NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-1138

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

SIERRA CLUB DE PUERTO RICO, CIUDADANOS EN DEFENSA DEL AMBIENTE, MADRES DE NEGRO DE ARECIBO, AND COMITÉ BASURA CERO ARECIBO,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ENERGY ANSWERS ARECIBO, LLC,

Intervenor-Respondents.

PETITION FOR REVIEW OF A FINAL RULE OF THE EPA

RESPONSE BRIEF FOR THE EPA RESPONDENTS

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Respondents,

ENERGY ANSWERS ARECIBO, LLC,

Intervenor-Respondents.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel for Respondents U.S. Environmental Protection Agency and Gina McCarthy submits this certificate as to parties, rulings, and related cases:

A. Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

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B. Rulings Under Review. Petitioners seek review of, and a remedy regarding, a nationally applicable final rule promulgated by the U.S. Environmental Protection Agency over 35 years ago, *Requirements for Preparation, Adoption, and Submittal of SIPS; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (Joint Appendix ("JA") 19, 23). Since 1986, this rule has been codified at 40 C.F.R. § 51.165(a)(2)(i); it is reproduced in this Brief's Statutory and Regulatory Addendum.

C. Related Cases. There are no related cases.

/s/Andrew J. Doyle
Counsel for Respondents

Dated: August 28, 2015

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Coalition	*Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part and rev'd in part sub nom. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)
Energy Answers	Intervenor-Respondent Energy Answers Arecibo, LLC
EPA	Respondents U.S. Environmental Protection Agency and its Administrator
Handbook	Clean Air Act Handbook (D.R. Wooley & E.M. Morss eds., 24th ed., 2014)
JA	Joint Appendix
Sierra Club	Petitioners Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo
Sierra Club Br.	Opening Brief of Petitioners (Aug. 2015)
SIP	State Implementation Plan
UARG	*Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)

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STATEMENT OF JURISDICTION

Petitioners Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo (collectively "Sierra Club") fail to properly invoke the Court's jurisdiction to review a nationally applicable regulation promulgated in 1980 by Respondents U.S. Environmental Protection Agency and its Administrator (collectively "EPA") under the Clean Air Act ("Act"). Jurisdiction is lacking on two grounds: standing, *see infra* pp. 24-27, and timing, *see infra* pp. 27-40.

STATEMENT OF THE ISSUES

1. A petitioner lacks standing if its requested relief will not redress the claimed injury. Sierra Club alleges injury from lead emissions from an incinerator proposed by Intervenor-Respondent Energy Answers Arecibo, LLC's ("Energy Answers"), but Sierra Club merely seeks vacatur of a regulation that does not require Energy Answers to do, or refrain from doing, anything regarding emissions. Such relief will not result in more lead emissions controls unless Energy Answers modifies the incinerator at a speculative and unforeseen point in the future. Does Sierra Club lack standing to challenge the regulation?

2. To ensure that challenges to EPA's regulations are raised promptly, the Act limits the Court's jurisdiction to petitions filed "within sixty days from the date notice of such promulgation . . . appears in the Federal Register" or, "if

such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). Sierra Club, which did not file its petition in 1980, alleges that grounds for its claim arose, for the first time, when Energy Answers obtained a permit under a program that does not apply to the incinerator's lead emissions and is separate from the program to which the challenged regulation applies. Is Sierra Club's petition time-barred?

3. Under the Act, with respect to areas that have not attained an air quality standard, states and territories must require permits for the construction or operation of a source with the potential to emit 100 tons per year of "any air pollutant." 42 U.S.C. §§ 7502(c)(5), 7602(j). Under *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), EPA must interpret that specific statutory phrase in light of its context. The challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), reflects EPA's longstanding interpretation of "any air pollutant" in the context of permitting in nonattainment areas as referring only to a pollutant for which the area is designated nonattainment. Does that regulation fall within the bounds of EPA's statutory authority?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory provisions and the challenged regulation are reproduced in this Brief's Statutory and Regulatory Addendum.

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STATEMENT OF THE CASE

I. New Source Review under the Act and State Implementation Plans

Under the Act, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA establishes national ambient air quality standards for criteria pollutants. 42 U.S.C. § 7409.[1] "To date, EPA has issued [standards] for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead." *UARG*, 134 S. Ct. at 2435 (citation omitted). The standard for lead, the pollutant Sierra Club focuses on here, was last updated in 2008. *Coalition of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (upholding that standard).

"States [and territories[2]] have the primary responsibility for implementing the NAAQS by developing 'State [I]mplementation [P]lans.'" *UARG*, 134 S. Ct. at 2435 (citing 42 U.S.C. § 7410). State Implementation Plans ("SIPs") approved under the Act must regulate, *inter alia*, the construction and modification of stationary sources of air pollution. Such regulation includes a preconstruction permit program known as "New Source Review," which has three parts. *See* 73 Fed. Reg. 28,321, 28,323-34 (May 16, 2008).

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[1] Unless otherwise specified, we quote from the current U.S. Code.

[2] The Act defines "States" to include the Commonwealth of Puerto Rico and other U.S. territories. 42 U.S.C. § 7602(d).

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The first part of New Source Review generally requires that any new or modified major stationary source obtain and comply with a "Prevention of Significant Deterioration" permit addressing: (a) in the case of new construction, pollutants for which the source has the potential to emit in significant amounts; and (b) in the case of a modification, each pollutant that is projected to increase (or in fact increases) by a significant amount. *See* 42 U.S.C. §§ 7475, 7479(1); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 471 (2004). The applicability of the Prevention of Significant Deterioration permit program depends on, *inter alia*, the pollutant in question; i.e., it could apply only if the source is located in an area that has been designated as "attainment" or "unclassifiable" with respect to such pollutant. Attainment areas meet national ambient air quality standards for a given pollutant; unclassifiable areas lack sufficient data to determine attainment. 42 U.S.C. § 7407(d)(1)(A).

The second -- and separate -- part of New Source Review is the "Nonattainment New Source Review" program. 42 U.S.C. §§ 7501-15; Clean Air Act Handbook § 4:1 (D.R. Wooley & E.M. Morss eds., 24th ed., 2014) ("Handbook"). This program has relevance where the source in question is located in a "nonattainment" area. EPA designates an area nonattainment when it fails to meet standards for a particular pollutant. 42 U.S.C. § 7407(d)(1)(A). Unlike the Act's Prevention of Significant Deterioration program, which directly prohibits the construction of new or modified sources without a permit and is a required part of State (or Federal) Implementation Plans, the Act's Nonattainment New Source

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Review program relies entirely on State (or Federal) Implementation Plans to regulate covered sources. *See* 42 U.S.C. §§ 7502, 7503.

Air quality controls set forth in Nonattainment New Source Review permits are generally more stringent than those associated with Prevention of Significant Deterioration permits. Sources subject to Prevention of Significant Deterioration permits, for example, may only emit consistent with the "best available control technology" "for each pollutant subject to regulation under" the Act. 42 U.S.C. § 7475(a)(4). But state Nonattainment New Source Review programs must require permits that subject sources to, for example, the "lowest achievable emission rate" without regard to cost, 42 U.S.C. § 7503(a)(2), and "offsets," *id.* § 7503(c)(1).[3] In addition, nonattainment programs within SIPs may require other (i.e., extra-permit) emission-reduction measures as part of states' and territories' obligation to make "reasonable further progress" toward attainment. 42 U.S.C. §§ 7501(1), 7502(c)(2).

The third part of new source review, known as the "Minor New Source Review" program, may apply to the extent that a stationary source would emit a pollutant below specified levels. 76 Fed. Reg. 38,748, 38,752 (July 1, 2011); 45 Fed. Reg. 52,676, 52,712 (Aug. 7, 1980) (JA 51, 54). Under this program, states and

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[3] Offsets represent "[a] key method for controlling air pollution without impeding new economic activity . . . . Under this strategy, the relevant air pollution control authority . . . will permit the creation of a new source of emissions only if the new polluter is able to secure an offsetting reduction in emissions from preexisting polluters[.]" *Santa Barbara County Air Pollution Control Dist. v. EPA*, 31 F.3d 1179, 1181 (D.C. Cir. 1994).

territories assess the air quality implications of source construction or modification and evaluate whether that event would interfere with attainment or maintenance of standards. *See* 40 C.F.R. §§ 51.160-64.

Because the requirements of these programs are pollutant-specific, a major source may be required to obtain both a Prevention of Significant Deterioration permit and a Nonattainment New Source Review permit where it proposes to construct and operate in an area that is designated attainment or unclassifiable for some pollutants and non-attainment for others. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012) ("*Coalition*"), *aff'd in part and rev'd in part on other grounds sub nom. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979); 45 Fed. Reg. at 52,711-12 (JA 53-54). In such an area, the source may also be required to obtain a Minor New Source Review permit if its emissions of a particular pollutant are low or only increase by an insignificant amount.

II. Promulgation of 40 C.F.R. § 51.165(a)(2)(i)

Under the Act, the EPA Administrator "is authorized to prescribe such regulations as are necessary to carry out [her] functions under [the Act]." 42 U.S.C. § 7601(a)(1). The regulation sought to be challenged by Sierra Club here, 40 C.F.R. § 51.165(a)(2)(i), regards the Nonattainment New Source Review permit program.

In September 1979, EPA issued a proposal for public comment: a subsection would be added to EPA's existing regulations that set forth the required contents for

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"state plans for nonattainment areas." 44 Fed. Reg. 51,924, 51,958 (Sept. 5, 1979) (proposing to codify 40 C.F.R. § 51.18(j)(3)) (JA 45, 49). Under the proposal, SIPs would be required to include "[a] preconstruction review program . . . for any area designated as nonattainment for any national ambient air quality standard," and to apply that program "to any new or modified major stationary source that is *major* for the pollutant for which the area is designated nonattainment[.]" 44 Fed. Reg. at 51,959 (emphasis added) (JA 50). As EPA explained, the application of Nonattainment New Source Review permit requirements to "major sources everywhere in the designated nonattainment area" was an expansion of the policy at the time, which offered exemptions to any source demonstrating that, for example, because of its location, "it would not significantly impact the specific point(s) of violation." 44 Fed. Reg. at 51,939 (JA 46).

Moreover, EPA's proposal addressed both new and modified major stationary sources. As to modifications, EPA explained:

> Under today's proposal . . . the [New Source Review] requirements of section 173 [42 U.S.C. § 7503], the offset ruling, or the section 110(a)(2)(I) construction restrictions would apply only to a modification which would result in a significant net increase in the amount of the nonattainment pollutant which the source already emits in major amounts (i.e., 100 or more tons per year).

44 Fed. Reg. at 51,941 (JA 48). Similarly, as to entirely new sources in nonattainment areas, EPA stated: "[n]onattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts." *Id.*

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Among the sources of authority EPA referenced in its September 1979 proposal was then-section 110(a)(2)(I) of the Act, which Congress added to the Act in 1977 (and repealed in 1990). That provision, known as the "construction moratorium" or "construction ban," *see, e.g., Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986), generally had the effect of prohibiting, after a date certain (targeted to the submission and review of SIPs), the construction or modification of any "major stationary source . . . in any nonattainment area" "if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area" unless and until the state or territory submits and obtains EPA's approval of a SIP with a compliant Nonattainment New Source Review permit program. *See* former section 172(a)(1), 42 U.S.C. § 7502(a)(1) (1982), and former section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I) (1982). Although the legislative history does not directly address the moratorium's purposes,[4] an appellate court at the time concluded that Congress sought both to limit pollution from new sources and to prompt state planning efforts. *See Connecticut Fund for the Env't v. EPA*, 672 F.2d 998, 1008 (2d Cir. 1982).

Also referenced in the September 1979 proposal was EPA's "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26), an action in which "EPA endeavored to clarify . . . the circumstances in which new sources of pollution would be permitted in

[4] The construction moratorium originated in the Senate bill. S. Rep. 127, 95th Cong., 1st Sess. (1977).

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areas where an ambient standard had not been achieved." *NRDC v. Gorsuch,* 685 F.2d 718, 721 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). Under the offset ruling, permit authorities were directed to "perform an air quality analysis to determine if the [new] source will cause or exacerbate a violation of [national ambient air quality standards]" -- but "only for those pollutants causing the proposed source to be defined as a 'major' source[.]" 41 Fed. Reg. at 55,528 & n.2 (JA 28). EPA explained that such interpretation was appropriate because federal, state, and territorial permit authorities "have limited resources and . . . smaller air pollution sources may individually have an insignificant impact on air quality." *Id.* at 55,525 (JA 27). As part of the 1977 Amendments to the Act, Congress codified the offset ruling. *See* 91 Stat. 745 (offset ruling "shall apply" in nonattainment areas until July 1, 1979).[5]

Interested persons submitted comments to EPA about the September 1979 proposal. Some comments supported additional regulation. For example, Sierra Club Legal Defense Fund urged that "major emitting facilities in a nonattainment area should undergo [Prevention of Significant Deterioration] review on all pollutants -- not only for major pollutants for which the area is nonattainment." A-79-35, III-B, Comment 298 at cover, 4 (JA 10, 14). And in a comment similar to Sierra Club's

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[5] Further, the offset ruling "was later amended to conform to the 1977 Amendments to the Clean Air Act and codified as Appendix S to 40 C.F.R. Part 51." *NRDC,* 685 F.2d at 721 n.13 (citation omitted).

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challenge here, the Connecticut Chapter of the Sierra Club disagreed with the limitation that Nonattainment New Source Review permits be required "only [for] the pollutant for which [the source] is a major source[.]" A-79-35, III-B, Comment 84 at 1, 2 (JA 1-2). That chapter of Sierra Club regarded EPA's proposal as "not in agreement with the intentions of Congress." *Id.* at 2 (JA 2).

EPA also received comments to the effect that its proposal was over-inclusive. The Regional Air Pollution Control Agency of Dayton, Ohio, for example, urged EPA to "reconsider this position and not impose the restrictions on sources which have no significant impact on the nonattainment situation." A-79-35, III-B, Comment 38 at cover, 3 (JA 3, 6).

In May 1980, upon consideration of those and other comments, EPA finalized its proposal and codified what was then 40 C.F.R. § 51.18(j). 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (JA 19, 23).[6] Although EPA did not elaborate on its interpretation, it noted that "[a] source may emit many different pollutants" and that "an area may be designated attainment for certain criteria pollutants and

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[6] 40 C.F.R. § 51.18(j) at that time provided:

> Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard . . . . Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment . . . .

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nonattainment for other criteria pollutants." 45 Fed. Reg. at 31,309 n.3 (JA 21). "For simplicity," EPA stated that its preamble employed a shorthand phrase, "sources locating in a nonattainment area," to refer to "sources locating in an area designated nonattainment for a pollutant for which the source is major." *Id.*

Shortly thereafter, in August 1980, EPA amended 40 C.F.R. § 51.18(j) by moving the relevant text to subsection (2). 45 Fed. Reg. 52,676, 52,745 (Aug. 7, 1980) (JA 51, 56). EPA explained that "[t]he current regulations concerning pollutant applicability in nonattainment areas have not been changed" because the August 1980 rulemaking largely regarded the separate Prevention of Significant Deterioration program. 45 Fed. Reg. at 52,711 (JA 53). But EPA at that point further explained *why* the Nonattainment New Source Review permit program has a pollutant applicability scheme distinct from the Prevention of Significant Deterioration permit program:

> These rules are different from the [Prevention of Significant Deterioration] pollutant applicability rules. Major sources are subject to review under the Offset Ruling, section 173, and the construction moratorium only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review or the construction moratorium. Similarly, only if a modification increases emissions of a pollutant for which the source is major and for which the area is designated nonattainment do nonattainment requirements apply.

45 Fed. Reg. at 52,711 (JA 53). EPA emphasized:

> The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction

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> moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under the Offset Ruling and section 173 is restricted in the same manner as the construction moratorium.

Id. Similarly, EPA addressed comments "perceiv[ing] an inconsistency in requiring broader pollutant applicability for [Prevention of Significant Deterioration] review than for nonattainment review . . . ." 45 Fed. Reg. at 52,713 (JA 55). EPA explained that "[t]he scope of [Prevention of Significant Deterioration] review applicability and the nonattainment definition of source are separate issues[,]" and that "there is no basis for requiring that they be resolved in such a way as to in some manner equalize their effects." *Id.*

EPA also emphasized that other measures, such as "reasonable further progress," are available to states and territories and do not depend on a source's "major" status:

> [S]ection 173 [42 U.S.C. § 7503] . . . governs the specific review of sources emitting nonattainment pollutant(s) in major amounts. In addition, sources emitting the nonattainment pollutants in minor amounts are subject to the general [New Source Review] contained in SIPS, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP.

45 Fed. Reg. at 52,713 (JA 55). *See also* 42 U.S.C. § 7503(1)(A) (1982) (offsets may take the form of reductions in allowable emissions "from new . . . sources which are not major emitting facilities").

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In 1986, 40 C.F.R. § 51.18(j)(2) was re-codified as 40 C.F.R. § 51.165(a)(2)(i). *See* 51 Fed. Reg. 40,656, 40,672 (Nov. 7, 1986) (JA 63, 67).

III. New Source Review in Puerto Rico

As noted *supra* p. 3, the Act contemplates that states and territories will have the primary role in implementing the New Source Review permit programs. But EPA may administer the Prevention of Significant Deterioration permit program where a state or territory lacks an EPA-approved program. 42 U.S.C. § 7410(a)(2)(C), (c)(1); 40 C.F.R. § 52.21(a)(1). That is the scenario in Puerto Rico, where an EPA regional office, EPA Region 2, issues Prevention of Significant Deterioration permits while the Puerto Rico Environmental Quality Board conducts review and issues permits under the Commonwealth's EPA-approved Nonattainment New Source Review and Minor New Source Review programs. *See* 40 C.F.R. §§ 52.2722, 52.2723, and 52.2729; 62 Fed. Reg. 3,211 (Jan. 22, 1997); www.epa.gov/nsr/live/pr.html (last visited May 26, 2015).

Nonattainment areas have existed in Puerto Rico since at least 1991. *See Pan American Grain Mfg. Co. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996) (involving nonattainment in Guaynabo). In late 2011, EPA designated the following portion of Arecibo as a nonattainment area for lead: the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility." 40 C.F.R. § 81.355; 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011) (JA 117, 119). Following that designation, Puerto Rico proposed an update to its SIP. EPA Region 2, which is reviewing the proposal,

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recently indicated that "the primary source responsible for the nonattainment designation in Arecibo is the Battery Recycling Facility," and that "other facilities in Arecibo are very small contributors of lead." EPA Region 2 Letter of Apr. 24, 2015 to Petitioner Madres de Negro de Arecibo at 1 (JA 359).

IV. Energy Answers' Air Quality Control Permits

A. Prevention of Significant Deterioration Permit from EPA Region 2

In February 2011, Energy Answers submitted an application for a Prevention of Significant Deterioration permit to EPA Region 2. *See* Application excerpts (JA 123-162). Energy Answers described its proposed facility as an incinerator that would generate renewable energy from fuel derived from waste. Application at xi-xii (JA 123-124). The incinerator's location would be an 80-acre site, zoned as "heavy industrial," which was located more than a mile from Arecibo's "largest residential and commercial areas." *Id.* at 2-1, 2-2 (JA 125, 126).

The application addressed, in detail, the facility's potential to emit pollutants. *See id.* at 3-1 through 4-25 (JA 127-155). Pollutants to be emitted in "major" amounts (i.e., more than 100 tons/year) included, for example, sulfur dioxide and carbon monoxide. *Id.* at xi and Table 3-1 (JA 123, 130).

Lead was also addressed in Energy Answers' application. At that time, the area surrounding the Battery Recycling Company -- which encompasses the Energy Answers site, *see* Application at Appendix D (JA 158) -- had not yet been designated nonattainment for lead. Thus, Energy Answers' application addressed lead since it

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was then an attainment pollutant. As Sierra Club correctly notes, Energy Answers' Prevention of Significant Deterioration permit application "lists potential lead emissions as 0.31 tons/year[.]" Sierra Club Br. 3 (citing Application at 3-4, Table 3-1 (JA 130)). That amount of emissions is well under the significance threshold of 0.6 tons/year, *see* Application at Table 3-1 (JA 130),[7] and nowhere close to the "major source" threshold of 100 tons per year. 42 U.S.C. § 7602(j).[8] Energy Answers also explained its view that it would operate with the "best available control technology" for lead. *See* Application at 5-37 (JA 156); *supra* p. 5.

In May 2012, EPA Region 2 announced, through a public notice, its "preliminary determination to approve" Energy Answers' Prevention of Significant Deterioration permit application because it "meets all PSD requirements." Public Notice at 2 (JA 166). The public notice listed over 12 pollutants that would be subject to the best available control technology; because of the intervening nonattainment designation, lead was not listed. *See id.* The agency solicited comment on the application and draft permit, and it also scheduled public informational

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[7] Significance thresholds have relevance for modifications of existing sources. Handbook § 4:11 ("As with nonattainment [New Source Review], assuming the facility is 'major,' and that the change is not specifically excluded from the definition of modification, the owner or operator must determine if the emissions increase associated with the modification is significant."); *see also id.* § 4.6 & Table 4.1 (listing lead's significance threshold).

[8] But "[l]ead is also regulated as a hazardous air pollutant under Title III of the [Act]," Handbook § 4.6 n.7, which has a major source threshold of 10 tons per year. *See* 42 U.S.C. § 7412.

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sessions and hearings. *Id.* at 2-3 (JA 166-167). In addition, EPA provided a street address and Web link where interested persons may access the administrative record. *Id.* at 3 (JA 167).

More detail about the project was provided in a "fact sheet" that accompanied the public notice. *See* Fact Sheet (JA 176-199). EPA Region 2 explained, in pertinent part:

- "Currently, the area in which Energy Answers' facility is designated as meeting all National Ambient Air Quality Standards [] promulgated to protect public health, except for lead (Pb)." Fact Sheet at 3 (JA 178).
- "Pb . . . is not included in this permit because the applicant proposes to locate the source in a nonattainment area." *Id.* at 13 n.1 (JA 188).
- "[A]ll air pollutants that are not subject to [Prevention of Significant Deterioration], including Pb, . . . will be addressed in the State permit issued by [the Puerto Rico Environmental Quality Board]." *Id.* at 18 (JA 193).

Further, in May 2012, EPA Region 2 transmitted English and Spanish versions of the public notice and fact sheet directly to a number of interested persons, including Sierra Club. *See* EPA Region 2 Letter to Petitioner Sierra Club de Puerto Rico (JA 170-171); EPA Region 2 Letter to Petitioner Ciudadanos en Defensa del Ambiente (JA 172-173); EPA Region 2 Letter to Javier Biaggi of Petitioner Comité

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Basura Cero Arecibo (and of Comité Amplio de Arecibo Contra el Incinerador, which shares the same address) (JA 174-175); *see also* Energy Answers Arecibo, LLC Interested Parties List at 4 (EPA emailed public notice and fact sheet to Petitioner Madres de Negro de Arecibo) (JA 169).

"During the public comment period, EPA received 1,100 written comments," EPA Region 2 Response to Comments at 5 of 124 (JA 204), including comments from Sierra Club or its members. In April 2013, when responding to comments about lead emissions, EPA Region 2 repeated what it had previously explained in the public notice and fact sheet: that the Prevention of Significant Deterioration program does not regulate that nonattainment pollutant. *See, e.g.,* EPA Region 2 Response to Comments at 75 ("[F]or information related to the [Energy Answers'] project Pb emissions requirements, the commenters should consult with the [Puerto Rico Environmental Quality Board] Air Quality Department.") (JA 206); *id.* at 99 ("The [Prevention of Significant Deterioration] program does not apply in nonattainment areas. Therefore, lead is not a pollutant regulated in [the] permit.") (JA 207); *id.* ("Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead. Since the facility will emit less than this major source threshold it is also not subject to nonattainment permit requirements."); *id.* at 108 ("Energy Answers is not subject to the lead nonattainment permit requirements.") (JA 209).

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At the initiation of several interested persons, including Sierra Club or its members, EPA's Environmental Appeals Board reviewed the initial Prevention of Significant Deterioration permit that EPA Region 2 had issued in June 2013. *See* 40 C.F.R. part 124, subpart A (procedures applicable to administrative appeals of PSD permits). In March 2014, the Environmental Appeals Board issued a lengthy decision upholding the permit in all relevant respects. *See* Board Opinion (JA 243-340).[9] In response to arguments from Sierra Club that 40 C.F.R. § 51.165(a)(2)(i) is "unlawful," Sierra Club Br. 6, the Environmental Appeals Board stated: "the Region properly excluded lead [] from the [Prevention of Significant Deterioration] permitting process because the municipality of Arecibo has been designated as a nonattainment area for lead. Additionally, . . . [Sierra Club's] arguments concerning [Nonattainment New Source Review] applicability lie outside the Board's authority to decide." Board Opinion at 22 (JA 265). *See also id.* at 22-28 (JA 265-271).

EPA Region 2 issued the final Prevention of Significant Deterioration permit in April 2014, and a notice was published a month later. *See* 79 Fed. Reg. 28,710 (May 19, 2014) (JA 120-122).

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[9] EPA Region 2 requested, and was granted, a remand for the limited purpose of regulating biogenic greenhouse gas emissions in light of *Ctr for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). That issue has no bearing on this case.

B. Minor New Source Review Conditions in Puerto Rico's Permit

As EPA Region 2 noted in its public notice regarding Energy Answers' Prevention of Significant Deterioration permit application, "[a] separate permit is being issued by Puerto Rico Environmental Quality Board, to address the other pollutants emitted by this project." Public Notice at 2 (JA 166). In December 2014, the Puerto Rico Environmental Quality Board issued that permit. Regarding lead, it functions as a Minor New Source permit and restricts the incinerator's emissions to 0.31 tons/year, consistent with Energy Answers' previous assertion that its operations would reflect the best available control technology. *See* Construction Permit PFE-07-0811-0468-I-II-III-C at Table of Annual Emission Limits (in Spanish) (JA 210).

V. Proceedings in this Court

On July 14, 2014, Sierra Club filed a petition with this Court, seeking review of 40 C.F.R. § 51.165(a)(2)(i) based on an argument that it "unlawfully limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act [42 U.S.C. §§ 7502(c)(5), 7503] to a new major stationary source 'that is major for the pollutant for which the area is designated nonattainment.'" Petition for Rev., Doc. #1503791, at 2 (citation omitted).[10]

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[10] The petition also purported to seek review of EPA Region 2's "decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of the Environmental Appeals Board dated March 25, 2014." Petition for Rev. at 1. But Sierra Club has since abandoned any such claim.

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EPA moved to dismiss the petition on jurisdictional grounds. Doc. #1512121. Following Sierra Club's opposition, the Court issued an Order carrying the motion with the case and directing the parties "to address [in their briefs] the issues presented in the motion to dismiss rather than incorporate those arguments by reference." Order of Jan. 16, 2015, Doc. #1532690.

Sierra Club's opening brief followed.

SUMMARY OF ARGUMENT

Sierra Club lacks standing because its alleged injuries from Energy Answers' facility are not redressable by the Court. Vacatur of the challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), would have no effect on Energy Answers' ability to construct and operate its facility because that regulation does not govern Energy Answers' emissions of any pollutant, including lead. That regulation and, indeed, the Act's Nonattainment New Source Review program only govern the required contents of Puerto Rico's State Implementation Plan. Only Puerto Rico's State Implementation Plan governs Energy Answers' emissions of lead. At most, vacatur of the challenged regulation could eventually result in Puerto Rico having to revise its State Implementation Plan to cover a broader category of stationary sources after EPA amends the challenged regulation to conform to the judicial opinion Sierra Club seeks. But those changes would only have prospective effect; Energy Answers would need to modify its facility in the future -- a speculative future event -- before its emissions

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would be subject to the Nonattainment New Source Review permit requirements in any such revised State Implementation Plan.

In addition, Sierra Club's petition for review of 40 C.F.R. § 51.165(a)(2)(i) is untimely and should be dismissed for lack of jurisdiction. The Act provides explicit deadlines for challenging EPA rulemakings. A petition for review must be filed within 60 days of publication in the Federal Register, or if the petition is "based *solely* on grounds arising after such sixtieth day," within 60 days of the alleged after-arising grounds. 42 U.S.C. § 7607(b)(1) (emphasis added). Sierra Club's argument that the Court has jurisdiction based on after-arising grounds is seriously flawed. Evident on its face, the after-arising grounds exception is much narrower than Sierra Club contends. After-arising grounds may appropriately be found to exist where the petition is based on substantive legal arguments that were unavailable during the initial review period. The arguments in support of the claim Sierra Club seeks to adjudicate here were capable of being raised -- and, in fact, were raised -- in 1980.

Moreover, EPA Region 2's issuance of a permit to Energy Answers under the Act's Prevention of Significant Deterioration program cannot, as a matter of law, provide grounds to challenge 40 C.F.R. § 51.165(a)(2)(i), which has no bearing on any term or condition in that permit. Any potentially cognizable after-arising ground arose much earlier -- i.e., *years* before Sierra Club filed its petition -- when Sierra Club learned that Energy Answers' potential to emit lead would not, in the words of the

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challenged regulation, be "major for the pollutant for which the [Arecibo] area is designated nonattainment[.]" 40 C.F.R. § 51.165(a)(2)(i).

If the Court were to consider the merits of Sierra Club's challenge to 40 C.F.R. § 51.165(a)(2)(i), despite its petition's jurisdictional flaws, that 35-year old regulation is reasonable and entitled to deference. Under *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), the Act-wide definition of "major stationary source," including its reference to "any air pollutant," must be construed in a manner appropriate to its regulatory context. Here, the applicable context is the Nonattainment New Source Review permit program, and pertinent provisions of the Act, old and new, reflect an association between that permit program and the pollutant or pollutants for which the area is nonattainment. In addition, EPA explained its interpretation, distinguishing that permit program from the Act's Prevention of Significant Deterioration permit program, and pointing to Nonattainment New Source Review programs that can target problematic sources without regard to their "major" status.

Thus, because EPA's interpretation of the Act is supported by the Act and reasonably explained, Sierra Club's petition lacks merit.

STANDARD OF REVIEW

The Court conducts a *de novo* review of standing, *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013), which Sierra Club bears the burden of demonstrating. *See Delta Const. Co. v. EPA*, 783 F.3d 1291, 1295 (D.C. Cir. 2015). Another *de novo* question is the Court's jurisdiction under section 307(b)(1) of the Act,

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42 U.S.C. § 7607(b)(1), which Sierra Club must similarly establish. *See, e.g., Environmental Defense v. EPA*, 467 F.3d 1329, 1333-34 (D.C. Cir. 2006).

If Sierra Club has standing and properly invokes the Court's jurisdiction, EPA is entitled, on the merits, to a high degree of deference. Under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Court and EPA must adhere to Congress' clearly-stated intent (step one); however, if the Act is silent or ambiguous as to "the precise question at issue," *id.* at 842, then EPA's interpretation should be upheld so long as it is a reasonable interpretation of the statute (step two). *Id.* at 843-44. EPA's interpretation need not "represent[] the best interpretation of the statute," only a "reasonable one." *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 744-45 (1996).

ARGUMENT

The Court lacks jurisdiction over Sierra Club's challenge for two reasons. Section I explains that Sierra Club lacks standing because the relief it seeks, vacatur of 40 C.F.R. § 51.165(a)(2)(i), would not redress its alleged injury. *See infra* pp. 24 to 27. Section II explains that Sierra Club filed its petition too late under the mandatory deadlines set forth in 42 U.S.C. § 7607(b)(1). *See infra* pp. 27 to 40. And Section III explains that even if jurisdiction exists, Sierra Club's attempt to invalidate a decades-old regulation is without merit. *See infra* pp. 40 to 53.

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I. Sierra Club Lacks Standing under Article III of the U.S. Constitution.

Article III of the U.S. Constitution limits the Court's jurisdiction to cases and controversies, and "[t]his limitation requires a plaintiff to show that it has standing to sue[.]" *Teton Historic Aviation Foundation v. U.S. Dept. of Defense,* 785 F.3d 719, 724 (D.C. Cir. 2015). The element of standing lacking here is redressability, defined as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* (quoting *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

Sierra Club links its alleged injury with Energy Answers' current plan to construct and operate a lead-emitting facility. *See* Sierra Club Br. 18 ("Each of the standing declarants has set forth particularized facts demonstrating that the construction of the incinerator affects them personally."). But even if the Court granted the only relief Sierra Club seeks -- vacatur of 40 C.F.R. § 51.165(a)(2)(i) -- it would have no effect on that facility. By its terms, the challenged regulation applies to states and territories regarding the required contents of their SIPs. It does not govern the conduct of Energy Answers or any other source. Sierra Club is therefore mistaken when it assumes that it is the challenged regulation, rather than the Puerto Rico SIP that EPA long ago approved as conforming to that regulation, that

"exempts" the incinerator. Sierra Club Br. 22.[11] Because the challenged regulation sets forth no requirements for Energy Answers itself, vacating it would not redress Sierra Club's alleged injury. *See Delta Const.*, 783 F.3d at 1297 (redressability lacking where "a separate action . . . independently causes the same alleged harm as the challenged action").

The challenged regulation mirrors the framework of the Act. The Nonattainment New Source Review provisions of the Act, 42 U.S.C. §§ 7501-15, enumerate requirements only for SIPs. For example, section 172(c), 42 U.S.C. § 7502(c), begins by stating that "[t]he *plan provisions* . . . required to be submitted under this part shall comply with each of the following: . . ." (Emphasis added.) Likewise, section 173(a)(1)(B), 42 U.S.C. § 7503(a)(1)(B), provides that "[t]he *permit program* required by section [172(c)(5)[12]] shall provide that permits to construct and operate may be issued if . . . ." (Emphasis added.) In turn, section 172(c)(5), 42 U.S.C. § 7502(c)(5), states that "[s]uch *plan provisions* shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area." (Emphasis added.)

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[11] Sierra Club does not (and cannot here) challenge either the Puerto Rico SIP or EPA's approval of the SIP.

[12] This provision actually references section 172(b)(6) from the pre-1990 version of the Act. Under the Act as amended in 1990, the correct cross reference is section 172(c)(5). *Accord* Sierra Club Br. 9 n.7.

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In this regard, Nonattainment New Source Review differs from the Prevention of Significant Deterioration permit program. The latter program itself prohibits the construction or modification of a non-conforming source. *See, e.g., UARG*, 134 S. Ct. at 2435 ("It is unlawful to construct or modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit.") (citing 42 U.S.C. §§ 7475(a)(1), 7479(2)(C)); *Sierra Club v. Jackson*, 648 F.3d 848, 851-52 (D.C. Cir. 2011) (explaining that under the Prevention of Significant Deterioration program, a permit applicant may not rely on a SIP that had not yet been amended to conform with the Act's requirements because 42 U.S.C. § 7475(a) "forbids the construction of such facilities absent a PSD permit meeting the requirements of the Clean Air Act"). No comparable direct regulation of sources exists under the Act's Nonattainment New Source Review program. Instead, as explained above, stringent air quality controls such as "lowest achievable emission rate," 42 U.S.C. § 7503(a)(2), and "offsets," *id.* § 7503(c)(1), are applicable to and enforceable against sources only through SIPs that have been approved by EPA.

Thus, even if Sierra Club prevailed and obtained an order directing EPA to replace the challenged regulation with a regulation requiring SIPs to cover more sources, nothing would change with respect to permits issued before the amendment of the SIP, including the permit that Energy Answers has already received from the Puerto Rico Environmental Quality Board. *See supra* p. 19. Although vacating EPA's regulation could eventually lead to a revision in the Puerto Rico SIP to broaden its

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coverage in the manner preferred by Sierra Club -- i.e., to apply lowest achievable emissions rate, offsets, and other requirements associated with Nonattainment New Source Review permits to emissions of any pollutant, whether major or minor, from a new or modified major stationary source -- any such revision would have only prospective effect. So long as Energy Answers does not, going forward, alter its plans and trigger Nonattainment New Source review anew -- a speculative future event[13] -- the company is entitled to rely on the permit issued by the Puerto Rico Environmental Quality Board and the determination reflected therein, i.e., that Energy Answers' lead emissions do not require a Nonattainment New Source Review permit under the EPA-approved Puerto Rico SIP then in effect. *See General Motors*, 496 U.S. at 540-41 ("[T]he approved SIP is the applicable implementation plan during the time a SIP revision proposal is pending.") (citations omitted).

Accordingly, because even a decision in Sierra Club's favor would not redress its claimed injury, Sierra Club lacks standing.

II. Sierra Club's Petition is Statutorily Time-Barred.

Sierra Club fails to establish jurisdiction not only under Article III but also under the Act. "Section 307(b)(1) of the Clean Air Act sets a 60-day period for challenges to EPA regulations, with a renewed 60-day period available based on the

[13] Speculative future harm does not establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("injury in fact . . . is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.") (citations and quotation marks omitted).

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occurrence of after-arising grounds." *Am. Road & Transp. Builders Ass'n v. EPA,* 705 F.3d 453, 456 (D.C. Cir. 2013). Outside of those 60-day periods, the Court is "powerless" to address the petition. *See Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) ("The filing period in the Clean Air Act 'is jurisdictional in nature'; if the petitioners have failed to comply with it, [the courts] are powerless to address their claim.") (citation omitted). Here, the flaws in Sierra Club's jurisdictional arguments are many.

A. Congress intended that judicial review of regulations promulgated under the Act be sought promptly.

In contrast to Sierra Club's casual treatment of the jurisdictional deadlines set forth in the Act, Congress has made clear -- repeatedly -- the importance it places on quickly resolving challenges to EPA regulations implementing the Act.

As amended in 1970, the Act's judicial review provisions required petitions for review to be brought within 30 days. The purpose of the 30-day limit was "to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970) ("1970 Senate Report"). The 1970 amendments also provided that a petition for review could be brought after the initial review period if "based solely on grounds arising after such 30th day." Act of Dec. 31, 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1708. The legislative history indicates that Congress enacted this provision to account for the possibility that new factual

information would arise suggesting either further regulation is needed or that existing regulations are unnecessary. 1970 Senate Report 41-42.

In 1977, Congress amended this provision to its present form. At that time, Congress extended the review period to 60 days and provided that any petition based "solely" on grounds arising after the initial review period must be filed within 60 days of those grounds arising. 42 U.S.C. § 7607(b)(1). The legislative history emphasized that Congress continued to view this provision as "strictly limit[ing] section 307 challenges to those which are actually filed within that time." H.R. Rep. No. 294, 95 Cong., 1st Sess. 322 (1977). The House Report further explained:

> The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

Id.

In addition to addressing after-arising grounds while strictly limiting the time to file judicial challenges to regulations and other final agency action, Congress addressed the subject in the context of presenting new information to EPA. Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), sets forth an exhaustion requirement, i.e., a rule that only reasonably specific objections noted during the public comment period may be raised on judicial review. But with respect to raising alleged after-arising grounds to EPA, Congress provided an exception to that rule:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or *if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)* and if such objection is of *central relevance* to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded *had the information been available* at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B) (emphasis added). That exception further demonstrates that Congress regarded after-arising grounds as narrow and linked with consequential new information.

Also in 1977, Congress amended the Act to establish another consequence for failing to promptly challenge EPA action. Section 307(b)(2) provides that any issue that could have been raised in a petition for review cannot be used as a defense to a civil or criminal enforcement action. 42 U.S.C. § 7607(b)(2).

B. This Court has repeatedly enforced the Act's narrow window for petitioning for review of regulations.

Although the Act does not expressly define "grounds after arising," this Court construes the phrase far more narrowly than Sierra Club does here. In *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995), the Court rejected a claimant's attempt to challenge the validity of an old regulation promulgated under the Surface Mining Control and Reclamation Act. Addressing that Act's after-arising grounds provision -- which the Court noted is "similar" to section 307(b)(1) of the Clean Air Act -- the Court stressed the importance of giving effect to Congress' "careful balance between the need for administrative finality and the need to provide for subsequent

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review in the event of unexpected difficulties." 70 F.3d at 1350 & 1350 n.2. Moreover, in dismissing the challenge as time-barred, the Court held that "[p]ermitting review of [the] petition based on grounds clearly available within 60 days of the rule's promulgation would thwart Congress' well-laid plan." 70 F.3d at 1350. Because the claimant's argument that the regulation was *ultra vires* or impermissible under *Chevron* was available at the time of promulgation, no after-arising grounds existed.

Similarly, in *Am. Road*, the Court dismissed a belated challenge to an old regulation promulgated under the Clean Air Act. 705 F.3d at 456-58. The Court rejected the petitioner's contention that EPA's recent application of that regulation constituted after-arising grounds, reasoning: "There would be no pressure to challenge regulations within the 60-day period after their promulgation if any petitioner could simply wait to test the substance of those regulations once EPA applies them, for example, in an approval of a state SIP revision -- as [the petitioner] has attempted to do here." 705 F.3d at 458. The Court's reasoning encompasses other examples, such as the application of a regulation to a permit proceeding. Any such application would not provide grounds to "test the substance" of that regulation. *See infra* p. 39 n.18.

This Court's decision in *Coalition* involved the application of the principle, also noted in *Am. Road*, that "the occurrence of an event that ripens a claim constitutes an after-arising ground." 705 F.3d at 457 (citation omitted); *Coalition*, 684 F.3d at 129-30

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(same). In *Coalition*, this Court allowed two industrial organizations to challenge old regulations promulgated under the Act's Prevention of Significant Deterioration program where a new regulation -- the asserted after-arising ground -- had the effect of subjecting those organizations' members, for the first time, to the old regulations' requirements. *See* 684 F.3d at 130. Before the new regulation existed, the Court reasoned, any alleged injury to those organizations' members from the old regulations was speculative and therefore the new regulation ripened the organizations' claim.[14] Here, by contrast, there is no new regulation or other consequential event to ripen any claim (as discussed *infra* pp. 33 to 34).

In a cogent decision issued after *Coalition*, the Tenth Circuit generally defined an after-arising ground as "a sufficient *legal* basis for granting the relief sought." *Utah ex rel. Utah Dep't of Environmental Quality, Div. of Air Quality v. EPA*, 750 F.3d 1182, 1184 (10th Cir. 2014) (quoting *Sanders v. United States*, 373 U.S. 1, 16 (1963)) (emphasis

[14] Another example of claimants establishing jurisdiction to challenge an old regulation in light of an after-arising significant development is *Honeywell Int'l, Inc. v. EPA*, 705 F.3d 470 (D.C. Cir. 2013). There, certain participants in an Act cap-and-trade program sought review of EPA's approval of pollutant transfers after this Court issued a decision, *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), involving that same approval decision. Rejecting EPA's position, *Arkema* held that certain pollutant transfers were "permanent," a term of art under the program. This Court in *Honeywell* concluded that *Arkema* had "changed the legal landscape" as it applied to participants in the cap-and-trade program and effectively altered the terms of EPA's approval, and that the petitioner in *Honeywell* "could not have raised its merits argument until [the Court's] decision in *Arkema*." *Honeywell*, 705 F.3d at 473. In that context, *Arkema* constituted after-arising grounds for participants in the program to challenge EPA's approval.

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added). That understanding squares with congressional intent and this Court's precedent, which disfavor a tardy attack on an old regulation based on nothing more than a contention that the old regulation is *ultra vires*, impermissible under *Chevron*, or a similar argument available at the time of promulgation.

C. Under a correct reading of the Act and the Court's precedent, Sierra Club's petition is time-barred.

Under a faithful reading of the Act, congressional intent, and precedent, Sierra Club may not raise a facial challenge to 40 C.F.R. § 51.165(a)(2)(i) decades after its promulgation based on a statutory construction argument that was available in 1980 and, in fact, is similar to an argument raised by a commenter during the rulemaking process. *See supra* pp. 9-10. Moreover, it is irrelevant under 42 U.S.C. § 7607(b)(1) whether every single one of the petitioning organizations existed at the time of the old regulation's promulgation or whether any of the petitioning organizations has acquired new members since the old regulation's promulgation. Rather, it is the *general* availability of the current argument at the time of the old regulation that matters in determining whether an alleged after-arising ground is cognizable. As in *Nat'l Mining*, "[p]ermitting review of [the] petition based on grounds clearly available within 60 days of the rule's promulgation would thwart Congress' well-laid plan." 70 F.3d at 1350.

Coalition, at bottom, involved *sui generis* after-arising grounds that are not present here. Those petitioners challenged old regulations that, for the first time, had far broader effect due to a new regulation. Indeed, Sierra Club acknowledges that the

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new regulation at issue in *Coalition* (i.e., the after-arising ground there) brought about a "transformation of [the Prevention of Significant Deterioration] program[.]" Sierra Club Br. 43.[15] Here, in contrast to the petitioners in *Coalition*, Sierra Club does not point to any new action by EPA that changed anything about, or had any bearing on, the scope of 40 C.F.R. § 51.165(a)(2)(i). The only new action Sierra Club cites, the Prevention of Significant Deterioration permit, had no impact -- much less a transformative effect -- on the challenged regulation (as discussed further in the section below).

D. Even under a broader reading of the Act and the Court's precedent, Sierra Club's challenge is untimely.

Even under a broader reading of the Act and *Coalition*, Sierra Club's attempt to establish jurisdiction fails. Sierra Club concedes, as it must, that it did not file a petition for review of the challenged regulation promptly after notice of its promulgation appeared in the Federal Register in 1980. *See* Sierra Club Br. 19. But Sierra Club argues that "the grounds for [its] challenge arose on May 19, 2014[,]" when "EPA published the notice of the final permit in the Federal Register, for the construction and operation of an incinerator by Energy Answers under the Prevention of Significant Deterioration program." Sierra Club Br. 19 (citing 79 Fed. Reg. 28,710, 28,712 (May 19, 2014) (JA 120, 122)). *See also, e.g.,* Sierra Club Br. 25

[15] But Sierra Club is incorrect that such transformation discounts the import of *Utility Air Regulatory Group* (the caption of the case when it reached the Supreme Court) with respect to statutory construction and *Chevron*. *See infra* pp. 41-44.

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(Sierra Club's assertion that its "legal challenge became ripe when EPA granted Energy Answers a permit to construct and operate an incinerator"). Sierra Club is wrong.

That alleged after-arising ground, as a matter of law, bears no relation to Sierra Club's merits claim. Sierra Club does not challenge, and seeks no relief whatsoever regarding, Energy Answers' Prevention of Significant Deterioration permit. *See, e.g.,* Sierra Club Br. 25 ("The issue in this case is the validity of an EPA rule . . . ."); *id.* at 60 ("The Court should vacate the rule."). Nor could Sierra Club challenge that permit here; any such challenge can only be heard by the United States Court of Appeals for the First Circuit, which encompasses Puerto Rico. *See supra* 42 U.S.C. § 7607(b)(1) (providing that petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit") (emphasis added).[16]

Moreover, the permit was issued under the Act's Prevention of Significant Deterioration program, whereas the regulation Sierra Club seeks to invalidate governs SIP requirements under the "separate" Nonattainment New Source Review program. Handbook § 4:1. The challenged regulation does not inform any term or condition of

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[16] Sierra Club mischaracterizes EPA's motion to dismiss as having argued that "this is only a local matter that belongs in the Circuit Court of Appeals having jurisdiction over Puerto Rico." Sierra Club Br. 28. That argument applied only to the first (of two) parts of Sierra Club's petition for review, which does, on its face, purport to challenge the Prevention of Significant Deterioration permit. *See supra* p. 19 n.10. Sierra Club has since abandoned any challenge to the permit.

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the Prevention of Significant Deterioration permit, and the permit is not governed by the challenged regulation. Further, the pollutant of concern to Sierra Club here, lead, is not regulated by the Prevention of Significant Deterioration permit because Energy Answers' incinerator is located in a lead nonattainment area. *See supra* pp. 14-19.

Notwithstanding the separate nature of the Nonattainment New Source Review program and the challenged regulation (on the one hand) and the Prevention of Significant Deterioration program and permit (on the other), Sierra Club, armed with declarations from its members, argues that their challenge to the regulation has factually "ripened because the permit creates a 'substantial probability' of injury to them." Sierra Club Br. 21 (quoting *Coalition*, 684 F.3d at 131). But the record shows that any substantial probability of injury to Sierra Club's members from "lead emissions from the incinerator" occurred well before the Prevention of Significant Deterioration permit. Sierra Club Br. 17.[17]

By late 2011, the relevant portion of Arecibo had been designated a lead nonattainment area. *See* 76 Fed. Reg. 72,097 (Nov. 22, 2011) (JA 117). *All* declarants admit that, by that time, they had learned of Energy Answers' plans and permit applications to construct and operate a pollutant-emitting facility. *See* Decl. of Luisa Margarita Águila Nieves at ¶¶ 5-6; Decl. of Rafael Bey Nazario at ¶¶ 5-6; Decl. of

[17] To the extent that Sierra Club alleges injury from pollutants other than lead, those allegations are irrelevant to its claim. Energy Answers' Prevention of Significant Deterioration permit regulates pollutants other than lead, and Sierra Club does not challenge that permit.

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Wilfredo Vélez Hernández at ¶¶ 5-6; Decl. of Jessica Seiglie Quiñones at ¶¶ 5-6; and Decl. of Javier Biaggi Caballero at ¶¶ 6-7.

Further, by at least May 2012, Sierra Club had learned that the facility would emit lead and that such pollutant would *not* be addressed in any Prevention of Significant Deterioration permit. By then, not only had there been a nonattainment area designation impacting the location of Energy Answers' incinerator, but EPA Region 2 had transmitted key information to Sierra Club, including a fact sheet and public notice. *See* EPA Region 2 Letter to Sierra Club de Puerto Rico and enclosed public notice and fact sheet (JA 170-171, 165-167, 176-199); *supra* pp. 16-17. The fact sheet explained, in no uncertain terms, that lead ("Pb") would not be addressed in the Prevention of Significant Deterioration permit. Fact Sheet at 3, 13 n.1, 18 (JA 178, 188, 193). The public notice provided similar information; it listed the pollutants subject to Prevention of Significant Deterioration review, omitted lead from that list, and stated that "[a] separate permit is being issued by the Puerto Rico Environmental Quality Board, to address the other pollutants emitted by this project." Public Notice at 2 (JA 166).

EPA Region 2's public notice also noted the availability of the administrative record. *See* Public Notice at 3 (JA 167). That record included Energy Answers' permit application -- the same application from which Sierra Club cites and quotes in its brief. *See* Sierra Club Br. 3 ("Energy Answers lists potential lead emissions as 0.31 tons/year[.]") (citing Application at 3-4, Table 3-1 (JA 130)). Thus, by May

2012, Sierra Club had access to even more detailed information about projected emissions of lead (and other pollutants) from the incinerator.

That EPA later (i.e., long after May 2012) issued a final Prevention of Significant Deterioration permit is of no moment. As previously explained, the challenged regulation and the permit are independent of one another; with or without the challenged regulation, not a single term or condition of that permit would be different.

Furthermore, Sierra Club confuses after-arising grounds with final agency action. *See* Sierra Club Br. 24 ("If EPA is suggesting that a simple notice of public comment period can trigger the 60-day time period, such a change in the law would increase litigation by forcing petitioners to bring pre-emptive legal actions, just to be safe."). Under the Act, EPA action must be "final" to be reviewable. 42 U.S.C. § 7607(b)(1); *In re: Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) ("We may review final agency rules . . . . But we do not have the authority to review proposed rules.") (citations omitted). But the Act does not provide that only final agency action may constitute an after-arising ground. *See* 42 U.S.C. § 7607(b)(1). After-arising grounds may, but need not, be final agency action.

In addition, after May 2012, nothing new that was pertinent to the challenged regulation surfaced. After that date, Sierra Club or its members raised comments to EPA Region 2 about lead and also argued to the Environmental Appeals Board that the regulation was inconsistent with the Act. *See supra* pp. 17-18. Those comments

and arguments were as irrelevant as they were out of place. Neither EPA Region 2 nor any other regional office has a delegation from the Administrator to revise a regulation of nationwide applicability. 42 U.S.C. § 7601(a)(1). Likewise, the Environmental Appeals Board may exercise only the authority expressly delegated to it by regulation or provide assistance specifically requested by the Administrator. 40 C.F.R. § 1.25(e)(2). No regulation grants the Environmental Appeals Board the authority to promulgate or revise regulations promulgated under the Nonattainment New Source Review program. *See* 57 Fed. Reg. 5,320, 5,320-21 (Feb. 13, 1992) (listing matters the Board was empowered to consider at its inception). Further, "[a]s [the Environmental Appeals Board] ha[s] repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations." *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (2001).[18]

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[18] None of those events matters for purposes of after-arising grounds. *Am. Road* held that while "an agency may reexamine its regulations and thereby initiate a new 60-day period of judicial review," the mere "response to a petitioner's comments cannot provide the sole basis for reopening," 705 F.3d at 457. Under the same reasoning, statements from EPA Region 2 or the Environmental Appeals Board regarding the relationship between the challenged regulation and Energy Answers' facility do not constitute after-arising grounds because they do not alter the scope or effect of that regulation. *See also supra* p. 31.

But even if any of those events could matter for purposes of after-arising grounds, Sierra Club's petition would still be time-barred. It was not filed within 60 days of: (a) EPA Region 2's April 2013 response to comments; (b) EPA Region 2's June 2013 issuance of an initial Prevention of Significant Deterioration permit; or (c) the Environmental Appeals Board's March 2014 decision upholding the initial permit in all relevant respects.

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The bottom line is that the record does not support Sierra Club's assertion that "[t]he problem with the EPA rule in the specific context of the Arecibo nonattainment area did not come to light until *recently*." Sierra Club Br. 25 (emphasis added). The record instead establishes that, by May 2012, Sierra Club was aware that Energy Answers' potential to emit lead would not make it, in the words of the challenged regulation, "major for the pollutant for which the area [encompassing Energy Answers' facility] is designated nonattainment." 40 C.F.R. § 51.165(a)(2)(i). Instead of petitioning this Court in July 2012 -- i.e., within 60 days of when Sierra Club faced any substantial probability of injury from 40 C.F.R. § 51.165(a)(2)(i) -- Sierra Club waited to do so until July 2014. Although this filing date fell within 60 days of the Federal Register notice of the final Prevention of Significant Deterioration permit, it was more than *two years* after pertinent facts and any alleged injury "c[a]me to light" regarding the facility's potential to emit lead.

Thus, even under a broad interpretation of what may plausibly constitute an after-arising ground under the Act and precedent, Sierra Club's petition is time-barred.

III. If the Court Reaches the Merits, the Challenged Regulation is Reasonable and Falls within the Bounds of EPA's Statutory Authority.

The challenged 35-year old regulation reflects EPA's interpretation of the Act in the context of the Nonattainment New Source Review permit program. That longstanding regulation is reasonable and entitled to deference under *Chevron* -- even if Sierra Club properly invokes the Court's jurisdiction to review it. The principal

question is whether EPA acted reasonably and thus "stayed within the bounds of its statutory authority." *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). The challenged regulation falls well within those bounds.

A. The Supreme Court has made clear that the phrase "any air pollutant" must be interpreted in its regulatory context.

As an initial matter, the Supreme Court's recent decision in *UARG* is highly pertinent to the *Chevron* question presented here. There, the Court examined EPA's interpretation of the phrase "any air pollutant" in the context of preconstruction permitting of greenhouse gas emissions under the Prevention of Significant Deterioration program. *See* 42 U.S.C. § 7479(1) (defining, for purposes of that program, "major emitting facility" to include "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of *any air pollutant*") (emphasis added). The challenged regulation here similarly involves EPA's interpretation of the phrase "any air pollutant" in the context of preconstruction permitting of pollutants for which an area is designated nonattainment. *See* 42 U.S.C. § 7602(j) (defining, for purposes of the entire Act, "major stationary source" to include "any stationary . . . source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of *any air pollutant*") (emphasis added).

In *UARG*, the Court acknowledged the very regulation at issue here, 40 C.F.R. § 51.165(a)(2)(i), explaining: "The Act requires a permit for the construction or

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operation in a nonattainment area of a source with the potential to emit 100 tons per year of 'any air pollutant.' [42 U.S.C.] §§ 7502(c)(5), 7602(j). EPA interprets that provision as limited to pollutants *for which the area is designated nonattainment*. 45 Fed. Reg. 52745 (1980) [(JA 56)], promulgating 40 C.F.R. § 51.18(j)(2), as amended, § 51.165(a)(2)." 134 S. Ct. at 2440 (emphasis by the Court). The Court then characterized that regulation as a "longstanding" example of EPA's ordinary practice of "inferr[ing] from statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition." *UARG*, 134 S. Ct. at 2440 & 2442 n.6. Moreover, in light of EPA's ordinary practice as reflected in the challenged regulation (and elsewhere), *UARG* rejected the argument -- very similar to that advanced by Sierra Club here -- that the statutory phrase "any air pollutant" means the same thing each time it appears in the Act.

The specific question presented in *UARG* was whether emissions of greenhouse gases, by themselves, can trigger the need for either a Prevention of Significant Deterioration permit or an operating permit under Title V of the Act. EPA had concluded that they can, an argument that the Court summarized as follows: "Under *Massachusetts* [*v. EPA*, 549 U.S. 497 (2007)], the general, Act-wide definition of 'air pollutant' includes greenhouse gases; the Act requires permits for major emitters of 'any air pollutant'; therefore, the Act requires permits for major emitters of greenhouse gases." *UARG*, 134 S. Ct. at 2439. The Supreme Court rejected that argument as too categorical -- and instead concluded that EPA should have followed

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its ordinary practice of construing "any air pollutant" in a manner appropriate to its specific statutory context. *Id.* at 2439-40.

The Court acknowledged that "[i]n *Massachusetts*, [it] held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it 'embraces all airborne compounds of whatever stripe.'" *UARG*, 134 S. Ct. at 2439 (quoting *Massachusetts*, 549 U.S. at 529). The Court also noted that "Congress's profligate use of 'air pollutant' where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity." *UARG,* 134 S. Ct. at 2441. But the Court held that, consistent with *Massachusetts*, EPA must "use . . . statutory context to infer that certain of the Act's provisions use 'air pollutant' to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program." *UARG*, 134 S. Ct at 2441. The Court found controlling the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citations omitted).

In short, *UARG* establishes that the meaning of "any air pollutant," as that phrase appears within the Clean Air Act, depends upon its regulatory context. Sierra Club, by contrast, urges this Court to hold that the Act requires EPA *not* to consider context. Thus, the premise of Sierra Club's *Chevron* step one argument -- that the Act leaves EPA without authority to apply anything but the broadest construction of that statutory phrase -- is without merit. *See UARG*, 134 S. Ct. at 2439 ("Under *Chevron*,

we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.").

B. The challenged regulation is reasonable and entitled to deference under *Chevron* step two.

EPA's interpretation of sections 172(c)(5) and 302(j) of the Act, 42 U.S.C. §§ 7502(c)(5) and 7602(j), as reflected in the longstanding challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), is reasonable and must be upheld under *Chevron* step two. The Act-wide definition of "major stationary source" includes "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[.]" 42 U.S.C. § 7602(j). Under *UARG*, that definition must be given a meaning appropriate to the particular regulatory context in which it is used. *See supra* pp. 41-43. The context of the challenged regulation is the Nonattainment New Source Review program and, more specifically, its requirement that SIPs "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area[.]" 42 U.S.C. § 7502(c)(5). *See also* 42 U.S.C. § 7503 (setting forth the requirements for Nonattainment New Source Review permit programs). EPA gave effect to that context in interpreting the scope of the Nonattainment New Source Review permit program, i.e., that it applies to "any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment." 40 C.F.R. § 51.165(a)(2)(i).

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1. EPA reasonably construed Congress' intent.

In promulgating the challenged regulation, EPA construed and sought to effectuate Congress' intent as gleaned from: "the [New Source Review] requirements of section 173," 42 U.S.C. § 7503 (1982); the "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26), which Congress endorsed and codified, 91 Stat. 745; and the so-called "construction moratorium," 42 U.S.C. §§ 7410(a)(2)(I), 7502(a)(1) (1982). 44 Fed. Reg. at 51,940-41 (JA 47-48). In doing so, EPA "stayed within the bounds of its statutory authority." *Arlington*, 133 S. Ct. at 1868.

In the late 1970s, many areas of the country were not attaining national ambient air quality standards, and Congress took sweeping measures to halt pollution increases until states and territories assumed their primary responsibility for controlling air pollution by adopting implementation plans to provide for attainment. *See Chevron,* 467 U.S. at 848-49; *New England Legal Foundation v. Costle*, 475 F. Supp. 425, 428 (D. Conn. 1979). Those measures included the "construction moratorium," which provided that "no *major stationary source* shall be constructed or modified in any nonattainment area . . . if the emissions from *such facility* will cause or contribute to concentrations of *any pollutant for which a national ambient air quality standard is exceeded in such area,*" unless states and territories produce compliant Nonattainment New Source Review permit programs "*as of the time of application for a permit for such construction or modification*[.]" 42 U.S.C. § 7410(a)(2)(I) (1982) (emphasis added). As is evident, Congress associated the construction moratorium with new or modified major

stationary sources, their permitting, and the particular pollutant or pollutants whose standards were not being met in their location (i.e., the basis for designation of the area as nonattainment).

The plain text of the construction moratorium links the phase "major stationary source" (referenced at the beginning of the provision) with the phrase "concentrations of any pollutant for which a national ambient air quality standard is exceeded" (referenced toward the end of the provision) with a connecting clause: "if the emissions from *such facility* will . . . contribute to." 42 U.S.C. § 7410(a)(2)(I) (1982) (emphasis added). By using the phrase "such facility," Congress intended to qualify "major stationary source" for purposes of the construction moratorium.

In addition, the plain text shows that Congress associated the construction moratorium with the Nonattainment New Source Review permit program. The construction moratorium expressly states, at its ending, that the ban applies "unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas)[.]" 42 U.S.C. § 7410(a)(2)(I) (1982). Thus, EPA reasonably interpreted the Act to require Nonattainment New Source Review permit programs to carry the same "major

stationary source" coverage and the same focus on pollutants for which the area is nonattainment as EPA reasonably interpreted the construction moratorium to carry.[19]

The challenged regulation is also supported by EPA's "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26); *supra* pp. 8-9, a key action that aligned with Congress' intent that "major" refer to a pollutant for which a national ambient air quality standard is exceeded. In that action, taken just before the 1977 amendments to the Act -- which codified the offset ruling and included the construction moratorium -- EPA stated that air quality analyses and action were required "if the [new] source will cause or exacerbate a violation of [national ambient air quality standards]" and, moreover, "only for those pollutants causing the proposed source to be defined as a 'major' source[.]" 41 Fed. Reg. at 55,528 & n.2 (JA 28). Given the widespread air pollution at the time, EPA explained that it would not be effective to focus limited resources on "smaller air pollution sources [that] may individually have an insignificant impact on air quality." *Id.* at 55,525 (JA 27).

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[19] Sierra Club asserts that the construction moratorium "clear[ly]" carried a different meaning; in Sierra Club's view it applied to "any sources that contributed to concentrations of nonattainment pollutants[.]" Sierra Club Br. 57. But such reading gives no effect to the construction moratorium's qualifying clause "emissions from such facility" or to its textual association with the Nonattainment New Source Review permit program. Further, Sierra Club's contention is contrary to principles of *Chevron* deference, which require courts to "presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *UARG*, 134 S. Ct. at 2439. The construction moratorium is, at least, ambiguous and amenable to EPA's construction.

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Other provisions of the Nonattainment New Source Review program, both then and now, share a common thread: the Act's programs for nonattainment areas focus on reducing emissions of the pollutant or pollutants for which the area is designated nonattainment. In the 1977 Amendments, Congress specified that SIPs, with respect to nonattainment areas, were to "require permits for the construction and operation of new or modified major stationary sources[.]" 42 U.S.C. § 7502(b)(6) (1982). Congress defined a nonattainment area "for any air pollutant" as "an area which is shown by monitored data or which is calculated by air quality modeling . . . to exceed any national ambient air quality standard for such pollutant[.]" 42 U.S.C. § 7501(2) (1982). The construction moratorium used similar language when referring to nonattainment areas as places where "a national ambient air quality standard is exceeded." 42 U.S.C. § 7410(a)(2)(I) (1982).

Current section 172(c)(3), similar to former section 172(b), requires states and territories to provide an inventory of emissions from "sources of the *relevant* pollutant or pollutants" in nonattainment areas. 42 U.S.C. § 7502(c)(3) (emphasis added); *see also* 42 U.S.C. § 7502(b)(4) (1982) (requiring "plan provisions" to include an inventory of "sources . . . of each such pollutant for each such area"). In addition, section 172(c)(4) of the Act requires states and territories to "quantify the emissions, if any, of any *such* pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) [], from the construction and operation of major new or modified stationary sources in each such area." 42 U.S.C. § 7502(c)(4).

Section 173(a)(1)(B), 42 U.S.C. § 7503(a)(1)(B), in turn, requires states and territories to have a Nonattainment New Source Review permit program that provides that, if a new or modified major stationary source proposes to locate in an economic development zone within a nonattainment area, any permit must assure that "emissions of *such* pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for *such* pollutant for such area[.]" (Emphasis added.) Similarly, former section 172(b)(5), required the quantification of emissions "of any *such* pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area." 42 U.S.C. § 7502(b)(5) (1982) (emphasis added).

The challenged regulation reflects this common thread by focusing on the pollutant for which the area is designated nonattainment and is thus tethered to the Act.

2. EPA reasonably explained its interpretation.

EPA offered a reasonable explanation in support of the challenged regulation. As explained *supra* pp. 7-9, EPA's September 1979 proposal specifically invoked the Nonattainment New Source Review program, the offset ruling, and the construction moratorium as pertinent to interpreting the Act-wide definition of "major stationary source" in nonattainment areas. *See* 44 Fed. Reg. 51,940-41 (JA 47-48). Although commenters attempted to convince EPA that the proposal either regulated too much

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or too little, EPA finalized its proposal in May 1980. *See supra* pp. 9-10 (discussing comments at JA 1-18). "Simplicity" was not the rationale for EPA's interpretation, as Sierra Club asserts (Sierra Club Br. 52). In finalizing its proposal in May 1980, EPA explained that "[a] source may emit many different pollutants" and that "an area may be designated attainment for certain criteria pollutants and nonattainment for other criteria pollutants." 45 Fed. Reg. at 31,309 n.3 (JA 21).[20]

EPA elaborated on its reasoning shortly thereafter, in August 1980. *See* 45 Fed. Reg. at 52,711 (JA 53). EPA explained that the construction moratorium is unique to the Nonattainment New Source Review provisions of the Act, and that no similar statutory text could be found in the Prevention of Significant Deterioration provisions of the Act. *Id.* (JA 53). EPA emphasized that the Prevention of Significant Deterioration program specifically provides for broader pollutant applicability. "Section 165(a)," EPA explained, "subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant[.]" 45 Fed. Reg. at 52,711 (JA 53).[21]

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[20] The only reference to "simplicity" EPA made regarded a shorthand phrase that EPA had used. *See id.*; *supra* p. 11.

[21] Contrary to Sierra Club's contention, EPA's rationale did not rely on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), which resolved challenges to regulations promulgated under the Act's Prevention of Significant Deterioration program. And nothing in that decision supports expanding the Nonattainment New Source Review program in the manner urged by Sierra Club. *See, e.g., id.* at 368 (rejecting EPA's prior interpretation of PSD as applying beyond the borders of attainment or unclassifiable areas to reach certain sources in nonattainment areas); 40

Cont.

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That distinction was as correct then as it is today. Section 165(a)(4) of the Act provides that "[n]o major emitting facility . . . may be constructed in any area to which this part [i.e., part C, the Prevention of Significant Deterioration program] applies unless . . . the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). *See also* 42 U.S.C. § 7475(a)(4) (1982) (same). No similar scheme exists within the Nonattainment New Source Review provisions of the Act. The Prevention of Significant Deterioration requirement for best available control technology applies "in any area to which this part [PSD] applies," 42 U.S.C. § 7475(a), but the requirement for lowest achievable emissions rate applies only in "an area which is designated 'nonattainment' with respect to that pollutant." *Id.* § 7501(2). Further, a covered source in an attainment or unclassifiable area must have the best available control technology for any "pollutant subject to regulation under this chapter," 42 U.S.C. § 7475(a), whereas the Nonattainment New Source Review provisions of the Act provide that an EPA-approved SIP "shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area." *Id.* § 7502(c)(5). *See also id.*

C.F.R. § 52.21(i)(2) (EPA's current interpretation of PSD as applying to attainment or unclassifiable areas).

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§ 7502(c)(6) (requiring additional control measures as necessary to provide for "attainment of such standard in such area").

Moreover, EPA addressed the suggestion of under-regulation of minor sources in nonattainment areas. Specifically, EPA noted: "sources emitting the nonattainment pollutants in minor amounts are subject to the general [New Source Review] contained in SIPs, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP." 45 Fed. Reg. at 52,713 (JA 55). In other words, EPA's interpretation, embodied at 40 C.F.R. § 51.165(a)(2)(i), implements only "sections 172(c)(5) and 173 of the Act," 42 U.S.C. §§ 7502(c)(5), 7503, which, in turn, reference the "permit requirement" of the Nonattainment New Source Review program.

To alleviate pollution, states and territories may well have to propose and seek EPA's approval to control emissions from minor sources as part of their obligation to make "reasonable further progress" toward attainment. 42 U.S.C. § 7502(c)(2); *see also id.* at § 7501(1) (defining "reasonable further progress" as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date"); *id.* at § 7503(a)(1)(A)(addressing reductions in allowable emissions "from new or modified sources which are not major emitting facilities" by allowing their use to meet offset requirements). Indeed, here, following the designation of an area within Arecibo as

nonattainment for lead, 76 Fed. Reg. 72,097 (Nov. 22, 2011) (JA 117), Puerto Rico has proposed, for EPA Region 2's review and approval, extra-permit measures targeted at the real cause of the nonattainment problem: the Battery Recycling Facility. *See* EPA Region 2 Letter of Apr. 24, 2015 to Petitioner Madres de Negro de Arecibo (JA 359); *supra* pp. 13-14.

Accordingly, the challenged regulation is supported by the Act and reasonably explained. As such, it is valid and permissible under *Chevron* step two.

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CONCLUSION

The motion to dismiss should be granted and the petition for review should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,510 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/Andrew J. Doyle

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I electronically filed the foregoing brief and statutory and regulatory addendum with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

In addition, on the same date, pursuant to D.C. Circuit Rule 31, two copies of the foregoing brief and statutory and regulatory addendum were served via first class U.S. mail, postage prepaid, on each of the following counsel of record for Petitioners and Intervenor, respectively:

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STATUTORY AND REGULATORY ADDENDUM

(separately filed and bound due to its length)

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