EPA's orders in this case have "the force of law," a factor that this Court has found to support *Chevron* deference for agency interpretations. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); see *Mead*, 533 U.S. at 230. Those orders are not analogous to "interpretations contained in policy statements, agency manuals, and enforcement guidelines" that "are beyond the *Chevron* pale." *Mead*, 533 U.S. at 234.

2. EPA's construction of the Clean Air Act to require permitting authorities not merely to make *some* BACT determination, but also to make *reasonable* BACT determinations, was embodied in the orders in this case. In those or-

ders, EPA invoked Sections 113(a)(5) and 167 as the sources of its authority,[15] and the orders were based on the premise that a State's BACT determination must be reasonable and supported by the record. See J.A. 150 ("[Petitioner's] record simply does not support its decision that BACT for * * * MG-17 is low NOx controls rather than SCR."). Additionally, the administrative record here is replete with EPA's interpretation of the scope of Sections 113(a)(5) and 167 as granting EPA authority to enforce the statutory BACT requirement when state permitting authorities make arbitrary or unreasoned BACT determinations. J.A. 137, 148-149, 261-262, 292-293, 295-296, 302. Accordingly, EPA's construction of the Act in these orders to require that BACT determinations be reasonable is entitled to *Chevron* deference.

3. Other factors that this Court has discussed in deciding whether an agency's interpretation of a statute is entitled to *Chevron* deference are also present here. EPA's position is "longstanding" and reflects a "careful consideration * * * over a long period of time," *Barnhart* v. *Walton*, 122 S. Ct. 1265, 1270, 1272 (2002), and it has remained "consistent[]," *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993). EPA guidance documents dating from as long ago as 1983 reflect the same basic interpretation as the Agency employed here. See p. 29, *supra*. Moreover, EPA has presented that same interpretation in notice-and-comment rulemaking proceedings approving various States' PSD programs. See 57 Fed. Reg. 28,095 (1992); 58 Fed. Reg. 10,961 (1993); 63 Fed. Reg. 13,796 (1998). For example, in responding to comments that Virginia should not receive EPA's approval to run a PSD program, EPA assured the public that "it has a responsibility to insure that all States properly implement their preconstruction permitting pro-

[15] Pet. App. 26a, 29a-30a, 35a-36a (¶¶ 1-2, 19-20, 46-47); *id.* at 38a, 41a-42a, 47a, 49a (¶¶ 1-2, 18-19, 42, 48-50); *id.* at 51a, 54a-55a, 60a, 62a (¶¶ 1-2, 18-19, 42, 48, 51-52).

grams." *Id.* at 13,796. At the same time, however, EPA reiterated the need to accord appropriate deference to the States: "EPA may not intrude upon the significant discretion granted to states * * * and will not 'second guess' state decisions." *Id.* at 13,797. As EPA noted, it "will review the process followed by the permitting authority in determining [BACT] * * * to ensure * * * any determination * * * was made on reasonable grounds properly supported on the record." *Ibid.*

4. Finally, the Agency's interpretation addresses an issue within its expertise and one with "importance * * * to administration of the statute." *Barnhart*, 122 S. Ct. at 1272. The question whether a State's determinations of the best available control technology for new facilities are subject to EPA oversight is not only of great importance to residents of the State itself. It also is of substantial importance to residents of neighboring States that may suffer from increased air pollution, and still other States that must compete for new facilities with a State that has adopted an arbitrarily lenient standard for BACT. If there is any doubt whether the Clean Air Act requires that a State make its BACT determination reasonably, EPA's construction of the Act to encompass that requirement should be conclusive.[16]

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[16] This Court has made clear that development of an agency's views in a formal rulemaking proceeding is not necessary for *Chevron* deference. See, *e.g.*, *Edelman* v. *Lynchburg Coll.*, 122 S. Ct. 1145, 1150 (2002); *Mead*, 533 U.S. at 281. Nor, in the absence of rulemaking, is a formal adjudication a prerequisite to *Chevron* deference. See *id.* at 231-232 & n.13 (discussing *Nations Bank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995). Formal adjudication under 5 U.S.C. 554 and 556 is designed to guarantee certain procedures for the determination of *facts* in particular types of cases; it does not have a direct bearing on how an agency interprets applicable *law*. See also *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) (according deference to interpretation reflected in administrative complaint). Under the Clean Air Act, Congress has contemplated that EPA will render decisions on numerous issues without a

III. THE COURT OF APPEALS CORRECTLY SUSTAINED EPA'S CONCLUSION THAT PETITIONER MADE AN UNREASONABLE BACT DETERMINATION

A. Petitioner argues (Br. 39-48) that even if EPA has statutory authority to issue a stop-construction order based on a state permit's failure to comply with BACT, it erred in doing so in this case. That issue falls outside the question of statutory construction presented in the certiorari petition (Pet. i):

> Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

The petition fairly poses the question whether EPA has statutory authority under Sections 113(a)(5) and 167 to review the substance of state BACT determinations and to act accordingly. The petition does not, however, present any question concerning whether, if EPA does have such authority, it was properly exercised in this case. Although the petition later, in a single sentence in the "Statement," mentions that the court of appeals "went on to hold that the EPA's issuance of the orders [in this case] was not arbitrary or capricious," Pet. 12, it contains no further mention of that point. Moreover, it could not fairly be said that EPA's analysis of the particular factual record in this case is "in

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formal adjudication. See *PPG Indus.*, 446 U.S. at 587-589. But even if EPA's interpretation were ineligible for *Chevron*-level deference, it has the "power to persuade" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), because of the Agency's "thoroughness," "validity of * * * reasoning," and "consistency."

conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs." Pet. i. Accordingly, the question whether EPA's orders in this particular case were adequately supported by the record is not fairly included in the question presented and should not be addressed by this Court. *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998).

B. In any event, EPA properly found that petitioner had not reasonably justified its determination that Low NOx was the best available control technology for MG-17. See Pet. App. 13a-16a.

1. The record is uncontradicted that SCR "is the most stringent control technology available for large diesel-fired generators," J.A. 80, and requiring it would result in "the maximum degree of reduction of" nitrogen oxide. 42 U.S.C. 7479(3). With SCR, MG-17 would emit only 53 tons of NOx per year. J.A. 198. It would emit 10 times that level—531 tons per year—under a permit that allowed Low NOx. *Ibid.*

Petitioner asserts that, "because Cominco had agreed to install Low NOx on *all* its generators," petitioner's "permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR * * * were installed on only the MG-17 generator." Pet. Br. 13; see also *id.* at 4, 42 n.12; Cominco Br. 4; North Dakota, et al. Amicus Br. 14. That contention is mistaken, and it is inconsistent with the conclusions that petitioner itself reached in issuing the permit.

First, petitioner concluded in its Final Technical Report that, "[o]*f* the Wartsila generators at the Red Dog Mine, only unit MG-17 requires BACT," J.A. 232, and whatever low emission parts Cominco may install on "existing, unmodified engines * * * *is not a consideration of the BACT review.*" J.A. 199 (emphasis added); see also J.A. 111-112 (same). That conclusion was correct. The plain terms of the Clean Air Act require that a State determine and apply the best

available control technology for *each* "major emitting facility" that is "constructed," 42 U.S.C. 7475(a)(1). Neither a facility owner nor a State may avoid the BACT requirement for a new facility by arguing that some other control technology will be used on some other facility.

Second, the permit issued by petitioner plainly allows much *greater* emissions of nitrogen oxide than a permit requiring the use of SCR on the MG-17 generator. The permit "retain[ed]" the limit on nitrogen oxide emissions from the pre-existing generators that had already been imposed in the operating permits for those generators. J.A. 239. Indeed, those pre-existing limits had to be retained, without regard to any BACT determination for any generator, old or new, so that the facility would not exceed the applicable increments—a requirement that petitioner concedes to be binding on the States and enforceable by EPA. J.A. 237. Therefore, Cominco must ensure that the existing generators remain within the pre-existing limits, regardless of what pollution control device—Low NOx or SCR—is required on MG-17. Cominco may of course choose to install Low NOx on the existing generators in order to increase electricity production without exceeding the pre-existing limits on emissions of nitrogen oxide. Nothing in the permit, however, *requires* Cominco to do so, much less to reduce their overall emissions to offset added emissions from MG-17. As a result, petitioner's determination that Cominco may use Low NOx rather than SCR on MG-17 plainly allows substantially greater emissions from the Red Dog Mine.

2. There is no suggestion in the record that petitioner should have rejected SCR on account of "energy" or "environmental * * * impacts." 42 U.S.C. 7479(3). See, *e.g.*, J.A. 200-203 (rejecting Cominco's arguments concerning such impacts); see also Pet. Br. 40 ("ADEC discounted Cominco's claim that energy or environmental impacts warranted eliminating SCR."). In fact, petitioner specifically rejected

Cominco's efforts to "reduce the stringency of BACT" by reliance on the mine's compliance with other air quality standards, J.A. 200, and even found that "it is likely that the NOx emission reductions resulting from [SCR] will improve workplace conditions." J.A. 201.

3. Nor does the record on which petitioner's decision was based reveal any reasoned basis to conclude that a limitation based on SCR was not "achievable for such facility" due to "economic impacts and other costs." 42 U.S.C. 7479(3). Petitioner and its engineer initially concluded that SCR was "economically feasible" for MG-17. J.A. 65. Further evincing SCR's economic feasibility is the world-wide pervasiveness of that technology. See, *e.g.*, J.A. 102 ("SCR has been installed on similar diesel-fired engines throughout the world."); J.A. 234 ("The Department has permitted projects [in Alaska] requiring SCR."); J.A. 289-291.[17]

Petitioner asserts that its BACT determination was correct because the cost of SCR—approximately $2,100 per ton of NOx removed, see J.A. 204—was higher than the cost of controls in recent BACT determinations it had made of $0 to $936 per ton of NOx removed. Pet. Br. 40. See J.A. 205-206. Not even Cominco, however, had placed reliance on those "installations," see R. 44- 011, 45-034, 45-043, and petitioner itself commented that "[t]he cited examples of engines permitted in Alaska without requiring SCR are not valid exam-

[17] Because SCR is so pervasive, including in cold climates, petitioner's selected excerpts (see Br. 44-45) from EPA's *New Source Review Workshop Manual* do not help its cause. A fair reading of the cited portion of the guidance is that the more a "control alternative" is "effectively employed in the same source category," the harder it is generally to eliminate that level of control on the basis of an "economic impact." R. 71-115. That reading is confirmed by petitioner's own acknowledgment that Cominco bore the burden of showing "compelling and atypical energy, environmental, or economic * * * circumstances specific to a facility [that] constrain it from using [] the most effective technology"—a burden that Cominco failed to discharge. J.A. 178.

ples as they either took place over 18 months ago or were not used for similar purposes." J.A. 233-234; see also R. 21-018 ("[N]one of the decisions cited by Cominco are similar to the case at hand.").

Moreover, even if the "recent BACT decisions" cited by petitioner had any instructive value,[18] the record does not support petitioner's dismissal of higher-cost examples within the State. J.A. 115, 205. As petitioner itself noted with respect to a prior permit decision, "the Yukon Pacific Corporation permit included a gas/diesel-fired boiler and heaters with costs at $2,900 and $7,000, respectively, per ton of NOx removed," and the estimated cost of SCR for Cominco falls well below either figure. R. 21-019.[19]

Ultimately, petitioner rested its BACT analysis on an analogy to rural electric utilities in Alaska. Petitioner stated that "[i]f [Cominco] did not have a powerhouse, it would probably buy power from a rural Alaska utility." J.A. 206. Petitioner reasoned that, because what it termed a "cursory review" revealed that the average cost of electricity for such rural utilities is 15 cents per kilowatt hour and the use of SCR would increase that by 3 cents, SCR "would be equivalent to a 20% increase in the electric rate of the facility." J.A. 206. Petitioner concluded that "this is a disproportionate cost increase *when viewed as an electric utility*." J.A. 206 (emphasis added). Cominco, however, is not a rural util-

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[18] Because the record does not reveal the dates of those BACT decisions, it is not clear whether they have any precedential relevance. See R. 22-031 to 22-033. As petitioner itself noted, "18 months is the timeframe over which BACT decisions are rendered stale under both state and federal PSD regulations." R. 21-014. Relying on other BACT decisions standing alone is also problematic because, as both EPA and petitioner pointed out, cost-effectiveness is not always calculated or published. See J.A. 127, 205.

[19] While this analysis is from an internal memorandum, petitioner incorporated that analysis by reference into its final response to comments. See J.A. 236 n.31.

ity and it does not compete with rural utilities. Moreover, the economic impact of a requirement that a rural Alaska utility use SCR on a new generator could be far different than the economic impact of a requirement that Cominco do so on the new generator at its mine. Indeed, no facts exist to suggest that the "economic impact[]" of the incrementally higher cost of SCR on the world's largest producer of zinc concentrates would be anything like its impact on a rural, non-profit utility that must pass costs on to a small base of individual consumers.' 42 U.S.C. 7479(3); J.A. 116, 207.

4. The best demonstration that petitioner unreasonably selected Low NOx over SCR for MG-17 is found in its own final BACT determination:

> The Red Dog Mine plays a unique and continuing impact on the economic diversity of this region. Therefore, the Department has chosen to consider the direct cost of SCR technology and its relationship to retaining the Mine's world competitiveness as it relates to community socioeconomic impacts for the foremost consideration to judge economic impacts of SCR. To support Cominco's Red Dog Mine Production Rate Increase Project, and its contributions to the region, the Department has rejected Selective Catalytic Reduction controls based on excessive economic cost * * *.

J.A. 208. Assuming that "retaining the Mine's world competitiveness as it relates to community socioeconomic impacts" could properly be the "foremost consideration" in petitioner's BACT determination, the record provides no support whatever for the proposition that requiring the use of SCR would either affect the "Mine's world competitiveness" or have significant "community socioeconomic impacts." Petitioner acknowledged that, although the "better way to determine if the cost of BACT is excessive" would be "for the applicant to present detailed financial information showing its effect on the operation," Cominco "did not present this

information." J.A. 207. Petitioner therefore acknowledged that "no judgment can be made as to the impact of [the costs of SCR] on the operation, profitability, and competitiveness of the Red Dog Mine." J.A. 207.[20] If it was impossible to make a judgment about the effect of requiring SCR on the "operation, profitability, and competitiveness" of the mine, it was also impossible to make a resulting judgment about its effect on the mine's "world competitiveness" or local "socio-economic impact[]." J.A. 207. Petitioner could not possibly have articulated a "rational connection between the facts found and the choice made" because Cominco did not provide the requisite "facts" to depart from the "maximum degree of [NOx] reduction." 42 U.S.C. 7479(3); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

As the court of appeals appropriately observed, petitioner's BACT decision underscores one of the reasons why Congress intended EPA to have oversight authority—"to protect states from industry pressure to issue ill-advised permits." Pet. App. 16a. Based on this "available information" from the record, 42 U.S.C. 7413(a)(5), EPA acted reasonably in issuing the finding of noncompliance to petitioner and the administrative orders to Cominco to prevent the construction of a major new source of air pollution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] Petitioner cannot now suggest that it considered Cominco's bare assertion of an impact to be sufficient (Pet. Br. 41); it contemporaneously stressed an inability "to verify [the] claim." R. 22-002. Additionally, while the Red Dog Mine is an important employer in the region (Pet. Br. 9, 10, 46), there is no record evidence that requiring SCR would compromise even a single job.

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APPENDIX

1. Section 101 of the Clean Air Act, 42 U.S.C. 7401, provides in relevant part:

§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

* * * * *

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

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

(b) Declaration

The purposes of this subchapter are—

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

* * * * *

(c) Pollution prevention

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

2. Section 107 of the Clean Air Act, 42 U.S.C. 7407, provides in relevant part:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in each State.

* * * * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, * * * the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national

primary or secondary ambient air quality standards for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

* * * * *

(B) Promulgation by EPA of designations

(i) * * * [T]he Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable * * * *

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). * * * *

3. Section 110 of the Clean Air Act, 42 U.S.C. 7410, provides in relevant part:

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

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

(1) Each State shall * * * adopt and submit to the Administrator * * * a plan which provides for imple-

mentation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator * * * a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. * * * *

(2) * * * * Each such plan shall —

(A) include enforceable emission limitations and other control measures, means, or techniques * * * as may be necessary or appropriate to meet the applicable requirements of this chapter; * * *

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

* * * * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

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

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum

criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

* * * * *

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

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

4. Section 113 of the Clean Air Act, 42 U.S.C. 7413, provides in relevant part:

§ 7413. Federal Enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which

the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may * * *

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

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

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

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. * * * * During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

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

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

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

(3) EPA enforcement of other requirements

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

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

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

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

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

(4) Requirements for orders

An order issued under this subsection * * * shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable

specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. * * * * No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

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

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

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

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

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

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected

source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty or not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. * * * *

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter * * * including, but not limited to, a requirement or prohibition of any rule, order, waiver, or permit promulgated, issued, or approved under this chapter * * * *

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

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, * * * and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. * * * *

* * * * *

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. * * * *

5. Section 116 of the Clean Air Act, 42 U.S.C. 7416, provides:

§ 7416. Retention of State authority.

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

6. Section 160 of the Clean Air Act, 42 U.S.C. 7470, provides:

§ 7470. Congressional declaration of purpose

The purposes of this part [Part C—Prevention of Significant Deterioration of Air Quality] are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [sic] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air[], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic , or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

7. Section 161 of the Clean Air Act, 42 U.S.C. 7471, provides:

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

8. Section 162 of the Clean Air Act, 42 U.S.C. 7472, provides in relevant part:

§ 7472. Initial classifications

* * * * *

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

9. Section 165 of the Clean Air Act, 42 U.S.C. 7475(a), provides in relevant part:

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility * * * may be constructed in any area to which this part applies unless-

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission

limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subjection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrative has approved the determination of best available control technology as set forth in the permit.

* * * * *

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the

Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I areas which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particular matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the face that the change in air quality resulting from emissions from such facility will not cause or

contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

10. Section 167 of the Clean Air Act, 42 U.S.C. 7477, provides:

§ 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.

11. Section 169 of the Clean Air Act, 42 U.S.C. 7479, provides in relevant part:

§ 7479. Definitions

For purposes of this part —

* * * * *

(3) the term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Amendments of 1990.

12. Section 7607(b) of the Clean Air Act, 42 U.S.C. 7607(b), provides in pertinent part:

(b) Judicial review

(1) * * * A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the

Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. * * *

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. * * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SIERRA CLUB, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Sierra Club, Inc. hereby petitions the court for review of the following actions of the United States Environmental Protection Agency:

1) An October 10, 2003 construction permit issued by the Illinois Environmental Protection Agency under a delegation agreement with the U.S. Environmental Protection Agency regarding a proposal by Indeck-Elwood LLC to construct a 660-megawatt coal-burning power plant and associated emission control units in the city of Elwood, Illinois, permit number 197035AAJ, including a determination of case-by-case maximum achievable control technology pursuant to Clean Air Act section 122(g), 42 U.S.C. section 7412(g).

2) An October 10, 2003 letter from Cheryl Newton, Acting Director, Air and Radiation Division, U.S. Environmental Protection Agency, Region V, to John D. Rogner, Field Supervisor, U.S. Fish and Wildlife Service, Chicago Ecological Services Field Office, deciding that "EPA consultation with FWS on the [Indeck] construction permit to be issued by IEPA

Ex 5

[Illinois Environmental Protection Agency] was not appropriate because EPA lacks discretionary authority."

Dated: December 9, 2003

Respectfully submitted,

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This will certify that the undersigned caused a copy of the attached **Petition for Review** to be served via Certified Mail, Return Receipt Requested on:

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This 9th day of December 2003,

Kathleen Krust