BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR
THE AVENAL ENERGY PROJECT

DOCKET NO. 08-AFC-1

DOCKET
08-AFC-1
DATE
RECD. June 23 2009

Rob Simpson
PREHEARING CONFERENCE STATEMENT

Each statement shall specify:

1. The topic areas that are complete and ready to proceed to evidentiary hearing;
   None

2. The topic areas that are not complete and not yet ready to proceed to evidentiary hearing, and the reasons therefor;
   All ares are incomplete as the documents are not properly vetted in public scrutiny.

3. The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic; All areas are disputed because inadequate opportunity to review applicants 1500 page testimony that was delivered to me 2 days ago. My understanding from the other interveners is that they had not received the testimony at all and it has not been posted on the CEC document page.

4. The identity of each witness sponsored by each party, the topic area(s) which each witness will present; a brief summary of the testimony to be offered by each witness; qualifications of each witness; and the time required to present a summary of direct testimony by each witness;

Sanjay Narayan, Senior Attorney Sierra Club
Sanjay Narayan joined the Sierra Club as a staff attorney in 2002. Before coming to the Sierra Club, Sanjay worked for the Northern Rockies office of Earthjustice in Bozeman, Montana, and for Farella Braun Martel LLP in San Francisco. Sanjay received an A.B. in Public and International Affairs from Princeton University in 1991, along with a certificate in Soviet Studies. The Soviet Union disintegrated shortly thereafter. Sanjay swears that it wasn't his fault. He received a J.D. from Yale Law School in 1995, and clerked for the honorable Robert Eastaugh on the Alaska Supreme Court.

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I would expect their testimony to be consistent with their associated comments that I provided and the attached.

I will also seek to call all witnesses that are identified in attachments to my previous testimony whose comments would otherwise be excluded by the applicants motion to strike

5. Topic areas upon which a party desires to cross-examine witnesses, a summary of the scope of such cross-examination, and the time desired for such cross-examination;
   I wish to preserve all rights pending review of the applicants testimony.

6. A list identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply (**see** following *section* on format); All previous testimony and comment with declarations by any document originator.

7. Proposals for briefing deadlines, vacation schedules, and other scheduling matters; I will be unavailable the first 2 weeks of August. Briefing deadlines should extend at least 60 days.

8. For all topics, the parties shall review the proposed Conditions of Certification listed in the Final Staff Assessment (FSA) for enforceability, comprehension, and consistency with the evidence, and submit any proposed modifications. My comments were not considered in the FSA.

While it is clear that my intervention petition extended to testimony, Should the Commission accept the motion to strike my Intervention as testimony I would like to reintroduce it as part of my pre hearing conference Statement now. The Applicant had more of an opportunity to review and respond to my testimony than any intervener has had to review applicants testimony.

3 Attachments
PETITION FOR RECONSIDERATION
Federal Register / Vol. 74, No. 103 / Monday, June 1, 2009 / Rules and Regulations
EPA

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BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Final Rule Published at 73 Fed. Reg. 28321 (May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)," Docket No. EPA-HQ-OAR-2003-0062, RIN 2060-AN86

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act ("Act"), Natural Resources Defense Council, and Sierra Club ("Petitioners") petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule referenced above as well as the January 14, 2009 letter from Stephen L. Johnson ("Johnson Letter") denying Petitioners' July 15, 2008 petition for reconsideration.[1] The last-minute denial signed by Administrator Johnson relied on absurd arguments to defend the legally defective final rule and in some cases even worsens those defects. Because the grounds for the objections raised in this petition for reconsideration, as well as the original, arose after the close of the public comment period for the challenged rule, and these objections are of central relevance to the outcome of the rule, the Administrator must "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." Clean Air Act § 307(d)(7)(B). Reconsideration is further warranted because the Johnson Letter was issued without any public notice and comment opportunity. As further discussed below, some of the rationales offered in the Johnson Letter were not previously provided by EPA. Reconsideration is therefore warranted to provide Petitioners the opportunity to comment on rationales that arose after the close of comment on the original rule proposal.

OBJECTIONS

In their original petition for reconsideration, Petitioners identified four exemptions or so-called "flexibilities" introduced for the first time in the final rule. These provisions were never offered for public comment and were not logical outgrowths of the proposed rule. In each case, EPA violated the requirements of Clean Air Act section 307(d)(3)(C), which requires EPA to present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." The Johnson Letter made no attempt to deny or excuse several of these failures, and for the others offered groundless arguments based on a revisionist interpretation of the original proposal. In the end, the Johnson Letter offered the excuse that EPA preferred not to expend resources on complying with the procedural requirements of the law. But compliance with the law's notice and comment requirements is plainly not optional, regardless of the resources required, as Administrator Johnson surely knew. For each of the elements described below, Petitioners ask that the Administrator reject this flouting of

[1] For your convenience, this original petition for reconsideration is enclosed at Attachment A.

the law and stay the challenged elements of the final rule pending completion of a proper public review process.

The hasty, last-minute denial by Administrator Johnson failed to address many of the substantive issues raised in Petitioners' original petition for reconsideration. Petitioners hereby resubmit the original petition and incorporate it herein by reference. Below, Petitioners focus on the absurd arguments made in the Johnson Letter defending the addition of the challenged provisions and attempting to dismiss the significance of EPA's illegal actions.

A. EPA's decision to extend the deadline to 2011 for States to revise the prevention of significant deterioration ("PSD") programs in their state implementation plans ("SIPs") is illegal.

1. EPA offered no opportunity for public comment on the new deadline or the underlying legal rationale.

In the notice of proposed rulemaking, EPA proposed that "States with SIP-approved PSD programs [must] submit revised PSD programs for $PM_{2.5}$ at the same time that they must submit nonattainment NSR programs for $PM_{2.5}$ (April 5, 2008)." 70 Fed. Reg. 65894, 66043 (Nov. 1, 2005). EPA decided to split out the portions of the proposed rule relating to new source review and finalized those portions on May 16, 2008. Notwithstanding the fact that the final rule was published after the April 5, 2008 SIP submittal deadline, EPA did not revise the deadline for submitting the nonattainment NSR programs for $PM_{2.5}$. Yet in the final rule, EPA announced for the first time that instead of requiring PSD SIP submittals at the same time as nonattainment NSR SIP submittals, PSD submittals could be delayed until May 16, 2011. 73 Fed. Reg. 28321, 28341 (May 16, 2008). EPA's rationale, offered for the first time in the final rule, was that no statutory deadline applies to the SIP revisions required under this rule, so the regulatory deadlines adopted as part of EPA's NSR Reform relaxation rulemaking should govern. *See* 73 Fed. Reg. at 28340-41. This legal analysis is nowhere to be found in the proposed rule and is fundamentally flawed.

As explained more fully in Petitioners' original petition for reconsideration, the statute *does* specify a deadline for revising SIPs following the adoption or revision of a national ambient air quality standard ("NAAQS"). Section 110(a)(1) provides that SIPs are due within 3 years after the promulgation of a new or revised primary NAAQS. Section 110(a)(2)(C) states that each SIP shall include a permit program as required in Part C of the Act (*i.e.*, the PSD permit program). There is no ambiguity in this language or in how these deadlines apply to the current rulemaking.

As EPA explained in the notice of proposed rulemaking, the regulations being challenged here govern how States must revise their SIPs to implement the revised particulate matter NAAQS. *See* 70 Fed. Reg. at 65894. EPA has already acknowledged that the deadline in 110(a)(1) applies to SIP submittals required to implement a new or revised NAAQS, even where EPA issues new regulations specifying what that

implementation requires. *See* 52 Fed. Reg. 24672 (July 1, 1987). In that 1987 rulemaking, just as here, EPA revised the PSD and NSR rules to implement changes made to the particulate matter NAAQS. In that rulemaking EPA found that the deadline for revised PSD SIPs was governed by section 110(a)(1) and required SIP revisions within 9 months after the revision of the NAAQS. *Id.* at 24683. EPA cannot change its interpretation of the Act by announcing in a final rule with no opportunity for comment, its new legal conclusion that the statute does not provide a deadline applicable to this action.

Administrator Johnson's January 14, 2009 letter tries to claim that the public had notice of EPA's new legal interpretation and the possibility that EPA would significantly delay revision of SIP-approved PSD programs because this three-year extension is provided in the pre-existing PSD rules. The Johnson Letter further argues (for the first time) that the reason the deadline in section 110(a)(1) does not apply is because it only governs the "infrastructure" SIPs that EPA previously required. These groundless excuses are completely disingenuous.

The notice of proposed rulemaking *explicitly* stated that States would be required to submit SIP revisions to implement revised PSD programs for $PM_{2.5}$ "*at the same time that they must submit nonattainment NSR programs for* $PM_{2.5}$ (**April 5, 2008**)." 70 Fed. Reg. at 66043 (emphasis added). The proposal was absolutely unambiguous on this score, and offered no indication whatsoever that some other deadline was being considered, or that the "pre-existing" PSD rules even applied to this rulemaking. There was no mention at all of this pre-existing regulatory deadline provision, let alone any connection between this provision and the April 2008 deadline that EPA had proposed. To the contrary, it is clear that EPA, at the time, did not believe this regulatory deadline provision was relevant to a rulemaking governing the implementation of a revised NAAQS. EPA proposed to allow States less than two and a half years to revise their SIP-approved PSD programs (not the three allowed under the regulatory provision), and tied the deadline not to the date of promulgation of the final rule as the regulatory deadline provision does, but to the SIP submittal deadlines provided in the statute. Had EPA mentioned the possibility that the regulatory deadline provision, and not the statute, would apply, commenters would have been able to show why that regulatory deadline provision is inconsistent with the governing statutory deadlines.

The Johnson Letter attempted to add new arguments for ignoring the statutory deadline in section 110(a)(1) based on what EPA guidance calls the "infrastructure SIPs." This new line of argument only highlights the illegality of EPA's final decision. The Johnson Letter claims that the requirements of section 110(a)(1) with respect to the 1997 $PM_{2.5}$ NAAQS were met with the submittal of these infrastructure SIPs, and that a PSD program implementing the $PM_{2.5}$ NAAQS was not part of this required submittal. This argument is completely new – it appeared nowhere in the proposed or final rule. Moreover, it has absolutely no basis in the statute. Section 110(a)(1) says that, "[e]ach State shall . . . adopt and submit [a SIP] to the Administrator[] within 3 years . . . after the promulgation of a [NAAQS] . . . ." Section 110(a)(2)(C) further states that each such SIP shall include "regulation of the modification and construction of any stationary source . . .

to assure that national ambient air quality standards are achieved, including a permit program as required in part[] C . . . ." *See also* CAA § 110(a)(2)(J) (requiring each plan to meet the applicable requirements of part C). There is no ambiguity in the statute regarding the deadline for these revisions to the SIPs.

EPA's infrastructure SIP guidance says nothing that purports to change these deadlines. The guidance says "EPA believes that the currently-approved section 110 SIPs may be adequate because many of the required section 110(a) SIP elements are general information and authorities that constitute the 'infrastructure' of the air quality management plan . . . ." Memorandum from Sally L Shaver, Dir., Air Quality Strategies and Standards Div., OAQPS, to Regional Air Div. Dir., "Re-issue of the Early Planning Guidance for the Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)," at 5 (June 12, 1998). It goes on to note that:

> States, however, should review and revise, as appropriate, the ozone and PM SIPs to ensure they are adequate. In particular, given that EPA has issued new PM standards for fine particles ($PM_{2.5}$), it is conceivable that some States may need to adopt language specific to the $PM_{2.5}$ NAAQS formally to ensure it has adequate authority to implement the $PM_{2.5}$ NAAQS under section 110(a). . . . If a State's section 110 SIP is not adequate for purposes of the revised ozone or PM standards, as required in the Act, the States must revise the SIP and submit it to EPA within 3 years of the NAAQS promulgation (by July 2000).

Id. at 6. In Attachment A to the guidance, EPA lists the "Required Section 110 SIP Elements," which includes the PSD program requirement of section 110(a)(2)(J). EPA's guidance makes it clear that the SIP revisions due under section 110(a)(1) included revisions to the PSD programs necessary to ensure implementation of the new $PM_{2.5}$ NAAQS. Thus, even if it could override the statute (which it cannot), this guidance in fact reaffirms the plain statutory reading that precludes EPA's attempt to illegally delay the SIP submittal deadline until 2011. The Johnson Letter's creation of this new "infrastructure SIP" argument highlights the fact that the public has never had an opportunity to point out the inconsistencies between EPA's claims and its own guidance interpreting these provisions.

2. EPA's decision to waive compliance with $PM_{2.5}$ standards in States with SIP-approved PSD programs is illegal.

The most egregious part of EPA's decision to delay the deadline for revising SIP-approved PSD programs is that in the interim States may rely on EPA's 1997 PM_{10} surrogate policy, which allows permits to ignore the $PM_{2.5}$ NAAQS and instead look only at whether a source will cause or contribute to a violation of the 24-hour PM_{10} NAAQS. *See* 73 Fed. Reg. at 28341 (allowing States to continue to implement the PM_{10} program pursuant to the document entitled "Interim Implementation of the New Source Review Requirement for $PM_{2.5}$" (John S. Seitz, EPA, October 23, 1997)). The denial letter

defends this decision with the incredible claim that "the surrogate policy does not 'waive' or 'exempt' sources from complying with the statutory requirements."

As the Bush Administration was well aware, the surrogate policy does unquestionably waive the Act's most central requirements for major sources and permitting authorities – namely, the requirement to assure compliance with national ambient air quality standards. The Act expressly requires a PSD permit applicant to "*demonstrate*[] . . . that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of *any . . . national ambient air quality standard* in any air quality control region . . . ." As EPA has long known, a demonstration of compliance with PM_{10} standards does not by any stretch of the imagination constitute a demonstration of compliance with $PM_{2.5}$ standards. As more fully documented in Petitioners' first reconsideration petition, and not disputed by the Bush Administration, there is no scientifically supported showing that compliance with the 24-hour PM_{10} standard means that compliance with both the 24-hour and annual $PM_{2.5}$ standards is even probable. Indeed, the evidence is to the contrary. The vast majority of areas that are nonattainment for the $PM_{2.5}$ *do not* violate the PM_{10} standard. In the face of this plain evidence, it is absolutely absurd to allow major sources to pretend that their compliance with the PM_{10} standard is "proof" that they will comply with $PM_{2.5}$ standards. The absurdity of this approach is dramatically highlighted by the fact that EPA itself does not allow use of such a surrogate approach for federally permitted new sources applying for permits today. Thus, there can be no question that the purpose of the surrogate policy is to excuse sources from making the NAAQS compliance demonstration *vis-à-vis* the $PM_{2.5}$ NAAQS. *See* 73 Fed. Reg. at 28341 (explaining that its new decision in the final rule to extend the use of the surrogate policy meant that EPA was "finalizing proposed option 1, *without the requirement of demonstrating compliance with the* $PM_{2.5}$ *NAAQS*") (emphasis added).

The results of this approach are outlandish in the extreme. The policy allows the permitting of major new factories and power plants right next to, or even in, areas that are already violating $PM_{2.5}$ standards without even looking at the new plant's impact on $PM_{2.5}$ levels. Instead, the permit applicant need only look at impacts on PM_{10} levels, which as noted above, are unlikely to be violated in most areas violating the $PM_{2.5}$ standard. Thus, the policy produces the absurd result of allowing a huge new source to be built that will worsen $PM_{2.5}$ violations, and yet pretend that all is well because it will not cause or contribute to a PM_{10} violation. This is not merely a hypothetical. As documented in Petitioners' motion for a stay in the Court of Appeals (incorporated herein by reference), and not disputed by the Bush Administration, there are numerous examples of pending power plant proposals that meet just the above description. *See* Petitioners' Mot. for a Stay Pending Review at 15-19, *NRDC v. EPA*, Case No. 08-1250 (D.C. Cir. filed Aug. 28, 2008).

EPA's position appears to be that sources cannot be constructed if they will cause or contribute to a violation of the $PM_{2.5}$ NAAQS, but that no demonstration of compliance is required unless someone first proves that such a violation will occur. This type of argument – that there is no violation unless someone from the public can prove

one – flatly violates that statute, which places the burden *on the permit applicant* to demonstrate that no violations will occur. That requirement is waived under the surrogate policy.

The Bush Administration tried to defend the surrogate policy as by asserting (contrary to EPA's own conclusions in the proposed rule[2]) that because $PM_{2.5}$ is a subset of PM_{10} all sources that would be major for $PM_{2.5}$ will also be major for PM_{10}. This observation is utterly irrelevant, as the issue here is not identifying which sources are major for $PM_{2.5}$, but rather whether those sources will cause or contribute to violations of the $PM_{2.5}$ standards.

Even if emissions estimates and modeling of PM_{10} were accurate surrogates for estimating emissions and ambient concentrations of $PM_{2.5}$, which they are plainly not, showing that those results demonstrate compliance with the 24-hour PM_{10} NAAQS provides absolutely no basis to conclude that the 24-hour and annual $PM_{2.5}$ NAAQS will not be violated. The Bush Administration deliberately ignored this glaring defect in its defense of the surrogate policy.

The surrogate policy plainly waives otherwise applicable statutory requirements. Even though the previous administration seemed to forget this frequently, EPA is not free to waive statutory requirements it finds inconvenient or burdensome. *See New York v. EPA*, 413 F.3d 3, 41 (D.C. Cir. 2005) ("Absent clear congressional delegation… EPA lacks authority to create an exemption from New Source Review by administrative rule."); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[A]n agency may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.").

This failure to protect the $PM_{2.5}$ NAAQS is among the most troubling results of the final rule. The sources EPA will allow to be permitted without assuring compliance with $PM_{2.5}$ standards could cause long-term attainment problems for many areas – problems that could easily be avoided if the correct analysis were required immediately. It is particularly inexcusable for EPA to allow continued use of PM_{10} as a surrogate *more than a decade after adoption of the $PM_{2.5}$ standards*. There is no question that permit applicants, States and EPA have the technical ability to require demonstration of compliance with $PM_{2.5}$ standards, rather than relying on a surrogate approach that is not defensible on the law or the science. EPA must withdraw the decision to extend the exemptions for sources in States with SIP-approved PSD programs.

B. EPA's new exemption for certain sources to avoid compliance with federal PSD requirements based on their date of application is illegal.

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[2] EPA explained that if condensables are not included, sources' total $PM_{2.5}$ emissions in excess of the major source threshold will be missed. *See* 70 Fed. Reg. at 66044 (explaining the that PM_{10} will not act as a reasonable surrogate for $PM_{2.5}$ "where a source emitted significant amounts of condensible emissions that would not otherwise be counted under a State's PM_{10} program"). This problem of "missing" otherwise major sources is more important for $PM_{2.5}$ sources because condensables tend to make up a much more significant portion of $PM_{2.5}$ than PM_{10}. *See id.* at 66039.

1. EPA offered no opportunity for public comment on the announcement in the final rule to grandfather certain PSD sources out of the obligation to comply with $PM_{2.5}$ requirements.

The final rule announced that sources submitting complete applications prior to July 15, 2008 that had relied on EPA's 1997 surrogate policy could continue to ignore the statutory obligations related to the $PM_{2.5}$ NAAQS. 73 Fed. Reg. at 28340 (codified at 40 CFR § 52.21(i)(1)(xi)); *see also id.* at 28341 (allowing States with SIP-approved PSD programs to include similar grandfathering provisions). This is particularly astounding because the final rule for the first time actually *codifies* the 1997 surrogate policy without ever having allowed the public to comment on the appropriateness or legality of the surrogate policy.

The Johnson Letter made no attempt to deny that this "grandfather" exemption was newly added to the final rule without notice or an opportunity for public comment, and there is no possible argument that this exemption is a logical outgrowth of the proposal. The proposed rulemaking explained that the scientific uncertainties that led EPA to issue the PM_{10} surrogate policy in 1997 "have been resolved in most respects." 70 Fed. Reg. at 66043. As a result, EPA announced that following promulgation of the final rule, reliance on the surrogate policy would no longer be allowed and the requirement to demonstrate compliance with the $PM_{2.5}$ NAAQS "will take effect immediately on the effective date in States that issue permits under a delegation from EPA." *Id.* There was no mention or any indication that certain sources would be carved out of these immediately effective requirements based on the date of their application. This is a plain violation of section 307(d)(3) of the Act and therefore demands withdrawal and reconsideration of this provision.

The fact that the Bush Administration did not even respond to Petitioner's reconsideration petition on this point, much less offer any defense to the flagrant procedural violation described in that petition, is by itself more than sufficient grounds for the new Administration to revisit the issue.

2. EPA has no authority to "grandfather" sources out of complying with the statute.

Notwithstanding the absence of any excuse for violating the procedural requirements of the Act, the Johnson Letter nonetheless tried to defend the merits of the exemption. The arguments offered, however, are simply stunning. Administrator Johnson admitted that this grandfathering provision does not grow out of any authority in the Act. Instead, Administrator Johnson suggested that, even though the only grandfathering expressly allowed under the Act in section 168(b) does not apply to the sources covered by EPA's rule, nothing in the Act precludes the agency from allowing "other" grandfathering by regulation. This position reflects a fundamental confusion over who gets to write the law.

As explained above, the purpose and effect of the grandfathering provision is to allow sources to continue to rely on the surrogate policy, which illegally waives, among other things, the requirement to demonstrate that emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. Grandfathered sources must demonstrate only that the 24-hour PM_{10} NAAQS will not be violated and can rest on that showing unless someone proves a $PM_{2.5}$ NAAQS violation will occur. The affirmative obligations of section 165(a)(3) have been illegally waived. Again, if no requirements of the statute were being waived, there would be no need for these grandfathering provisions.

EPA cannot waive statutory requirements without express authority to do so. *See New York v. EPA*, 413 F.3d at 41. Congress gave EPA limited express authority in section 168(b), but nowhere else. The Johnson Letter's admission that this grandfathering provision is not covered by section 168(b) ends the debate. That Congress provided limited authority to grandfather certain sources is proof that other such exemptions are not authorized.

The Johnson Letter's offered another new assertion in defense of the grandfathering exemption – namely, the appalling claim that this exemption "is of little consequence." The letter claims that "only" nine sources fall within the grandfathering provision, and comments were submitted on "only" six of these. As EPA never made this claim in the proposed rule, the Johnson Letter's reliance on the claim violates the notice and comment rights of Petitioners and the public, who never had the chance to comment on its relevance or validity. Thus again, this new defense is by itself grounds for granting this petition. On the merits, aside from being statutorily irrelevant (as the Act does not allow waiver of the relevant requirements for any reason), a claim that "only" nine sources are affected simply cannot be the position of an agency charged with protecting the public health of the Nation's population. It should go without saying that the construction of even *one* major source that is allowed to violate national health-based standards is of major consequence to the people impacted by pollution from that source who will be forced to breathe unhealthy air. Moreover, EPA's characterization of these sources is completely disingenuous. Several of the facilities on EPA's list are not just "major" sources emitting more than 250 tons per year, but are massive coal-fired power plants that will emit *thousands* of tons per year of $PM_{2.5}$. The list includes the Desert Rock power plant in New Mexico (a 1500 megawatt coal-fired power plant that will emit 1,125 tons of PM_{10} per year, most of that presumably in the form of condensable $PM_{2.5}$), the White Pine power plant in Nevada (a 1600 megawatt coal plant that will emit 2,687 tons of PM_{10} per year), and the Ely Energy Center plant in Nevada (a 1500 megawatt coal plant with project PM_{10} emissions of 1788 tons per year). Moreover, several of these sources – Big West, Colusa, and Victorville 2 – will be located in or near areas that are attainment for PM_{10} but nonattainment for $PM_{2.5}$. As a result, demonstrating compliance with the PM_{10} NAAQS for these sources will ignore the clear likelihood that these sources will contribute to existing violations of the $PM_{2.5}$ NAAQS.

Petitioners have further discovered that the Bush Administration's list of affected plants, which was also offered to the D.C. Circuit under penalty of perjury, is incomplete. For example, the Russell City Energy Center in Hayward, California, was not included in

EPA's list of nine sources even though the Bay Area Air Quality Management District is the delegated PSD permitting authority and has proposed a permit that invokes the grandfathering exemption of the final rule to justify its refusal to evaluate $PM_{2.5}$ impacts from the proposed source.[3] The Russell City Energy Center is a perfect example of why this grandfathering exemption is so clearly illegal. The San Francisco Bay Area has monitored exceedances of the 2006 $PM_{2.5}$ 24-hour NAAQS of 35 ug/m3 since 2004. *See* Letter from James Goldstene, Executive Officer, California Air Resources Board, to Wayne Nastri, Regional Administrator, Region 9, U.S. EPA (Dec. 17, 2007) (State recommendations for area designations under the $PM_{2.5}$ NAAQS based on 2004 through 2006 monitoring data).[4] Based on these monitoring results, on December 22, 2008, EPA signed a notice designating the Bay Area as nonattainment for $PM_{2.5}$.[5] There is no possible dispute that the new $PM_{2.5}$ and NOx emissions from this source will contribute to the existing violations of the $PM_{2.5}$ NAAQS, since air quality in the Bay Area already exceeds the 24-hour $PM_{2.5}$ standard. And yet, amazingly, the Bay Area Air Quality Management District has argued that as long as it can show that the 24-hour PM_{10} NAAQS will not be violated, no further analysis is required. When such egregiously illegal permitting decisions are allowed to proceed under this policy, it is all the more galling for EPA to claim that as long as no one objects, these permitting decision are inconsequential.

C. EPA's decision to allow States to ignore condensable particulate matter from their permitting analysis was not a logical outgrowth of the proposed rule.

The Johnson Letter claimed that the final provisions allowing States to ignore condensable particulate matter were not adopted without notice because "[t]he final rule merely deferred the effective date of the proposed action and preserved the status quo in the interim – requiring continued enforcement of those SIPs and permits that clearly address [condensable particulate matter]." Johnson Letter at 4. This attempt to rewrite history provides no excuse at all for the procedural violation.

The proposed rule explained that "[c]ondensible emissions commonly make up a significant component of $PM_{2.5}$ emissions, and the failure to include them may result in adverse consequences to the environment." 70 Fed. Reg. at 66039. EPA added that, "[w]hile EPA *has always* included condensible emissions in its definition of particulate matter emissions, insofar as these emissions are measured by applicable test methods or included in emissions factors, we believe that the greater significance of condensible emissions in addressing $PM_{2.5}$ warrants greater emphasis in including these emissions in implementing the major NSR program." *Id.* (emphasis added). The proposal noted that "EPA has issued guidance clarifying that PM_{10} includes condensible particles and that,

[3] Statement of basis available at www.baaqmd.gov/pmt/public_notices/2008/15487/index.htm.
[4] The State reevaluated and confirmed its recommendation to designate the Bay Area as nonattainment for $PM_{2.5}$ based on 2005 through 2007 monitoring data. *See* Letter from James Goldstene, Executive Officer, California Air Resources Board, to Wayne Nastri, Regional Administrator, Region 9, U.S. EPA (Oct. 18, 2008). These letters from the California Air Resources Board are available at: www.epa.gov/pmdesignations/2006standards/rec/region9R.htm
[5] Available at: www.epa.gov/pmdesignations/2006standards/documents/2008-12-22/FR_Final_24hr_PM2.5_Designations_010609.pdf

where condensible particles are expected to be significant, States should use methods that measure condensible emissions," and that "States are already required under the consolidated emissions reporting rule to report condensible emissions . . . and Method 202 in Appendix M of 40 CFR part 51 quantifies condensible particulate matter." *Id.* How anyone could have read this discussion and concluded that EPA was also considering allowing States to exclude condensable emissions from permitting decisions is beyond the pale. "Whatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt the inverse." *See Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005)

The most shocking thing about the new defense offered in the Johnson Letter is that it actually moves the consideration of condensables backwards by inventing a new "*status quo*." The Johnson Letter suggest that the *status quo* allowed States that had not previously addressed condensable particulate matter to exclude condensables from permits. Johnson Letter at 4. This was never the legal position of EPA. As noted above, the proposal explained that EPA "has always" included condensables in the definition of particulate matter and its guidance instructed States to use methods that measure condensables where those emissions are expected to be significant. The proposal, after noting "misconceptions" as to whether condensable emissions must be included, sought only to "clarify" the *status quo* – not change it – that "condensible emissions must be included when determining whether a source is subject to the major NSR program." 70 Fed. Reg. at 66039. It is appalling for EPA to now argue that it has always been EPA's policy that condensables can be excluded if a State so chooses. Moreover, this new rationale was offered for the first time in the Johnson Letter. It did not appear in the notice of proposed rulemaking or even in the final rule. The final rule justified the exclusion of condensables on the ground that a commenter had raised concerns about monitoring – a ground that itself had never been subjected to public comment. Again, the Johnson Letter's reliance on newly minted rationales never before set forth for public review and comment warrants reconsideration of that letter, as well as the underlying rule.

On the merits, as explained in the original petition for reconsideration, the exclusion of condensable $PM_{2.5}$ emissions violates a host of statutory provisions, including the requirements to permit major sources of any pollutant (§§ 169(1), and 182), apply required controls for all regulated pollutants (§§ 165(a)(4), 171(3), and 173), and attain the $PM_{2.5}$ NAAQS as expeditiously as possible but no later than 2010 (§§ 172(a)(2)(A), (c)(1), (c)(6), 188(c), and 189). The Johnson Letter made no attempt to refute any of these legal defects associated with the exclusion of condensable $PM_{2.5}$ emissions.

The Johnson Letter must be withdrawn in order to avoid creation of new law to allow the exclusion of condensable emissions. EPA never indicated in the proposed rule that it would allow such an exclusion and offered no opportunity for the public to comment on the legality of such an exclusion.

D. EPA provided no opportunity for the public to comment on the new interpollutant trading ratios.

Petitioners raised a number of objections to EPA's arbitrary and illegal decision to adopt in the final rule, without notice and comment, "preferred" interpollutant trading ratios to facilitate the interpollutant trading of emissions offsets under the NSR program. *See* 73 Fed. Reg. at 28339. The Johnson Letter ignored these objections, instead offering only that these ratios will be open to public review in subsequent SIP and permit approvals. This is a transparently illegal attempt to shift the obligation to provide a technical basis from EPA to the public.

It is a fundamental principle of administrative law that agencies must provide a rational basis for their decisions. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Yet EPA is refusing to allow the public to comment on the basis for EPA's preferred ratios. Instead, States may *presume* these ratios will be approved by EPA (*i.e.*, the State need not provide *any* technical basis), and it is up to the public to provide a "credible" basis for showing why the ratios are inappropriate. *See* 73 Fed. Reg. at 28339. That the public, and not the agency, has the technical burden of proof is astounding given that EPA admits that "[t]here is considerable uncertainty about the relationship of precursor and direct $PM_{2.5}$ emissions to localized ambient $PM_{2.5}$ concentration both spatially and temporally." *Id.* Given this uncertainty and variability, the only permissible presumption is that the ratios in different areas will be different, not that a uniform ratio is valid unless proven otherwise. Not only must the public make the technical case on the appropriate ratios, it must make this case in every single SIP approval action in order to prevent these indefensible ratios from being used. This is not a legally adequate substitute for the public review required under section 307(d)(3)(C) of the Act.

The Johnson Letter's assertion that permit review will also provide the necessary public review is even more outrageous. Pending SIP approval of revised nonattainment new source review programs, States will issue nonattainment new source review permits pursuant to Appendix S of 40 CFR part 51. These permits can rely on EPA's preferred ratios even though the ratios will not yet have been approved into the SIP. Thus, anyone that objects to the technical basis of these ratios must comment on the inappropriateness of these ratios in every single permit that proposes to allow interpollutant trading. The Johnson Letter's assertion that this provides adequate opportunity for public review is utterly disingenuous, especially since EPA itself concluded that "we do not believe that available models can determine the effects of interpollutant trades at a single source . . . [and w]e will not accept case-by-case demonstrations on an individual source permit basis." 73 Fed. Reg. at 28339. In other words, the Bush Administration put the burden on the public to make a credible case for rejecting the preferred ratios – ratios that have never been justified through an open review process – yet acknowledged that in the context of a specific permitting action, such a credible case may not be possible to prove.

Before EPA can establish presumptions on important technical conclusions that will have immediate impacts on permitting decisions, EPA must provide the public an opportunity to review and comment on those conclusions. As outlined in the original petition for reconsideration, and undenied by the Johnson Letter, the ratios announced in the final rule suffer from fundamental technical flaws. As such they must be immediately withdrawn until they have been adopted through the proper notice and comment procedures.

PETITION FOR STAY

Petitioners reiterate their request that EPA stay those portions of the final rule (including the preamble) challenged herein. A stay of these provisions is warranted to prevent irreparable harm to the members of the public (including Petitioners' members) from the construction and operation of major sources of $PM_{2.5}$ pollution without the safeguards mandated by Congress in the Act. That harm is presented not only from threatened exposure to increased levels of dangerous $PM_{2.5}$ pollution, but also from implementation of rules and policies on which Petitioners and their members had no opportunity to comment. Petitioners' motion for stay in the D.C. Circuit, incorporated herein by reference, provides extensive evidence of the imminent threats faced by Petitioners' members and the public if these illegal Bush Administration rules are allowed to govern new source permitting in the coming months.

As documented in EPA's most recent review of the PM NAAQS, $PM_{2.5}$ pollution is linked to tens of thousands of premature deaths annually, and is a major contributor to visibility impairment in many parts of the nation. EPA has repeatedly found that the PM_{10} NAAQS does not adequately protect against these effects, and that PM_{10} is not an accurate surrogate for fine particles or their adverse health and welfare impacts.

The threat to Petitioners' members and the public is compounded by the fact that sources permitted under these illegal policies will likely emit $PM_{2.5}$ pollution long after EPA's "transition" period ends. For example, new coal-fired power plants, like those EPA acknowledges will be grandfathered out of $PM_{2.5}$ compliance, typically remain in operation for at least 30 years. Petitioners' members and many others will be exposed to emissions from these plants for decades. There is accordingly an urgent need to ensure that emission limits adequate to protect the NAAQS are imposed *before* these plants are built, and that those limits address all components of $PM_{2.5}$ – not just a fraction.

For all the foregoing reasons, Petitioners ask EPA to stay the above-referenced provisions of the final rule. Petitioners further ask that EPA respond to this stay request within 30 days of the date of this petition.

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DATED: February 10, 2009

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ATTACHMENT A

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Final Rule Published at 73 Fed. Reg. 28321 (May 16, 2008), entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5)," Docket No. EPA-HQ-OAR-2003-0062, RIN 2060-AN86

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, Natural Resources Defense Council, and Sierra Club petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule referenced above ("NFRM," "final rule" or "rule"). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." CAA § 307(d)(7)(B).

INTRODUCTION

This petition raises objections to the final rule captioned above. Each objection is "of central relevance to the outcome of the rule," CAA § 307(d)(7)(B), in that it demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 307(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the NFRM published on May 16, 2008, 73 Fed. Reg. 28321. A Federal Register notice soliciting comment on the rule was published on November 1, 2005, 70 Fed. Reg. 65984. The public comment period on the November 1, 2005 notice closed on January 31, 2006. 70 Fed. Reg. 63902 (Nov. 15, 2005). The grounds for the objections raised in this petition thus "arose after the period for public comment." CAA § 307(d)(7)(B). Because judicial review of the rule is available by the filing of a petition for review by July 15, 2008, the grounds for the objections arose "within the time specified for judicial review." CAA § 307(d)(7)(B).

OBJECTIONS

I. EPA's New Transition Flexibility For PSD Programs In SIP-Approved States Is Illegal And Arbitrary

The final rule unlawfully and arbitrarily includes new requirements governing the way in which States with prevention of significant deterioration ("PSD") programs approved into their state implementation plans ("SIPs") will come into compliance with the new PSD rules governing PM2.5. 73 Fed. Reg. at 28340-42. In the final rule, EPA

announced that such States are excused from the proposed April 5, 2008 SIP submittal deadline, and, instead, will have until May 16, 2011 to revise their PSD programs and submit those revisions for approval into the SIP. *Id.* at 28341. In addition, EPA eliminated the proposed requirements that during the interim period before the SIP-approved PSD program is revised, States must (1) require sources to demonstrate that emissions will not cause or contribute to a violation of the national ambient air quality standards ("NAAQS") for PM2.5, and (2) include condensable PM2.5 emissions in determining major NSR applicability. *Id.*

This new scheme governing the transition period for States with SIP-approved PSD programs is an about-face on the transition program proposed, and was added to the rule after the close of the public comment period. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). These objections are of central relevance to the rule, *see id.*, because they go to the core requirements of how and when PSD programs will be revised to comply with the PM2.5 NAAQS – including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Transition Requirements For SIP-Approved PSD Programs

EPA unlawfully failed to present this new transition scheme for States with SIP-approved PSD programs and accompanying rationale to the public for comment. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act ("APA"). 5 U.S.C. § 553. EPA's rejection of the deadlines and requirements to safeguard the PM2.5 NAAQS that EPA included in the proposal is not a logical outgrowth of that proposal. *See Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) ("Whatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt the inverse."). EPA therefore committed a procedural violation by failing to solicit public comment on this new transition scheme. *See* CAA § 307(d)(9)(D). That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. *Id.*

First, EPA's procedural dereliction is arbitrary and capricious. *See* CAA § 307(d)(9)(D)(i). EPA, after providing the legal rationale for the proposed deadlines and safeguard requirements governing the transition for SIP-approved states, now completely ignores that rationale and finalizes a new scheme that is nearly the exact opposite of the proposal without any public notice and comment.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). *See* CAA § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some small aspect of the challenged provisions. Rather, it failed to seek comment on completely reversing itself on how and when SIP-approved PSD programs must be revised to comply with the PM2.5 NAAQS promulgated in 1997. The new transition scheme purports to allow source to be constructed or expanded even if they result in long-term contributions to violations of the PM2.5 NAAQS. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

B. EPA's Transition Scheme Is Unlawful and Arbitrary.

The law governing when SIPs with PSD programs are due following a revision to the NAAQS is clear. Section 110(a)(1) provides that SIPS are due within 3 years after the promulgation of a new or revised primary NAAQS. Section 110(a)(2)(C) states that each plan shall include a permit program as required in Part C of the Act. There is no ambiguity in this language or in how these deadlines apply to the current rulemaking. This rulemaking governs how States must revise their SIPs to implement the revised particulate matter NAAQS. Those NAAQS were promulgated on July 18, 1997. 62 Fed. Reg. 38652 (July 18, 1997). Revised PSD SIP to implement these revised NAAQS were therefore due by July 18, 2000.

EPA, however, proposed to set a PSD SIP submittal deadline of April 5, 2008. 70 Fed. Reg. at 66043. This deadline is the same deadline for submitting SIPs with nonattainment NSR programs and is based on the requirement in section 172(b), which requires nonattainment area SIPs, including nonattainment NSR permitting programs, no later than 3 years from the date of the nonattainment designation. Since EPA delayed designating areas until April 5, 2005, the nonattainment area SIP submittal deadline was delayed until April 5, 2008. 70 Fed. Reg. 944 (Jan. 5, 2005). EPA's rationale for applying the same SIP submittal deadline for both attainment and nonattainment area permit programs was based on administrative convenience and not on the law.

EPA in the final rule abandons even that "compromise" solution and instead suggests that States may have until July 15, 2011 – 3 years from the effective date of this final rule – to revise and submit PSD or NSR SIPs that address PM2.5. 73 Fed. Reg. at 28341. EPA claims that the Act does not specifically address the timeframe by which States must submit SIP revisions when EPA revises PSD and NSR rules, and argues that this new deadline is consistent with the approach taken in the NSR Reform rulemaking. *Id.*

The relevant dates here, however, are those tied to the revision of the NAAQS. EPA cannot avoid these statutory deadlines by "reframing" this action into something else. EPA has already acknowledged that the deadline in 110(a)(1) applies to SIP submittals required to implement a new or revised NAAQS even where EPA is issuing rulemaking specifying what that implementation requires. *See* 52 Fed. Reg. 24672 (July 1, 1987). In that rulemaking, just as here, EPA revised the PSD and NSR rules to implement changes made to the particulate matter NAAQS. In that rulemaking EPA found that the deadline for revised PSD SIPs was governed by section 110(a)(1) and required SIP revisions within 9 months after the revision of the NAAQS. *Id.* at 24683.

EPA's reliance on the NSR Reform rulemaking as precedent for determining the appropriate deadline for this rulemaking is absurd. That rulemaking had nothing to do with the implementation of a new or revised NAAQS. Moreover, that rulemaking was to promote "flexibility" for permitted sources and was not needed or intended to protect air quality under even the existing NAAQS. *See* 67 Fed. Reg. 80186 (Dec. 31, 2002). There is no legal or policy similarity between that Reform rulemaking and the current rulemaking required to ensure permitting programs are adequate to implement the revised NAAQS.

The new deadlines for both PSD and NSR SIP revisions violate the plain language of sections 110(a)(1) and 172(b). The decision with respect to the PSD programs is made even more illegal by EPA's new decision in the final rule to abandon all safeguards that might arguably have protected air quality in areas attaining the NAAQS. With the nonattainment NSR program, EPA at least has decided that it will implement the substitute Appendix S provisions during the interim period while states revise their NSR SIPs. 73 Fed. Reg. at 28342. EPA announced in the final rule that no such substitute requirements or other safeguards need be applied in attainment areas. *Id.* at 28341.

Section 165(a)(3) plainly prohibits the construction or modification of a facility unless the owner or operator of that facility demonstrates that:

> emissions from construction or operation of that 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 Act[.]

Likewise, section 165(a)(4) requires best available controls for each pollutant subject to regulation under the Act. There is no "transition period" allowed under these provisions. The requirements apply to any "major emitting facility on which construction is commenced *after the date of enactment of this part.*" CAA § 165(a) (emphasis added).

EPA had proposed that during any interim period before States revise their SIP PSD programs, States would be allowed to implement their existing PSD programs using coarse particulates ("PM10") as a surrogate for PM2.5 *provided* the States met specific requirement "to assure that the use of PM10 is protective of the PM2.5 NAAQS." 70 Fed. Reg. at 66044. The proposal required that States: (1) meet the requirements of Clean Air Act section 165(a)(3) by demonstrating that emissions from the construction or operation of the source will not cause or contribute to a violation of the PM2.5 NAAQS; and (2) include condensable PM2.5 emissions in determining whether the source is "major." 70 Fed. Reg. at 66044. EPA explained that these requirements were necessary to ensure that the PM2.5 NAAQS would be protected and that all sources subject to PSD based on PM2.5 emissions would be covered. *Id.* In particular, EPA noted that while generally, if a source emits more than 100 or 250 tons per year of PM2.5, it will also be a major source for PM10 because PM2.5 is a subset of PM10, this is only assured if States include condensable PM2.5 emissions in determining major source applicability as a condition of using PM10 as a surrogate. *Id.* Otherwise, a source could be emitting more than 100/250 tons per year of PM2.5 and these emissions would be missed in PM10 emission measurements.

EPA abandoned these safeguards in the final rule with no explanation as to how protection of the NAAQS and regulation of all major PM2.5 sources would be assured. 73 Fed. Reg. at 28341. EPA gives no explanation of how the PM2.5 NAAQS will be protected if States are no longer required to demonstrate that emissions from the construction or operation of the source will not cause or contribute to a violation of the PM2.5 NAAQS. Nor does EPA address how it can assure that the requirements of section 165 will be met without requirements to ensure all major sources of PM2.5 are subject to permitting. EPA repeats its statement that all major sources of PM2.5 are major sources of PM10 but ignores the scenario EPA itself acknowledged regarding sources with significant condensable emissions that are not captured by PM10 measurements. This is the height of arbitrary decision making.

EPA's "transition period" is not allowed under the statute. As of July 18, 2000, all SIP-approved State programs were required to implement their PSD permitting programs to address PM2.5. To the extent those programs cannot assure compliance with the statutory requirements of section 165 of the Act, EPA was obligated to institute a SIP call and implement the PSD permitting federally. EPA has arbitrarily abandoned even the minimal safeguards in its proposal, and has no legal basis for arguing that a three-year transition period can be allowed during which time permitting agencies can continue to use PM10 as a surrogate while ignoring the PM2.5 NAAQS. As such, EPA must rescind its final decision to allow States until 2011 to revise their SIP-approved PSD programs and to use PM10 as a surrogate for permitting during the interim. Because the deadline for adopting SIP PSD permitting programs has long since passed, EPA must immediately issue a SIP call for all PSD programs that do not meet the Part C requirements for implementing PM2.5. EPA must implement the federal PSD regulations in 40 CFR § 52.21 while these States revise their SIPs.

II. EPA's New Pronouncement That Sources Relying On EPA Guidance May Be "Grandfathered" And Need Not Comply With PM2.5 PSD Requirements Is Illegal And Arbitrary

The final rule unlawfully and arbitrarily includes a new pronouncement that:

> EPA will allow sources or modifications who previously submitted applications in accordance with the PM10 surrogate policy for purposes of permitting if EPA or its delegate reviewing authority subsequently determines the application was complete as submitted.

73 Fed. Reg. at 28340 (codified at 40 CFR § 52.21(i)(1)(xi)); *see also id.* at 28341 (allowing States with SIP-approved PSD programs to include similar grandfathering provisions). EPA made no mention of "grandfathering" in the proposed rule and the proposed regulatory text included no such provision. Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core requirements of PSD permits implementing the PM2.5 NAAQS – including the public's opportunity to comment on these requirements, and the consistency of these requirements with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment On The Final Rule's Grandfathering Provision For Sources Subject To PSD Permitting

EPA unlawfully failed to present this grandfathering provision and accompanying rationale to the public for comment. Moreover, EPA's approach attempts to codify the October 23, 1997 surrogate policy without ever subjecting that policy to notice and comment rulemaking. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the APA. 5 U.S.C. § 553. EPA therefore committed procedural violations by failing to solicit public comment on: (1) whether it is lawful or appropriate to exempt certain permit applicants from the new PSD requirements; and (2) whether the requirements in EPA's October 23, 1997 surrogate policy are sufficient to comply with the Act and excuse compliance with these new PSD requirements. *See* CAA § 307(d)(9)(D). These procedural violations meet the criteria set forth in the Act for reversal based on procedural violations. *Id.*

First, EPA's procedural dereliction is arbitrary and capricious. *See* CAA § 307(d)(9)(D)(i). There is no rationale for adding this grandfathering provision in the final rule without any public notice and comment. It not a logical outgrowth of any proposed provision or any requirement in the statute.

Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). *See* CAA § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* CAA §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA failed to seek comment on a major new exemption to the PSD rules, as well as the codification of a policy that violates the plain language of the Clean Air At and has never been subject to any formal review. The new provision added in 40 CFR § 52.21(i)(1)(xi) purports to allow a significant number of major sources to be constructed without meeting the part C requirements of Clean Air Act title I for protecting the PM2.5 NAAQS, which are already more than 10 years old. These sources will be allowed to be constructed or expanded even if they result in long-term contributions to violations of the PM2.5 NAAQS. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

B. EPA's Grandfathering Provision Is Unlawful and Arbitrary.

There is no authority for EPA's PSD exemption for major sources based on the date of their permit application. Section 165(a) prohibits the construction of major emitting facilities that do not comply with the applicable permitting requirements where "construction is commenced after the date of the enactment of this part . . . ." CAA § 165(a). As EPA is well aware, the term "commenced" is specifically defined in section 169(2) and requires more than merely a complete application. § 169(2) (requiring not only approval of permits but also either actual physical construction or binding agreements for construction). Congress specifically addressed the issue of grandfathering in section 168(b) and again allowed for the grandfathering of only those sources on which "construction had commenced" before the enactment of the 1997 Clean Air Act Amendments. There is no suggestion that sources who merely have complete applications are entitled to similar treatment.

EPA's only argument for allowing the grandfathering of sources with complete applications is that a similar approach was adopted in the 1987 rulemaking implementing the revisions of the PM NAAQS from the total suspended particulates indicator to PM10. 73 Fed. Reg. at 28340. The 1987 rulemaking, however, also offered no statutory basis for the exemption. EPA rationale for the exemption in 1987 was only that such exemptions were necessary out of "fairness." 52 Fed. Reg. at 24683.

Even if such claims of "fairness" could be used to trump the plain language of the statute, EPA's invocation of such fairness claims in this rulemaking is hollow and arbitrary. Here the revised NAAQS have been in effect for over ten years. There is no "surprise" or quick change in the legal requirements for permit applicants. Unlike the situation in 1987, where EPA adopted its grandfathering provision at the same time as it

revised the NAAQS, there is no similar claim now that time is needed to adjust to the new national standards, which have been in effect for over ten years.

EPA suggests that using PM10 as a surrogate for PM2.5 is needed to be fair to permit applicants but even the "fairness" rationale for the 1997 surrogate policy itself has become stale. In the 1997 memo announcing the surrogate policy, EPA claimed that allowing sources to rely on PM10 as a surrogate for PM2.5 permitting was appropriate "[i]n view of the significant technical difficulties that now exist with respect to PM2.5 monitoring, emissions estimation, and modeling." Memorandum from John S. Seitz, Dir., OAQPS, to Regional Air Directors, "Interim Implementation of New Source Review Requirements for PM2.5" (Oct. 23, 1997) ("Seitz Memo"). EPA cannot reasonably claim that these technical difficulties persist now ten years later. *Cf. id.* at 2 (noting that technical difficulties would be addressed by projects underway that would be completed by 2002). The ambient monitoring program for PM2.5 is now established and has been used by EPA to make attainment designations. States likewise have relied on these monitors as well as modeling to prepare their nonattainment SIPs, which were due last April. Stack monitoring and emissions estimation, likewise, cannot be claimed as legitimate excuses as States have had to adopt enforceable reasonably available control technology requirements for stationary sources. If EPA were to persist in such claims it would undercut the approvability of any SIP that purports to include meaningful controls on stationary sources and demonstrate attainment of the PM2.5 NAAQS. EPA cannot claim that States can demonstrate attainment of the PM2.5 NAAQS in nonattainment areas while still claiming that it is impossible for these same States to demonstrate that the PM2.5 NAAQS will be protected in attainment areas. Nor can EPA claim that these technical difficulties persist when EPA is at the same time requiring permitting for all sources that do not qualify for this exemption. The excuses for failing to implement PM2.5 permitting programs ran out long ago and there is no legitimate "fairness" justification for allowing sources to continue to rely on EPA's illegal surrogate policy in the face of the plain language of the Act.

Through this illegal grandfathering announcement EPA also seeks to codify the 1997 surrogate policy which EPA has, to this point, said "do[es] not bind State and local governments and the public as a matter of law." Seitz Memo at 2. Now, through this final rule, permitting agencies in delegated States will be pushed to honor this surrogate policy and those challenging permits that fail to address PM2.5 will have this newly added regulatory provision offered as the legal defense. EPA is making this policy into law without ever having subjected it to public notice and comment.

Had EPA allowed such comment it would have been told that the policy violates numerous provisions of Clean Air Act section 165. First, as EPA admits, the use of PM10 as a surrogate may miss major sources of PM2.5 where those sources emit significant amounts of condensable PM2.5. *See* 70 Fed. Reg. at 66044. The requirement of section 165(a) requiring PSD permitting for the construction of *any* major emitting facility therefore cannot be assured through the blind use of PM10 as a surrogate for PM2.5. *See* CAA § 165(a)(3); *see also id.* § 169 (defining major emitting facility based on emissions of "any pollutant"). Second, the use of PM10 as a surrogate fails to meet

the requirements of section 165(a)(3) requiring the owner or operator of the facility to demonstrate that emissions will not cause or contribute to air pollution in excess of "any" NAAQS. *See* § 165(a)(3). Third, the use of PM10 as a surrogate means that sources will not demonstrate that PM2.5, which is undeniably a "regulated pollutant," will be subject to best available control technology. *See* § 165(a)(4). Fourth, modeling using PM10 as a surrogate will fail to satisfy the class I protection requirement and the air quality impact analysis vis-à-vis PM2.5 concentrations as required by sections 165(a)(5) and (6). *See* § 165(a)(5) and (6). Finally, there is no possible claim that using PM10 as a surrogate can satisfy the requirement in section 165(a)(7) for monitoring in areas affected by the source because the surrogate policy neither requires sources to evaluate the PM2.5 effect nor establish monitoring specific to PM2.5. *See* § 165(a)(7).

Nor can states implementing delegated programs meet the overarching requirement of Clean Air Act section 110(a)(2)(C) that they have a permitting program in place that is "necessary to assure that the national ambient air quality standards are achieved . . . ." *See* § 110(a)(2)(C). If States must, according to the new rules, allow sources to be permitted based only on an analysis of PM10 emissions and impacts, they cannot reasonably claim that the permitting program assures the PM2.5 NAAQS will be protected.

This failure to protect the PM2.5 NAAQS is among the most troubling results of this grandfathering decision. The sources EPA will allow to be permitted without consideration of PM2.5 impacts could cause long-term attainment problems for many areas – problems that could easily be avoided if the correct analysis were required immediately. Accordingly, EPA must rescind its final decision grandfathering sources with complete applications that fail to meet the permitting requirements for PM2.5. EPA must also instruct States with SIP-approved programs that such grandfathering is not allowed under the Clean Air Act. EPA must require that PM2.5 be addressed in all permits for sources that did not commence construction before the effective date of the PM2.5 NAAQS.

II. Condensable PM Emissions

The final rule illegally and arbitrarily allows the states and EPA to exclude condensable particulate matter emissions ("condensables") from NSR applicability determinations and emission control requirements until January 1, 2011. As further discussed below, the proposed rule allowed no such exclusions, but instead required inclusion of condensables in applicability determinations and emission limitations as of the effective date of the rule. Thus, the rule's provisions governing condensable emissions were significantly modified after the close of the public comment period in ways that did not reflect logical outgrowths of the proposal. The grounds for our objections therefore arose after the period for public comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core procedural and substantive validity of the provisions of the rule governing the limitation of PM2.5 emissions (of which condensables are major components) --

including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Provisions Allowing Exclusion of Condensables From Applicability Determinations and Emission Limitations

EPA unlawfully failed to present for public comment provisions of the final rule allowing exclusion of condensables from NSR applicability determinations and emission control requirements until January 1, 2011 (collectively, "condensable exclusions"). Nor did EPA present for public comment the rationale articulated in the final rule for the condensable exclusions. Under § 307(d) (which EPA has found applicable to this proceeding), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the APA. 5 U.S.C. § 553. EPA's condensable exclusions and accompanying rationales are not logical outgrowths of the proposal. They did not appear in the notice or proposed rulemaking, nor did EPA otherwise present them to the public for comment. To the contrary, the notice of proposed rulemaking proposed to regulate condensables immediately. It was only in the final rule that EPA for the first time indicated that it would adopt the condensable exclusions.

For all the foregoing reasons, EPA committed a procedural violation (*see* § 307(d)(9)(D)) by failing to solicit public comment on the above-described provisions of the final rule. That procedural violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). EPA has exempted from regulation significant components of PM2.5 in a manner not proposed at the time of public notice and comment.

Second, via the present petition, petitioner have satisfied the requirements of § 307(d). *See* § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8), *cited in* § 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some minor aspect of the rules, but rather on whether to allow years of delay in regulating condensable emissions that comprise a major part of PM2.5 pollution. EPA itself found that condensables "commonly make up a significant component of PM2.5 emissions, and the failure to include them may result in adverse consequences to the environment." 70 Fed. Reg. 65984, 66039 (Nov. 1, 2005). Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below -- objections that address the lack of statutory basis for the challenged exclusions, and those exclusions' inconsistency with fundamental principles of reasoned agency decision-making.

B. The Final Rule's Provisions Allowing Exclusion of Condensables from Regulation are Unlawful and Arbitrary

1. Exclusion Violates Act's PSD and NSR Provisions

EPA violated the Act's express terms in allowing the exclusion of condensables from the determination of a whether a new or modified source is a "major" source subject the Act's PSD and/or nonattainment NSR requirements. Section 302(j) of the Act defines a "major stationary source" or "major emitting facility" as one that emits or has the potential to emit, 100 tons per year or more "of any air pollutant," except as otherwise expressly provided in the Act. Other specific provisions of the Act define different tonnage thresholds for "major" sources, but do not otherwise change the above-referenced portions of §302(j) definition. *See, e.g.*, § 182 (setting lower major source thresholds for serious and above ozone nonattainment areas); § 169(1). EPA itself has found, as it must, that condensables are "a component of direct PM emissions" and "a significant component of direct PM2.5 emissions." 73 Fed. Reg. 28334. EPA has similarly defined PM10 as including condensables. Memorandum from Stephen D. Page, April 5, 2005, re: "Implementation of New Source Review Requirements in PM2.5 Nonattainment Areas" at 3 n.3. Because PM10 and PM2.5 are indisputably "pollutants" (§302(g)), EPA has no authority to exclude condensables in determining whether a source is "major" for those pollutants for NSR purposes. A source is "major" for NSR/PSD purposes if it has actual or potential emissions of 100 tpy or more of any "air pollutant" -- not just a portion of the air pollutant. Likewise, the Act's provisions requiring permits for modification of major sources are triggered by changes that increase "the amount of any air pollutant emitted" by such source, a provision that again cannot be read as meaning only a "part of the amount" emitted. *See* §§ 111(a)(4), 169(2)(C), 171(4).

EPA also has no power to allow permitting authorities to exclude condensables in establishing enforceable emission limits for PM10 or PM2.5. A PSD permit may not be issued unless, among other things, the source shows that "emissions from construction or operation" of the source will not cause or contribute to air pollution in excess of any increment, any NAAQS, or any applicable emission standard or limitation. § 165(a)(3). If "emissions from…operation" of the source will include condensables, the source must show that those emissions will not cause or contribute to violations of increments, NAAQS, and emission limits: the source cannot pretend that the condensable emissions are not there, and EPA cannot lawfully or rationally allow the source or permitting authority to do so. Likewise, a PSD permit must subject the source to the "best available control technology for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." § 165(a)(4). PM-10 and PM2.5 are indisputably pollutants subject to regulation under the Act, and condensables are indisputably components of those pollutants: Thus condensables must be subjected to BACT emission limits.

Further, the Act's nonattainment NSR provisions require new and modified major sources to achieve the "lowest achievable emission rate," defined as the more stringent of the most stringent emission limitation in a SIP (unless the source shows such limitations are not achievable) or achieved in practice for the class or category of source. §§ 171(3), 173. There is no language in these provisions allowing states or EPA to ignore condensables (or any other pollutant components) in determining the most stringent emission limitations, nor would such a reading be consistent with the statutory language and purpose. *See also* § 302(j) (defining "emission limitation" as a requirement which limits emissions "of air pollutants" – not fractions or components of air pollutants). Moreover, EPA concedes that some states do in fact limit condensable emissions, and LAER for PM sources would plainly have to ensure emission limits at least as stringent. The nonattainment NSR provisions also require offsets sufficient to ensure "that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction . . . in the actual emissions of such air pollutant." § 173(c)(1). Again, the statute does not limit offsets to only a fraction of the relevant air pollutant, but rather requires an offset in the "actual emissions," which necessarily includes the condensable fraction of such emissions. Moreover, the offsets must be sufficient to ensure reasonable further progress (RFP), and RFP cannot be assured without accounting for all emissions, including the condensable portion.

2. Act Precludes 3-Year Phase in Period

The Act does not allow EPA to adopt a 3-year phase in period for including condensables in the applicability and compliance determinations. EPA has no authority delay or defer NSR and PSD requirements, or selectively waive portions thereof. The 3-year phase in period is far beyond the deadlines for states to have in place enforceable SIPs to implement the PM-10 and PM2.5 standards. CAA § 110(a)(1) (requiring states to submit SIPs within 3 years of NAAQS revision – *i.e.* by 2000 for the 1997 PM NAAQS revision – to implement the new NAAQS); § 172(b) (requiring submittal of nonattainment SIPs within 3 years of nonattainment designations); § 189 (setting deadlines for PM10 SIP submittals). As EPA itself has noted, the Act's NSR provisions apply "[a]s of the date areas are designated attainment or nonattainment" under a standard." *See* 68 Fed. Reg. 32802, 32843 (2003).

The phase in period also undermines and cannot be reconciled with the requirement for expeditious attainment. CAA §§ 172(a)(2)(A) and 188(c). EPA admits that most PM2.5 emissions may be in a condensable state. Based on an analysis of particle size distribution, EPA estimated that "about 78 percent of the total PM2.5 emissions would be condensable PM." 70 Fed. Reg. at 66051. EPA adds that because controls to date have reduced the filterable portion of PM2.5 emissions but not the condensable portion, "the significance of the condensable emissions as a proportion of direct PM2.5 emissions may be greater than indicated." *Id.* EPA further acknowledges that certain areas will need to address direct PM2.5 emissions from stationary sources in order to demonstrate attainment and that measurements and controls that only address the filterable portion of these direct emissions "would limit the control measures available for developing cost effective strategies to achieve attainment of the PM2.5 NAAQS." *Id.* at

66049. Even if EPA had not made any of these admissions on the importance of controlling condensable PM2.5 emissions for attainment, there can be no argument that allowing States to ignore controls on any portion of stationary source emissions violates the overriding Clean Air Act requirement for expeditious attainment.

The decision to allow States until 2011 to establish emission limits for condensable PM is particularly astounding since it pushes control beyond the outside attainment deadline of 2010, thereby illegally flouting the statutory mandate that implementation plans provide for attainment as expeditiously as practicable, and no later than the outside attainment date. CAA §§ 172(a)(2)(A), (c)(1), (c)(6), 188(c), and 189. *See also* § 173(a)(1)(A).

4. EPA Cannot Lawfully or Rationally Establish Presumptions That SIPs and Permits Exclude Condensables

EPA states that it will not revisit applicability determinations made prior to the end of the transition period insofar as the quantity of condensable PM emissions are concerned "unless the applicable implementation plan clearly required consideration of condensable PM." 73 Fed. Reg. at 28335. As noted above, condensable PM is by definition a part of the pollutants PM10 and PM2.5: EPA cannot lawfully or rationally establish an additional requirement that SIPs "clearly require consideration of condensable PM" emissions before such emissions must be included in applicability determinations.

EPA also has no authority to "interpret PM emissions limitations in existing permits or permits issued during the transition period as not requiring quantification of condensable PM2.5 for compliance purposes unless such a requirement was clearly specified in the permit conditions or the applicable implementation plan." 73 Fed. Reg. at 28335. Such a policy is unlawful for all the above-stated reasons. It also illegally and arbitrarily establishes an "interpretation" of PM emission limitations in already-issued permits that does not necessarily reflect either the applicable SIP provisions or the intent of the permitting authority. For example, prior to this rule, a permitting authority could have justifiably assumed, consistent with the Act and prior EPA guidance, that an emission limit for PM necessarily encompassed condensables. Or the permitting authority might have expressly indicated in a public notice, fact sheet or response to comments, that it intended a permit limit for PM to encompass condensables, even though the final permit did not expressly so state. EPA cannot retroactively change such permits and permitting proceedings without acting arbitrarily and without flouting the public notice and comment rights of affected persons – who could not have know at the time of permitting that EPA intended to misread the permits as excluding condensables.

5. EPA's Justification for the Condensable Exclusion is Arbitrary and Capricious

As noted above, EPA admits that condensable PM likely represents the bulk of direct PM2.5 emissions from stationary sources and that controls on these sources may be important for several areas to attain the PM2.5 NAAQS. EPA also admits that methods

exist for measuring condensable PM and that States have established emission limits or emission testing requirements that include the measurement of condensable PM. 70 Fed. Reg. at 66050; 72 Fed. Reg. at 20652; 73 Fed. Reg. at 28334-35. Specifically, EPA describes the use of Conditional Method 40 with EPA method 202 as the most reliable measurement of total direct PM2.5 and added that "Conditional Method 40 has been used at several facilities in the U.S. and the hardware required to implement this method has been readily available since the mid-1980's." 70 Fed. Reg. at 66050. EPA is also aware through comments on the proposed rule that EPA Method 202 has been widely used to measure condensable PM including in recent permits issued to the Longview, Thoroughbred, Oak Creek and Weston coal-fired EGUs. Comments Prepared by Clean Air Task Force, Earthjustice and Environmental Defense on Proposed Rule to Implement the Fine Particle NAAQS, at 32 (Jan. 31, 2006) [Available in Docket at EPA-HQ-OAR-2003-0062-0108.1]. These comments also describe the various controls available and already in use to reduce condensable PM emissions, including scrubbers, wet electrostatic precipitators, and sorbent injection. *Id.* Finally, EPA admits that the information on condensable PM emissions is adequate for use in inventories and attainment demonstrations. 72 Fed. Reg. at 20652.

Given this record, there is no rational basis for claiming that condensable PM cannot be accounted for in applicability and compliance determinations today. Nor does EPA attempt to provide a basis. EPA only cites generalized "concerns" raised by commenters. 74 Fed. Reg. at 28335. EPA fails to explain why these concerns are of such credibility and magnitude as to justify ignoring condensable emissions entirely until 2011.

States face many uncertainties in quantifying and measuring emissions, and yet they still must act in accordance with the deadlines and requirements of the Clean Air Act. EPA can offer no explanation as to why the particular issues surrounding measurement of condensable PM rise to some new level of difficulty that precludes moving forward with the best available information and tools. Even if EPA could waive inclusion of condensables in applicability and compliance determinations, it has offered no rational basis for doing so. As such, the adoption of a transition period is arbitrary and capricious and must be removed from the final rule.

III. Interpollutant Trading

The final rule unlawfully and arbitrarily includes preferred interpollutant trading ratios to facilitate the interpollutant trading of emissions offsets under the NSR program. 73 Fed. Reg. at 28339. The proposed rule suggested that EPA would allow states to implement interpollutant offsets based on air quality modeling showing that such trades would produce an air quality benefit. 70 Fed. Reg. at 66043. However, in the final rule EPA dramatically changed course and announced that states could simply incorporate into their SIPs "preferred interpollutant trading ratios" developed by EPA with no public input. Thus, the rule's treatment of interpollutant offsets was significantly modified after the close of the public comment period in ways that did not reflect logical outgrowths of the proposal. The grounds for our objections therefore arose after the period for public

comment, and the raising of those objections during the public comment period was impracticable. *See* CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core requirements of how stationary sources will comply with the Act's offset provisions – including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making.

A. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Provisions Establishing Preferred Interpollutant Trading Ratios.

EPA unlawfully failed to present for public comment the agency's adoption of preferred interpollutant trading ratios for emissions offsets. Nor did EPA present for public comment the rationale articulated in the final rule for establishing such ratios and for selecting the specific ratios that EPA chose. Under Clean Air Act section 307(d), which EPA has found applicable to this proceeding, EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." CAA § 307(d)(3)(C). The same requirement would apply under the APA. 5 U.S.C. § 553. EPA's adoption of preferred interpollutant trading ratios and the specific ratios selected are not logical outgrowths of the proposal. These aspects of the final rule did not appear in the notice or proposed rulemaking, nor did EPA otherwise present them to the public for comment.[1] Not until the final rule did EPA provide any indication that it was even considering establishing preferred ratios for interpollutant offsets. EPA therefore committed a procedural violation by failing to solicit public comment on this new approach to interpollutant offsets. *See* § 307(d)(9)(D).

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[1] In proposing to allow interpollutant trading, EPA suggested two alternative frameworks under which states could regulate such trades:

> Under one approach, a State would develop its own interprecursor trading rule for inclusion in its SIP, based on a modeling demonstration for a specific nonattainment area. The EPA would review a State interprecursor trading rule during the SIP approval process. Once approved, the State could follow this approach on all future NSR permits issued. Another approach would be to review individual trades as part of the major NSR permitting process. The EPA and the public would have an opportunity to comment on whether the modeling or other technical evidence presented by a particular State is sufficient to support interprecursor offsets for that specific permit application. Under either approach, a State could not allow interprecursor trading without EPA approval.

70 Fed. Reg. at 66043. Each of these alternatives presupposes that the implementation of interpollutant emissions offsets will rely on SIP- or source-specific technical analyses demonstrating the efficacy of such trades. EPA did not even seek comment on the possibility of preferred trading ratios, much less the specific ratios the agency ultimately selected: "The EPA is requesting comment on whether, States should be required to demonstrate the adequacy of offset ratio(s) using modeling as part of a State rule, in demonstrations for specific nonattainment areas, and/or on a permit-by-permit basis, and/or on some other basis. *Id.*

That procedural violation meets the criteria set forth in the Act for reversal based on procedural violations. *Id.* First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). After proposing to allow interpollutant offsets based on SIP or source-specific technical analyses, in the final rule EPA has announced what is essentially a "one-size fits all" approach – developed without any public comment – that completely ignores the real world implications of interpollutant emissions offsets in order to facilitate such trades. Second, via the present petition, petitioners have satisfied the requirements of Clean Air Act section 307(d). *See* § 307(d)(9)(D)(ii). Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* §§ 307(d)(8) and 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some minor aspect of the rules, but rather on an approach that completely undermines the fundamental basis of the emissions offset requirement for new and modified sources in nonattainment areas – that such offsets will prevent additional degradation of air quality. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below – objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decision-making.

B. EPA's Preferred Interpollutant Trading Ratios Are Unlawful and Arbitrary.

1. The Clean Air Act Does Not Permit Interpollutant Offset Trading.

The plain language of the Clean Air Act forbids interpollutant emissions offsets. Section 173(c)(1) of the Act provides:

> The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining *emission reductions of such air pollutant* from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain *such emission reductions* in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.

CAA § 173(c)(1) (emphasis added). In requiring that increases in the emissions of one air pollutant be offset by reductions in the emissions "of such air pollutant," Congress has clearly foreclosed the option of offsetting additional emissions of one pollutant with reductions in emissions of any other pollutant. The Act simply does not permit the level of flexibility that EPA is attempting to inject into this process.

The Act's definition of "air pollutant," which incorporates precursors, § 302(g), does not disturb the plain language of section 173(c)(1), because the Act specifically provides for how precursors are to be treated for purposes of compliance with offset requirements. Thus, subpart 2 of Part D of the Act establishes specific ratios for offsets of VOCs, an ozone precursor, in ozone nonattainment areas. *See*, *e.g.*, § 182(e)(1) (requiring that, in extreme nonattainment areas "the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1," or less under certain conditions). Congress' approach to ozone precursors in the offset provisions of subpart 2 demonstrates that Congress intended for EPA to treat pollutants and their precursors alike, maintaining in each instance the basic requirement that increases in emissions of one pollutant (or precursor) must be offset with reductions in emissions of that same pollutant (or precursor).

Trading at ratios of less than 1-to-1 is further prohibited by section 173(c)(1), which requires that "the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset *by an equal or greater reduction*, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area" (emphasis added). Thus, any offset must assure a total tonnage reduction equal to or greater than the total tonnage of increased emissions of the air pollutant. EPA's preferred ratios violate this mandate by allowing increased emissions of NOx and SO2 to be offset by lesser reductions in PM2.5 emissions. For example, EPA's rule would allow a 200 ton increase in NOx emissions to be offsets by a 1 ton decrease in PM2.5 emissions.

2. EPA's Justification for Its Preferred Interpollutant Trading Ratios is Arbitrary and Capricious.

EPA's preferred trading ratios also suffer from glaring deficiencies and logical gaps that reflect arbitrary and capricious decisionmaking.

In the final rule, EPA conceded that important uncertainties surrounded the extent to which the impacts of direct PM2.5 and PM2.5 precursor emissions vary with distance and time. Yet, rather than recognize that such uncertainty precluded the setting of non-arbitrary "preferred" ratios, EPA took the exact opposite tack. EPA chose to set uniform preferred ratio and allow states to adopt them into SIPs without any additional analysis. 73 Fed. Reg. at 28340. Moreover, EPA inexplicably and irrationally cited as support for its uniform trading ratios the fact that "[t]here is considerable uncertainty about the relationship of precursor and direct PM2.5 emissions to localized ambient PM2.5 concentration both spatially and temporally." *Id.* There is no logic whatsoever to EPA's assertion that by encouraging states to adopt the agency's "one size fits all" approach to interpollutant offsets the agency was "opt[ing] for program flexibility." *Id.*

EPA compounded the arbitrariness of its approach to interpollutant offsets by failing to complete any air quality modeling to ascertain the real world impacts of its preferred ratios. The only analysis of this complex issue contained in the docket is a memo from a member of EPA's Air Quality Modeling Group that summarizes the results

of response surface modeling of interpollutant offsets. Adding an additional level of abstraction to the analysis, EPA's response surface modeling provides only an estimate of the results that EPA's Community Multi-scale Air Quality modeling program would provide – it is a model of a model. This approach is a complete about-face from EPA's position in the proposed rule that interpollutant offsets are only permissible when the air quality benefits have been assured through modeling or source-specific technical analysis.

Even the "meta-modeling" that EPA performed demonstrates the irrationality of a one size fits all approach to interpollutant trading. For example, EPA only established ratios for NOx to primary PM2.5 by eliminating from its analysis entirely "those counties predicted to have an issue with NOx disbenefits." Memorandum from Tyler J. Fox, Air Quality Modeling Group at 13 (July 23, 2007). Given that EPA's own analysis thus demonstrated the infeasibility of uniform trading ratios, it is wholly irrational for EPA to nevertheless allow states to incorporate, without any further analysis, EPA's preferred ratios into their SIPs to govern future emissions offsets, even in areas likely to experience the NOx disbenefits that EPA excluded from its study.

Moreover, the final rule contains an internal inconsistency with regard to the feasibility of implementing interpollutant offsets. EPA announced its preferred ratios for trades between primary PM2.5 and NOx with a caveat that they are based on an assumption that there will also be "a local demonstration that NOx reductions are beneficial in reducing PM2.5 concentrations (*i.e.*, no disbenefits from NOx reductions as noted previously)." 73 Fed. Reg. at 28339. Similarly, EPA's explanation of its preferred ratio for trades between primary PM2.5 and SO2 notes that the agency "recognize[s] there is spatial variability here between urban and regionally located sources of these pollutants that can be addressed through a local demonstration to determine an area-specific relationship, as appropriate." *Id.* However, EPA's approach allows interpollutant trading to occur in the absence of such locally focused analyses. It is impossible to reconcile the prerequisite for a local impact analysis with EPA's decision to allow states to adopt and implement its preferred ratios with no additional analysis.[2]

EPA's preferred ratios are further arbitrary because they are based on modeling of only nine urban areas, when there are nearly 40 PM2.5 nonattainment areas. EPA does not show that that these nine areas are representative, either of all PM2.5 nonattainment areas or of those within the East or West.

Aside from being unsupported by the agency's own analysis, EPA's preferred interpollutant ratios rely on a fundamentally mistaken assumption: reductions in

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[2] In the Response to Comment document for the final rule, EPA asserts that "the existing NA NSR regulations require a demonstration that proposed offsets, in combination with a project's emissions increase, will result in a net air quality benefit, which may require modeling in the case of direct PM emissions. These existing requirements apply to direct PM2.5 emissions offsets as they have in the past to offsets for other indicators of PM." EPA, *Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers in Diameter (PM2.5): Response to Comments*, at 75 (2008). However, this statement leaves unclear whether EPA intends to apply the net air quality benefit demonstration requirement to interpollutant offsets allowed by a SIP.

precursors can offset the impact of additional emissions of primary PM2.5 in the vicinity of the new or modified direct PM2.5 source. On the contrary, because it takes time for precursor emissions to transform into PM2.5, while large sources of direct PM2.5 emissions have their greatest impact in the immediately adjacent area, reductions in PM2.5 precursors would have a much more diffuse impact than reductions in direct PM2.5.[3] For example, EPA's approach will allow direct PM2.5 emissions increases that cause a NAAQS violation at a monitor located near a new or modified source to be offset by reductions in precursors from a source too distant to avoid that NAAQS violation. Moreover, while the Act allows sources to obtain emissions reductions from other nonattainment areas that contribute to nonattainment in the vicinity of the source, § 173(c)(1), coupling this provision with EPA's interpollutant trading regime leads to the highly unrealistic assumption that all sources of PM2.5 precursors contribute equally to downwind PM2.5 concentrations.

In sum, EPA's decision to adopt preferred interpollutant trading ratios for PM2.5 offsets is arbitrary and capricious. The numerous flaws in EPA's treatment of this issue require that the agency's preferred ratios be eliminated from the final rule.

IV. Petition for Stay

Petitioners further request that EPA stay those portions of the final rule (including the preamble) that: a) allow applicants for PSD permits to avoid demonstrating that their emissions will not cause or contribute to a violation of the PM2.5 NAAQS, and allowing them instead to merely show compliance with the PM10 NAAQS; b) allow sources that applied for PSD permits prior to the effective date of the rule to be permitted under EPA's 1997 PM10 surrogate policy rather than demonstrating compliance with the PM2.5 NAAQS; and c) allow the exclusion of condensables from NSR/PSD applicability and compliance determinations. A stay in these provisions is warranted to prevent irreparable harm to the members of the public (including petitioners' members) from the construction and operation of major sources of PM2.5 pollution without the safeguards mandated by Congress in the Act. That harm is presented not only from threatened exposure to increased levels of dangerous PM2.5 pollution, but also from implementation of rules and policies on which petitioners and their members had no opportunity to comment.

The provisions that petitioners seek to stay would allow numerous major sources to be permitted without any showing that such sources will not cause or contribute to PM2.5 NAAQS violations in areas where petitioners' members live, work and recreate. *See* EPA's Advanced Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions under the Clean Air Act" at 479 (noting that EPA, state and local permitting authorities issue approximately 200 to 300 PSD permits nationally every year) (available at http://www.epa.gov/climatechange/emissions/downloads/ANPRPreamble5.pdf). The condensable exclusions will also allow substantial PM2.5 emissions to go unregulated,

[3] *See also* Robert E. Yuhnke, et al., Comments on Proposed Interim Motor Vehicle Emissions Budgets for South Coast Air Basin, at § II.A (discussing elevated PM2.5 concentrations in near-source environment) (Attached).

threatening exposure of petitioners' members to much higher PM2.5 emissions than allowed by the Act. As documented in EPA's most recent review of the PM NAAQS, PM2.5 pollution is linked to tens of thousands of premature deaths annually, and is a major contributor to visibility impairment in many parts of the nation. EPA has repeatedly found that the PM10 NAAQS do not adequately protect against these effects, and (as documented above) that PM10 is not an accurate surrogate for fine particles or their adverse health and welfare impacts.

The threat to petitioners' members and the public is compounded by the fact that sources permitted under these illegal policies will likely emit PM2.5 pollution long after EPA's "transition" period ends. A new coal-fired power plant typically remains in operation for at least 30 years. *See, e.g.*, National Energy Technology Laboratory, U.S. Department of Energy, *Cost and Performance Baseline for Fossil Energy Plants* at 51 (2007) (available at http://www.netl.doe.gov/energy-analyses/pubs/Bituminous%20Baseline_Final%20Report.pdf. Dozens of such plants are currently seeking permits, and some have submitted applications already found complete. *See* http://www.sierraclub.org/environmentallaw/coal/plantlist.asp. Petitioners' members and many others will be exposed to emissions from these plants for decades. There is accordingly an urgent need to ensure that emission limits adequate to protect the NAAQS are imposed *before* these plants are built, and that those limits address all components of PM2.5 – not just a fraction.

In contrast to the irreparable harm faced by petitioners' members and the public, there is no comparable harm to the regulated sources. Those sources have know for more than a decade that compliance with the PM2.5 NAAQS would be required, and EPA's notice of proposed rulemaking specifically required compliance with that NAAQS.

For all the foregoing reasons, petitioners ask EPA to stay the above-referenced provisions of the final rule. We further ask that EPA respond to this stay request within 30 days of the date of this petition.

DATED: July 15, 2008

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affect the dignity and solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible, or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant's requested alternative is also unacceptable, or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

(3) If the Under Secretary determines that the request should be denied and that decision is based wholly or partly on information received from a source other than the applicant, then the following procedure will be followed:

(i) A tentative decision denying the request will be prepared;

(ii) Written notice of the tentative decision accompanied by a copy of any information on which the Under Secretary intends to rely will be provided to the applicant;

(iii) The applicant will have 60 days from the date of the written notice specified in subparagraph (ii) to present evidence and/or argument challenging the evidence and/or tentative decision; and

(iv) The Under Secretary will consider the applicant's submission under subparagraph (iii) and will issue a final decision on the request.

(4) The Director, Office of Field Programs, will provide the individual who made the request written notice of the Under Secretary's decision.

Authority: (38 U.S.C. 501, 2404).

[FR Doc. E9–12650 Filed 5–29–09; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2003–0062; FRL–8910–6]

RIN 2060–AN86

Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of grant of reconsideration and administrative stay of regulation.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is providing notice that through a letter signed on April 24, 2009, EPA has granted a petition for reconsideration dated February 10, 2009, submitted by Earthjustice on behalf of the National Resources Defense Council (NRDC) and the Sierra Club, with respect to the final rule titled, ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' published on May 16, 2008. In addition, EPA has administratively stayed one of the provisions to which the petitioners objected—a ''grandfathering'' provision for $PM_{2.5}$ contained in the federal prevention of significant deterioration (PSD) program. The EPA will publish notification in the **Federal Register** establishing a comment period and opportunity for a public hearing for the reconsideration proceeding.

The petition for reconsideration and request for administrative stay can be found in the docket for the May 16, 2008 rule. The EPA considered the petition for reconsideration and request for stay, along with information contained in the rulemaking docket, in reaching a decision on both the reconsideration and the stay.

DATES: Effective June 1, 2009, 40 CFR 52.21(i)(1)(xi) is stayed for a period of three months, until September 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Dan deRoeck, Air Quality Policy Division, (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5593; or e-mail address: *deroeck.dan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. How Can I Get Copies of This Document and Other Related Information?

This **Federal Register** notice, the petition for reconsideration and the letter granting reconsideration and an administrative stay of the grandfathering provision under the federal PSD program at 40 CFR 52.21(i)(1)(xi) are available in the docket that EPA has established for the final rule titled ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' published on May 16, 2008 at 73 FR 28321, under Docket ID No. EPA–HQ–OAR–2003–0062. The table below identifies the petitioner, the date EPA received the petition, the document identification number for the petition, the date of EPA's response, and the document identification number for EPA's response.

Petitioner	Date of petition to EPA	Petition: Document No. in docket	Date of EPA response	EPA response: Document No. in docket
National Resources Defense Council/Sierra Club	2/10/2009	0281	4/24/2009	0282

Note that all document numbers listed in the table are in the form of ''EPA–HQ–OAR–2003–0062–xxxx.''

All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, i.e., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Docket ID No. EPA–HQ–OAR–2003–0062, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

In addition to being available in the docket, an electronic copy of this **Federal Register** notice and EPA's response letter to the petitioners are also available on the World Wide Web at *http://www.epa.gov/nsr.*

II. Judicial Review

Under Clean Air Act section 307(b), judicial review of the Agency's decision concerning the stay is available only by

filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before July 31, 2009.

Dated: May 22, 2009.

Lisa P. Jackson,

Administrator.

■ For reasons discussed in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—[AMENDED]

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

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

§ 52.21 [Amended]

■ 2. Effective June 1, 2009, in § 52.21, paragraph (i)(1)(xi) is administratively stayed until September 1, 2009.

[FR Doc. E9–12572 Filed 5–29–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2008–0797–200824(a); FRL–8911–5]

Approval and Promulgation of Air Quality Implementation Plans: South Carolina; Approval of Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for Cherokee County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the South Carolina State Implementation Plan (SIP) concerning the maintenance plan addressing the 1997 8-hour ozone standard for Cherokee County, South Carolina. This maintenance plan was submitted for EPA action on December 13, 2007, by the State of South Carolina, and ensures the continued attainment of the 1997 8-hour ozone national ambient air quality standard (NAAQS) through the year 2014. EPA is approving the SIP revision pursuant to section 110 of the Clean Air Act (CAA). The maintenance plan meets all the statutory and regulatory requirements, and is consistent with EPA's guidance. On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 8-hour ozone standard. Requirements for the Cherokee County Area under the 2008 8-hour ozone standard will be addressed in the future.

DATES: This rule is effective on July 31, 2009 without further notice, unless EPA receives relevant adverse comment by July 1, 2009. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2008–0797, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2008–0797,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. ''EPA–R04–OAR–2008–0797.'' EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Zuri Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Analysis of the State's Submittals
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

In accordance with the CAA, the Cherokee County Area in South Carolina was designated as a nonattainment area effective November 6, 1991 (56 FR 56694) because the area did not meet the 1-hour ozone NAAQS.

On December 15, 1992, the State of South Carolina submitted a request to redesignate the Cherokee County Area

-------- Original Message --------
Subject: RE: Avenal Energy Project
From: rob@redwoodrob.com
Date: Mon, June 22, 2009 4:24 pm
To: Rivera.Shirley@epamail.epa.gov
Cc: "Bradley Angel" <bradley@greenaction.org>

Hi Shirley,

I want to incorporate comments from another PSD permit comments into my Avenal Comments. How would I best do this? Can I just reference it for administrative notice or should I incorporate referenced material in its entirety?

I am still trying to understand the CEC- EPA relationship. Do you incorporate the CEC record into yours or vica versa? I would like to request that you incorporate each others records. Those who are participating in the concurrent CEC action considering affects to air quality are not yet notified of your action. Members of the public who express an interest in the CEC Air Quality considerations might certainly be interested in this PSD permit. I ask that you extend your comment period until 60 days after the CEC verifies that it has incorporated PSD permit noticing into its proceeding and provided notice to all interested members of the public or provides all mailing lists associated with this proceeding to you to provide notice of your proceeding.

The CEC has commenced the outreach for this project:

NOTICE OF PUBLIC SITE VISIT AND INFORMATIONAL HEARING Dated May 1, 2008
"..The Energy Commission has exclusive jurisdiction to license this project and is considering the proposal under a twelve-month review process established by Public Resources Code section 25540.6...
The power plant licensing process, which incorporates requirements equivalent to the California Environmental Quality Act, considers all relevant engineering and environmental aspects of the proposed project. It provides a public forum allowing the Applicant, Commission staff, governmental agencies, adjacent landowners, and members of the general public to consider the advantages and disadvantages of the project, and to propose changes, mitigation measures, and alternatives as necessary."

The CEC Having held themselves as having "exclusive jurisdiction" has undermined your ability to draw interest in the PSD action. They are effectively misleading the public by drawing all public attention to themselves while the Air District completed its considerations in complete obscurity. You now can not complete your responsibility without reeducating the public as to the Jurisdictional authority of the United States Environmental Protection Agency and incorporating records including mailing lists. This is exactly the scenario that is described in the Russell City Remand.

thanks

Rob

> -------- Original Message --------
> Subject: Avenal Energy Project

From: rob@redwoodrob.com
Date: Sat, June 20, 2009 12:15 am
To: Rivera.Shirley@epamail.epa.gov

Hi Shirley,

I want to make sure that you are aware of the Workshop scheduled by the CEC for The Avenal project and confirm that the EPA will be represented at the meeting to receive public comments.

I am also trying to understand the top down BACT analysis. Is it in the SOB?

Thank you

Rob

NOTICE OF PUBLIC WORKSHOP
Tuesday, June 23, 2009
2:00pm-7:00pm
There will be an initial meeting from 2:00-5:30 p.m. followed by a summary meeting of the same contents from 5:30-7:00p.m. to facilitate public participation after work hours

-------- Original Message --------
Subject: Re: Avenal Energy Project EPA complaint (SJ 08-01)
From: Rivera.Shirley@epamail.epa.gov
Date: Thu, June 18, 2009 4:50 pm
To: rob@redwoodrob.com
Cc: dave.warner@valleyair.org, dpettit@nrdc.org, Rios.Gerardo@epamail.epa.gov, "ingrid " <ibrostrom@gmail.com>, "Michael Boyd" <michaelboyd@sbcglobal.net>, Sarveybob@aol.com, seyed.sadredin@valleyair.org

Mr. Simpson,

This is to confirm my receipt of your email. At this time, we are internally discussing the information you have raised. Thank you for your time and consideration.

Best regards,

- Shirley

Shirley F. Rivera
T: (415) 972-3966 | F: (415) 947-3579 | Rivera.Shirley@epa.gov
U.S. EPA, Region 9, Air Permits Office (AIR-3) | 75 Hawthorne St., San Francisco, CA 94105

From: rob@redwoodrob.com

To: Shirley Rivera/R9/USEPA/US@EPA, "ingrid " <ibrostrom@gmail.com>, "Michael Boyd" <michaelboyd@sbcglobal.net>, Sarveybc

Cc: dave.warner@valleyair.org, seyed.sadredin@valleyair.org, Gerardo Rios/R9/USEPA/US@EPA, dpettit@nrdc.org

Date: 06/04/2009 12:44 PM

Subject: Avenal Energy Project EPA complaint (SJ 08-01)

Hi Shirley,

Thanks for the response. I am hereby filing this complaint with you regarding the San Joaquin Valley Air Pollution Control District Avenal power plant plan. I request that the EPA revoke the Districts permitting authority if they continue to refuse to comply with the Clean Air Act in the Avenal power plant plan and others. I also request that you do not rely on The PDOC or FDOC in PSD permit considerations as they are not valid documents vetted in informed public participation. Also Attached is a Remand that I earned form the Environmental Appeals Board of the EPA for a very similar notice violation. Based upon the Remand and my repeated discovery of air districts ignoring informed public participation laws ie. Humboldt, Gateway, Russell City, Avenal etc. I also request that you investigate the Public participation activities of air districts in the Region. If there is a more appropriate venue for this complaint and requests please inform me.

In addition to the District rules 2201

5.9.1 New Sources and Significant Permit Modifications
5.9.1.1 Public Notification: The APCO shall provide a written notice of the proposed permit and, upon request, copies of the APCO analysis to interested parties. Interested parties shall include affected states, ARB and persons who have requested in writing to be notified. The notice shall also be given by publication in a newspaper of general circulation in the District and by any other means if necessary to assure adequate notice to the affected public. The public shall be given 30 days from the date of publication to submit written comments on the APCO's proposed action.
5.9.1.2 The notice shall provide the following information:
5.9.1.2.1 The identification of the source, the name and address of the permit holder, the activities and emissions change involved in the permit action;
5.9.1.2.2 The name and address of the APCO, the name and telephone number of District staff to contact for additional information;

5.9.1.2.3 The availability, upon request, of a statement that sets forth the legal and factual basis for the proposed permit conditions;
5.9.1.2.4 The location where the public may inspect the Complete Application, the APCO's analysis, the proposed permit, and all relevant supporting materials;
5.9.1.2.5 A statement that the public may submit written comments regarding the proposed decision within at least 30 days from the date of publication and a brief description of commenting procedures, and
5.9.1.2.6 A statement that members of the public may request the APCO or his designee to preside over a public hearing for the purpose of receiving oral public comment, if a hearing has not already been scheduled. The APCO shall provide notice of any public hearing scheduled to address the proposed decision at least 30 days prior to such hearing;

The notices provided did not conform with the Federal rules as set forth in the attached request made to the District. Below is their response:

Dear Mr. Simpson,

In response to your letter via email on April 28, our regulations require that we follow specific noticing requirements (in Rule 2201.5.5) when certain notice-triggering thresholds are exceeded (see Rule 2201.5.4, and 5.8.6 for power plants), and we followed those requirements for the Avenal Power Center project.

Specifically to your comments about our process:

- Contrary to your comment, the notice is not required to identify the potential source as "major" or as having a potential to emit over 100 pounds per day. Rather, these are notice-triggering thresholds, and because these thresholds were exceeded we provided the appropriate notice, following the provisions of Rule 2201.5.5.

- Many of your comments relate to 40 CFR part 124. Our investigations reveal this to be federal law pertaining to water quality permits under the National Pollutant Discharge Elimination System (NPDES) program. We are not charged with enforcing this program and are not intending to issue a NPDES permit. Therefore those noticing requirements have no bearing on the District actions in this case.

- Your final comment relates to 40 CFR part 51.161. This section of federal law contains requirements for the states (and air districts) as they implement the federal clean air act. In fact, our noticing requirements contained in Rule 2201 do comply with 40 CFR part 51.161, and so compliance with Rule 2201's noticing requirements, as discussed above, assures that we are acting in compliance with federal law. Specifically to your comment however: you imply that, according to part 51.161, the notice must contain the district's "analysis of the effect of construction or modification on

ambient air quality". However, that is not correct. Part 51.161 actually requires that the information made available to the public include the district's "analysis of the effect of construction or modification on ambient air quality". It is exactly this public information that our preliminary public notice references. I understand provided a copy of that analysis to you. As you've seen, that analysis is many pages long and can not be reasonably expected to be, nor is it required to be, a part of the public notice that gets printed in a newspaper.

In conclusion, the public comment process was proper and the public comment period for our process has expired. The District has no authority to reopen the commenting period as you have requested.

However, it is important to note that under state law the California Energy Commission is the state's sole licensing authority for power plants over 50 megawatts. In fact, the Determination of Compliance (DOC) process to which you refer is an informational process that provides the CEC with pertinent information about the District's regulations. The DOC that we issue does not convey authority to Avenal Power Center to begin construction. The CEC will use the information presented in the final DOC to determine compliance with our District's rules and regulations, as a part of their licensing process. If you are interested in participating in the Avenal Power Center's licensing process, we suggest that you contact the CEC.

Dave Warner
Director of Permit Services
San Joaquin Valley Air Pollution Control District

Sincerely,

Rob Simpson
27126 Grandview Avenue
Hayward CA. 94542
510-909-1800
Rob@redwoodrob.com

-------- Original Message --------
Subject: Avenal Energy Project (SJ 08-01)
From: Rivera.Shirley@epamail.epa.gov
Date: Wed, June 03, 2009 5:21 pm
To: rob@redwoodrob.com
Cc: Rios.Gerardo@epamail.epa.gov

Mr. Simpson (510-909-1800),

Thank you for your patience in receipt of this summary.

As mentioned, the following is my understanding of the information you expressed (regarding the Avenal Energy Project) in your call to me this afternoon. If there are corrections or clarifications you would like to make to this information, please "reply all" so that my manager, Mr. Gerardo Rios (415-972-3974), also has the benefit of receiving that information.

a) Process to file a complaint with EPA: You have a question - What is the process to file a complaint with the EPA? (You would like to file a complaint that addresses your issues of concern. See below.)

b) Issues of concern: The concern you expressed is that the San Joaquin Valley Unified APCD, for the issuance of its PDOC, did not properly follow what you understand to be the requirements for public notification of the Clean Air Act requirements (e.g., 40 CFR Part 51.166?). By not doing so, you noted that this did not provide for informed public participation. Furthermore, you also are concerned that the FDOC was not issued in a manner that makes it a valid document; therefore, the PSD process should not rely on the FDOC for information.

c) Contact with San Joaquin Valley APCD - You have already contacted the APCD, and they are not going to reopen the DOC process.

And as noted, we will add your name and email address to our notification list for PSD permits.

Best regards,

- Shirley

Shirley F. Rivera
T: (415) 972-3966 | F: (415) 947-3579 | Rivera.Shirley@epa.gov
U.S. EPA, Region 9, Air Permits Office (AIR-3) | 75 Hawthorne St., San Francisco, CA 94105 [attachment "AvenalNoticeInformal.pdf" deleted by Shirley Rivera/R9/USEPA/US] [attachment "Remand...50.pdf" deleted by Shirley Rivera/R9/USEPA/US]