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Sent: Thursday, September 15, 2011 2:33 PM
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Subject: Agency exemptive authority

Thanks once again for an excellent meeting on August 30th. We found it very helpful and constructive. Our action item was to get back to you with authority for your ability to exempt ERISA plans from some or all of the business conduct standards that were intended to protect plans.

The following cases illustrate that agencies have the inherent power to create exemptions where application of a requirement would not serve the purpose of the requirement. We believe these cases support the proposition that the CFTC/SEC have inherent power to exempt swap dealers (when they act as swap counterparties to certain special entities) from the requirement that SDs must have a reasonable basis to believe the SE has a "qualified representative." An exemption would be in order because applying this requirement would hurt, not protect, many special entities, including ERISA plans. ERISA plans are represented by fiduciaries that by law must be: (1) prudent experts and (2) independent of the SDs under ERISA. In effect, the CFTC and SEC have adequate authority to adopt a waiver or safe harbor that would allow an ERISA plan to say to its swap dealer counterparty -- "We have told you we are represented by an ERISA-regulated fiduciary and you have no need to learn, we have no need to tell, and you have no need to ask, for any more information."

In addition to the summaries provided below, we have attached copies of the cases for your reference. Note that we included the *Alabama Power* case, although it was decided against the agency, because it contains some instructive language on inherent exemptive authority (see bolded language) that has been cited by subsequent cases and its facts are distinguishable from our situation.

***State of Ohio v. EPA*,997 F.2d 1520 (D.C. Cir. 1993)**

Facts: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires periodic review of Superfund sites at which "any hazardous substances" remain. EPA promulgated regulation requiring periodic review only of sites where hazardous substances remained at levels presenting some possibility of harm, thus exempting the sites at which de minimis amounts of hazardous substances remained. States challenged EPA's de minimis exemptions as being contrary to statute.

Holding: EPA's exemption was valid.

Rationale/key quotes: Court found that Congress had not set out its requirement for periodic review in rigid terms -- the statute's reference to "any hazardous substances" could easily be referring to "even one" hazardous substance as opposed to "any amount of any hazardous substance." Even if States were correct that statute's reference to "any hazardous substances" was unambiguous, **"the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results, or where failure to allow a de minimis exemption is**

contrary to the primary legislative goal." States' literal reading would lead to such absurd or futile results: every Superfund site would be subject to five-year review because EPA cannot detect whether "true" zero has been obtained with respect to a particular hazardous substance. EPA's regulation, on the other hand, avoided this "mammoth monitoring burden" while serving the "health-protective purpose of the statute." Court concluded that to endorse the States' reading over the EPA's would be "to adjudge Congress incompetent to fashion a rational legislative design."

***Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996)**

Facts: Clean Air Act (CAA) prohibits any department, agency, or instrumentality of the federal government from engaging in "any activity" not in conformity with a state implementation plan (SIP) providing for the implementation, maintenance, and enforcement of national ambient air quality standards. CAA also directs the EPA to "promulgate criteria and procedures for determining conformity" under the statute. EPA promulgated regulations that required only "major" federal government activities to conform with SIPs, thereby exempting certain categories of government activities that produced trivial or no emissions increases. Environmentalist associations contended that EPA's de minimis exemptions were in conflict with the statutory conformity requirement for "any" federal government activity. EPA argued that statute could be read to require conformity of "any activity" that is likely to interfere with the attainment goals in a SIP -- i.e. major federal actions producing significant levels of emissions.

Holding: EPA's exemption was valid.

Rationale/key quotes: Court explained that it did not think that "Congress had taken a position so rigid that it will not admit of a de minimis exemption." EPA's interpretation of the "any activity" language as applying only to major federal activities (i.e. activities that could threaten a state's attainment goals in its SIP) was reasonable. The de minimis categories of federal action exempted by the EPA, by definition, could not threaten a state's attainment of goals in its SIP.

***Brodsky v. U.S. Nuclear Regulatory Com'n*, 2011 WL 797497 (S.D.N.Y March 4, 2011)**

Facts: Atomic Energy Act requires United States Nuclear Regulatory Commission (NRC) to establish rules and regulations governing the operation of nuclear power plants. The statute does not prescribe how the NRC is to fashion such rules, but rather reposes broad discretion in the agency. NRC promulgated regulations creating a fire protection program and allowing for exemptions from the program upon application of an interested party or the NRC's own initiative. Exemptions would be granted where "the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security," and where "special circumstances" are present -- for example, where application of the program's requirements would not serve the underlying purpose of the program or is not necessary to achieve the underlying purpose of the program. Pursuant to its regulations, NRC granted an exemption to the owner of a nuclear power plant from a fire protection program requirement that electrical cables be able to withstand fire for at least one hour. Citizens' group alleged that NRC lacked authority to create or issue exemptions to the NRC's fire protection program because the statute does not expressly authorize exemptions. NRC argued that legislative mandate to promulgate rules governing nuclear power plants also conferred authority

to grant exemptions to the rules promulgated.

Holding: NRC's decision to issue exemption for nuclear power plant was valid.

Rationale/key quotes: Court distinguished case from *Alabama Power* (summarized below). Whereas EPA in *Alabama Power* had created a blanket exemption that was contrary to the express language in its governing statute, NRC had created a case-specific exemption from regulations that Congress had authorized it to promulgate. Court concluded that "the argument that the NRC is authorized to promulgate rules but does not have the ability to modify those rules on a case by case determination defies common sense. **The NRC's authority to establish rules and regulations must go hand in hand with the agency's ability to grant exemptions on a case by case basis to those very same rules."**

***Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)**

Facts: Clean Air Act provides for exemption from air quality review for source modifications or expansions emitting less than 50 tons of air pollutants per year. Environmental Protection Agency (EPA) promulgated regulation that exempted new sources as well as modifications from best-available-control-technology review in addition to air quality review. Petitioners (Sierra Club and Environmental Defense Fund) contended that the statute did not allow for an Administratively-created exemption, and that even if statutorily permissible, the action was arbitrary and capricious. EPA characterized its exemption as an "expansion" of the statutory exemption that was justified because application to such sources of the full review and permit process would not be cost-effective and would strain the agency's resources to the limits.

Holding: EPA's exemption was invalid.

Rationale/key quotes: D.C. Circuit recognizes that "[u]nless Congress has been extraordinarily rigid, there is likely a basis for an implication of a de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." EPA could not assert implicit de minimis authority to create a categorical exemption precisely because "Congress ha[d] been extraordinarily rigid" through setting forth a narrow statutory exemption; EPA's categorical exemption was contrary to the "explicit statutory design." Moreover, EPA had not shown that the burdens of regulation would yield a gain of trivial or no value. Because the conditions for exercising inherent de minimis exemptive authority were not met, EPA could not create a categorical exemption.

In explaining its holding, Court also said: **"We noted at the outset that we are not concerned here with the 'equitable' discretion of agencies to afford case-by-case treatment taking into account circumstances peculiar to individual parties in the application of a general rule to particular cases, or even in appropriate cases to grant dispensation from the rule's operation. The need for such flexibility in appropriate cases is generally recognized, and enhances the effective operation of the administrative process**, though Congress may, of course, restrain the agency by mandating standards from which no variance is permitted. In this case, however, we are presented with an attempt by an agency to promulgate a blanket exemption from statutory requirements."

Conclusion

In the case of ERISA plans, we believe that we fit squarely within the reasoning of the courts in *Alabama Power* and *Brodsky*. First, Congress was not "extraordinarily rigid" with respect to the business conduct standards. Where Congress explicitly delegates rulemaking to an agency instead of setting forth a clear self-executing rule, it is impossible to say that Congress has been "extraordinarily rigid." On the contrary, as in *Brodsky*, the explicit delegation of rulemaking authority logically confers exemptive authority. Second, we are not asking for a "blanket exemption." On the contrary, we are only asking for an exemption where another set of laws ensures that the purpose of the statute is completely fulfilled. Third, not only would application of the counterparty rule to ERISA plans yield no benefit (since ERISA provides comprehensive protections for plans), such application would actually harm plans in a material way.

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Westlaw Delivery Summary Report for GAGOOMAL,PRASHIN

Date/Time of Request:	Friday, September 2, 2011 19:34 Central
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997 F.2d 1520, 36 ERC 2065, 302 U.S.App.D.C. 318, 62 USLW 2063, 23 Envtl. L. Rep. 21,157
(Cite as: 997 F.2d 1520, 302 U.S.App.D.C. 318)

United States Court of Appeals,
District of Columbia Circuit.
STATE OF OHIO, et al., Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.

Nos. 86-1096, 86-1116, 86-1117, 86-1119, 86-1120 to 86-1123, 90-1276, 90-1277, 90-1280, 90-1285, 90-1286, 90-1288, 90-1289, 90-1293 to 90-1295, 90-1297, 90-1439, 90-1444, 90-1449, 90-1451 and 90-1453.
Argued Feb. 3, 1993.
Decided July 20, 1993.

States brought action against Environmental Protection Agency (EPA), challenging EPA regulations promulgated under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and contained in National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP). The Court of Appeals held that: (1) NCP established proper cost-benefit analysis in remedy selection process; (2) NCP cancer risk range is adequate to protect human health and the environment; (3) NCP established proper federal/state cost sharing requirements; but (4) EPA failed to provide reasoned basis for its departure from past policy in amending NCP to expressly exclude states from exercising enforcement and remedy-selection authority under CERCLA.

Ordered accordingly.

Randolph, Circuit Judge, filed concurring opinion.

West Headnotes

[1] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) definition of legally "applicable" or "relevant and appropriate" environmental standards (ARARs) as "substantive" was reasonable and permissible construction of CERCLA; Environmental Protection Agency (EPA) reasonably interpreted CERCLA's reference to "a level or standard of control" to be directed at those environmental laws governing level or degree of cleanup required to remedy various types of toxic contamination. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(d)(2)(A), as amended, 42 U.S.C.A. § 9621(d)(2)(A).

[2] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) construction of statutory term "promulgated" was not inconsistent with Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); CERCLA requires that state standards be "promulgated * * * under a State environmental or facility siting law" to be considered as possible applicable or relevant and appropriate requirements, and NCP interprets "promulgated" to mean "standards [that] are of general applicability and are legally enforceable." Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(d)(2)(A)(ii), as amended, 42 U.S.C.A. § 9621(d)(2)(A)(ii).

[3] Statutes 361 219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases

Where congressional intent on precise question at issue is unclear, it is enough that agency's construction of statute is reasonable.

[4] Environmental Law 149E 666

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek666 k. Preservation of Error in Administrative Proceeding. Most Cited Cases
(Formerly 199k25.15(3.1) Health and Environment)

Court of Appeals would not reach merits of argument whether National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) improperly restricted meaning of federal applicable or relevant and appropriate requirements to those "promulgated" under federal environmental laws, where plaintiff states waived claim by failing to raise it during rule-making proceedings before Environmental Protection Agency (EPA).

[5] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) did not improperly fail to apply zero-level maximum containment level goals (MCLGs), established under Safe Drinking Water Act, as applicable or relevant and appropriate requirements (ARARs); Environmental Pollution Agency (EPA) has discretion to determine when MCLGs and ARARs are relevant and appropriate. Public Health Service Act, §§ 1401-1465, 1412(b)(4, 5), as amended, 42 U.S.C.A. §§ 300f to 300j-25, 300g-1(b)(4, 5); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(d)(2)(A), as amended, 42 U.S.C.A. § 9621(d)(2)(A).

[6] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) established proper cost-benefit analysis in remedy selection process. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(d)(1), as amended, 42 U.S.C.A. § 9621(d)(1).

[7] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) places reasonable emphasis on selection of permanent remedies as required by Comprehensive Environmental Response, Compensation, Liability Act (CERCLA); statutory language places as much emphasis on selection of cost-effective remedies as it does on selection of permanent remedies. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(b)(1), as amended, 42 U.S.C.A. § 9621(b)(1).

[8] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Ac-

tions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) cancer risk range does not improperly fail to protect human health and environment without regard to cost; although cost cannot be used to justify selection of remedy that is not protective of human health and environment, it can be considered in selecting from options that are adequately protective. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(b)(1), as amended, 42 U.S.C.A. § 9621(b)(1).

[9] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

Environmental Protection Agency (EPA) properly interpreted Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requirement of five-year review of certain remedial actions as requiring review only where hazardous substance is present in amount appreciable enough to present some possibility of harm; such interpretation squares with health-protective purpose of statute, and to go beyond that is to adjudge Congress incompetent to fashion rational legislative design. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(c), as amended, 42 U.S.C.A. § 9621(c).

[10] Environmental Law 149E 645

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek645 k. Hazardous Waste and Materials. Most Cited Cases
(Formerly 199k25.15(3.2) Health and Environment)

Issue whether National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) remedy selection guidance concerning use of engineering and institutional controls violate Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA's) remedy selection requirements was unfit for judicial decision because state's argument was premised on hypothetical application of nonbinding statement in NCP. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101-405, as amended, 42 U.S.C.A. §§ 9601-9675.

[11] Environmental Law 149E 645

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek645 k. Hazardous Waste and Materials. Most Cited Cases
(Formerly 199k25.15(3.2) Health and Environment)

Court of Appeals would not consider claims concerning National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) provisions concerning ground water restoration strategies and approaches because claims were premised on hypothetical applications of nonbinding statements in NCP; claims should be addressed in site-specific challenges in which reviewing court could consider agency's practical application of its statements.

[12] Environmental Law 149E 662

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek662 k. Ripeness. Most Cited Cases
(Formerly 199k25.15(3.2) Health and Environment)

Issue whether National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) improperly failed to apply federal water quality criteria as applicable or relevant and appropriate requirements was not ripe for review because NCP preamble merely set out general view that may or may not be followed in particular cases; claims should be disposed of in site-specific challenge

in which reviewing court could consider specific application of challenged language.

[13] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

Environmental Law 149E 454

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek450 Administrative Agencies and Proceedings
149Ek454 k. Hearing and Determination. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

Environmental Protection Agency (EPA) failed to provide reasoned basis for its departure from past policy in amending National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) to expressly exclude states from exercising enforcement and remedy-selection authority under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); although CERCLA did not require grant of authority whenever it was sought by a state, prior versions of NCP provided that EPA could enter into agreements allowing states to exercise most of available statutory authority. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101-405, as amended, 42 U.S.C.A. §§ 9601-9675.

[14] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP), which requires states to fund 100% of maintenance of fund-financed remedy, properly established federal/state cost sharing requirements pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(c)(3), as amended, 42 U.S.C.A. § 9604(c)(3).

[15] Environmental Law 149E 446

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek446 k. Covered Costs; Damages. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

For purposes of determining costs related to remedial treatment of waste water under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) reasonably construed "necessary to restore" language of CERCLA as contemplating only those measures that actively clean up ground and surface water, although plaintiff states contended that CERCLA required Environmental Protection Agency (EPA) to operate entire water quality restoration remedy, including elements that may also function as source control measures. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(c)(6), as amended, 42 U.S.C.A. § 9604(c)(6).

[16] Environmental Law 149E 660

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek660 k. Prematurity. Most Cited Cases
(Formerly 199k25.15(5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan's (National Contingency Plan's or NCP's) definition of when remedy becomes operational and functional, for purposes of determining state's responsibility for operations and maintenance costs, is merely rebuttable presumption that remedies are operational and functional one year after completion and, thus, plaintiff states' challenge to such definition was premature; if Environmental Protection

Agency (EPA) refuses to grant extension at end of one year, that decision would be subject to challenge.

[17] Environmental Law 149E 453

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek450 Administrative Agencies and Proceedings
149Ek453 k. Notice and Comment. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

Environmental Protection Agency (EPA) provided reasonable notice that assurances for institutional controls might be required of states where such controls were part of long-term response to a release, where EPA's proposed rule required states to provide assurances that they would assume responsibility for operation and maintenance of implemented remedial actions and, in that same proposed rule, EPA made it clear that it regarded institutional controls as integral part of many remedial actions.

[18] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) requirement that states provide assurances that institutional controls (e.g., zoning restrictions) to receive federal funding for hazardous waste clean ups was not arbitrary and capricious; to extent that institutional controls are necessary component of fund-financed remedial action, it is entirely appropriate for Environmental Protection Agency (EPA) to require assurance of integrity of such controls prior to spending federal funds on a cleanup. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101(24), 104(c)(3), as amended, 42 U.S.C.A. §§ 9601(24), 9604(c)(3).

[19] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substance Pollution Contingency Plan's (National Contingency Plan's or NCP's) site access provisions are not arbitrary and capricious; NCP expressly does not condition fund financing on state assurance of site access but merely articulates Environmental Protection Agency's (EPA's) preference for state acquisition of site access, and does not constitute additional state "assurance," not authorized by Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), upon which federal funding is conditioned. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 104(c)(3), as amended, 42 U.S.C.A. § 9604(c)(3).

[20] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

Environmental Law 149E 453

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek450 Administrative Agencies and Proceedings
149Ek453 k. Notice and Comment. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) allows states reasonable opportunity to review and comment upon Environmental Pollution Agency (EPA) technical documents; potential conflicts between states and EPA should become apparent during process of remedy selection and implementation and, if not explicitly identified by EPA, be anticipated by states. Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, § 121(f)(1), as amended, 42 U.S.C.A. § 9621(f)(1).

[21] Environmental Law 149E 439

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek439 k. Remedial and Removal Actions in General; Cleanup Plans. Most Cited Cases
(Formerly 199k25.5(5.5) Health and Environment)

National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) properly defined "on site" for purposes of exemption from obtaining permits for remedial actions; NCP definition allows Environmental Protection Agency (EPA) to respond to releases expeditiously and efficaciously and reflects practical aspects of responding to hazardous waste releases under various conditions. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 121(e)(1), as amended, 42 U.S.C.A. § 9621(e)(1).

[22] Environmental Law 149E 666

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek666 k. Preservation of Error in Administrative Proceeding. Most Cited Cases
(Formerly 199k25.15(3.1) Health and Environment)

Issue whether preamble to National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) in which Environmental Protection Agency (EPA) proposed to treat noncontiguous but reasonably related facilities as single "site" would not be reviewed on appeal; issue was not properly raised before EPA, and minimal reference to contiguity issue in public comment was so tangential to principal thrust of comment that it could not fairly be said to have been presented to EPA for resolution.

***1523 **321** Petitions for Review of Orders of the Environmental Protection Agency.Donald A. Brown, Victoria L. Peters, and Alan C. Williams argued the cause, for petitioners Com. of PA, Dept. of Environmental Resources, California, Colorado, Com. of KY, New Jersey, New Mexico Environment Dept., New York, and Ohio, and intervenor State of Minn. With them on the briefs were Beverly M. Conerton, Roderick E. Walson, Theodora Berger, Brian Hembacher, Charlotte Robinson, Mary Ann R. Baker, Gordon J. Johnson, Jack Van Kley, and Ellen B. Leidner. James D. Ellman, Bryon A. Thompson, Paul H. Schneider, Jacqueline H. Berardini, Charlotte Robinson, Mary C. Jacobson, and R. Brian McLaughlin also entered appearances for petitioners.

Lewis C. Green argued the cause, for petitioner Missouri Coalition for the Environment.

Edmund B. Frost, David F. Zoll, Michael W. Steinberg, and Arline M. Sheehan entered appearances, for petitioner Chemical Mfrs. Assn.

Randy M. Mott entered an appearance, for petitioners CPC Intern., and ASARCO, Inc.

Mark G. Weisshaar, David O. Ledbetter, Edward H. Commer, and Toni K. Allen entered appearances, for petitioner Edison Elec. Institute.

***1524**322** George C. Freeman, Jr.,Alfred R. Light, and James Kimble entered appearances, for petitioner American Ins. Ass'n.

Timothy A. Vandervere, Jr. and John C. Martin entered appearances, for petitioner United Technologies Corp.

Samuel I. Gutter and Peggy L. O'Brien entered appearances, for petitioner General Elec. Co.

Mark G. Weisshaar and Jeffrey N. Martin entered appearances, for petitioners American Tel. & Tel. Co., and Bridgestone/Firestone Inc.

Scott A. Schachter and Alice L. Mattice, Attorneys, Dept. of Justice, and Lawrence E. Starfield, Counsel, E.P.A., argued the cause, for respondents. With them on the briefs was Roger Clegg, Acting Asst. Atty. Gen. Carl Strauss, Roger J. Marzulla, Edward J. Shawaker, Elizabeth Ann Peterson, Richard B. Stewart, Marilyn P. Jacobsen, Raymond Ludwiszewski, and Earl Salo also entered appearances, for respondents.

Michael W. Steinberg, Hunter L. Prillaman, David F. Zoll, Dell E. Perelman, G. William Frick, Ellen Siegler, Paul E. Shorb, III, and Barton C. Green were on the brief, for intervenors Chemical Mfrs. Ass'n, American Petroleum Institute, and American Iron & Steel Institute.

Cynthia L. Amara was on the brief, for amicus curiae of the Commonwealths of Massachusetts and Virginia, and the states of Alaska, Arizona, Florida, Maine, Maryland, Michigan, Montana, New Hampshire, Rhode Island, South Carolina, and Washington.

Victoria L. Peters entered an appearance, for intervenor State of Colo.

Paul E. Shorb, III and Barton C. Green entered appearances, for intervenor American Iron & Steel Institute.

Mark G. Weisshaar and David O. Ledbetter entered appearances, for intervenor Edison Elec. Institute.

Michael W. Steinberg, Arline M. Sheehan, and David F. Zoll entered appearances, for intervenor Chemical Mfrs. Ass'n.

Susan M. Schmedes and Ellen Siegler entered appearances, for intervenor American Petroleum Institute.

Alan C. Williams entered an appearance, for intervenor State of Minn.

Gordon J. Johnson entered an appearance, for intervenor State of N.Y.

Before MIKVA, Chief Judge, EDWARDS and RANDOLPH, Circuit Judges.

Opinion PER CURIAM.

Concurring opinion filed by Circuit Judge RANDOLPH.

PER CURIAM:

These consolidated petitions present a multifarious challenge to Environmental Protection Agency ("EPA") regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613. The regulations under review are portions of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, commonly known as the "NCP."

Glossary of Acronyms

ARAR Applicable or Relevant and Appropriate Requirements

CERCLA Comprehensive Environmental Response, Compensation, and Liability Act of 1980

EPA Environmental Protection Agency

FS Feasibility Study

J.D.A. Joint Deferred Appendix

MCL Maximum Contaminant Level

MCLG Maximum Contaminant Level Goal

MOCO Missouri Coalition for the Environment

NCP National Contingency Plan

NIH National Institutes of Health

OMB Office of Management and Budget

O & M Operations and Maintenance

PRP Potentially Responsible Party

RI Remedial Investigation

***1525 **323 ROD** Record of Decision

SARA Superfund Amendments and Reauthorization Act of 1986

SDWA Safe Drinking Water Act

SMOA Superfund Memorandum of Agreement

997 F.2d 1520, 36 ERC 2065, 302 U.S.App.D.C. 318, 62 USLW 2063, 23 Envtl. L. Rep. 21,157
(Cite as: 997 F.2d 1520, 302 U.S.App.D.C. 318)

I

Before Congress created the Environmental Protection Agency ("EPA" or "the Agency"), and long before Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, there was a National Contingency Plan ("NCP"). In 1968, a group of federal agencies developed the first NCP, which was a multi-agency strategy for dealing with environmental disasters. *See* Freedman, *Proposed Amendments to the National Contingency Plan: Explanation and Analysis*, 19 Envtl.L.Rep. 10,103, 10,105-06 (1989). In 1970, Congress incorporated the NCP into the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, and pursuant to its directive, the President issued the first published NCP. Water and Environmental Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91, § 102 (1970); 35 Fed.Reg. 8508 (1970). The NCP, which acquired its current name-the National Oil and Hazardous Substances Pollution Contingency Plan, 36 Fed.Reg. 16,215 (1971)-in 1971, was revised a number of times throughout the 1970s. *See* 37 Fed.Reg. 2808 (1972); 38 Fed.Reg. 21,888 (1973); 45 Fed.Reg. 17,832 (1980). By 1980, a comprehensive NCP was in place, although it applied only to discharges into waters regulated by the Clean Water Act. *Id.* "It did not apply to releases to groundwater or soil, and it did not provide authority or funding for long-term federal response to chronic hazards." Freedman, *supra*, 19 Envtl.L.Rep. at 10107.

CERCLA came next. Enacted in 1980, CERCLA provided "for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive waste disposal sites." Pub.L. No. 96-510, 94 Stat. 2767, 2767. We have summarized its general scheme in previous decisions. *See, e.g.*, *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 438-40 (D.C.Cir.), *reh'g denied*, 897 F.2d 1151 (1989) (*en banc*); *Ohio v. EPA*, 838 F.2d 1325, 1327-29 (D.C.Cir.1988).

Of particular importance to this case is the prominent role of the NCP under CERCLA. Section 104(a)(1) of CERCLA authorizes the President "to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time ..., or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9604(a)(1). The NCP thus "provide[s] the organizational structure and procedures" for responding to hazardous waste threats. 40 C.F.R. § 300.1. It is the means by which EPA implements CERCLA.

When Congress enacted CERCLA in 1980, it directed the President to revise and republish the NCP in light of the new law. 42 U.S.C. § 9605(a). Pursuant to section 115 of CERCLA, the President assigned EPA the responsibility of amending the NCP. *See* 42 U.S.C. § 9615; Exec. Order No. 12,316, 46 Fed.Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed.Reg. 2923 (1987). In 1982, EPA issued a new version of the NCP. 47 Fed.Reg. 31,180 (1982). EPA revised the NCP again in 1985. 50 Fed.Reg. 47,912 (1985). When Congress passed the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613, which significantly revised the statute, Congress directed the President to revise the NCP again to reflect the changes in CERCLA. 42 U.S.C. § 9605(b). EPA issued these revisions to the NCP in 1990. 55 Fed.Reg. 8666 (1990).

Petitioners, whom we shall call "the States," include both states and private parties [FN1] contending that EPA's changes to the ***1526 **324** NCP in 1985 and 1990 are inconsistent with the requirements of CERCLA. The petitions for review challenge two general categories of NCP provisions. One category involves claims that the NCP unlawfully diminishes the level of environmental protectiveness in the remedy selection process and cleanup provisions of CERCLA. (These claims are resolved in Parts II, III, and IV of the opinion.) The second category involves claims that the NCP improperly limits the States' participation in the cleanup process while increasing their financial burden. (These claims are resolved in Part V of the opinion.) The specific provisions of CERCLA and the NCP at issue in this case will be discussed in the portion of the opinion analyzing petitioners' claims regarding those provisions.

FN1. This case consolidates a number of petitions for review challenging the NCP. The petitioners before us are: State of Ohio; State of Colorado; Chemical Manufacturers Association; State of New York; Commonwealth

of Pennsylvania, Department of Environmental Resources; New Mexico Environment Department; Commonwealth of Kentucky; State of California; State of New Jersey; Missouri Coalition for the Environment; General Electric Company; American Telephone & Telegraph Company; Bridgestone/Firestone, Inc.; LaSalle Steel Co.; Bull NH Information Systems Inc.; McDonnell Douglas Corp.; Seagate Technology Inc.

The following parties intervened: American Iron & Steel Institute; American Petroleum Institute; Edison Electric Institute; State of Minnesota; Texas Instruments, Inc.; Borg-Warner Co.; Mobil Oil Corp.; Gencorp. Inc.; and Oklahoma Publishing Co.

The following states appeared as *amici curiae* in support of petitioners: Alaska, Arizona, Florida, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Rhode Island, South Carolina, Texas, Virginia, and Washington.

II

The States first challenge several elements of the NCP definition of legally "applicable" or "relevant and appropriate" environmental standards, known as "ARARs." CERCLA does not define ARARs, but the statute does require that remedial actions at Superfund sites result in a level of cleanup or standard of control that at least meets the legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements. 42 U.S.C. § 9621(d)(2)(A). The NCP defines "applicable requirements" as follows:

> *Applicable requirements* means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable.

40 C.F.R. § 300.5. "Relevant and appropriate requirements" are those substantive requirements that, while not "applicable," nonetheless "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." *Id.*

A. *Does the NCP definition of ARARs as "substantive" requirements violate CERCLA?*

[1] The States claim that the NCP definition of ARARs is contrary to CERCLA because it excludes "procedural" requirements, such as recordkeeping and reporting to the government, by inserting the word "substantive" into the definition. The States argue that limiting ARARs to substantive requirements is contrary to the plain language of CERCLA because the statute itself does not distinguish between substantive and procedural requirements. They also contend that the definition is inconsistent with congressional intent because the SARA legislative history gives no indication that Congress intended for ARARs to be limited to substantive requirements. The States argue in the alternative that EPA's distinction between substantive and procedural requirements is irrational.

The States are correct that CERCLA does not explicitly draw a line between substantive and procedural requirements, but neither does the statutory language clearly forbid the NCP distinction. In fact, as the following discussion indicates, an application of traditional tools of statutory construction, *see* *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123, 108 S.Ct. 413, 416, 98 L.Ed.2d 429 (1987); ***1527**325***Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C.Cir.1993), strongly suggests that CERCLA is concerned only with substantive environmental requirements. In any case, the NCP limitation of ARARs to substantive standards certainly represents a reasonable and permissible construction of the statute. *See* *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We do not dwell in our analysis on the question of which of *Chevron*'s two prongs best resolves this issue.

In limiting ARARs to procedural requirements, EPA reasonably interprets CERCLA's reference to "a level or standard of control" to be directed at those environmental laws governing "how clean is clean"-that is, the level or degree of cleanup required to remedy various types of toxic contamination. The CERCLA section at issue, section 121(d), is titled

"Degree of cleanup," and it talks of standards that apply "to any hazardous substance, pollutant or contaminant," 42 U.S.C. § 9621(d)(2)(A), not of standards that apply more generally to a site or a party executing a cleanup. Moreover, the only specific requirements explicitly set out in the statute are substantive standards such as Maximum Contaminant Levels established in the Safe Drinking Water Act and Federal Water Quality Criteria established in the Clean Water Act. Finally, contrary to the States' claim, the SARA Conference Report explicitly states that "[n]ew section 121(d) establishes the *substantive* standards that remedial actions ... must meet." H.R.Conf.Rep. No. 962, 99th Cong., 1st Sess. (1985), U.S. Code Cong. & Admin. News 1986, pp. 2835, 3339.

The States are surely correct that the procedural requirements of various environmental statutes are intended to ensure that the substantive contaminant levels are met. However, this does not compel EPA to impose these requirements under CERCLA. The language and structure of section 121(d) strongly support, if not compel, the EPA interpretation. The NCP represents at the very least a permissible construction of CERCLA within the dictates of *Chevron.*

B. *Does the NCP improperly restrict the meaning of state ARARs to standards that are generally applicable and legally enforceable?*

[2] The States also claim that the NCP construction of the statutory term "promulgated" is inconsistent with CERCLA. As noted *supra* p. 1526, CERCLA requires that Superfund remedial actions result in a level of cleanup that at least meets federal, or stricter state, ARARs. 42 U.S.C. § 9621(d)(2)(A). The statute contains an additional requirement with regard to state standards: they must be "promulgated ... under a State environmental or facility siting law" in order to be considered as possible ARARs. 42 U.S.C. § 9621(d)(2)(A)(ii). CERCLA does not define "promulgated," but the NCP interprets the term to mean "standards [that] are of general applicability and are legally enforceable." 40 C.F.R. § 300.400(g)(4).

[3] None of the States' arguments establishes that EPA's definition is an impermissible construction of this admittedly undefined term. Under *Chevron,* EPA need not establish that the statute *compels* its regulation. Where congressional intent on the precise question at issue is unclear, it is enough that the Agency's construction is reasonable. *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). EPA's definition of "promulgated" clearly meets this standard.

The States claim that the ordinary meaning of the term "promulgated" precludes the NCP's narrow definition. However, the dictionary definitions that the States cite-which include notions such as "official announcement" and "to make ... obligatory"-are perfectly consistent with the NCP requirements of general applicability and legal enforceability. Neither the absence of clear legislative history, nor the fact that the word sometimes has a broader meaning, demonstrates that the NCP definition is impermissible.

The States also argue that another CERCLA provision, allowing the President to waive ARARs that "the State has not consistently applied," 42 U.S.C. § 9621(d)(4)(E), indicates ***1528 **326** that EPA carries the burden of proving inconsistent application by the State if it decides to waive an ARAR. The NCP definition of "promulgated," the States argue, shifts the burden to the States to prove the general applicability of a state standard before it will be adopted as an ARAR. This argument is unavailing because the NCP definition and the cited CERCLA provision are perfectly consistent. Under the NCP definition, a standard must be generally applicable on its face, and if so, the standard is a potential ARAR. However, if such generally applicable standard is not applied consistently, then the standard may be waived under section 9621(d)(4)(E).

The States' remaining arguments on this point merely suggest alternative reasonable interpretations of the statute. The States suggest different language that Congress might have used to indicate clearly its authorization of EPA's approach. However, just as the statute does not compel EPA's interpretation, neither does the absence of clear language render the Agency's approach impermissible. Furthermore, the inclusion in CERCLA of the terms "standards," "criteria," and "limitations" in addition to "requirements" does not, as the States suggest, necessarily indicate a broader class of state rules than those generally applicable and legally enforceable. Finally, the States' attack on EPA's allegedly inconsistent uses of the term must be rejected. EPA's definition of "promulgate" is limited to the specific context of state requirements, and the Agency is defining an ambiguous term in-

serted in the statute by Congress. *See* 40 C.F.R. § 300.400(g)(4). EPA is not acting inconsistently by using the term differently from its use in other contexts.

C. *Does the NCP improperly restrict the meaning of federal ARARs to those "promulgated" under federal environmental laws?*

[4] The States also object to the NCP definition of ARARs insofar as it is limited to requirements "*promulgated* under *federal* " environmental laws. 40 C.F.R. § 300.5 (emphasis added). The States argue that in setting out possible ARARs, CERCLA includes the word "promulgated" in reference to state standards, but not federal standards. *Compare* 42 U.S.C. § 9621(d)(2)(A)(i) ("any standard ... under any Federal environmental law") and 42 U.S.C. § 9621(d)(2)(A)(ii) ("any *promulgated* standard ... under a State environmental or facility siting law") (emphasis added). Thus, argue the States, the NCP is contrary to CERCLA insofar as it requires that federal standards must be promulgated to be considered as possible ARARs.

We do not reach the merits of this argument because the States waived the claim by failing to raise it during rulemaking proceedings before the Agency. *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308 (D.C.Cir.1991); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C.Cir.1983). The States argue that the court should exercise its discretion to consider this issue despite the States' failure to raise it below because the policies behind the waiver rule would not be frustrated if the court were to address the merits in this case. We disagree.

The States point to some of the purposes of the waiver doctrine-to allow an administrative agency to make a factual record and exercise its discretion or apply its expertise, *see McKart v. United States*, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969)-and argue that these concerns are not implicated here because the States raise a purely legal challenge to the NCP. However, with the possible exception of developing a factual record, these concerns *are* relevant to an agency's legal interpretation of a statute which it is implementing. The notion of deference to agency interpretations of law embodied in *Chevron* is founded on just such concerns. *See Chevron*, 467 U.S. at 843-45, 104 S.Ct. at 2782-83.

Furthermore, the waiver doctrine is also concerned with notions of agency autonomy and judicial efficiency. The doctrine promotes agency autonomy by according the agency an opportunity to discover and correct its own errors before judicial review occurs. Judicial efficiency is served because issues that are raised before the agency might be resolved without the need for judicial***1529 **327** intervention. *McKart*, 395 U.S. at 195, 89 S.Ct. at 1663. The efficiency concern is especially germane to this challenge to the NCP, involving an extremely complex rulemaking in which a multitude of issues might be raised for the first time before this court in the absence of the waiver doctrine.

The States also point out that this court has "excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue," *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1151 (D.C.Cir.1987), but they offer no evidence that EPA actually considered an objection to the limitation of ARARs to "promulgated" federal standards. Neither the States nor any other party raised an objection to the use of the word "promulgated" with respect to federal environmental standards, and EPA therefore had no opportunity to consider the issue.

Finally, the States argue that this issue presents a matter of great public importance worthy of allowing an exception to the waiver doctrine. *See Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 156 (D.C.Cir.1985). In *Foundation*, this court decided the level of environmental review required of the National Institutes of Health ("NIH") before it approved the first deliberate release of genetically engineered, recombinant-DNA-containing organisms into the open environment. Although the plaintiffs had failed to raise their objections to the release during the period of NIH review, the court nonetheless upheld the district court's decision to address the claims because of the grave public importance of insuring appropriate environmental review "of a new technology with unknown environmental consequences." *Id.*

Of course, the public health that CERCLA and the NCP are aimed at protecting is also an extremely important concern. But the choice between two alternative readings of the CERCLA provision at issue here is not so critical to the overall scheme. The States present no convincing argument that limiting ARARs

to *promulgated* federal standards will compromise CERCLA's health protection goals or is otherwise of such gravity as to warrant departure from settled waiver principles.

D. *Does the NCP improperly fail to apply zero-level Maximum Contaminant Level Goals ("MCLGs") as ARARs?*

[5] The States challenge EPA's decision that Maximum Contaminant Level Goals ("MCLGs) established under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, do not have to be attained for contaminants whose MCLG has been set at a level of zero. 40 C.F.R. § 300.430(e)(2)(i)(C). The States contend that EPA lacks authority to depart from a statutory requirement to achieve MCLGs, and in the alternative, that even if EPA possesses this authority, it has failed to provide a reasoned basis for its departure.

The SDWA is specifically referenced in section 121(d)(2)(A) of CERCLA as one of the federal laws containing ARARs for Superfund cleanups. 42 U.S.C. § 9621(d)(2)(A). The SDWA identifies two standards for exposure to contaminants. The first, Maximum Contaminant Level Goals ("MCLGs"), are generally unenforceable goals that reflect the level for a given contaminant at which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C. § 300g-1(b)(4). Many MCLGs for carcinogens are set at zero. 55 Fed.Reg. 8750 (1990). The second type of standards, Maximum Contaminant Levels ("MCLs")-the actual maximum permissible concentration levels under the SDWA-must be set as close as "feasible" to their corresponding MCLGs, taking into account available technology and cost. 42 U.S.C. § 300g-1(b)(4)-(5).

While MCLGs are unenforceable under the SDWA, section 121 of CERCLA converts them into enforceable goals, providing:

> Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act ... where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

***1530 **328** 42 U.S.C. § 9621(d)(2)(A). Consistent with this requirement, the NCP generally requires the attainment of MCLGs. 40 C.F.R. § 300.430(e)(2)(i)(B). When the MCLG for a contaminant has been set at a level of zero, however, the NCP requires only that the MCL be attained. In essence, EPA has made a categorical determination that MCLGs set at a level of zero are never "relevant and appropriate under the circumstances" of a release.

This determination was based on EPA's conclusion "that it is impossible to detect whether 'true' zero has actually been attained." 55 Fed.Reg. 8752 (1990). During rulemaking to promulgate MCLGs under the SDWA, EPA "emphasized that ... zero is not a measurable level in scientific terms." 50 Fed.Reg. 46,884, 46,896 (1985). "Due to limitations in analytical techniques, it will always be impossible to say with certainty that the substance is not present. In theory, RMCLs [Recommended Maximum Contaminant Levels] at zero will always be unachievable (or at least not demonstrable)." 49 Fed.Reg. 24,330, 24,347 (1984).

The States contend that EPA's decision concerning zero-level MCLGs is inconsistent with CERCLA's mandate that all remedial actions attain MCLGs. This argument ignores the full language of the section, which imposes the requirement "where such goals ... are relevant and appropriate under the circumstances of the release or threatened release." 42 U.S.C. § 9621(d)(2)(A). This language leaves EPA with discretion to determine when MCLGs are relevant and appropriate. The States contend, though, that such discretion cannot be exercised in a categorical manner, but instead must be based on a case-specific determination at individual sites. Hence, there is no reason for EPA to make an individualized determination of what they have concluded can never be relevant and appropriate.

The States also contend that even if EPA has discretion to conclude that zero-level MCLGs are never relevant and appropriate, it has not justified the decision to do so in this case. But EPA articulated a number of justifications, *see* 55 Fed.Reg. 8750-52 (1990), and we find its reliance on the fact that true zero levels can never be detected to provide adequate support for the Agency's decision. As we understand EPA's scientific analysis, one can never prove a true zero level. If the measuring device indicates zero, this shows only that the device is not sufficiently sensitive

to detect the presence of any contaminants. It does not show the total absence of the contaminants. In other words, if one asserts that zero contaminants are present, this can be *falsified* by showing the presence of some detectable level, but it can never be shown to be *true.* EPA chose to set MCLGs for carcinogens at zero under the SDWA because they "are goals which may or may not be practically achievable and the practicality of these goals should be factored into the MCLs," not the MCLGs. 50 Fed.Reg. 46,896 (1985). In contrast, EPA concluded that "ARARs must be measurable and attainable since their purpose is to set a standard that an actual remedy will attain." 55 Fed.Reg. 8752 (1990).

The States do not contest EPA's scientific conclusion that zero-level MCLGs are not achievable. Instead, they argue that EPA could select a method of measurement approximating zero by setting "a goal of achieving the analytical detection limits for specific carcinogens." Final Amended Joint Brief of Petitioning States at 68. That EPA could do this, however, does not mean it is required to do so. Section 121 requires the selection of MCLs where MCLGs are unattainable. That is what the NCP does. That conclusion is reasonable given EPA's discretion to determine when ARARs are relevant and appropriate.

III

The next set of challenges by the States addresses a variety of issues concerning remedy selection: the role of cost-benefit analysis in remedy selection; the requirement that selected remedies are permanent to the maximum extent practicable; the use of a cancer risk range in remedy selection; and the requirement of five-year review of certain remedial actions.

***1531 **329** A. *Does the NCP establish an improper cost-benefit analysis in the remedy selection process?*

[6] Section 121 of CERCLA, added by SARA, requires the selection of remedial actions "at a minimum which assures protection of human health and the environment." 42 U.S.C. § 9621(d)(1). Although a different provision of section 121 requires the selection of remedial actions that are also cost-effective, 42 U.S.C. § 9621(b)(1), the States interpret section 121(d)(1) to prohibit EPA from considering the cost of a remedial action when it determines the level of protectiveness to be achieved by that remedial action. EPA is in full agreement with the States' interpretation of § 121(d)(1). *See* 55 Fed.Reg. 8726 (1990). The States contend, however, that two provisions in the NCP implicitly authorize the use of cost-benefit analysis, thereby permitting cost to be considered in determining the level of protectiveness to be achieved by a remedial action. In making this argument, the States distort the language of the NCP, which is carefully structured so "that protection of human health and the environment will not be compromised by other selection factors, such as cost." *Id.*

The States first point to a provision in the NCP authorizing EPA to balance nine different criteria, including both protection of human health and cost, in selecting a remedy. 40 C.F.R. § 300.430(f)(1)(i)(A). But while the NCP identifies nine criteria to be used in selecting a remedy, all of the criteria are not given equal weight. Instead, they are divided into three classifications: threshold criteria, primary balancing criteria, and modifying criteria. Under this structure, "[o]verall protection of human health and the environment and compliance with ARARs (unless a specific ARAR is waived) are threshold requirements that each alternative must meet in order to be eligible for selection." 40 C.F.R. § 300.430(f)(1)(i)(A). EPA explained in the preamble to the NCP that remedial alternatives "must be demonstrated to be protective ... in order to be eligible for consideration in the balancing process by which the remedy is selected." 55 Fed.Reg. 8726 (1990). The identification of threshold criteria therefore undermines the States' claim that by listing nine criteria, the NCP permits the level of protectiveness to be affected by cost.

The States also point us to the NCP's definition of "cost-effectiveness," which states that "[a] remedy shall be cost-effective if its costs are proportional to its overall effectiveness." 40 C.F.R. § 300.430(f)(1)(ii)(D). The States contend that this language actually authorizes the use of cost benefit analysis. In making this argument, though, the States ignore the first sentence of the same section of the NCP that they are challenging. It states: "Each remedial action shall be cost-effective, provided that it first satisfies the threshold criteria set forth in § 300.430(f)(1)(ii)(A) and (B)." *Id.; see also* 55 Fed.Reg. 8727 (1990). Thus, consistent with the creation of threshold criteria, the NCP explicitly prohibits consideration of costs in the manner complained of by the States. [FN2]

FN2. The intervenors argue in support of

> EPA that cost must be considered in determining the level of protection to be achieved. EPA, however, rejected their argument, *see* 55 Fed.Reg. 8726 (1990), and the industry intervenors did not seek review of that decision.

B. *Does the NCP improperly fail to require the selection of permanent remedies to the maximum extent practicable?*

[7] The States next argue that the NCP is inconsistent with section 121(b)(1)'s requirement that the President select remedial actions "that utilize[ ] permanent solutions ... to the maximum extent practicable." 42 U.S.C. § 9621(b)(1). The NCP classifies permanence as one of the five primary balancing criteria, along with reduction of toxicity, mobility, or volume; short-term effectiveness; implementability; and cost. 40 C.F.R. § 300.430(f)(1)(i)(B). The States reason that because the selection of permanent remedies "is one of the overarching statutory principles of remedy selection under CERCLA," Final Amended Joint Brief of Petitioning States at 27, the other balancing criteria, particularly cost, should play no role in EPA's determination whether a permanent remedy is to be selected. In essence, the States would like permanence to be treated ***1532 **330** as an additional threshold criterion that must be evaluated independently of cost.

The flaw in the States' argument is in the premise that permanence is an overarching statutory principle. This premise is not supported by the statutory language. Section 121(b)(1), which the States rely upon, requires the President to "select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." 42 U.S.C. § 9621(b)(1). The statutory language places as much emphasis on the selection of cost-effective remedies as it does on the selection of permanent remedies. Although the NCP elevates protection of human health and the environment to a threshold criterion, a different provision in section 121 provides the basis for that treatment. 42 U.S.C. § 9621(d)(1); *see supra* p. 1531. But there is nothing in section 121 to suggest that selecting permanent remedies is more important than selecting cost-effective remedies.

The States offer two responses. The first is a decision defining "practicable" as " 'possible to practice or perform' or 'capable of being put into practice, done, or accomplished.' " *Ashton v. Pierce*, 541 F.Supp. 635, 641 (D.D.C.1982) (quoting Webster's Third New International Dictionary (1963)), *aff'd*, 716 F.2d 56 (D.C.Cir.1983); *cf. American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09, 101 S.Ct. 2478, 2490-91, 69 L.Ed.2d 185 (1981). The *Ashton* court had before it a statute requiring a single goal to be achieved to the extent practicable. A 1973 amendment to the Lead-Based Paint Poisoning Prevention Act required the Secretary of Housing and Urban Development to "establish procedures to eliminate as far as practicable the hazards of lead paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary." 42 U.S.C. § 4822. The regulations at issue in *Ashton* authorized the use of cost-benefit analysis in determining the appropriate remedy and the court found no basis for this approach in the statute. In contrast, section 121(b)(1) of CERCLA mandates the achievement of multiple goals. If EPA were to require the selection of permanent remedies whenever possible, it would be ignoring the statutory mandate to select cost-effective remedies.

The States' second response relies on comments made from the floor of Congress. We have frequently cautioned against placing much weight on such statements. *See, e.g.*, *Colorado v. United States Dep't of Interior*, 880 F.2d 481, 490 (D.C.Cir.1989); *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 717 (D.C.Cir.1987); *Northern Colorado Water Conservancy Dist. v. Federal Energy Regulatory Commission*, 730 F.2d 1509, 1519 (D.C.Cir.1984). That caution is certainly warranted here. For every set of comments supporting the States' position, there is another set of comments supporting the opposite position. *See, e.g.*, 132 Cong.Rec. 29,719-20 (1986) (statement of Rep. Lent); *id.* at 29,743 (statement of Rep. Eckart, Chairman of Conference Committee).

The States argue in the alternative that even if permanence is not treated as a threshold criterion, the NCP should at least place special emphasis on the selection of permanent remedies. But the NCP does exactly that. It requires that "[t]he balancing [of al-

ternative remedies] shall emphasize long-term effectiveness and reduction of toxicity, mobility, or volume through treatment." 40 C.F.R. § 300.430(f)(1)(i)(E). In the preamble, EPA explained that "[t]hese two criteria are given primary consideration in the rule and preamble when analyzing the relative merits of the alternatives. These criteria will be the most important, decisive factors in remedy selection when the alternatives perform similarly with respect to the other balancing criteria." 55 Fed.Reg. 8725 (1990). Given the statutory requirement to achieve a number of competing goals, EPA's decision concerning how much emphasis to place on the selection of permanent remedies is a reasonable one.

***1533 **331** C. *Does the NCP cancer risk range improperly fail to protect human health and the environment without regard to cost?*

[8] The States next challenge EPA's use of a cancer risk range between 10^{-6} and 10^{-4} in the NCP, arguing that an exposure level greater than 10^{-6} is never appropriate. A 10^{-4} risk subjects the surrounding population to an increased lifetime cancer risk of 1 in 10,000. A 10^{-6} risk subjects the surrounding population to an increased lifetime cancer risk of 1 in 1,000,000. When EPA develops objectives for a remedial action at a site, it selects a remediation goal that "establish[es] acceptable exposure levels that are protective of human health." 40 C.F.R. § 300.430(e)(2)(i). EPA attempts to use health-based ARARs to set the goal, but if ARARs are nonexistent or unsuitable for use, EPA establishes the goal based on criteria in the NCP. 55 Fed.Reg. 8712 (1990). "For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{-6} and 10^{-4}...." 40 C.F.R. § 300.430(e)(2)(i)(A)(2). The NCP expresses a preference for remedial actions that achieve a level of 10^{-6} however, the ultimate decision depends on a balancing of nine criteria, including cost. *Id.;* 55 Fed.Reg. 8718 (1990).

The States contend that by permitting cost to play a role in determining the level of exposure, the cancer risk range fails to meet the requirement in § 9621 that remedial actions be "protective of human health." 42 U.S.C. § 9621(b)(1); *see also* 42 U.S.C. § 9621(d)(1). The States' argument necessarily depends, though, on the notion that an exposure level greater than 10^{-6} is not protective of human health. CERCLA requires the selection of remedial actions "that are protective of human health," not as protective as conceivably possible. A "risk range of 10^{-4} to 10^{-6} represents EPA's opinion on what are generally acceptable levels." 55 Fed.Reg. 8716 (1990). Although cost cannot be used to justify the selection of a remedy that is not protective of human health and the environment, it can be considered in selecting from options that are adequately protective.

The States also argue that the actual risk range selected is not adequately protective. EPA concluded, though, that all levels of exposure within the risk range are protective of human health. *Id.* EPA has used 10^{-4}44444444444 as an upper bound for establishing risk levels in the past, *see* 53 Fed.Reg. 51,394, 51,426 (1988), and "[m]any ARARs, which Congress specifically intended be used as cleanup standards at Superfund sites, are set at risk levels less stringent than 10^{-6}," 55 Fed.Reg. 8717 (1990). The States offer no evidence challenging EPA's position that 10^{-4} represents a safe level of exposure, and in any event, we give EPA's findings on this point significant deference. *See New York v. EPA*, 852 F.2d 574, 580 (D.C.Cir.1988), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed.2d 809 (1989).

The States also argue that EPA failed to justify the use of a range, instead of a single point. But EPA explained its decision to use a range. While "[t]he use of 10^{-6} expresses EPA's preference for remedial actions that result in risks at the more protective end of the risk range," 55 Fed.Reg. 8718 (1990), the Agency is also required to consider other factors in selecting an appropriate remedy. "Factors related to exposure, uncertainty and technical limitations may justify modifications of initial cleanup levels that are based on the 10^{-6} risk level." *Id.* A flexible approach to developing remedial goals is justified by the multiple statutory mandates of CERCLA, so long as EPA meets the statutory requirement of protectiveness.

The States' final argument is that we should not defer to EPA's judgment because of OMB's role in developing the NCP. Executive Order No. 12,580 provides that "[a]ll revisions to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget." 52 Fed.Reg. 2923, 2924 (1987). CERCLA, though, grants the President authority to revise the NCP, and OMB is part of the Executive Office. 42

U.S.C. §§ 9605, 9615. Perhaps for this reason, "[t]he States are not challenging the authority of OMB to review the NCP." Final***1534 **332** Amended Joint Brief of Petitioning States at 38. Instead, the States question whether deference is appropriate. The preamble reveals that EPA considered a number of comments from OMB, as well as from other interested parties, such as the States. EPA then settled on a final rule, and it alone claimed responsibility for the contents of the NCP. 55 Fed.Reg. 8813 (1990). Our review is based on EPA's justification for changes in the NCP, and its response to comments from a number of parties. We are not reviewing, or deferring to, any justification offered by OMB.

D. *Has EPA improperly interpreted the CERCLA requirement of five-year review of certain remedial actions?*

[9] The States next challenge EPA's interpretation of the CERCLA requirement of five-year review of certain remedial actions. This claim must also be rejected. CERCLA provides for a five-year review of Superfund sites as follows:

> If the President selects a remedial action that results in any hazardous substances ... remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review ... action is appropriate at such site ... the President shall take or require such action.

42 U.S.C. § 9621(c). EPA, exercising power delegated from the President, is also required to supply Congress with a list of sites subject to review, the results of reviews, and any actions taken in light of the reviews. *Id.*

EPA interprets this provision to require review only when remedial action "results in hazardous substances ... remaining at the site above levels that allow for unlimited use and unrestricted exposure." 40 C.F.R. § 300.430(f)(4)(ii). A site is not designated for review when the initial remedial action renders the site safe, under the standards prevailing at the time of the determination, for all purposes and for an unlimited period of exposure through drinking water, air, or any other "exposure pathway."

The States attack this standard on two grounds. First, the States argue that EPA's approach violates clear statutory language requiring a review when "any hazardous substances" remain at the site. 42 U.S.C. § 9621(c). The Agency responds that the regulation merely imposes a *de minimis* gloss on the CERCLA requirement in order to avoid an absurd result. EPA maintains that under the approach that the States suggest, the Agency would be required to conduct a review of every site, every five years, in perpetuity, because it is virtually impossible to prove that not a single molecule of hazardous material remains at a site. *See supra* p. 1530.

The States do not dispute that their suggested approach would require review at all sites every five years and impose a mammoth monitoring burden on EPA. Rather, the States argue that a *de minimis* exception is impermissible in this case under *Public Citizen v. Young*, 831 F.2d 1108 (D.C.Cir.1987), *cert. denied*, 485 U.S. 1006, 108 S.Ct. 1470, 99 L.Ed.2d 699 (1988). In *Public Citizen*, this court refused to allow a *de minimis* exception to the "Delaney Clause" in the Pure Food and Drug Act, which provided that a color additive will be deemed unsafe if appropriate tests reveal that it "induce[s] cancer in man or animal." *Public Citizen*, 831 F.2d at 1112. The States seize in particular on the *Public Citizen* court's admonition that the *de minimis* doctrine cannot "thwart a statutory command; it must be interpreted with a view to 'implementing the legislative design.' " *Id.* at 1113 (quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C.Cir.1979)).

The "legislative design" is not being flouted by EPA's reading of the five-year review provision because the statutory command is not so clear as to rule out EPA's application of a *de minimis* exception. The *Public Citizen* court relied heavily on the "almost inescapable" terms of the Delaney Clause and the substantial legislative history supporting an absolutist application of the language. *See Public Citizen*, 831 F.2d at 1112-17. The terms at issue here are not so rigid: the phrase "any hazardous substances" could ***1535 **333** easily mean "*even one* hazardous substance" as opposed to "any *amount* of any hazardous substance." In addition, the legislative history provides no convincing support for the States' position. The States point to the comment of a single Senator to bolster their position:

> The periodic review provision is intended to assure that Superfund cleanups keep pace with developing technologies and that remedial actions are upgraded to take advantage of such developing technologies. The ultimate goal of the Superfund program must be to implement permanent solutions at all national priorities list sites. One way to accomplish this goal is to require periodic review and to assure that sites are not removed from the ambit of the program until such solutions have been implemented.

132 Cong.Rec. 28,426 (1986) (statement of Sen. Mitchell). EPA's interpretation is completely consistent with Senator Mitchell's comments, which do not in any way suggest that a permanent solution has not been implemented within the meaning of the statute once a site is rendered safe for all purposes and for an unlimited period of exposure. Thus, EPA's implementation of five-year review represents a permissible construction of the statute.

Even assuming *arguendo* that the States' reading of the statute were indeed the "literal" one, a *de minimis* exception might nonetheless be appropriate. The *Public Citizen* court noted that the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results, or where failure to allow a *de minimis* exception is contrary to the primary legislative goal. The States' version of the statute would require that *every* CERCLA site be subject to five-year review because, as discussed *supra* p. 1530, EPA cannot detect whether "true" zero has been attained with respect to a particular hazardous substance. Section 9621(c) certainly does not appear to have been drafted to require perpetual five-year review at every Superfund site. EPA's interpretation, which requires review only where a hazardous substance is present in an amount appreciable enough to present some possibility of harm, squares with the health-protective purpose of the statute. To go beyond that is to adjudge Congress incompetent to fashion a rational legislative design.

The States also argue that under EPA's approach, any five-year reviews that are conducted-at those sites where the initial cleanup action does not allow unlimited use and unrestricted exposure-will be rendered meaningless because EPA has stated that "the five-year review is not intended as an opportunity to consider an alternative to a protective remedy that was initially selected." 55 Fed.Reg. 8730-31 (1990). The States argue that because all remedies must be "protective" as of implementation, the review will never provide an opportunity for new remedial action. EPA responds convincingly that new action will occur when the review reveals that the remedy is *no longer* protective-for example, where a remedial technology has failed, or where a newly promulgated standard indicates that the old standard is no longer protective. Thus, EPA's construction does not render the five-year review provisions a nullity.

The more substantial argument is that the Agency will not bring new toxicological information or new technologies to bear at those sites that initially fell within the Agency's *de minimis* exception and are therefore not subject to five-year review. The States are correct that five-year review will not occur at sites deemed safe under the standards prevailing at the time of the determination, and that the latest information therefore will not automatically be brought to bear at these sites through the five-year review mechanism. However, this fact does not demonstrate that the Agency's regulation is an impermissible interpretation of the statute. As long as the *de minimis* exception is permissible under the statute, as we hold that it is, the fact that new technologies and information will not be applied through the five-year review mechanism does not render EPA's construction of the statute impermissible.

We also hasten to note that a location initially deemed safe for all purposes and for an unlimited period of exposure would never ***1536 **334** be listed as a Superfund site in the first instance. Moreover, to say that new information will not be applied to a site via the five-year review mechanism is not to say that the new information will not be applied *at all.* If a site deemed safe for any use and any amount of exposure is later understood to be unsafe under new standards developed in light of new toxicological information, the site could again be eligible for Superfund treatment. Although five-year review of such sites might lead to greater protection of public health (at greater cost), we cannot say that omitting these sites from five-year review is an impermissible construction of the statute.

IV

The States make three additional challenges to the NCP remedy selection and cleanup provisions, none of which are ripe for judicial review. The ripeness

doctrine requires us to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Both prongs of this test dictate delaying review of the States' remaining claims.

The claims are unfit for resolution because "judicial appraisal ... is likely to stand on a much surer footing in the context of a specific application of th [ese] regulation[s] than could be the case in the framework of the generalized challenge made here." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967). "Where we believed the agency's practical application of a statement would be important, we have found the issue not ripe." *Public Citizen v. Nuclear Regulatory Commission*, 940 F.2d 679, 683 (D.C.Cir.1991). As to the second prong of the ripeness analysis, the States will not be prejudiced or suffer any other significant hardship by our decision to defer resolution of these issues until they are raised in the context of a site-specific challenge. *See* 42 U.S.C. §§ 9604(c)(3), 9621(f)(2), 9622(d), 9659, 9613(h)(4). We discuss each of the claims in turn.

A. *Does NCP remedy selection guidance concerning the use of engineering and institutional controls violate CERCLA's remedy selection requirements?*

[10] The States first argue that one of EPA's "program expectations" violates CERCLA by authorizing the use of institutional controls (such as fences and deed restrictions) as a sole remedy at Superfund sites. The NCP provision regarding selection of an appropriate remedy provides in part as follows:

> (iii) *Expectations.* EPA generally shall consider the following expectations in developing appropriate remedial alternatives:
>
> ....
>
> (D) EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants.... The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.
>
> 40 C.F.R. § 300.430(a)(1)(iii).

The States interpret this language to authorize EPA to choose, based on cost considerations, institutional controls as the sole remedy for cleaning up hazardous waste sites. As a result, they believe that this provision may allow EPA to use cost considerations to select a cleanup remedy that may not comply with the minimum human health and environmental protectiveness requirements of CERCLA, *see* 42 U.S.C. § 9621(b)(1), (d)(1), and to select a remedy in which there is no treatment or removal of contaminants.

However, EPA explained in the Federal Register that the program expectations are not intended to displace the use of the nine ***1537 **335** criteria identified in 40 C.F.R. § 300.430(e)(9)(iii):

> EPA has placed the expectations in the rule to inform the public of the types of remedies that EPA has achieved, and anticipates achieving, for certain types of sites. These expectations are not, however, binding requirements. Rather, the expectations are intended to share collected experience to guide those developing cleanup options.... *However, the fact that a proposed remedy may be consistent with the expectations does not constitute sufficient grounds for the selection of that remedial alternative. All remedy selection decisions must be based on an analysis using the nine criteria.*

55 Fed.Reg. 8702 (1990) (emphasis added); *see also* 40 C.F.R. § 300.430(f)(1)(i)(A) ("Overall protection of human health and the environment and compliance with ARARs ... are threshold requirements that each alternative must meet in order to be eligible for selection.") Thus, any remedy relying on institutional controls must meet the threshold requirement of protectiveness.

As the foregoing discussion amply demonstrates, this issue is unfit for judicial decision at this time because the States' argument is premised on a hypothetical application of a nonbinding statement in the

NCP. The States acknowledge that institutional controls can be utilized as a sole remedy where other remedies are not practicable, and they must concede that EPA might never implement institutional controls as a sole remedy in a manner that the States (or another party with standing) find objectionable. Furthermore, any appeal that is brought would necessarily have to be decided on the basis of the precise circumstances of the cleanup at issue and the alternative remedies available and practicable in that context. Thus, the issue is better resolved in the context of a specific application of the nonbinding statement.

B. *Do the NCP provisions concerning ground water restoration strategies and approaches improperly exempt certain contaminated groundwater resources?*

[11] The States next argue that the NCP provisions for dealing with contaminated ground water are inconsistent with the CERCLA mandate for protection of human health and the environment and for compliance with ARARs. *See* 42 U.S.C. § 9621(b)(1), (d)(1), (d)(2)(A). In the preamble to 40 C.F.R. § 300.430, EPA sets out the following program expectations:

> EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. When restoration of ground water to beneficial uses is not practicable, EPA expects to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction.

55 Fed.Reg. 8846 (1990). The NCP also provides that the documentation of a remedy selection must "[i]ndicate, as appropriate, the remediation goals ... that the remedy is expected to achieve. Performance shall be measured at appropriate locations in the ground water, surface water, soils, air, and other affected environmental media." 40 C.F.R. § 300.430(f)(5)(iii)(A).

The States challenge the NCP approach to ground water contamination on four grounds. First, the States assert that EPA's expectation of selecting "a timeframe that is reasonable given the particular circumstances of the site," 55 Fed.Reg. 8846, permits significant delay in implementing remedies and thereby permits EPA to avoid making improvements in the environment and the level of protectiveness. The States claim that the NCP should require rapid implementation of remedies whenever possible. EPA points in response to language describing its general ground water policy and explaining that the Agency's

> preference is for rapid restoration, when practicable, of Class I ground waters and contaminated ground waters that are currently, or likely in the near-term to be, the source of a drinking water supply. The most appropriate timeframe must, however, be determined through an analysis of alternatives....
>
> More rapid restoration of ground water is favored in situations where a future ***1538 **336** demand for drinking water from ground water is likely and other potential sources are not sufficient. Rapid restoration may also be appropriate where the institutional controls to prevent the utilization of contaminated ground water for drinking water purposes are not clearly effective or reliable.

55 Fed.Reg. 8732 (1990). Thus, in a situation where health could be jeopardized, EPA intends to rapidly restore the water; in other situations, the timeframe may be longer.

Second, the States argue that the NCP improperly permits a remedy to incorporate a point of compliance that is an unlimited distance away from the source of ground water contamination. The States point to the following language in the preamble to 40 C.F.R. § 300.430(f)(5)(iii)(A):

> EPA believes that remediation levels should generally be attained throughout the contaminated plume, or at and beyond the edge of the waste management area, when the waste is left in place. However, EPA acknowledges that an alternative point of compliance may also be protective of public health and the environment under site-specific circumstances.

55 Fed.Reg. 8753. The States emphasize the flexible nature of the preamble language. EPA notes in reply that the preamble expresses a clear preference for remediation throughout the plume and states that alternatives must in any case be protective of public health and the environment.

Third, the States argue that the EPA ground water policy permits EPA to ignore compliance with

ARARs. The States assert that EPA achieves this result with respect to Class I and II ground water by establishing an exclusive federal ARAR. The States point to the following statement of EPA's general ground water policy:

> For Class I and II ground waters, preliminary remediation goals are generally set at maximum containment levels, and non-zero MCLGs where relevant and appropriate, promulgated under the Safe Drinking Water Act or more stringent state standards....

55 Fed.Reg. 8732. EPA responds that the NCP clearly requires compliance with all ARARs as a threshold requirement, and that the general statement on ground water policy does not affect the NCP requirement.

As for Class III ground water, the States argue that EPA has determined improperly that Safe Drinking Water Act ("SDWA") standards are not ARARs. The States note the following language:

> For Class III ground water (i.e., ground water that is unsuitable for human consumption-due to high salinity or widespread contamination that is not related to a specific contamination source-and that does not have the potential to affect drinkable or environmentally significant ground water), drinking water standards are not ARAR and will not be used to determine preliminary remediation goals.

55 Fed.Reg. 8732. EPA responds that standards from other statutes such as the SDWA only apply where "legally applicable." 42 U.S.C. § 9621(d)(2)(A). Thus, EPA argues, it has properly concluded that where the ground water does not come within the scope of the SDWA, the Agency is not obligated to apply those standards. EPA acknowledges that it must apply the standards in any case if it determines that they are otherwise "relevant and appropriate under the circumstances" of the specific site in question. *Id.* The NCP sets out the procedure for making the "relevant and appropriate" determination. *See* 40 C.F.R. § 300.400(g)(2).

Fourth, and finally, the States assert that a variety of additional preamble statements, regarding general ground water policy and specific NCP regulations, permit remedies that are inconsistent with the CERCLA mandate for remedies that protect human health and the environment and are permanent to the maximum extent practicable. *See* 42 U.S.C. § 9621(b)(1), (d)(1). EPA again responds that the nine criteria set out in 40 C.F.R. § 300.430(e)(9)(iii)-the first of which is protection of human health and the environment, *see id.* § 300.430(e)(9)(iii)(A), and the third of which is permanence, *see id.* § 300.430(e)(9)(iii)(C)-must always be used in selecting a remedy. EPA points out that the nine criteria will be balanced on a site-specific basis, but that overall protection of ***1539 **337** the environment is a threshold requirement that each alternative must meet in order to be considered. 40 C.F.R. § 300.430(f)(1)(i)(A).

The States must make site-specific challenges to press each of its four ground water contamination claims-that the NCP permits remedy implementation timeframes that are unreasonably long, that the NCP permits remedies to incorporate unreasonably remote points of compliance, that the NCP permits EPA to ignore compliance with ARARs, and that the NCP permits remedies that are inconsistent with the CERCLA mandates of protection of human health and the environment and permanence. EPA argues with regard to each claim that the States have simply misapprehended the import of the various statements that form the basis of their arguments. Because the claims are premised on hypothetical applications of non-binding statements in the NCP, we conclude that they should be addressed in site-specific challenges in which the reviewing court can consider "the agency's practical application" of its statements. *See Public Citizen*, 940 F.2d at 683.

C. *Does the NCP improperly fail to apply Federal Water Quality Criteria ("FWQC") as ARARs?*

[12] The States' final set of unripe claims involves EPA's decision to use MCLs and non-zero MCLGs in place of the federal water quality criteria established under the Clean Water Act ("CWA"). CERCLA requires that remedial actions attain these federal water quality criteria ("FWQC") wherever "relevant and appropriate under the circumstances of the release or threatened release." 42 U.S.C. § 9621(d)(2)(A). Like MCLGs, FWQC do not have any independent regulatory impact. *See supra* pp. 1529-30. Rather, they present scientific data and guidance on the effects of pollutants from which state and federal authorities may derive actual requirements.

CERCLA provides the following guidance in deciding when an FWQC is relevant and appropriate:

> In determining whether or not any [FWQC] ... is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

42 U.S.C. § 9621(d)(2)(B)(i). The preamble to 40 C.F.R. § 300.430(e)(2) states as follows with regard to the choice between MCLGs and MCLs on the one hand, and FWQC on the other, as ARARs:

> EPA believes that an MCL or non-zero MCLG is generally the [ARAR] for *ground water that is a current or potential source of drinking water* ... even if an FWQC for human health is also available....
>
> ....
>
> EPA believes that MCLs or non-zero MCLGs generally will be the [ARAR] for *surface water designated as a drinking water supply*, unless the state has promulgated water quality standards (WQS) for the water body that reflect the specific conditions of the water body.

55 Fed.Reg. 8755 (1990) (emphasis added). In addition, the NCP provides that MCLs and non-zero MCLGs "shall be attained by remedial actions for ground or surface waters that are current or potential sources of drinking water" where relevant and appropriate under the circumstances of the release. 40 C.F.R. § 300.430(e)(2)(i)(B).

The States argue that the NCP preamble and regulations embody an unreasonable decision to use MCLs and non-zero MCLGs in place of FWQC. EPA responds that the issue is not ripe for review because the preamble merely sets out a general view that may or may not be followed in particular cases. We agree. Although EPA sets out a detailed rationale for its tentative conclusion, the preamble guidance is nonetheless nonbinding. Thus, this claim should also be disposed of in a site-specific challenge in which the reviewing court can consider a specific application of the challenged language. *Public Citizen*, 940 F.2d at 683.

***1540 **338 V**

The States' final group of claims focus on the proper role of individual states in CERCLA cleanups and the allocation of costs between the federal and state governments.

A. *Does the NCP improperly limit the States' ability to take actions authorized by CERCLA?*

[13] The States next challenge the NCP's provisions regarding the delegation of CERCLA authority. Specifically, the States argue that Subpart F of the NCP impermissibly precludes state officials from applying for cleanup and related enforcement authority pursuant to section 104 of CERCLA, and from exercising authority that is properly assignable to them under the statute.

The applicable part of section 104 states:

> A State or political subdivision thereof or Indian tribe may apply to the President *to carry out actions authorized in this section.* If the President determines that the State ... has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 9605(a)(8) of this title *and to carry out related enforcement actions*, the President *may* enter into a contract or cooperative agreement with the State ... to carry out such actions. *The President shall make a determination regarding such an application within 90 days* after the President receives the application.

42 U.S.C. § 9604(d)(1)(A) (1988) (emphasis added). Under this provision, states may apply for enforcement authority and the President "shall make a determination" regarding any such application within ninety days. If a state is determined to be capable of carrying out the policies of the statute, section 104 allows the President to delegate all of the responsibilities authorized in section 104 as well as the authority to take "related enforcement actions." Moreover, a delegation under this section authorizes states to carry out these actions on behalf of federal authorities, not merely in conjunction with them. *See id.* §§ 9604(d)(3) (states may act "on behalf of the President"), 9611(f) (President may delegate to states authority to obligate federal funds and settle claims against Superfund).

The actions authorized under section 104, in addition to the undefined "related enforcement actions," include the right to take removal or remedial action or "any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment." *Id.* § 9604(a)(1). The section also confers the authority to investigate releases of hazardous substances, direct responses and recover the costs thereof, select remedial actions, and obtain information about and entry upon contaminated sites. *Id.* § 9604(b), (c)(4), (e). The fundamental dispute here centers on the scope of EPA's discretion to bar States from even applying for certain enforcement authority under section 104.

The NCP regulations pertaining to state participation in CERCLA response actions are contained in Subpart F, 40 C.F.R. §§ 300.500-.525 (1991). *See* 55 Fed.Reg. 8666, 8775 (1990) (Subpart F "codifies all regulatory requirements or state participation and involvement in CERCLA-authorized response actions"). There are two types of state-led response actions that are implicated by the Subpart F regulations. The first involves a state acting as the lead agency in a *federally financed cleanup* ("state-lead, fund-financed"); in such a situation, the NCP limits state participation to preparing proposed remedial plans and the final record of decision ("ROD") setting forth the selected remedy. Specifically, states must first enter into a cooperative agreement with EPA in order to receive Superfund financing. 40 C.F.R. § 300.515(a). The state may then perform initial site assessment activities, conduct the remedial investigation ("RI"), do the feasibility study ("FS"), draft and recommend a proposed remedial action plan, and prepare the final ROD. *Id.* However, in state-lead, fund-financed actions, the state may not publish a remedial plan that has not been approved by EPA, or proceed with the response action unless EPA has concurred in, and adopted, the ROD. *Id.* § 300.515(e)(1), (e)(2)(ii). Thus, all final authority is reserved to EPA.

***1541 **339** The second type of state-led response action under Subpart F involves a state acting as the lead agency in potentially responsible party ("PRP") or state funded cleanups. In these actions ("state-lead, non-fund-financed"), states need not get EPA concurrence to publish and implement a remedy, but, under the NCP, the states are barred from invoking CERCLA authority. *Id.* § 300.515(e)(2)(ii). In other words, a state may not even apply for such authority pursuant to section 104. Thus, if a state elects to proceed on its own authority, there is a risk that EPA will take later actions or select different remedies under CERCLA that could potentially expose the state or the PRP to additional liabilities. The States contend that, without the ability to invoke CERCLA authority as the lead agency, state officials are severely handicapped in their ability to enforce and settle cleanup obligations.

In the States' view, the Subpart F scheme unlawfully restricts the scope of state participation under CERCLA. The statute provides for the delegation of CERCLA authority to states that apply for, and are found capable of carrying out, section 104 actions. Subpart F, however, establishes a blanket limitation on state participation, barring states from exercising the most important CERCLA authority (remedy selection) in fund-financed cleanups and from using any CERCLA authority in non-fund-financed cleanups, without regard to the capability of any given state.

The first question subsumed by the States' petition on this issue is whether CERCLA requires the grant of authority to a state under section 104 whenever it is sought. The answer to this question is obvious: under the statute, EPA's determination (on behalf of the President) to delegate section 104 responsibilities to state officers is clearly discretionary. The statute directs that states "*may* apply to the President to carry out actions authorized in this section.... [T]he President *may* enter into a contract ... with the State ... to carry out such actions." 42 U.S.C. § 9604(d)(1)(A) (emphasis added). Naturally, terms such as "may" are indicative of discretionary authority. *International Union, UAW v. Dole*, 919 F.2d 753, 756 (D.C.Cir.1990). Furthermore, cooperative contracts are "subject to such terms and conditions as the President may prescribe." 42 U.S.C. § 9604(d)(1)(B). Seeking to counter the clear language of the statute, the States cite several portions of the legislative history as purportedly revealing that the statute's draftsmen intended states to exercise the full range of CERCLA authority. *See, e.g.,* 126 Cong.Rec. 26,761 (1980) (statement of Rep. Florio) (federal Government "required to provide for contracts and grants" to states that have response capability). However, the history cited by the States is composed of isolated references from a long and tangled legislative process.

In light of the clear discretionary language used in the enacted version of the statute, we find these statements unpersuasive. Thus, the statute manifestly does not *require* EPA to delegate full CERCLA authority in either state-lead, fund-financed, or state-lead, non-fund-financed responses.

This does not dispose of the issue, however, for the States have raised a second question challenging EPA's determination to preclude all states from even applying for enforcement authority that is otherwise permissible under section 104. As noted above, under section 104, the President must make a determination within ninety days on any application from a state to participate in a CERCLA cleanup through a cooperative agreement. 42 U.S.C. § 9604(d)(1)(A). Thus, under the statute, states have a right to apply for enforcement authority under section 104, and the President is required to respond based on the particular state's capability of performing. Subpart F, though, categorically precludes states from taking CERCLA actions that are not included in the NCP codification of delegable duties, irrespective of the state's capabilities. For instance, Subpart F does not allow delegation of the authority to select the final remedy, despite the fact that such authority is one of those enumerated in CERCLA section 104. Nor is there any mention in Subpart F of enforcement authority that may be delegated to the states. In effect, EPA has determined in a rulemaking that no state may qualify to exercise *all* of the potentially delegable authority of section 104.

***1542 **340** To the extent that the NCP merely defines the terms of arrangements governing "cooperative agreements" under 42 U.S.C. § 9604(d)(1)(A) we can see no problem with the regulations. CERCLA expressly provides that such cooperative agreements are to be governed by the terms and conditions of EPA's choosing. *Id.* § 9604(d)(1)(B). Thus, in one sense, the NCP provisions in Subpart F merely provide for a uniform set of conditions to which states entering into cooperative agreements must adhere. Viewed as such, the provisions are a valid exercise of the Agency's rulemaking authority. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947) (agencies may choose to implement federal policy on either case-specific basis or in rulemaking); *National Small Shipments Traffic Conference v. Interstate Commerce Commission*, 725 F.2d 1442, 1447 (D.C.Cir.1984) (same).

Moreover, the conditions EPA has placed on state participation under the cooperative agreements are far from arbitrary. Since EPA bears ultimate responsibility under the statute to ensure appropriate remedial responses at release sites, it is not surprising that the Agency also intends to control final remedial selection. *See Ohio v. EPA*, 838 F.2d 1325, 1330-31 (D.C.Cir.1988) ("The most fundamental policy is not that [the states] should be involved in the cleanup but that the cleanup of hazardous waste sites should occur."). Similarly, at least with regard to fund-financed cleanups, EPA must also protect scarce federal resources. *Id.* at 1331. Subpart F of the NCP is one means of accomplishing these two legitimate ends.

The problem with EPA's blanket prohibition in the latest version of the NCP is that it reflects an inexplicable change in policy. Both the 1982 and 1985 NCPs provided that EPA could enter into agreements allowing states to exercise most of the statutory authority available under the statute. *See* 40 C.F.R. § 300.62 (1983); 40 C.F.R. § 300.62 (1986). In neither of the earlier NCPs was an entire category of powers excluded. *See, e.g.*, 47 Fed.Reg. 31,180, 31,186 (1982) (extent of state participation to be a case-specific determination). Thus, the provisions of the current NCP that expressly exclude states from exercising enforcement and remedy selection authority represent a departure from EPA's previous policy of making individualized determinations based on state capability.

Assuming that a regulation of the sort here at issue might be lawful, it could not be promulgated by EPA without some reasoned explanation from the Agency justifying the significant change in policy. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 S.Ct. 2856, 2874, 77 L.Ed.2d 443 (1983); *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C.Cir.1992). In the present case, EPA offered only the most general and cursory explanation for the new blanket exclusion-the necessity of retaining federal control over remedy selection to ensure consistency. *See* 55 Fed.Reg. 8783 (1990). Yet, the Agency never explained the relationship between remedial consistency and statutory objectives, nor did it substantiate its assumption that state remedy selection would lead to less consistency than the present system in which remedies are selected by diverse EPA field offices. Given that EPA may condition any cooperative agreement as it deems necessary, we see no

reason to assume that greater remedial inconsistency would follow from state remedy selection.

The Agency's failure to offer any reasoned explanation is particularly troubling given that several states commented on the blanket exclusion and suggested alternative procedures during the rulemaking proceedings. *See, e.g.,* Comments of Minnesota, *reprinted in* Joint Deferred Appendix ("J.D.A.") at 61-62. Under the circumstances, EPA has no excuse for failing to explain its shift in policy. *See Brookings Mun. Tel. Co. v. FCC,* 822 F.2d 1153, 1169 (D.C.Cir.1987) (agency must consider alternatives suggested in rulemaking and give reasons for rejecting them). Thus, we grant the petition in so far as EPA has not substantiated its new blanket rule against the delegation of certain CERCLA remedial authorities to states, and remand the case to EPA for proceedings consistent with this opinion.

In remanding, we are unwilling to say that every state is entitled to an individualized ***1543 **341** determination on every question that might arise as to "capability" under section 104; indeed, we have no doubt that EPA could easily justify certain categorical requirements applicable to all states. Nonetheless, the Agency must make those determinations on the record based on reasoned consideration.

B. *Does the NCP improperly establish federal/state cost sharing requirements?*

The next two issues raised by the States relate to the allocation of the financial burdens of CERCLA cleanup responses between federal and state authorities.

1. Sharing of Operation and Maintenance Costs

[14] Section 104(c)(3) of CERCLA states that:

> (A) the State will assure *all future maintenance of the removal and remedial actions* provided for the expected life of such actions as determined by the President ... (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, *including all future maintenance,* or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) *of any sums expended* in response to a *release* at a facility, that was operated by the State or a political subdivision thereof....

42 U.S.C. § 9604(c)(3) (emphasis added). The States read this provision to impose a 10%/90% (state/federal) allocation for most operations and maintenance costs related to CERCLA cleanup actions. EPA agrees that states are only responsible for 10% of the costs of the *remedial* action, but claims that the NCP properly codifies the Agency's long-standing practice of requiring states to fund 100% of the *maintenance* of a fund-financed remedy. *See* 40 C.F.R. §§ 300.435(f), 300.510(c). The positions of the parties may be summarized as follows:

States' Position:

> 10%-States' share for "remedial action"
>
> 10%-States' share of "all future maintenance"
>
> 50%-States' share of sums expended in response to a release at a facility that was operated by the States

EPA's Position:

> 10%-States' share for "remedial action"
>
> 100%-States' share of "all future maintenance"
>
> at least 50%-States' share of sums expended in response to a release at a facility that was operated by the States.

The States and EPA reach their respective constructions of the statute via diametrical routes. To begin with, the plain language of the section is open to two plausible interpretations. EPA maintains that the central distinction in the statute is between *maintenance* costs, for which the States are completely responsible under subparagraph (A), and *remedial* actions, for which the States must pay at least ten percent of the costs under subparagraph (C). EPA argues that the inclusion of "all future maintenance" in subparagraph (C) was merely meant to highlight that distinction. In other words, according to EPA, "all future maintenance" cannot modify (or be encompassed within) "remedial action," so the "10 per centum" does not refer to the former.

By contrast, the States understand the phrase "including all future maintenance" in section

104(c)(3)(C)(i) to mean that the states' 10% cost share applies to remedial costs as well as "all future maintenance" costs. Since Congress chose the word "including" rather than "in addition to" or "plus," this is not an unreasonable interpretation. However, it is certainly not compelled.

Hence, to further bolster their case, the States attack EPA's construction as incompatible with the statutory context. As the States point out, the second part of subparagraph (C) (relating to cost sharing for "releases" for which the state was responsible) does not include a reference to "future maintenance costs." Nonetheless, both parties appear to assume that such "releases" include all future maintenance at such sites. Thus, on this assumption, it would seem an especially odd statutory scheme under which ***1544 **342** states are responsible for only 50% of costs (presumably part of "any sums expended") at sites that the states themselves operated, but were obligated to pay 100% of maintenance costs at all other sites.

However, EPA's construction does not necessarily lead to the posited quandary. According to EPA, subparagraph (c)(3)(C)(ii) requires states to pay *at least* 50% of all sums expended in response to a release at a state operated facility. Since states are responsible for 100% of maintenance costs under subparagraph (c)(3)(A), the constraints imposed by subparagraph (c)(3)(C)(ii) are inapposite. Therefore, although it imposes an awkward structure upon the statute, the Agency's construction equally accounts for state culpability at release sites.

Just as the parties have antithetical readings of the language of section 104(c), they draw different inferences from the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986). In that legislation, two additional subparagraphs were added to CERCLA. First, section 104(c)(6) was added, which specifies that, for up to ten years of operation, ground and surface water restoration measures are "remedial action" rather than operations and maintenance. 42 U.S.C. § 9604(c)(6). Second, SARA added section 104(c)(7), which provides that federal funds are to be used for the "[f]ederal share of the payment of the cost of operation or maintenance pursuant to paragraph (3)(C)(i) or paragraph (6)." *Id.* § 9604(c)(7). Since section (c)(6) redesignated maintenance costs for water treatment measures "remedial" for the purposes of section (3)(C)(i), the States contend that Congress must have been referring to the federal share of the cost of other maintenance actions under subparagraph (c)(3). Yet, under EPA's interpretation, this addition would be largely meaningless since maintenance costs in (c)(3) are solely the states' responsibility.

EPA, naturally, has a different understanding of the SARA amendments. Prior to and since SARA, EPA has applied a 10/90 cost sharing ratio to the costs of remedial actions and to the costs of *one year* of maintenance (the "shakedown" period after ROD objectives are achieved). *See* 50 Fed.Reg. 47,912, 47,924 (1985) (long-term maintenance costs not funded entirely by states since EPA will fund up to one year); 40 C.F.R. § 300.510(c)(2) (EPA may share maintenance costs for up to one year). EPA applied this ratio to all cleanup sites, even those that included water restoration actions, which typically require several years of pumping to achieve final cleanup objectives after the maintenance period has begun. In response to state complaints about this cost sharing arrangement, Congress added section 104(c)(6), essentially redefining maintenance for water treatment actions as "remedial action" for up to ten years. *See* H.R.Rep. No. 253, 99th Cong., 1st Sess., pt. 1 at 70 (1985). However, Congress did not change the cost sharing provisions in section 104(c)(3). Thus, Congress shifted the financial burden of funding maintenance costs for the long-term operation of water restoration systems from the states to EPA. *See id.* at 60; S.Rep. No. 11, 99th Cong., 1st Sess. 21 (1985). Yet, as EPA argues, such a cost shifting would have been unnecessary if the States' interpretation obtained, since EPA would already have been bound to pay for ninety percent of the maintenance costs of *all* types of responses pursuant to section 104(c)(3). Moreover, faced with a clear opportunity to repudiate established EPA policy regarding cost sharing, Congress' decision to merely redefine the maintenance period for water treatment measures represents, if not an implicit adoption of the policy, at least tacit acceptance. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 137, 106 S.Ct. 455, 464, 88 L.Ed.2d 419 (1985) (refusal of Congress to overrule an agency interpretation is "some evidence of the reasonableness of that construction").

With regard to the States' argument that section 104(c)(7) necessarily implies a federal share of the payment of maintenance costs pursuant to subpara-

graph (c)(3)(C), the legislative history suggests that the phrase "federal share" in section 104(c)(7) refers only to the maintenance of water treatment operations, restyled as remedial action in section (c)(6), and the costs of maintenance over the one year "shakedown" period for other remedial***1545 **343** actions, which EPA has traditionally funded at the 90% level. *See* S.Rep. No. 11 at 21 ("Under current EPA policy, the costs of such operation are provided on a 90 percent Federal share for only one year."); Staff of Joint Comm. on Taxation, 99th Cong., 1st Sess., *Background and Issues Relating to House Bills for Reauthorization and Financing of Superfund 17* (Joint Comm. Print (JCS-13-85) 1985) (states "generally ... required to pay 10 percent of the capital and first-year operating costs of a remedial action ... and 100 percent of the operating costs in subsequent years"). Thus, the Agency's construction is not in tension with section 104(c)(7).

In sum, both parties have proposed plausible constructions of this cumbersome statutory section. However, when confronted with language as heavily laden with ambiguity as section 104(c) of CERCLA, we may not second-guess a permissible and reasonable construction posited by the agency charged with implementing the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Here, EPA's interpretation of section 104(c)(3) is both a permissible, reasonable reading of the statute under the second step of the *Chevron* test, *see* 467 U.S. at 842-44, 104 S.Ct. at 2781-82, and not otherwise arbitrary or capricious under the test of *State Farm*, 463 U.S. at 41-44, 103 S.Ct. at 2865-67.

2. Costs Related to Remedial Treatment of Wastewater

[15] Section 104(c)(6) of CERCLA provides that states are only responsible for 10% of maintenance costs for a limited type of remedial action (up to ten years of "treatment or other measures ... necessary to restore ground and surface water quality to a level that assures protection of human health"). 42 U.S.C. § 9604(c)(6). The NCP expressly excludes "source control maintenance measures" and "ground- or surface-water measures initiated for the primary purpose of providing a drinking-water supply" from the activities covered by section 104(c)(6). 40 C.F.R. § 300.435(f)(4). The States consider these exclusions to be arbitrary and directly contrary to the statute. Since Congress did not define which measures are "necessary to restore" ground and surface water quality "to a level that assures protection of human health and the environment," EPA may apply its expertise to interpret those phrases, as long as the interpretations are permissible and reasonable. *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2782.

The States' primary complaint is that "source control measures" may be an integral part of a water restoration measure and, yet, under the NCP, not eligible for 90% federal funding. For instance, landfill covers and leachate collection systems, which are designed to prevent the migration of water into and out of contaminated sites, are among the source control measures that EPA has excluded from categorization under section 104(c)(6). *See* 40 C.F.R. § 300.5. The States contend that section 104(c)(6) requires EPA to operate an *entire* water quality restoration remedy, including elements such as these that may also function as source control measures.

EPA, on the other hand, construed the "necessary to restore" language of the statute as contemplating only those measures that "actively cleanup ground and surface water." 55 Fed.Reg. 8737 (1990). This interpretation is consistent with the legislative history of CERCLA. *See* S.Rep. No. 11 at 21 (exemption applies where "pumping and treating of water or other technology is required"); H.R.Rep. No. 253, Pt. 1 at 70 (section directed at "long-term cleanup remedies, such as pumping and treating of groundwater"). Source control measures do not *treat* any surface or ground water, nor are they "necessary" to "restore" water quality; instead, these activities are required to *maintain* the effectiveness of remedial measures. *See* 55 Fed.Reg. 8738. The States nonetheless insist that these measures are necessary to restore water quality because without them additional releases may result. However, were that the test, virtually all related maintenance activities would qualify as necessary to restore water quality, and hence, as "remedial" under the statute. Such a construction exceeds the apparent reach of the section. The NCP provision excluding ***1546 **344** source control measures from the scope of the section 104(c)(6) exemption is far more congruent with the terms of the statute. Thus, we deny the States' petition in so far as it challenges the facial validity of section 300.435(f)(4)(i) of the NCP.

The States also challenge the NCP's exclusion of

measures whose primary purpose is to provide drinking water from the scope of section 104(c)(6) of CERCLA. Briefly, the States argue that the exclusion leads to absurd results since a measure used to treat water that will be discharged without beneficial use *would* qualify for 90% federal funding, whereas the same measure used to provide drinking water *would not* qualify.

The States, however, have stretched section 104(c)(6) beyond its intended reach. Section 104(c)(6) is designed to ensure that federal funds are used to pay for the long-term restoration of ground and surface water to *protected levels.* Yet, under the States' approach, federal funds would pay 90% of the costs of treatments designed not to restore water to protective levels, but to provide drinking water, which is not the object of CERCLA responses. Thus, 40 C.F.R. § 300.435(f)(4)(ii), which excludes from section 104(c)(6) treatment measures whose *primary* purpose is to provide drinking water, is entirely consistent with the terms of the statute. This portion of the States' petition is, therefore, denied.

C. *Does the NCP improperly define when a remedy becomes operational and functional?*

[16] Given that states are responsible for 100% of operations and maintenance ("O & M") costs, the determination of the point at which a response becomes "operational" is an extremely important aspect of the cost sharing issue. Section 300.435(f)(2) of the NCP provides that "[a] remedy becomes 'operational and functional' either one year after construction is complete, *or* when the remedy is determined concurrently by EPA and the state to be functioning properly and is performing as designed, *whichever is earlier.* EPA may grant extensions to the one-year period, as appropriate." 40 C.F.R. § 300.435(f)(2) (emphasis added); *see also* 40 C.F.R. § 300.510(c)(2) (EPA may share O & M costs for up to one year to ensure remedy is operational and functional). EPA contends that the regulatory presumption that a remedy is operational after one year reflects the practical realities of remedy management. *See* 55 Fed.Reg. 8739 (analogizing to construction grant regulations). The States argue that this aspect of the NCP is arbitrary and capricious because states will be burdened with the costs of responses that are not *actually* operational once a year has passed since the completion of construction.

Here again, though, the States' challenge is premature. By its terms, the NCP merely has articulated a rebuttable presumption that remedies are operational and functional one year after completion. If, in a specific situation, a remedy is not fully functional at the end of a year, EPA has indicated that an extension will be appropriate. 40 C.F.R. § 300.435(f)(2). *See also* 55 Fed.Reg. 8739 (extensions available where remedy not fully operational after a year). If the Agency refuses to grant such an extension, that decision would be subject to challenge. At this point, however, we have no reason to assume that EPA will deny an extension in any situation in which a remedy is not operational after one year. Thus, the challenge to this portion of the NCP is premature.

D. *Does the NCP establish improper provisions on state assurances for institutional controls and site access?*

The States next complain that the NCP unlawfully requires assurances relating to institutional controls and site access from states seeking federal funds for response actions.

1. State Assurances of Institutional Controls

Section 300.510(c) of the NCP conditions receipt of fund-financing upon state assurances that institutional controls (e.g., zoning restrictions) implemented as part of a remedial action are "in place, reliable, and will remain in place after the initiation of O & M." 40 C.F.R. § 300.510(c)(1). The States challenge two aspects of this provision. First, the States argue that this section was ***1547 **345** promulgated without proper notice and opportunity for comment. Second, the States maintain that the section is arbitrary and capricious because it requires states to act beyond their legal authority on threat of losing federal funding for hazardous waste cleanups.

[17] On the first point, the States contend that neither the originally proposed rule, 53 Fed.Reg. 51,394 (1988), nor the interim final rule, 54 Fed.Reg. 4132 (1989), gave notice of the rule finally promulgated in section 300.510(c)(1); the States therefore argue that the rule was adopted in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706. The test, of course, is whether the final rule that emerged from the administrative process was a "logical outgrowth" of the earlier proposed rules. *Chemical Waste Mgmt. v. EPA*, 976 F.2d 2, 28 (D.C.Cir.1992), *cert. denied*, 507 U.S. 1057, 113 S.Ct. 1961, 123 L.Ed.2d 664 (1993).

In this case, EPA's proposed rule required states to provide assurances that they would "assume responsibility for operation and maintenance of implemented remedial actions." 53 Fed.Reg. 51,510. In that same proposed rule, EPA made it clear that it regarded institutional controls as an integral part of many "remedial actions." *See* 53 Fed.Reg. 51,423, 51,427. There was, therefore, reasonable notice that assurances for institutional controls might be required of states where such controls were part of the long-term response to a release. Thus, the final rule was presaged by the proposed rules and a further round of rulemaking is not required.

[18] The States also challenge the substance of this requirement as arbitrary and capricious. The States claim that the NCP poses an insuperable barrier to fund-financed remedial action where the state lacks the authority necessary to make the assurances that EPA may require under section 300.510(c)(1). For instance, *state* officials often are powerless to implement changes in many *local* zoning ordinances. Thus, where a proposed fund-financed remedy requires such changes, the state must either act *ultra vires* or forego federal funding.

Whatever dilemma this framework poses for the states is a product of the statute. Under CERCLA, the states are required to assure *all* future maintenance of the removal and remedial actions, 42 U.S.C. § 9604(c)(3), which may include institutional controls, *see id.* § 9601(24) (listing responses encompassed within the phrase, "remedial actions"). Section 300.510(c)(1) was added to the NCP precisely because EPA lacks the authority to impose many of these controls. 55 Fed.Reg. 8706 (1990). Thus, to the extent that institutional controls are a *necessary* component of a fund-financed remedial action, it is entirely appropriate under section 104(c)(3) for EPA to require assurance of the integrity of these controls prior to spending federal funds on the cleanup. If, for *whatever* reason, the state cannot or will not give the necessary assurances, the statute forbids EPA from proceeding with a fund-financed cleanup. A state wishing to proceed with a fund-financed remedy in such a case may either work with local officials to secure the required assurances (perhaps through a three-party agreement, *see* 40 C.F.R. §§ 300.515(a)(1), 35.6115(a)), or advocate a remedial scheme that does not depend on the problematic institutional controls.

For the foregoing reasons, we deny the petition for review with respect to this portion of the NCP.

2. Site Access

[19] The States also attack the NCP's site access provisions as arbitrary and capricious. Section 35.6805(p) of the Subpart O regulations provides that, "[t]he State ... is *expected* to use its own authority to secure access to the site and adjacent properties, as well as rights-of-way and easements necessary to complete the response actions." 40 C.F.R. § 35.6805(p) (emphasis added). The States complain that this section constitutes an additional state "assurance," not authorized by CERCLA section 104(c)(3), upon which federal funding is conditioned.

If it were the case that the NCP required states to assure site access, the States would have a colorable claim. By its terms, though, the NCP expressly *does not* condition fund financing on state assurance of site access. ***1548 **346** *See* 40 C.F.R. §§ 35.6105(b), 35.6805(i) (list of *required* state assurances does not include site access). Instead, section 35.6805(p) merely articulates EPA's *preference* for state acquisition of site access. EPA has explained that this preference is a matter of expediency and that "EPA will acquire site access only if the state cannot do so." 55 Fed.Reg. 22,994, 23,005 (1990). If at some time in the future EPA attempts to condition federal funding on state assurance of site access, the state involved may bring a site-specific challenge. At this point, any such claim is premature. *See supra* pp. 1536-40.

E. *Does the NCP improperly limit the allowable time for support agency review of technical documents?*

[20] Section 121(f) of CERCLA requires EPA to promulgate regulations providing for "substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." 42 U.S.C. § 9621(f)(1). One aspect of this requirement is that states are to be given a "reasonable opportunity" to review and comment upon several documents that are generated in the remedial decision-making process. *Id.* § 9621(f)(1)(E). The NCP implements this statutory requirement through section 300.515(h)(3), which establishes specific default time periods in which a support agency (EPA in state-lead cleanups) must review and comment on lead agency documents. *See* 40 C.F.R. § 300.515(h)(3). Absent a Superfund memorandum of

agreement ("SMOA") to the contrary, a support agency has fifteen working days to comment on the RI/FS, ROD, applicable or relevant and appropriate requirements ("ARAR") determination, and ten working days to comment on the proposed remedial plan. *Id.* In addition, the NCP also provides states with numerous opportunities to participate throughout remedy selection and implementation. *See, e.g.*, 40 C.F.R. § 300.515(d) (states involved in RI/FS process), 300.515(e) (states involved in remedy selection). Thus, states may participate in the creation of remedial action documents as well as review the final product of the process.

Nonetheless, the States maintain that section 300.515(h)(3) of the NCP denies them a reasonable opportunity to review and comment on what are often complex and lengthy documents. We are unpersuaded. The participation process described in sections 300.515(d) and (e) is so extensive that we fail to see how the states will be unfairly burdened by the rules covering review of RI/FSs or proposed remedial plans. The documents subject to review will not be unfamiliar to state officials, so it is not as if the states will be forced to act in the blind in unreasonably short periods of time. For instance, under section 300.515(d), the lead and support agencies are directed to identify potential ARARs and communicate them to each other in a timely fashion. *Id.* § 300.515(d)(1). If EPA intends to waive any state identified ARAR, "or does not agree with the state that a certain state standard is an ARAR, it shall formally notify the state when it submits the RI/FS report for state review." *Id.* § 300.515(d)(3). Thus, potential conflicts between states and EPA should become apparent during the process and, if not explicitly identified by EPA, be anticipated by the states. Given this structure, an extended review period is unnecessary.

Moreover, the NCP specifically provides for modification of the time periods in section 300.515(h)(3) on a site-specific basis using a SMOA. *Id.* § 505(a)(3); *see also* 55 Fed.Reg. 8781 (1990) (review times in the NCP "can be modified by a SMOA"). Thus, where novel problems are presented, or where the release is of such magnitude that extremely complex remedial measures are anticipated, states may negotiate longer review periods and, again, an EPA refusal to negotiate such an agreement would be open to a site-specific challenge. Absent such circumstances, the review times provided in the NCP allow states a reasonable opportunity to review and comment upon EPA documents. This facet of the States' challenge is, therefore, denied.

F. *Does the NCP improperly define "onsite" for purposes of the exemption from obtaining permits for remedial actions?*

[21] Section 121(e)(1) of CERCLA provides for a waiver of state and federal permitting***1549 **347** requirements for cleanup actions taken "entirely onsite." 42 U.S.C. § 9621(e)(1). The NCP defines "onsite" to mean "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. §§ 300.5, 300.400(e)(1). The States challenge this facet of the NCP, arguing that it allows EPA to expand the permit exemption of section 121(e)(1) beyond its intended scope.

Although used in several places, "onsite" is not defined in the statute. Normally, in such a situation, we would presume that Congress intended the disputed term to have its common meaning. *Kosak v. United States*, 465 U.S. 848, 853, 104 S.Ct. 1519, 1523, 79 L.Ed.2d 860 (1984). That presumption does not help us here, though, because "onsite" is a statutory term of art with no "plain" meaning. Faced with this ambiguity, we turn to the definitions offered by the parties. The State petitioners (excluding Ohio, New York, Minnesota, New Jersey and California) define "onsite" formalistically, confining the term to "the continuous contaminated area having the same legal ownership as the actual site of the original disposal." States Brief at 166. For obvious reasons, we cannot hold that Congress meant this and nothing more in its reference to "onsite."

CERCLA provides for an overarching framework within which the federal Government, states, and PRPs can respond to hazardous waste releases. The statutory scheme is meant to transcend artificial geographical and legal distinctions in order to facilitate remedial action. *See, e.g.*, 42 U.S.C. § 9621(e)(1) (no federal, state or local permits required for actions taken under CERCLA), 9621(d)(2) (requirements of other environmental laws become ARARs for actions taken under CERCLA), 9621(d)(4) (EPA may waive substantive requirements of other environmental laws for actions taken under CERCLA). The petitioning States ignore this fundamental statutory premise, and rest their definition of "onsite" on precisely the artifi-

cial constraints that the statute meant to reject.

On the other hand, the ability of the statute to accommodate a broader, more functional definition of "onsite" is not limitless. In the definition section of CERCLA, the term "facility" is defined as "any site, or area where a hazardous substance has been deposited ... or otherwise come to be located." *Id.* § 9601(9)(B); *cf.* 55 Fed.Reg. at 8689 n. 3 ("onsite" broader than "facility"). The statute's implicit definition of "site" in terms of the area of the actual contamination, leads us to conclude that the definition of "onsite" must be anchored to that area as well. How far this anchor will allow EPA to drift, though, is not readily ascertainable using the traditional tools of statutory interpretation.

EPA's definition of "onsite" contained in the NCP is at best ambiguous. The Agency's definition includes "suitable areas in very close proximity to the contamination." 40 C.F.R. § 300.5. Yet, absent a specific application of the NCP, we have no way of knowing what EPA considers a "suitable area," or how far away from the site of contamination EPA would deem "in very close proximity." Thus, we are not presented with a typical *Chevron* second prong case, in which we may determine whether the Agency's interpretation reasonably comports with congressional intent. Here, the meaning of the term "onsite" as it is used both in the statute and the NCP is indeterminate. Thus, no final judgment can be made on the permissibility or reasonableness of EPA's interpretation absent an application of the rule to a specific set of facts. However, forced to construe the NCP definition in a vacuum, we have no trouble in concluding that the regulation on its face is not unlawful.

The NCP definition allows EPA to respond to releases expeditiously and, one would hope, efficaciously. It is a definition that reflects the practical aspects of responding to hazardous waste releases under various conditions. For instance, in many situations, it may be prohibitively burdensome or, in fact, impossible to conduct necessary response measures within a narrowly "contaminated" area. *See* 53 Fed.Reg. 51,406-07 (1988) (flexibility needed to respond to a contaminated plume of ground water extending far beyond the area of contaminated soil); 55 Fed.Reg. 8689-90 (1990) (impossible to locate an incinerator in a contaminated lowland ***1550 **348** marsh). Nonetheless, the necessary response measures may so closely relate to the concerned site as to be effectively managed under the aegis of CERCLA.

The same reasoning disposes of the challenge raised to this aspect of the NCP by the Missouri Coalition for the Environment ("MOCO"). MOCO would have "onsite" defined by exactly the same parameters as the area of the contamination, essentially paralleling the CERCLA definition of a "facility." *See* MOCO Brief at 3. Driving this definition is MOCO's concern that allowing CERCLA responses to proceed in areas beyond the extent of the contamination will lead to the subversion of state and local participation in the handling and treatment of hazardous substances in disparate uncontaminated areas. *See* MOCO Brief at 5. If, after experience with the latest NCP, petitioners can show that EPA has abused its flexible definition of "onsite" to deliberately bypass other environmental laws or to implement response activities far afield of contaminated areas, the NCP definition would doubtless be subject to challenge. In the interim, we have no basis to believe that EPA will so abuse the minimal discretion contained in the NCP. Therefore, this portion of the States' petition is denied.

[22] The States have also challenged one part of the Preamble to the NCP in which EPA proposed to treat non-contiguous, but reasonably related facilities as a single "site." *See* 55 Fed.Reg. 8690-91. It appears, though, that this issue was not properly raised before the Agency, thus foreclosing our review. *See Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308-09 (D.C.Cir.1991). In support of their contention that the issue was raised below, the States have referred us to a public comment challenging EPA's definition of "onsite." *See* States' Reply Brief at 71 n. 36. The comment relied upon offered a proposed definition of "onsite" that limited the term to contiguous areas. *See* Comments of Colorado, *reprinted in* J.D.A. at 128-29. However, this minimal reference to the contiguity issue is so tangential to the principal thrust of the comment that it cannot fairly be said to have been presented to EPA for resolution. Therefore, this portion of the petition for review is dismissed.

CONCLUSION

The petitions for review are granted in part with respect to the issues discussed in Part V.A of this opinion. Although CERCLA does not require EPA to delegate full CERCLA authority in state-lead response actions, the NCP regulations which categorically bar

states from exercising enforcement and remedy selection authority represent an inadequately justified departure from the Agency's prior practice. The petition is granted with respect to these regulations, and the matter is remanded to the Agency for further proceedings consistent with this opinion.

The petitions for review are denied with respect to the issues discussed in parts II.A, II.B, II.C, II.D, III.A, III.B, III.C, III.D, V.B.1, V.B.2, V.D.1, and V.E of this opinion. The petitions for review are also denied with respect to the issues discussed in part V.F of this opinion insofar as the petitions present a facial challenge to the regulation in question.

The petitions for review are dismissed as premature with respect to the issues discussed in Parts IV.A, IV.B, IV.C, V.C, and V.D.2 of this opinion. The petitions for review with respect to the issues discussed in Part V.F of this opinion are also dismissed as premature insofar as they attempt to raise a site-specific, as-applied challenge to the regulation in question.

So ordered.

RANDOLPH, Circuit Judge, concurring:

With respect to the issue discussed in Part V.A of our *per curiam* opinion, I believe EPA may retain exclusive remedial and enforcement authority without running afoul of CERCLA. I join this portion of today's opinion because the current NCP fails to provide a reasoned explanation for categorically denying states the right to apply to exercise enforcement and remedy selection authority pursuant to § 104(d)(1)(A) of CERCLA. 42 U.S.C. § 9604(d)(1)(A). But I see no problem with EPA imposing such a categorical restriction so long as the Agency provides an adequate justification for doing so. Section 104(d)(1) gives the President unlimited discretion to determine whether a ***1551 **349** state is capable of carrying out CERCLA enforcement actions. Under section 104(d)(1)(A), if the President determines that a state has the capability to carry out CERCLA authority, the President "may" enter into a cooperative agreement with the state. Furthermore, such "contract or cooperative agreement ... shall be subject to such terms and conditions as the President may prescribe." 42 U.S.C. § 9604(d)(1)(B). The President can always refuse to grant states enforcement authority after receiving their applications. It follows that EPA can announce beforehand that it will never enter into any agreements depriving EPA of final approval over remedy selection. The regulations already contain numerous conditions on approval of state applications. *See* 40 C.F.R. § 35.600 *et seq.* These conditions do not prevent states from applying to enter into cooperative agreements; they simply inform the states that their applications will not be considered unless those conditions are met. The states, in other words, can apply for anything they want, but EPA may decide that there are some things they just will not get, ever.

C.A.D.C.,1993.
State of Ohio v. U.S. E.P.A.
997 F.2d 1520, 36 ERC 2065, 302 U.S.App.D.C. 318, 62 USLW 2063, 23 Envtl. L. Rep. 21,157

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FOCUS - 2 of 7 DOCUMENTS

Caution
As of: Aug 31, 2011

ENVIRONMENTAL DEFENSE FUND, INC., SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, INC., CONSERVATION LAW FOUNDATION, OREGON ENVIRONMENTAL COUNCIL, DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, PETITIONERS v. ENVIRONMENTAL PROTECTION AGENCY, ET AL., RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC. AND AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, INTERVENORS

Nos. 94-1044, 94-1062

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

82 F.3d 451*; *317 U.S. App. D.C. 207*; *1996 U.S. App. LEXIS 8471*; *42 ERC (BNA) 1577*; *26 ELR 20968

December 13, 1995, Argued
April 19, 1996, Decided

SUBSEQUENT HISTORY: [**1] Amending Order of July 29, 1996, Reported at: *1996 U.S. App. LEXIS 42573*.

PRIOR HISTORY: On Petitions for Review of Rulemakings of the Environmental Protection Agency.

DISPOSITION: Petitions for review Denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, six environmentalist associations, sought review of regulations promulgated by the Environmental Protection Agency (EPA) pursuant to § 176 of the Clean Air Act, *42 U.S.C.S. § 7506*.

OVERVIEW: Section § 176(c)(2) specifically addressed conformity of transportation programs and plans developed pursuant to Title 23 or the Urban Mass Transportation Act. This required that a metropolitan planning organization establish for its area both a "long range" transportation plan and a "transportation improvement program" (TIP), *23 U.S.C.S. § 134(g), (h)*; *49 U.S.C.S. § 5303(f), 5304(a)*. The Act directed the EPA to promulgate criteria and procedures for determining conformity under the statute. Accordingly, the EPA published regulations, portions of which the petitioners challenged. The court held that § 176(c) of the Clean Air Act was adopted as part of a larger regulatory program through which federal and state governments worked together to control air pollution. It required that a federal action conform to the implementation plan that was currently in place, not to a revised plan that had yet to be examined and approved by the EPA. Given certain safeguards, as well as the enforcement power wielded by the EPA, the court found that the regulations were reasonable, narrowly drawn, consistent with the purpose of the Act, and within the EPA's discretion.

OUTCOME: The petition for review was denied.

COUNSEL: Howard I. Fox, for Sierra Club Legal Defense Fund, et al., and Robert E. Yuhnke, for Environ-

mental Defense Fund, Inc., argued the cause for the petitioners. On brief were William S. Curtiss and James T. Tripp.

Eileen T. McDonough and Alan J. Birnbaum, Attorneys, Department of Justice, argued the cause for the respondents. On brief were Lois J. Schiffer, Assistant Attorney General, Department of Justice, Sara Schneeberg, Attorney, Environmental Protection Agency, and Peter J. Plocki, Attorney, Department of Transportation. Mary E. Ward, Attorney, Department of Justice, entered an appearance.

F. William Brownell and Lee A. Casey, for American Road and Transportation Builders Association, and Linda S. Mounts, for American Trucking Associations, Inc., were on the joint brief for the intervenors. Mark G. Weisshaar entered an appearance for American Road and Transportation Builders Association.

JUDGES: Before: SILBERMAN, GINSBURG and HENDERSON, Circuit Judges. Opinion for the Court filed PER CURIAM.

OPINION

[*454] *PER CURIAM*: The petitioners, six environmentalist associations, [**2] [1] (collectively cited as EDF) seek review of regulations promulgated by the Environmental Protection Agency (Agency or EPA) pursuant to section 176 of the Clean Air Act, *42 U.S.C. § 7506*. For the reasons set forth below, we deny the petitions for review.

1 These are the Environmental Defense Fund, Inc., the Sierra Club, the Natural Resources Defense Fund, Inc., the Conservation Law Foundation, the Oregon Environmental Council, and the Delaware Valley Citizens Council for Clean Air.

I. STATUTORY BACKGROUND

Since 1970 the Clean Air Act has required states to adopt, after reasonable notice and public hearings and approval by the Agency, State Implementation Plans (SIPs) that "provide[] for implementation, maintenance, and enforcement" of "national ambient air quality standards." *42 U.S.C. § 7410(a)(2)(A)*. In 1977 Congress amended the Act by adding section 176, *42 U.S.C. § 7506*. That section, as amended, requires each federal agency to determine that a proposed activity in a "nonattainment" or "maintenance" [**3] area [2] conforms to an applicable SIP before the agency can "engage in, support in any way or provide financial assistance for, license or permit, [*455] or approve" the activity and prohibits a "metropolitan planning organization" [3] from approving "any project, program, or plan which does not conform to [an applicable SIP]." *42 U.S.C. § 7506(c)(1)*. [4] Subsection (c)(2) of section 176 specifically addresses conformity of transportation programs and plans "developed pursuant to Title 23 or the Urban Mass Transportation Act." Each of the cited laws requires that a metropolitan planning organization establish for its area both a "long range" transportation plan and a "transportation improvement program" (TIP). *23 U.S.C. § 134(g), (h)*; *49 U.S.C. § 5303(f), 5304(a)*. [5] Subsection (c)(2) requires that the transportation plans and TIPs "implement the transportation provisions of any applicable [SIP] applicable to all or part of the area covered by such transportation plan or program" and prohibits federal approval, acceptance or funding of any transportation plan unless it is first found to conform to the SIP. [6] *42 U.S.C. § 7506(c)(2)*. In addition, subsection (c)(4) further directs the [**4] Agency to "promulgate criteria and procedures for determining conformity" under the statute. Accordingly, the Agency published its final "Transportation Conformity Rule" on November 24, 1993, *see 58 Fed. Reg. 62,188*, and its final "General Conformity Rule" on November 30, 1993, *see 58 Fed. Reg. 63,214*. It is to portions of these rules that the petitioners mount their challenge. We address each challenged regulation separately.

2 The Agency has always construed the conformity requirement to apply only to "nonattainment" areas (those that have not attained a national ambient air quality standard for a particular pollutant) and to maintenance areas (former nonattainment areas that have attained the standard). *See* 40 C.F.R. § 51.394(b), *51.853*. Petitioners stated, in their nonbinding statement of issues on review in this court, that this was one aspect of the rules on which it would petition for review. Argument as to this aspect was not included in petitioners' briefs and therefore has not been raised in this court. Apparently, petitioners prevailed in the Northern District of California on a claim that the Agency failed to take statutorily required action when it extended coverage of the conformity rules only to nonattainment areas. We understand that this case is on appeal in the Ninth Circuit. Intervenors American Road and Transportation Builders Association and American Trucking Associations, Inc. moved this court for a writ to protect our jurisdiction over this issue, said by intervenors to be exclusive under the statute. In the meantime, Congress has amended the Clean Air Act to make clear that the conformity requirements extend only to nonattainment or maintenance areas. *See* National Highway System Designation Act of 1995, Pub. L. No.

104-59, § 305(b), 109 Stat. 568, 580 (1995). We assume that Congress' action renders intervenors' concerns moot.

[**5]

3 Under *23 U.S.C. § 134(b)* and *49 U.S.C. § 5303(c)(1)*, a metropolitan planning organization must be designated to develop transportation plans and programs for each urban area with a population of at least 50,000.

4 For the statutory definition of "conformity," see *infra* Part VII (quoting *42 U.S.C. § 7506(c)(1)*).

5 The long range plan, to be updated "periodically," must (1) identify transportation facilities "that should function as an integrated metropolitan transportation system," (2) provide for financing implementation of the plan, (3) assess capital investment and other measures necessary to preserve and make the most efficient use of existing metropolitan transportation facilities and (4) provide for "transportation enhancement activities." The TIP, to be updated "at least once every 2 years," must include a priority list of transportation projects to be conducted each triennium and a plan for financing the projects. *23 U.S.C. § 134(g), (h)*; *49 U.S.C. § 5303(f), 5304(a)-(b)*.

6 Subsection (c)(2) provides:

> (A) no transportation plan or transportation improvement program may be adopted by a metropolitan planning organization designated under Title 23 or the Urban Mass Transportation Act, or be found to be in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan, and that the plan or program will conform to the requirements of paragraph (1)(B);
>
> (B) no metropolitan planning organization or other recipient of funds under Title 23 or the Urban Mass Transportation Act shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan;
>
> (C) a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under Title 23 or the Urban Mass Transportation Act, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements--
>
> (i) such a project comes from a conforming plan and program;
>
> (ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and
>
> (iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.
>
> (D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan only if it is demonstrated that the projected emissions from such project, when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area, do not cause such plans and programs to exceed the

> emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan.

42 U.S.C. § 7506(c)(2)(A)-(D).

[**6] II. GRANDFATHER PROVISION

First, the petitioners challenge "grandfather" provisions that temporarily exempt [*456] certain projects from the section 176 conformity determination requirements. Both final rules require generally that conformity determinations for covered projects be made before any federal action is taken on them. *See 40 C.F.R. § 51.850(a)-(b),* 51.394(a). [7] Each rule exempts from the conformity determination requirement, however, projects that have undergone recent National Environmental Policy Act (NEPA) analyses--for non-transportation projects within the preceding five years and for transportation projects within the preceding three years. *See 40 C.F.R. § 51.850(c)(1),* 51.394(c)(1). [8] The petitioners contend the rules' "grandfather" provisions conflict with the clear conformity mandate of section 176(c)(1) and (c)(2). We disagree.

7 The general conformity regulation provides:

> (a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.
>
> (b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

40 C.F.R. § 51.850(a)-(b). The transportation conformity regulation provides:

> (a) Action applicability.
>
> (1) Except as provided for in paragraph (c) of this section or § 51.460, conformity determinations are required for:
>
> (i) The adoption, acceptance, approval or support of transportation plans developed pursuant to 23 CFR part 450 or 49 CFR part 613 by [a metropolitan planning organization] or [the Department of Transportation];
>
> (ii) The adoption, acceptance, approval or support of TIPs developed pursuant to 23 CFR part 450 or 49 CFR part 613 by [a metropolitan planning organization] or [the Department of Transportation]; and
>
> (iii) The approval, funding, or implementation of FHWA/FTA projects.

40 C.F.R. § 51.394(a).

[**7]

8 The general regulation provides:

> (c) Paragraph (b) of this section does not include Federal actions where ...:
>
> (1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994;
>
> ....

40 C.F.R. § 51.850(c)(1). The transportation regulation provides:

> (c) *Limitations.* (1) Projects subject to this regulation for which the NEPA process and a conformity determination have been

> completed by FHWA or FTA may proceed toward implementation without further conformity determinations if one of the following major steps has occurred within the past three years: NEPA process completion;....

40 C.F.R. § 51.394(c)(1).

While the statute requires that a conformity determination be made before any federal action is taken, it also vests the Agency with discretion to set "the appropriate frequency for making conformity determinations" so long as "such determinations for [**8] transportation plans and programs [not] be less frequent than every three years." *42 U.S.C. § 7506(c)(4)(B)(ii)*. Exercising its discretion, the Agency set a conformity determination deadline of five years after a NEPA analysis for non-transportation projects and three years after a NEPA analysis for transportation projects. *See 40 C.F.R. § 51.857(a)* ("The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under § 51.855, unless the Federal action has been completed or a continuous program has been commenced to implement that Federal action within a reasonable time."); 40 C.F.R. § 51.394(c)(1) (exempting conformity determinations for transportation projects if there has been a "NEPA process completion" "within the past three years"). As the Agency explained, the accommodation was necessary to avoid immediate "retroactive" implementation of the new conformity requirement which would impose a substantial and unforeseen burden on federal projects that had already satisfied existing federal requirements. *58 Fed. Reg. at 63,216*; *see also 58 Fed. Reg. at 62,200* ("By proposing to allow projects which have [**9] final approval to proceed, and by proposing to require only one project-level conformity determination, EPA intended to avoid disrupting the implementation process for projects which are underway."). The resulting scheme permits projects in compliance with former statutory requirements, as demonstrated by the NEPA review, to proceed as planned so long as the [*457] newly required compliance determination is made according to the Agency's regulatory schedule. Because its schedule is consistent with the statutory language (preserving the one statutorily fixed three-year deadline for transportation project compliance determinations), we conclude it must be upheld as a reasonable exercise of the Agency's express statutory discretion to set conformity determination deadlines. *See Woolen Mill Assocs. v. FERC, 286 U.S. App. D.C. 367, 917 F.2d 589, 593 (D.C. Cir. 1990).*

III. IMPLEMENTATION

Next, the petitioners challenge two additional regulations on the ground that they permit untimely implementation of "transportation control measures" (TCMs) [9] in violation of the express requirements of section 176. We conclude both regulations reflect reasonable interpretations of the statutory language.

> 9 The Agency has construed a "TCM" to mean "any measure that is directed toward reducing emissions of air pollutants from transportation sources." *40 C.F.R. § 51.100(r)*. "Such measures include, but are not limited to, those listed in section 108(f) of the Clean Air Act." *Id.* Section 108 describes various possible TCMs that reduce vehicle emission concentrations by, for example, providing incentives for mass transit, car-pooling and nonmotorized travel. *See 42 U.S.C. § 7408(f)(1)(A).*

[**10] The petitioners first contend that 40 C.F.R. § 51.418(c)(1) allows approval of a TIP when the TIP's TCMs "are behind the schedule established in the applicable implementation plan" and therefore violates the statutory requirement that "no metropolitan planning organization or other recipient of funds under Title 23 or the Urban Mass Transportation Act shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan." *42 U.S.C. § 7506(c)(2)(B)*. According to the petitioners, the challenged regulation conflicts with the statute's clear mandate that no transportation project be approved unless it requires implementation of TCMs in strict compliance with the SIP schedules. We believe the petitioners construe the phrase "consistent with" too narrowly. Preceding the preposition "with," "consistent" means "agreeing or according in substance or form," that is "congruous" or "compatible." 3 *Oxford English Dictionary* 773 (2d ed. 1989). Thus, the statutory language does not require exact correspondence [**11] between the SIP TCM schedule and the TIP's implementation schedule but only congruity or compatibility between them. *Cf. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898-99 (9th Cir. 1986)* (statutory phrase "consistent with the national contingency plan" in *42 U.S.C. § 9607(a)(2)(B)* "does not necessitate strict compliance with [national contingency plan's] provisions") (citing *Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891-92 (9th Cir.1986))*. Such congruity is attained under the promulgated regulation which permits deviation from a SIP schedule only when "the [metropolitan planning organization] and [the Department of Transportation] have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with

influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control." 40 C.F.R. § 51.418(c)(1). The Agency determined that "this approach is a practical necessity to accommodate uncontrollable delays." *58 Fed. Reg. at 62,197*. Given the flexible statutory language we must defer to the agency's [**12] determination.

Second, the petitioners challenge 40 C.F.R. § 51.418(b)(1) and (c)(1) insofar as those subsections require that transportation plans and TIPs provide for timely implementation of only those TCMs "which are eligible for funding under title 23 U.S.C. or the Federal Transit Act." The Agency explained the reason for limiting the regulation to projects eligible for federal funding in the preamble to the final transportation conformity rule:

> Clean Air Act section 176(c)(2)(B) requires TIPs to provide for timely implementation of TCMs, but does not define TCMs. The statute is therefore ambiguous with respect to which TCMs must be implemented, [*458] and EPA may take any reasonable interpretation of the definition of TCMs. *Chevron v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. Since plans and TIPs can at the most "provide for" only those projects which are eligible for Federal funding, it is reasonable to define those TCMs required to be implemented by Clean Air Act section 176(c)(2)(B) to be only those SIP TCMs that are eligible for Federal funding.

58 Fed. Reg. at 62,211. We find the Agency's rationale persuasive and the challenged limitation consistent with the statutory language. [**13] The petitioners argue that under the statute transportation plans and TIPs must "provide for" timely implementation of non-federally fundable TCMs by allocating federal funding of eligible projects in such a way that state funds are freed for funding of ineligible projects. Like the Agency we doubt that Congress intended so strained a reading of its federal funding legislation. Nevertheless, assuming that the petitioners' position is reasonable, we must still defer to the Agency's view which is at least equally compatible with the statutory language. *See Natural Resources Defense Council, Inc. v. Thomas, 256 U.S. App. D.C. 310, 805 F.2d 410, 439 (D.C. Cir. 1986)* (in spite of petitioners' "often plausible" interpretations, where "the EPA was able to adduce an equally reasonable interpretation of the law it was assigned to execute, we must defer to the agency").

IV. "CONTRIBUTE TO" IN THE INTERIM PERIOD

Section 176(c) provides for conformity determinations to be made for transportation plans, programs, and projects before revised SIPs are approved by the Agency. During this so-called "interim period," transportation plans and improvement programs may be found to conform if *inter alia* they, "with respect [**14] to ozone and carbon monoxide nonattainment areas, *contribute to annual emissions reductions consistent with* [*42 U.S.C. § 7511a(b)(1)* and *7512a(a)(7)*]." *42 U.S.C. § 7506(c)(3)(A)* (emphasis added). *Section 7511a(b)(1)* requires that SIPs provide for "Moderate Area" emissions reductions of volatile organic compounds in an amount "of at least 15 percent from [1990] emissions" by 1996, and for "such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone" by the applicable date. *42 U.S.C. § 7511a(b)(1)(A)(i)*. *Section 7511a(b)(1)* further provides that certain emissions reductions--increasingly demanding tailpipe exhaust standards, for example--will not be creditable toward the required 15% reduction. *Section 7512a(a)(7)* states that, within "Moderate Areas," SIPs must provide for attainment of the carbon monoxide national ambient air quality standard and for "such specific annual emission reductions as are necessary to attain the standard" by the applicable date.

The Agency's rules for determining whether a transportation plan (40 C.F.R. § 51.436) or program [**15] (40 C.F.R. § 51.438) "contributes to annual emissions reductions" during the interim period require two comparisons. The metropolitan planning organization (or other recipient of federal highway funds) determines what the transportation emissions levels for volatile organic compounds, oxides of nitrogen, and carbon monoxide were for 1990. The metropolitan planning organization must also predict the emissions from its transportation system if the projects existing or very near completion today were to continue to exist at specified points in the future but without the plan or program. This level of emissions is called the "Baseline" or "no build" scenario. And, the future emissions if the given transportation plan or improvement program were to be implemented and if other regionally significant projects were to be undertaken--the "Action" or "build" scenario--must be determined. Once these three emissions levels are calculated, the metropolitan planning organization compares the Action scenario emissions with the emissions under the Baseline scenario and with the emissions level as of 1990. If the Action scenario emissions are lower

than both the Baseline and 1990 emissions, then the [**16] transportation plan or improvement program has met the "contribute to" requirement.

Petitioners challenge the "contribute to" rules, which allegedly fail to require that the transportation plan or improvement program [*459] reduce emissions at all, much less at the amount that the statute is said to command. Petitioners complain that non-plan and non-improvement program technologies and measures that reduce emissions after 1990 may render the Action scenario emissions lower than 1990 levels even though the plan or improvement program fails to produce any emissions reduction. [10] Further, petitioners contend that the rule improperly allows the Action scenario to account for projects and traffic reduction measures not included in the plan or improvement program. If non-plan, non-improvement program projects reduce Action scenario emissions enough, the plan and improvement program need not reduce emissions at all and may in fact *increase* emissions. It is also argued that the Action scenario allows credit to be taken for emissions reductions that are expressly non-creditable under *section 7511a(b)(1)(D)*. Permitting plans and programs to be found to conform despite their contributing *no* [**17] emissions reductions is particularly egregious, petitioners suggest, since the plan or improvement program must reduce emissions at a level sufficient to meet the 15% requirement set forth in *section 7511a(b)(1)*.

> 10 Petitioners acknowledge that this concern exists only in the Action/1990 comparison. It does not affect the Action/Baseline comparison as these reductions appear on both sides of that equation.

The Agency does not disagree with petitioners' assessment of the possible consequences of its "contribute to" regime. Rather, it takes issue with the premise of petitioners' criticisms: that the plan or improvement program must itself produce an absolute reduction in the given emissions. According to the Agency, section 176(c)(3)(a)(iii) may be interpreted such that a plan or improvement program need not itself produce demonstrable emissions reductions so long as the projected emissions of a region with the plan or improvement program are lower than those for the region without the plan or improvement program. [**18] The Agency asserts that plans and improvement programs may "contribute to" emissions reductions by "avoiding or reducing increases in emissions over the years." EPA Br. at 46. It is also argued that the contribution to the emissions reductions need only be "consistent with" the provisions of *sections 7511a* and *7512a*--a requirement that is met so long as the contribution is "congruous" or "compatible" with the reductions required by those sections even though the contribution may not comport with every jot and tittle of those sections. Along these lines, the Agency further contends that the determination of whether a plan or improvement program contributes to annual emissions reductions need not be performed according to the standards of *section 7511a(b)(1)(D)*--which provides that certain kinds of emissions reductions are not creditable. Those crediting restrictions are said to apply only to SIP revisions, not to plans and programs adopted in the interim. And, those provisions apply to computing the ultimate 15% reduction in emissions, not to the annual emissions reductions required by *section 7511a(b)(1)* to which section 176(c)(3)(a)(iii) specifically refers.

Petitioners contend that [**19] the "contribute to" rules run afoul of the plain language of the statute by failing to require that any given plan or program produce emissions reductions by itself. The Agency has demonstrated, however, that the "contribute to" language of the statute--particularly in combination with the "consistent with" language--is ambiguous. In the first place, the language leaves wide open the question of how large a reduction in emissions must be to constitute a contribution. As the Agency discussed in its notice of proposed rulemaking, the language could be read to require that the plan or program produce "any nonzero reduction" or it could be read to require that the plan or program provide for the entire 15% reduction in volatile organic compounds required under *section 7511a(b)(1)*. Nor does the language clearly set forth whether emissions reductions that can be counted as contributing to annual emissions are those directly attributable to the implementation of the plan or program, or those that follow indirectly. In the face of this ambiguity, and given the statute's express directive to the Agency to "promulgate criteria and procedures for demonstrating [*460] and assuring conformity in the case [**20] of transportation plans, programs, and projects," § 176(c)(4)(A), we will uphold the Agency's rules if they are reasonable. [11]

> 11 Petitioners quote from what they call the "conference report" to bolster their argument that the contribution to emissions reductions must be sufficient to realize the required 15% reduction: "The sponsors intend that the mobile source contribution to overall emissions in the nonattainment areas be reduced annually at the same percentage rate that would apply for the development of a SIP." 136 CONG. REC. S16,973 (Oct. 27, 1990) (remarks of Sen. Baucus). This document, inserted in the Congressional Record by Senator Baucus, and entitled "Clean Air Act Amendments of 1990 Chafee-Baucus Statement of Senate Managers," was described by Senator Baucus as having "not been reviewed or approved by all of the conferees." *Id.* at S16,933.

The report of the House and Senate conference committee on the Clean Air Act amendments is H.R. CONF. REP. NO. 952, 101st Cong., 2d Sess. (1990), which contains no discussion of this issue. The statement of Senator Baucus is certainly probative of congressional intent as to the amount of emissions reduction that must be proved, but cannot undermine the statute's language or the explicit delegation to the Agency of the task of setting forth conformity criteria. *See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 311, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979).*

[**21] We think that it was reasonable for the Agency to construe the "contribute to ... consistent with" requirement as not necessarily requiring the reduction of emissions attributable to the plan or program standing alone. *Sections 7511a(b)(1)* and *7512a(a)(7)* require reductions in volatile organic compounds, nitrogen oxide, and carbon monoxide, but do not require that the emissions come entirely from mobile sources. [12] A requirement that the transportation plan or program provide all the statutorily required reductions would seem to impinge on the prerogative of states to determine how and where to comply with the Act's emissions reductions requirements. A plan or program that does not reduce emissions, but that facilitates the reduction of emissions by other projects could still "contribute to annual emissions reductions consistent with *sections 7511a(b)(1)* and *7512a(a)(7).*" And, as we have noted with respect to the requirement of timely implementation of transportation control measures, the requirement that the contributions be "consistent with" *sections 7511a(b)(1)* and *7512a(a)(7)* calls for congruence or compatibility with those sections, not lock-step correspondence. The Agency's [**22] test for interim-period conformity may not be perfect--it seems to us that the test could also result in the converse of the problem petitioners identify: emissions reductions directly attributable to a plan or program could be erased by increased emissions from non-plan, non-program projects included in the Action scenario--but we cannot say that it is unreasonable. The Agency acted well within its delegated discretion in construing the "contribute to" language for interim-period transportation plans and improvement programs as it has.

12 Of course, as the Agency noted in its notice of proposed rulemaking, a state may decide in the course of revising its SIP that it wants to achieve the necessary reductions strictly through reducing motor vehicle emissions without reducing stationary source emissions. *58 Fed. Reg. 3782 (1993).*

V. STATE TRANSPORTATION PLANS AND PROGRAMS

Under *23 U.S.C. § 135 (1994)*, states must prepare statewide transportation plans and improvement programs similar to those required of metropolitan [**23] planning organizations. The Agency's transportation regulations require that metropolitan planning organization's transportation plans and programs conform to the relevant SIP, but do not require conformity determinations for state transportation plans or programs. *See* 40 C.F.R. § 51.392 (definition of "transportation improvement program" and "transportation plan"). Petitioners challenge the exclusion of state transportation planning from the Clean Air Act's conformity requirements, arguing that the Agency has improperly circumscribed a broad statutory provision. Section 176(c)(2), after all, requires conformity determinations to be made for "any transportation plan or program."

We agree with the Agency that it reasonably defined "transportation plan or program" to be only those plans or programs [*461] adopted by metropolitan planning organizations and that not requiring state plans or programs to conform in no way works to reduce the protections afforded air quality under the statute. A state transportation plan or program must include the plans or improvement programs adopted by metropolitan planning organizations within that state. Before any plan or improvement program can be included [**24] in the state's plan or program, it must be found by the relevant metropolitan planning organization to conform to the SIP. *See* 23 C.F.R. § 450.3(12)(a). A state may well include both areas that have and areas that have not attained the national ambient air quality standards. The conformity requirements, however, apply only to nonattainment areas. The Agency concluded, therefore, that little was to be gained by requiring state plans and programs to conform. An area inside a state that was covered by the conformity rules--a nonattainment area--and contained a metropolitan planning organization would necessarily already have a conforming plan or improvement program. Under petitioners' reading of the statute, *attainment* areas within the state would be forced to undergo conformity determinations that Congress did not intend to require. [13] We further agree with the Agency that the information yielded by conformity determinations at the state level is of minimal additional value--we are told, and petitioners do not dispute, that analyses for purposes of determining conformity are performed by region, not by state. *See 58 Fed. Reg. at 62,206*.

13 Petitioners argued in their reply brief that requiring conformity determinations for state transportation improvement programs would "ensure conformity in those smaller nonattainment areas that lack" metropolitan planning organizations. We think that the Agency's complex of rules dealing with transportation projects in

such areas ensures that petitioners' concern is adequately addressed. *See* 40 C.F.R. § 51.452(d); *see also 58 Fed. Reg. 62,207*-08.

[**25] VI. TRANSPORTATION PROJECTS

As noted above, "transportation plans, programs, and projects" are subject to specific conformity requirements to which their non-transportation counterparts are not. The Agency's transportation conformity rules define "transportation project" to encompass only highway or transit projects. 40 C.F.R. § 51.392. Petitioners challenge this limited definition, arguing that the Agency has ignored Congress' intent to apply the conformity requirements specific to transportation to *all* manner of transportation. The effect of the Agency's definition is to leave air, water, and rail transportation projects and their emissions subject only to the general conformity requirements--if they are subject to any requirement at all: petitioners argue that because projects included in transportation plans or improvement programs are exempted from the general conformity rule, non-highway and non-transit transportation projects slip all statutory punches.

The Agency counters that it reasonably construed "transportation projects" to include only highway or transit modes. It argues that the statute, read as a whole, clearly contemplates conformity requirements only for plans [**26] encompassing transit or highway projects. The only statutory references in section 176(c)(2) are to statutes concerned with highway and transit projects: 23 U.S.C. and the Urban Mass Transit Act, *49 U.S.C. § 5301, et seq.* Non-highway and non-transit transportation facilities, such as airports, ports, and interstate railroads, are covered by statutes not set forth in section 176(c). The Agency acknowledges that *23 U.S.C. § 134(a)* identifies promotion of intermodal transportation as an important national goal. Toward that end, however, metropolitan planning organizations are given no authority over non-highway and non-transit modes of transportation. Given the metropolitan planning organization's inability to control the development of air, rail (other than transit rail), or water transportation, and Congress' manifest intent in section 176(c) to prescribe special conformity requirements for highway and transit forms of transportation, the Agency contends that it reasonably limited the definition of "transportation projects."

We have little difficulty upholding the Agency's definition of "transportation project." It is hardly insensible to conclude that [*462] the types of transportation [**27] that Congress wished to reach with the special transportation conformity rules were those modes over which the entities listed, metropolitan planning organizations and recipients of funds under Title 23 or UMTA, have authority. As the Agency notes, metropolitan planning organizations and recipients of highway and transit funds (at least in their capacity as recipients of highway funds [14]) have no authority with respect to airports, shipping, or non-transit rail transportation. Petitioners contend that metropolitan planning organizations' responsibility for intermodal planning ought to be sufficient to regard airports, ports, and interstate railroads as part of the metropolitan planning organization's bailiwick. In fact, however, both statutory sections imposing the "intermodal" planning requirement list air, water, and rail modes separately from "intermodal transportation facilities," suggesting that, *e.g.*, an airport is not an intermodal transportation facility. *See 23 U.S.C. § 134(f)(7)* (metropolitan planning organizations must "consider" "international border crossings and access to *ports, airports, intermodal transportation facilities, major freight distribution routes*, [**28] national parks, recreation areas, monuments and historic sites, and military installations.") (emphasis added); *see also 49 U.S.C. § 5303(b)(7)* (same). Congress has also stated that the "National Intermodal Transportation System" shall "provide improved access to ports and airports," *49 U.S.C. § 5501(b)(4)*, further suggesting that a requirement of intermodal planning does not give the metropolitan planning organization control over airports--it merely requires that access to airports be accounted for in intermodal planning. [15] Given Congress' clear focus in section 176(c)(2) on projects that are "adopted," "approved," or "accepted" by metropolitan planning organizations or highway fund recipients, we think that the Agency properly limited the reach of Congress' transportation rules to projects over which these entities have authority.

14 The Agency appreciated the possible disconnect between the receipt of highway funds on the one hand and other activities on the other, and concluded that Congress specified recipients of highway funds in their capacity as recipients of highway funds. *See 58 Fed. Reg. 3768, 3772 (1993).*

[**29]

15 Although Congress has not explicitly defined "intermodal," we take it to mean "between or among modes." *See, e.g.*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 1176 (1971).

Nor are we persuaded by petitioners' contention that air, water, and rail modes of transportation will fall into a regulatory nether region if they are not subject to the transportation rules. The regulation to which petitioners point as providing the supposed loophole, *40 C.F.R. § 51.858(a)(5)(ii)*, permits activities "specifically included" by a metropolitan planning organization in a conforming plan or improvement program to proceed without a further conformity determination. We doubt that the Agen-

cy could argue that the projects over which a metropolitan planning organization has no authority--a lack of authority on which it relied in not requiring transportation conformity determinations for these projects in the first place--could nonetheless be "specifically" included in a metropolitan planning organization's transportation plan or program. [16]

16 In its notice of proposed rulemaking, the Agency described the effect of *§ 51.858(a)(5)(ii)* as providing "that *vehicular* activity from a Federal action may be determined to conform with the air quality criteria if the Federal action *and its vehicular* activity is specifically included in the conforming transportation plan and transportation improvement program for the area." *58 Fed. Reg. 13,836, 13,845 (1994)* (emphasis added). Since "vehicular" is best understood in this sentence as the adjectival form of "motor vehicle"--a term used throughout the rulemaking and apparently understood by Congress as well as all participants to the rulemaking to mean vehicles of the sort that travel on highways (as opposed to "any motorized conveyance")--we think it is clear that the Agency perceives this supposed loophole in its regulation as limited to the sorts of Federal activities that involve motor vehicles and would be involved in transportation plans and programs: highway or transit projects.

[**30] VII. INDIRECT EMISSIONS

In performing a conformity determination, a federal agency is to consider the emissions that will result from its action both directly and indirectly. *40 C.F.R. § 51.858(a)*; *58 Fed. Reg. 63,218*/2. The EPA has defined direct emissions as "those emissions [*463] of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action." *40 C.F.R. § 51.852*. Indirect emissions, on the other hand, are those that:

> (1) Are caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable; and
>
> (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Id.

EDF objects to the second clause of this latter definition on the ground that it creates an exemption for emissions that are the reasonably foreseeable result of federal action but that are not within the agency's "continuing program responsibility." This exemption, EDF contends, is inconsistent with the Congress's broad command that "no department, [**31] agency, or instrumentality of the Federal Government shall engage in ... [or] support in any way" an activity that does not conform to the applicable state implementation plan, *42 U.S.C. § 7506(c)(1)*, and with the statutory definition of "conformity" set out in *42 U.S.C. § 7506(c)(1)*:

> Conformity to an implementation plan means--
>
> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
>
> (B) that such activities will not--
>
> (i) cause or contribute to any new violation of any standard ...;
>
> (ii) increase the frequency or severity of any existing violation of any standard ...; or
>
> (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

EDF argues that the "support in any way" and "cause or contribute" wording evinces an intent by the Congress to require each federal agency to take into account all reasonably foreseeable emissions, regardless of whether they are within the agency's continuing control. [**32] Under this reading, for example, before the Army Corps of Engineers could grant a permit for dredge-and-fill activities as part of a new private shopping center development, the Army Corps would have to examine all reasonably foreseeable emissions--including not only the emissions produced by the equipment involved in the

dredge-and-fill operation but also those resulting from the construction and continuing operation of the shopping center.

The question before us, then, is whether the statute requires consideration of the emissions that the EPA exempted--that is, emissions that are the reasonably foreseeable result of the federal action, but that are separated in time or place from the federal action itself and are not within the agency's control. In answering this question, we must first look to the statute itself to determine whether the Congress clearly expressed its intent. Because the legislative history of the statute provides little guidance on the general conformity rule, our inquiry begins and ends with the text of the statute.

Neither "support" nor "cause" are defined in the statute, nor does the statute address whether or to what extent the federal agency must consider [**33] emissions that are caused by the federal action only indirectly. Moreover, in enacting this statute the Congress expressly delegated to the EPA the responsibility for promulgating "criteria and procedures for determining conformity" under the general conformity rule. *42 U.S.C. § 7506(c)(4)(A)*. We must therefore defer to the EPA's interpretation of the relevant and undefined terms in the statute, as long as that interpretation is reasonable. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*.

In determining to what extent federal agencies must consider indirect emissions in their conformity analyses, the EPA properly focused upon the provision that forbids the federal government to "support in any way" an activity that does not conform to the applicable implementation plan. *See 58 Fed. Reg. 63,220*-22. That is the only proscription [*464] that could describe the relationship between a federal action and a subsequent activity that is outside the control or responsibility of the federal agency. (The prohibitions on a federal agency's engaging in, providing financial assistance for, licensing, permitting, or approving a nonconforming activity, [**34] *see 58 Fed. Reg. 63,221 n.4*, all bar direct federal involvement in a nonconforming activity.) In other words, emissions that result from but are not directly produced by the federal action itself are covered by the statute only if that initial federal action constitutes federal "support" of the subsequent event or activity that actually produces the emissions in question.

As the EPA pointed out in the preamble to the final rule, the word "support" has a wide range of possible meanings, "from mere facilitation to continuing responsibility." *58 Fed. Reg. 63,221*/3. Under the broadest definition of "support," the EPA noted, the prohibition in section 176(c)(1) "might be interpreted to include virtually all Federal activities, since all Federal activities could be argued to support, at least in some remote way, an action that ultimately emits pollution." *58 Fed. Reg. 63,221*/2. Concluding that the Congress could not have intended "such egregious or absurd applications" of section 176(c)(1), *id.*, the EPA settled upon a definition that "focuses on the extent to which the Federal agency has continuing program responsibilities, and whether it can practicably control emissions from its [**35] own and other party activities," *58 Fed. Reg. 63,221*/3. This is certainly a reasonable interpretation, and therefore it is entitled to our deference.

Contrary to EDF's contention, the EPA's definition of indirect emissions is not inconsistent with the statutory definition of "conformity," which we quoted above. EDF maintains that the broad terms of subsection (B) of that provision require the agency to take into account all reasonably foreseeable emissions, whether produced by the federal action itself or by a subsequent action that is contingent upon the federal action having been taken. By the terms of the statute, however, an agency is required to ask whether an activity will "cause or contribute to any new violation" or "delay timely attainment" of an air quality standard only if the activity that produces the emissions will itself be supported in some way by the agency. The broad "cause or contribute" provision, therefore, pertains only to whether the federally supported activity itself would produce emissions not accounted for in the implementation plan, either at the time and place of the activity (direct emissions) or later or elsewhere (indirect emissions). *See 58 Fed.* [**36] *Reg. 63,218*/2 (indirect emissions must be included by virtue of "support in any way" criterion, not "cause and contribute" criterion).

By its terms, therefore, the statute prescribes a two-stage inquiry for federal agencies, and the EPA's regulations appropriately recognize and implement this structure. First, the agency is to determine whether it will be in some way supporting an activity that could potentially produce emissions. Second, the agency is to determine whether that activity conforms to the applicable implementation plan, which involves an inquiry into whether the activity would, *inter alia*, cause or contribute to a violation of an air quality standard. If the federal action leads to or facilitates a subsequent activity that could potentially produce emissions, the agency must again ask whether the action under consideration will be "supporting" that subsequent activity; if so, then the reasonably foreseeable emissions produced by the subsequent activity must also be taken into account as the indirect emissions of the agency action. The EPA's definition of "indirect emissions"--including only those reasonably foreseeable emissions that are within the continuing responsibility [**37] of the agency--is thus entire-

ly consistent with the requirement that federally supported activities not cause or contribute to a violation.

Neither are we persuaded that the two other Clean Air Act provisions to which EDF refers us are evidence that the Congress intended that the general conformity rule be applied any more broadly than the EPA has applied it. First, EDF points to section 176(c)(2), the provision requiring conformity for transportation plans and projects, in which the Congress specifically required that the "emissions from motor vehicles" traveling on a new highway be included in the conformity [*465] determination for the highway construction project. *42 U.S.C. § 7506(c)(2)(A)*. Because the Congress clearly intended that motor vehicle traffic that is outside the continuing program responsibility of the Department of Transportation be included in the conformity determination, EDF argues, the Congress must also have intended the general conformity rule to extend beyond activities within the continuing control of the relevant agency. As we view this provision, however, it suggests the opposite point: the Congress referred explicitly to motor vehicle emissions in section 176(c)(2)(A) [**38] precisely because such emissions would not necessarily be included in the conformity determination by virtue of the provisions setting out the conformity requirements.

Second, EDF directs our attention to section 316(b) of the Act, which sets out the conformity requirements that apply to EPA grants for construction of sewage treatment plants. *See 42 U.S.C. § 7616(b)*. This section explicitly authorizes the EPA to withhold or attach conditions to federal sewage treatment grants if the new sewage capacity would "reasonably be anticipated to cause or contribute to, directly or indirectly, an increase in emissions of any air pollutant in excess of the increase provided for under the provisions" of the applicable SIP, or if the new capacity "would otherwise not be in conformity with the applicable implementation plan." *42 U.S.C. § 7616(b)(3)*. The statute also specifies that in nonattainment areas the relevant SIP provisions must account for emissions "resulting directly or indirectly from areawide and nonmajor stationary source growth." *42 U.S.C. § 7616(b)*. According to EDF, the structure of this provision implies that the reasonably anticipated effects of the newly created treatment [**39] capacity are among the relevant factors in concluding whether the grant itself is in conformity. As the EPA explained, however, this provision is evidence that the Congress clearly intended a conformity review in this particular area. *58 Fed. Reg. 63,223*/3. By specifically requiring the conformity analysis to be performed with respect to the capacity of the new sewage treatment plant, *see 42 U.S.C. § 7616(b)(3)*, the Congress indicated that it was not satisfied in this area to limit conformity review to emissions caused by the construction of the plant, as it was for other types of federal construction permits or grants. Therefore, as with the transportation provision discussed above, we are not persuaded that this provision provides evidence that the Congress intended a broader application of the general conformity rule than the EPA's regulation indicates.

VIII. EXEMPTION FOR NON-MAJOR FEDERAL ACTIONS

The EPA's general conformity regulations apply only to "major" sources of emissions. *58 Fed. Reg. 63,229*/1. This limitation appears in the regulations in the form of tonnage thresholds of emissions, below which the conformity of the federal action is presumed. *40 C.F.R. § 51.853(b)(1),* [**40] *(c)(1), (g)(2)*. The regulations also identify certain categories of government action that are exempt from the conformity rule because the emissions increases they produce, if any, are de minimis. These exempt actions include judicial and legislative proceedings, recurring activities such as permit renewals where the activities to be conducted will be similar in scope and operation to activities already being conducted, rulemaking and policy development and issuance, routine maintenance and repair activities, civil and criminal law enforcement activities, actions related to foreign affairs, and so on. *See 40 C.F.R. § 51.853(c)(2), (c)(3)* (listing exempt actions).

EDF maintains that these exemptions and thresholds are in conflict with the statute. According to EDF, the broad prohibition in section 176(c)(1)--"no department, agency, or instrumentality of the Federal Government shall engage in ... any activity"--shows that the Congress intended the general conformity requirement to apply to every activity of the federal government, however minor a source of emissions it may be. Moreover, the threshold levels adopted by the EPA are taken from the major stationary source definitions [**41] promulgated by the EPA for the use of states, in doing their SIPs, to determine which sources will be subject to review for compliance with air quality standards. [*466] In the present proceeding, argues EDF, the EPA has not and could not prove that these exemptions are truly de minimis: the cumulative effect of the exempted federal actions would produce at least some negative impact upon a state's prospects of attaining the national air quality standards.

As we explained in *Alabama Power Co. v. Costle, 204 U.S. App. D.C. 51, 636 F.2d 323 (D.C. Cir. 1979)*, categorical exemptions from the requirements of a statute may be permissible "as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis." *Id. at 360*. This principle derives from the commonplace notion that "the law does not concern itself

with trifling matters." *Id.* The ability to create a de minimis [**42] exemption "is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." *Id.*

Of course, as EDF points out, a de minimis exemption cannot stand if it is contrary to the express terms of the statute. See, e.g., *Public Citizen v. Young, 265 U.S. App. D.C. 349, 831 F.2d 1108, 1122 (D.C. Cir. 1987)* (rejecting agency's attempt to create de minimis exemption for certain chemicals that caused cancer in animals but posed only minuscule risk to humans, because statute barred listing of chemicals causing cancer "in man or animal"); *Sierra Club v. EPA, 301 U.S. App. D.C. 175, 992 F.2d 337, 343-45 (D.C. Cir. 1993)*; *Kokechik Fishermen's Ass'n v. Secretary of Commerce, 268 U.S. App. D.C. 116, 839 F.2d 795, 801-02 (D.C. Cir. 1988)*. As long as the Congress has not been "extraordinarily rigid" in drafting the statute, however, "there is likely a basis for an implication of de minimis authority to provide [an] exemption when the burdens of regulation yield a gain of trivial or no value." *Alabama Power, 636 F.2d at 360-61*; *see also Public Citizen v. FTC, 276 U.S. App. D.C. 222, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989)* (doctrine permits exemptions when application of statute would have no benefit, not merely when agency [**43] concludes that costs exceed benefits). For example, in *State of Ohio v. EPA, 302 U.S. App. D.C. 318, 997 F.2d 1520 (D.C. Cir. 1993),* we upheld the EPA's recognition of a de minimis exemption from a statute requiring periodic review of certain Superfund sites; the EPA's regulation required periodic review only of sites where hazardous substances remained at levels precluding unrestricted use of and exposure to the site, thus exempting the sites at which a nonhazardous amount remained. The exemption stood because the Congress had not set out its requirement for periodic review in rigid terms: the statute requiring periodic review for a site at which "any hazardous substances" remain, we concluded, could easily be referring to "even one" hazardous substance, as opposed to "any amount of any hazardous substance." *997 F.2d at 1534-35*. Moreover, we noted in that case, as we had in *Public Citizen v. Young,* that "the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results, or where failure to allow a de minimis exemption is contrary to the primary legislative goal." *Id. at 1535*. Because the EPA's regulation avoided a "mammoth monitoring burden" and yet [**44] "squared with the health-protective purpose of the statute," we concluded that to require a different result would be "to adjudge Congress incompetent to fashion a rational legislative design." *Id. at 1534-35*.

In this case, as in *Ohio v. EPA,* we do not think that the Congress has taken a position so rigid that it will not admit of a de minimis exemption. Although the terms of the statute do prohibit the federal government from engaging in "any activity" that is not in conformity, it seems eminently reasonable for the EPA to interpret this provision to refer to "any activity" that is likely to interfere with the attainment goals in a SIP--that is, to major federal actions and to lesser actions that could still produce a regionally significant level of emissions. *See 40 C.F.R. § 51.853(b), (i)*; *58 Fed. Reg. 63,229*/1 (applying conformity requirements to de minimis actions would generate "vast numbers of useless conformity statements"). The purpose of section 176(c)(1), after all, is not to minimize emissions but to ensure that federal actions conform with state implementation plans. *58 Fed. Reg. 63,215*/2. Moreover, we find nothing in the statute to preclude the [*467] EPA's identification [**45] of categories of federal action that would produce either no or a trivial level of emissions; these activities by definition could not threaten a state's attainment of the goals in its SIP. Although a series of de minimis federal actions, taken together, could conceivably effect a significant environmental harm, the EPA appropriately did not consider the cumulative effect of the exempted federal actions; the statute requires each individual federal activity to be in conformity with the SIP and does not demand a mechanism that would evaluate the emissions of various federal activities in the aggregate.

EDF contends, in the alternative, that the EPA's ability to create de minimis exemptions is conditioned upon its providing a higher level of justification than it gave in this case. In *Alabama Power,* it is arguable, we indicated that a high level of justification is indeed necessary to support a de minimis exemption. *See 636 F.2d at 360* ("Determination of when matters are truly de minimis naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing"). We decided *Alabama Power,* however, before the Supreme [**46] Court's decision in *Chevron,* which clarified the degree to which a reviewing court should defer to an agency acting within the scope of its delegated authority, whether implicit or explicit. To the extent that both *Chevron* and *Alabama Power* address agency power inherent in a statutory scheme, the same deference due to an agency's reasonable interpretation of an ambiguous statute may also be due to an agency's creation of a de minimis exemption. Thus, in *Ohio v. EPA* we upheld a de minimis exemption after finding it to be "permissible" under the statute--the same standard applied by the Supreme Court in the second step of the *Chevron* analysis. *See Ohio, 997 F.2d at 1535*; *Chevron, 467 U.S. at 843*; *see also Western Nebraska Resources Council v. EPA, 943 F.2d 867, 870 (8th Cir. 1991)* (upholding exemption as "permissible" construction of statute, and citing both *Alabama Power* and *Chevron*). *But see Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992)*

(rejecting de minimis exemption because of "lack of data" to show that regulation would be of "trivial or no value").

In this case, however, we need not resolve whether, [**47] under *Chevron*, an agency may create a de minimis exemption with a justification less rigorous than we indicated in *Alabama Power*, because the EPA has adequately explained itself even by the standard of the latter case. The tonnage requirements that the EPA adopted in the final rule are taken from the major stationary source definitions because these thresholds are a reasonable measure of the level of emissions that would result from a major federal action, and that limitation is entirely reasonable given the aforementioned futility and wastefulness of applying the conformity requirements to all federal actions, however minor. *58 Fed. Reg. 63,228*-29. When the EPA chose to deviate from these standards by prescribing a lower tonnage threshold for lead, it explained that this adjustment was required because even relatively small increases in lead emissions, as compared to other pollutants, may threaten a state's ability to attain the national standards for lead. *58 Fed. Reg. 63,229*/1. Moreover, the EPA provided a safety net to account or actions that produce emissions at a level lower than the tonnage requirements but still high enough to be "regionally significant" for that particular pollutant, *see 40 C.F.R. § 51.853 (i)*; the tonnage requirements are therefore not the sole basis upon which an agency is to determine whether a conformity analysis is warranted, and the EPA need not have justified the requirements as if they were. Given that the tonnage requirements in this context serve only to ensure conformity with SIPs and do not purport to distinguish between those federal actions that are harmful to the environment and [**48] those that are not, a more specific analysis linking the actual threshold levels with the goal of public health was not necessary.

Finally, that the categorical exemptions are de minimis is entirely self-evident; the EPA has concluded that these activities "would result in no emissions increase or an increase in emissions that is clearly de minimis," *40 C.F.R. § 51.853(c)(2)*, and we neither see nor would expect to find any evidence to the contrary. The brevity of the EPA's explanations therefore does not preclude us from affirming these provisions as an appropriate exercise of the EPA's authority, inherent in the statutory scheme, to create de minimis exemptions.

IX. CONFORMITY WITH PROMISED SIP REVISIONS

The EPA's general conformity rule permits an agency to approve an activity [*468] when it conforms not with the SIP currently in place but with the SIP as it will be when the state carries out a commitment to revise it; in other words, the regulation permits a state to change its SIP to accommodate a federal action, as long as the state complies with certain safeguards intended to ensure that the revision is actually forthcoming. *See 40 C.F.R. § 51.858(a)(5)(i)(B)*. EDF argues that [**49] this provision is contrary to the Congress's command that federally supported activities conform to "an implementation plan after it has been approved or promulgated under *section 7410* of this title." *42 U.S.C. § 7506(c)(1)*.

EDF did not present this argument during the rulemaking proceedings. The provision at issue, however, was not included in the proposed rule, so EDF would have had to present its argument, if at all, in a petition for reconsideration. Because the Clean Air Act, unlike some others, does not, for regulations such as this one, require exhaustion of all available remedies, *compare, e.g.*, National Labor Relations Act, *29 U.S.C. § 160(e) with* Clean Air Act, *42 U.S.C. § 7607(b)(1)*, EDF's failure to bring a petition for reconsideration does not preclude our hearing its argument. *Cf. Darby v. Cisneros, 509 U.S. 137, 113 S. Ct. 2539, 2548, 125 L. Ed. 2d 113 (1993)* (holding § 10(c) of APA, similar in substance to Clean Air Act, precludes court from requiring litigants "to exhaust optional appeals"); *Ciba-Geigy Corp. v. EPA, 310 U.S. App. D.C. 291, 46 F.3d 1208, 1210 n.2 (D.C. Cir. 1995)*. Although in a more fact-intensive case we might invoke the prudential doctrine of ripeness and remand to the agency an issue raised here in the first instance, [**50] *see, e.g., Ciba-Geigy, 46 F.3d at 1210*, we do not think that is necessary in this case.

The plain meaning, if there is one, controls our interpretation of a statute "except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)* (quoting *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982)*). This is one of those rare cases. This case requires a more flexible, purpose-oriented interpretation if we are to avoid "absurd or futile results." *Alabama Power v. Costle, 204 U.S. App. D.C. 51, 636 F.2d 323, 360 n.89 (D.C. Cir. 1979)* (quoting *United States v. American Trucking Ass'ns, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1939)*).

Section 176(c) of the Clean Air Act was adopted as one part of a larger regulatory program through which federal and state governments work together to control air pollution. While the air quality standards are developed by the EPA, *see 42 U.S.C. § 7409*, the Congress directed each state to develop and submit for the EPA's approval a state implementation plan containing the state's strategies for achieving the [**51] air quality standards, *see 42 U.S.C. § 7410*. Section 176(c)(1) was

enacted to prevent federal activities from interfering with the efforts of a state to attain the goals set out in its SIP. As the EPA explains, "this integration of Federal actions and air quality planning is intended to protect the integrity of the SIP by helping to ensure that SIP growth projections are not exceeded, emissions reduction progress targets are achieved, and air quality attainment and maintenance efforts are not undermined." *58 Fed. Reg. 63,215*/2.

Read literally, section 176(c)(1) of the Clean Air Act requires that a federal action conform to the implementation plan that is currently in place, not to a revised plan that has yet to be examined and approved by the EPA. *See 58 Fed. Reg. 63,237*-38 ("The plain language of the statute does not allow the flexibility suggested" by the comment proposing that conformity determinations be based upon the most recent SIP revisions submitted to EPA). When the state expresses a willingness to revise its SIP specifically to account for the emissions that will arise from a proposed federal action, the literal terms of the statute would prevent the federal action [**52] from proceeding until such time as a full-fledged SIP revision could be developed, submitted, and approved. The result would be to frustrate the process of state and federal cooperation and the integrated planning that section 176(c)(1) was created to foster; this rigid application of the conformity rule would block a federal action that the state desires and promises to accommodate [*469] through the appropriate adjustments to levels of emissions from other sources. Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to the Congress's purpose.

As the EPA explained in its preamble to the final rule, *section 51.858(a)(5)(i)* of the regulations "is consistent with the congressional desire to assure that State plans are not undermined by Federal actions; thus, where the State voluntarily commits to revise its SIP so that a Federal action conforms, that action would not undermine the State's decision-making ability and should be allowed to conform." *58 Fed. Reg. 63,236*/1. The circumstances in which this provision applies are quite narrow; in order to ensure that the SIP will [**53] indeed be revised as promised, a commitment "must be made by the Governor or Governor's designee for submitting SIP revisions and must provide for revision of the SIP so that emissions from the Federal action would conform to the SIP emission budget in a time period consistent with the time that emissions from a Federal action would occur." *Id.* This commitment must include, *inter alia*, a specific schedule for SIP revision, identification of specific accommodation measures that would be taken, and written documentation to support the conformity determination. Given these safeguards, as well as the enforcement power wielded by the EPA, *see 40 C.F.R. § 51.858(a)(5)(i)(C)*; *42 U.S.C. § 7509*, we find that the regulation is reasonable, narrowly drawn, consistent with the purpose of the Act, and therefore within the EPA's discretion.

For the preceding reasons, the petitions for review are

Denied.

1 of 1 DOCUMENT

Analysis
As of: Aug 31, 2011

RICHARD L. BRODSKY, New York State Assemblyman, from the 92nd Assembly District in his official and individual capacities, WESTCHESTER CITIZEN'S AWARENESS NETWORK (WESTCAN), ROCKLAND COUNTY CONSERVATION ASSOCIATION, INC. (RCCA), PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), and SIERRA CLUB - ATLANTIC CHAPTER (SIERRA CLUB), Petitioners, -- v. -- U.S. NUCLEAR REGULATORY COMMISSION, Respondent, ENTERGY NUCLEAR OPERATIONS, INC., Intervenor.

Docket No. 08-1454-ag

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

578 F.3d 175*; *2009 U.S. App. LEXIS 19230

May 11, 2009, Argued
August 27, 2009, Decided

SUBSEQUENT HISTORY: Related proceeding at *Brodsky v. United States NRC, 2011 U.S. Dist. LEXIS 22088 (S.D.N.Y., Mar. 4, 2011)*

CASE SUMMARY:

PROCEDURAL POSTURE: Pursuant to the Hobbs Act, *28 U.S.C.S. § 2342*, petitioner assemblyman and citizen groups sought review of a final order of the United States Nuclear Regulatory Commission (NRC) that granted an exemption from certain fire safety regulations to the operator of a nuclear power plant. The NRC moved to dismiss the petition.

OVERVIEW: Although *28 U.S.C.S. § 2342(4)* gave the appellate court jurisdiction to review the NRC's final orders made reviewable under *42 U.S.C.S. § 2239*, it lacked jurisdiction to consider the NRC's grant of an exemption under *10 C.F.R. § 50.12* where the agency interpreted the Hobbs Act to mean that exemptions were different from amendments to a license, and that interpretation was consistent with the plain language of the statute. In the absence of jurisdiction, the appellate court lacked the authority to review not only an NRC order that issued an exemption, but also any orders preliminary or ancillary to an exemption, such as a denial of a hearing request. Moreover, the NRC reasonably applied its regulations when it classified the relief granted to the operator as an exemption where a requirement that exemptions be temporary would have conflicted with the special circumstances of *10 C.F.R. § 50.12(a)(2)*, there was no requirement that a modification had to be treated as an amendment to a license if it relaxed a safety standard, and the NRC did not require hearings for exemptions involving material questions directly related to an agency's licensing action.

OUTCOME: The petition was dismissed without prejudice. All other pending motions were denied as moot.

COUNSEL: [**1] RICHARD L. BRODSKY, Albany, NY, for Petitioners.

ROBERT M. RADER, Senior Attorney, (Karen D. Cyr, General Counsel, John F. Cordes, Jr., Solicitor, on the brief), Office of the General Counsel, U.S. Nuclear Regulatory Commission, John Cruden, Acting Assistant Attorney General, Ellen Durkee, Trial Attorney, Appellate

Section, U.S. Department of Justice, Environment & Natural Resources Division, Washington, DC, for Respondent.

MICHAEL B. WALLACE, (Paul E. Barnes, on the brief), Wise Carter Child & Caraway, P.A., Jackson, MS, for Intervenor.

JOHN J. SIPOS, Assistant Attorney General, (Barbara D. Underwood, Solicitor General, Katherine Kennedy, Special Deputy Attorney General, Michelle Aronowitz, Deputy Solicitor General, Janice A. Dean, Assistant Attorney General, Monica Wagner, Assistant Solicitor General, on the brief), for Andrew M. Cuomo, Attorney General of the tate of New York, New York, NY, for Amicus Curiae New York State.

JUDGES: Before: WALKER and J. Clifford WALLACE, * Circuit Judges. **

* The Honorable J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

** The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme [**2] Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule 0.14(2); United States v. Desimone, 140 F.3d 457 (2d Cir. 1998).

OPINION BY: JOHN M. WALKER, JR.

OPINION

[*177] Pursuant to the Hobbs Act, Petitioners seek review of a final order of the U.S. Nuclear Regulatory Commission, granting an exemption from certain fire safety regulations to Entergy Nuclear Operations, Inc., the operator of Indian Point nuclear power plant in Buchanan, NY. We hold that we lack jurisdiction under the Hobbs Act to review exemptions. We also conclude that the order being challenged is indeed an exemption, and not actually an amendment or other order covered by the Hobbs Act.

DISMISSED without prejudice for want of jurisdiction.

JOHN M. WALKER, JR., *Circuit Judge*:

This case tests the limits of our jurisdiction under the Hobbs Act to review orders of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"). The NRC is the federal agency that licenses and regulates all nuclear power plants in the United States, including the Indian Point Energy Center ("Indian Point") in Buchanan, NY, operated by Entergy Nuclear Operations, Inc. ("Entergy"). [**3] The Atomic Energy Act ("AEA"), which gives the NRC its authority, requires the Commission to hold hearings before taking certain actions, such as granting or amending a license. Petitioners Richard Brodsky *et al.* contend that the NRC violated this hearing requirement when granting Indian Point an exemption from a fire safety regulation with which it was out of compliance. Petitioners also argue that, apart from the hearing requirement, the exemption is an invalid exercise of the NRC's authority.

Petitioners filed their action in this court pursuant to the Hobbs Act, which vests the courts of appeals with exclusive jurisdiction over NRC orders made reviewable by the AEA. We hold, however, that the Hobbs Act does not give us jurisdiction over NRC exemptions. We also conclude that the order being challenged by Petitioners is indeed an exemption, and not an amendment or other type of NRC order within the ambit of the Hobbs Act. Accordingly, we dismiss the petition without prejudice for lack of jurisdiction.

BACKGROUND

Indian Point, like all nuclear power plants, is licensed and regulated by the NRC, pursuant to the AEA. The AEA requires that, when granting a license, the NRC determine that [**4] a plant's operation is "in accord with the common defense and security and will provide adequate protection to the health and safety of the public." *42 U.S.C. § 2232(a)*. Under the AEA, "all licenses shall be subject to amendment, revision, or modification . . . by reason of rules and regulations issued [by the NRC] in accordance with [the Act]." *Id. § 2237*.

The AEA also mandates that the NRC hold hearings, if requested, when taking certain license-related actions:

> In any proceeding . . . for the granting, suspending, revoking, or amending of any license[,] . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Id. § 2239(a)(1)(A). Additionally, the NRC has promulgated regulations requiring a public notice-and-comment period to precede any amendments to a license. *See 10 C.F.R. § 50.91(a)*.

NRC regulations also permit the agency to grant "exemptions from the requirements of the regulations," as long as (1) [*178] the exemptions are "[a]uthorized

by [**5] law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security," and (2) "special circumstances are present." *10 C.F.R. § 50.12(a)*. The regulations set out six potential "special circumstances," any of which can justify an exemption. *See id. § 50.12(a)(2)(i)-(vi)*. [1] The regulations do not require the NRC to hold hearings for exemptions.

1 Special circumstances are "present whenever":

> (i) Application of the regulation in the particular circumstances conflicts with other rules or requirements of the Commission; or
>
> (ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or
>
> (iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or
>
> (iv) The exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or
>
> (v) The exemption would provide [**6] only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or
>
> (vi) There is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption.

10 C.F.R. § 50.12(a)(2).

In 1980, the NRC adopted fire safety regulations in response to a nearly catastrophic fire five years earlier at the Browns Ferry power plant. The regulations, *inter alia*, required nuclear plants to use fire barriers to protect the electrical cables that power the plants' shutdown systems. *See Fire Protection Program for Operating Nuclear Power Plants, 45 Fed. Reg. 76,602, 76,608 (Nov. 19, 1980)*. By shielding these electrical systems, the barriers would improve a plant's ability to shut down its reactors safely after a fire had started. The regulations mandated that the barriers should be able to withstand a fire for at least one hour, and longer if the plant does not have automatic sprinklers installed. *See id*.

In 1984, the NRC granted Indian Point several exemptions from compliance with certain of the fire protection program's requirements. In doing so, [**7] the agency noted that the plant was using a popular fire barrier called Hemyc, which was rated for one hour of protection. However, in 2005, the NRC discovered that Hemyc, despite its one-hour rating, could actually withstand a fire for only 27 to 49 minutes. The agency required Indian Point and all other licensees "to confirm compliance with the existing applicable regulatory requirements in light of" this newfound problem. Licensees were directed to "implement appropriate compensatory measures and develop plans to resolve any nonconformances." The NRC asked for a response from each licensee so that it could "determine whether a facility license should be modified, suspended, or revoked, or whether other action should be taken."

In June 2006, Entergy alerted the NRC to potentially noncompliant Hemyc barriers at Indian Point. Entergy stated that it could not meet NRC standards, but that it had implemented hourly "fire watch tours" and other compensatory measures. Entergy asked the NRC to issue Indian Point a revised exemption to reflect a thirty-minute fire resistance rating, in lieu of the one-hour rating, for two "[f]ire [a]reas" at the plant. In August 2007, Entergy amended its request [**8] to ask that one of the two fire areas be rated for 24 minutes.

[*179] On September 24, 2007, pursuant to the National Environmental Policy Act ("NEPA"), *42 U.S.C. §§ 4321-4347*, the NRC issued an environmental assessment ("EA") finding that Entergy's requested exemption would not significantly impact the environment. Four days later, the NRC granted the revised exemption, which was published in the Federal Register on October 4, 2007. *Revision to Existing Exemptions, 72 Fed. Reg. 56,798 (Oct. 4, 2007)*. In approving Entergy's request, the agency explained that, "given the existing fire protection features in the affected fire zones, [Entergy] continues to meet the underlying purpose" of the fire protection program. *Id. at 56,799*.

On December 3, 2007, Petitioners wrote to the NRC objecting to the agency's "grant of an exemption . . . in an amendment" to the Indian Point license. Petitioners asked the agency to reopen the matter, grant them leave to intervene, and hold a public hearing. The NRC responded on January 30, 2008, treating the petition solely as a request for a hearing. The agency explained that Petitioners were "challenging . . . an exemption from NRC regulations[,] . . . not a license [**9] amendment as asserted in [the] petition." The agency stated that the AEA "does not provide for hearings on exemptions from NRC regulations" and denied the request.

On March 27, 2008, Petitioners filed the instant petition in this court, seeking review of the NRC's order denying their December 3 petition. Petitioners contend that the September 28 exemption "fails, among other things, to provide reasonable assurance of adequate protection of the health and safety of the public as required by law under the [AEA]." The petition also argues that the NRC violated the AEA, NEPA, Administrative Procedures Act ("APA"), and various regulations by granting the exemption, and that the agency acted arbitrarily and abused its discretion in granting the exemption. Petitioners request that we vacate the exemption and remand for a public hearing on the matter.

The NRC moved to dismiss the petition, arguing that Petitioners' challenges to the September 28 exemption were untimely, and that the agency's January 30 order should be summarily affirmed because exemptions do not warrant hearings under NRC regulations. A previous panel of this court referred the motion to us. *See Brodsky v. U.S. Nuclear Regulatory Comm'n*, No. 08-1454-ag (2d Cir. July 7, 2008). [**10] We reserved decision on that and two other motions.

DISCUSSION

I. Whether We Have Jurisdiction Over Exemptions

Pursuant to the Hobbs Act, Petitioners have challenged the NRC's actions directly in this court without first filing in a district court. The Act gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [NRC] made reviewable by *section 2239* of title 42." *28 U.S.C. § 2342(4)*. [2] *Section 2239*, in turn, makes reviewable "[a]ny final order entered in any proceeding of the kind specified in *[§ 2239(a)*]." *42 U.S.C. § 2239(b)(1)*. And *§ 2239(a)*, in relevant part, encompasses "any proceeding . . . for the granting, suspending, revoking, or amending of any license." In defining the scope of our jurisdiction under [*180] the Hobbs Act, *§ 2239(a)* does not mention exemptions.

2 The Hobbs Act actually refers to the Atomic Energy Commission ("AEC"), not the NRC, but the AEC has been abolished. *42 U.S.C. § 5814*. The AEC's functions (including licensing) have largely been transferred to the NRC, and NRC orders entered pursuant to those functions are [**11] reviewable as if entered by the AEC. *See 42 U.S.C. §§ 5841(f), 5871(g)*; *Gen. Atomics v. U.S. Nuclear Regulatory Comm'n, 75 F.3d 536, 538 n.2 (9th Cir. 1996)*.

The NRC contends that the Hobbs Act should nonetheless apply to exemptions because of the Supreme Court's decision in *Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)*. *Lorion* sheds light on how *§ 2239(a)* operates. *Section 2239(a)* serves multiple ends: In addition to establishing Hobbs Act jurisdiction in the courts of appeals, it also dictates when the NRC must hold hearings. *42 U.S.C. § 2239(a)(1)(A)*. These two purposes may or may not coexist in particular instances. For example, with respect to license amendments, *§ 2239(a)* gives the courts of appeals the exclusive jurisdiction to review an amendment and simultaneously compels the NRC to hold a hearing (if requested) before issuing an amendment. *See id. Lorion* tells us, however, that the jurisdictional element and hearing requirement of *§ 2239(a)* are not coextensive, because we have Hobbs Act jurisdiction over "all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred." [3] *Lorion, 470 U.S. at 737*. The NRC argues [**12] that this distinction between *§ 2239(a)*'s two elements establishes that we have Hobbs Act jurisdiction over exemptions even though, under *§ 2239(a)*, exemptions do not require hearings. We disagree.

3 For instance, the *Lorion* Court noted that we have Hobbs Act jurisdiction over final orders in summary proceedings and informal NRC rulemaking, even though hearings may be unavailable with respect to each. *See 470 U.S. at 742 & n.10*.

In separating *§ 2239(a)*'s hearing requirement from the provision's jurisdictional component, *Lorion* did not alter the basis for jurisdiction pursuant to that section: we have jurisdiction over only an appeal from an order "issued in a 'proceeding . . . for the granting, suspending, revoking, or amending of any license.'" *Id. at 735* (quoting *42 U.S.C. § 2239(a)(1)*) (ellipsis in original). The Supreme Court has commanded "strict fidelity to the[] terms" of judicial review provisions that create jurisdiction, such as those contained in the Hobbs Act. *Stone v. INS, 514 U.S. 386, 405, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)*. The plain text of *§ 2239(a)* does not confer appellate jurisdiction over final orders issued in pro-

ceedings involving exemptions, irrespective of any hearing requirement.

Lorion's [**13] facts are instructive on this point. *Lorion* specifically held that the Hobbs Act gives the courts of appeals exclusive jurisdiction to review the NRC's denial of a citizen petition without a hearing. *Id. at 746*. The NRC suggests that the Hobbs Act similarly applies to an appeal from a final order granting an exemption without a hearing. But a citizen petition is a "request to institute a proceeding . . . to *modify, suspend, or revoke* a license." *10 C.F.R. § 2.206(a)* (emphasis added). The petition is "but the first step in a process that will, if not terminated for any reason, culminate in a full formal proceeding under *42 U.S.C. § 2239(a)(1)*." *Lorion, 470 U.S. at 745 n.11*.

In contrast, the NRC contends that an exemption is distinct from "the granting, suspending, revoking, or amending" of a license. We think this is a reasonable interpretation of the Hobbs Act, and one that deserves deference. *See Chevron U.S.A. Inc. v. NRDC., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. The NRC takes this stance to avoid having to hold hearings for exemptions; but by asserting that exemptions are different from amendments, a position to which we defer, the NRC necessarily deprives us of the [**14] ability [*181] to review exemptions pursuant to *§ 2239(a)*.

There are, of course, policy advantages in finding Hobbs Act jurisdiction over exemptions. Placing initial review of agency action in the courts of appeals improves judicial efficiency. "The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking," and thus proceeding in the district court often adds an unneeded layer of review. *Lorion, 470 U.S. at 744-45*. These advantages led the *Lorion* Court to hold that, "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id. at 745*. The First Circuit gave this policy "special weight" when finding that it had Hobbs Act jurisdiction to review NRC rules that, as a textual matter, "appear[ed] to fall outside" the Act. *Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 346-47 (1st Cir. 2004)*. But ultimately, policies alone are not dispositive. "Whether initial subject-matter jurisdiction lies initially in the courts of appeals [**15] must of course be governed by the intent of Congress and not by any views we may have about sound policy." *Lorion, 470 U.S. at 746*.

"[T]he plain language of the enacted text is the best indicator of intent." *Nixon v. United States, 506 U.S. 224, 232, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)*. Indeed, when the First Circuit broadly construed its Hobbs Act jurisdiction in light of the *Lorion* policies, the statutory text still constrained the court to hold that it could "review any NRC action that could be cognizable in a petition for review *from a proceeding under section 2239." Citizens Awareness Network, 391 F.3d at 347* (emphasis added). Here, we cannot read exemptions into the plain text of *§ 2239(a)*, particularly when the NRC itself (to which deference is owed) is urging that exemptions are different from "amending . . . [a] license" and the other orders mentioned in that section. *See, e.g.*, Resp't's Mot. to Dismiss at 7 ("An exemption is not a licensing action or rulemaking."); Resp't's Br. at 39 ("License amendments and post-licensing exemptions are entirely distinct and serve distinct purposes under NRC's regulatory scheme . . . ."). Moreover, the NRC's exemption program has been on the books in some form since 1956, [**16] *see* 21 Fed. Reg. 356 (Jan. 19, 1956), and Congress has amended *§ 2239(a)* since then, *see* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 3120, but has never included exemptions in the statute's text. This reinforces our view, evident from the text, that Congress intended to have exemptions treated differently from the orders mentioned in *§ 2239(a)*.

The NRC points out that the First and Sixth Circuits have each reviewed an exemption under the Hobbs Act. In both cases, however, other orders plainly within *§ 2239(a)*'s scope were also being challenged. In *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission, 878 F.2d 1516 (1st Cir. 1989)*, the petitioners appealed not only an NRC exemption, but also a citizen petition denial (the subject of *Lorion*) and a decision allowing a previously shutdown plant to resume operations. *Id. at 1519-20*. Similarly, *Kelley v. Selin, 42 F.3d 1501 (6th Cir. 1995)*, concerned several NRC orders, only one of which was an exemption. *Id. at 1503-04*. Neither case explained how or why exemptions fall under the Hobbs Act. It is possible that the issue was not squarely presented to those courts, which frequently occurs when parties prefer that [**17] the court decide an issue despite its potential jurisdictional infirmity, especially when the problem is relevant to only part of the [*182] appeal. It is also possible that the two courts assumed some type of supplemental jurisdiction over the exemption, in light of their undisputed Hobbs Act jurisdiction over the other orders at issue. *See Conoco, Inc. v. Skinner, 970 F.2d 1206, 1214 n.10 (3d Cir. 1992)* ("As long as this court has jurisdiction over one of the challenged regulations, the interests of judicial economy and efficiency allow us to hear the entire matter."). Regardless, to the extent that *Commonwealth of Massachusetts* and *Kelley* are inconsistent with our jurisdictional analysis, we decline to follow them.

We therefore hold that we lack jurisdiction under the Hobbs Act to review an NRC exemption. In the absence of jurisdiction, we lack the authority to review not only an NRC order that issues an exemption, but also any orders "preliminary or ancillary" to an exemption, such as a denial of a hearing request. *Lorion, 470 U.S. at 743* ("[R]eview of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order [**18] resolving the core issue."). But our inquiry does not end there, because we lack jurisdiction in this case only if the challenged NRC order is indeed an exemption and not an amendment or otherwise within the purview of *§ 2239*, an issue to which we now turn.

II. Whether the NRC's Order is an Exemption

Whether the challenged order is an exemption, as the NRC has labeled it and thus beyond our jurisdiction, or is properly regarded as an amendment and within our Hobbs Act jurisdiction, is itself an issue that is within our jurisdiction. *See Estate of Pew v. Cardarelli, 527 F.3d 25, 28 (2d Cir. 2008)* ("As always, we have jurisdiction to determine our jurisdiction.").

"The particular label placed upon [an order] by [an agency] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942)*. Still, the NRC's labels, though not dispositive, deserve deference when those labels are reasonable. The NRC, in deciding whether to treat an order as an exemption, applies its regulations governing when exemptions can be granted. *See 10 C.F.R. § 50.12*. An agency's application [**19] of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)* (internal quotation marks omitted); *see also Fed. Express Corp. v. Holowecki, 552 U.S. 389, 128 S. Ct. 1147, 1155, 170 L. Ed. 2d 10 (2008)* ("[T]he agency is entitled to . . . deference when it adopts a reasonable interpretation of regulations it has put in force."). We serve as an important check on the agency's decisionmaking process, but ultimately the agency's judgment, if reasonable, must prevail.

Here, we think the NRC reasonably applied its regulations when it classified the relief granted to Indian Point as an exemption. [4] Consistent with *10 C.F.R. § 50.12*, the agency concluded that treating the challenged order as an exemption was authorized by law, presented no undue risk to public health and safety, and was consistent with the common defense and security. As required by *10 C.F.R. § 50.12*, the NRC also found that "special circumstances" justified this exemption: specifically, that "the underlying purpose" of the fire safety rule would still be satisfied after the modification. *See 10 C.F.R. § 50.12(a)(2)(ii)*. Although it appears that [*183] the NRC could have alternatively [**20] treated the order as an amendment to Indian Point's license, the Commission applied its regulations reasonably in opting instead to grant Indian Point an exemption.

> 4 We assume without deciding that the regulations themselves are valid. Although the parties contest the issue, our lack of jurisdiction precludes us from resolving it.

Neither Petitioners nor *amicus curiae* New York State have persuaded us otherwise. Petitioners argue that this exemption should be deemed an amendment because it is permanent, noting that the First Circuit found that the exemption at issue in *Commonwealth of Massachusetts* did "not amount to a license amendment" because it had only "temporarily exempted the licensee" from a rule. *878 F.2d at 1521*. But the NRC had granted that exemption pursuant to *10 C.F.R. § 50.12(a)(2)(v)*, which allows exemptions providing "temporary relief from the applicable regulation." *878 F.2d at 1521* & n.7. In citing the temporary nature of the exemption before it, the First Circuit confirmed that the NRC had applied its regulations reasonably, but did not announce a general standard for distinguishing exemptions from amendments. Nor would such a standard comport with the NRC regulations: [**21] a requirement that exemptions must be temporary would conflict with the five "special circumstances" that allow for exemptions even if the relief is permanent. *See 10 C.F.R. § 50.12(a)(2)(i)-(iv), (vi)*; *supra* note 1.

We also reject New York State's position that a modification, purported to be an exemption, should be treated as an amendment if it relaxes a safety standard. The State's position may or may not be sound policy, but it lacks a basis in law. [5]

> 5 The State relies on *Bellotti v. U.S. Nuclear Regulatory Commission, 725 F.2d 1380, 233 U.S. App. D.C. 274 (D.C. Cir. 1983)*, to support its position, noting that *Bellotti* held that "automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer." *Id. at 1383*. However, *Bellotti* concerned the different question of whether the Massachusetts Attorney General could intervene in the statutorily required hearing for an amendment, *see id. at 1381-82*, and is therefore inapposite.

Petitioners' claim that the NRC requires hearings for exemptions involving "material questions directly related to an agency's licensing action" is also unavailing. Pet'rs' Reply Br. at 19. Petitioners rely solely on *In re Private*

Fuel Storage, L.L.C., 53 N.R.C. 459 (2001), [**22] to demonstrate this alleged NRC practice, but *Private Fuel Storage* concerned the unrelated issue of whether claims normally appropriate for an exemption, and thus not warranting a hearing, nonetheless can be included in an ongoing licensing hearing. *Id. at 461, 466*. Here, there is no such hearing.

In sum, none of the standards offered by Petitioners and the State for deciding when to treat exemptions as amendments withstand scrutiny. More importantly, none of their proffered distinctions between exemptions and amendments establish that the NRC acted unreasonably in considering the modification at issue in this case to be an exemption.

We recognize that, under the NRC regulations, little appears to distinguish an exemption from an amendment. But as long as the NRC has applied its regulations reasonably, we will not displace the agency's judgment with our own as to whether an exemption or amendment is warranted. Accordingly, we defer to the NRC's classification in this case and hold that the modification order that the Commission granted to Entergy and labeled an exemption is indeed an exemption. Petitioners challenge only that exemption in this appeal. Because we lack jurisdiction under [**23] the Hobbs Act over exemptions, we must dismiss the petition.

Finally, because we lack jurisdiction, we also express no opinion as to whether the NRC's hearing denial was proper, whether [*184] the exemption at issue is arbitrary and capricious, or the other issues raised by Petitioners. We hold only that Petitioners are indeed challenging an exemption, and that exemptions cannot be reviewed under the Hobbs Act. [6]

6 We note that our holding does not necessarily shut off every avenue Petitioners may have at their disposal for relief. Petitioners are free to seek review in the district court of the NRC's actions pursuant to the APA. *See Sharkey v. Quarantillo, 541 F.3d 75, 84 (2d Cir. 2008)* ("[A] suit that arises under the APA is properly brought in district court.").

CONCLUSION

For the foregoing reasons, we DISMISS the petition without prejudice for want of jurisdiction. All pending motions are denied as moot.

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636 F.2d 323, 13 ERC 1993, 204 U.S.App.D.C. 51, 10 Envtl. L. Rep. 20,001
(Cite as: 636 F.2d 323, 204 U.S.App.D.C. 51)

United States Court of Appeals,
District of Columbia Circuit.
ALABAMA POWER COMPANY, et al., Petitioners,[FN*]

FN* Consolidated with the following cases (identified by this Circuit's case number and petitioner), in all of which the Environmental Protection Agency is the respondent: No. 78-1008, American Petroleum Institute, et al.; No. 78-1525, Part II, Environmental Defense Fund, Inc.; No. 78-1590, Part II, Hampton Roads Energy Company; No. 79-1591, Alabama Power Company, et al.; No. 78-1592, Alabama Power Company, et al.; No. 78-1595, American Petroleum Institute, et al.; No. 78-1596, American Petroleum Institute, et al.; No. 78-1610, Part II, The Montana Power Company, et al.; No. 78-1752, District of Columbia, a municipal corporation; No. 78-1801, National Coal Association; No. 78-1802, National Coal Association; No. 78-1805, Mining and Reclamation Council of America, Inc.; No. 78-1806, Mining and Reclamation Council of America, Inc.; No. 78-1807, The Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, Puget Sound Power and Light Company, and Washington Water Power Company; No. 78-1810, Part II, The Pittston Company; No. 78-1811, American Iron and Steel Institute; No. 78-1815, Part II, American Paper Institute and the National Forest Products Association; No. 78-1816, Ashland-Warren, Inc.; No. 78-1817, Ashland-Warren, Inc.; No. 78-1818, Manufacturing Chemists Association, Chemical Products Corporation, Dow Chemical Company, FMC Corporation, Monsanto Company, PPG Industries, Inc., Rohm and Haas Company, Stauffer Chemical Corporation, Union Carbide Corporation, and Allied Chemical Corporation; No. 78-1819, Part II, Manufacturing Chemists Association, Chemical Products Corporation, Dow Chemical Company, FMC Corporation, Monsanto Company, PPG Industries, Inc., Rohm and Haas Company, Stauffer Chemical Company, Union Carbide Corporation, and Allied Chemical Corporation; No. 78-1821, Asarco Incorporated; No. 78-1822, American Mining Congress, United States Steel Corporation, Buttes Resources Company, Cyrus Mines Corporation, Energy Fuels Corporation, Freeport Exploration Company, ITT Resources, Inc., Johnsmanville Sales Corporation, The Montana Coal Council, Thermal Energy Inc., and Wyoming Mineral Corporation; No. 78-1823, Westmoreland Coal Company and Westmoreland Resources, Inc.; No. 78-1824, Westmoreland Coal Company and Westmoreland Resources, Inc.; No. 78-1825, State of Texas; No. 78-1827, Mitchell Energy Co., a corporation; No. 78-1828, Cheyenne Refining Co., a corporation; No. 78-1829, Gary Western Co.; No. 78-1830, LA Jet, Inc., a corporation; No. 78-1832, Sierra Club; No. 78-1833, Reynolds Metals Company, Inc.; No. 78-1834, Colorado Interstate Gas Company, Tennessee Gas Pipeline Company, a division of Tenneco, Inc., and Natural Gas Pipeline Company of America; No. 78-1836, GATX Terminals Corporation, General American Transportation Corporation, and GATX Corporation; No. 78-1837, Occidental Oil Shale, Inc. and Ashland Colorado, Inc.; No. 78-1838, Part II, Kroppers Company, Inc.; and No. 78-1839), Part II, USM Corporation.

v.

Douglas M. COSTLE, as Administrator, Environmental Protection Agency, et al., Respondents,*
Sierra Club, et al., Intervenors.*

No. 78-1006.
Argued April 20, 1979.
Decided Dec. 14, 1979.
As Amended April 21, 1980.

Petitions were filed seeking review of Environmental Protection Agency's final regulations embracing prevention of significant deterioration of air quality in “clean air areas,” which PSD regulations implemented Clean Air Act Amendments of 1977. Preliminary issues were decided by initial per curiam opinion, 196 U.S.App.D.C. 161, 606 F.2d 1068. Subsequently, a three-part opinion was issued. In an opinion for the Court, Leventhal, Circuit Judge, held, among other things, that: (1) it was error to define “poten-

tial to emit" by discounting beneficial effect of air pollution control equipment designed into a facility; (2) EPA may exempt de minimis situations; and (3) authority other than PSD permit requirements permit resolution of problem of interstate pollution. In an opinion for the Court, Robinson, Circuit Judge held, among other things, that: (1) statutory method for establishing baseline concentrations was controlling; (2) modeling regulations would not be overturned; and (3) tall-stack policy, for purpose of PSD program, applies to nonbaseline emissions of nongrandfathered stacks. In an opinion for the Court, Wilkey, Circuit Judge, held, among other things, that: (1) NSPS definition of "source" applies to PSD provisions; (2) a "bubble concept" may be applied in determining a covered "increase"; and (3) visible emission standards may be considered by PSD permitting authority in applying BACT.

Affirmed in part and remanded in part.

Opinion by Circuit Judge Leventhal

West Headnotes

[1] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

In enacting provision of Clean Air Act Amendments of 1977 subjecting major emitting facilities to preconstruction review and permit requirements Congress' intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the "PSD", i. e., prevention of significant deterioration provisions, and which facilities, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air. Clean Air Act, §§ 165, 169, 169(1), 42 U.S.C.A. §§ 7475, 7479, 7479(1).

[2] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

In subjecting major emitting facilities to preconstruction review and permit requirements of Clean Air Act Amendments of 1977 the purpose of Congress was to require preconstruction review and a permit before major amounts of emissions were released into the air, and when determining a facility's potential to emit air pollutants, the Environmental Protection Agency must look to the facility's "design capacity," a concept which not only includes a facility's maximum productive capacity but also takes into account the anticipated function of the air pollution control equipment designed into the facility. Clean Air Act, §§ 165, 169, 169(1), 42 U.S.C.A. §§ 7475, 7479, 7479(1).

[3] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

In general a court defers to the interpretations of a new statute by the agency that is charged with putting it into effect, meshing the wheels, and that presumably has some awareness of the approaches of legislators particularly concerned with the legislation.

[4] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

In implementing the "PSD" provisions of Clean Air Act Amendments of 1977 the Environmental Protection Agency erred in defining the "potential to emit" language

in definition of a "major emitting facility" by discounting the beneficial effects of air pollution control equipment designed into a facility. Clean Air Act, §§ 165, 169, 169(1), 42 U.S.C.A. §§ 7475, 7479, 7479(1).

[5] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

The Clean Air Act Amendments of 1977 do not give the Environmental Protection Agency a free hand to grant broad exemptions. Clean Air Act, §§ 101 et seq., 165(b), 42 U.S.C.A. §§ 7401 et seq., 7475(b).

[6] Environmental Law 149E 292

149E Environmental Law
149EVI Air Pollution
149Ek289 Administrative Agencies and Proceedings
149Ek292 k. Notice and Comment. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Whether planned down time must, or may, be included in calculating the "potential to emit" threshold tonnage triggering preconstruction review and permit requirements of the "PSD" provisions of Clean Air Act Amendments of 1977 is a matter for the notice and comment proceedings on proposed Environmental Protection Agency regulations addressing the point. Clean Air Act, §§ 165, 169, 169(1), 42 U.S.C.A. §§ 7475, 7479, 7479(1).

[7] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Environmental Protection Agency's exemption allowing sources and modifications emitting under 50 tons per year of air pollutants to forego best available control technology and air quality assessment, i. e., expanding the statutory exemption from air quality review for modifications or expansions emitting less than 50 tons of pollutants per year, fell beyond the Agency's exemption authority under the PSD provisions of Clean Air Act Amendments of 1977. Clean Air Act, §§ 165, 165(b), 42 U.S.C.A. §§ 7475, 7475(b).

[8] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

The exemption of modification or expansion of existing facilities from the air quality review provisions necessary to obtain approval of construction of a major emitting facility under PSD provisions of Clean Air Act Amendments of 1977 applies to major emitting facilities in class II areas which existed on August 7, 1977 and which became subject to permit requirements because of expansion or modification that, after application of best available control technology, results in a net increase of less than 50 tons a year in emission so long as they do not contribute to ambient air quality levels in excess of national secondary ambient air quality standards for sulphur dioxide and particulate matter. Clean Air Act, §§ 165, 165(b), 42 U.S.C.A. §§ 7475, 7475(b).

[9] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

Although Environmental Protection Agency regulations establishing March 19, 1978 as effective date of preconstruction review and permit requirements of PSD part of Clean Air Act Amendments of 1977 supplanted effective date specified in the Act, i. e., August 7, 1977, and although same statutory date, subject to change by Agency rule, was specified for exception for expansion or modification of existing facilities whose emissions would be less than 50 tons per year, absent rule making changing

the latter effective date the Court of Appeals was constrained to apply literal terms of the statute. Clean Air Act, §§ 165, 165(a, b), 42 U.S.C.A. §§ 7475, 7475(a, b).

[10] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Protection Agency erred in construing phrase "whose allowable emissions," as used in exception to air quality review necessary for preconstruction approval of a major emitting facility under PSD part of Clean Air Act Amendments of 1977 for an expansion or modification of an existing facility whose allowable emissions will be less than 50 tons per year, as referring to emissions from the major emitting facility, with agency applying exception to an existing major emitting facility that becomes subject to permit requirements due to an expansion or modification where allowable emissions from entire facility have been reducted, after best available control technology, to less than 50 tons per year. Clean Air Act, § 165(b), 42 U.S.C.A. § 7475(b).

[11] Environmental Law 149E 698

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek698 k. Remand to Administrative Agency. Most Cited Cases
(Formerly 199k25.15(9), 199k25.15(6) Health and Environment)

Although since "major emitting facilities" subject to permit requirements of PSD part of Clean Air Act Amendments of 1977 are only those sources which after controls emit or have potential to emit at least 100 tons annually, standard doctrine taught that proper course for reviewing court was to remand to agency for further consideration on concluding that agency erred in defining "potential to emit" by discounting beneficial effects of air pollution control equipment, notwithstanding that dispute over Agency's 50 tons per year exemption had, in effect, become academic. Clean Air Act, § 165(a), 42 U.S.C.A. § 7475(a).

[12] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In General. Most Cited Cases
(Formerly 15Ak303)

Administrative Law and Procedure 15A 749

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak749 k. Presumptions. Most Cited Cases

Certain limited grounds for the creation of exemptions are inherent in the administrative process and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them; however, there exists no general administrative power to create exemptions to statutory requirement based on the agency's perception of costs and benefits.

[13] Administrative Law and Procedure 15A 324

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak324 k. Discretion. Most Cited Cases

Constitutional Law 92 2407

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2405 To Executive, in General
92k2407 k. Standards for Guidance. Most Cited Cases
(Formerly 92k62(2), 15Ak209)

Agencies have "equitable" discretion to afford case-by-case treatment, taking into account circumstances peculiar to individual parties in application of a general rule to particular cases, or even in appropriate cases to

grant dispensation from the rule's operation; however, Congress may restrain the agency by mandating standards from which no variance is permitted.

[14] Statutes 361 235

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k235 k. Liberal or Strict Construction as Affected by Nature of Act in General. Most Cited Cases

Categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.

[15] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In General. Most Cited Cases
(Formerly 15Ak303)

Broad principle that frowns on categorical administrative exemptions from command of a regulatory statute is strict, but is not absolute, and consideration of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute.

[16] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In General. Most Cited Cases
(Formerly 15Ak303)

The same consideration of administrative need to adjust to available resources underlying an administrative approach not explicitly provided for in the regulatory statute applies where the constraint is imposed not by a shortage of funds but, rather, by a shortage of time, or of the technical personnel needed to administer a program.

[17] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

To extent that Environmental Protection Agency, in granting a general exemption from preconstruction review and permit requirements of the PSD provisions of Clean Air Act Amendments of 1977 for stationary sources emitting less than 50 tons per year of any air pollutant relied on substitution of its own analysis of policy considerations for those enunciated by Congress, its action was to be rejected as trenching on the congressional function. Clean Air Act, § 165(a), 42 U.S.C.A. § 7475(a).

[18] Administrative Law and Procedure 15A 389

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak389 k. Duty to Make. Most Cited Cases

Where an agency seeks approval of a prospective exemption of certain categories from the statutory command based on the agency's prediction of the difficulties of undertaking regulations, the agency's burden of justification is especially heavy as such is a different case from where the agency seeks relief from a charge which, after a good-faith effort, it has found it cannot perform.

[19] Administrative Law and Procedure 15A 385.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak385 Power to Make
15Ak385.1 k. In General. Most Cited Cases
(Formerly 15Ak385)

Before a court sanctions an agency's prospective exemption of certain categories from a statutory command based on prediction of difficulties of undertaking regulation a court is to carefully study the governing statute to ascertain whether it authorizes approaches that deviate

from the legislative mandate in response to concerns about feasibility.

[20] Administrative Law and Procedure 15A 389

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak389 k. Duty to Make. Most Cited Cases

Under doctrine of necessity, an agency may defer regulation in individual instances until the aggregation of those instances surpasses a reasonable threshold, and agency's burden of justification for such approach is substantially less than that required when the agency seeks to exempt rather than defer regulation.

[21] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In General. Most Cited Cases
(Formerly 15Ak303)

Categorical exemptions from scope of a regulatory statute may be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis as the law does not concern itself with trifling matters.

[22] Administrative Law and Procedure 15A 305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory Basis and Limitation. Most Cited Cases

Agency ability to exempt de minimis situation from a statutory command is not an ability to depart from the regulatory statute, but, rather, a tool to be used in implementing the legislative design.

[23] Statutes 361 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Statutes 361 189

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k189 k. Literal and Grammatical Interpretation. Most Cited Cases

Notwithstanding the "plain meaning" of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results.

[24] Administrative Law and Procedure 15A 303.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak303.1 k. In General. Most Cited Cases
(Formerly 15Ak303)

Determination of when matters are truly de minimis will turn on the assessment of particular circumstances, and the agency bears the burden of making the required showing.

[25] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Protection Agency may exempt de minimis situations from statutory commands of the Clean Air Act. Clean Air Act, §§ 101 et seq., 165, 42 U.S.C.A. §§ 7401 et seq., 7475.

[26] Administrative Law and Procedure 15A 389

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak389 k. Duty to Make. Most Cited Cases

Although difference between what an agency must regulate and what it may exempt as de minimis is one of degree, the difference is an important one as unless Congress has been extraordinarily rigid there is likely basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield gain of trivial or no value while such implied authority is not available where the regulatory function provides benefits, in the sense of furthering the regulatory objective, but the agency concludes that the acknowledged benefits are exceeded by the costs and for such a situation any implied authority to make cost-benefit decisions must be based not on general doctrine but on a fair reading of the specific statute, its aims and legislative history.

[27] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

In provision of Clean Air Act Amendments of 1977 exempting from air quality review provisions of the PSD preconstruction permit requirements any modifications or expansions of existing facilities involving increase of pollutants to less than 50 tons a year Congress has permitted a narrow exemption which provides no basis for Environmental Protection Agency to exercise a "revisory power" to exclude new sources as well as modifications or to extend the exemption to best available control technology review in addition to air quality review. Clean Air Act, § 165(a), (a)(4), (b), 42 U.S.C.A. § 7475(a), (a)(4), (b).

[28] Environmental Law 149E 276

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek276 k. In General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Fact that emission of mercury is not within the group of sources covered by national emission standards for hazardous air pollutants does not mean that mercury is not a pollutant subject to regulations under PSD provisions of Clean Air Act Amendments of 1977. Clean Air Act, §§ 101 et seq., 165, 42 U.S.C.A. §§ 7401 et seq., 7475.

[29] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Apart from its limited de minimis exemption authority in applying the PSD part of Clean Air Act Amendments of 1977 the Environmental Protection Agency has flexibility to consider costs and benefits in deciding what is "best available control terminology" for any situation. Clean Air Act, § 165(a)(4), 42 U.S.C.A. § 7475(a)(4).

[30] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Any administratively created 50-ton exemption from preconstruction review and permit requirements of PSD provisions of Clean Air Act Amendments of 1977 must take into account the fact that exemption authority is narrow in reach and tightly bounded by the need to show that the situation is genuinely de minimis or one of administrative necessity. Clean Air Act, § 165, 42 U.S.C.A. § 7475.

[31] Environmental Law 149E 258

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards

149Ek258 k. In General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Environmental Protection Agency has authority under the PSD part of Clean Air Act Amendments of 1977 to prevent or to correct a violation of the increments, but the agency is without authority to dictate to the states their policy for management of the consumption of allowable increments. Clean Air Act, §§ 161, 163(a), 42 U.S.C.A. §§ 7471, 7473(a).

[32] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Although principal mechanism for monitoring the consumption of allowable increments in pollution concentrations in clean air areas is the preconstruction review and permit process required for new or modified major emitting facilities, as specified in section 165 of Clean Air Act Amendments of 1977, such section does not provide the exclusive mechanism for protection of the increments, as Administrator of Environmental Protection Agency has authority beyond such section to prevent or remedy a violation of the threshold specified in the Act. Clean Air Act, §§ 161, 163, 165, 42 U.S.C.A. §§ 7471, 7473, 7475.

[33] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

General rule-making authority granted Administrator of Environmental Protection Agency under section 301 of Clean Air Act Amendments of 1977 to prescribe such regulations as are necessary to carry out its functions under "this Act" includes authority to promulgate regulations for state implementation plans under the "PSD provisions" in addition to promulgating regulations relating to pre-construction permitting process. Clean Air Act, §§ 161, 301, 42 U.S.C.A. §§ 7471, 7601.

[34] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Although waiver provisions of Clean Air Act Amendments of 1977 could conceivably allow permissible pollution increments in clean air areas to be exceeded, waiver only has vitality and recognition in that facilities granted special consideration thereunder are, in effect, treated as facilities operating in compliance with the Act, but the totality of facilities in compliance, as a group, may be subject to measures necessary to cope with a condition of pollutants exceeding the PSD maximum. Clean Air Act, §§ 163, 165, 168, 169, 42 U.S.C.A. §§ 7473, 7475, 7478, 7479.

[35] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Although legislative history underlying PSD part of Clean Air Act Amendments of 1977 gave no indication that prior regulatory approach, which was limited to preconstruction review, was being altered, such was no indication that enforcement measures under the amendment were limited to preconstruction review as Congress did not in each case compare amendments with reach of prior regulations and although Act is patterned in many respects on preexisting regulatory approach it contains many differences. Clean Air Act, §§ 101 et seq., 165, 42 U.S.C.A.

§§ 7401 et seq., 7475.

[36] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Environmental Protection Agency regulation stating that the state implementation plans under PSD provisions of Clean Air Act Amendments of 1977 must make provisions to ensure that violation of the increments of maximum allowable concentrations do not occur and if they have occurred to ensure that steps will be taken to correct them is interpretive in nature and, as such, exempt from notice and comment requirements of Administrative Procedure Act and rule-making provisions of Clean Air Act. 5 U.S.C.A. § 553(b)(A); Clean Air Act, §§ 161, 163, 301, 307(d), 42 U.S.C.A. §§ 7471, 7473, 7601, 7607(d).

[37] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

In implementing the PSD provisions of Clean Air Act Amendments of 1977 the Environmental Protection Agency has authority to require inclusion in state plans of provision for the correction of any violation of allowable increments or maximum allowable concentrations, and may require, in appropriate instances, the relatively severe corrective of a rollback in operations or the application of retrofit air pollution control technology. Clean Air Act, §§ 161, 163, 42 U.S.C.A. §§ 7471, 7473.

[38] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Under PSD part of Clean Air Act Amendments of 1977, it is permissible for Environmental Protection Agency to promulgate guidelines to help the states manage the allocation of available increments in pollutants in clean air areas; however, the Agency may not prescribe the manner in which states will manage their allowed internal growth. Clean Air Act, §§ 161, 163, 42 U.S.C.A. §§ 7471, 7473.

[39] Constitutional Law 92 2488

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2488 k. Policy. Most Cited Cases
(Formerly 92k70.3(3))

Constitutional Law 92 2621

92 Constitutional Law
92XX Separation of Powers
92XX(D) Executive Powers and Functions
92k2621 k. Encroachment on Legislature. Most Cited Cases
(Formerly 92k70.3(3))

Where Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals by what an agency asserts are less than optimal means, neither the reviewing court nor the agency is free to ignore the plain meaning of the statute and substitute its policy judgment for that of Congress.

[40] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Phrase "constructed in any area to which this part applies," as contained in permit and preconstruction review requirements of PSD part of Clean Air Act Amendments of 1977, limits PSD review requirements to major emitting facilities to be constructed in certain locations and does not

authorize extension of permit requirements to all sources, wherever located, if emissions therefrom would have an impact on a clean air area; permit requirement may not be extended to major facilities located in nonattainment areas in one state although they may have an adverse impact on clean air areas in a neighboring state. Clean Air Act, §§ 101(b)(1), 160(4), 161, 165, 42 U.S.C.A. §§ 7401(b)(1), 7470(4), 7471, 7475.

[41] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

Although PSD permit requirement of Clean Air Act Amendments is based on location rather than impact on a clean air area, provisions other than the permit section are available to fulfill the congressional objective of a need to cope with the problem of interstate pollution. Clean Air Act, §§ 110(a)(2)(E)(i), 114, 126(a-c), 161, 165, 169A, 42 U.S.C.A. §§ 7410(a)(2)(E)(i), 7414, 7426(a-c), 7471, 7475, 7491.

[42] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Phrase "measures required to be included" in a state implementation plan, as provided for in Clean Air Act Amendments of 1977, clearly incorporate at least absolute emission limitation for each pollutant for which increment limitations have been set under PSD provisions, the monitoring and modeling requirements of PSD part and "such other measures as may be necessary, as determined under regulations promulgated" under PSD provisions, thereby authorizing EPA to prevent the industry of one state from interfering with the PSD program of another. Clean Air Act, §§ 110(a)(2)(E)(i), 161, 163, 165(e), 166, 42 U.S.C.A. §§ 7410(a)(2)(E)(i), 7471, 7473, 7475(e), 7476.

[43] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

Provision of Clean Air Act Amendments of 1977 governing abatement of interstate pollution is a vehicle for abating substantial interstate air pollution independent of permit requirements of the PSD part. Clean Air Act, §§ 126, 165, 42 U.S.C.A. §§ 7426, 7475.

[44] Environmental Law 149E 261

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek261 k. Contents of Implementation Plans. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Both provision of Clean Air Act Amendments of 1977 requiring a state implementation plan to prohibit stationary sources within the state from emitting pollutants which interfere with implementation plan of any other state under the PSD provisions and provision governing abatement notwithstanding any permit gives Environmental Protection Agency power to require that state implementation plans contain provisions sufficient to address the problem of interstate air pollution, including authority to require that SIPs include notice provisions designed to trigger the mechanisms required by the former. Clean Air Act, §§ 110(a)(2)(E)(i), 126(a, c), 42 U.S.C.A. §§ 7410(a)(2)(E)(i), 7426(a, c).

[45] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Record-keeping provision of Clean Air Act Amendments of 1977 authorizes Environmental Protection Agency to require any facility to provide notice of an interstate impact on air quality, be it or some other source the cause of the impact, and provides an additional tool for

combating effect on a clean air area of one state by a pollution source located in another state. Clean Air Act, § 114, 42 U.S.C.A. § 7414.

[46] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Provision of PSD part of Clean Air Act Amendments of 1977 that each state implementation plan contain emissions limitations "and such other measures as may be necessary, as determined under regulations promulgated under this part," to prevent significant deterioration of air quality in clean air areas grants to EPA the power to promulgate rules requiring that SIPs adequately address the problem of abatement of substantial interstate air pollution and, hence, the administrator may promulgate rules to require inclusion of such provisions in the SIP of the state whose clean air is affected, of the state which is the source of the adverse impact, or of both. Clean Air Act, § 161, 42 U.S.C.A. § 7471.

[47] Administrative Law and Procedure 15A 385.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak385 Power to Make
15Ak385.1 k. In General. Most Cited Cases
(Formerly 15Ak385)

Where congressional objective is clear but statutory measures addressed thereto are modest, a determination that supplemental measures are necessary for purpose of triggering rule-making authority is within an agency's authority even though generally the statute relies on measures specified by Congress rather than a contemplation of broad agency rule-making discretion.

[48] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Permit requirements applicable to new construction of major emitting facilities under PSD provisions of Clean Air Act Amendments of 1977 do not apply to sources in nonattainment areas that impact on the air quality of federal lands and Indian reservations, although other measures under the Act are available to combat the problem. Clean Air Act, §§ 161, 165, 165(d)(2), 169A, 42 U.S.C.A. §§ 7471, 7475, 7475(d)(2), 7491.

[49] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

In view of other statutory tools available to combat interstate air pollution, specifically, effect on one state's clean air areas of pollution emanating from a source in another state, there is no predicate for judicial "gloss" on preconstruction requirements provision of PSD portions of Clean Air Act Amendments of 1977 to support EPA rule-making authority to apply permit requirements to major emitting facilities located in nonattainment areas in one state that impact adversely on clean air areas within a neighboring state. Clean Air Act, § 165, 42 U.S.C.A. § 7475.

[50] Environmental Law 149E 278

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek278 k. Fugitive Emissions. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Phrase "fugitive emissions" for purpose of Clean Air Act Amendments of 1977 are emissions from a facility that escape from other than a point source and principal among which is "fugitive dust," a term referring to fugitive emissions by particulate matter; although such are the general parameters of subject terms, EPA has latitude to provide

reasonable, though more specific, definitions along similar lines, so long as they comport with congressional intent. Clean Air Act, § 302(j), 42 U.S.C.A. § 7602(j).

[51] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Provisions of PSD part of Clean Air Act Amendments of 1977 detailing the preconstruction review and permit requirements for each new or modified "major emitting facility" apply with equal force to fugitive emissions and emissions from industrial point sources. Clean Air Act, § 165, 42 U.S.C.A. § 7475.

[52] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 278

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek278 k. Fugitive Emissions. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

A major emitting facility is subject to preconstruction requirements of PSD part of Clean Air Act Amendments of 1977 for each pollutant it emits irrespective of the manner in which it is emitted; however, a source emitting large quantities of fugitive emissions may remain outside the definition of "major emitting facility" and thus may not be subject to the preconstruction requirements. Clean Air Act, § 165, 42 U.S.C.A. § 7475.

[53] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

Definition of "major emitting facility" in general definition provisions of Clean Air Act Amendments of 1977 is not totally supplanted for the PSD part by definition of "major emitting facility" in PSD provisions, as general definition specifically attaches a rule-making requirement for inclusion of fugitive emissions in the threshold 100-ton per year calculation and under the PSD part the calculation of the threshold emission levels may include fugitive emissions only as determined by rule, thereby giving agency flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage. Clean Air Act, §§ 169(1), 302(j), 42 U.S.C.A. §§ 7479(1), 7602(j).

[54] Environmental Law 149E 278

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek278 k. Fugitive Emissions. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Environmental Law 149E 695

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek695 k. In General. Most Cited Cases
(Formerly 199k25.15(12), 199k25.15(6) Health and Environment)

Environmental Protection Agency regulation including partial exemption from statutory PSD permit requirements for major emitting facilities of fugitive dust was required to be vacated as based on an erroneous premise, namely, that Clean Air Act Amendments of 1977 of their own force subject major sources of fugitive emissions to PSD preconstruction review and permit requirements; objective of partially exempting fugitive dust emitted by major emitting facilities from permit requirements was to be had by way of appropriate rule making. Clean Air Act, §§ 111, 165, 169(1), 302(j), 42 U.S.C.A. §§ 7411, 7475,

7479(1), 7602(j).

[55] Environmental Law 149E 268

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek268 k. Stationary Sources in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 276

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek276 k. In General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Under Clean Air Act Amendments of 1977, including PSD part, the Environmental Protection Agency has discretion to define the pollutant termed "particulate matter" to exclude particles of a size or composition determined not to present substantial public health or welfare concerns and although the excluded particulates would remain "air pollutants" within meaning of the Act, they could be dropped from list of air pollutants the emission of which might endanger public health and thereby would not be subject to NAAQS but nonetheless might be included in the list, required under the amendments, of stationary sources that contribute to pollution. Clean Air Act, §§ 108(a)(1), (a)(2), 109, 111(b)(1)(A), 302(g), 42 U.S.C.A. §§ 7408(a)(1), (a)(2), 7409, 7411(b)(1)(A), 7602(g).

[56] Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Under Clean Air Act Amendments of 1977, a stationary source may significantly contribute to air pollution by emission of "particulate matter" even though quantities emitted fall below tonnage threshold that would qualify such source as a major emitting facility for purpose of preconstruction permit and review requirements of PSD part, and due to difference in focus of the listing requirements a performance standard might be developed governing "excluded particulates" although no NAAQS had been promulgated but once a standard of performance was promulgated for "excluded particulates" they would become "subject to regulation" within meaning of provision requiring BACT prior to PSD permit approval. Clean Air Act, §§ 108, 111(a)(1)(C), (b)(1)(A), (d)(1), 165(a)(3, 4), 42 U.S.C.A. §§ 7408, 7411(a)(1)(C), (b)(1)(A), (d)(1), 7475(a)(3, 4).

[57] Environmental Law 149E 278

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek278 k. Fugitive Emissions. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency has authority by rule making to incorporate fugitive emissions, including fugitive dust, in the calculation of tonnage threshold required to qualify a stationary source as major emitting facility for purpose of preconstruction permit requirements of the PSD parts of Clean Air Act Amendments of 1977. Clean Air Act, §§ 165, 302(j), 42 U.S.C.A. §§ 7475, 7602(j).

[58] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Requirement of PSD part of Clean Air Act Amendments of 1977 that preconstruction review in connection with construction of a major emitting facility "shall" be preceded by an analysis for each pollutant subject to regulation which will be emitted from the facility is mandatory, subject only to authority of the agency to exempt de minimis situations; there must be an analysis and it must be for each pollutant regulated under the Act. Clean Air Act, § 165(a)(2), (e)(1), 42 U.S.C.A. § 7475(a)(2), (e)(1).

[59] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Although an analysis for each pollutant regulated under Clean Air Act Amendments of 1977 must be conducted in preconstruction review of a new major emitting facility the Act does not require monitoring as the method of analysis; EPA may use its discretion in its choice of methodology, either monitoring or modeling, which discretion is subject to statutory requirements as to monitoring. Clean Air Act, § 165(a)(2), (e)(1, 2), 42 U.S.C.A. § 7475(a)(2), (e)(1, 2).

[60] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

The monitoring required under PSD part of Clean Air Act Amendments of 1977 in connection with construction of a new major emitting facility requires monitoring to determine whether emissions will exceed allowable increments. Clean Air Act, § 165(e)(2), 42 U.S.C.A. § 7475(e)(2).

[61] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Even a congressional mandate, such as a clean air technology-forcing requirement based on a congressional projection of emergency of technology for the future, is subject to a justified excuse from agency compliance where good-faith effort to comply has not been fruitful of results; however, such is different from exemption on basis of current technological infeasibility. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[62] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Although Environmental Protection Agency, in undertaking the monitoring required by PSD parts of Clean Air Act of a new major emitting facility has authority to require methods other than monitoring to ensure that allowable increments and NAAQS are not violated and may choose to invoke that authority because of its perception that monitoring alone is inadequate, it does not have authority to dispense with monitoring as one enforcement mechanism as Congress has mandated the use of that technique. Clean Air Act, § 165(e)(2), 42 U.S.C.A. § 7475(e)(2).

[63] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Environmental Protection Agency is to furnish meaningful guidance to the states as to circumstances appropriate for exemption from one-year monitoring requirement applicable to preconstruction review of a major emitting facility. Clean Air Act, § 165(e)(2), 42 U.S.C.A. § 7475(e)(2).

[64] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Under PSD provisions of Clean Air Act Amendments of 1977, the Environmental Protection Agency has latitude to determine whether postconstruction monitoring of a newly constructed major emitting facility is required, in light of facts and circumstances, and has latitude to respond to suggestions that guidelines be formulated outlining circumstances that require postconstruction monitoring and nature thereof. Clean Air Act, § 165(a)(7), (e), 42 U.S.C.A. § 7475(a)(7), (e).

[65] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Authority of Administrator of Environmental Protection Agency to require monitoring by any source that in his judgment is necessary to carry out his responsibilities under Clean Air Act includes authority to require postconstruction monitoring under PSD parts of a newly constructed major emitting facility, but such monitoring is not compelled. Clean Air Act, §§ 114, 165(e), 42 U.S.C.A. §§ 7414, 7475(e).

[66] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

The nationwide monitoring network authorized by Clean Air Act Amendments of 1977 is to be a function of government, not responsibility of a PSD applicant for permit to construct a new major emitting facility. Clean Air Act, § 319, 42 U.S.C.A. § 7619.

[67] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Protection Agency exceeded scope of its authority under PSD part of Clean Air Act Amendments of 1977 in departing from statutory baseline data from which a deterioration in air quality is calculated, i. e., time of first application for a permit, with agency defining baseline concentration in terms of actual air quality as of August 7, 1977, i. e., effective date of PSD provisions. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[68] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 280

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek280 k. Sulfur and Sulfur Dioxide. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

The baseline concentration of pollutants under PSD provisions of Clean Air Act Amendments of 1977 is to include all emissions actually being made by major facilities on which construction was underway before January 6, 1975, and which are in operation when the baseline determination is made, with emissions of sulphur dioxide and particulate matter from major facilities on which construction began after January 6, 1975, not being grandfathered into the baseline but, rather, counted against in-

crements, even if such facilities are operating on the date of the first permit application, i. e., the measuring date in determining baseline concentration. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[69] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Under the PSD provisions of Clean Air Act Amendments of 1977, baseline concentrations of pollutants and increments are set for regions, rather than individual facilities. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[70] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's decision, in establishing baseline concentrations under PSD part of Clean Air Act Amendments of 1977, not to grandfather emissions from voluntary fuel switches by facilities which, prior to January 6, 1975, had fuel-switching capabilities did not violate congressional intent. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[71] Statutes 361 189

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k189 k. Literal and Grammatical Interpretation. Most Cited Cases

Every issue of statutory interpretation should commence with a close textual examination.

[72] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

For purpose of establishing a "baseline concentration" under PSD part of Clean Air Act Amendments of 1977, there are two types of emitting sources begun prior to existence of any PSD program: if the source has no actual emissions because it has yet to commence operating, its hypothetical, projected emissions are included in the baseline while if the source is an established operation, a more realistic assessment of its impact on ambient air quality levels is possible, and thus is directed. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[73] Environmental Law 149E 273

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek273 k. Mobile Sources; Motor Vehicles. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Environmental Protection Agency did not act improperly in treating state-ordered fuel conservation orders differently from federally mandated fuel switches for purpose of counting emissions from voluntary fuel changes against the increment in setting baseline concentrations under PSD provisions of Clean Air Act Amendments of 1977. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[74] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Congress expected Environmental Protection Agency to use administrative good sense in establishing the baseline concentration and in calculating exceedances under

the PSD part of Clean Air Act Amendments of 1977; were measurements on an atypical day the sole method of determining actual ambient air quality as of approximate time of first permit application, i. e., the date for setting baseline concentrations, affected industries would have cause for complaint and potential ground for relief. Clean Air Act, § 169(4), 42 U.S.C.A. § 7479(4).

[75] Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 280

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek280 k. Sulfur and Sulfur Dioxide. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Under PSD provisions of Clean Air Act Amendments of 1977, increments setting forth the maximum allowable increase in pollutants are stated for particulates and sulphur dioxide, which increments are not source specific; all emissions are considered in determining whether statute's aim of preventing significant deterioration of air quality in attainment areas is being secured. Clean Air Act, § 163(b), 42 U.S.C.A. § 7473(b).

[76] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's refusal to grandfather into baseline concentrations the emissions resulting from voluntary fuel switches, with Agency view being that switches consume the increment in applying PSD part of Clean Air Act Amendments of 1977, is not procedurally infirm as Agency carefully delineated rationale of its policy and its views of congressional intent merely differed, justifiably so, from that of the industry and, also, since such regulation was interpretive and exempt from rule-making requirements of the Amendments and the Administrative Procedure Act. 5 U.S.C.A. § 553; Clean Air Act, §§ 169(4), 307(d), 42 U.S.C.A. §§ 7479(4), 7607(d).

[77] Administrative Law and Procedure 15A 394

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak394 k. Notice and Comment, Necessity. Most Cited Cases

Administrative Law and Procedure 15A 400

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak400 k. Hearing in General. Most Cited Cases

For purpose of notice and comment provisions of Administrative Procedure Act, the line between binding, substantive rules and mere informal announcements as to how an agency plans to exercise a discretionary power is not always bright. 5 U.S.C.A. § 553(b)(3)(A).

[78] Environmental Law 149E 292

149E Environmental Law
149EVI Air Pollution
149Ek289 Administrative Agencies and Proceedings
149Ek292 k. Notice and Comment. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Since guidelines accompanying final modeling regulations promulgated by Environmental Protection Agency under Clean Air Act Amendments of 1977 require that

deviations from specified models be fully supported and documented, the models designated in the guidelines are thus granted sufficient weight in subsequent proceedings to remove the regulations from the ambit of mere policy statements and Administrative Procedures Act's exemption therefrom of notice and comment requirements applicable to rule making. 5 U.S.C.A. § 553(b)(3)(A); Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(d), 7620.

[79] Administrative Law and Procedure 15A 394

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak394 k. Notice and Comment, Necessity. Most Cited Cases

Administrative Law and Procedure 15A 400

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak392 Proceedings for Adoption
15Ak400 k. Hearing in General. Most Cited Cases

Agency's duty to respond to significant comments finds a statutory basis in required notice and comment procedures, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public. 5 U.S.C.A. § 553(b)(3)(A).

[80] Environmental Law 149E 293

149E Environmental Law
149EVI Air Pollution
149Ek289 Administrative Agencies and Proceedings
149Ek293 k. Hearing and Determination; Statement of Reasons. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Since Clean Air Act Amendments of 1977 explicitly afford interested persons the opportunity to comment with respect to proceedings of required special modeling conference, and since submitted comments must be included in the docket established for promulgation and review of regulations pertaining to air quality modeling, any comments standing unaddressed may well leave a reviewing court unable to say that the agency has considered all relevant factors. 5 U.S.C.A. § 553(b)(3)(A); Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(b), 7620.

[81] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

In enacting modeling provisions of the PSD part of Clean Air Act Amendments of 1977 Congress recognized the technical difficulties in modeling emissions across complex terrain and expected Environmental Protection Agency to develop and use the most appropriate models for such situations. Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[82] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

In authorizing use of modeling under the PSD part of Clean Air Act Amendments of 1977 Congress did not direct the use of any particulate defusion models but, rather, expected Environmental Protection Agency to develop and utilize the most accurate and feasible modeling techniques available. Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[83] Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 280

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek280 k. Sulfur and Sulfur Dioxide. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Since PSD part of Clean Air Act Amendments of 1977 set largely inflexible increments for sulphur dioxide and particulates, Congress has commanded the use of conservative assumptions on weather and other data input in the modeling process. Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[84] Environmental Law 149E 293

149E Environmental Law
149EVI Air Pollution
149Ek289 Administrative Agencies and Proceedings
149Ek293 k. Hearing and Determination; Statement of Reasons. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Protection Agency's first models under the PSD part of Clean Air Act Amendments of 1977 do not contravene any discernible congressional directive and since comments of industry spokesmen to the contrary raised relatively insubstantial questions of law they did not necessitate an agency reply. 5 U.S.C.A. § 553(b)(3)(A); Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[85] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Of great importance in implementation of modeling provisions of PSD part of Clean Air Act Amendments of 1977 is a reasoned agency response to substantial questions of fact, policy or science raised in comments on recommended models or in proposals to employ new technique, as lack of scientific certitude about modeling techniques increases rather than reduces need for the agency to critically examine all substantial questions of fact and science emerging from the commenting process. 5 U.S.C.A. § 553(b)(3)(A); Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[86] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Since first set of models adopted under PSD part of Clean Air Act Amendments of 1977 are concededly flawed, should scientific advances or better information permit a more accurate assessment of air quality, Environmental Protection Agency should move to adopt the more accurate procedure, although it too may not be entirely free from fault. 5 U.S.C.A. § 553(b)(3)(A); Clean Air Act, §§ 165(e)(3)(D), 320, 42 U.S.C.A. §§ 7475(e)(3)(D), 7620.

[87] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(9) Health and Environment)

Environmental Protection Agency did not exceed its authority in interpreting stack height provision of Clean Air Act Amendments of 1977 as requiring emissions from all preexisting sources with tall stacks that were built after effective date of the 1970 Act and, hence, were not grandfathered, to be modeled as though the emissions proceeded from GEP (Good Engineering Practice) height stacks when ascertaining the emission limitations to be imposed on new facilities. Clean Air Act, § 123, 42 U.S.C.A. § 7423.

[88] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation

361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Deference to agency interpretation of regulatory statute is heightened when the interpretation is of a statute by its implementing agency.

[89] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(3.1), 199k25.6(3) Health and Environment)

Although it is fair to say that in enacting stack height provisions of Clean Air Act Amendments of 1977 Congress generally approved of judicial decisions disapproving use of tall stacks and other dispersion techniques in lieu of emission limitations, it is not accurate to say that Congress simply codified the holdings and dicta of those decisions. Clean Air Act, § 123, 42 U.S.C.A. § 7423.

[90] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Term "emission limitation" in stack height provision of Clean Air Act Amendments of 1977 includes any requirement imposed on a source by Environmental Protection Agency or a state which restricts the quantity, rate, or concentration of air pollutants on a continuous basis. Clean Air Act, §§ 123, 123(a), (a)(1), 302(k), 42 U.S.C.A. §§ 7423, 7423(a), (a)(1), 7602(k).

[91] Statutes 361 181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases

An absurd construction of a regulatory statute is to be avoided if at all possible.

[92] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Emissions from tall-stack sources that have been included in baseline definition for PSD permit requirements of Clean Air Act Amendments of 1977 do not consume the available increment as their actual emissions at time of first permit application are grandfathered; grandfathering does not conflict with exemption of stack height requirements for stacks in existence before December 31, 1970, as grandfathered emissions do not affect the "degree of emission limitation required" for PSD permits nor render the December 31, 1970 cutoff nugatory as the latter is not in the PSD part and statutory tall-stack policy is not confined to the nondeterioration program but applies to entire range of programs under Clean Air Act. Clean Air Act, §§ 123, 123(a), 169(4), 42 U.S.C.A. §§ 7423, 7423(a), 7479(4).

[93] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and En-

vironment)

Since only actual emissions of a major source operating on date of the baseline determination for a PSD permit and on which construction commenced prior to January 6, 1977 are grandfathered, additional emissions from such source consume the increment and, thus, if nonbaseline emissions from such source proceed from a taller than GEP stack not in existence before statutory December 31, 1970 cutoff they consume the increments as though they were emitted from GEP stacks; in short, tall-stack policy of Clean Air Act Amendments, for purpose of the nondeterioration PSD program, applies to nonbaseline emissions of nongrandfathered stacks. Clean Air Act, §§ 123, 123(a), 169(4), 42 U.S.C.A. §§ 7423, 7423(a), 7479(4).

[94] Environmental Law 149E 259

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek259 k. Inventory, Emission Limits, and Modelling. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Although tall-stack facilities existing before date of Clean Air Act Amendments of 1970 are grandfathered as regards emission limitation requirements, i. e., their emissions are modeled at actual stack height, it is in the interests of all post-1970 facilities with tall stacks to demonstrate, if possible, that their excess height is justified by downwash problem, for such sources may be subjected to extensive regulatory measures in the event of increment exceedances or violation of national standards and if a source makes such a demonstration, its emissions will be modeled at actual stack height in subsequent permit proceedings. Clean Air Act, §§ 123, 123(a, c), 165, 42 U.S.C.A. §§ 7423, 7423(a, c), 7475.

[95] Environmental Law 149E 254

149E Environmental Law
149EVI Air Pollution
149Ek253 Federal Regulation
149Ek254 k. In General. Most Cited Cases
(Formerly 199k25.6(4) Health and Environment)

Congress did not intend its tall-stacks policy of Clean Air Act Amendments of 1977 to preclude identification of areas with real pollution problems; since Environmental Protection Agency may require revision of state implementation plans whenever the increments or the national standards are actually being violated, such authority insures that the tall-stacks policy need not hamper attainment and maintenance of federally prescribed pollution standards everywhere. Clean Air Act, §§ 123, 161, 163(a), 42 U.S.C.A. §§ 7423, 7471, 7473(a).

[96] Environmental Law 149E 695

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek695 k. In General. Most Cited Cases
(Formerly 199k25.15(12), 199k25.15(1) Health and Environment)

Court of Appeals would not defer ruling on Environmental Protection Agency's interpretation of stack height provision of Clean Air Act Amendments of 1977 until completion of pending rule-making proceedings which, among other things, would define good engineering practice for stack height since issue before the court was propriety of modeling emissions from tall stacks GEP height when calculating emission limitations from later sources and Agency's final position on the question had been announced. Clean Air Act, § 123(a), 42 U.S.C.A. § 7423(a).

[97] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Definition of term “source” for purpose of PSD provisions of Clean Air Act Amendments of 1977 is the same as that provided for new source performance standards; hence, EPA erred in defining “source” to include equipment, operations and combinations thereof. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[98] Statutes 361 212.6

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 k. Words Used. Most Cited Cases

Given no expression of any contrary intent in a statute or in legislative history regarding definition of that being regulated, it is assumed that the meaning of a particular term is to be consistent throughout the enactment, especially where the subject term prior to enactment of controversial language has assumed a particular definition under closely related statutory provisions.

[99] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

For purpose of the PSD regulations, components of the term "source" need not be interpreted so narrowly so as to comprehend only those sources that emit pollutants through industrial "point" sources, such as smokestacks and chimneys, as Environmental Protection Agency has discretion to define the term reasonably to carry out intent of Clean Air Act Amendments of 1977, but not to go beyond the clear scope of the Act. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[100] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

In implementing PSD provisions of Clean Air Act Amendments of 1977 the EPA has discretion to define statutory terms reasonably to carry out express purposes of the Act and, for instance, it is reasonable to define "facility" and "installation" broadly enough to encompass an entire plant. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[101] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Entire plants may be considered single "sources" for purpose of PSD provisions of Clean Air Act Amendments of 1977. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[102] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Although an entire plant may be considered a single "source" for purpose of PSD review under Clean Air Act Amendments of 1977, the Environmental Protection Agency cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms; EPA should devise regulatory definitions of the terms "structure," "building," "facility," and "installation" to provide for aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[103] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's definition of "source" for PSD review under Clean Air Act Amend-

ments of 1977 should provide explicit notice as to whether and on what statutory authority the agency construed the term source, as divided into its several constituent units, to include unloading of vessels at marine terminals and "long-line" operations such as pipelines, railroads and transmission lines. Clean Air Act, § 169(1), 42 U.S.C.A. § 7479(1).

[104] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

For purpose of PSD review under Clean Air Act Amendments of 1977, Environmental Protection Agency has latitude to adopt definition of the component terms of "source" that are different in scope from those that may be employed for new source performance standards and other clean air programs, due to differences in the purpose and structure of the two programs. Clean Air Act, §§ 111(a)(3), 169(1), 42 U.S.C.A. §§ 7411(a)(3), 7479(1).

[105] Environmental Law 149E 661

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek661 k. Finality. Most Cited Cases
(Formerly 199k25.15(3.2), 199k25.15(1) Health and Environment)

Opportunity to petition for review of reasonableness of Environmental Protection Agency's contiguity and common ownership criteria in defining "source" for purpose of PSD requirements of Clean Air Act Amendments of 1977 would not be forfeited by judicial decision not to resolve such issueson finding that inclusion of equipment, operation and combination thereof was erroneous since regulations, as revised in light of the opinion, would constitute new "final action" and trigger once again review procedures of Clean Air Act. Clean Air Act, §§ 169(1), 307(b), 42 U.S.C.A. §§ 7479(1), 7607(b).

[106] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's use of term "major stationary source" in place of statutory term "major emitting facility" in defining coverage of PSD parts of Clean Air Act Amendments of 1977 was not objectionable as long as the regulatory term was defined in a manner consistent with statutory requirements. Clean Air Act, § 169(1), 42 U.S.C.A. § 7479(1).

[107] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's extension of PSD requirements to all sources with potential emissions of 250 tons or more per year regardless of physical size or production capacity of the source, was not an unreasonable construction of Clean Air Act Amendments of 1977. Clean Air Act, § 169(1), 42 U.S.C.A. § 7479(1).

[108] Environmental Law 149E 267

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek267 k. In General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Critical factor in pollution control is not the industrial output of a particular source, but its pollution output. Clean Air Act, § 169(1), 42 U.S.C.A. § 7479(1).

[109] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards

149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Environmental Protection Agency exceeded scope of its authority by limiting PSD review to those modifications deemed "major," defined by agency as incorporating the same 100 or 250-ton per year threshold for a "major emitting facility" ; PSD review requirements apply to any modification of a major emitting facility and term "modification" is nowhere limited to physical changes exceeding a certain magnitude. Clean Air Act, §§ 111(a)(4), 165(a), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a), 7479(1), (2)(C).

[110] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

In administering "modification" provision of PSD provisions of Clean Air Act Amendments of 1977 the EPA has discretion to exempt from review some emission increases on grounds of de minimis or administrative necessity. Clean Air Act, §§ 111(a)(4), 165(a), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a), 7479(1), (2)(C).

[111] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

The PSD part of Clean Air Act Amendments of 1977 is intended to "grandfather" existing industries; however, provisions concerning modification indicate that there is no perpetual immunity of existing industries from all standards under the PSD program, and if existing plants increase pollution they will generally need a permit, with exceptions when increases are de minimis or are offset by contemporaneous decreases of pollutants. Clean Air Act, §§ 111(a)(4), 165(a), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a), 7479(1), (2)(C).

[112] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Word "increases" as used in definition of "modification" for purpose of PSD permit and review process under Clean Air Act Amendments of 1977 is not to be construed as requiring an inspection at individual plant units affected by an operational change to determine whether any of the units will consequently emit more of a pollutant, as opposed to a "bubble" concept, i. e., determination of whether net effect of all steps involved in the change is to increase emission of any air pollutant. Clean Air Act, § 111(a)(4), 42 U.S.C.A. § 7411(a)(4).

[113] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

In passing the PSD part of Clean Air Act Amendments of 1977, Congress wished to apply the permit process only where industrial changes might increase pollution in area, not where an existing plant changed its operation in a way that produced no pollution increase. Clean Air Act, §§ 111(a)(4), 165(a), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a), 7479(1), (2)(C).

[114] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

In applying PSD parts of Clean Air Act Amendments of 1977, the EPA has properly exempted from the best available control technology and ambient quality review

those "modifications" of a source that do not produce a net increase in any pollutant. Clean Air Act, §§ 111(a)(4), 165(a)(3, 4), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a)(3, 4), 7479(1), (2)(C).

[115] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Environmental Protection Agency retains substantial discretion in applying the "bubble" concept, i. e., a net result determinative of whether there has been an increase in pollutants activating PSD review requirements, in that any offset changes claimed by industry must be substantially contemporaneous, as defined by the agency, and, second, offsetting changes must be within the same source, as defined by the agency. Clean Air Act, §§ 111(a)(4), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7479(1), (2)(C).

[116] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency's definition of "statutory source" for purpose of PSD provisions of Clean Air Act Amendments of 1977 governs both the definition of "modification" and the coverage of major emitting facilities. Clean Air Act, § 169(1), (2)(C), 42 U.S.C.A. § 7479(1), (2)(C).

[117] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Where there is no net increase from contemporaneous changes within any pollution source the PSD review requirements of Clean Air Act Amendments of 1977, whether procedural or substantive, cannot apply; hence, in applying a "bubble" concept to determine what types of industrial changes constitute "modifications" subject to PSD review requirements, the EPA could not adopt two different definitions of "modification," one that looked only at net increases for substantive requirements and a second that looked at all increases, without allowing offset, for procedural requirements. Clean Air Act, §§ 111(a)(4), 165(a), 169(1), (2)(C), 42 U.S.C.A. §§ 7411(a)(4), 7475(a), 7479(1), (2)(C).

[118] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Environmental Protection Agency regulation exempting from the PSD review and best available control technology requirements of Clean Air Act Amendments of 1977 each pollutant not emitted in sufficient amounts to qualify as a source as a major emitting facility, i. e., adoption of BACT de minimis criterion to coincide with the 100 to 250-ton emission thresholds for major emitting facilities, is contrary to clear statutory language. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[119] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Although application of BACT requirements to emission of all pollutants from a new facility could impose severe administrative burden on Environmental Protection Agency in implementing PSD part of Clean Air Act Amendments of 1977 and could impose a severe economic burden on construction of new facilities, proper way to

resolve the difficulty is to define a de minimis standard rationally designed to alleviate administrative burden, not to extend the statutory 100 or 250-ton threshold for major emitting facilities to a context where it is not applicable. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[120] Environmental Law 149E 274

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek274 k. Exemptions, Extensions, Exceptions, and Variances. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

The de minimis exemption as applied to BACT requirements under PSD part of Clean Air Act Amendments of 1977 must be designed with specific administrative burdens and specific regulatory context in mind. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[121] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

The statutory 100-ton threshold for defining a major emitting facility does not necessarily exceed a permissible de minimis level for application of BACT requirements under PSD part of Clean Air Act Amendments of 1977, however, the EPA must follow a rational approach to determine what level of emission is a de minimis amount and may not merely adopt the statutory threshold. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[122] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

A rational approach to determining what level of the emission is a de minimis amount for purpose of PSD requirements under Clean Air Act Amendments of 1977, including best available control technology, would consider the administrative burden with respect to each statutory context: what level of emission is de minimis for modification and what level de minimis for application of BACT, with agency looking at degree of administrative burden posed by enforcement of various de minimis threshold levels and taking into account the facility's air pollution controls and possibly considering of statutory thresholds for new facilities. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[123] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

In establishing a de minimis standard for application of best available control technology to modifications of facilities subject to PSD requirements of Clean Air Act Amendments of 1977, a rational approach would consider whether the de minimis threshold should vary depending on the specific pollutant and the danger posed by increases in its emission. Clean Air Act, §§ 165(a)(3, 4), 169(1, 3), 42 U.S.C.A. §§ 7475(a)(3, 4), 7479(1, 3).

[124] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Law 149E 276

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek276 k. In General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and En-

vironment)

Phrase "each pollutant subject to regulation" as used in preconstruction requirements of PSD part of Clean Air Act Amendments of 1977 is not limited to sulphur dioxide and particulates; PSD preconstruction review is not qualified by provision requiring EPA to conduct a study and promote regulations to prevent significant deterioration of air quality resulting from emissions of hydrocarbons, carbon monoxide, photochemical oxidants and nitrogen oxides, the automotive pollutants, as well as pollutants for which national ambient air quality standards are promulgated. Clean Air Act, §§ 165(a)(3, 4), (e)(1), 166(a), 169(3), 42 U.S.C.A. §§ 7475(a)(3, 4), (e)(1), 7476(a), 7479(3).

[125] Environmental Law 149E 264

149E Environmental Law
149EVI Air Pollution
149Ek257 Implementation of Federal Standards
149Ek264 k. Prevention of Significant Deterioration. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

In deciding on immediate PSD regulation of pollutants other than sulphur dioxide and particulates the EPA under Clean Air Act Amendments of 1977, acted reasonably in balancing feasibility in economic impact arguments against the goal of protecting clean air areas. Clean Air Act, §§ 165, 166, 42 U.S.C.A. §§ 7475, 7476.

[126] Environmental Law 149E 683

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek683 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(9), 199k25.15(6) Health and Environment)

In determining whether Environmental Protection Agency acted properly in immediate PSD regulation of pollutants other than sulphur dioxide and particulates it was not the role of the reviewing court to engage in a technical review of policy decisions made by Congress where those decisions were clearly stated in Clean Air Act Amendments of 1977. Clean Air Act, §§ 165, 166, 42 U.S.C.A. §§ 7475, 7476.

[127] Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

Under PSD part of Clean Air Act Amendments of 1977, the EPA has authority to include a visible emissions standard among other emission limitations to be considered by the PSD permitting authority in applying best available control acknowledgment; PSD permitting authority could fairly have construed statutory term "emissions standard" as comprehending a visible emissions standard. Clean Air Act, §§ 165(a)(4), 169(3), 302(k), 42 U.S.C.A. §§ 7475(a)(4), 7479(3), 7602(k).

[128] Environmental Law 149E 277

149E Environmental Law
149EVI Air Pollution
149Ek275 Particular Pollutants
149Ek277 k. Particulate Matter. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

The EPA's inclusion of visible emission standards among others, to be used to determine compliance with BACT sets no single standard that all PSD permittees must meet under Clean Air Act Amendments of 1977 but, instead, regulations contemplate only factoring of an opacity standard into other BACT considerations to be applied on a "case-by-case basis" to emitting facilities and, as such, the regulation is far from oppressive or unduly expansive but merely defines some specificity in an area in which the permitting authority may exercise reasonable discretion. Clean Air Act, §§ 165(a)(4), 169(3), 302(k), 42 U.S.C.A. §§ 7475(a)(4), 7479(3), 7602(k).

[129] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

The EPA did not exceed its authority under Clean Air Act Amendments of 1977 in conditioning grant of a comprehensive PSD permit for a phased construction project on: independent BACT review of each phase, actual commencement of construction of each phase within 18 months of target date specified in original application, with a variance only for commencement of the first phase, and avoidance of interruption in construction of any phase for longer than 18 months. Clean Air Act, §§ 165, 169(2)(A), 42 U.S.C.A. §§ 7475, 7479(2)(A).

[130] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Under PSD part of Clean Air Act Amendments of 1977 the EPA has authority to allow a comprehensive permit for construction projects that are to be completed in phases, with phased construction projects having "mutually dependent" facilities exempt from the new PSD requirements if one of the facilities has commenced construction by the applicable grandfather date, i. e., August 7, 1977. Clean Air Act, §§ 165, 169(2)(A), 42 U.S.C.A. §§ 7475, 7479(2)(A).

[131] Environmental Law 149E 269

149E Environmental Law
149EVI Air Pollution
149Ek266 Particular Sources of Pollution
149Ek269 k. Power-Generating Facilities; Utilities. Most Cited Cases
(Formerly 199k25.6(7) Health and Environment)

Ineligibility of utility company multiboiler projects for grandfathering under Environmental Protection Agency's multiphase projects for purpose of PSD permits under Clean Air Act Amendments of 1977 is consistent with reason behind a multiphase PSD program and has not been shown to be arbitrary or capricious. Clean Air Act, §§ 165, 169(2)(a), 42 U.S.C.A. §§ 7475, 7479(2)(a).

[132] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Within limits of statutory language, EPA can define each phase of a multiphase construction project as a separate source for PSD permit and review requirements of Clean Air Act Amendments of 1977, so long as each phase could reasonably be termed a structure, building, facility or installation or it could define the entire project as a single source, so long as it was reasonably one facility, or installation, etc., and, as the case may be, require either separate or single permits. Clean Air Act, §§ 111(a)(2, 3), 165(a), 169(1), 42 U.S.C.A. §§ 7411(a)(2, 3), 7475(a), 7479(1).

[133] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

If a particular phase of a multiphase construction project is deemed a separate source, the EPA has authority under PSD provisions of Clean Air Act Amendments of 1977 to require for it a separate permit, but EPA also has statutory authority to issue a single permit covering all phases of project and, also, if the Agency deems the project to be a single source, then a single permit would be appropriate, but if it considers each phase to constitute a single source, it may still issue a single permit covering all phases, so long as the permit prerequisites are satisfied as to each phase. Clean Air Act, §§ 111(a)(2, 3), 165(a), 169(1), 42 U.S.C.A. §§ 7411(a)(2, 3), 7475(a), 7479(1).

[134] Environmental Law 149E 265

149E Environmental Law
149EVI Air Pollution
149Ek265 k. Permits, Licenses, and Approvals in General. Most Cited Cases
(Formerly 199k25.6(5.1), 199k25.6(5) Health and Environment)

Environmental Protection Agency reasonably exer-

cised its discretion by providing for a comprehensive PSD permit, under Clean Air Act Amendments of 1977, for related facilities of a single project on a common site and, also, limitations on use of comprehensive permit are also valid, as to require mutual dependence before multiphase projects, one phase of which commenced construction prior to 7 August 1977, are exempt from the PSD requirements is a reasonable threshold standard as Act leaves Agency discretion to issue separate permits for phases that can be deemed separate sources. Clean Air Act, §§ 165, 169(2)(A), 42 U.S.C.A. §§ 7475, 7479(2)(A).

[135] Environmental Law 149E 291

149E Environmental Law
149EVI Air Pollution
149Ek289 Administrative Agencies and Proceedings
149Ek291 k. Regulations and Rulemaking in General. Most Cited Cases
(Formerly 199k25.6(8) Health and Environment)

There was no need for EPA to repropose regulations specifying when "construction is commenced" for purpose of PSD review and permit requirements of Clean Air Act Amendments of 1977 since the rules represented reasonable revisions to original proposal in light of comments received. Clean Air Act, § 169(2)(A), 42 U.S.C.A. § 7479(2)(A).

Opinion of Circuit Judge Robinson

***342 **70** Petitions for Review of Orders of the Environmental Protection agency.Henry V. Nickel, Washington, D. C., with whom George C. Freeman, Jr., Richmond, Va., Michael B. Barr, Andrea S. Bear, Washington, D. C., were on brief, for Alabama Power Company, et al., in Nos. 78-1006, 78-1591, 78-1592, 78-1801, 78-1802 and 78-1832.

Michael K. Glenn, Washington, D. C., for American Paper Institute, et al., in Nos. 78-1815 and 78-1832.

James R. Bieke, Washington, D. C., with whom Francis M. Shea, Richard T. Conway, William R. Galeota and Joseph C. Zengerle, Washington, D. C., were on brief, for Montana Power Company, et al., in Nos. 78-1610, 78-1807 and 78-1832.

Richard G. Wise, Asst. Corp. Counsel, Washington, D. C., with whom Louis P. Robbins, Acting Corp. Counsel, John C. Salyer, III, Asst. Corp. Counsel, Washington, D. C., were on brief, for District of Columbia in No. 78-1752.

Jim Mathews, Asst. Atty. Gen., State of Texas, Austin, Tex., with whom John L. Hill[FN**], Atty. Gen., David M. Kendall, Jr.[**], First Asst. Atty. Gen., State of Texas, Austin, Tex., were on brief, for State of Texas in No. 78-1825.

FN** At the time the brief was filed.

John J. Adams, Washington, D. C., and David F. Peters, Richmond, Va., were on brief, for American Petroleum Institute, et al., in Nos. 78-1008, 78-1595, 78-1596, 78-1801 and 78-1832.

J. Michael Hines, John D. Field, III and John R. Feore, Jr., Washington, D. C., were on brief, for Hampton Roads Energy Company in Nos. 78-1590 and 78-1832.

Alan B. Mollohan and J. Roy Spradley, Jr., Washington, D. C., were on brief, for Mining and Reclamation Council of America, Inc. in Nos. 78-1805 and 78-1832.

Jonathan B. Hill and Donald W. Markham, Washington, D. C., were on brief, for The Pittston Company in Nos. 78-1810 and 78-1832.

Roger M. Golden, Washington, D. C., was on brief, for American Iron and Steel Institute in Nos. 78-1811 and 78-1832.

George J. Miller, Denver, Colo. and William A. White, Washington, D. C., were on brief, for Westmoreland Coal Company, et al., in Nos. 78-1823, 78-1824 and 78-1832.

James L. Lyons, Washington, D. C., was on brief, for Mitchell Energy Co., et al., in Nos. 78-1827, 78-1828, 78-1829, 78-1830 and 78-1832.

Carl W. Ulrich, William R. Duff and Henry E. Brown, Washington, D. C., were on brief, for Colorado Interstate Gas Company, et al., in Nos. 78-1832 and 78-1834.

William S. Hemsley, Jr., Washington, D. C., was on brief, for GATX Terminals Corporation, et al. in Nos. 78-1832 and 78-1836.

Albert J. Beveridge, III and Charles A. Patrizia, Wash-

ington, D. C., were on brief, for Reynolds Metals Company, Inc. in No. 78-1833.

Thomas C. Matthews, Jr., Charles C. Abeles and Donald T. Bucklin, Washington, D. C., were on brief, for Occidental Oil Shale, Inc., et al., in Nos. 78-1832 and 78-1837.

Frank H. Morison, Donald Quander and James L. White, Denver, Colo., were on brief, for ASARCO Inc. in Nos. 78-1821 and 78-1832.

Robert C. Rauch, for Environmental Defense Fund in Nos. 78-1006, 78-1008, 78-1525, Part II and 78-1610, Part II.

Peter J. Herzberg, Washington, D. C., with whom H. Anthony Ruckel, Denver, Colo., James H. Cohen and Kristine L. Hall, Washington, D. C., were on brief, for Sierra Club Legal Defense Fund, Inc. in No. 78-1006, 78-1008, 78-1591, 78-1592, 78-1595, 78-1596, 78-1752, 78-1839, Part II, 78-1801, 78-1802, 78-1805, 78-1806, 78-1807, 78-***343 **71** 1810, Part II, 78-1811, 78-1815, Part II, 78-1816, 78-1817, 78-1818, 78-1819, Part II, 78-1821, 78-1822, 78-1823, 78-1824, 78-1825, 78-1827, 78-1828, 78-1829, 78-1830, 78-1832, 78-1833, 78-1834, 78-1836, 78-1837 and 78-1838, Part II.

Erica L. Dolgin, Angus Macbeth and Elizabeth Stein, Attys., Dept. of Justice, Washington, D. C., with whom Sanford Sagalkin, Acting Asst. Atty. Gen., Washington, D. C., was on brief, for respondent Douglas M. Costle, et al.

Peter H. Wyckoff, Atty., Environmental Protection Agency, Washington, D. C., a member of the bar of the Supreme Court of New York pro hac vice by special leave of Court, Jeffrey C. Smith and Lydia N. Wegman, Attys., Environmental Protection Agency, Washington, D. C., with whom Joan Z. Bernstein, General Counsel, Environmental Protection Agency, Washington, D. C., was on brief, for respondent Environmental Protection Agency, et al.

Lawrence V. Robertson, Jr. and John H. Cheatham, III, Washington, D. C., were on brief, for intervenor, Interstate Natural Gas Association of America in No. 78-1834.

James W. Moorman and Earl Salo, Attys., Dept. of Justice, Washington, D. C., entered appearances for respondent, Douglas M. Costle, et al. in Nos. 78-1006 and 78-1008.

Tom Watson, Washington, D. C., entered an appearance for intervenor Sierra Pacific Power Company in No. 78-1832.

Bruce J. Terris and Philip G. Sunderland, Washington, D. C., entered appearances for intervenor, Environmental Defense Fund, et al. in No. 78-1610, Part II.

Theodore L. Garrett, Washington, D.C., for Ashland-Warren, Inc., in No. 78-1817, and Manufacturing Chemists Assn., et al., in No. 79-1818; Patricia A. Barald, Washington, D.C., on brief, for Manufacturing Chemists Assn., in No. 78-1818.

Before LEVENTHAL,[FN***] ROBINSON and WILKEY, Circuit Judges.

FN*** This opinion was written by Circuit Judge LEVENTHAL and concurrences were received from the other Judges prior to his death.

PER CURIAM:

Because of the great number of complex issues, the court's opinion appears in three parts, each written for the court by a member of the panel. Today's opinions supersede the per curiam opinion in this case, issued June 18, 1979. We have entertained narrowly focused petitions for reconsideration, all of which are disposed of by our holdings here.

A table of contents for the three opinions appears at the start of Judge Leventhal's opinion.

LEVENTHAL, Circuit Judge:

This is one of three opinions issued today considering challenges to the validity of final regulations [FN1] promulgated by the Environmental Protection Agency (EPA) on June 19, 1978 generally embracing the prevention of significant deterioration of air quality in the nation's "clean air areas." [FN2] These "PSD" regulations interpreted and began the implementation of various provisions of the Clean Air Act Amendments of 1977.[FN3] Pertinent provisions are gathered in title I, part C of the Clean Air Act as ***344 **72** amended (hereafter sometimes referred to as the "PSD part" or the "PSD provisions").

FN1. 40 C.F.R. ss 51.24, 52.21 (1978).

FN2. "Clean air areas" is the term generally used to refer to regions designated under sections 107(d)(1)(D) & (E) of the Clean Air Act as having

ambient air quality better than the applicable national primary or secondary ambient air quality standard, or for which there is insufficient data to make a determination of the air quality. 42 U.S.C. ss 7407(d)(1)(D) & (E) (1978).

FN3. P.L. 95-95, 91 Stat. 685, 42 U.S.C. ss 7401 et seq. (1978) (hereafter cited as the "1977 Amendments"). The Clean Air Act is hereafter cited as "C.A.A." or as the "Act."

Before us are consolidated petitions for review filed in this court, as provided by statute, within 60 days of the date of promulgation.[FN4] A special procedure was employed by the Chief Staff Counsel of the Circuit to coordinate the efforts of counsel and facilitate the presentation of this extraordinarily complex case.[FN5] Significant preliminary issues raised by these petitions were argued on October 10, 1978, and our ruling on those questions issued March 27, 1979.[FN6] The remaining issues raised by the petitions, involving primarily interpretative questions of comprehensive importance,[FN7] came to be argued on April 19 and 20, 1979.

FN4. C.A.A. s 307(b)(1), 42 U.S.C. s 7607(b)(1) (1978).

FN5. Chief Staff Counsel first separated out the preliminary issues for argument and arranged for them to be heard first in a separate action. Then, he aligned the parties according to their interests, divided the issues, and assigned them for presentation in written and oral argument.

FN6. Citizens To Save Spencer County v. EPA, 195 U.S.App.D.C. 30, 600 F.2d 844 (1979) (upholding EPA's exercise of legislative rulemaking authority to set the effective date for the PSD preconstruction review and permit requirements of the 1977 Amendments as March 1, 1978, subject to minor exceptions).

FN7. In addition to the effect on the interpretation and implementation of the PSD provisions, several of the questions decided here are of significance for other comprehensive rulemakings under the 1977 Amendments, e. g., the regulations for "nonattainment areas" under part D of the Act, 42 U.S.C. ss 7501-08 (1978).

The judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance an invaluable national resource, our clean air. Motivated by such concerns, after careful and complete consideration of the case, we issued on June 18, 1979, a per curiam opinion [FN8] summarizing our rulings on the questions presented. The expedited judgment and per curiam opinion served two additional purposes: (1) it enabled the EPA to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by our rulings, and to take other prudent action to effectuate congressional policies; [FN9] and (2) it allowed the court to entertain, prior to the issuance of this opinion, narrowly focused petitions for reconsideration directed to the panel by the parties.[FN10]

FN8. Alabama Power Company, et al. v. Costle, et al., 196 U.S.App.D.C. 161, 606 F.2d 1068 (1979).

FN9. EPA has proceeded with expedition to revise the pertinent regulation in accordance with the rulings of our per curiam opinion. Proposed revised regulations have already been published in the Federal Register for public comment. 40 Fed.Reg. 51924 (Sept. 5, 1979).

FN10. The court was prompted to adopt this novel procedure by its appreciation of the complex and subtle nature of the case. Parties were encouraged to consolidate the presentation of petitions for reconsideration, a procedure successfully employed at oral argument.

Petitions for reconsideration submitted pursuant to this procedure were submitted without prejudice to the right of filing in the ordinary course full petitions for reconsideration subsequent to the issuance of this detailed opinion.

The three opinions issued today are in part an incorporation, with some enlargement of analysis, of the rulings in our per curiam opinion of June 18, 1979, together with modifications that the court has deemed appropriate in light of the petitions for reconsideration that have been filed. In view of the large number of questions raised, the members of the panel divided responsibility for preparation of discrete parts.

636 F.2d 323, 13 ERC 1993, 204 U.S.App.D.C. 51, 10 Envtl. L. Rep. 20,001
(Cite as: 636 F.2d 323, 204 U.S.App.D.C. 51)

TABLE OF CONTENTS

636 F.2d 323, 13 ERC 1993, 204 U.S.App.D.C. 51, 10 Envtl. L. Rep. 20,001
(Cite as: 636 F.2d 323, 204 U.S.App.D.C. 51)

***346 **74** I. BACKGROUND OF PSD PROGRAM AND REGULATIONS UNDER REVIEW [FN11]

FN11. This description derives in substantial measure from the able joint statement of the case prepared by industry counsel.

A. Clean Air Amendments of 1970

Responding to the growing perception of air pollution as a serious national problem, Congress enacted the Clean Air Amendments of 1970,[FN12] which restructured the Clean Air Act and established a rigorous program for the regulation of existing and new sources of air pollution. At the heart of the program were federally promulgated national ambient air quality standards (NAAQS) and state-adopted plans to implement those standards.

FN12. Pub.L. No. 91-604, 84 Stat. 1676.

Section 109 of the Act [FN13] directed the Administrator of EPA to promulgate primary and secondary NAAQS establishing the maximum permissible concentrations of air pollutants. Primary standards were defined as those whose attainment and maintenance were necessary "to protect the public health," with "an adequate margin of safety." Secondary standards were to specify the level of air quality necessary to "protect the public welfare from any known or anticipated adverse effects" of a pollutant. Pursuant to this authority, the Administrator in 1971 promulgated NAAQS for six pollutants, including sulfur dioxide and particulate matter, two pollutants of primary concern to this litigation.[FN14]

FN13. Current version at 42 U.S.C. s 7409 (1978).

FN14. 40 C.F.R. s 50.4-.11 (1978).

The Act contemplated application of the NAAQS to

individual sources of pollution through state enforcement. Section 110 of the Act [FN15] required each state to hold hearings on, adopt, and submit to the Administrator a State Implementation Plan (SIP) for each "air quality control region" within the state. The SIP was to provide (1) for the attainment of primary NAAQS "as expeditiously as practicable but . . . in no case later than three years from the date of approval of the plan," and (2) for the attainment of the secondary standards within "a reasonable time." Section 110 required that each plan include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the ambient air quality standards. Once a state plan was submitted, the Administrator was to approve it if it was consistent with the statutory requirements. If the plan was inadequate, or if no plan was submitted, the Administrator was required to propose and promulgate a plan for the state.

FN15. Current version at 42 U.S.C. s 7410 (1978).

The provisions for the attainment and maintenance of NAAQS were to operate primarily through controls on existing sources of pollution. In addition, the Act contemplated that major new sources of pollution would be subject to controls more stringent than those needed to meet primary and secondary NAAQS. Section 111 of the Act [FN16] required the Administrator to adopt technology-based new source performance standards (NSPS) limiting the emissions from any new or modified facilities in certain industrial categories that "contributed significantly to air pollution." Section 111(e) made it unlawful for a new source in such a category to operate in violation of any applicable NSPS regardless of whether its emissions caused ambient standards to be exceeded. Section 110 also provided that state implementation plans contain a preconstruction review procedure to assure that major new sources would not interfere with the attainment and maintenance of ambient standards.

FN16. Id. at s 7411.

B. The PSD Program Prior to the 1977 Amendments

1) Genesis of PSD Program. Section 110 of the Act contained no explicit provision addressing potential deterioration of ambient air quality in those areas where ambient***347 **75** pollutant levels were lower than those mandated by primary and secondary NAAQS. EPA did not impose on the states any requirement to control new sources of pollution that posed no threat to ambient standards.

In 1972, the Sierra Club brought suit alleging that the Act required state plans to include measures to prevent the "significant deterioration" of air quality in those parts of the country where the ambient standards were being met. The District Court for the District of Columbia held that the Act's statement of purpose, contained in section 101(b)(1), imposed such an obligation.[FN17] On June 12, 1972, it issued a preliminary injunction directing the Administrator to disapprove state plans and to promulgate regulations where the plan failed to take the measures necessary to prevent such deterioration. This court affirmed. On June 11, 1973, the Supreme Court affirmed by an equally divided court. In response to the injunction, EPA disapproved all state plans in November, 1972, and in 1973, following the Supreme Court's action, the agency initiated rulemaking to incorporate PSD requirements into each state plan.

FN17. Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C.1972), aff'd per curiam, 4 ERC 1815 (D.C.Cir.1972), aff'd by an equally divided court, sub. nom. Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973).

2) 1974 PSD Regulations. In December, 1974, the Administrator promulgated final regulations amending each state plan to include a PSD requirement. [FN18] The new PSD program implemented through preconstruction reviews of new or modified sources of sulfur dioxide and particulate matter.[FN19] "Significant deterioration" was defined in terms of allowable numerical increases in the concentration of sulfur dioxide and particulate matter in areas where ambient pollution levels were presumed by the regulations to be lower than those mandated by primary and secondary NAAQS.[FN20] These regulated areas came to be referred to as "clean air areas," although, as will become clear from our subsequent discussion, the term encompasses areas that in fact need not possess air quality better than the applicable NAAQS. These allowable increases, or "increments," determined whether air quality deterioration associated with a new facility was permissible. Increment consumption, or "use," was calculated by reference to a "baseline" level of air quality. Under the 1974 regulations this baseline was defined as the representative air quality during 1974 plus the projected emissions from sources that had received permits to construct before January 1, 1975, but were not in operation by that date.[FN21]

FN18. 39 Fed.Reg. 42,510 (1974).

FN19. 40 C.F.R. s 52.21(d)(1) (1977) (superseded). EPA stated that it could not regulate for PSD the other four pollutants for which NAAQS had been established because, among other reasons, existing analytical procedures were not adequate to determine the impact of individual sources on air quality concentrations of these pollutants. See 39 Fed.Reg. 42,51 1 (1974).

FN20. The regulations applied of their own force to all areas of the country except as provided by the following provision:

> The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

40 C.F.R. s 52.21(c)(1) (1977).

FN21. 40 C.F.R. s 52.21(d)(1)(i) (1977) (superseded).

The 1974 regulations established a program under which the amount of new growth allowed the size of increment would depend upon the amount of growth desired for the area. Areas subject to PSD regulations were divided into three groups. Initially, all such areas were designated Class II, for which increments were set permitting moderate growth. Areas could be redesignated Class I, for which much smaller increments applied, allowing virtually no growth, or Class III, for which increases in pollution were allowed up to the national ambient standards. Procedures ***348 **76** were established for redesignations by the state (or, with respect to areas within their jurisdiction, by Federal Land Managers and Indian Governing Bodies).[FN22]

FN22. Id. at s 52.21(c) (superseded).

Small industrial facilities, surface mining, forestry and similar operations were not subject to PSD review. Rather, the regulations covered 19 categories of typical large industrial (or, in the case of incinerators, municipal) facilities. Each source on the list had significant process emissions of particulates or sulfur dioxide which, EPA estimated, accounted for "essentially all of (the sulfur dioxide and particulate matter) emitted in clean areas." [FN23] New sources and modifications of existing sources on the list of 19 were subject to preconstruction review. The term "modification," which triggered preconstruction review, was generally defined as a change in operation or design that increased emissions at a source, but it was further defined so as to be inapplicable to certain changes, including the use of a more polluting fuel, if the source was designed to use the alternate fuel prior to the December, 1974, promulgation of the PSD regulations.[FN24] A PSD permit was required for new or modified sources on the list if construction was commenced after June 1, 1975.

FN23. 38 Fed.Reg. 18,989 (1973).

FN24. 40 C.F.R. s 52.01(d) (1977) (superseded).

In order to obtain a PSD permit, sources were required to demonstrate that their emissions would not violate the increments in any area encompassed by the regulations. Under the PSD program, after January 1, 1975, all emission increases were counted against the increments unless emitted from a source that had received its permit but was not in operation by that date.[FN25] In other words, emission increases from new small sources, from fuel switches and from large sources commencing construction between January 1, 1975, and June 1, 1975, were not subject to PSD review but could consume the increment. Therefore, the 1974 PSD regulations "would permit" unregulated sources of increased emissions "to 'use up' the entire available deterioration increment, and in some cases exceed the increment. . . ." [FN26] Since major sources subject to PSD were required to "consider the impact" of emission increases from unregulated sources, the PSD program assured that, if the increments were exceeded, PSD permitting of major industrial sources would cease unless the area were "reclassified" to make a larger increment applicable to it.[FN27]

FN25. The definition of "baseline," see 40 C.F.R. s 52.21(d)(2)(i) (1977) (superseded), excluded such emissions.

FN26. 39 Fed.Reg. 31,004 (1974).

FN27. Id. at 31,003.

Under the PSD program, determination of a source's impact on the applicable increments was based upon "diffusion models" mathematical techniques for simulating the diffusion into the atmosphere of a new source's emissions under various meteorological conditions and operating levels.[FN28] The purpose of such models is to predict pollutant concentrations at any point in the neighborhood of the source. While EPA recognized that diffusion modeling could not be expected to predict exactly actual increment consumption, the "normal variability of air quality data," [FN29] in EPA's view, made it impractical to use monitoring data (i. e., actually measured data) to determine increment consumption. Therefore, since models were a more "consistent" method for calculating consumption, they were "used to keep track of available (or unused) ***349 **77** increments as sources and emission(s) are increased or decreased." [FN30]

FN28. See Technical Support Document EPA Regulations for Preventing the Significant Deterioration of Air Quality 29-30 (1975); J.A. at 241-42.

FN29. 39 Fed.Reg. 31,003 (1974). The concentration of pollutants in the air is not constant. Variable meterological conditions (wind direction, wind speed, temperature, humidity, etc.), source location, design and operating modes as well as other factors combine to create different pollutant concentrations at different times.

FN30. Technical Support Document, supra note 16, at 29-30, J.A. at 241-42.

"Accounting" by modeling was an on-going process, and modeling techniques or assumptions might require adjustments in previous estimates of increment consumption. These changes would affect only future PSD applicants, however. As EPA emphasized in its Background Document, "significant deterioration is defined in terms of air quality increments rather than absolute air quality levels." Therefore, because the PSD program did not establish "absolute air quality levels" that could not be exceeded, new sources receiving PSD permits were not subject to further controls to meet the increment if it were later discovered that the "EPA or State approved model was inaccurate." [FN31]

FN31. Id.

In addition to the increment impact review, sources under the 1974 PSD program had to apply "best available control technology," defined in terms of emission limitations on sulfur dioxide and particulates. These BACT limitations were to be established on a case-by-case basis unless the source was subject to new source performance standards under section 111. The regulations provided that where an NSPS was applicable, compliance with the NSPS would constitute compliance with BACT.[FN32]

FN32. 40 C.F.R. s 52.21(d)(2)(ii) (1977) (superseded).

3) Judicial Review of 1974 Regulations. We sustained the 1974 PSD regulations over challenges by both industry and environmental groups.[FN33] The Supreme Court granted industry petitions for certiorari to review our holding that EPA had authority to adopt PSD requirements under section 110 of the Act. On August 27, 1977, Congress passed the Clean Air Act Amendments of 1977 (1977 Amendments). The Supreme Court consequently vacated our decision and remanded for consideration in light of the 1977 Amendments and of possible mootness. We, in turn, remanded the case to EPA for consideration of those issues.

FN33. Sierra Club v. EPA, 176 U.S.App.D.C. 335, 540 F.2d 1114 (1976), vacated sub nom. Montana Power Co. v. EPA, 434 U.S. 809, 98 S.Ct. 40, 54 L.Ed.2d 66 (1977).

C. Clean Air Act Amendments of 1977

The 1977 Amendments [FN34] maintain the basic structure of regulation of stationary sources through state plans, but made substantial changes in the requirements governing those plans. The Amendments provide for additional controls on existing sources to ensure protection of the ambient standards and visibility. Further, they establish strict requirements for major new sources to be located in areas where the national standards have not yet been attained ("non-attainment areas").

FN34. Pub.L.No. 95-95, 91 Stat. 685, 42 U.S.C. s 7401 et seq. (1978).

The central focus of this case is Part C of title I (sections 160-169) added to the Clean Air Act by the 1977 Amendments. Section 161 of the Act [FN35] now provides an express directive that state plans include measures to pre-

vent the significant deterioration of air quality in areas designated by the states under section 107(d)(1)(D) & (E) of the Act as having ambient air quality better than the applicable national primary or secondary ambient air quality standard, or for which there is insufficient data to make a determination of the air quality. An area so designated has commonly been referred to in the legislative history and in the literature that has developed as a "clean air area," a description often contrasted with the term "non-attainment area," which is defined by section 171(2) of the Act as an area that has been demonstrated to exceed an NAAQS for a given pollutant.[FN36] We ***350 **78** wish to alert the reader that the phrase "clean air areas" is a generalization that may be confusing when employed in technical usages. A so-called clean air area for a given air pollutant may include an area that for the same pollutant would be classified as a non-attainment area if sufficient data existed. Further, since classification of areas is pollutant-specific, the same area may be a clean air area due to the air quality with respect to one pollutant, yet be a non-attainment area with respect to another pollutant. Finally, the areas of the country subject to regulation under the PSD provisions of the Act include areas other than those commonly referred to as clean air areas. With these caveats, which will be explained in greater detail as they become pertinent to our discussion, we will continue to use the term "clean air areas" as a shorthand expression where we do not feel the context calls for a more technical usage.

FN35. 42 U.S.C. s 7471 (1978).

FN36. C.A.A. s 171(2), 42 U.S.C. s 7501(2) (1978) provides:

> The term 'nonattainment area' means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under paragraphs (A) through (C) of section 107(d)(1).
>
> Circumstances will arise where an area that has been designated under section 107(d)(1)(D) or (E) will be demonstrated on the basis of monitoring data required of a permit applicant under section 165(e)(2), or on the basis of other information, to be a nonattainment area for a given pollutant. Until the designation of that area for such a pollutant is modified under section 107, the area will be categorized both under section 107 as a presumed "clean air area" and under section 171(2) as a "nonattainment area." This anomaly illustrates that the second sentence of the definition of nonattainment area is inclusive, but not exhaustive.

Under the provisions of the 1977 Amendments, areas subject to PSD regulation are divided into three classes;[FN37] increments are set for each class;[FN38] new major facilities to be located in such areas must meet technology-based emission limitations reflecting BACT;[FN39] these facilities cannot commence construction if their emissions would cause or contribute to a violation of the applicable increments in a Class I, II or III area;[FN40] and demonstrations that new facility emissions would not violate the applicable increments are to be based on both monitoring and diffusion modeling.[FN41] The list of 19 major sources which emit, or have the potential to emit, 100 tons per year or more of any pollutant are subject to PSD review.[FN42] In addition, any other source having the potential to emit 250 tons per year or more of any pollutant is also covered. As in the 1974 regulations, "modifications" of such major sources are also subject to PSD review.[FN43] Section 165 of the Act[FN44] tightens the requirement that must be included in state plans for the PSD preconstruction review and permitting of major new sources to be located in clean air areas. These stricter requirements include: (1) case-by-case determination of BACT rather than automatic application of NSPS; (2) requirements of air quality impact analyses performed in accordance with EPA regulations; (3) requirements for the protection of visibility in Class I areas even though Class I increments are met; and (4) provisions requiring public hearings in all cases instead of mere opportunity for written comment. Other changes in the 1974 regulations effected by the 1977 Amendments include provision for "variances" from Class I increments if stringent criteria are satisfied,[FN45] and modification of the definition of "baseline."[FN46] Congress also structured the program to minimize disruption, by exempting existing sources from the permit requirement of section 165 until "modifications" of those facilities increased emissions,***351 **79**[FN47] and by phasing sources under construction into the program.[FN48] In addition, section 166 directs EPA to develop within two years PSD programs for pollutants other than particulates and sulfur dioxide. EPA is not required to follow the "area classification" approach for these other pollutants, but implementation through a permit program is contemplated.

FN37. C.A.A., s 162, 42 U.S.C. s 7472 (1978).

FN38. Id. at s 163, 42 U.S.C. s 7473 (1978).

FN39. Id. at s 165(a)(4), 42 U.S.C. s 7475(a)(4) (1978).

FN40. Id. at s 169(4), 42 U.S.C. s 7479 (1978).

FN41. Id.

FN42. Id. at s 169(1), 42 U.S.C. s 7479(1) (1978).

FN43. Id. at s 169(2), 42 U.S.C. s 7479(2) (1978).

FN44. Id. at s 165, 42 U.S.C. s 7475 (1978).

FN45. C.A.A. at s 165(d)(2)(D), 42 U.S.C. s 7475(d)(2)(D) (1978).

FN46. Id. at s 169(4), 42 U.S.C. s 7479(4) (1978).

FN47. Id. at s 169(2)(C), 42 U.S.C. s 7479(2)(C) (1978).

FN48. Id. at s 168, 42 U.S.C. s 7478 (1978).

D. PSD Regulations Under the 1977 Amendments

Following several notices of proposed rulemaking, comment periods, and public hearings, EPA promulgated two sets of final PSD regulations on June 19, 1978. [FN49] One set amended 40 C.F.R. Part 51 to provide guidance to the states on the development of revised state implementation plans. The other set amended 40 C.F.R. Part 52 to incorporate the immediately effective changes required by the 1977 Amendments.

FN49. 43 Fed.Reg. 26,380, 26,388 (1978).

The regulations require that each major stationary source and each modification covered by the regulations undergo a detailed preconstruction review and obtain a permit prior to the commencement of construction. The PSD review process contains a number of steps:

1) Control Technology Review. Each new major source must meet all applicable new source performance standards promulgated under section 111 of the Act, all emission standards for hazardous pollutants under section 112 of the Act, and all applicable state implementation plan requirements.[FN50] In addition, each such source must apply best available control technology (BACT) for sulfur dioxide and particulates unless emissions of that pollutant will be less than 50 tons per year, 1,000 pounds per day and 100 pounds per hour, whichever is most restrictive.[FN51]

FN50. 40 C.F.R. ss 51.24(j)(1), 52.21(j)(1) (1978).

FN51. Id. at ss 51.24(j)(2), 52.21(j)(2).

2) Air Quality Review. At the time an application for a PSD permit is submitted, the owner or operator of the proposed source must demonstrate that allowable emissions from the source will not cause or contribute to a violation of any NAAQS or the applicable increments.[FN52] Estimates of ambient concentrations that must be provided in order to determine compliance with these requirements must "be based on the applicable air quality models, data bases, and other requirements" specified in EPA's modeling guidelines. The models described in these guidelines may be modified, or other models substituted, only after notice and opportunity for comment by the public, and written approval by the Administrator.[FN53]

FN52. Id. at ss 51.24(1), 52.21(1).

FN53. Id. at ss 51.24(m)(1), 52.21(m)(1).

3) Monitoring Requirements. Two types of monitoring requirements are imposed on sources submitting PSD applications after August 7, 1978. An application must include a full year of continuous monitoring data for any pollutant emitted by the source for which there is an ambient standard. This monitoring data, along with the required modeling results, will form the basis for the permitting authority's determination of whether the proposed source would cause or contribute to a violation of a primary or secondary NAAQS. The second requirement is for post-construction monitoring, to be used as the state or EPA feels necessary to determine actual impact of the source on primary or secondary ambient standards.[FN54]

FN54. Id. at ss 51.24(n), 52.21(n).

4) Source Information. The PSD permit application must include, at a minimum, information on the location, design, and planned operating schedule of the proposed facility, a detailed construction schedule, and a description

of the control technology that is proposed as BACT.[FN55] In addition, ***352 **80** the applicant must provide an "analysis of impairment to visibility, soils, and vegetation" in the area, and an analysis of the air quality impacts of the expected growth associated with the proposed source. [FN56] Meteorological and topographical information on the air quality impacts and nature and extent of any growth in the locale of the proposed facility since August 7, 1977, must also be provided if requested by EPA or the state.

FN55. Id. at ss 51.24(o), 52.21(o).

FN56. Id. at ss 51.24(p), 52.21(p).

5) Processing Applications. The regulations establish a complex process for handling the permit application. Within 30 days of receipt of the application, EPA must inform the applicant of any additional information required. EPA or the state must make a final determination on the application within one year after the application is complete. During that time, EPA or the state must: (a) make a preliminary determination whether the proposed source will be approved, disapproved, or approved with conditions; (b) give public notice of the preliminary determination, provide opportunity for comment and public hearing and the applicant's responses, and give the applicant and the public notice of the final determination.[FN57]

FN57. Id. at ss 51.24(r), 52.21(r).

The regulations also require that, even after the PSD review process is completed and permit issued, the state plan must be revised and individual source emissions reduced if the state or EPA determines that an applicable increment or maximum permissible concentration is being violated.[FN58]

FN58. Id. at s 51.24(a)(1)-(3).

II. POTENTIAL TO EMIT

[1] At the heart of the PSD provisions lies a definition that is jurisdictional in nature. We refer to the section 169(1) definition of "major emitting facility," which identifies sources of air pollution that are subject to the preconstruction review and permit requirements of section 165.[FN59] The definition is not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of any air pollutant.[FN60] Once a source has been so identified, it may become subject to section 165's substantial administrative burdens and stringent technological control requirements for each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act. As will become apparent ***353 **81** from consideration of the ramifications of this definition, Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air. Such facilities are defined in section 169(1) as those stationary sources of air pollutants from among 28 listed categories which "emit, or have the potential to emit" 100 tons per year or more of any air pollutant plus any other stationary source with the "potential to emit" 250 tons per year or more of any air pollutant.

FN59. Section 169(1), 42 U.S.C. s 7479 (1978) provides in relevant part:

> The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source

> with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

FN60. Section 165 requires BACT for any pollutant regulated under the act. It should be noted that the s 169(1) definition of major emitting facility refers to a broader category of pollutants than does that of s 165. Section 169 sets as a threshold the emission of "any air pollutant," and s 302(g) defines that extremely broadly.

[2] EPA has interpreted the phrase "potential to emit" as referring to the measure of a source's "uncontrolled emissions" i. e., the projected emissions of a source when operating at full capacity, with the projection increased by hypothesizing the absence of air pollution control equipment designed into the source.[FN61] Yet, the language and comprehensive scheme of the statute reveal that an emitting facility is "major" within the meaning of section 169(1), only if it either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount. The purpose of Congress was to require preconstruction review and a permit before major amounts of emissions were released into the air. When determining a facility's potential to emit air pollutants, EPA must look to the facility's "design capacity" a concept which not only includes a facility's maximum productive capacity (a criterion employed by EPA) but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility.

FN61. 40 C.F.R. ss 51.24(b)(3), 52.21(b)(3)(1978).

[3][4] We are cognizant that in general a court defers to the interpretation of a new statute by the agency that is charged with putting it into effect, meshing the wheels, and that presumably has some awareness of the approaches of legislators particularly concerned with the legislation. However, we view our analysis of congressional intent, set forth above, as clearly discernible from section 169(1). We identify the following as indicators of legislative intent. Looking at language, we see that the first sentence provides that a major emitting facility (in enumerated categories) must "emit, or have the potential to emit" 100 tons per year of any air pollutant. Plainly, the pollutants that sources "emit" is a reference to some measure of actual emissions. However, under EPA's interpretation of "potential to emit," the actual emissions calculation called for by the verb "emit" would lose all significance. When potential emissions are calculated, as EPA provided, by assuming operation at full capacity, without any reduction to take into account the operation of the facility's air pollution control equipment, then potential emissions will always and inherently exceed actual emissions. Under our construction a meaning is given to the use of "emit" and "or," as applicable in those instances when for any reason, whether or not there is fault or accident, the "cleansing" equipment has not been operated, or has been operated at variance from design.[FN62]

FN62. We are aware that the second sentence of section 169(1), which extends coverage of the term "major emitting facility" to "any other source with the potential to emit" 250 tons per year of any air pollutant, is not phrased in the disjunctive; the verb "emit" has not been included. Nevertheless, we are unpersuaded that Congress intended the disjunctive form of the first sentence to be mere surplusage. It may be that the "actual emissions" alternative should be read into the second sentence on the ground that Congress plainly included a parallel construction.

For a wide angle lens on intent, we turn to the fact that Congress was fully aware that many major new sources of air pollution were already required by law to install and operate air pollution control equipment. The "new source performance standards" of section 111 of the Act, as well as provisions of existing state implementation plans, were the sources of such requirements. In this context one would require strong statutory***354 **82** evidence that Congress intended to approach the measurement of emissions in ignorance and disregard of the operation of pollution control equipment already required by law to be designed into a facility. All the statutory evidence points the other way.

The coverage of the 100 ton-per-annum threshold of the first sentence of section 169(1) extends to 28 categories of facilities. A look at these categories, and a further look at the legislative history [FN63] reveal that Congress was concerned with large industrial enterprises major actual emitters of air pollution. The draftsmen were of the view that certain small industrial facilities within these categories might actually and potentially emit less than the threshold amount. But the submissions of the parties establish that no operational industrial facility that could be described as within the listed categories would have the

"potential to emit" less than the threshold amount if the operation of cleansing control equipment is totally discounted.

FN63. See notes 70 & 72, infra.

Congress was presumably also aware of the high rate of effectiveness with which control equipment eliminates pollutants from unprocessed industrial emissions. For example, at the time of the enactment of the PSD provisions, technology in operation was capable of eliminating over 99% of the particulate matter from emissions. Thus, a source with the potential according to EPA's "uncontrolled emissions" standard to emit 100 tons per annum of particulate matter would emit in actuality less than one ton per year. The record illustrates that the heating plant operating in a large high school or in a small community college would become "major" sources under such a test. FN64 We have no reason to believe that Congress intended to define such obviously minor sources as "major" for the purposes of the PSD provision.

FN64. Cong.Rec. 512812 (July 19, 1976), LHA at 382.

[5] EPA recognized that its definition placed an intolerable burden on both the agency and minor sources of pollution and sought to cope with it by creating a broad exemption for smaller sources. As we explain in a subsequent section of this opinion,FN65 the Act does not give the agency a free hand authority to grant broad exemptions. Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA's administrative capability.

FN65. See section III, infra.

EPA asserts that its view is supported by the interplay between the section 169(1) definition of major emitting facility and a partial exemption from PSD review requirements specified in section 165(b).FN66 It suffices at this juncture to refer to a subsequent part of the Court's opinion,FN67 and say that EPA's asserted conflict between sections 165(b) and 169(1) is premised on an erroneous interpretation of the application of section 165(b).

FN66. Section 165(b) creates a partial exemption from certain PSD review requirements for facilities that have been "modified" where the increase in particulate and SO 2 emissions, due to the modification, is less than 50 tons per year. EPA asserts that the proper interpretation of section 165(b) creates a conflict with the definition of major emitting facility that is eliminated when the measure of a major emitting facility is projected emissions in the absence of "cleansing" control equipment.

FN67. See section III of Judge Wilkey's opinion in this case.

We mention the legislative history with some diffidence, for it is extensive, complex, and conflicting in certain instances. But our full review of the materials that have come to our attention reveals that the legislative history in general supports our interpretation of section 169(1).

The critical phrase "emit, or (has) the potential to emit" had its origin in the Senate version of the bill that was to become***355 **83** the 1977 Amendments to the Clean Air Act.FN68 The House version used the equivalent phrase: "directly emits, or has the design capacity to emit." FN69 The Conference Committee adopted the wording of the Senate bill, but its Report reflects an understanding of the equivalence of the House and the Senate versions on this point. We refer to the Report's interpolation of the House language into the Conference Committee's paraphrase of the final provision:

FN68. S.Rep.No.94-717, 94th Cong., 2d Sess. 221 (1976), LHA at 1691 (1976 version of bill); S.Rep.No.95-127, 95th Cong., 2d Sess. 219 (1977), LHA at 2643 (1977 version of bill).

FN69. H.Rep.No.94-1175, 94th Cong., 2d Sess. 358 (1976), LHA at 932 (1976 version of bill); H.Rep.No.95-194, 95th Cong., 2d Sess. 438 (1977), LHA at 1908 (1977 version of bill).

> The State plan must require permits for: (a) All 28 categories listed in the Senate bill if the source has the potential (design capacity) to emit over 100 tons per year; and (b) any other source with the design capacity to emit more than 250 tons per year of any air pollutant.FN70

FN70. H.Rep.No.95-564, 95th Cong., 1st Sess. 152 (1977), LHA at 3046, U.S.Code Cong. & Admin.News, pp. 1077, 1533.

EPA agrees that the Conference Committee treated the House and Senate versions as having the same meaning but argues that EPA's "uncontrolled emissions" construction was intended. There is some support for EPA's position in legislative history, particularly on the Senate side,[FN71] but the overall legislative history does not support EPA's position. The committee reports and floor debates evidence the understanding that only major sources of actual emissions would be covered by the PSD permit requirements and that some sources within the 28 industrial categories would be too small to satisfy the threshold tonnage specified in section 169(1).[FN72] These understandings are inconsistent with EPA's "uncontrolled emissions" approach.

FN71. EPA makes the point that the term "potential emissions" had some currency within the agency during the course of the legislative process and that the term referred to emissions in the absence of pollution control equipment. EPA also points to portions of the legislative history where documents or postulated situations employing the "potential emissions" usage have been incorporated. At most, there are indications from these references that there may have been some ambiguity or confusion at times between the term "potential emissions" and the term "potential to emit." But it is too great a leap to conclude from these few references that one phrase ("potential emissions") describing a type of emissions, has the same meaning as "potential to emit," a phrase used in the statute to describe a type of polluting source.

FN72. E. g., S.Rep.No.94-717, supra, at 23, 123 Cong.Rec. S12809 (July 29, 1976), LHA at 381 (remarks of Sen. McClure); S.Rep.No.95-127, supra, at 96-97, LHA at 2521; 123 Cong.Rec. S9169 (June 8, 1977), LHA at 2667 (remarks of Sen. Muskie); id. at S9255 (June 9, 1977) (remarks of Sen. Domenici).

[6] We remand the regulations premised on EPA's erroneous construction of section 169(1) for appropriate revision by the agency.[FN73]

FN73. The design capacity of a facility rarely contemplates uninterrupted operation 24 hours per day, 365 days per year. Projected down-time for repair and maintenance or other factors may reduce the hours of operation that are appropriately considered in the calculation of a facility's "potential to emit."

The Court's per curiam opinion did not address the issue of whether such planned down-time must, or may, be included in calculating "potential to emit;" and, we do not decide it today. Since the issue was not briefed and argued, we are not in a position to define for this specific question the appropriate response by EPA, given our clarification at a more general level of the meaning of "potential to emit." Industry has petitioned this court to comment on proposed EPA regulations addressing this point, and has registered with us objections to them. The appropriate forum for such discussion is the notice and comment proceeding on those proposed regulations. At a later date, if necessary, recourse might be had to this Court. For now, we indicate only that we did not have this issue in mind when we issued the per curiam opinion, and we do not decide it today.

III. GENERAL EXEMPTION FOR STATIONARY SOURCES EMITTING LESS THAN 50 TONS PER YEAR OF ANY AIR POLLUTANT

Having swept in too many facilities, in our view, by its interpretation of "potential ***356 **84** to emit," EPA inserted in its PSD regulations a partial exemption from the preconstruction review and permit requirements of section 165 for all major emitting facilities that emit less than specified amounts,[FN74] 50 tons on a yearly basis, of any air pollutant. The pertinent amount is to reflect operation at maximum capacity and employing the air pollution controls imposed either by the applicable State Implementation Plan (SIP) or by an enforceable permit.[FN75]

FN74. The specified amounts were 50 tons per year, 1,000 pounds per day, or 100 pounds per hour, whichever was most restrictive. For the purposes of this opinion, we shorthand these amounts in terms of the annual figure, 50 tons per year.

FN75. 40 C.F.R. ss 51.24(j)(2), (k)(1)(ii); 52.21(j)(2), (k)(1)(ii) (1978).

Petitioners Sierra Club and the Environmental De-

fense Fund contend that the Act contains no warrant for the Administratively-created exemption, and that even if statutorily permissible, the action was arbitrary and capricious.

EPA does not argue that its 50 ton per year exemption is consistent with the statutory language of the Clean Air Act. Rather, EPA concedes [FN76] that its exemption allowing sources and modifications under 50 tons per year to forego BACT and air quality assessment is an "expansion" of the limited exemption provided in section 165(b) of the Act.[FN77] This "expansion" is defended as reflecting EPA's judgment that application to such sources of the full preconstruction review and permit process would not be cost-effective and would strain to the limits the agency's resources. Characterizing its approach as "(f)ollowing Congress('s) lead," EPA concluded that the costs to industry and permitting authorities entailed in reviewing an estimated 2,400 PSD applications for sources emitting less than 50 tons would far outweigh the benefit of the "relatively insignificant" reduction in emissions that would result. Consequently, EPA "expanded" the exemption found in section 165(b) to new as well as existing sources, and precluded BACT review as well as air quality review. EPA promised periodic assessments to assure that overall air quality in any pertinent area did not deteriorate beyond the level of any increment.[FN78]

[7][8][9][10] EPA's "expansion" of the section 165(b) exemption falls well beyond the agency's exemption authority. Moreover, it is premised on a misconstruction of the meaning and motivation of the section. The court has given close consideration to this provision and has toiled to give a reasonable construction to language that is somewhat awkward and which does not easily disclose the function intended for it by Congress. We conclude that the exemption is applicable to major emitting facilities in Class II areas which existed on August 7, 1977,[FN79] and which become subject to the permit requirements of section 165 because ***357 **85** of an expansion or modification that, after application of BACT, results in a net increase of less than 50 tons a year in the emissions from that facility. Those expansions or modifications that come within the exemption of section 165(b) are permitted to operate so long as they will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for two pollutants, sulfur dioxide and particulate matter. Were this exemption not in the statute, major emitting facilities, in order to avoid the permit requirements of section 165, would be encouraged to pursue their plans for industrial expansion by establishing small, independent facilities rather than by the more efficient expansion or modification of existing facilities. [FN80]

FN76. 43 Fed.Reg. 26393, Joint Appendix (J.A.) 80.

FN77. Section 165(b), 42 U.S.C. s 7475(b) (1978), of the Act provides:

> The demonstration pertaining to maximum allowable increases required under subsection (a)(3) (air quality review) shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) (BACT), will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

FN78. 43 Fed.Reg. 26392-93 (1978).

FN79. In Citizens to Save Spencer County v. EPA, 195 U.S.App.D.C. 30, 600 F.2d 844 (1979), we approved EPA regulations establishing March 19, 1978, as the effective date of the preconstruction review and permit requirements. That date supplanted the effective date specified in section 165(a), the date of enactment of the Clean Air Act Amendments of 1977, August 7, 1977. The date specified in section 165(b) was obviously intended to mirror that of section 165(a). In view of this congressional intention, EPA would have latitude to alter by rule the effective date in section 165(b) to conform with the new effective date of the PSD provision. Absent such rulemaking, however, this Court is constrained to apply the literal terms of the statute.

FN80. In EPA's view, section 165(b) applies to a major emitting facility in existence on the date of enactment of the Clean Air Act Amendments that becomes subject to section 165 due to an expansion or modification where the allowable emissions from the entire facility have been reducted,

> after BACT, to less than 50 tons per year. EPA has construed the curious phrase "whose allowable emissions" as referring to emissions from the major emitting facility. Though this construction may be supported by one reading of the syntax, it is so teratogenetic as to force us to reject it as an incorrect interpretation of the provision. Such a construction would render section 165(b) completely non-functional. The section allows a facility to operate notwithstanding the fact that it would exceed maximum allowable increases for Class II areas. But any major emitting facility in existence on the date of enactment would have a credit within the baseline concentration of at least 50 tons per annum because on the baseline date that facility would certainly have been emitting air pollutants at a rate of 50 tons per annum. If that same source reduces its emissions to below 50 tons per annum it is obviously in no danger of exceeding its credit. On such a reading, therefore, section 165(b) would be superfluous.

[11] We have concluded above that EPA erred in defining "potential to emit" by discounting the beneficial effects of air pollution control equipment designed into a facility. For practical purposes, then, the dispute over the 50-ton exemption has become academic. Since "major emitting facilities" subject to section 165 are only those sources which after controls emit or have the potential to emit at least 100 tons annually, sources emitting 50 tons per year or less would ipso facto be excluded from the PSD requirements. Nevertheless, standard doctrine teaches us that our proper course is to remand this matter for further consideration by EPA.

In view of the possibility that EPA may refashion, rather than terminate, its exemption, we guide our remand by identifying the principles pertinent to an agency's authority to adopt general exemptions to statutory requirements. This discussion is appropriate because the exemption regulations under discussion reflect a misunderstanding by EPA of these principles and of regulatory exemptions based upon assessment of costs and benefits. These principles may have bearing on EPA's reconsideration of this exemption on remand and would appear to have bearing on a number of other EPA actions under review.

[12] Exemptions Born of Administrative Necessity. Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them. But there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits.

[13] We noted at the outset that we are not concerned here with the "equitable" discretion of agencies to afford case-by-case treatment taking into account circumstances peculiar to individual parties in the application of a general rule to particular cases, or even in appropriate cases to grant dispensation from the rule's operation. The need for such flexibility in appropriate cases is generally recognized, and enhances the effective operation of the administrative process,[FN81] though Congress may, of ***358 **86** course, restrain the agency by mandating standards from which no variance is permitted.[FN82] In this case, however, we are presented with an attempt by an agency to promulgate a blanket exemption from statutory requirements. The EPA's action reflects no choice to exercise administrative discretion based on circumstances peculiar to the individual case.

> FN81. E. g., Allegheny-Ludlum Steel Corp. v. U. S., 406 U.S. 742, 755, 92 S.Ct. 1941, 1949, 32 L.Ed.2d 453 (1972); Portland Cement Ass'n v. Ruckelshaus, 158 U.S.App.D.C. 308, 332, 486 F.2d 375, 399 (1973), cert. denied, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974) ("a regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to the system as a whole").

> FN82. E. g., E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 137-39, 97 S.Ct. 965, 979-980, 51 L.Ed.2d 204 (1977); see Weyerhaeuser Co. v. Costle, 191 U.S.App.D.C. 309, 329-335, 590 F.2d 1011, 1031-37 (1978).

[14] Categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored. In FPC v. Texaco Inc., 417 U.S. 380, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), the Supreme Court held that the FPC had no authority to exempt rates charged by small producers of natural gas from regulation under the just and reasonable standard of the Natural Gas Act. Although it recognized that persuasive arguments had been made that the assumptions underlying natural gas regulations did not obtain for such producers, and that continued regulation might even be counterproductive, the Court declared that its role was not "to overturn congressional assumptions

embedded into the framework of regulation established by the Act." Id. at 400, 94 S.Ct. at 2327-2328. Similarly, in NRDC v. Costle, 186 U.S.App.D.C. 147, 568 F.2d 1369 (1977), this court held that the EPA lacked the power to exempt categories of point sources from the permit requirements established in section 402 of the Federal Water Pollution Control Act Amendments of 1972. We emphasized: "Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." Id. at 155, 568 F.2d at 1377. In American Iron & Steel Institute v. EPA, 568 F.2d 284 (3rd Cir. 1977), the Third Circuit rejected EPA's blanket exemption of steel plants in the Mahoning Valley from BACT requirements. Id. at 306-08. While recognizing that the FWPCA permitted flexibility to accommodate diverse conditions, the court held that "an exemption by regulation from effluent limitations is not a permissible means of accommodating diversity." Id. at 307 (footnote omitted; emphasis in the original).

[15] This broad principle that frowns upon categorical administrative exemptions is strict, but is not absolute. Considerations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute. The relevance of such considerations to the regulatory process has long been recognized. Courts frequently uphold streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress. As the Supreme Court recognized in approving the adopting by the FPC of area rate regulation as the practical means of regulating thousands of natural gas producers:

> "(C)onsiderations of feasibility and practicality are certainly germane" to the issues before us. . . . We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purpose for which it has acted.

Permian Basin Area Rate Cases, 390 U.S. 747, 777, 88 S.Ct. 1344, 1365, 20 L.Ed.2d 312 (1968) (quoting Bowles v. Willingham, 321 U.S. 503, 517, 64 S.Ct. 641, 648, 88 L.Ed. 892 (1944)).[FN83]

FN83. Accord. E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 132, 97 S.Ct. 965, 977, 51 L.Ed.2d 204 (1977); Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 621-22 93 S.Ct. 2469, 2479, 37 L.Ed.2d 207 (1973); United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05, 76 S.Ct. 763, 770-71, 100 L.Ed. 1081 (1956); Environmental Defense Fund v. EPA, 194 U.S.App.D.C. 143, 165-66, 598 F.2d 62, 84-85 (1978).

Another application of the underlying principle appears in ***359**87**Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1973). There, the controlling statute provided general assistance benefits under the Snyder Act to Indians living on or near reservations. When Congress did not provide enough funding to provide for both classes, the Bureau of Indian Affairs decided to use the limited funds solely for Indians living on reservations. The Court held that such a policy, operating as it did to curtail the statutory rights of those Indians living near but not on reservations, could not be implemented unless there was compliance with the procedural requirements of notice-and-comment rulemaking set forth in the Administrative Procedure Act, 5 U.S.C. s 553. But, the Court acknowledged the substantive authority of the Secretary to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute. Id. at 230-31, 94 S.Ct. at 1072.

[16] The same consideration of administrative need to adjust to available resources would apply where the constraint was imposed not by a shortage of funds but, say, by a shortage of time, or of the technical personnel needed to administer a program.[FN84]

FN84. Cf. American Federation of Labor, et al. v. Marshall, et al., 187 U.S.App.D.C. 121, 128-29, 570 F.2d 1030, 1037-38 (1978); NRDC v. Train, 166 U.S.App.D.C. 312, 332, 510 F.2d 692, 712 (1974).

A corollary principle is observed by the courts when practical considerations make it impossible for the agency to carry out its mandate. Thus, in NRDC v. Train, 166 U.S.App.D.C. 312, 510 F.2d 692 (1974), we considered EPA's failure to meet certain statutory deadlines for the promulgation of effluent guidelines under the Federal Water Pollution Control Act. In ordering that the guidelines be issued no later than December 31, 1974, we did not accept EPA's "apprehension that it (would) not be able to publish the great majority of the guidelines" by the deadline. We nevertheless did recognize the possibility of a showing by EPA that publication of some of the guidelines by that date was infeasible. We perceived two "constraints" on the agency:

> First, it is possible that budgetary commitments and manpower demands required to complete the guidelines by December 31 are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs. Second, EPA may be unable to conduct sufficient evaluation of available control technology to determine which is the best practicable or may confront problems in determining the components of particular industrial discharges.

166 U.S.App.D.C. at 332, 510 F.2d at 712. We acknowledge the principle that an agency official required "to do an impossibility," should be relieved from sanction. Id. at 333, 510 F.2d at 713. But we emphasized that the agency bore a heavy burden to demonstrate the existence of an impossibility:

> An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.

Id.

[17][18][19][20] Viewed in its most favorable light, EPA seeks approval of a prospective exemption of certain categories from a statutory command based upon the agency's prediction of the difficulties of undertaking regulation.[FN85] The agency's burden of justification in such a case is especially heavy. This is not a circumstance of an agency seeking relief from a charge which, after a good faith effort, it has found it cannot perform. It is, rather, an agency seeking vindication of an approach contrary to the ***360 **88** explicit statutory design on the basis of its estimate of its lack of capacity to handle the task delegated to it. Before a court sanctions such actions, it will carefully study the governing statute in the manner of Permian Basin, to ascertain whether the statute authorizes approaches that deviate from the legislative mandate in response to concerns about feasibility. Thus in NRDC v. Costle, supra, we rejected EPA's arguments that a categorical exemption of runoff point sources from the National Pollution Discharge Elimination System was necessary because of the infeasibility of developing national effluent limitations applicable to all runoff point sources and the impossibility of processing the literally millions of applications for discharge permits. We found in the statutory scheme a flexibility encompassing devices such as "general" effluent permits (similar to the area rate regulation employed in Permian Basin), and this flexibility was sufficient to accomplish the regulatory purpose, thereby alleviating any need to exempt runoff sources entirely.[FN86]

FN85. Cf. WNCN Listeners Guild v. FCC, 197 U.S.App.D.C. 319, at 327-330, 610 F.2d 838, at 846-849 (1979) (en banc) (rejecting FCC claim that implementation of Circuit's rules on format diversity would result in an "administrative nightmare"). To the extent the agency relies, in support of its exemption, on substitution of its own analysis of policy considerations for those enunciated by Congress, we must reject its action as trenching on the congressional function.

FN86. A similar administrative approach, supported by the doctrine of necessity, is the deferral of regulation in individual instances until the aggregation of these instances surpasses a reasonable threshold. The agency's burden of justification for such an approach is substantially less than that required when the agency seeks to exempt rather than defer regulation.

[21][22][23] Exemptions for De Minimis Circumstances. Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis. It is commonplace, of course, that the law does not concern itself with trifling matters,[FN87] and this principle has often found application in the administrative context.[FN88] Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort. As we wrote in District of Columbia v. Orleans, 132 U.S.App.D.C. 139, 141, 406 F.2d 957, 959 (1968), "(t)he 'de minimis' doctrine that was developed to prevent trivial items from draining the time of the courts has room for sound application to administration by the Government of its regulatory programs . . ." The ability, which we describe here, to exempt de minimis situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.[FN89]

FN87. See, e. g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687 n. 29, 99 S.Ct. 3055, 3076 n. 29, 61 L.Ed.2d 823 (1979) (Indian fishing rights); Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977) (search and seizure); Ingraham v. Wright, 430 U.S. 651, 674, 97 S.Ct. 1401, 1414, 51 L.Ed.2d 711 (1977)

(due process liberty interest); Sniadach v. Family Finance Corp., 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (1969) (Harlan, J., concurring).

FN88. See, e. g., FPC v. Texaco, Inc., 417 U.S. 380, 399, 94 S.Ct. 2315, 2327, 41 L.Ed.2d 141 (1974); Volkswagenwerk, A.G. v. FMC, 390 U.S. 261, 276-77, 88 S.Ct. 929, 937-38, 19 L.Ed.2d 1090 (1968); Monsanto Company v. Kennedy, 198 U.S.App.D.C. 214, 222, 613 F.2d 947, 955 (1979); United Glass & Ceramic Workers v. Marshall, 189 U.S.App.D.C. 240, 242, 584 F.2d 398, 440 (1978); Marine Space Enclosures, Inc. v. FMC, 137 U.S.App.D.C. 9, 16, 420 F.2d 577, 584 (1969).

FN89. In this respect, the principle is a cousin of the doctrine that, notwithstanding the "plain meaning" of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to "absurd or futile results." United States v. American Trucking Ass'ns, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1939); District of Columbia v. Orleans, 132 U.S.App.D.C. 139, 141, 406 F.2d 957, 959 (1968).

[24][25] Determination of when matters are truly de minimis naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing. But we think most regulatory statutes, including the Clean Air Act, permit such agency showings in appropriate cases.

[26][27] While the difference is one of degree, the difference of degree is an important one. Unless Congress has been extraordinarily rigid, there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of ***361 **89** regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history. Congress, in section 165(b), permitted a narrow exemption for modifications, and from air quality review only; this provides no basis for EPA to exercise a "revisory power" to exclude new sources as well as modifications, and to extend the exemption to BACT review in addition to air quality review.

[28][29][30] We do not here extend our analysis of exemption authority for other situations,[FN90] beyond taking note that our ruling that there is a narrow exemption authority has not been challenged in any of the petitions for reconsideration, and has been invoked in other contexts by several of the parties.[FN91] As to the context of the "50-ton exemption," if this has practical importance notwithstanding our "potential to emit" ruling, EPA must take into account in any action following the remand that this exemption authority is narrow in reach and tightly bounded by the need to show that the situation is genuinely de minimis or one of administrative necessity.

FN90. For example, industry petitioners raise the issue that mercury is only a "trace" emission from electric generating plants. See Industry Petitioners' Petition for Rehearing on the Application of PSD Requirements to Pollutants Other than Sulfur Dioxide and Particulates at p. 15.

The court does not agree with industry petitioners that the fact that emission of mercury is not within the group of sources covered by the national emissions standards for hazardous air pollutants (40 C.F.R. s 61.50) means that mercury is not a pollutant subject to regulation.

It may be that, assuming EPA considers it in the public interest, it would be able to craft a de minimis exemption regulation that would have the result sought by petitioners. The matter is not now presented to us in a manner permitting authorization declaration.

Apart from its limited de minimis exemption authority, EPA has flexibility to consider costs and benefits in deciding what is "best available control terminology" for any situation.

FN91. Respondents' Response to Industry Petitioners' Motion for Clarification and Petitions for Rehearing and for Reconsideration at 20 (August 2, 1979); Sierra Club Brief in Response to Industrial Petitioners' Motion for Rehearing and Motion for Clarification and to the Environmental Protection Agency's Petition for Stay of Issuance of Mandate at 6-7 (August 2, 1979); Response of

the District of Columbia to Industry Petitioners' Petition for Rehearing on the Application of PSD Requirements to Pollutants Other Than Sulfur Dioxide and Particulates at 2 (August 2, 1979).

IV. PROTECTION OF THE INCREMENTS

[31] The regulations provide that once it is determined that a state implementation plan "is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated," then the SIP must "be revised to correct the inadequacy or the violation." FN92 We rule that EPA has authority under the statute to prevent or to correct a violation of the increments, but the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments.

FN92. 40 C.F.R. s 51.24(a)(3) (1978).

[32] The PSD part of the statute, by its title and by its terms, is designed to prevent significant deterioration of air quality in the nation's "clean air areas" in general, those areas that have or are presumed to have air quality better than that specified in the applicable primary and secondary national ambient air quality standards (NAAQS).FN93 The fundamentals of the statutory approach include differentiation within the clean air areas of Class I, II, and III areas,FN94 and specification for each class of areas of maximum allowable increases ("increments") in pollution concentrations for ***362 **90** particulate matter and sulfur dioxide,FN95 with provision for the Administrator to promulgate allowable increments or similar limitations for other pollutants governed by NAAQS.FN96 These provisions set as the threshold of "significant deterioration" for each pollutant in each area the lower of the allowable increment of the applicable NAAQS,FN97 and the emphatic goal of the PSD provisions is to prevent those thresholds from being exceeded. It is evident that the principal mechanism for monitoring the consumption of allowable increments and for preventing significant deterioration is the preconstruction review and permit process required for new or modified major emitting facilities by the provisions of section 165. However, we cannot agree with industry's contention that section 165 provides the exclusive mechanism for protection of the increments. The Administrator has authority beyond the provisions of section 165 to prevent or to remedy a violation of the thresholds specified in the Act.

FN93. C.A.A. at s 107(d)(1)(D) & (E); 42 U.S.C. s 7407(d)(1)(D) & (E) (1978).

FN94. C.A.A. at ss 162, 163; 42 U.S.C. ss 7472, 7473 (1978).

FN95. C.A.A. at s 163, 42 U.S.C. s 7473 (1978).

FN96. C.A.A. at s 166; 42 U.S.C. s 7476 (1978).

FN97. C.A.A. at s 163(b)(4); 42 U.S.C. s 7473(b)(4) (1978).

The statutory provisions central to our conclusion are sections 161 and 163(a). Section 161 provides in pertinent part:

> each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each (clean air area).FN98

FN98. 42 U.S.C. s 7471 (1978).

Section 163 provides in part:

> each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of (sulfur oxides and particulates) shall not be exceeded.FN99

FN99. 42 U.S.C. s 7473(a) (1978).

On their face, these provisions establish the thresholds as limitations that are not to be exceeded and contemplate that state implementation plans shall include such measures "as may be necessary" to ensure the observance of this command. The section 165 permit process alone does not ensure that maximum concentrations or allowable increments will not be exceeded. Significant deterioration may occur due to increased emissions from unregulated minor sources and major emitting facilities grandfathered out of the permit process, due to the use of different models to calculate increment consumption, due to the discovery through monitoring that limitations inadvertently have been exceeded, due to redesignation of an area to a more restrictive class, or due to allocation through administrative error of too many permits. Nothing in the plain language of the statute limits the measures in the state implementation plan to the preconstruction permit process. The legislative history reflects an understanding that other

measures might be required and are within the authority conveyed by the Act.

The Conference Report states that the "House provision requiring that the State Implementation Plan must contain measures to insure that significant deterioration, as defined, will be prevented was accepted." FN100 The House Report, in discussing its provision, stated: "This preconstruction review process should help minimize the need for enforcement or other actions under the State implementation plan requiring additional postconstruction control measures on the permitted plants." FN101 And at another point: "States would not be required to apply the permit process to smaller new sources, although the State plan would still be required to contain such measures as are necessary to prevent significant deterioration."***363 **91** FN102 Implicit in each statement is a contemplation that measures under the Act include more than the pre-construction process.

FN100. H.Rep.No.95-564, 95th Cong., 1st Sess. 153 (1977), LHA at 3047, U.S.Code Cong. & Admin.News, p. 1534.

FN101. H.Rep.No.95-294, 95th Cong., 1st Sess. 145 (1977), LHA at 1615, U.S.Code Cong. & Admin.News, p. 1224.

FN102. Id. at 171, LHA at 1641, U.S.Code Cong. & Admin.News, p. 1250.

[33][34] Industry representatives do not successfully counter the force of the statute and the legislative history. They argue that section 161 refers to incorporation into state plants of such other measures as may be necessary "as determined under regulations promulgated under this part," and they assert that the only regulations mentioned in the PSD part are those identified as relating to the preconstruction permitting process. This argument overlooks the Administrator's general rulemaking authority under section 301 of the Act to "prescribe such regulations as are necessary to carry out his functions under this Act," for a regulation promulgated under this general authority to ensure compliance with section 161 is a regulation promulgated under the PSD part. Industry petitioners also rely on those sections of the Act that provide for waiver provisions which, conceivably, could allow increments to be exceeded. The waiver has vitality and recognition in that facilities granted special consideration under these provisions are, in effect, treated as facilities operating in compliance with the provisions of the Act. But the totality of facilities in compliance, as a group, may be subject to measures necessary to cope with a condition of pollutants exceeding the PSD maximum.

[35] Finally, industry petitioners argue that the EPA regulations that preceded passage by Congress of the PSD provisions undertook to prevent significant deterioration through preconstruction review only. And they further agree, correctly, the legislative history gives no indication that this fundamental aspect of the prior regulatory approach was being altered. But this omission and negative implications do not offset the language of the Act and the affirmative implications of the House Report that enforcement measures were contemplated beyond preconstruction review. Though the Act is patterned in many respects on the pre-existing regulatory approach, there are many differences. Congress did not in each instance compare the legislation with the reach of the prior regulations, and we cannot view as controlling its failure to do so in this instance.

[36][37] The challenged regulation is interpretative in nature. FN103 It simply states the proposition that SIPs must make provision to ensure that violations of the increments of maximum allowable concentrations do not occur, and, if they have occurred, to ensure that steps will be taken to correct the violation. EPA has furnished no guidelines to the states in this regard; there is no requirement that specified corrective measures be employed. Industry evidences a concern that when EPA does promulgate guidelines or require specific measures, certain operating facilities will be unfairly disadvantaged. Obviously, such considerations are not ripe for review at this time. We may confirm that EPA has authority to require inclusion in state plans of provision for the correction of any violation of allowable increments or maximum allowable concentrations, and may even require, in appropriate instances, the relatively severe correctives of a rollback in operations or the application of retrofit air pollution control technology. At oral argument, EPA assured the court that any such measures would be employed in a reasonable fashion on the basis of a rule of general applicability, or by some reasonable attribution of responsibility for the violation. Any regulations promulgated will be reviewed with such considerations in mind.

FN103. As an interpretative rule, the challenged regulation was exempt from the notice and comment requirements of the APA and of section 307(d) of the Clean Air Act. 5 U.S.C. s 553(b)(A) (1976); 42 U.S.C. s 7607(d) (1978). Thus there is

no merit to the contention of industry that the regulation was promulgated without due procedural regularity.

[38] The environmental groups have petitioned us to require EPA to promulgate guidelines detailing the manner in which ***364 **92** States may permit consumption of the available increments. They also seek to have EPA set aside some portion of the available increments to ensure that current development does not inadvertently cause a violation of the maximum thresholds. EPA has evidenced an intention to promulgate guidelines to help the states manage the allocation of available increments. This is an appropriate step. But this is not to say that the agency may prescribe the manner in which states will manage their allowed internal growth. In the allocation of responsibilities made by Congress, maximum limitations have been set. These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states.

V. SOURCES LOCATED IN NON-ATTAINMENT AREAS

Section 165(a) [FN104] provides that a PSD permit is required before a major emitting facility "may be constructed in any area to which this part applies." Industry petitioners contend that this language limits the application of the PSD review requirements to sources constructed in certain locations, and that those locations are the statutorily defined "clean air areas." [FN105] On this premise, industry petitioners argue that section 165 does not apply to sources located in the so-called "non-attainment" areas. [FN106] EPA, on the other hand, takes the position that the identification of "clean air" and "non-attainment" areas in section 107(d) [FN107] of the Act are only a starting point for the planning process that will lead to revised state implementation plans, that these identifications do not shape the "area" to which the PSD review requirements apply, and that preconstruction review must precede the construction anywhere of a major emitting facility which will adversely affect the air quality of an area to which this part applies. EPA's regulations extend the permit requirements of section 165 to all sources, wherever located, if the emissions from the source have an impact on any clean air area.[FN108] The issue, then, is whether a source becomes subject to the PSD review process because of its location within an area to which this part applies, or because of its impact upon the air quality of one.

FN104. 42 U.S.C. s 7475(a) (1978).

FN105. In this context, the term "clean air area" refers to those air quality control regions in which the ambient air quality does not exceed the applicable NAAQS, which there is insufficient data to make such a determination. See C.A.A. at ss 161, 163(b), 42 U.S.C. ss 7471, 7473(b) (1978). The clean air areas are identified pursuant to C.A.A. at s 107(d)(1)(D), (E), 42 U.S.C. s 7407(d)(1)(D), (E) (1978).

FN106. "Non-attainment" areas are defined in section 171(2) as those air quality control regions designated, under sections 107(d)(1)(A)-(C), as regions that fail to meet the standards of an applicable NAAQS.

FN107. 42 U.S.C. s 7407(d) (1978).

FN108. 40 C.F.R. ss 51.24(i)(1), 52(i)(1) (1978).

EPA discovers in the purposes of the Clean Air Act and the 1977 Amendments an authority sufficient to justify its regulation applying section 165 according to impact. It asserts that such a reading is necessary to prevent the significant deterioration of air quality in fact. Section 160(4) sets forth as a purpose of Part C (PSD) "to assure that emissions from any source in any State" (regardless of whether the location of the source is designated an attainment area) "will not interfere with" any portion of the PSD plan for any other State. Clearly, EPA argues, the concern is with the air quality in clean air areas, not with the location of the source affecting that air quality. Finally, the agency contends, Section [FN109] 161 incorporates the purpose set out in Section 101(b)(1),[FN110] to protect and enhance the quality of the nation's air resources which prompted this Court's holding in Sierra Club v. Ruckelshaus.[FN111]

FN109. 42 U.S.C. s 7471 (1978).

FN110. 42 U.S.C. s 7401(b)(1) (1978).

FN111. 344 F.Supp. 253 (D.D.C. 1972), aff'd per curiam, 4 ERC (D.C. Cir. 1972), aff'd by a equally divided court sub nom. Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973).

****93 *365** [39] EPA is correct that portions of the legislative history indicate that the purposes of the Act would best be served by an extension of the PSD provi-

sions to any source, the emissions from which adversely affect the non-degradation scheme.[FN112] But this alone does not present the situation we faced in Sierra Club, where Congress had clearly articulated a purpose but had remained silent as to the means for effectuating that purpose. Nor do we have here a case where two provisions of the Act are in irreconcilable conflict, the situation we faced in Citizens to Preserve Spencer County v. EPA.[FN113] Rather, we have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals by what EPA asserts are less than optimal means. In such a case, neither this court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.

FN112. See, e. g., H.Rep.No.95-564, 95th Cong., 1st Sess. 151 (1977); H.Rep.No.95-294, 95th Cong., 1st Sess. 9, 145, 151-52 (1977).

FN113. 195 U.S.App.D.C. 30, 600 F.2d 844 (1979).

[40] After careful consideration of the statute and the legislative history, we must accept the contention of the industry petitioners that the phrase "constructed in any area to which this part applies" limits the application of Section 165 to major emitting facilities to be constructed in certain locations. But, we reject the proposition that the only statutory means available to fulfill the purposes of Part C are the permit provisions of s 165.

The plain meaning of the inclusion in section 165 of the words "any area to which this part applies" is that Congress intended location to be the key determinant of the applicability of the PSD review requirements. That this is the correct interpretation is underscored by the inclusion of the same words in section 165(a)(3)(A), and by the precise language employed by Congress in those provisions where its concern was more source (rather than area) specific. [FN114]

FN114. See, e. g., C.A.A. at s 169A(b)(2)(a), 42 U.S.C. s 7491(b)(2)(a) (1978); C.A.A. at s 165(a)(7), 42 U.S.C. s 7475(a)(7) (1978); C.A.A. at s 165(e)(1), 42 U.S.C. s 7475(e)(1) (1978).

The legislative history supports our interpretation. The language of the pertinent provision, section 165(a), derives from the original bill reported to the Senate in 1976 by the Public Works Committee. That bill stated in pertinent part that "(n)o major emitting facility . . . may be constructed in any area designated under this subsection." [FN115] That plainly means location in a designated (clear air) area. In 1977, when Senator Muskie introduced the bill, [FN116] he said, with respect to its PSD provisions, that it was "in every significant detail identical to last year's bill." [FN117] When the Senate provision limited the PSD permit process to sources in areas "designated under this subsection," it was expressly limiting that process to sources located in the areas subject to PSD protection. The Conference bill maintained the principle of the Senate version in that regard, but substituted for the Senate provisions the House provisions which designated the areas subject to PSD protection. Because of this combined approach, the conferees could not refer to areas "designated under this subsection" (or even "section") because, unlike the Senate bill, the PSD provisions of the Conference bill comprised several sections (ss 160-169 of Part C). Accordingly, in order to make the intended reference, the language was changed to area "to which this part applies." This change in language preserved location as a determinant of the applicability of section 165. Therefore, we conclude, as noted above,[FN118] that the phrase "constructed***366 **94** in any area to which this part applies" limits the application of section 165 to major emitting facilities to be constructed in certain locations.

FN115. Senate Bill, S.3219, 94th Cong., 2d Sess. (1976).

FN116. Senate Bill, S.252, 95th Cong., 1st Sess. (1977).

FN117. 123 Cong.Rec. S9162 (daily ed., June 8, 1977).

FN118. See also Remarks of Senator Hart, 122 Cong.Rec. S12470 (daily ed., July 26, 1976); Remarks of Senator Muskie, 122 Cong.Rec. S13316 (daily ed., August 4, 1978).

EPA sought to further extend the reach of the PSD review provisions. But, to so extend EPA's authority is to ignore the fact that section 165(a) defines those major emitting facilities which become subject to its permit requirements and does so by virtue of location in a designated area.

EPA argued initially, and in its petition for reconsideration, that limiting the application of the permit requirements of section 165 solely to sources within clean air

areas may not provide an adequate solution to a particular pollution problem associated with those areas the problem of interstate pollution. In our per curiam opinion, we indicated agreement with the position advanced by EPA, noting that the problem of interstate pollution was indeed a serious concern not dealt with adequately by the permit requirement. It was our apprehension that Congress did not intend such a major pollution problem to go untreated, and this led us to discover within the statute a basis for the exercise by EPA of rulemaking authority to extend the permit requirement of section 165 beyond its literal limitations.

[41] Our review of the petitions for reconsideration submitted by both the industry petitioners and EPA has led us to conclude that sections other than section 165 are available to fulfill that congressional objective of need to cope with the problem of interstate pollution.

[42] Section 110(a)(2)(E)(i) provides a vehicle for implementing the congressional objective of abating substantial interstate air pollution. That provision requires that an SIP shall contain "adequate provisions . . . prohibiting any stationary source within the State from emitting any air pollutant in amounts which will . . . interfere with measures required to be included in the applicable implementation plan for any other state under (the PSD part)." The phrase "measures required to be included" in an SIP clearly incorporates at least (1) the absolute emissions limitation for each pollutant for which increment limitations have been set under section 163 or 166, (2) the monitoring and modeling requirements of section 165(e), and (3) "such other measures as may be necessary, as determined under regulations promulgated under (part C)," as provided in section 161. EPA's authority, under s 110(a)(2)(E) (i), to prevent interstate inference with these measures to prevent, in other words, the industry of one state from interfering with the PSD program of another is clear. And, it does not depend upon the permit process of section 165 for its effectiveness.

[43] So also, section 126 of the Act is a vehicle for abating substantial interstate air pollution independent of permitting. That provision allows that, upon petition by a state or political subdivision, the EPA may determine that a source in a neighboring state "emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(E)(i)." If such a violation is found, the remedy provided by section 126(c) which remedy is applicable "(n)otwithstanding any permit which may have been granted by the State" is not denial or revocation of a permit, but a prohibition against construction or operation for a new source and a prohibition against continued operation for an existing source, unless EPA authorizes continued operation for up to three years while the source is being brought into compliance with s 110(a)(2)(E)(i).

[44] The industry petitioners acknowledged the obligation imposed upon them by sections 110 and 126 in their Response to EPA's Petition for Rehearing.

> Even if s 126(a)(1)(A) does not mandate SIPs to require notice from sources in nonattainment areas, as we believe, that does not relieve such sources from the requirements of s 110(A)(2)(E)(i) that SIPs contain "adequate provisions" preventing any source from emitting pollutants in amounts which will interfere with the PSD measures required to be included in the SIPs of other States. Nor does it relieve them from the provisions ***367 **95** of s 126(b) for enforcement of s 110(a)(2)(E)(i). If notice similar to that otherwise provided in s 126(a) should be necessary to prevent violation of s 110(a)(2)(E)(i) by a source in a nonattainment area which would adversely affect air quality in a clean-air area of another State, we do not perceive any reason why such notice could not be required pursuant to s 110(a)(2)(E)(i) even though not required by s 126(a)(1)(A).[FN119]
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> FN119. Response of Industry Petitioners to Respondents' Petition for Rehearing at 12 (filed August 2, 1979).

We hold that both section 110(a)(2)(E)(i) and section 126(c) give EPA the authority to require that SIP's contain provisions sufficient to address the problem of interstate air pollution. We find that section 126(a) gives the agency the authority to require that SIP's include notice provisions designed to trigger the mechanisms required by section 110(a)(2)(E)(i) or section 126(c). And we find that section 126(b) is an additional means to activate those mechanisms by permitting any state or political subdivision to petition the Administrator for a finding that "any major source emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(E)(i)." [FN120]

> FN120. 42 U.S.C. s 7426(b) (1978) (emphasis added).

[45] To the extent that there is any gap in those notice provisions, section 114 is available. It provides that for the purpose of carrying out the provisions of the Act "the Administrator may require any person who owns or oper-

ates any emission source . . . to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions . . ., and (E) provide such other information, as he may reasonably require . . ." [FN121] Thus, section 114 authorizes the Administrator to require any facility to provide notice of an interstate impact on air quality, be it or some other source the cause of the impact.

FN121. 42 U.S.C. s 7414 (1978) (emphasis added).

[46] Section 161 [FN122] provides still another vehicle for implementing the congressional objective of abating substantial interstate air pollution. We realize that, at oral argument, EPA disclaimed invocation of section 161 rulemaking authority to address this problem. However, that disclaimer came at a time when, in the agency's view, section 165, by its own terms, applied PSD review to sources of interstate air pollution impacting on clean air areas. Given such a view of section 165, the agency's disclaimer of authority under section 161 was reasonable. We have now held that section 165 does not, by its own terms, apply to sources located outside of clean air areas. In this light, and in view of the legislative desire to prevent interstate impacts, the authority granted to the EPA by the plain language of section 161 "each (SIP) shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality (in clean air areas)" [FN123] grants to the Administrator the power to promulgate rules requiring that SIPs adequately address the problem. We hold that the Administrator may promulgate rules to require the inclusion of such provisions in the SIP of the state whose clean air area is affected, of the state which is the source of the adverse impact, or of both.

FN122. 42 U.S.C. s 7471 (1978).

FN123. Id. (emphasis added).

[47] This is not a case where Congress has crafted a specified set of measures to solve a problem, so that additional measures in agency-initiated rules can be deemed not "necessary." On the contrary, this is a case where the congressional objective to meet the problem of substantial interstate pollution is clear, and the statutory measures addressed to it are modest. Accordingly, a determination that supplemental measures are "necessary," [FN124] for the purpose of triggering***368 **96** rulemaking authority under section 161, is within the authority granted by Congress, even though generally the statute relies on measures specified by Congress rather than a contemplation of broad agency rulemaking discretion.

FN124. Even giving that term an expansive reading, see, e. g., Niagara Mohawk Power Corporation v. FPC, 126 U.S.App.D.C. 376, 379 F.2d 153 (1967).

In sum, though it is clear from the legislative history that Congress intended to address the problem of interstate pollution, we are of the view that the Administrator has authority to administer section 110(a)(2)(E)(i) and section 126(b) and (c) in conjunction with section 114 and section 126(a) so as to require SIPs to address the problem. We are also of the view that EPA has additional authority, pursuant to rulemaking authority granted in section 161, to promulgate regulations requiring that SIPs include measures to abate interstate adverse impacts on clear air areas.

[48] There are provisions in the Act, such as those of section 165(d)(2), which evidence a solicitude for the maintenance of air quality in federal lands but there are none which justify the application of the permit requirements of section 165 to sources not located in, but impacting upon, such areas. Section 169A is available to protect visibility in Class I areas where visibility is an important characteristic, and the Administrator may choose to invoke the rulemaking authority granted to him by section 161 to address this problem. We find no basis for reading into section 165 an application of the PSD review provisions to sources in non-attainment areas that impact upon the air quality of federal lands and Indian reservations.

In conclusion, based upon our analysis of the Act, we vacate EPA's regulations extending the permit requirements of section 165 to all sources, wherever located, if the emissions from the source have an impact on any clean air area. [FN125] We do so because they were promulgated pursuant to EPA's reading of Section 165, a reading which we have rejected.[FN126]

FN125. 40 C.F.R. ss 51.24(i)(1), 52.21(i)(1) (1978).

FN126. Should the Administrator determine that the provisions of sections 110, 126, and 114 are insufficient to address the problem of interstate pollution that impacts upon clean air areas, he may use his rulemaking authority under section

161 to promulgate new regulations. Those regulations will, of course, be subject to review.

[49] Based upon this analysis, we are no longer confident that this statute provides a predicate for the court to put a "gloss" on section 165 sufficient to support EPA rulemaking authority to apply the permit requirements of that section to major emitting facilities located in non-attainment areas in one state that impact adversely upon clean air areas within a neighboring state.

EPA, in a petition for reconsideration, correctly points out that emissions from facilities located in a non-attainment area within a state which impact adversely on the air quality of federal lands and Indian reservations raise similar problems of interjurisdictional pollution as are presented in the context of interstate pollution.

VI. REGULATION OF FUGITIVE EMISSIONS, INCLUDING FUGITIVE DUST

[50] In the general definitional section of the Act, section 302(j), [FN127] Congress employed the term "fugitive emissions" to refer to one manner of emission of any air pollutant. As commonly understood, emissions from an "industrial point source" include emissions emanating from a stack or from a chimney. By contrast, "fugitive emissions," are emissions from a facility that escape other than from a point source. Principal among the fugitive emissions is "fugitive dust," a term referring to fugitive emissions by particulate matter.[FN128] EPA's regulations encompass sources of fugitive emissions (including fugitive dust) as well as industrial point sources. A subsequent ***369 **97** section of this opinion [FN129] confirms EPA's authority to regulate sources of fugitive emissions and discusses the factors that de- limit the agency's discretion to define a "source" or an "emitting facility" of fugitive emissions.

FN127. 42 U.S.C. s 7602(j) (1978).

FN128. Though we have discerned the general parameters of these terms, EPA has latitude to provide reasonable, though more specific, definitions along similar lines, so long as they comport with congressional intent.

FN129. See section III of Judge Wilkey's Part of this opinion.

[51] EPA's regulation of fugitive emissions has been of special concern to the mining and forestry industries which contend, without serious opposition, that they are incapable of meeting the strict limitations on the emission of particulate matter set by the PSD provisions. The terms of section 165, which detail the preconstruction review and permit requirements for each new or modified "major emitting facility" apply with equal force to fugitive emissions and emissions from industrial point sources.[FN130] EPA assumed that there is similarly no distinction to be made between fugitive emissions and emissions from industrial point sources when determining whether a source is a major emitting facility within section 169(1) [FN131] and thus subject to section 165. This assumption led the agency to conclude that sources of fugitive dust satisfying the annual tonnage threshold specified in section 169(1) are major emitting facilities. But, solicitude for the plight of the extractive and silvaculture industries motivated EPA to promulgate a partial exemption for sources of fugitive dust, an exemption which industry argues is inadequate and environmental groups contend is beyond agency authority.[FN132]

FN130. 42 U.S.C. s 7475 (1978).

FN131. 42 U.S.C. s 7479(1) (1978).

FN132. 40 C.F.R. ss 51.24(k)(5), 52.21(k)(5) (1978). The regulation maintains the requirement that such sources apply best available control technology (BACT) as defined by section 169(3), 42 U.S.C. s 7479(3) (1978), but exempts them from the otherwise-required showing that particulate emissions from the facility will not exceed either the applicable national ambient air quality standards (NAAQS) or the allowable increments.

[52] EPA is correct that a major emitting facility is subject to the requirements of section 165 for each pollutant it emits irrespective of the manner in which it is emitted. However, a source emitting large quantities of fugitive emissions may remain outside the definition of major emitting facility and thus may not be subject to the requirements of section 165.

[53] The origin of this distinction lies in section 302(j) of the Act, which provides:

> Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one

> hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).[FN133]
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> FN133. 42 U.S.C. s 7602(j) (1978).

EPA construes this provision as a general definition of "major emitting facility" that is totally supplanted for the PSD provisions by the definition of major emitting facility contained in section 169(1). Such is not the case. Section 302(j) is a definition of "major emitting facility" in quantitative terms. That quantitative term is set at the threshold of 100 tons per year. The calculation of the 100 ton figure includes "fugitive emissions of any such pollutant, as determined by rule by the Administrator." Thus, section 302(j) specifically attaches a rulemaking requirement for the inclusion of fugitive emissions in the threshold calculation. The legislative history of this rulemaking provision is sparse, but it well may define a legislative response to the policy considerations presented by the regulation of sources where the predominant emissions are fugitive in origin, particularly fugitive dust. Whatever the motivation of the "rule" provision of 302(j), its existence is unmistakable. Even if the origin of this provision is fortuitous, the provision may be welcomed as serendipitous, for it gives EPA flexibility to provide industry-by-industry consideration and the appropriate tailoring of coverage.

***370 **98** We must still ask where the special rulemaking provision of section 302(j) has been supplanted by the definition, in section 169(1), of "major emitting facility." We consider section 169(1) to be governed by the rulemaking requirement of section 302(j). Section 302(j) is a general definitional section defining terms "when used in this Act" and 302(j) begins: "Except as other expressly provided."

Section 169(1) does expressly make a substantial modification in the 302(j) definition of "major." The 100 ton-per-annum threshold is expressly retained only for sources within 28 listed categories. For "any other source," the threshold is expressly raised to 250 tons per annum.

However, section 169(1) has no "express" provision modifying section 302(j)' s "rule" requirement as to fugitive emissions. Therefore under section 169(1) controlled in this respect by section 302(j), the calculation of the threshold quantity emissions may include fugitive emissions only as determined by rule by the Administrator.

[54] As we have noted, the regulations under review include a partial exemption from statutory permit requirements for major emitting facilities of fugitive dust. In light of our discussion in section III of this opinion, we have reason to doubt whether EPA possesses the statutory authority to promulgate the exception in this manner, but we need not resolve the question. The exemption rule was based on a premise that we have held to be erroneous namely, that the statute of its own momentum subjects major sources of fugitive emissions to PSD preconstruction review and permit requirements. In light of our interpretation of section 302(j), and in accordance with our discussion as to the limits of EPA general exemption authority, we vacate the exemption for sources of fugitive dust and remand for further consideration.

[55][56][57] The statutory scheme provides EPA with a mechanism for accomplishing its objectives of partially exempting fugitive dust emitted by major emitting facilities from the requirements of section 165 by appropriate rulemaking pursuant to section 111.[FN134]

> FN134. EPA has discretion to define the pollutant termed "particulate matter" to exclude particulates of a size or composition determined not to present substantial public health or welfare concerns. Such "excluded particulates" would remain "air pollutants" within the meaning of the Act, section 302(g), but would be dropped from the list of pollutants compiled by the EPA Administrator under section 108(a)(1) a list comprised of air pollutants the "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Since national ambient air quality standards may exist only for those pollutants lists under section 108(a)(1), "excluded particulates" would not be subject to NAAQS. See C.A.A. at ss 108(a)(1), (2), 109, 302(g), 42 U.S.C. ss 7408(1), (2), 7409, 7602(g) (1978).
>
> However, under section 111(b)(1)(A) the Administrator must compile a list of categories of stationary sources that in his judgment "(cause or contribute) significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." This list could include sources of "particulate matter," as newly defined, even though the great preponderance of particulates emitted by such sources have become "excluded particulates." A source

may "significantly" contribute to air pollution on account of its emissions of "particulate matter" even though the quantities of "particulate matter" emitted fall well below the tonnage threshold that would qualify such a source, due to the emissions of that pollutant, as a major emitting facility. Section 111(d)(1) grants authority to the Administrator to establish standards of performance for any air pollutant emitted by a source on the list compiled under section 111(b)(1)(A). See also C.A.A. at s 111(a)(1)(C). Thus, due to the difference in focus of sections 108 and 111 one on pollutants and the other on sources a standard of performance might be developed governing "excluded particulates" though no NAAQS has been promulgated. Once a standard of performance has been promulgated for "excluded particulates," those pollutants become "subject to regulation" within the meaning of section 165(a)(4), 42 U.S.C. s 7475(a)(4) (1978), the provision requiring BACT prior to PSD permit approval.

EPA has authority by rulemaking to incorporate fugitive emissions, including fugitive dust, in the calculation of tonnage thresholds required to qualify a stationary source as a major emitting facility. See C.A.A. at s 302(j), 42 U.S.C. s 7602(j) (1978); Section D, supra. After such a rulemaking, a major emitting facility of "excluded particulates" would become subject to the preconstruction review and permit requirements of section 165. The net result of the administrative action outlined above would be a requirement that such major emitting facilities apply BACT (section 165(a)(4)), but no need for showing required by section 165(a)(3) that emissions of "excluded particulates" would not violate NAAQS or allowable increments. No NAAQS would exist for "excluded particulates" and the increments applicable to "particulate matter" would not apply. See also C.A.A. at s 166, 42 U.S.C. s 7476 (1978) (premising development of increments for "other pollutants" on the existence of NAAQS for such pollutants).

***371 **99** VII. MONITORING

Environmental petitioners challenge the EPA's monitoring regulations [FN135] as falling short of the statutory mandate in several respects. The EPA argues that the Act, specifically the text of sections 165(a)(2) and (a)(7),[FN136] grants broad discretion to the agency to formulate monitoring regulations.

FN135. 40 C.F.R. ss 51.24(n), 52.21(n) (1978).

FN136. 42 U.S.C. s 7475(a)(2) and (a)(7) (1978).

The arguably discretionary language of sections 165(a)(2) and (a)(7) is in our view restricted by the plain language of section 165(e), which provides in part:

> The review provided for in subsection (a) shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection . . . .[FN137]

FN137. 42 U.S.C. s 7475(e) (1978) (emphasis added).

Subsection (e) provides unambiguously that certain requirements must be included in the regulations EPA is directed to issue respecting the analysis. Of course there are circumstances when statutory language mandatory in form is held to constitute a mere directory command to the agency, so that variance triggers no judicial sanction. In this case, however, the nature of the statutory command and its background in the legislative history [FN138] supports our determination that the specification of requirements in section 165(e) must control agency action in this respect.

FN138. See H.Rep.No.95-564, 95th Cong., 1st Sess. 151-53 (1977); H.Rep.No.95-294, 95th Cong., 1st Sess. 8-9, 171 (1977).

A. Elements Required by Section 165(e)(1)

[58] On its face, section 165(e)(1) requires that preconstruction "review . . . shall be preceded by an analysis . . . for each pollutant subject to regulation under this Act which will be emitted" from the facility. [FN139] The mandatory nature of these provisions subject only to the authority of the agency to exempt de minimis situations [FN140] is clear. There must be an analysis; it must be for each pollutant regulated under the Act.

FN139. 42 U.S.C. s 7475(e)(1) (1978).

FN140. See section IIIB of this opinion.

[59] The regulations under review required monitoring only for those pollutants for which a NAAQS exists. The Sierra Club and the Environmental Defense Fund argue that s 165(e)(1) mandates monitoring for all pollutants under the Act. In the per curiam opinion issued earlier in this case, we expressed the view that s 165 did in fact require preconstruction monitoring for each pollutant subject to regulation under the Act.[FN141] Further reflection, prompted in part by a petition for rehearing filed by industry petitioners,[FN142] has caused us to reconsider our rulings. We now affirm that s 165(e)(1) requires that an analysis be conducted, and that it be conducted for each pollutant regulated under the Act. But, we also find that s 165(e)(1), standing alone, does not require monitoring as the method of analysis to be employed in fulfillment of its requirements. This conclusion is dictated by the absence of any reference to monitoring***372 **100** in s 165(e)(1) in contrast to its explicit inclusion in s 165(e) (2), which requires preconstruction monitoring to determine whether emissions will exceed maximum allowable increases or concentrations where such limits have been promulgated. Furthermore, s 165(e)(3)(D), which provides that EPA regulations shall specify any models to be used, opens the possibility that EPA might, in varying circumstances or for various pollutants, choose either monitoring or modeling as the method of analysis for s 165(e)(1).

FN141. Alabama Power Company, et al. v. Costle, 196 U.S.App.D.C. 161, 180, 606 F.2d 1068, 1087 (1979).

FN142. Industry Petitioners' Petition for Rehearing on the Application of PSD Requirements to Pollutants Other Than Sulfur Dioxide and Particulates at 7-10 (Filed July 19, 1979).

EPA may use its discretion in the choice of methodology either monitoring or modeling to be employed in fulfilling the requirements of s 165(e)(1). That discretion is subject, however, to the provisions of s 165(e)(2) which sets forth requirements as to monitoring.

B. Elements Required by Section 165(e)(2)

EPA's regulations have required monitoring only to determine whether an applicable NAAQS will be exceeded. The Agency argues in justification for its restrictions on the use of monitoring that monitoring for actual air quality concentrations is technologically infeasible for all but a small number of pollutants and that current monitoring techniques are at best of questionable accuracy even for the relatively straightforward measurement of whether an applicable NAAQS has been exceeded. The environmental petitioners argue that the regulation falls short of the statutory command, that monitoring must be required to determine as well whether the applicant will cause or contribute to violations of allowable increments.

[60] The language of subsection 165(e)(2) is dispositive. It provides in part:

> Effective one year after date of enactment of this part, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part.[FN143]
>
> FN143. 42 U.S.C. s 7475(e)(2) (1978) (emphasis added).

This is a plain requirement for inclusion of monitoring data, for purposes of the determination whether emissions will exceed allowable increments.

[61][62] We discern from the statute a technology-forcing objective. Congress intended that monitoring would impose a certain discipline on the use of modeling techniques, which would be the principal device relied upon for the projection of the impact on air quality of emissions from a regulated source. This projects that the employment of modeling techniques be held to earth by a continual process of confirmation and reassessment, a process that enhances confidence in modeling, as a means for realistic projection of air quality. This objective is furthered by the development of sophisticated monitoring techniques, and the collection of the data base that would result from monitoring's widespread use. Of course even a congressional mandate, such as a technology-forcing requirement based on a congressional projection of emergence of technology for the future, is subject to a justified excuse from compliance where good-faith effort to comply has not been fruitful of results. That is far different from the exemption created by EPA on the basis of current technological infeasibility. Though EPA has authority to require methods other than monitoring in its effort to ensure that allowable increments and NAAQS are not violated, and though it may choose to invoke that authority because of its perception that monitoring alone is inadequate to the task, it does not have authority to dispense with monitoring as at least one element of the overall enforcement effort where Congress has mandated the use of that

technique.

C. Guidelines for State Exemption Authority Under Section 165(e)(2)

[63] The monitoring requirement of subsection 165(e)(2) includes an instruction that:

> ***373 **101** Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period.

(Emphasis added.) The pertinent regulations have failed to provide concrete guidance to the cognizant State authorities for the exercise of the partial exemption authority granted by the provision. Instead, they have left such determinations to the States on a completely open-ended basis. We discern a congressional intention that EPA furnish meaningful guidance to the States as to the circumstances appropriate for exemption. We remand for further consideration.

D. Requirement for Post-Construction Monitoring

EPA has imposed no requirement for post-construction monitoring. The Sierra Club and the Environmental Defense Fund argue that this omission is invalid. In support of their contention, they point (1) to what they perceive to be the "prospective" monitoring requirement of section 165(a)(7); [FN144] and (2) to a congressional intent, ostensibly apparent from the inclusion of the modeling provisions of section 165(e)(3)(D) [FN145] in section 165, to ensure that monitoring and modeling augment one another in an ongoing manner.

FN144. 42 U.S.C. s 7475(a)(7) (1978).

FN145. 42 U.S.C. s 7475(e)(3)(D) (1978).

[64] This contention of environmental petitioners runs against the explicit language. Section 165(a)(7) [FN146] does make reference to a requirement of post-construction monitoring, but grants discretion to the agency in this regard a discretion that has not been provided with respect to the pre-application monitoring requirements specified in subsection 165(e). Section 165(a)(7) provides as a condition of permit approval that the applicant:

FN146. 42 U.S.C. s 7475(a)(7) (1978).

> agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source.[FN147]

FN147. Id.

The determination of the post-construction monitoring that "may be necessary" is not dictated by any provision in subsection 165(e), which pertains to pre-application monitoring requirements. EPA has latitude to make a determination under subsection 165(a)(7) in light of the facts and circumstances of each case. There is also latitude to respond to suggestions that guidelines be formulated outlining the circumstances that require post-construction monitoring and the nature of the monitoring requirement.

[65][66] Section 114 [FN148] grants the Administrator broad authority to require monitoring by any source that in his judgment is necessary to carry out his responsibilities under the Act. This includes an authority to require post-construction monitoring, but does not compel such a requirement. Section 319 [FN149] of the Act provides for development of a nationwide monitoring network, but this is to be a function of government, not the responsibility of permit applicants.

FN148. 42 U.S.C. s 7414 (1978).

FN149. 42 U.S.C. s 7619 (1978).

ROBINSON, Circuit Judge:

This opinion addresses four issues: first, whether EPA's action in specifying a uniform date on which baseline concentrations in attainment areas are to be ascertained comports with statutory requirements; second, whether increased emissions consequent upon voluntary changeovers from cleaner to dirtier fuels are to be included in the baseline; third, whether EPA provided reasoned responses to the modeling regulations that it proposed and ultimately adopted; and fourth, the legal propriety of EPA's regulations governing the role of stack height in determining the air pollution***374 **102** control requirements applicable to an emitting source.

I. BASELINE DATE

A central feature of the statutory program for the prevention of significant deterioration of air quality in

attainment areas, with respect to sulfur dioxide and particulate matter at least,[FN1] is the establishment of maximum allowable increases, known as increments, in concentrations of pollutants. [FN2] The increment concept incorporates the idea of a baseline from which deterioration is calculated, by models or monitors, to determine whether it is permissible. Congress has defined with specificity the time and manner in which the baseline for an attainment area is to be determined. The first sentence of Section 169(4), the part now relevant, provides:

> FN1. Section 163 fixes the increments for these two pollutants. 91 Stat. 732, 42 U.S.C. s 7473 (Supp. I 1977). Section 166 contemplates that EPA will study the four so-called "automotive" pollutants for which national ambient air quality standards have been set with a view to determining whether increments for these pollutants should be established. 91 Stat. 739, 42 U.S.C. s 7476 (Supp. I 1977). See generally Part III(B) supra of Judge Wilkey's opinion.
>
> FN2. See s 163, 91 Stat. 732, 42 U.S.C. s 7473 (Supp. I 1977).

> The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to (Part C), based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit.[FN3]
>
> FN3. 91 Stat. 741, 42 U.S.C. s 7479(4) (Supp. I 1977).

EPA has acknowledged that the literal purport of the statutory definition is that the starting point [FN4] for determining the baseline in a particular clean air region is the existing ambient pollution level in that area at the time of the first application for a permit by a major emitting facility. [FN5] Yet, in a remarkable assertion of administrative power to revise what Congress has wrought, EPA's final regulations define baseline concentration in terms of actual air quality as of August 7, 1977.[FN6] The Administrator explained this decision as follows:

> FN4. The remainder of s 169(4) deals with attribution of emissions of non-operating major emitting facilities on which construction was commenced prior to January 6, 1975, and of major emitting facilities, whether operating or not, on which construction was commenced after January 6, 1975. These provisions will be instrumental in our resolution of the "fuel switches" issue. See Part II infra.
>
> FN5. "Section 169(4) of the Act generally defines baseline in terms of the ambient concentration existing at the time of the first application for a permit in an area." 43 Fed.Reg. 26400 (June 19, 1978) (explanation of final regulations).
>
> FN6. 40 C.F.R. s 51.24(b)(11) (1978); 40 C.F.R. s 52.21(b)(11) (1978).

> (T)he regulations promulgated today recognize the severe technical and administrative problems with implementing a definition of baseline concentration that relates to the date of first permit application in an area. The administrator believes that a strict interpretation of the Act's language would create thousands of different areas each with different baseline starting points. Moreover, these areas would eventually overlap as more and more sources applied for PSD permits. The final regulations . . . resolve those problems by establishing a uniform starting date for determining the baseline concentration in all areas.[FN7]
>
> FN7. 43 Fed.Reg. 26400 (June 19, 1978).

Without disavowing that rationale, EPA's counsel has offered, as a second justification for the selection of a single date for calculation of the baseline, the following "anomaly":

> There is no apparent reason why in one clean air area five 'minor' sources constructed at the same time as five 'minor' sources in another clean air area should be counted against the increment simply because the first application by a major facility for a PSD permit came at an ***375 **103** earlier date in the first area than in the second.[FN8]
>
> FN8. Brief for Respondents at 161. In rejecting this position on the merits, see notes 12-17 infra and accompanying text, we do not mean to imply that appellate counsel's carpentry can repair a deficient agency rationale. See, e. g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 825, 28 L.Ed.2d 136, 155

(1971).

[67] Industry petitioners, the State of Texas and the District of Columbia [FN9] urge that EPA's uniform baseline date be set aside and the statutory baseline date reinstated. We agree. EPA has no authority to overrule a clear, consistent congressional directive: [FN10] "the sound principle of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible of differing interpretations." [FN11]

FN9. It may be some time before a major emitting facility seeks to operate in the District of Columbia.

FN10. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95, 94 S.Ct. 334, 339, 38 L.Ed.2d 287, 295 (1973), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 384 (1969) ("(c)ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong' "); Volkswagenwert Aktiengesellschaft v. FMC, 390 U.S. 261, 273, 88 S.Ct. 929, 936, 19 L.Ed.2d 1090, 1098 (1968), quoting NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839, 849 (1965) ("the courts are the final authorities on issues of statutory construction (citations omitted), and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrates the congressional policy underlying a statute' ").

FN11. Shea v. Vialpando, 416 U.S. 251, 262 n.11, 94 S.Ct. 1746, 1754 n.11, 40 L.Ed.2d 120, 130 n.11 (1974); see Townsend v. Swank, 404 U.S. 282, 286, 92 S.Ct. 502, 505, 30 L.Ed.2d 448, 453 (1971).

The statutory definition of baseline concentration was in no sense a product of legislative inadvertence.[FN12] Congress focused on how to define the baseline and fully understood the consequences of its chosen resolution. The Conference Committee explicitly acknowledged its adoption of the Senate definition of baseline,[FN13] and the Senate report had explicitly rejected EPA's uniform date approach.[FN14] Indeed, it purposely embraced the situation EPA's counsel considers anomalous: "Under this definition (of baseline) it is possible for nonmajor emitting sources to be constructed in the area after the date of enactment without having their emissions affect the ability of major emitters to use the increment available." [FN15]

FN12. Compare Citizens to Save Spencer County v. EPA, 195 U.S.App.D.C. 30, 600 F.2d 844 (1979).

FN13. H.R.Rep.No.564, 95th Cong. 1st Sess. 153 (1977) (conference report).

FN14. See S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977) ("(u)nder the reported bill (unlike EPA's regulations), the time at which the baseline is established for different areas will depend upon the timing of the first application of a major emitting facility"). Congress also rejected the House definition of baseline, which embraced a fixed-date approach. See H.R. 6161, 95th Cong., 1st Sess., s 108 (1977) (adding s 160(c)(2)(E) to the Clean Air Act).

FN15. S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977). EPA suggests that the Conference Committee's rejection of the Senate proposal that only emissions from major new sources should be considered in assessing consumption of the increment, see S. 252, 95th Cong., 1st Sess. s 7 (1977) (adding s 110(g)(2) to the Clean Air Act), vitiated the purpose of calculating the baseline as of the date of the first permit application. Brief for Respondents at 157-161. This misapprehends the rationale of the Senate's baseline definition. See notes 16-18 infra and accompanying text. It is true, however, that the statement quoted in text possessed, prior to the above-mentioned conference decision, a broader meaning.

This differential treatment of clean air areas, keyed to when the first major emitting facility applies for a permit, is based on a sound, practical consideration. As the Senate explained,

> (t)he purpose is to use actual air quality data to establish the baseline. Where sufficient actual data are not available, the State may require the applicant to perform whatever monitoring the State believes is necessary to provide that information.***376 **104** This may involve monitoring for 12 months or more to establish an annual average.[FN16]

FN16. S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977).

In other words, the task of monitoring existing ambient pollution levels in attainment areas is assigned to the first permit applicant, who will provide the information essential to calculation of the baseline.[FN17]

FN17. See s 165(e)(1)-(2), 91 Stat. 738, 42 U.S.C. s 7475(e)(1)-(2) (Supp. I 1977). EPA asserts that its uniform date is supported by s 107(d) of the Act, 91 Stat. 687, 42 U.S.C. s 7407(d) (Supp. I 1977). Brief for Respondents at 162. Section 107(d)(1) requires each state to submit to EPA, within 120 days of enactment of the 1977 amendments, a list of those portions of the state which, on August 7, 1977, do not meet a national ambient air quality standard, and a list of both those which meet all such standards and those which, for lack of sufficient information, cannot be classified and therefore are deemed clean air areas. See Citizens to Save Spencer County v. EPA, supra note 12, 195 U.S.App.D.C. at 83, 600 F.2d at 897 (dissenting opinion). But the s 107 lists submitted so far indicate that a great many states do not have acceptable air quality data showingpollution levels as of August 7, 1977. See, e. g., 43 Fed.Reg. 8967, 8970, 8978, 8980, 8983, 8985, 8992, 8999, 9001, 9002, 9005, 9012, 9017, 9019, 9025, 9027, 9029, 9035, 9037, 9041, 9044, 9046 (Mar. 3, 1978). Thus, Congress' concern over the adequacy of existing information concerning ambient air quality has been borne out by experience.

The Administrator's recitation of the administrative and technical burdens obviated by a uniform date for the setting of the baseline simply blinks reality.[FN18] A uniform date for calculating the baseline does not result in establishment of a uniform baseline. Ambient concentration levels of regulated pollutants varied considerably in different clean air areas on August 7, 1977, or any date for that matter, and thus baselines inevitably must differ. EPA's regulations requiring baseline concentration to be figured as of August 7, 1977, must be set aside in favor of the statutory directive to ascertain the baseline in each region as of the date of the first permit application.

FN18. See note 7 supra and accompanying text.

II. BASELINE AND VOLUNTARY FUEL SWITCHES

The first sentence of Section 169(4),[FN19] as we have just explained, specifies that the baseline concentration means primarily the actual ambient pollution levels existing at the time of the first permit application by a major omitting facility.[FN20] This baseline is, however, subject to an adjustment specified in the remainder of Section 169(4):

FN19. 42 U.S.C. s 7479(4) (Supp. I 1977), quoted in relevant part in text supra at note 3.

FN20. See notes 10-18 supra and accompanying text.

> Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under (Part C). [FN21]

FN21. 42 U.S.C. s 7479(4) (Supp. I 1977).

The significance of January 6, 1975, is that it was the effective date of EPA's earlier PSD regulations.[FN22]

FN22. See S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977).

[68] Indisputably, then, the baseline is to include all emissions actually being made by major facilities on which construction was under way before January 6, 1975, and which are in operation when the baseline determination is made. Nor is there any quarrel over the scope or import of the last sentence of Section 169(4): emissions of sulfur dioxide and particulate matter [FN23] from ***377 **105** major facilities on which construction began after January 6, 1975, are not grandfathered into the baseline but rather count against the increments, even if such facilities are operating on the date of the first permit application. [FN24]

FN23. This case does not require us to explore the implications, if any, to be drawn from the fact that the last sentence of s 169(4), 42 U.S.C. s 7479(4) (Supp. I 1977), is limited to sulfur dioxide and

particulate matter while the remainder of the statutory definition of "baseline concentration" speaks more broadly of pollutants. The other regulated pollutants have not yet been subjected to the baseline-increment method of regulation. Section 166 contemplates that the four pollutants other than sulfur dioxide and particulate matter for which national ambient standards have been set will be regulated to prevent significant deterioration. 42 U.S.C. s 7476 (Supp. I 1977). The methods for preventing significant deterioration by those pollutants, however, "need not require the establishment of maximum allowable increases." 42 U.S.C. s 7476(e) (Supp. I 1977).

FN24. 43 Fed.Reg. 26383 (June 19, 1978) (to be codified in 40 C.F.R. s 51.24(b) (11)); 43 Fed.Reg. 26404 (June 19, 1978) (to be codified in 40 C.F.R. s 52.21(b) (11)).

[69] On the other hand, controversy rages over the meaning of the middle sentence of Section 169(4). EPA has persisted, over firm objection,[FN25] in reading that directive according to its literal terms.[FN26] In EPA's view, the sentence evinces a congressional design to grandfather projected emissions only of sources not in operation when the baseline is established, and then only if construction began prior to January 6, 1975.[FN27] The State of Texas and members of the chemical manufacturing and utility industries have petitioned for review on this point, arguing that the provision in question reflects an intention to exempt projected emissions of any source on which construction commenced before January 6, 1975, even if operating at the time of establishment of the baseline.[FN28] Issue has been joined on whether increased emissions resulting from a major facility's voluntary switch from a relatively clean but scarce fuel to a more abundant but dirtier fuel are to consume the increments or rather are to be included within the baseline when the facility was capable of utilizing the alternate, more plentiful fuel prior to January 6, 1975.[FN29]

FN25. Several of these complaints, submitted to EPA in affidavit form and appended to petitioners' brief, maintain that EPA's position penalizes companies that have in the past voluntarily burned cleaner-than-allowable fuel. The answer is that baseline and increments are set for regions, rather than individual facilities.

FN26. See generally 40 C.F.R. s 51.24(b)(11) (1978); 40 C.F.R. s 52.21(b)(11) (1978).

FN27. "The baseline concentration shall include contributions from . . . (t) he allowable emissions of major stationary sources and major modifications which commenced construction before January 6, 1975, but were not in operation by August 7, 1977." 40 C.F.R. s 51.24(b)(11)(ii) (1978); 40 C.F.R. s 52.21(b) (11)(ii) (1978). August 7, 1977, it will be recalled, was EPA's uniform baseline date, which we have held to be in contravention of the statute. See Part I supra. The reference to August 7, 1977, is thus simply to the time of baseline determination.

FN28. Brief for Industry Petitioners on Fuel Switches at 17-22.

FN29. EPA's position is "that (voluntary fuel) switches . . . will consume increment." 43 Fed.Reg. 26397 (June 19, 1978) (explanation of final regulations).

EPA has held, first, that voluntary fuel switches by emissions sources which were designed to accommodate the alternate fuel prior to January 6, 1975, do not constitute modifications within the meaning of Section 111(a)(4),[FN30] and accordingly that such changeovers are not subject to the review and permitting strictures imposed by Section 165.[FN31] EPA's ruling on this point has ***378 **106** not been challenged. EPA has further resolved, as we have stated, that the additional emissions resulting from such fuel switches do, under the Act, consume the increments.[FN32]

FN30. 42 U.S.C. s 7411(a)(4) (Supp. I 1977).

FN31. 42 U.S.C. s 7475 (Supp. I 1977). In enacting the 1977 amendments, Congress neglected to subject modifications of major emitting facilities to the permit and best available control technology requirements. A so-called "technical" amendment to s 169(2) of the Act added a new subparagraph C, which provided that "(t)he term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility." Act of Nov. 16, 1977, Pub.L.No.95-190, 91 Stat. 1402, 42 U.S.C. s 7479(2)(C) (Supp. I 1977). By this amendment modifications of major facilities must meet the demands of s 165, and "modification" is defined to mean "any physical

> change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. s 7411(a)(4) (Supp. I 1977).
>
> EPA's decision to omit voluntary fuel switches from PSD scrutiny is based upon a belief that Congress did not intend that they be considered changes in the "method of operation." The Administrator explained:
>
> In adding Section 169(2)(C) to the Act, Congress indicated that it intended to conform the meaning of 'modification' to 'usage in other parts of the Act.' 123 Cong.Rec. H11955, 11957 (November 1, 1977). At the time, regulations promulgated under Section 111 had defined 'modifications' to exclude voluntary fuel switches when the source, 'prior to the date any standard under this part becomes applicable to that source type . . . (,) was designed to accommodate that alternative use.' 40 C.F.R. 60.14(e)(4) (1977). Apparently, Congress intended voluntary fuel switches to be treated similarly for PSD purposes.
>
> 43 Fed.Reg. 26396 (June 19, 1978).

FN32. See note 29 supra.

Texas and the industry petitioners complaining intimate that EPA's position on voluntary fuel switches is internally inconsistent.[FN33] This argument conflates the different yet complementary functions of Section 165 review and calculation of increment consumption. The theory of the statutory PSD program is that concentration on preconstruction review of major emitting facilities [FN34] in clean air areas will preserve air quality in those areas with a minimum of economic hardship.[FN35] At the same time, the success of the program depends heavily upon realistic assessments of pollution levels. As Senator Gary Hart put it, "(s)ulfur dioxide is sulfur dioxide and it doesn't matter whether it comes from 1 large major source or from 1,000 small nonmajor sources. The effects are still the same." [FN36] Moreover, the severe technical problems involved in assessing the origin of existing pollution are sidestepped somewhat by this approach.[FN37]

FN33. E. g., Brief for Industry Petitioners on Fuel Switches 37-42. These petitioners also urge that EPA's fuel-switches position is at odds with its avowed intent to deviate from a baseline calculated on the basis of actual emissions in those regions where a SIP relaxation was submitted to EPA and was still pending on August 7, 1977. 43 Fed.Reg. 26400 (June 19, 1978). The validity of this approach itself is not questioned here, and we intimate no view either on its appropriateness or on petitioners' argument of inconsistency. Restraint is especially warranted because EPA could reconsider this issue in light of our decision overturning its uniform, August 7, 1977, date for determining the baseline. See Part I supra. Industry also points to EPA's announcement that it will use reasonable assumptions in ascertaining ambient concentration as of the baseline date. 43 Fed.Reg. 26400 (June 19, 1978). This policy likewise is unchallenged, and may be revised, so we decline to rule on it. See generally notes 43-44 infra and accompanying text.

FN34. "This key term (major emitting facility) assures that industrial plants of significant impact are fully covered, yet also assures that smaller activities are not subject to overzealous regulation." 122 Cong.Rec. S12809 (daily ed. July 29, 1976) (remarks of Senator McClure). See also 123 Cong.Rec. S13710-13711 (daily ed. Aug. 4, 1977) (remarks of Senator McClure).

FN35. 122 Cong.Rec. S12470 (daily ed. July 26, 1976) (remarks of Senator Hart).

FN36. Id. See also 122 Cong.Rec. S13325-13326 (daily ed. Aug. 4, 1976) (remarks of Senator Hart). The Hart amendment was defeated. See note 46 infra and accompanying text.

FN37. Id.

[70] The central submission of the protesting petitioners is that EPA's decision not to grandfather emissions from fuel switches by facilities capable of so changing prior to January 6, 1975, contravenes congressional intent as revealed in the second sentence of Section 169(4) and throughout the history of the 1977 Amendments. Approaching the issue with the considerable degree of deference due an agency's interpretation of the statute it is charged with administering, [FN38] we sustain the administrative construction.

FN38. United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 131, 98 S.Ct. 965, 979, 55 L.Ed.2d 148, 166 (1978); United States v. Consumer Life Ins. Co., 430 U.S. 725, 751-752, 97 S.Ct. 1440, 1454, 52 L.Ed.2d 4, 24 (1977); Train v. Natural Resources Defense Council, 421 U.S. 60, 87, 95 S.Ct. 1470, 1485, 43 L.Ed.2d 731, 750 (1975); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

****107 *379** [71] Every issue of statutory interpretation should commence with a close textual examination.[FN39] The second sentence of Section 169(4) is in express terms limited to facilities on which construction was commenced prior to January 6, 1975, but which are not in operation when the first permit application triggers calculation of the baseline. Petitioners, however, would modify this provision to make it referable to any major facility on which construction started before that date, "even if " the facility has not begun operation at the time of the baseline determination.[FN40] To justify this surgery, they assert that "(c) learly it would be anomalous to assume that Congress intended to grandfather only those projected emissions from sources that commenced construction prior to January 6, 1975, but which were not in operation (by the date the baseline is figured), and exclude sources which were built and operating beforehand." [FN41]

FN39. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197, 96 S.Ct. 1375, 1383, 47 L.Ed.2d 668, 679 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539, 561 (1975) (concurring opinion) ("(t)he starting point in every case involving construction of a statute is the language itself"); FTC v. Bunte Bros., 312 U.S. 349, 350, 61 S.Ct. 580, 581, 85 L.Ed. 881, 883 (1941) ("(w)hile one may not end with the words of a disputed statute, one certainly begins there"); Citizens to Save Spencer County v. EPA, supra note 12, 195 U.S.App.D.C. at 79 & nn. 12-14, 600 F.2d at 893 & nn. 12-14 (dissenting opinion).

FN40. Brief for Industry Petitioners on Fuel Switches 18 (emphasis in original).

FN41. Id. at 20 n. 1.

[72][73] In our opinion, Section 169(4) as enacted draws a sensible distinction. There are two types of emitting sources begun prior to the existence of any PSD program. If the source has no actual emissions because it has yet to commence operating, its hypothetical, projected emissions are included in the baseline. If, however, the source is an established operation, a more realistic assessment of its impact on ambient air quality levels is possible, and thus is directed.[FN42]

FN42. Brief for Respondents at 173. EPA also relies on s 163(c), 91 Stat. 733, 42 U.S.C. s 7473(c) (Supp. I 1977), to support its policy of counting emissions from voluntary fuel changes against the increment. Brief for Respondents at 166-174. This subsection provides in relevant part:

> (1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out (Part C), the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:
>
> (A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.
>
> (B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan, . . .
>
> (3) No action under this subsection shall take effect unless the Governor submits the order or

> rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.
>
> Since Congress focused on the question of increment consumption caused by fuel conversions and declined to fashion an exemption for voluntary switches, so the argument goes, EPA could not expand the statutorily-authorized exemptions. While this thesis has some appeal, industry petitioners aptly respond that s 163(c) deals with fuel conversions regardless of whether the plant was capable of utilizing the alternate fuel prior to January 6, 1975. Thus that subsection addresses a somewhat different concern and application of the maxim expressio unius est exclusio alterius did not compel EPA's decision to count emissions from post-January 6, 1975, voluntary switches not involving any design changes. Reply Brief for Industry Petitioners on Fuel Switches at 3-6.
>
> Texas, in a separate brief, insists that EPA's final regulations arbitrarily treat state-ordered fuel-conversion orders differently from federally-mandated fuel switches since only emissions from the latter are exempted from increment consumption. Brief for Petitioner State of Texas at 6-15. This contention is firmly rebutted by s 163(c). Texas maintains that state- and federally-ordered conversions are indistinguishable both are directed for sound energy conservation reasons. If, however, Texas has a justified grievance, resolution of it is committed to Congress. Congress may have been concerned that some state agencies might not consider all of the environmental consequences of a conversion order, as federal energy authorities are required to do. In any event, in light of s 163(c), EPA's failure to exclude increased emissions resulting from a state-ordered fuel switch is not judicially condemnable.

****108 *380** [74] Petitioners rail against this qualified "snapshot" approach to determination of the baseline concentration. They argue that if the snapshot is taken on a day on which industrial activity is rather dormant say, Sunday or a holiday, or when wind conditions are peculiarly favorable then the baseline concentration will be set so low that full operation of existing facilities on an average day will lead to increment exceedances.[FN43] We think this fear is groundless. Congress expected EPA to use "administrative good sense" in establishing the baseline and calculating exceedances.[FN44] Were measurements on an atypical day the sole method of determining actual ambient air quality as of the approximate time of the first permit application, affected industries would then have cause for complaint and potential ground for relief.

> FN43. Reply Brief for Industry Petitioners on Fuel Switches at 9.
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> FN44. The Senate Report, after explaining that actual air quality data are to be utilized to establish the baseline, stated:
>
> > In calculating the baseline air quality concentration, one caveat is in order. This concerns background particulates levels in rural, arid and semiarid States. Because of the imprecision inherent in the total suspended particulate standards, background dust in such States can cause levels in excess of the particulates standards. Fortunately, the logical dilemma posed by the shortcomings of the present particulate standards can be overcome by administrative good sense until such time as modification of the standards are adopted.
>
> S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977). Though directed at a specific problem, we believe that this illustration indicates that Congress did not intend a simple measurement of air quality on a day with atypical conditions to control calculation of the baseline. Reasonable efforts to ascertain the actual but usual concentration levels, as of the date of the first application for a permit, are required. See also note 33 supra.

Petitioners understandably seek support for their projected-emissions approach in the Act's legislative history, for both the Senate and House bills, in different ways, would have excluded projected emissions from old sources in calculating expenditure of the increments. Both the 1976 and 1977 Senate bills defined the increments in terms of maximum allowable increases in sulfur dioxide and particulate matter "resulting from the construction and operation of any new major emitting facility"; [FN45] thus only emissions from new major sources would count against the

increments. In 1976, the Senate soundly defeated an amendment providing that emissions from all sources would be counted in determining increment consumption.[FN46] Both the 1976 and 1977 House bills included within the baseline "the level of concentration determined for each period of exposure on the basis of plant capacity in existence on . . . January 1, 1975." [FN47] As the 1976 House report stated, "the bill's definition of baseline level authorizes the 'grandfathering' of . . . all existing industrial capacity . . . ." [FN48]

FN45. S.252, 95th Cong., 1st Sess. s 7 (1977), (adding s 110(g)(2) to the Clean Air Act); S.3219, 94th Cong., 2d Sess. s 6 (1976) (adding s 110(g)(2) to the Clean Air Act).

FN46. See 122 Cong.Rec. S13325-13329 (daily ed. Aug. 4, 1976) (debate on the Hart amendment); 122 Cong.Rec. S13336 (daily ed. Aug. 4, 1976) (defeat of Hart amendment).

FN47. H.R. 6161, 95th Cong., 1st Sess. s 108 (1977) (adding s 160(c)(2)(E)(i) to the Clean Air Act); H.R. 10498, 94th Cong., 2d Sess. s 108 (1976) (adding s 160(c)(2)(E)(i) to the Clean Air Act).

FN48. H.R.Rep.No.1175, 94th Cong., 2d Sess. 123 (1976); see id. 131.

***381 **109** Had either the House definition of baseline concentration or the Senate approach to increment consumption been enacted, petitioners would be on firm ground in urging that emissions resulting from fuel switches in plants with the capacity to use the dirtier fuel prior to January 6, 1975, do not consume the increments. The Conference Committee withdrew these crucial supports, however. The Senate definition of the baseline became Section 169(4). [FN49] As explained in the discussion of the appropriate date for determining the baseline,[FN50] the Senate chose "to use actual air quality data to establish the baseline," gathered if necessary through monitoring by the first permit applicant.[FN51] Petitioners attempt to distinguish the injunction to use "actual data" from the use of "actual emissions," [FN52] but this strikes us as contrary to common sense and, more significantly, to the clear directive of the first sentence of Section 169(4), which defines the baseline in terms of existing ambient concentration levels.[FN53]

FN49. H.R.Rep.No.564, 95th Cong., 1st Sess. 153 (1977) (conference report).

FN50. See notes 16-17 supra and accompanying text.

FN51. S.Rep.No.127, 95th Cong., 1st Sess. 98 (1977). See also 122 Cong.Rec. S13177 (daily ed. Aug. 3, 1976) (remarks of Senator Brooke) ("the House bill, unlike the Senate bill, defines the 'baseline' to which new pollution increases may be added on the basis of total 'design capacity' of existing sources, not actual emissions").

FN52. Reply Brief for Industry Petitioners on Fuel Switches at 10.

FN53. 42 U.S.C. s 7479(4), quoted in pertinent part in text accompanying note 3 supra.

[75] The Conference Committee also rejected the Senate philosophy that only emissions from new major facilities should expend the increments. As the Committee observed, "(i)ncrements setting forth the maximum allowable increase in pollutants are stated in the statute for particulates and sulfur dioxide," [FN54] and those increments are not source-specific; all emissions are considered in determining whether the statute's aim of preventing significant deterioration of the air quality in attainment areas is being secured. [FN55]

FN54. H.R.Rep.No.564, 95th Cong., 1st Sess. 151 (1977) (conference report), U.S.Code Cong. & Admin.News, p. 1532.

FN55. s 163(b), 91 Stat. 732, 42 U.S.C. s 7473(b) (Supp. I 1977); see also notes 33-36 supra and accompanying text.

[76] In sum, EPA's refusal to grandfather emissions resulting from a voluntary fuel switch is a well-supported interpretation of congressional intent.[FN56] We accordingly must uphold EPA's regulations on this score.

FN56. Petitioners also assert that EPA's position on voluntary fuel switches is procedurally infirm. They suggest that EPA failed to explain the basis for its action and neglected to respond to significant comments. Brief for Industry Petitioners on Fuel Switches at 30-37. These contentions are without merit. EPA carefully detailed the rationale of its fuel-switches policy; its view of con-

gressional intent simply differed, and justifiably so, from those of petitioners. Moreover, since EPA's fuel switches regulations are interpretative, they are exempt from the requirements of s 4 of the Administrative Procedure Act. 5 U.S.C. s 553 (1976). See Citizens to Save Spencer County v. EPA, supra note 12, 195 U.S.App.D.C. at 38, 600 F.2d at 852. See also s 307(d), 91 Stat. 772, 42 U.S.C. s 7607(d) (Supp. I 1977) (procedural requirements applicable to rules proposed more than 90 days after enactment of the 1977 amendments; interpretative rules are exempted).

III. MODELING

In its initial, reluctant effort to establish a program for the prevention of significant clean-air deterioration, EPA in 1973 proposed four alternative sets of regulations.[FN57] Though differing in many important respects, each set embraced increment-consumption measurements as the primary means for determining whether to grant a permit to a proposed new major emitting facility.[FN58] Each facility would be required to monitor its impact on air quality unless the state wherein it was located were to ***382 **110** determine that an adequate monitoring network already existed. [FN59]

FN57. 38 Fed.Reg. 18986 (July 16, 1973).

FN58. Id. at 18989-18990.

FN59. Id. at 18990.

By 1974, EPA had abandoned this program, mainly for two reasons: the absence of existing air quality data in attainment areas, and the inability of existing monitoring technology to "reliably distinguish between readings approaching the small increments." [FN60] Instead, EPA decided to rely principally on techniques of diffusion modeling mathematical techniques for estimating the effects of emissions from multiple sources on air quality in the surrounding area.[FN61] Where feasible, the accuracy of the models was to be tested by measurements of actual air quality.[FN62]

FN60. 39 Fed.Reg. 31000, 31003 (Aug. 27, 1974).

FN61. Id.

FN62. "(C)urrent instrumentation would be adequate to calibrate and improve current diffusion modeling techniques . . . ." Id.

In fashioning the Clean Air Act Amendments of 1977, Congress basically shared EPA's mind-set concerning models. Although Congress considered models less than completely trustworthy,[FN63] it believed them to be essential to implementation of a PSD program.[FN64] Consequently, it directed EPA to develop regulations "specify(ing) with reasonable particularity each air quality model or models to be used under specified sets of conditions . . . ." [FN65] To insure that EPA-sanctioned models would not lag behind the state of the art, Congress instructed the agency to hold conferences on modeling techniques, and permit specialists and interested persons to participate and submit comments.[FN66] The first such conference***383 **111** was held on December 14-15, 1977, in Washington, D.C., and subsequent modeling conferences must be held at least triennially.[FN67]

FN63. See, e. g., 122 Cong.Rec. H9564 (daily ed. Sept. 8, 1976) (remarks of Representative Milford) ("(a) wide variety of diffusion modeling methodology is available, each with its supporters and its detractors . . . (;) (i)n other words, the nondeterioration proposal rests fundamentally on mathematical procedures that require data and scientific knowledge which we do not have"); 122 Cong.Rec. S13175 (daily ed. Aug. 3, 1976) (remarks of Senator Domenici) ("(a) major premise in the study rationale (of a proposed amendment) is that the current state of the art of air quality diffusion modeling makes the studies the committee has relied on unreliable(;) . . . even if one grants this contention . . . (a)ll the . . . amendment offers us is another study employing the same flawed modeling techniques").

FN64. 123 Cong.Rec. S9269 (daily ed. June 9, 1977) (remarks of Senator McClure) ("(w)e are making the best judgment we can, without knowing what those models are going to show, without knowing what the science of modeling will do, without knowing what effects it may have on specific questions"); 122 Cong.Rec. S13175 (daily ed. Aug. 3, 1976) (remarks of Senator Domenici) (the bill, with its reliance on modeling, is "the first step in gathering knowledge on how our environmental values can be protected"; "real world feedback can . . . serve as the basis for making future modifications in the law").

FN65. s 165(e)(3)(D), 91 Stat. 739, 42 U.S.C. s 7475(e)(3)(D) (Supp. I 1977). This provision goes on to say that

> (a)ny model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or a meteorological characteristic of an area potentially affected by emissions from a source applying for a permit required under this part.
>
> Id.

FN66. (a) Not later than six months after the date of the enactment of the Clean Air Act Amendments of 1977, and at least every three years thereafter, the Administrator shall conduct a conference on air quality modeling. In conducting such conference, special attention shall be given to appropriate modeling necessary for carrying out Part C of title I (relating to prevention of significant deterioration of air quality).

> (b) The conference conducted under this section shall provide for participation by the National Academy of Sciences, representatives of State and local air pollution control agencies, and appropriate Federal agencies, including the National Science Foundation; the National Oceanic and Atmospheric Administration, and the National Bureau of Standards.
>
> (c) Interested persons shall be permitted to submit written comments and a verbatim transcript of the conference proceedings shall be maintained.
>
> (d) The comments submitted and the transcript maintained pursuant to subsection (c) shall be included in the docket required to be established for purposes of promulgating or revising any regulation relating to air quality modeling under Part C of title I.
>
> s 320, 91 Stat. 782, 42 U.S.C. s 7620 (Supp. I 1977).

FN67. Id.

Many industry petitioners participated in the 1977 conference and utilized the subsequent comment period. EPA, however, adhered essentially to its proposal to adopt the variety of models detailed in its "Interim Guideline on Air Quality Models," which had been released in October, 1977.[FN68] The final regulations on modeling incorporate essentially the revised version of this document, released in April, 1978.[FN69] On this review, industry petitioners urge that EPA's modeling regulations be set aside on the ground that the agency failed to respond meaningfully to significant criticism of the Interim Guideline, in contravention of Section 4 of the Administrative Procedure Act. [FN70] They contend that their comments raised three crucial policy issues which EPA neglected to address.[FN71]

FN68. 42 Fed.Reg. 57472-57473 (Nov. 3, 1977) (explaining proposal to employ requirements specified in EPA's Interim Guideline on Air Quality Models (Oct. 1977)).

FN69. 43 Fed.Reg. 26398-26399 (June 19, 1978) (explaining regulations that incorporate by reference EPA's Guideline on Air Quality Models (Apr. 1978) (hereafter cited as "Guideline")); 40 C.F.R. s 51.24(m) (1978); 40 C.F.R. s 52.21(m) (1978).

FN70. 5 U.S.C. s 553 (1976).

FN71. Brief for Industry Petitioners on Modeling at 13-27.

Petitioners' first policy complaint goes not to the substance, but to an assumed exclusivity, of the models described in the guideline. The regulations require estimates of ambient concentrations to normally be based on the models specified in the 1978 guideline.[FN72] If, however, a model designated by the guideline is inappropriate, it may be modified or another model substituted, [FN73] but such changes are subject to public notice and comment procedures. [FN74] Moreover, methods prescribed in an EPA-prepared workbook [FN75] are to be used to determine whether substituted models are comparable to those laid out in the guideline.[FN76] Petitioners read the regulations to require a demonstration that an industry-proposed model shares the individual technical aspects of one of the models approved in the guideline.[FN77] They suggest that even if a

proposed model possesses greater predictive accuracy in particular circumstances than the reference model, it may not be employed unless it reproduces the technical shortcomings in the design of the standard model. According to petitioners, comments criticizing this emphasis on strict comparability, to the detriment of precision in estimating***384 **112** pollution concentrations, went unanswered.[FN78]

FN72. Air quality models. (1) The plan shall provide for procedures which specify that

(i) All estimates of ambient concentrations required under paragraph (1) shall be based on the applicable air quality models, data bases, and other requirements specified in the Guideline on Air Quality Models . . .

(ii) Where an air quality impact model specified in the Guideline on Air Quality Models is inappropriate, the model may be modified or another model substituted.

(iii) A substitution or modification of a model shall be subject to public comment procedures developed in accordance with paragraph (r) of this section.

(iv) Written approval of the Administrator must be obtained for any modification or substitution.

(v) Methods like those outlined in the Workbook for the Comparison of Air Quality Models . . . should be used to determine the comparability of air quality models. (2) The Guideline on Air Quality Models is incorporated by reference. . . .

40 C.F.R. s 51.24(m) (1978); see 40 C.F.R. s 52.21(m) (1978) (same standards with respect to models used by source owners or operators to demonstrate compliance with the increments).

FN73. See note 72 supra.

FN74. See note 72 supra.

FN75. Environmental Protection Agency, Workbook for the Comparison of Air Quality Models (May, 1978).

FN76. 40 C.F.R. s 51.24(m)(1)(v) (1978); 40 C.F.R. s 52.21(m)(2) (1978).

FN77. Brief for Industry Petitioners on Modeling at 14-15, 23 (quoting a comment submitted by the American Petroleum Institute).

FN78. Id. at 14-15, 23, 26.

EPA asserts, and we agree, that petitioners misread the regulations and the accompanying guideline.[FN79] "(N)ot intended to be a compendium of modeling techniques," [FN80] the guideline explicitly states its role:

FN79. Brief for Respondents at 214.

FN80. Guideline, supra note 69, at 1.

(t)his guide makes specific recommendations concerning (1) air quality models, (2) data bases and (3) general requirements for concentration estimates. . . . However, it may be found that (1) the recommended air quality model is not appropriate for a particular application, (2) the required data base is unavailable, or (3) a better model or analytical procedure is available and applicable. In such cases, alternatives indicated in this guide or other data, models and techniques deemed appropriate by the Regional Administrator may be used. Thus, even though specific recommendations are made, they should not be considered rigid requirements. The preferred model is that which best simulates atmospheric transport and dispersion in the area of interest. [FN81]

FN81. Guideline, supra note 69, at 1-2.

In sum, industry's criticism proceeded from a faulty premise and was firmly rebutted by the guideline, which was incorporated in the final regulations.

Since the models prescribed in the guideline are presumptively, not conclusively, appropriate, and EPA welcomes use of more accurate models, it could be argued that the modeling regulations are "general statements of policy" exempt under Section 4 from notice and comment procedures,[FN82] whence comes the duty to respond to significant comments.[FN83] We have heretofore noted that

FN82. 5 U.S.C. s 553(b)(3)(A) (1976) provides that "(e)xcept when notice or hearing is required by statute," the notice and comment requirement is inapplicable to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ."

FN83. Home Box Office, Inc. v. FCC, 185 U.S.App.D.C. 142, 168, 567 F.2d 9, 35 (1977); Automotive Parts & Accessories Ass'n v. Boyd, 132 U.S.App.D.C. 200, 208, 407 F.2d 330, 338 (1968).

(t)he critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. FN84

FN84. Pacific Gas & Elec. Co. v. FPC, 164 U.S.App.D.C. 371, 376, 506 F.2d 33, 38 (1974); see Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3d Cir. 1969); Air Port Comm'n v. CAB, 300 F.2d 185, 188 (4th Cir. 1962); Pacific Lighting Serv. Co. v. FPC, 518 F.2d 718, 719 (9th Cir.), cert. denied, 423 U.S. 1000, 96 S.Ct. 432, 46 L.Ed.2d 376 (1975).

[77][78][79][80] As the modeling regulations illustrate, the line between binding, substantive rules and merely informational announcements on how the agency plans to exercise a discretionary power is not always bright. But the guideline requires that "deviations (from the specified models) be fully supported and documented," FN85 and in our view the models designated in the guideline are thus granted sufficient weight in subsequent proceedings to remove the regulations from the ambit of policy statements and the exemption therefor. In any event, it bears repeating that the duty to respond to significant comments finds a statutory basis in required notice and comment procedures, for "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." FN86 and, for the case at bar, Section ***385 **113** 320 of the Clean Air Act Amendments of 1977 explicitly affords interested persons that opportunity with respect to the proceedings of the special modeling conference,FN87 and submitted comments must be included in the docket established for promulgation and review of regulations pertaining to air quality modeling.FN88 Comments standing unaddressed thus may well leave a reviewing court unable to say that the agency has considered all relevant factors.FN89

FN85. Guideline, supra note 69, at 2.

FN86. Home Box Office, Inc. v. FCC, supra note 80, 185 U.S.App.D.C. at 168-169, 567 F.2d at 35-36; see Portland Cement Ass'n v. Ruckelshaus, 158 U.S.App.D.C. 308, 326-327, 486 F.2d 375, 393-394 (1973), cert. denied, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).

FN87. 42 U.S.C. s 7620(c) (Supp. I 1977), quoted in note 66 supra.

FN88. 42 U.S.C. s 7620(d) (Supp. I 1977), quoted in note 66 supra.

FN89. See Citizens to Preserve Overton Park v. Volpe, supra note 8, 401 U.S. at 420, 91 S.Ct. at 823-824, 28 L.Ed.2d at 153; Home Box Office, Inc. v. FCC, supra note 83, 185 U.S.App.D.C. at 169, 567 F.2d at 36; Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 178 U.S.App.D.C. 336, 346, 547 F.2d 633, 646 (1976), rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978); Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

[81] The second group of allegedly unrebutted but significant comments submitted by industry spokesmen charges undue conservatism in assumptions adopted in the guideline. Industry states that the guideline assumes "maximum loading, worst case meteorology, ground reflection, no travel time considerations and minimum plume rise," FN90 and that together they result in drastic overprediction of pollution concentrations. These comments were critical of the assumptions underlying the proposed models, not the techniques they incorporate. No objection has been raised against EPA's view that the models proposed, though flawed, reflect faithfully the present technological state of the art.FN91

FN90. Brief for Industry Petitioners on Modeling at 22 (citing comments submitted on behalf of

Arizona Public Service Company and American Petroleum Institute).

FN91. Guideline, supra note 69, at 18 ("(t)he models recommended in this guideline are simply those which are (1) representative of the state-of-the-art for atmospheric simulation models and (2) most readily available to air pollution control agencies"). Industry petitioners do point out that some commentators have expressed serious reservations about one of the models. Brief for Industry Petitioners on Modeling at 25. These may prove to be persuasive to EPA, however, as all the Guideline says about this model is that it may be "applicable to some complex terrain situations . . .." Guideline, supra note 69, at 19. Congress recognized the technical difficulties in modeling emissions across complex terrain and expected EPA to develop and use the most appropriate models for such situations. See 123 Cong.Rec. S13708 (daily ed. Aug. 4, 1977) (colloquy between Senator Muskie and Senator Garn).

Industry's position, we think, is overdrawn. The guideline first recommends use of a preliminary screening technique to single out, with minimum effort, those emission sources that clearly will not consume the remaining increment. FN92 Only if the source might threaten an increment exceedance is more sophisticated and expensive modeling required. The diffusion models specified are designed to make an accurate translation from source emissions to ambient air concentration levels at carefully selected places, called receptor sites, away from the sources.FN93 These models depend upon procurement and analysis of data concerning background pollution, load-emission conditions at the sources, and topographical and meteorological conditions in the area. FN94 The guideline does not, contrary to petitioners' intimation, require use of the highest of ***386 **114** all estimated concentrations at any site. Rather, the "highest of second-highest concentrations for a field of receptors" is generally employed to predict increment consumption.FN95 This concentration is obtained by (a) estimating the short-term concentration at each receptor site in the field, (b) discarding the highest estimated concentration at each site, and (c) identifying the highest of the remaining concentration estimates from the field the result referred to as the "highest, second-highest" concentration.FN96 Where monitored air-quality data indicate impacts greater than predicted by models using highest, second-highest estimated concentrations, the measured concentration levels are utilized. FN97 And if the regional administrator determines that there is a lack of confidence in the highest, second-highest concentration standard because of data or model inadequacies, he may require use of the highest estimated concentrations until the necessary data are acquired or analytical techniques are improved.FN98

FN92. Guideline, supra note 69, at 2, 19-20. Recommended are the screening techniques summarized in EPA's Guidelines for Air Quality Maintenance Planning and Analysis, Vol. 10: Procedures for Evaluating Air Quality Impact of New Stationary Sources (Oct., 1977).

FN93. See, e. g., Sierra Club v. EPA, 176 U.S.App.D.C. 335, 357, 540 F.2d 1114, 1136 (1976), remanded sub nom. Montana Power Co. v. EPA, 434 U.S. 809, 98 S.Ct. 40, 54 L.Ed.2d 66 (1977); Mision Indus., Inc. v. EPA, 547 F.2d 123, 128-129 (1st Cir. 1976); Cincinnati Gas & Elec. Co. v. EPA, 578 F.2d 660, 661 (6th Cir. 1978), cert. denied, 439 U.S. 1114, 99 S.Ct. 1017, 59 L.Ed.2d 72 (1979); W. Rodgers, Environmental Law 237 (1977).

FN94. Guideline, supra note 69, at 27-37.

FN95. Id. at 8.

FN96. Id.

FN97. Id. at 9.

FN98. Id. at 9-10.

EPA's resort to the highest, second-highest concentration level is not inexplicable. Models are designed to aid EPA in its task of protecting the statutorily-prescribed increments and, as the guideline states, "(t)hese maximum allowable increases in pollutant concentrations may be exceeded only once per year, except for the annual increment." FN99 Thus the guideline points out why the models embrace rather conservative assumptions not likely to hold true on many days: protection of the increments, the statute says, is a well-nigh continuous responsibility, not a casual goal to be assured only on typical days.

FN99. Id. at 11. See s 163(a), (b), 91 Stat. 732, 42 U.S.C. s 7473(a), (b) (Supp. I 1977).

Industry petitioners' remaining set of complaints does recognize the need to fit the models into the statutory scheme. They submitted comments averring that Congress intended to ratify the modeling analysis employed in a 1975 report by EPA and the Federal Energy Administration [FN100] assessing the impact of the PSD program on the electric utility industry.[FN101] They point out ways in which the models selected in the guideline are more conservative than that employed in the 1975 EPA-FEA study.[FN102]

FN100. Environmental Protection Agency & Federal Energy Administration, An Analysis of the Impact on the Electric Utility Industry of Alternative Approaches to Significant Deterioration (Oct., 1975).

FN101. Brief for Industry Petitioners on Modeling at 16-21 (discussing comments submitted on behalf of Utility Air Regulatory Group and other industry interests).

FN102. They suggest that the EPA-FEA report, unlike the guideline, relied heavily on a limited mixing model for Class I impact analysis, and that the guideline adopts conservative assumptions while the earlier report was based "on the use of average (typical) conditions." Brief for Industry Petitioners on Modeling at 16. The limited mixing model has been retained as a screening model. See Guidelines for Air Quality Maintenance Planning and Analysis, supra note 92, at 4-12, 4-38 to 4-40. And the more conservative assumptions were warranted by the new statutory framework. See notes 90-99 supra and accompanying test.

This argument is belied by the facts. Congress itself changed some of the assumptions on which the EPA-FEA report was based. To take an obvious example, Congress made the increments used in both the House bill and the study more stringent.[FN103] Congress also specified the conference and comment procedures in order to prod EPA into revising its models to reflect growing scientific sophistication.[FN104] Moreover,***387 **115** industry's interpretation of the legislative history is itself one-sided. It is true that Congressman Broyhill indicated that the House receded from insistence upon the provisions of an amendment, which would have authorized temporary increment exceedances in Class II areas, upon assurances that the EPA-FEA study demonstrated that "powerplants up to 6,000 megawatts could be built" under the bill.[FN105] But this proves nothing, for even according to petitioners' representative, such a plant can be built under the EPA regulations.[FN106] Moreover, Senator McClure, an influential supporter of the Act, did remark that the bill would "make it impossible to build a 3,000-megowatt plant in southern Utah," [FN107] yet the Senator recognized that the Act was not drafted in terms of either allowing or prohibiting sources of specified sizes, and that the Act's actual impact on particular sources could not be predicted: "(s)o we are taking something on faith. We are making the best judgment we can, without knowing what those models are going to show, without knowing what the science of modeling will do, without knowing what effects it may have on specific questions." [FN108] Senator Muskie agreed that "the best we can do is to try to define the broad parameters" [FN109] of what the Act will do.

FN103. Petitioners' representative at the December, 1977, modeling conference acknowledged this crucial change. Transcript of Modeling Conference at 81 (Dec. 15, 1977) (remarks of Dr. Mahoney), quoted infra note 106.

FN104. See 42 U.S.C. s 7620 (Supp. I 1977), quoted supra note 66. See also H.R.Rep.No.564, 95th Cong., 1st Sess. 153 (1977) (conference report) U.S.Code Cong. & Admin.News, p. 1533 ("(t)he conference adopted the air quality modeling conference in the House bill and expects that EPA will seek the full participation of representatives of private and public interests").

FN105. 123 Cong.Rec. H6667 (daily ed. Aug. 4, 1977) (remarks of Representative Broyhill); see also H.R.Rep.No.294, 95th Cong., 1st Sess. 157 (1977).

FN106. (W)e find that this is entirely consistent with the new guidelines and that when the earlier results are scaled to the increment level limit finally adopted by Congress, plants up to 6,000 megowatt capacity could be built, if they adopt what we would call best available control technology, having very limited degradation, that is use of low sulfur Western coal with a scrubber. . . . We do find that the statement of the Congressional debate, that a 6,000 megowatt plant could be built is appropriate for that case.

Transcript of Modeling Conference at 81-82

(Dec. 15, 1977) (remarks of Dr. Mahoney).

FN107. 123 Cong.Rec. S9269 (daily ed. June 9, 1977) (remarks of Senator McClure). This example concerned a Class I area.

FN108. Id. (remarks of Senator McClure).

FN109. Id. (remarks of Senator Muskie).

[82][83][84] We conclude that Congress did not direct the use of any particular diffusion models; rather, it expected EPA to develop and utilize the most accurate and feasible modeling techniques available. It also set largely inflexible increments for sulfur dioxide and particulates, thus commanding the use of conservative assumptions on weather and other data input. In short, EPA's models do not contravene any discernible congressional directive. Comments of industrial spokesmen to the contrary thus raised relatively insubstantial questions of law, and consequently did not necessitate an agency reply.[FN110]

FN110. See Home Box Office, Inc. v. FCC, supra note 83, 185 U.S.App.D.C. at 168-169 & n.58, 567 F.2d at 35-36 & n.58; Portland Cement Ass'n v. Ruckelshaus, supra note 86, 158 U.S.App.D.C. at 326-327, 486 F.2d at 393-394.

[85][86] But though we today sustain EPA's modeling regulations, a final observation is in order. Of great importance is a reasoned agency response to substantial questions of fact, policy or science raised in comments on recommended models or in proposals to employ new techniques. In passing Part C of the Clean Air Act,[FN111] Congress evinced its determination to preserve the clean air regions of the Nation. Congress did not, however, ignore other vital economic and energy considerations.[FN112] Moreover, successful implementation of the balance struck by Congress will in large part depend on EPA's good sense in establishing and applying modeling guidelines. Modeling, the agency tells us, is on "the frontiers of scientific knowledge," [FN113] but the lack of scientific certitude about modeling techniques increases rather than reduces***388 **116** the need for the agency to critically examine all substantial questions of fact and science emerging from the commenting process. EPA's guideline warns that all proposed deviations from the endorsed model must be fully supported,[FN114] but this language should not be overemphasized, for the models presently specified in the guideline are concededly flawed. [FN115] Should scientific advances or better information permit a more accurate assessment of air quality, EPA should move to adopt the more accurate procedure, although it too may not be entirely free from fault.[FN116]

FN111. 42 U.S.C. ss 7470-7491 (Supp. I 1977).

FN112. See, e. g., s 160(3), 91 Stat. 731, 42 U.S.C. s 7470(3) (Supp. I 1977); s 163(c), 91 Stat. 733, 42 U.S.C. s 7473(c) (Supp. I 1977).

FN113. Brief for Respondents at 206, citing Hercules, Inc. v. EPA, 194 U.S.App.D.C. 172, 205, 598 F.2d 91, 123 (1978); Industrial Union Dep't v. Hodgson, 162 U.S.App.D.C. 331, 338, 499 F.2d 467, 474 (1974).

FN114. Guideline, supra note 69, at 2.

FN115. In many cases, solutions to the issues raised must rely on further scientific developments. Some inherently must rely on case-by-case technical judgments by qualified scientists. EPA is actively working in the areas of model validation and improvement, turbulence characterization and the use of representative meteorological data and will provide additional guidance on these areas as it becomes available.

43 Fed.Reg. 26399 (June 19, 1978) (explanation of final regulations). See also Guidelines, supra note 69, at 4-6.

FN116. We would associate ourselves with the observation that "(d)ecisions which are not arbitrary and capricious in the light of existing knowledge may become so by the dint of scientific advances. By its use of estimations and sparse data, the EPA creates a continuing responsibility to develop, review and apply updated and more sophisticated information." Texas v. EPA, 499 F.2d 289, 301 n.16 (5th Cir. 1974).

IV. STACK HEIGHT

Both ambient air quality standards and PSD increments are expressed in terms of permissible concentrations of pollutants at ground level.[FN117] The effect of a source's emissions on air quality in its vicinity, as gauged by these fundamental criteria, will be influenced by the altitude at which pollutants are released. A good many industrial facilities subject to the Clean Air Amendments of 1970

FN118 tried to take advantage of this phenomenon by building taller-than-necessary stacks in order to achieve greater dispersion of their emissions and thus comply with national ambient standards. This strategy was also in vogue among sources required to comply with EPA's 1974 PSD program. FN119

FN117. Industry Petitioners' Joint Statement of the Case at 3-4, 14-15.

FN118. Clean Air Amendments of 1970, Pub.L. No. 91-604, 84 Stat. 1676.

FN119. Promulgated pursuant to Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C.1972), aff'd, 4 ERC 1815 (D.C.Cir. 1972), aff'd by an equally divided Court sub. nom. Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973).

The Congress that enacted the Clean Air Act Amendments of 1977 FN120 was deeply concerned about the consequences to health and welfare of the use of tall stacks and other dispersion techniques.FN121 It addressed the problem forcefully, not by prohibiting tall stacks, but by removing all existing regulatory incentives for constructing them.FN122 Section 123(a) of the Act provides in relevant part that

FN120. Clean Air Amendments of 1977, Pub.L.No.95-95, 91 Stat. 685.

FN121. See, e. g., H.R.Rep.No. 564, 95th Cong., 1st Sess. 143-144 (1977) (conference report); H.R.Rep.No. 294, 95th Cong., 1st Sess. 81-94 (1977); 123 Cong.Rec. S9174-9175 (daily ed. June 8, 1977) (remarks of Senator Muskie). Related to the tall stacks problem, and addressed in similar fashion by virtue of ss 123(a)(2) and 123(b), 91 Stat. 721, 42 U.S.C. ss 7423(a)(2), (b) (Supp. I 1977), is the problem of intermittent controls, which involve extensive operation when meteorological conditions will best disperse the emissions and curtailed operations at other times. See W. Rodgers, Environmental Law 259 (1977) ("(t)he rhythm method, to be sure, is better than nothing but it is born of desperation and succeeds by chance").

FN122. See notes 150-156 infra and accompanying text.

> (t)he degree of emission limitation required for control of any air pollutant under an applicable implementation plan under (Title I) shall not be affected in any manner by
>
> (1) so much of the stack height of any source as exceeds good engineering practice (as determined under regulations ***389 **117** promulgated by the Administrator) FN123

FN123. s 123(a), 91 Stat. 721, 42 U.S.C. s 7423(a) (Supp. I 1977).

[87][88] Industry petitioners read Section 123 as a ban only on administrative consideration of stacks taller than warranted by good engineering practice (GEP) as an alternative to emission limitations. FN124 So, industry concedes, when a facility with a tall stack a term that really covers a too-tall stack seeks a permit and it must be determined whether that facility's emissions will threaten a violation of a national ambient standard or an increment exceedance, the calculation must be predicated on the false assumption that the stack has only GEP height.FN125 EPA interprets the mandate of Section 123 more broadly, declaring that it further requires emissions from all preexisting sources with tall stacks that were built after the effective date of the 1970 Act, and hence were not grandfathered, to be modeled as though the emissions proceeded from GEP-height stacks when ascertaining the emission limitations to be imposed on new facilities.FN126

FN124. Brief for Industry Petitioners on Stack Height at 11-12.

FN125. Id.

FN126. 42 Fed.Reg. 57460 (Nov. 3, 1977) ("(a)ny subsequent PSD reviews will have to be based on a GEP stack height for the applicant as well as for any sources which have received PSD approval"); see 40 C.F.R. s 52.21(h) (1978); 40 C.F.R. s 51.24(h) (1978) (provision appears to have been written so as to erroneously reach only grandfathered tall stacks).

Asked to resolve this dispute, "our task is to interpret the words of (Section 123) in light of the purposes Congress sought to serve." FN127 Granting EPA's view a proper

measure of deference,[FN128] we sustain its construction.

FN127. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508, 516 (1979).

FN128. We have noted that "(t)his deference is heightened when, as here, the interpretation is of a new statute by its implementing agency." Ethyl Corp. v. EPA, 176 U.S.App.D.C. 373, 403 n.64, 541 F.2d 1, 31 n.64 (en banc), cert. denied, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), citing Power Reactor Devel. Co. v. International Union of Elec., Radio and Mach. Workers, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961); United States v. Zucca, 351 U.S. 91, 96, 76 S.Ct. 671, 674, 100 L.Ed. 964, 970 (1956); United States v. American Trucking Ass'n, 310 U.S. 534, 549, 60 S.Ct. 1059, 1067, 84 L.Ed. 1345, 1354 (1940); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796, 807 (1933); Natural Resources Defense Council v. Train, 166 U.S.App.D.C. 312, 326, 510 F.2d 692, 706 (1975).

A. The 1970 Act and Tall Stacks

Under the Clean Air Act of 1970,[FN129] EPA was required, by Section 110(a)(2) (B), to approve a state implementation plan if it determined that the plan was "adopted after reasonable notice and hearing," [FN130] and if "it include(d) emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of (the applicable) primary or secondary standard, including, but not limited to, land-use and transportation controls . . . ." [FN131] EPA initially permitted state plans to authorize tall stacks and other dispersion techniques [FN132] in lieu of emission limitations. The Fifth Circuit, however, ordered EPA to disapprove state plans endorsing this practice as inconsistent with Section 110(a)(2)(B)'s requirement of emission limitations constant in their operation,****118 *390** [FN133] and the Sixth [FN134] and Ninth Circuits [FN135] followed the Fifth Circuit's construction of the 1970 Act.

FN129. Pub.L.No. 91-604, 84 Stat. 1676.

FN130. 42 U.S.C. s 1857c-5(a)(2) (1976).

FN131. 42 U.S.C. s 1857c-5(a)(2)(B) (1976). Section 110(a)(2) of the 1977 Amendments, 91 Stat. 693, revised this subsection by substituting "transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D)" for "land use and transportation controls." See 42 U.S.C. s 7410(a)(2)(B) (Supp. I 1977).

FN132. See 37 Fed.Reg. 10859 (May 31, 1972), rev'd in relevant part, Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974), rev'd on other issues sub nom. Train v. Natural Resources Defense Council, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

FN133. Natural Resources Defense Council v. EPA, supra note 132, 489 F.2d at 406-411.

FN134. Big Rivers Elec. Corp. v. EPA, 523 F.2d 16, 20-22 (6th Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976).

FN135. Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1151-1160 (9th Cir. 1975), cert. denied, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976).

B. EPA's 1976 Tall-Stack Guidelines

Informed as well as chastened by these judicial decisions, EPA in early 1976 promulgated a guideline on the role of tall stacks.[FN136] The agency declared that "it is clear that Congress did not intend increased stack height and supplementary control systems to be used as a means of attaining national ambient air quality standards where constant emission reduction controls were available." [FN137] On the other hand, EPA ruled, dispersion techniques were within the congressional intendment "when constant controls are not available." [FN138]

FN136. Environmental Protection Agency, Legal Interpretation and Guideline Concerning Stack Height Increases as a Means of Meeting Federal Ambient Air Quality Standards (Jan. 6, 1976).

FN137. Id. at 1.

FN138. Id.

The guideline divided emission sources into three

categories and imposed different technological requirements on each group: (1) sources in existence prior to the latest date by which state plans were to be submitted to EPA under the 1970 Act; (2) sources receiving permits after the Fifth Circuit decision but before issuance of the guideline; (3) sources receiving permits after release of the EPA notice.[FN139] The guideline was clear, however, that if any source applied the best available control technology it would be credited for the full dispersive effect of its tall stack.[FN140] Indeed, said EPA, "(s)o long as stack height is not used in lieu of emission reduction, the Agency encourages tall stacks as the means of further minimizing the effects of emissions on ground level concentrations." [FN141]

FN139. Id. at 2-4.

FN140. Id.

FN141. Id. at 4 (emphasis in original).

C. The 1977 Amendments

[89] Industry petitioners suggest, though somewhat halfheartedly, that the Ninety-fifth Congress "ratified the general thrust" of the EPA guideline when it enacted Section 123.[FN142] They concede, however, that unlike the guideline, Section 123 requires that GEP stack height be assumed in calculating emission limitations for an individual source even though it applies the best available control technology.[FN143] But, they argue, once the emission limitation for a source is properly set, Congress intended that the pollutants from that source be modeled as though emitted from the existing tall stack in order to reflect its actual impact on air quality. As already explained, [FN144] EPA, in its November 3, 1977, final rules, adopted the contrary reading of the statute.[FN145]

FN142. Brief for Industry Petitioners on Stack Height at 10. It would be fair to say that Congress generally approved of the court decisions. See H.R.Rep.No. 294, 95th Cong., 1st Sess. 91 (1977). It would not be accurate to say that Congress simply codified the holdings and dicta of those decisions in s 123.

FN143. Brief for Industry Petitioners on Stack Height at 11.

FN144. See note 126 supra and accompanying text.

FN145. See note 126 supra.

[90] The language of Section 123(a), though not necessarily reflective of a conscious resolution of the point in dispute, is certainly more amenable to EPA's construction.[FN146] The section specifies that the degree of emission limitation required for control of any air pollutant "shall not be affected in any manner by . . . so much of the stack height of any source as exceeds ***391 **119** good engineering practice . . . ." [FN147] The term "emission limitation" includes any requirement imposed on a source by EPA or a state which restricts the quantity, rate, or concentration of air pollutants on a continuous basis. [FN148] The interpretation urged by industry petitioners contravenes the natural import of these words, as it would have the degree of emission limitation required for a source reduced by the fact that neighboring, preexisting sources with tall stacks disperse their emissions over a broader region, thus resulting in lower concentrations in the immediate vicinity.

FN146. See cases cited supra note 39.

FN147. 42 U.S.C. s 7423(a)(1) (Supp. I 1977) (emphasis supplied).

FN148. s 302(k), 91 Stat. 770, 42 U.S.C. s 7602(k) (Supp. I 1977). The House report, H.R.Rep.No. 294, 95th Cong., 1st Sess. 92 (1977), U.S.Code Cong. & Admin. News, p. 1170, states that "(b)y defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements."

The policy of Section 123, as gleaned from examination of its genesis and progress in Congress, is also supportive of EPA's interpretation. This provision originated in the House,[FN149] and the 1977 House Report dealt extensively with the problem of dispersion techniques.[FN150] In addition to disapproving tall stacks and other dispersion-dependent techniques in lieu of constant controls,[FN151] the House Report detailed some independently deleterious effects of tall stacks. Among other things, the report noted that tall stacks, by increasing the transportation of pollutants, may lead to production of derivative pollutants, such as suspended sulfates and nitrates, which pose a greater health hazard than the parent compounds.[FN152] Tall stacks also transport pollution problems to distant areas and states "where it is too late to control the pollution." [FN153]

FN149. See H.R.Rep.No. 564, 95th Cong., 1st Sess. 143-144 (1977) (conference report).

FN150. H.R.Rep.No. 294, 95th Cong., 1st Sess. 81-94 (1977).

FN151. Id.

FN152. Id. at 83-84. The report also suggested that harmful acid rain appears to be associated with tall stacks. Id. at 85-86.

FN153. Id. at 84-85, U.S.Code Cong. & Admin.News, p. 1162.

In the upper chamber, Senator Muskie spoke at length on the tall stacks problem.[FN154] Contrary to petitioners' suggestion,[FN155] EPA's 1976 guideline was not beyond congressional dissatisfaction. Senator Muskie expressed this sentiment:

FN154. 123 Cong.Rec. S9174-9175 (daily ed. June 8, 1977) (remarks of Senator Muskie).

FN155. See note 142 supra and accompanying text.

> Far from prohibiting the construction of tall stacks or the use of intermittent controls, the guidelines provide that once minimal emission control requirements are met, polluters are encouraged to substitute unlimited stack height for any further control of emissions.
>
> As the courts have held, the act prescribes how air quality standards must be met neither EPA nor the States may permit a proposed plan to meet the requirements by using tall stacks or other dispersion devices or techniques.
>
> A policy of encouraging 'tall stacks' will increase the burden of pollution. Long-range transport of pollutants will be exacerbated. There is no support in the Clean Air Act for such a policy. Certainly such a policy would be wholly inconsistent with the policy to prevent significant deterioration.[FN156]

FN156. 123 Cong.Rec. S9175 (daily ed. June 8, 1977) (remarks of Senator Muskie). The Senator also noted that a report by "the National Academies of Science of Engineering found that dispersion measures may exacerbate the formation in the atmosphere of acid sulfates and nitrates from the sulfur and nitrogen oxides emitted from fuel-burning sources. These derivative pollutants are thought to be more toxic forms than the oxides of sulfur and nitrogen that are actually emitted at the smokestack and are measured in the vicinity of the source." Id. at S9174.

***392 **120** The firm congressional resolve to remove all regulatory incentives for the construction of tall stacks bolsters EPA's reading of Section 123, for the position urged by industry petitioners would encourage, though to a lesser degree than the 1976 guideline, the use of such stacks and other dispersion methods. A company may well wish to expand by building a new facility close to an existing one, and if the older facility had a tall stack and if petitioners' interpretation of Section 123 were to prevail, the new facility would find it easier to comply with nondeterioration and national ambient standards. Additionally, operating permits are not irrevocable, and by use of a tall stack a facility would lessen pollution concentrations in its own air quality region and render it less likely that violations of national standards or increment exceedances which would necessitate further controls or possibly partial or complete shutdown of the facility [FN157] will occur.

FN157. See Part IV of Judge Leventhal's Opinion.

[91][92][93] Industry petitioners make three points which, they submit, reveal the absurdity [FN158] of EPA's interpretation of Section 123. First, they bitterly complain of artificial assumptions which in their view unnecessarily complicate administration of the federal pollution regulatory system.[FN159] One might concur in petitioners' assessment, but a sufficient answer is that Congress introduced a number of such elements into the system. For example, the baseline is not only a snapshot of pollution on the date of the first permit application, but it must be reduced to exclude emissions from major operating facilities on which construction commenced after January 6, 1975, and increased to include the projected emissions of sources not yet in operation as of the date of the first permit application but on which construction began prior to January 6, 1975.[FN160] There is, indeed, a degree of artificiality in the modeling of tall-stack emissions as though they came from a GEP stack, but indisputably that is what Congress envisioned.

FN158. Of course, an absurd construction is to be avoided if at all possible. E. g., United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 520, 99 L.Ed. 615, 624 (1955); Melong v. Micronesian Claims Comm'n, 186 U.S.App.D.C. 391, 395, 569 F.2d 630, 634 (1977); Quinn v. Butz, 166 U.S.App.D.C. 363, 373, 510 F.2d 743, 753 (1975).

FN159. E. g., Brief for Industry Petitioners on Stack Height at 14-16; Transcript of Oral Argument 128-129 (Apr. 20, 1979).

FN160. See notes 21-43 supra and accompanying text. Of course, as EPA has recognized, 43 Fed.Reg. 26400 (June 19, 1978); 42 Fed.Reg. 57460 (Nov. 3, 1977); Brief for EPA at 186-187, emissions from tall-stack sources that have been included in the definition of baseline under s 169(4) do not consume the available increment; their actual emissions as of the time of the first permit application are grandfathered. See Parts I, II supra. This consequence of the baseline definition does not conflict with s 123(a), for these grandfathered emissions do not affect the "degree of emission limitation required" for applicants for PSD permits. Nor does it render the December 31, 1970, cutoff in s 123 nugatory, for s 123 is not in Part C (PSD), and the statutory tall-stacks policy is not confined to the nondeterioration program but rather is applicable to the entire range of programs developed pursuant to the Clean Air Act. This point was not made clear in our per curiam opinion, Alabama Power Co. v. Costle, 196 U.S.App.D.C. 161, at 183, 606 F.2d 1068, at 1090 (1979), as industry petitioners have pointed out in a petition for reconsideration. On the other hand, as we have explained in our discussion of the fuel-switches issue, see notes 19-56 supra and accompanying text, only the actual emissions of a major source operating on the date of the baseline determination and on which construction commenced prior to January 6, 1975, are grandfathered; additional emissions from such a source consume the increment. Thus, if non-baseline emissions from such a source proceed from a taller-than-GEP stack not in existence before December 31, 1970, they consume the increment as though they were emitted from a GEP stack. In short, s 123's tall-stacks policy, for purposes of the nondeterioration program, applies to non-baseline emissions of nongrandfathered stacks.

Second, petitioners point out that under Section 123(c) a stack height in excess of two and one-half times the height of the emission source may be considered a GEP stack only if the "owner or operator" demonstrates that such height is "necesary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the ***393 **121** source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles . . . ." FN161 Petitioners spot a lacuna in this statutory passage, which, they urge, reveals the error of EPA's construction: only the owner or operator of a source can demonstrate that a very tall stack is really GEP height. FN162 The owner of a proposed facility cannot show, they say, that preexisting tall stacks in the area in which he plans to build are necessary to avoid downwash, and this may preclude obtention of a permit.

FN161. s 123(c), 91 Stat. 721, 42 U.S.C. s 7423(c) (Supp. I 1977).

FN162. Transcript of Oral Argument 128-131 (Apr. 20, 1979).

[94] We believe petitioners exaggerate the problem. Tallstack facilities existing before the date of enactment of the Clean Air Act Amendments of 1970 are grandfathered; FN163 their emissions are modeled at actual stack height for all purposes. On the other hand, Congress felt that since the 1970 Act "prohibited tall stacks as a final compliance method, . . . sources which raised their stacks or constructed tall stacks after the date of enactment should (not) be eligible for any credit." FN164 It will, however, be in the interest of all post-1970 facilities with tall stacks to demonstrate, if possible, that their excess height is justified by downwash problems, for such sources may be subjected to extensive regulatory measures in the event of increment exceedances or violation of national standards.FN165 If a source makes such a demonstration, its emissions will be modeled at actual stack height in subsequent permit proceedings.

FN163. The tall-stacks policy of s 123(a) is expressly made inapplicable "with respect to stack heights in existence before the date of enactment of the Clean Air Amendments of 1970 or dispersion techniques implemented before (that) date."

s 123(a), 91 Stat. 721, 42 U.S.C. s 7423(a) (Supp. I 1977). There is also a limited exemption for coal-fired electric generating facilities. See id. In addition, ss 113(d) and 119 permit some use of dispersion techniques under specified conditions. See s 113(d), 91 Stat. 705, 42 U.S.C. s 7413(d) (Supp. I 1977); s 119, 91 Stat. 712, 42 U.S.C. s 7419 (Supp. I 1977). Moreover, with respect to the nondeterioration program, the actual emissions from tall stacks of major operating facilities on which construction commenced prior to January 6, 1975, are grandfathered into the baseline. See note 160 supra.

FN164. H.R.Rep.No. 294, 95th Cong., 1st Sess. 93 (1977), U.S.Code Cong. & Admin.News, p. 1172.

FN165. See Part IV of Judge Leventhal's Opinion.

[95] Lastly, industry petitioners observe that the artificial assumptions injected into the environmental protection program by EPA's construction of Section 123 will lead to underprediction of pollution levels in areas to which emissions from tall stacks are transported.[FN166] Surely Congress did not intend its tall-stacks policy to preclude identification of areas with real pollution problems, the petitioners persuasively urge, but this, they say, is the consequence of EPA's fallacious construction of Section 123. [FN167] As explained in Judge Leventhal's opinion,[FN168] however, Congress afforded EPA authority to order revision of state implementation plans whenever the increments or the national standards are actually being violated. [FN169] This residual authority ensures that the tall-stacks policy need not hamper attainment and maintenance of federally-prescribed pollution standards everywhere.

FN166. Reply Brief for Industry Petitioners on Stack Height at 6-8.

FN167. This assumes and we do not pass on the validity of the assumption that EPA must interpret s 123(a) consistently, despite the fact that the policy of the provision may not apply to the case of underprediction of pollution in areas to which emissions from tall stacks migrate.

FN168. See Part IV of Judge Leventhal's Opinion.

FN169. Id.

[96] In summary, EPA's reading of Section 123(a) is preferable as a matter of simple English to petitioners', is soundly supported by the legislative history, and is not belied by other provisions or policies of the Clean Air Act. Granting EPA's interpretation***394 **122** due deference, [FN170] it must be sustained. [FN171]

FN170. See cases cited supra notes 38, 128.

FN171. Petitioners have urged us to defer our ruling on EPA's interpretation of s 123(a) until completion of a pending rulemaking proceeding designed to implement s 123, and which will define, among other things, GEP height. 44 Fed.Reg. 2608 (Jan. 12, 1979) (proposed rules). That proceeding does not involve the question we decide today the propriety of modeling emissions from tall stacks at GEP height when calculating emission limitations for later sources. EPA's final position on the question under review here was announced in November, 1977, 42 Fed.Reg. 58460 (Nov. 3, 1977). We perceive no merit in petitioners' deferral request.

WILKEY, Circuit Judge:

This part of our opinion reviews several interrelated regulatory provisions [FN1] promulgated by the Environmental Protection Agency under the Clean Air Act, as amended in 1977.[FN2] These provisions fall within five topical categories: I. EPA's definition of pollution-emitting "sources" subject to rules governing the Prevention of Significant Deterioration (PSD) [FN3] of air quality ("source definition" issue); II. EPA's definition of the term "modification" of stationary sources for the purposes of PSD, and the right of industries to offset pollution-increasing changes against pollution-decreasing changes in a single source without PSD review ("major modification" and "bubble" issues); III. the applicability of PSD to pollutants other than sulfur dioxide and particulate matter, and EPA's 100 and 250-ton per year emission threshold for each pollutant (pollutants subject to PSD and EPA's "major emitting facility" threshold); IV. EPA's inclusion of visible emission standards among emission limitations subject to best available control technology; [FN4] and V. administrative conditions imposed by EPA on each stage of a multi-phase construction project for which EPA issues a comprehensive construction permit (the definition of "commerce construction" for phased projects).

FN1. 40 C.F.R. ss 51.24, 52.21 (1978).

FN2. Pub.L.No. 88-206, 77 Stat. 392 (1963), as amended by Clean Air Act Amendments of 1977, Pub.L.No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. ss 7401-7642 (Supp. I 1977)). EPA's general rulemaking authority under the Act is provided in s 301, 42 U.S.C. s 7601 (Supp. I 1977).

FN3. The Act's PSD provisions are set forth in Clean Air Act Title I, Part C, ss 160-169A, 42 U.S.C. ss 7470-7491 (Supp. I 1977). These are the principal provisions at issue in this case.

FN4. See Clean Air Act s 169(3), 42 U.S.C. s 7479(3) (Supp. I 1977) (definition of "best available control technology").

I. SOURCE DEFINITION

Pollution control measures enacted under the Clean Air Act's PSD program apply to major pollution-emitting facilities,[FN5] which are defined as certain types of "stationary sources" that emit or could emit 100 tons of pollutants per year, or "any other source" that could emit 250 tons.[FN6] The terms "stationary source" and "any other source," however, are not specifically defined in the PSD provisions of the Act. To fill this statutory definitional breach, EPA as part of comprehensive Clean Air Act regulations promulgated for the purposes of PSD the following definition:

FN5. Clean Air Act s 165(a), 42 U.S.C. s 7475(a) (Supp. I 1977).

FN6. Clean Air Act s 169(1), 42 U.S.C. s 7479 (Supp. I 1977).

> "Source" means any structure, building, facility equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).[FN7]

FN7. 40 C.F.R. ss 51.24(b)(4), 52.21(b)(4) (1978).

EPA also provided by regulation that:

> Notwithstanding the source sizes specified in (the first sentence of Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977), "major stationary source" means) any source which emits, or has the potential to emit, 250 tons per year or more of ***395 **123** any air pollutant regulated under the Act. [FN8]

FN8. Id. s 51.24(b)(1)(ii). See id. s 52.21(b)(1)(ii).

In this section of our opinion we consider three separate issues pertaining to the above regulatory definitions.

A. Inclusion of "Equipment," "Operation," and "Combination Thereof" within EPA's Definition of "Source"

We consider first whether EPA erred in defining "source" to include "any structure, building, facility, equipment, installation or operation (or combination thereof) ...." [FN9]

FN9. Id. ss 51.24(b)(4), 52.21(b)(4) (emphasis added).

Petitioning Industry Groups [FN10] argue that by introducing the above italicized language into the regulatory definition of "source," EPA has subjected a wider range of pollution-emitting activities to the Act's PSD requirements than Congress intended. Industry groups fear that EPA will capitalize on its expansive definition of "source" by subjecting to PSD review every type of productive enterprise ranging from mining and forestry to commercial trains and ships.[FN11] There is a risk of an unlimited scope of PSD regulation which could follow from literal application of PSD to any "equipment" or "operation," and to any "combination" of, for example, equipment and operations, that meets minimum emission standards.

FN10. We use the term "Industry Groups" throughout this opinion to refer generally to the numerous industry petitioners and intervenors. Likewise we use the term "Environmental Groups" to refer to the several environmental petitioners and intervenors.

FN11. Industry Petitioners' Brief on Source Definition Issue at 10 (hereinafter cited as Industry Brief on Source Definition).

EPA, however, argues that Congress did not intend to confine PSD to a class of pollution-emitting entities so

narrow as the four nonitalicized terms above. EPA considers it prudent to "err on the side of inclusiveness," in order to extend PSD to the range of activities it claims Congress intended, and in order to give notice to those who must apply for PSD permits.[FN12]

FN12. See Brief for EPA at 55-56. See also 42 U.S.C. s 7411(a)(3) (Supp. I 1977).

We find this definitional issue to be governed by the definition of "source" provided in Clean Air Act section 111(a)(3),[FN13] pertaining to the Act's new source performance standards (NSPS). Section 111(a)(3) provides that for the purposes of NSPS "(t)he term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." [FN14] In addition, section 111(a)(2) provides that for NSPS "(t)he term 'new source' means any stationary source, the construction or modification of which is commenced after (a specified time)," [FN15] thus incorporating into the term "source" the components of the term "stationary source." For NSPS the two terms become essentially interchangeable.

FN13. 42 U.S.C. s 7411(b)-(j) (Supp. I 1977).

FN14. Id. s 7411(a)(3) (Supp. I 1977) (emphasis added).

FN15. Id. s 7411(a)(2).

[97] We find no support in the statute for the notion that Congress intended its definition of the term "source" as used in the PSD provision of the Act to differ from that provided for NSPS in section 111(a)(3). Though "stationary source" is not defined expressly for PSD in the Act, it had at the time of the 1977 Amendments a well-established meaning, which included the four terms "structure," "building," "facility," and "installation," but not "equipment," "operation," or "combination thereof." [FN16]

FN16. EPA's NSPS regulations in effect at the time of the enactment of the Clean Air Act Amendments of 1977, 40 C.F.R. s 60 (1977), define the term "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant and which contain any one or combination of (a variety of specified types of facilities). Id. s 60.2(d). Similarly, EPA's definition of "stationary source " in its regulations for approval and promulgation of implementation plans, 40 C.F.R. s 52.01(a) (1977), refers to "any building, structure, facility, or installation which emits or may emit an air pollutant for which a national standard is in effect."

****124 *396** [98] Given no expression of any contrary intent in the Act or in the legislative history regarding these definitions, we must assume that the meaning of a particular term is to be consistent throughout the Act. This is especially true under present circumstances, where the subject term prior to enactment of the controversial language had assumed a particular definition under closely related statutory provisions.

In support of this conclusion we note that Clean Air Act section 169, which defines certain terms expressly for PSD, states in subsection (2)(C) that "(t) he term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility." [FN17] Section 111(a)(4), in turn, provides that the term "modification" means "any physical change in, or change in the method of operation of, a stationary source . . ." as that term is defined in section 111(a)(3).[FN18] Since several key sections of the Act apply PSD to the construction of new facilities,[FN19] those sections thereby incorporate the definition of "stationary source" used in section 111, at least with regard to source "modification." The PSD provisions thus indirectly incorporated the section 111 definition of "source" concerning modifications; we find it implausible to assume that the same definition of source does not apply to construction as well. Therefore, we hold that the term "source" retains a consistent meaning in all PSD provisions of the Act and that the applicable definition is provided in section 111.

FN17. Clean Air Act s 169(2)(C), 42 U.S.C. s 7479(2)(C) (Supp. I 1977) (emphasis added).

FN18. Clean Air Act s 111(a)(4), 42 U.S.C. s 7411(a)(4) (Supp. I 1977).

FN19. See, e. g., Clean Air Act ss 165, 167, 42 U.S.C. ss 7475, 7477 (Supp. I 1977).

[99][100] EPA contends that the words "equipment," "operation," and "combination thereof" must be included in the definition of "source" for PSD, because the full range of industrial entities specifically made subject to PSD in section 169(1) cannot be comprehended within the definition of "source" provided in section 111(a)(3).[FN20] We do not agree. The four terms encompass all of the types

of entities specified in the first sentence of section 169(1), as well as all entities and activities included on a longer list compiled by EPA from which the statutory list was drawn. Thus, for example, the components of the term "source" provided in section 111(a)(3) need not be interpreted so narrowly as to comprehend only those sources that emit pollutants through industrial "point" sources (such as smokestacks and chimneys). EPA has discretion to define the terms reasonably to carry out the intent of the Act, but not to go clear beyond the scope of the Act, as it has done here. Section 169(1) clearly does mean that a plant is to be viewed as a source; the section lists many types of plants as stationary sources. But EPA has discretion to define statutory terms reasonably so as to carry out the expressed purposes of the Act. We view it as reasonable, for instance, to define "facility" and "installation" broadly enough to encompass an entire plant.

FN20. See Brief for EPA at 57.

In ASARCO Inc. v. Environmental Protection Agency, this court struck down the agency's defining source for NSPS as, inter alia, a combination of facilities. But that case allowed EPA broad discretion to define the statutory terms for "source," so long as guided by a reasonable application of the statute. [FN21] The agency has the same reasonable discretion here to refashion its regulations.

FN21. 578 F.2d 319, 324 & n.17 (D.C.Cir. 1978).

B. Extension of EPA's Definition of "Source" to Include Industrial Units Joined by Contiguity and Common Ownership

EPA regulations provide that the term "source" shall mean any industrial unit "which is located on one or more contiguous or adjacent properties and which is owned ***397 **125** or operated by the same person (or by persons under common control)." [FN22]

FN22. 40 C.F.R. ss 51.24(b)(4), 52.21(b)(4) (1978).

Industry Groups contend that Congress intended PSD review to apply only to "major industrial process facilities at specific plant sites" without grouping of such process facilities according to proximity or ownership, and that EPA's contiguity and common ownership language has expanded unlawfully the potential scope of PSD.[FN23] In ASARCO, this court held that EPA had no authority to attach a similar provision to the definition of "source" for the NSPS program, as defined in section 111 of the Act. That definition, however, was not expanded by any other part of the NSPS provisions or their legislative history. For this reason, the court in ASARCO concluded that the definition of "stationary source" in section 111(a)(3) as "any building, structure, facility, or installation which emits or may emit any air pollutant" could not be administratively expanded to include an entire plant.[FN24]

FN23. See Industry Brief on Source Definition, supra note 11, at 23.

FN24. 578 F.2d at 326-27.

[101] With regard to PSD, however, Congress clearly envisioned that entire plants could be considered to be single "sources." Clean Air Act section 169(1) expressly provides that for the purposes of PSD the term "major emitting facility" means "any of the following stationary sources of air pollutants . . . : fossil-fuel fired steam electric plants . . . , Portland Cement plants, . . . iron and steel mill plants." [FN25] In fact, fourteen different types of industrial "plants " are specifically cited in section 169(1) as types of "stationary sources" to which PSD is to apply.[FN26] By the terms of the PSD provisions, then, the ASARCO holding does not prevent aggregation of individual units of a plant into a single source.

FN25. Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977) (emphasis added).

FN26. Id. A similar list of such industrial "plants" and "mills" was considered by Congress in drawing up NSPS requirements in s 111, and was considered as a part of the legislative history of s 111 by the court in ASARCO. See ASARCO Inc. v. EPA, 578 F.2d at 326 n.24. This list, however, was not incorporated into s 111 as it was in s 169(1). Consequently, the court in ASARCO found the legislative history on the question of whether an entire plant could be considered a single source for NSPS "a much less reliable guide than the words of the statute itself," and concluded from the statute that the types of industrial units used to define "source" in s 111 could not be aggregated for the purposes of NSPS. ASARCO Inc. v. EPA, 578 F.2d at 326 n.24.

[102] Because of the limited scope afforded the term "source" in section 111(a) (3), however, EPA cannot treat

contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms. To allow an entire plant or other appropriate grouping of industrial activity to be subject as a single unit to PSD, as Congress clearly intended, EPA should devise regulatory definitions of the terms "structure," "building," "facility," and "installation" to provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership. We have no doubt that the term installation, for instance, is susceptible in its common usage to a reasonable interpretation that includes all the types of sources specified in the first sentence of section 169(1), as well as those intended by Congress to be reached in the second sentence of section 169(1).

[103] EPA's new definitions should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source, as divided into its several constituent units, to include the unloading of vessels at marine terminals and "long-line" operations such as pipelines, railroads, and transmission lines. We agree with Industry Groups that EPA has not yet given adequate notice as to whether it considers those industrial activities to be subject to PSD.

[104][105] EPA has latitude to adopt definitions of the component terms of ***398 **126** "source" that are different in scope from those that may be employed for NSPS and other clean air programs, due to differences in the purpose and structure of the two programs. The reasonableness of EPA's contiguity and common ownership criteria, in light of the new source definitions required, must await review until their application in specific circumstances.[FN27]

FN27. There is no danger that the limited opportunity for parties to petition for review under the Act will be forfeited by our decision not to resolve these issues here, since EPA's regulations as revised in light of this opinion will constitute new "final action" and trigger once again the review procedures of Clean Air Act s 307(b), 42 U.S.C. s 7607 (Supp. I 1977).

C. EPA's Extension of PSD to All Sources with Potential Emissions of 250 Tons or More Per Year

[106] Petitioners object to EPA's definition of "major stationary source" to include any "source" with actual or potential emissions of 250 tons per year, regardless of physical size or production capacity of the source. [FN28] The statute leaves some ambiguity on this issue. Under section 169(1), the term "major emitting facility" includes twenty-eight specific types of industrial entities which can emit 100 tons per year or more of any air pollutant.[FN29] Four of these types of entities, however, are subject to PSD only if they meet additional operating capacity, or size, qualifications. [FN30] The second sentence of section 169(1) then states that major emitting facilities include "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." [FN31] EPA interprets the two sentences to mean that the four special entities are not exempt from PSD if they exceed the 250-ton threshold, even if they remain below the size qualifications. [FN32] To justify this interpretation, EPA emphasizes the mandate of the second sentence that PSD shall apply to "any " other source with the requisite potential to emit.[FN33] Industry Groups, on the other hand, stress that PSD shall apply only to any "other " source with the requisite potential to emit. [FN34] Industry Groups assume, in essence, that each generic type of industrial entity specified in the first sentence, regardless of size, was considered exclusively by Congress in the first sentence and cannot be included by EPA within the second.

FN28. Industry Groups also object to EPA's use of the term "major stationary source" in place of the statutory term "major emitting facility." This objection is without merit so long as the regulatory term is defined in a manner consistent with statutory requirements.

FN29. Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977).

FN30. Id.

FN31. Id. (emphasis added).

FN32. See 40 C.F.R. ss 51.24(b)(1)(ii), 52.21(b)(1)(ii) (1978).

FN33. See Brief for EPA at 74.

FN34. See, e. g., Industry Brief on Source Definition, supra note 11, at 36-37.

[107][108] Reasonable semantic arguments can be made on either side of this issue, and the EPA's interpretation is not unreasonable. While it may be uneconomical and impractical to apply PSD to small sources that emit a low level of pollutants, such as those sources, withdrawn from PSD by the first sentence of section 169(1); it is less

impractical to apply PSD to small sources that emit relatively higher levels of pollutants, such as those sources reached by the second sentence. The critical factor in pollution control is not the industrial output of a particular source, but its pollution output. As demonstrated by offshore oil spills, a great pollution hazard can be caused by a relatively small source.

Finally, and most conclusively, legislative history shows that Congress intended the contested sources to be subject to PSD. The two sentence definition of "major emitting facility" in section 169(1) resulted from the adoption of both a one sentence definition originating in the Senate and a one sentence definition originating in the House. The first sentence of section 169(1), which designated the twenty-eight types of entities to which PSD would apply, originated***399 **127** almost verbatim in Senate bills passed in 1976 and 1977. [FN35] The second sentence of section 169(1), which applies PSD to all other sources with potential to emit 250 tons per year or more of any pollutant, originated in House bills passed in 1976 and 1977 but with the pollution-emission minimum raised from 100 to 250 tons per year.[FN36] As noted in the applicable Conference Committee Report,[FN37] the House concurred in the adoption of the Senate provision contained in the eventual first sentence of section 169(1) "with a requirement that . . . a major emitting facility will also include facilities which have the capacity to emit 250 tons per year or more (of any air pollutant)" [FN38] the language subsequently adopted in the second sentence. The Report does not suggest that those entities subject to size limitations in the definitional sentence borrowed from the Senate bill were to be excluded from the term "facilities," as defined by the sentence from the House.

FN35. See S.Rep.No. 717, 94th Cong., 2d Sess. 221 (1976); S.Rep.No. 127, 95th Cong., 1st Sess. 219 (1977).

FN36. See H.R.Rep. No. 1175, 94th Cong., 2d Sess. 358 (1976); H.R.Rep.No. 294, 95th Cong., 1st Sess. 439 (1977).

FN37. This is the Conference Committee Report of 1976, which explained language later adopted into the Clean Air Act Amendments of 1977. See H.R.Rep.No. 1742, 94th Cong., 2d Sess. (1976).

FN38. Id. at 46.

We conclude that the definition from the House bill adopted by the Conference Committee as the second sentence of section 169(1) retains its universal character, thus comprehending all sources that meet the sole qualification specified in that sentence: that they have the "potential to emit two hundred and fifty tons per year or more of any air pollutant." [FN39] We therefore uphold EPA's extension of PSD to all sources with potential emissions of 250 tons or more per year.

FN39. Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977).

II. "MAJOR MODIFICATION" AND "BUBBLE"

We consider in this part of the opinion two questions relating to the applicability of the Clean Air Act's PSD provisions to the "modification" (as opposed to the initial construction) of "major emitting facilities."

A. EPA's Regulatory Definition of "Modification"

Standards for PSD review of construction of facilities apply also to the "modification" of any source or facility,[FN40] as defined by section 111(a) (4). That section of the Act defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." [FN41]

FN40. See Clean Air Act s 169(2)(C), 42 U.S.C. s 7479(2)(C) (Supp. I 1977).

FN41. Clean Air Act s 111(a)(4), 42 U.S.C. s 7411(a)(4) (Supp. I 1977).

By regulation EPA has limited PSD review to only those modifications deemed "major" within the following definition:

> "Major modification" means any physical change in, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the act . . . by either 100 tons per year or more for any source category identified in (the first sentence of Clean Air Act s 169(1)), or by 250 tons per year or more for any stationary source.[FN42]

FN42. 40 C.F.R. ss 51.24(b)(2), 52.21(b)(2)(1978) (emphasis added).

This definition incorporates the same 100 or 250-ton per year threshold that Congress established for the term "major emitting facility." [FN43] The regulation differs from the statute by exempting from PSD review any modification that does not exceed this threshold.

FN43. Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977).

****128 *400** [109] For this departure in regulation language, no reasonable basis can be found in the statute. The Act requires PSD review for any construction of a major emitting facility; [FN44] the same PSD review requirement applies for any modification of a major emitting facility; [FN45] and the term "modification" is nowhere limited to physical changes exceeding a certain magnitude.[FN46] There is some indication in the legislative history to suggest that at least one Senator intended some such limit.[FN47] But the language of the statute clearly did not enact such limit into law. We are constrained here to follow the clear language.

FN44. See Clean Air Act s 165(a), 42 U.S.C. s 7475(a) (Supp. I 1977).

FN45. See Clean Air Act s 169(2)(C), 42 U.S.C. s 7479(2)(C) (Supp. I 1977).

FN46. To exempt modest increases in pollution emissions, however, Congress did provide in s 165(b) of the Act for a 50-ton per year minimum for certain substantive elements of PSD review of "modification of a major emitting facility" in class II clean air areas. Clean Air Act s 165(b), 42 U.S.C. s 7475(b) (Supp. I 1977). As noted in the Senate report:

> Section 110(g)(4)(C) exempts smaller, well-controlled sources which are expansions of existing facilities from having to demonstrate compliance with Class II increments. Many such sources which are small and relatively insignificant with respect to air quality would otherwise be brought under the requirements of section 110(g) by the "major emitting facility" definition of 100 tons per year potential emissions of any pollutant.
>
> S.Rep.No. 127, 95th Cong., 1st Sess. 33 (1977). We find nothing to indicate that a substantial additional exemption, applicable for all clean air areas, was implicit in the statute's definition of "modification" itself.

FN47. Describing the scope of the Senate bill, Senator Buckley stated, " 'No significant deterioration' is a policy that has no effect on existing sources, unless a source undertakes a major expansion program. It requires the States to study the impact on air quality resulting from the siting of new major sources of pollution . . . ." 122 Cong.Rec. 23,833 (1976). Senator Buckley was ranking minority member of the Subcommittee on Environmental Pollution at the time the bill was drafted, and took a leading role in its drafting and in explaining it on the floor of the Senate. When this debate took place, the statutory language did not apply PSD preconstruction review to source "modification." In November 1977, the Senate and House passed technical amendments, one of which had the effect of defining "construction" to include "modifications." It was this new language that had the effect of overriding Senator Buckley's interpretation of the meaning of "no significant deterioration."

[110] EPA does have discretion, in administering the statute's "modification" provision, to exempt from PSD review some emission increases on grounds of de minimis or administrative necessity. The exemption in question, however, has not been so justified, and thus cannot stand. We discuss EPA's discretion to define de minimis in Part III below.

[111] Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are de minimis, and when the increases are offset by contemporaneous decreases of pollutants, as we discuss below. These two exceptions, we believe, will allow for improvement of plants, technological changes, and replacement of depreciated capital stock, without imposing a completely disabling administrative and regulatory burden.

B. EPA's Qualified Application of the "Bubble" Concept of PSD

An important issue under the Act arises from the problem of determining what types of industrial changes will be construed as "modifications" subject to PSD review requirements. Under the Act, the PSD permit and review process applies to construction and modification of major emitting facilities. As discussed in the previous section, the Act defines "modification" as any physical or operational change in a stationary source which "increases the ***401 **129** amount of any air pollutant emitted by such source." [FN48] There are two possible ways to construe the term "increases." First, one can look at any change proposed for a plant, and decide whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant this is commonly termed the "bubble" concept. Second, one can inspect the individual units of a plant, which are affected by an operational change, and determine whether any of the units will consequently emit more of a pollutant. In its regulations, EPA has adopted a qualified form of the "bubble" concept for defining modifications subject to PSD review.

FN48. Clean Air Act s 111(a)(4), 42 U.S.C. s 7411(a)(4) (Supp. I 1977).

[112] Congress did not, in any pertinent part of legislative history, specify which of these two constructions was to be controlling; [FN49] but an analysis of the implications of the two possible interpretations shows the second to be unreasonable and contrary to the expressed purposes of the PSD provisions of the Act. It is important first to recognize that alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands. This dynamic aspect of American industry was not disputed by the parties. To apply the second construction of "increases," however, would require PSD review for many such routine alterations of a plant; a new unit would contribute additional pollutants, these increases could not be set off against the decrease resulting from abandonment of the old unit, and thus the change would become a "modification" subject to PSD review. Not only would this result be extremely burdensome, it was never intended by Congress in enacting the Clean Air Act Amendments.

FN49. The definition of "modification" was incorporated into the PSD provisions by technical amendment, Pub.L.No. 95-190, s 14(a)(54), 91 Stat. 1393, 1402 (1977), which was not intended to resolve any substantive issues. See 123 Cong.Rec. H11,957 (daily ed. 1 Nov. 1977).

The intent of the relevant portion, Part C, of the Clean Air Act as amended in 1977, is succinctly stated by the title of that part: "Prevention of Significant Deterioration of Air Quality" in areas that currently attain air quality standards.[FN50] According to their stated purposes, the PSD provisions seek "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." [FN51]

FN50. See Clean Air Act s 160, 42 U.S.C. s 7470 (Supp. I 1977).

FN51. Clean Air Act s 160(5), 42 U.S.C. s 7470(5) (Supp. I 1977) (emphasis added).

[113][114] Congress wished to apply the permit process, then, only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase. It is true that Congress intended to generate technological improvement in pollution control, but this approach focused upon "rapid adoption of improvements in technology as new sources are built," [FN52] not as old ones were changed without pollution increase. The interpretation of "modification" as requiring a net increase is thus consistent with the purpose of the Act; while the other interpretation is not. The EPA has properly exempted from best available control technology (BACT) and ambient air quality review those "modifications" of a source that do not produce a net increase in any pollutant.[FN53] Within the terminology of the Act, of course, industrial changes meeting this standard are not "modifications" at all.

FN52. S.Rep.No. 127, 95th Cong., 1st Sess. 18 (1977).

FN53. See 40 C.F.R. ss 51.24, 52.21 (1978).

The "bubble" regulation for PSD must be compared with an earlier EPA regulation, which applied the bubble concept to the new source performance standards of the ***402 **130** Act,[FN54] and which was struck down by this court in ASARCO Inc. v. Environmental Protection

Agency.[FN55] That regulation stated that a modification of a source for NSPS purposes "shall not be deemed to occur if an existing facility undergoes a physical or operational change where . . . the total emission rate of any pollutant has not increased from all facilities within the stationary source . . . ." [FN56]

FN54. See id. ss 60.2(h), 60.14 (1976). The Act's new source performance standards are set forth in Clean Air Act s 111, 42 U.S.C. s 7411 (Supp. I 1977).

FN55. 578 F.2d 319 (D.C.Cir.1978).

FN56. 40 C.F.R. s 60.14(d) (1976).

The ASARCO case struck down that regulation because it expanded the definition of "source," within which offsets were allowed, to include combinations of facilities, contrary to the statutory definition of "source." [FN57] Here we start with the same premise as ASARCO, that the Agency may not define "source" to include a combination of facilities.[FN58] Several factors prevent us, however, from drawing the same conclusion. First is a difference between the two regulations. The present EPA regulation allows offsets within a "source"; it does not, in light of our decision in this case, allow offsets within any "combination of facilities." Thus it does not suffer from the defect on which the ASARCO decision turned. Second, ASARCO did not rule out the interpretation of "increases" in pollution as net increases. The case stated that a bubble concept would be contrary to the intent of the NSPS provisions, but such is clearly not the case with regard to the PSD provisions. Third, the PSD provisions express a purpose of ensuring that economic growth occurs in a manner consistent with preservation of clean air. [FN59] The bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement. Finally, it is relevant that EPA had its NSPS bubble concept in effect at the time Congress enacted the 1977 Clean Air Act Amendments. Though we are reluctant to assume that Congress expressly endorsed the specific bubble regulation, the Conference Committee approved the congressional policy as enacted at that time in existing EPA regulations. [FN60] ASARCO, in short, dealt with a significantly different regulation and statutory purpose. Its holding is therefore not inconsistent with our decision today, upholding the bubble concept for the PSD regulations.

FN57. See ASARCO Inc. v. EPA, 578 F.2d at 329.

FN58. See Part I supra.

FN59. 42 U.S.C. s 7470(3) (Supp. I 1977).

FN60. See 123 Cong.Rec. H8665 (daily ed. 4 Aug. 1977).

[115][116] The Agency retains substantial discretion in applying the bubble concept. First, any offset changes claimed by industry must be substantially contemporaneous. The agency has discretion, within reason, to define which changes are substantially contemporaneous. Second, the offsetting changes must be within the same source, as defined by EPA. In light of the statutory intent to treat modification the same as construction,[FN61] EPA's definition of "statutory source" for the PSD provisions will govern both the definition of "modification" and the coverage of section 169(1).

FN61. See Clean Air Act s 169(2)(C), 42 U.S.C. s 7479(2)(C) (Supp. I 1977).

The Agency's regulations, however, impose on the use of the bubble concept an additional limitation, which is challenged in this case. The regulations define "major modification" by means of accumulated increases in potential emissions after 7 August 1977, with no offset allowed for contemporaneous emission decreases.[FN62] The effect of this definition is to subject major changes to PSD review, even when they are offset by contemporaneous reductions. The only effect of the EPA's bubble concept then is to exempt the facility from certain substantive review standards when there ***403 **131** are such offsetting changes, leaving the facility subject to all procedural PSD requirements.[FN63] The most important procedural requirement is that a permit be issued, under section 165 of the Act, before construction begins. Under the Act, however, PSD procedural requirements, just like substantive ones, apply only to construction and modification of sources. We must therefore resolve the question whether EPA has authority to impose procedural requirements where there is no net increase of any pollutant from contemporaneous changes.

FN62. See 40 C.F.R. ss 51.24(b)(2), 52.21(b)(2) (1978).

FN63. Since we have rejected the limitation of

modifications to only "major" ones, this provision, when revised in accordance with our opinion, would bring many more offsetting changes within the PSD procedural review requirements.

[117] The Agency concedes that a literal reading of the Act would allow exemption from all PSD review requirements for offsetting changes. But it argues that a total exemption from section 165 requirements would contravene the basic purpose of the 1977 Amendments. We disagree.

There is no basis in the Act for establishing two different definitions of "modification," one that looks only at net increases for substantive requirements, and a second that looks at all increases, without allowing offsets, for procedural requirements. If a particular set of industrial alterations is not a "modification" within the terms of the Act, then it is subject to neither procedural nor substantive PSD requirements.

The Act gives the EPA Administrator authority "to prescribe such regulations as are necessary to carry out his functions" under the Act.[FN64] The Agency argues that the permit process is necessary to ensure that it receives information about industrial plans, so that it can decide whether proposed emission increases are in fact offset. But the PSD provisions set several thresholds, below which Agency review authority does not extend. The 100 and 250-ton per year limit for "major emitting facilities" is one such threshold. The logic of the Agency's argument would justify permit requirements for any industrial action that falls below any of the thresholds. Rather than allow such an extension of Agency review authority, Congress has set clear limits outside which PSD review does not apply. If industries falsely claim to be below the thresholds for PSD applicability, there exist means to uncover and penalize such abuses. An extension of PSD permit requirements beyond the wording of the Act is therefore neither necessary nor appropriate to carry out EPA's functions under the Act. Such extension would seriously delay and impede industrial changes that Congress did not intend to regulate. Where there is no net increase from contemporaneous changes within a source, we hold that PSD review, whether procedural or substantive, cannot apply.

FN64. Clean Air Act s 301(a)(1), 42 U.S.C. s 7601(a)(1) (Supp. I 1977).

III. POLLUTANTS SUBJECT TO PSD REGULATION AND THE "MAJOR EMITTING FACILITY" THRESHOLD

Several sections of the Clean Air Act apply PSD review and best available control technology to emissions by major emitting facilities of each pollutant subject to regulation under the Clean Air Act. In this part we review two regulations of EPA that define which pollutants are subject to PSD and BACT review. One regulation exempts from PSD and BACT each pollutant not emitted in sufficient amounts to qualify a source as a major emitting facility. The other applies PSD and BACT immediately to each type of pollutant regulated for any purpose under any provision of the Act, not limited to sulfur dioxide and particulates. We reverse EPA on the first regulation and affirm on the second.

A. Statutory and Regulatory Background

Section 165 of the Act provides in pertinent part:

(a) No major emitting facility on which construction is commenced after (7 August***404 **132** 1977) may be constructed . . . unless

(3) the owner or operator of such facility demonstrates, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which (PSD) applies more than one time per year, . . . or (C) any other applicable emission standard or standard of performance under this Act;

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

(e)(1) The review provided for in subsection (a) shall be preceded by an analysis . . . of the ambient air quality at the proposed site . . . for each pollutant subject to regulation under this Act which will be emitted from such facility.

(3) The Administrator shall . . . promulgate regulations . . . which . . .

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility . . . for each pollutant regulated

under this Act which will be emitted from . . . such facility . . . .[FN65]

FN65. Clean Air Act s 165, 42 U.S.C. s 7475 (Supp. I 1977) (emphasis added).

Also section 169(3), for the purposes of PSD, defines BACT as "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility." [FN66]

FN66. Clean Air Act s 169(3), 42 U.S.C. s 7479(3) (Supp. I 1977) (emphasis added).

The italized language in the above sections would not seem readily susceptible to misinterpretation. In each instance, any source that qualifies with regard to any applicable pollutant as a "major emitting facility" under the statute's definition of such a source,[FN67] is subject to "any . . . applicable emission standard" or "standard of performance" under the Act, and to pollution controls for "any pollutant in any (geographic) area" subject to PSD and for "each pollutant subject to regulation" under the Act. The only administrative task apparently reserved to the Agency in executing these provisions is to identify those emission standards, standards of performance, and pollutants subject to regulation under the Act which are thereby comprehended by the statute. The language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act, establish any special timetable for the regulation of particular pollutants, or set high thresholds for potential emissions of each pollutant before a major emitting facility becomes subject to PSD for that pollutant.

FN67. See Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977).

The first regulation states that PSD requirements, including BACT, "shall apply to a proposed source or modification only with respect to those pollutants for which the proposed construction would be a major stationary source or major modification." [FN68] This provision exempts from PSD all pollutants not emitted in quantities of at least 100 tons per year by a major emitting facility of one of the twenty-eight types specified in the first sentence of section 169(1), and 250 tons per year by all other sources. [FN69] The Agency thus adopted a BACT "de minimis" criterion to coincide with the 100 and ***405 **133** 250-ton emission thresholds for major emitting facilities. It did this on grounds that the "BACT de minimis level should be made consistent" with the overall PSD emission threshold.[FN70]

FN68. 40 C.F.R. s 51.24(i)(1) (1978). See id. s 52.21(i)(1).

FN69. Clean Air Act s 169(1), 42 U.S.C. s 7479(1) (Supp. I 1977).

FN70. 43 Fed.Reg. 26,380, 26,381-82 (1978).

[118] The petition of the District of Columbia challenges this regulation. We find the regulation to be contrary to clear statutory language. Section 165 states that no major emitting facility may be constructed unless it is subject to BACT "for each pollutant subject to regulation under this Act emitted from . . . such facility." [FN71] The statute, then, does not exempt pollutants emitted at quantities of less than 100 tons per year by the twenty-eight types of sources specified in the first sentence of section 169(I), or less than 250 tons per year by any other source. There is no statutory basis for applying the 100 and 250-ton thresholds directly to the BACT requirement for all pollutants from a major emitting facility. This clear error of statutory interpretation by EPA is analogous to its exemption for non-major modifications. We strike down both for similar reasons.

FN71. Clean Air Act s 165(a)(4), 42 U.S.C. s 7475(a)(4) (Supp. I 1977).

[119][120][121] We understand that the application of BACT requirements to the emission of all pollutants from a new facility, no matter how miniscule some may be, could impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities. But the proper way to resolve this difficulty is to define a de minimis standard rationally designed to alleviate severe administrative burdens, not to extend the statutory 100 or 250-ton threshold to a context where Congress clearly did not apply it. Just as for the applicability of PSD to modifications, the de minimis exemption must be designed with the specific administrative burdens and specific regulatory context in mind. This the Agency has failed to do. We do not hold that 100 tons per year necessarily exceeds a permissible de minimis level; only that the Agency must follow a rational approach to determine what level of emission is a de minimis amount.

[122][123] A rational approach would consider the

administrative burden with respect to each statutory context: what level of emission is de minimis for modification, what level de minimis for application of BACT. Concerning the application of BACT, a rational approach would consider whether the de minimis threshold should vary depending on the specific pollutant and the danger posed by increases in its emission. The Agency should look at the degree of administrative burden posed by enforcement at various de minimis threshold levels. It is relevant that our decision requires the Agency, in its evaluation of emissions of facilities, to take into account the facility's air pollution controls. It may also be relevant, though it is certainly not controlling, that Congress made a judgment in the Act that new facilities emitting less than 100 or 250 tons per year are not sizeable enough to warrant PSD review.

B. Types of Pollutants to be Regulated Under PSD

Industry Groups argue that the Act's provisions which apply PSD to each pollutant subject to regulation under this Act, require that controls be imposed immediately for only two types of pollutants: sulfur dioxide and particulates. The argument is made that PSD preconstruction review under section 165 is qualified by section 166, which requires EPA to conduct a study and to promulgate regulations to prevent the significant deterioration of air quality resulting from emissions of "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides" (the "automotive pollutants"), as well as "pollutants for which national ambient air quality standards are promulgated." [FN72] Although there is no statutory language which so provides, Industry Groups contend that the effective date of the PSD permit and review framework in ***406 **134** section 165 must be delayed in the case of each pollutant until studies and regulations required in section 166 have been set forth. Only sulfur dioxide and particulates are said to be exempt from this requirement, since these pollutants alone were covered by EPA's pre-1977 PSD regulations; [FN73] thus the requisite studies have already been conducted and the applicable standards set,[FN74] and any PSD review not premised on the studies and standards required by section 166 thus must be arbitrary and invalid. Industry Groups also argue that an undue burden will be imposed on affected facilities by the Agency's immediate application of section 165 to all pollutants subject to regulation under the Act. In line with their reading of the statute and in order to lessen the regulatory burden, Industry Groups argue that PSD regulation of the four "automotive pollutants" should be delayed for at least three years and seven months following the enactment of the 1977 Amendments, and other pollutants even longer.[FN75]

FN72. Clean Air Act s 166(a), 42 U.S.C. s 7476(a) (Supp. I 1977).

FN73. The first set of proposed PSD regulations was published in 1974, see 39 Fed.Reg. 42,510, 42,514 (1974), and later codified in 40 C.F.R. ss 52.01(d)(5), 52.21 (1977).

FN74. Industry Groups also point out that s 163(a) of the Act expressly requires that state plans contain measures assuring that maximum allowable increases over baseline concentrations not be exceeded "in the case of sulfur oxide and particulate matter," and that s 163(b) establishes specific sulfur dioxide and particulate increments for class I, II, and III areas to be implemented in state plans. Clean Air Act s 163(a)-(b), 42 U.S.C. s 7473(a)-(b) (Supp. I 1977). No mention is made in these sections of other pollutants to be reached by PSD.

FN75. See Brief for Industry Petitioners on Regulation of Pollutants Other Than Sulfur Dioxide and Particulates at 14 (hereinafter cited as Industry Brief on Other Pollutants).

[124] These arguments, however, are contradicted by the plain language of section 165. Section 165, in a litany of repetition, provides without qualification that each of its major substantive provisions shall be effective after 7 August 1977 with regard to each pollutant subject to regulation under the Act, or with regard to any "applicable emission standard or standard of performance under" the Act.[FN76] As if to make the point even more clear, the definition of BACT itself in section 169 applies to each such pollutant. [FN77] The statutory language leaves no room for limiting the phrase "each pollutant subject to regulation" to sulfur dioxide and particulates.

FN76. See Clean Air Act s 165(a)(3)-(4), (e)(1), 42 U.S.C. s 7475(a)(3)-(4), (e)(1) (Supp. I 1977).

FN77. Clean Air Act s 169(3), 42 U.S.C. s 7479(3) (Supp. I 1977).

[125][126] We find no implied or apparent conflict between sections 165 and 166; nor, as Industry Groups contend, must the requirements of section 165 be "subsumed" within those of section 166.[FN78] As we noted in our

earlier per curiam opinion, section 166 has a different focus from section 165: "the development of maximum allowable increments or equivalent limitations for those pollutants (other than sulfur dioxide and particulate matter) for which NAAQSs (national ambient air quality standards) have been or will be established." [FN79] Though Congress could have decided to delay the applicability of PSD for such pollutants until all studies and regulations required by section 166 have been completed, Congress apparently chose not to do so, and it emphasized its decision on that point in at least five statutory provisions.[FN80] What legislative history there is on this point supports that view.[FN81] Therefore we uphold this Agency regulation.[FN82]

FN78. See Industry Brief on Other Pollutants, supra note 75, at 19.

FN79. See Alabama Power Co. v. EPA, 606 F.2d at 1085 (D.C.Cir.1979) (per curiam).

FN80. See notes 76-77 supra.

FN81. Though the legislative history is not entirely unambiguous, we note, for example, that the House specifically rejected an amendment offered to restrict PSD coverage to sulfur oxides and particulates. See 122 Cong.Rec. 29,568-69 (1976). In the Senate, the clearest statement of intention in late 1977 may have been made by Senator Muskie, the principal Senate sponsor of the 1977 Clean Air Act Amendments:

> The committee did not extend the use of nondegradation increments to pollutants other than sulfur oxides or particulates. The lack of adequate information on the implications of covering other criteria pollutants precluded such a requirement. The committee did, however, agree that the best available control technology requirements should be applicable to all pollutants emitted from any new major emitting facility so that the maximum degree of emission reduction would be achieved in order to minimize potential deterioration. And the committee did authorize a study by EPA of increments applicable to other pollutants in order to establish a basis for future congressional action.
>
> 123 Cong.Rec. S9162, S9170 (daily ed. 8 June 1977) (emphasis added). The final bill passed by the Senate after conference applied BACT to "each pollutant subject to regulation" under the Act, just as other PSD requirements were so applied. See Clean Air Act s 165, 42 U.S.C. s 7475 (Supp. I 1977).

FN82. We have considered, but cannot give great weight to, petitioners' "feasibility" and "economic impact" argument against immediate PSD regulation of pollutants other than sulfur dioxide and particulates. See Industry Brief on Other Pollutants, supra note 75, at 31-37. We find that EPA acted reasonably in balancing these costs against the goal of protecting clean air areas.

> Of greater interest is the detailed economic and scientific study presented to this court in support of Industry Groups' petitions for rehearing. See Impact of the Court of Appeals Decision on the PSD Permit Process, prepared by Environmental Research & Technology, Inc. (July 1979), Exhibit A, Industry Petitioners' Petition for Rehearing on the Application of PSD Requirements to Pollutants Other Than Sulfur Dioxide and Particulates. It is not the role of this court, however, to engage in a technical review of policy decisions made by Congress where those decisions are clearly stated. We also note that the impact study nowhere takes into account the de minimis exemptions that EPA has authority to allow in the case of individual pollutants emitted by a major facility. Some of the dire effects feared by petitioners therefore may be relieved to some degree. These arguments are more appropriately presented to Congress, which (in light of the unambiguous language of the statute) apparently has adopted a different position.
>
> We also are not convinced by petitioners' procedural objections. See Industry Brief on Other Pollutants, supra note 75, at 23-30. In light of the unambiguous legislative command at issue, we believe that the Administrator adequately explained the basis for his action and responded to significant comments raised during the rulemaking proceedings. See 43 Fed.Reg. 26,380, 26,397 (1978).

***407 **135** IV. DEFINITION OF BACT TO INCLUDE A VISIBLE EMISSION STANDARD

[127] One of the principal substantive prerequisites to

obtaining a PSD permit for construction of a major emitting facility in clean air areas under the Act is utilization by that facility of the "best available control technology" for each pollutant subject to regulation under the Act to be emitted from that facility.[FN83] In this part of the opinion we consider whether EPA had authority to include a visible emission standard among other emission limitations to be considered by the PSD permitting authority in applying BACT. For reasons stated herein, we conclude that EPA had such authority.

FN83. See Clean Air Act s 165(a)(4), 42 U.S.C. s 7475(a)(4) (Supp. I 1977).

Clean Air Act section 169(3) defines BACT as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from . . . any major emitting facility, which the permitting authority . . . determines is achievable . . . through application of production processes and available methods, systems, and techniques . . . .[FN84]

FN84. Clean Air Act s 169(3), 42 U.S.C. s 7479(3) (Supp. I 1977) (emphasis added).

Section 302(k) of the Act, in turn, defines "emission limitation" (and also "emission standard") as:

> a requirement established by the State or the (EPA) Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.[FN85]

FN85. Clean Air Act s 302(k), 42 U.S.C. s 7602(k) (Supp. I 1977) (emphasis added).

In its final regulations, EPA defined BACT essentially as in section 169(3) of the statute, except for the parenthetical inclusion ***408 **136** that BACT means "an emission limitation (including a visible emission standard)." [FN86] The central question for review is thus whether a "visible emission standard" may be considered an "emission limitation" or "emission standard" within the meaning of section 302(k) and in the context of BACT.

FN86. 40 C.F.R. ss 51.24(b)(10), 52.21(b)(10) (1978) (emphasis added).

A petitioning Industry Group [FN87] contends that EPA's parenthetical inclusion of a "visible emission standard" as a type of emission limitation expands the scope of BACT beyond that intended by Congress. The Group argues that Congress provided explicitly and exclusively for visibility protection of certain clean air areas in section 169A [FN88] of the Act, and that therefore such visibility standards cannot be incorporated into other PSD provisions. These contentions are without merit.

FN87. This Group is the American Iron and Steel Institute.

FN88. Clean Air Act s 169A, 42 U.S.C. s 7491 (Supp. I 1977).

Under the language of the statute, a visible emission standard to be incorporated into BACT must constitute a "requirement . . . which limits the quantity, rate, or concentration" of pollutant emissions.[FN89] An emission standard pertaining to air opacity is one such means of measuring and limiting emissions; such a standard sets limits on the emission of pollutants according to their density in ways that are apparent to the human eye and that therefore affect, for example, human vision. EPA's regulation on the point thus does no more than amplify one ordinary and reasonable meaning of the statutory term "emission standard"; even without the parenthetical amplification, we believe that PSD permitting authorities could fairly have construed the term "emission standard" to comprehend a "visible emission standard."

FN89. Clean Air Act s 302(k), 42 U.S.C. s 7602(k) (Supp. I 1977) (emphasis added).

Opacity standards are not novel; they are used, for example, by a number of states in their attempts to control air pollution.[FN90] Opacity standards have been upheld previously by this court under closely analogous circumstances involving the Clean Air Act's NSPS program.[FN91] Congress also has expressed concern for opacity values in measuring air pollution under the Clean Air Act, and specifically under PSD. As noted by Senator Muskie, chief Senate sponsor of the Clean Air Act Amendments of 1977, with regard to the need for nondegradation provisions to protect against harmful environmental effects not anticipated by the Clean Air Act's secondary standards:

FN90. See, e. g., Cal.Health and Safety Code s 41701 (West); Colo.Rev.Stat. s 25-7-108, and Regulation No. 1A promulgated thereunder; Ariz.Rev.Stat. s 36-779, and Regulation R 9-3-301 promulgated thereunder.

FN91. Portland Cement Ass'n v. Train, 513 F.2d 506 (D.C.Cir.1975), cert. denied, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1976).

(I)f the (Act's) secondary standards were the only restraint on new sources in clean air regions, visibility which is now 100 miles or more in some areas could deteriorate to 12 miles. If humidity is high, visibility would be reduced even further. While visibility may not be important in dirty air areas, it has high public value in many clean air regions FN92

FN92. 123 Cong.Rec. S9170 (daily ed. 8 June 1977) (emphasis added) (prepared statement on final version of Senate version of Amendments). See also 123 Cong.Rec. S9241 (daily ed. 9 June 1977) (statements of concern for air visibility in national parks).

[128] Finally, we note that EPA's inclusion of visible emission standards (among others) to be used to determine compliance with BACT sets no single standard that all PSD permittees must meet. Instead, the regulations contemplate only the factoring of an opacity standard into other BACT considerations such as "energy, environmental, and economic impacts and other costs" to be applied on a "case-by-case basis" to emitting facilities. FN93 As such the regulation is far from oppressive or unduly ***409 **137** expansive; it merely defines with some specificity an area in which the permitting authority, which in most cases will be a state, may exercise reasonable discretion.

FN93. Clean Air Act s 169(3), 42 U.S.C. s 7479(3) (Supp. I 1977).

V. "COMMENCED CONSTRUCTION" FOR PHASED CONSTRUCTION PROJECTS

Section 165 of the Clean Air Act states that no major emitting facility, on which construction is commenced after 7 August 1977, may be constructed in any clean air area unless PSD permitting requirements are met. For an industrial project that is to be constructed in stages, as over a period of years, the meaning of the phrase "construction is commenced" may determine whether and to what extent PSD preconstruction review applies. EPA has developed the practice of issuing a single, comprehensive PSD permit for an entire project with special conditions pertaining to each phase of construction.

In this part, we review regulations of EPA that condition the granting of a comprehensive PSD permit for a phased construction project on: (1) independent BACT review of each phase of the project, (2) actual commencement of construction of each phase within eighteen months of the target date specified in the original application, with a variance procedure available only for the commencement date of the first phase of the project, and (3) avoidance of any interruption in the course of construction of any particular phase for longer than eighteen months. EPA's regulations allow a comprehensive permit for construction projects that are to be completed in phases, thus avoiding a separate permit proceeding for each phase. Phased construction projects with "mutually dependent" facilities will be exempt from the new PSD requirements if one of the facilities has commenced construction by the applicable grandfather date, 7 August 1977; the regulations also suggest, very specifically, that power company multi-boiler construction projects are not mutually dependent and will not be eligible under any circumstances for such exemption.

The important statutory section for our evaluation of these regulations is Clean Air Act section 169(2)(A), which provides:

The term 'commenced' as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by . . . air quality laws or regulations and either has (i) begun . . . a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time. FN94

FN94. Clean Air Act s 169(2)(A), 42 U.S.C. s 7479(2)(A) (Supp. I 1977).

This section provides little guidance concerning the meaning of commencing construction, in the case of a multi-phase construction project, for which on-site construction may have begun, and contractual obligations may have been assumed, for only one of several phases of the

entire project. EPA has sought to provide guidance on this issue in its PSD regulations. The pertinent regulation reads:

> Approval to construct (a major emitting facility) shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.[FN95]

FN95. 40 C.F.R. s 52.21(s)(2) (1978) (emphasis added).

The preamble to the final regulations adds the significant qualification that only ****138 *410** "mutually dependent" multi-phase construction projects can escape the new PSD requirements by commencing construction on one phase prior to the applicable grandfather date.[FN96] As an example, EPA regulations cite a power company's "three-boiler project" as an instance in which a second construction phase would be subject to renewed PSD review even if "there may be a phased construction process at the same general site" of all three boilers. [FN97] Similarly, a footnote to this preamble appears to single out power company boilers for special treatment:

FN96. 43 Fed.Reg. 26,388, 26,396 (1978). The preamble states:

> In general, if the phases of the major facilities involved are mutually dependent and one of the major facilities has, by an applicable grandfather date, commenced construction, then all other dependent facilities specifically approved for construction at the same time will also hold such status. Conversely, each independent facility must individually commence construction by the prescribed grandfather date(s).

Id. (footnote omitted).

FN97. Id.

> The dependence of facilities within a source will be determined on an individual basis. Two or more facilities will generally be considered dependent if the construction of one would necessitate the construction of the other facility(ies) at the same site in order to complete a given project or provide a given type (not level of) service. A kraft pulp mill is an example of a source with dependent facilities, whereas a three-boiler power plant is a typical example of a source with major independent facilities.[FN98]

FN98. Id. n.6 (emphasis added).

Petitioning utility companies object to their apparent exclusion from EPA's special provision for grandfathering multi-phase projects and charge that such exclusion is arbitrary. These petitioners also object to EPA's refusal to consider granting specific exemptions from the eighteen-month commencement deadline for construction of all but the first phase of a multi-phase project. With regard to EPA's rules for phased construction aside from these two points, however, petitioners concede that in general EPA has taken a rational approach. [FN99]

FN99. See Reply Brief of Alabama Power Company, et al. on Stack Height and Commenced Construction at 9.

[129][130][131] We find EPA's regulations on these matters to be within the Agency's statutory authority. The conditions imposed by EPA on the granting of a multi-phase construction permit are reasonable. Finally, the ineligibility of utility company multi-boiler projects for grandfathering is consistent with the reasoning behind the multi-phase PSD program and has not, on this record, been shown to be arbitrary or capricious.

[132][133] As described in Part I, the Agency has considerable discretion to define the terms "source" and "major emitting facility." Within the limits of the statutory language, EPA could define each phase of a multi-phase construction project as a separate source so long as each phase could reasonably be termed a structure, building, facility, or installation or it could define the entire project as a single source, so long as it was reasonably one facility, or installation, etc. If a particular phase is deemed a separate source, then EPA has statutory authority to require for it a separate permit. But EPA also has statutory authority to issue a single permit covering all phases of the project. If the Agency deems the project to be a single source, then a single permit would of course be appropriate; if it consid-

ers each phase to constitute a separate source, it may still issue a single permit covering all phases, so long as the permit prerequisites are satisfied as to each phase.

[134][135] We find that the Agency reasonably exercised its discretion by providing for a comprehensive PSD permit for related facilities of a single project on a common site. This is a wise measure to reduce regulatory burdens and facilitate construction. It is valid whether or not the whole project can be deemed a single "source" in light of Part I of this opinion.

***411 **139** The limitations on the use of the comprehensive permit are also valid. To require mutual dependence before multi-phase projects, one phase of which commenced construction prior to 7 August 1977, are exempt from the new PSD requirements is a reasonable threshold standard. The Act leaves EPA discretion to issue separate permits for phases that can be deemed separate sources, and the Agency's action here does not amount to an abuse of that discretion. The time limits for commencement of construction [FN100] are reasonable, in order to prevent construction projects from reserving, for too long in the future, a disproportionate share of available pollution increments. The same rationale amply supports the restriction on gaps in construction progress exceeding eighteen months, and the refusal to grant variances except for the commencement date of the first phase. There is no need for EPA to re-propose these rules, as they represent reasonable revisions of the originally proposed rules in light of comments received.[FN101]

FN100. See 43 Fed.Reg. 26,388, 26,396 (1978).

FN101. See International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 & n.51 (D.C.Cir.1973).

Finally, utility companies object specifically to the statement, in the preamble to these regulations, that a three-boiler power plant is a typical example of a source with major independent facilities.[FN102] Where multi-boiler plants can utilize shared water, cooling, and other facilities, there is certainly an economy of scale, and EPA's regulation will reduce the certainty of industry that future boiler construction will pass PSD review. But EPA balanced this interest against the danger that grandfathering for multiple boiler units would preempt available pollution increment into the future. There is support in the legislative history for giving this adverse treatment to construction of multiple boiler units; the Senate Committee Report stated that most contracts for construction of multiple utility boiler units do not meet the statutory standard for "commenced construction." [FN103] Therefore EPA's treatment of utility boilers is not an abuse of discretion.

FN102. See 43 Fed.Reg. 26,388, 26,396 n.6 (1978).

FN103. S.Rep.No. 127, 95th Cong., 1st Sess. 33 (1977).

Opinions for the Court filed by Circuit Judges LEVENTHAL, ROBINSON and WILKEY.

C.A.D.C., 1979.
Alabama Power Co. v. Costle
636 F.2d 323, 13 ERC 1993, 204 U.S.App.D.C. 51, 10 Envtl. L. Rep. 20,001

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