

ORAL ARGUMENT REQUESTED, NOT YET SCHEDULED

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

No. 14-1138

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 Respondent.

Petition for Review of a Final Rule of the
United States Environmental Protection Agency

OPENING BRIEF OF PETITIONERS

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**PETITIONERS' CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

In accordance with Circuit Rule 28(a)(1), the Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo (collectively, "Petitioners") hereby certify as follows:

(A) Parties and Amici

Petitioners:

Sierra Club de Puerto Rico
Ciudadanos en Defensa del Ambiente
Madres de Negro de Arecibo
Comité Basura Cero Arecibo

Respondents:

United States Environmental Protection Agency
Gina McCarthy, Administrator of the U.S. Environmental Protection Agency

Intervenors:

Energy Answers Arecibo, LLC

Amici:

none

(B) Ruling Under Review

The present case seeks review of the nationally applicable final rule promulgated by the United States Environmental Protection Agency ("EPA") titled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, published at 45 Fed. Reg. 31,307,

31,312 (May 13, 1980), JA19, 23. This rule is now codified at 40 C.F.R.

§51.165(a)(2)(i), JA24-25. With respect to the decision of the Environmental Appeals Board dated March 25, 2014, this appeal is addressed to its reasoning that Nonattainment New Source Review does not apply to this incinerator, based on EPA's rule. Board Opinion 22–28, JA265-271.

(C) Related Cases

Petitioners appealed the grant of a permit to construct to Energy Answers Arecibo, LLC (“Energy Answers”) under the Prevention of Significant Deterioration program in *In re: Energy Answers Arecibo, LLC (Arecibo Puerto Rico Renewable Energy Project)*, Prevention of Significant Deterioration Appeal Nos. 13-05–13-09 (Environmental Appeals Board, U.S. Environmental Protection Agency). The Board made a decision in favor of Energy Answers.

Petitioners are not aware of any other related cases pending before this court or any other court.

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, D.C. Circuit Rule 26.1, and the Clerk's Order of July 21, 2014, Petitioners make the following disclosures.

Sierra Club de Puerto Rico. Sierra Club de Puerto Rico is a chapter of Sierra Club, a national nonprofit corporation organized and existing under the laws of the State of California that is dedicated to the protection and enjoyment of the environment. Sierra Club has no parent corporations and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Ciudadanos en Defensa del Ambiente. Ciudadanos en Defensa del Ambiente, also known as Ciudadanos en Defensa del Ambiente, Inc., is a nonprofit organization incorporated in the Department of State of the Commonwealth of Puerto Rico. Since its founding in 1993, it has been dedicated to the protection of the environment and natural resources and the right of communities to a healthy environment in Puerto Rico, particularly in the region of Arecibo. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest in it.

Madres de Negro de Arecibo. Madres de Negro de Arecibo is an association of Arecibo residents dedicated to the protection and enjoyment of the environment and the health in Arecibo, through education and opposition to the incineration of solid wastes being proposed by Energy Answers Arecibo, LLC. No

publicly held company has a 10% or greater ownership interest in it. No members of the association have issued shares or debt securities to the public.

Comité Basura Cero Arecibo. Comité Basura Cero Arecibo is a chapter of Basura Cero Puerto Rico, Inc., a non-profit corporation organized and existing under the laws of Puerto Rico, and dedicated to the protection of the environment and health through the promotion of the goal of zero wastes and the opposition to the incineration and disposal of wastes. Basura Cero Puerto Rico, Inc. has no parent corporations, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Acronym/Abbreviation	English
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
Pb	lead
SIP	State Implementation Plan

STATEMENT OF JURISDICTION

The petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency (“EPA”) entitled *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), JA19, 23.

This rule is now codified at 40 C.F.R. §51.165(a)(2)(i). The Court has jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1).

EPA has made a motion to dismiss, arguing that this legal challenge is not ripe or timely. We address EPA’s argument in Point II of our Argument below, pages 19–25, 26–28.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in a statutory addendum to this brief, separately bound.

ISSUES FOR REVIEW

1. Under its final rule at 45 Fed. Reg. 31,307 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i), EPA limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act to a new major stationary source “that is major for the pollutant for which the area is designated nonattainment.” Is EPA’s rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law? 42 U.S.C. §7607(d)(9)(A).

2. Is EPA's rule invalid under Step One of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?
3. Is EPA's rule invalid under Step Two of *Chevron*?

BACKGROUND

I. Procedural History

A. Designation of the Lead Nonattainment Area in Arecibo, Puerto Rico.

In 2011, EPA designated a part of the municipality of Arecibo as nonattainment for lead. 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011), JA117, 119; 40 C.F.R. §81.355.² This designation applies to the “[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility.” *Id.* This means that this part of Arecibo is not in attainment with the national ambient air quality standards for lead. *See* 42 U.S.C. §7407(d)(1)(A).

B. Incinerator's Potential to Emit for Lead and Lack of Viable Offsets.

Energy Answers Arecibo, LLC (“Energy Answers”) seeks to construct an incinerator in this nonattainment area. EPA Fact Sheet, Prevention of Significant Deterioration Draft Permit 3, JA178; Prevention of Significant Deterioration Air Quality Modeling Analysis Amendment 2 (Feb. 2012), JA164. The incinerator would release lead emissions into the air. Prevention of Significant Deterioration

² The island of Puerto Rico is one air quality control region. 40 C.F.R. §81.77.

Permit Application, Section 5.2.10, 5-37 (“Lead is present in refuse and is released as fumes and fine particulate matter during combustion”), JA156. It is Petitioners’ position that Energy Answers may not construct and operate the proposed incinerator because it is unable to obtain the offsets of lead emissions required under the Nonattainment New Source Review Program. *See* 42 U.S.C. §7503(a)(1)(A), (c). This is because the incinerator would release more lead emissions than the battery recycling facility that caused the lead nonattainment problem.

Assuming operation for every hour of the year (8,760 hours), Energy Answers lists potential lead emissions as 0.31 tons/year from two boilers each having potential emissions of 0.153 tons/year. Prevention of Significant Deterioration Permit Application 3-4, Table 3-1, JA130. This is equal to 620 pounds per year.³ The incinerator will actually operate at 95% availability, or 8,322 hours per year. *Id.*, Section 3.1.1, 3-1, JA127. In addition, each boiler will operate between a range of emissions rates for lead—a minimum rate of 0.028 pounds/hr and a maximum rate of 0.038 pounds/hr. *Id.*, Appendix A-Table 2, JA157. Therefore, minimum actual emissions from the combined boilers will be 466 pounds per year,⁴ and maximum actual emissions from the combined boilers

³ 0.31 tons/year x 2,000 pounds/ton = 620 pounds/year.

⁴ 2 boilers x 8,322 hour/year x 0.028 pounds/hour = 466 pounds/year.

will be 632 pounds per year.⁵ These potential emissions are greater than the actual emissions of lead from the battery recycling facility for each of the years 2007–2013. EPA Envirofacts Report (July 4, 2013), JA222-226; EPA Envirofacts Report (Sept. 22, 2014), JA354-358. There are a limited number of sources contributing to the lead nonattainment problem, the major one being the battery recycling facility. Letter from EPA Region 2 to Governor of Puerto Rico (June 14, 2011), Technical Support Document 4, Table 3, JA217 (identifying two sources of lead emissions: the battery recycling facility and the Puerto Rico Electric Power Authority).

C. Incinerator’s Potential to Emit for Attainment Pollutants.

Because it is capable of charging more than 50 tons of waste per day, the incinerator is a specified source and is therefore subject to the lower 100 tons/year threshold for review under the Prevention of Significant Deterioration program. Final Permit 22, JA347 (limiting fuel consumption rate to 2,106 tons per day). Under the final permit, the incinerator has allowable emissions greater than the 100 tons/year threshold for five air pollutants. Final Permit 7, JA346 (listing annual emissions limitations of 357 tons/year for carbon monoxide, 352 tons/year for nitrogen oxides, 260 tons/year for sulfur dioxide, 124 tons/year for hydrogen

⁵ 2 boilers x 8,322 hour/year x 0.038 pounds/hour = 632 pounds/year.

chloride, and 104 tons/year for coarse particulates). Therefore, these potential emissions make it a “major emitting facility” under the Prevention of Significant Deterioration program. Data submitted by Energy Answers in its permit application support the conclusion that it is a “major emitting facility” for these pollutants. Prevention of Significant Deterioration Permit Application 3-4, Table 3-1, JA130.

D. Permit Application and EPA’s Response to Comments (Prevention of Significant Deterioration program).

EPA is the permitting authority for the Prevention of Significant Deterioration program in Puerto Rico. 40 C.F.R. §52.2729 (state provisions not approvable). In approving Energy Answers’ application, EPA asserted that the incinerator is not subject to Nonattainment New Source Review, based on its rule limiting the pollutants whose potential to emit may trigger this program, to only nonattainment pollutants. EPA Response to Comments 99 (¶5), 107–08 (comment 2), JA207, 208-209.⁶

⁶ EPA also concluded that the incinerator is not subject to Nonattainment New Source Review because its projected lead emissions of 0.31 tons/year are less than a Significant Emission Rate of 0.6 tons/year. *See* EPA Response to Comments 107–08, comment 2, JA208-209. But if the Court grants Petitioners the relief requested and vacates EPA’s rule, the facility will be subject to Nonattainment New Source Review by virtue of its potential to emit for at least five other air pollutants—carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride, and coarse particulates. Therefore, any Significant Emission Rate for lead would

E. Permit and EPA's Final Agency Action (Prevention of Significant Deterioration program).

Following a public comment period, EPA granted a permit to Energy Answers. Petitioners filed a Petition for Review with the Environmental Appeals Board, which included arguments why EPA's rule is unlawful. Petition for Review to Environmental Appeals Board 21–33 (July 22, 2013), JA264-276. On March 25, 2014, the Environmental Appeals Board denied the petition for review and rejected those arguments. Board Opinion 22–28, JA265-271. On May 19, 2014, EPA published notice of its final agency action granting a final permit to Energy Answers. 79 Fed. Reg. 28,710, 28,712 (May 19, 2014), JA120, 122.

F. Petitioners' Legal Challenge to EPA's Rule.

Petitioners filed a petition for review on July 17, 2014, within 60 days of the publication of the notice in the Federal Register. They assert that EPA's rule at 45 Fed. Reg. 31,307, 31,312, currently codified at 40 C.F.R. §51.165(a)(2)(i), is invalid under the two-step test of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

not have any effect on the applicability of Nonattainment New Source Review to the incinerator.

II. Rulemaking History

A. Pre-1977 EPA Rulemakings.

Prior to the 1977 Clean Air Act Amendments, there was no statutory new source review program. But questions arose as to whether EPA would restrict the construction of new sources in nonattainment areas. In response, EPA issued an Interpretative Ruling establishing major source thresholds that would trigger certain restrictions. 41 Fed. Reg. 55,524 (Dec. 21, 1976), JA26. EPA set major source thresholds of 100 tons/year for certain pollutants except for carbon monoxide, set at 1,000 tons/year. *Id.* at 55,525, 55,528, column 1, JA27, 28. On the same date, EPA also proposed to cut the thresholds in half. 41 Fed. Reg. 55,558, 55,559, column 2 (Dec. 21, 1976), JA29-30. But Congress passed the 1977 amendments, which overshadowed these regulatory efforts.

B. 1977 Clean Air Act Amendments.

The 1977 Clean Air Act Amendments created a federal permitting program for new or modified stationary sources constructed after August 7, 1977. There are two parts to this program. The first is the Prevention of Significant Deterioration program, located at Sections 160–169B of the Clean Air Act. Pub. L. 95-95, 91 Stat. 685, 731–42; 42 U.S.C. §§7470–7492. The second is the Nonattainment New Source Review program, located at Sections 171–179B of the Clean Air Act. Pub. L. 95-95, 91 Stat. 685, 745–51; 42 U.S.C. §§7501–7509a.

To determine applicability, Congress provided a new statute-wide, uniform general definition of “major stationary source” and “major emitting facility.” Pub. L. 95-95, 91 Stat. 685, 769–70. This is the same statutory language that exists today in Section 302(j):

(j) Except as otherwise expressly provided, the terms ***“major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant*** (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

42 U.S.C. §7602(j) (emphasis added). This threshold applies to all facilities, as there is no distinction between specified and unspecified sources. *See id.* “Major stationary source” and “major emitting facility” are defined synonymously. *See id.*

The Prevention of Significant Deterioration program under Section 165(a)(1) requires a permit for the construction of a new source in an air quality control region that is in attainment with any of the national ambient air quality standards. 42 U.S.C. §7475(a)(1). The national ambient air quality standards are uniform, national standards that apply to the six criteria pollutants, which include coarse and fine particulates (collectively, “particulates”), ozone, nitrogen oxides, sulfur dioxide, lead, and carbon monoxide. 40 C.F.R. §§50.1–50.18.

For the Prevention of Significant Deterioration program, Congress deviated from the general definition in Section 302(j) and provided a specific definition of

“major emitting facility.” In Section 169(1), Congress defined a “major emitting facility” as a specified facility that emits or has the potential to emit 100 tons/year of any air pollutant, or any other source with a potential to emit 250 tons/year of any air pollutant. Pub. L. 95-95, 91 Stat. 685, 740–41; 42 U.S.C. §7479(1).

The Nonattainment New Source Review program under Sections 172 and 173 requires a permit for the construction of a new “major stationary source” in an air quality control region that is in nonattainment with any national ambient air quality standard. 42 U.S.C. §§7502(c)(5) (“Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title”), 7503(a) (“The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if”).⁷

In contrast to the Prevention of Significant Deterioration program, Congress did not create a special definition of “major emitting facility” for Nonattainment New Source Review. Rather, it followed the general definition of “major stationary source” in Section 302. Pub. L. 95-95, 91 Stat. 685, 747 (requiring “permits for the construction and operation of new or modified stationary sources

⁷ The reference to “Section 7502(b)(6)” in Section 7503(a) should read “Section 7502(b)(5).” Current Section 7502(b)(5) was originally located at Section 7502(b)(6). *See* Pub. L. 95-95, 91 Stat. 685, 747–48. In the 1990 amendments, Congress moved it to Section 7502(b)(5) but failed to amend the reference in Section 7503(a). *See* Pub. L. 101-549, 104 Stat. 2399, 2414–15 (Nov. 15, 1990).

in accordance with section 173 . . .”), 748 (imposing permit requirements for a “major stationary source”); 42 U.S.C. §§7502(c)(5), 7503(a), (c).

The legislative history reflects this dual approach. Four days before the passage of the 1977 Amendments, the House Report summarized that “preconstruction permits are required by the act for all new or modified major stationary sources, whether locating in significant deterioration or nonattainment areas.” H.R. Rep. No. 95-564 (1977) (Conference Report), 1977 U.S.C.C.A.N. 1502, 1508, JA348, 350. While Congress generally defined “major stationary source” and “major emitting facility” synonymously, it modified the definition of “major emitting facility” for the Prevention of Significant Deterioration program:

Defines major stationary source and major emitting facility as defined in the Senate bill. *For the purposes of prevention of significant deterioration, a modification of this term is used.* That modification appears in the part on prevention of significant deterioration.

Id. at 1553 (emphasis added).

C. **Post-1977 EPA Rulemakings.**

Following the 1977 amendments, EPA acknowledged that the new statute-wide definition of Section 302(j) determines a “major stationary source” for triggering Nonattainment New Source Review. 43 Fed. Reg. 21,673, 21,675, column 3 (May 19, 1978) (Notice of Policy Memorandum acknowledging “requirement that permits be issued for the construction and operation of new or

modified major sources in accordance with Section 173 . . .”), JA31, 32. In an Emission Offset Interpretative Ruling, EPA revised the 1976 Interpretative Ruling to conform to this new statutory definition:

Section 129(a) of the 1977 Amendments requires that the offset requirements be applicable to all major stationary sources (including Federal facilities) *as defined in Section 302 of the Act* (i.e. sources with potential emissions of 100 tons or more per year).

44 Fed. Reg. 3,274, 3,276, column 1 (Jan. 16, 1979) (emphasis added), JA39, 40. EPA continued to follow the statutory definition of “major stationary source” in subsequent rulemakings. General Preamble for Proposed Rulemaking, 44 Fed. Reg. 20,372, 20,375, column 1 (Apr. 4, 1979) (“Requirements for All Part D SIPs . . . Require preconstruction review permits for new major sources and major modifications of existing sources, to be issued in accordance with section 173 of the Act”), JA41, 42.

D. EPA’s Changing Interpretation.

But in a series of steps, EPA moved toward limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants only. *See* Interpretive Rule, 44 Fed. Reg. 38,471 (July 2, 1979), JA43. The first step was a rule providing that restrictions on “major stationary source[s]” located in nonattainment areas apply only to facilities emitting nonattainment pollutants:

After June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as designated in 40 CFR Part 81, Subpart C) (“nonattainment area”) to which any state implementation plan applies, ***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, as of the time of application for a permit for such construction, such plan meets the requirements of part D, title I, of the Clean Air Act, as amended (42 USC 7501 *et seq.*) (“Part D”).

Id. at 38,473, column 2 (emphasis added), JA44. Under that rule, a “major stationary source” emitting a nonattainment pollutant could not be constructed in a nonattainment area unless it had a permit under the Nonattainment New Source Review program. *See id.* at 38,473, column 3 (“The restrictions in paragraphs (a) and (b) apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant for which the nonattainment area was designated as nonattainment”), JA44.

EPA went a step further in the preamble. It said the restriction applied “only to major sources of the pollutant for which the area was designated as nonattainment of Part D.” *Id.* at 38,473, column 1, JA44. EPA repeated this new interpretation several months later in a preamble to a proposed rule for the Prevention of Significant Deterioration program. 44 Fed. Reg. 51,924, 51,941, column 1 (Sept. 5, 1979) (“Nonattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts”), JA45, 48.

E. **Final Rule, 45 Fed. Reg. 31,307 (May 13, 1980).**

Following the Court's decisions in *Alabama Power Company v. Costle*, 606 F.2d 1068 (D.C. Cir. 1979) ("*Alabama Power I*") and *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) ("*Alabama Power II*"), EPA published its final rule limiting pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), JA19, 23. In its original form, it read as follows:

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 as nonattainment for any national ambient air quality standard under 40 CFR 81.300 et seq. ***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, if the stationary source or modification would locate anywhere in the designated nonattainment area.*** A major stationary source or major modification that is major for volatile organic compounds is also major for ozone.

Id. at 31,312 (emphasis added), JA23. In the preamble, EPA paraphrased the rule as follows:

The Clean Air Act generally requires review of each new major stationary source or major modification. Section 110(a)(2)(D). In particular, ***all such sources and modifications*** planning to locate ***in areas designated nonattainment for a pollutant for which the source or modification would be major*** [fn 3] ***must receive a permit*** to assure that they will not interfere with efforts to attain and maintain national standards and that they utilize suitable emissions control technology.

Id. at 31,308–09, JA20-21. Having set forth this interpretation, EPA amended its Emissions Offset Interpretive Ruling to make it consistent with this interpretation.

Id. at 31,311, column 1, JA22.

F. EPA’s Divergent Interpretations.

By 1980, EPA had divergent rules for triggering Prevention of Significant Deterioration review and Nonattainment New Source Review. Final Rules, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980), JA51, 53. To be subject to the former program, the “major emitting facility” determination was based on the potential to emit for any air pollutant. *Id.*, column 1. But to be subject to the latter program, the “major stationary source” determination was based only on the potential to emit for a nonattainment pollutant. *Id.*, columns 2–3.

G. Relocation to Current 40 C.F.R. §51.165(a)(2)(i).

In a subsequent proposed rule, EPA stated that its divergent approach was justified by the decision of the Court in *Alabama Power II*:

... on December 14, 1979, the United States Court of Appeals for the District of Columbia Circuit issued its final opinion in *Alabama Power Co. v. Costle*, 13 ERC 1993, and ***held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C [Prevention of Significant Deterioration] review should not apply to those pollutants.***

46 Fed. Reg. 9,124, 9,125 (Jan. 28, 1981) (emphasis added), JA57, 58. EPA subsequently proposed to relocate its rule as part of a comprehensive effort to consolidate its regulations. 48 Fed. Reg. 46,152, 46,166–68 (Oct. 11, 1983), JA59, 60-62. Ultimately, EPA relocated its rule to 40 C.F.R. §51.165(a)(2)(i), where it is located today. Final Rule, 51 Fed. Reg. 40,656, 40,669–72 (Nov. 7, 1986), JA63, 64-67; Final Rule, 67 Fed. Reg. 80,186, 80,245–48 (Dec. 31, 2002), JA84, 87-90.

III. Rule Under Review

EPA’s rule creates a distinction between a major source for the Prevention of Significant Deterioration program and a major source for the Nonattainment New Source Review program. The former program applies to a facility that is a “major stationary source,” which is one that emits or has the potential to emit 100 tons/year or more of any air pollutant. 40 C.F.R. §52.21(a)(2) (“[t]he requirements of this section apply to the construction of any new major stationary source”); 40 C.F.R. §52.21(b)(1)(i) (defining a “major stationary source” as a specified facility which “emits, or has the potential to emit, 100 [tons/year] or more of any regulated [New Source Review] pollutant”).⁸ But for the latter program, EPA only considers whether a facility is a “major stationary source” “*for the particular pollutant for*

⁸ Although the statute technically creates a Prevention of Significant Deterioration program for a “major emitting facility” and a Nonattainment New Source Review program for a “major stationary source,” these two terms are defined synonymously in the statute. 42 U.S.C. §7602(j). Accordingly, EPA uses the term “major stationary source” in its regulations for both programs.

which the region is in nonattainment.” 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i) (emphasis added), JA19, 23.

Petitioners challenge this rule.

SUMMARY OF ARGUMENT

Energy Answers plans to construct a solid waste incinerator in a lead nonattainment area in Arecibo, Puerto Rico. Members of petitioning organizations live in the community and are opposed to this plan because of its environmental impacts. According to Energy Answers’ documents, the incinerator would release more emissions of lead than the battery recycling facility that caused the lead nonattainment problem in the first place. Allowing the incinerator to be constructed would worsen air quality in this lead nonattainment area.

EPA granted Energy Answers a permit to construct an incinerator under the Prevention of Significant Deterioration program, applicable to attainment areas (Arecibo is in attainment with some of the national ambient air quality standards). In doing so, EPA said the incinerator is not subject to Nonattainment New Source Review, a parallel but more stringent program for addressing air pollution in nonattainment areas. If Nonattainment New Source Review were to apply, Energy Answers would have to obtain offsets against its new lead emissions. Given the limited number of sources emitting lead in this area, and because the incinerator would generate more lead emissions than the battery recycling facility causing the

nonattainment problem, it is the position of Petitioners that Energy Answers could not obtain enough offsets. In other words, the incinerator could not be permitted if it were subject to Nonattainment New Source Review.

EPA concluded that Nonattainment New Source Review does not apply, based on its rule limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. EPA originally promulgated this rule at 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), and it is now codified at 40 C.F.R. §51.165(a)(2)(i). Petitioners are challenging this rule in this appeal. The Court should vacate this final rule because it violates the Clean Air Act.

Although EPA promulgated its rule 35 years ago, EPA's grant of a permit to Energy Answers makes this challenge to EPA's rule ripe for review. Petitioners have standing because they would be affected by air emissions from the incinerator.

STANDING/RIPENESS AND TIMELINESS

I. Petitioners have standing to challenge EPA's rule.

Petitioners are organizations whose members reside in Arecibo, Puerto Rico. Petitioners are opposed to the construction and operation of an incinerator by Energy Answers in Arecibo because of a number of environmental impacts, including the release of new lead emissions from the incinerator.

Each of the standing declarants has set forth particularized facts demonstrating that the construction of the incinerator affects them personally. Declaration of Luisa Margarita Águila Nieves ¶¶3, 8 (Sept. 24, 2014) (noting her respiratory problems and proximity of her residence to incinerator site); Declaration of Rafael Bey Nazario ¶¶3, 7–8 (Sept. 18, 2014) (noting his respiratory problems and proximity of his residence to incinerator site); Declaration of Wilfredo Vélez ¶¶3, 7–8 (Sept. 24, 2014) (noting his respiratory problems and proximity of his residence to incinerator site); Declaration of Jessica Seiglie Quiñones ¶¶3, 7–8 (Sept. 23, 2014) (noting her respiratory problems, proximity of her residence to incinerator site, and personal involvement in solid waste recycling advocacy organization); Declaration of Javier Biaggi Caballero ¶¶4, 8–11 (Sept. 22, 2014) (noting his respiratory problems, proximity of his residence to incinerator site, and personal involvement as a leader in a local environmental organization).

Petitioners satisfy the Court’s requirements for standing, as set forth in *Sierra Club v. EPA*, 292 F.3d 895, 900–01 (D.C. Cir. 2002). D.C. Circuit Rule 28(a)(7). In EPA’s motion to dismiss, EPA and Energy Answers made an objection based on ripeness and timeliness.

II. Petitioners' legal challenge to EPA's rule is ripe and timely.

In general, Section 307(b)(1) of the Clean Air Act requires a party to challenge a rule within 60 days of its promulgation, which would have been July 12, 1980 for the final rule challenged here. 42 U.S.C. §7607(b)(1). But there is an exception to this requirement. A party may make a legal challenge after the statutory 60-day period “if such petition is based solely on grounds arising after such sixtieth day.” *Id.* In such a case, the petition for review “shall be filed within sixty days after such grounds arise.” *Id.*

The grounds for Petitioners' challenge arose on May 19, 2014. On that date, 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. 79 Fed. Reg. 28,710, 28,712 (May 19, 2014) (“review [of this Prevention of Significant Deterioration permit] may be sought only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days from the date on which these determinations are published in the Federal Register”), JA120, 122. The 60-day period started on May 19, 2014, and ended on July 18, 2014. Petitioners timely filed their petition for review on July 17, 2014. Therefore, they may proceed with the appeal.

This conclusion is consistent with the Court's precedent allowing a party to challenge an agency action beyond the limitations period, based on a new, fact-based controversy. The Court has long assured petitioners they will not be foreclosed from their day in court when a challenge to an agency action becomes ripe for them, even beyond the limitations period. *See Balt. Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146, 148 (D.C. Cir. 1982). In that case, the parties recognized that no imminent harm confronted the company as a result of an interpretive order, but the company filed a legal challenge during the short 60-day limitations period, to be safe. *Id.* at 147–48. In declining to hear the case, the Court assured the company it could make a legal challenge later, once a fact-based controversy arose. *Id.* (“Because review is not available now, [Baltimore Gas & Electric] and other similarly situated shippers will not be barred, if and when a fact-based controversy eventuates, from challenging the Commission’s interpretation”). *Accord, Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 473 (D.C. Cir. 1998) (“our finding of unripeness gives petitioners the needed assurance’ that they will not be foreclosed from judicial review when the appropriate time comes”).

The Court recently addressed the exception to the 60-day rule under Section 307(b)(1) of the Clean Air Act and held that “[t]he exception encompasses the occurrence of an event that ripens a claim.” *Coal. for Responsible Regulation v.*

EPA, 684 F.3d 102, 129–30 (D.C. Cir. 2012). An injury-in-fact that is certainly impending will make a matter ripe. *Id.* at 130–31. The Court held that business and industry petitioners could challenge EPA rules regarding the applicability of the Prevention of Significant Deterioration program that had been promulgated in 1978, 1980, and 2002, despite the passage of decades. *Id.* at 129–32. Those petitioners were now subject to a permit requirement for their greenhouse gas emissions under the Prevention of Significant Deterioration program because those emissions were now subject to regulation under the mobile source program. *Id.* at 130–31. Consequently, the Court held they had ripe claims that were validly filed within sixty days of the Tailoring Rule. *Id.* at 131–32.

The Court should reach a similar result here. Just as those business petitioners established an injury-in-fact by now being subject to a permit requirement, Petitioners suffered an injury from EPA’s rule when EPA granted a permit to Energy Answers to construct and operate an incinerator whose air emissions will adversely affect them. Petitioners’ Declarations (attached to statutory addendum).

Petitioners’ challenge has ripened because the permit creates a “substantial probability” of injury to them. *Coal. for Responsible Regulation*, 684 F.3d at 131 (“[Petitioners’] challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of

the ‘substantial probability’ of injury to them”). According to the statute, the Nonattainment New Source Review program requires Energy Answers to obtain offsets against its lead emissions from other sources of lead emissions in the Arecibo nonattainment area. 42 U.S.C. §§7503(a), (c). It cannot do this because the incinerator will release more lead emissions than the battery recycling facility that caused the lead nonattainment problem. *See* Prevention of Significant Deterioration Permit Application 3-1, 3-4, Table 3-1; Appendix A-Table 2, JA127, 130, 157; EPA Envirofacts Reports, JA222-226, JA354-358. Because EPA’s rule exempts the incinerator from Nonattainment New Source Review and its requirements, Petitioners are now injured by that rule.

The Court’s precedent allowing for a newly ripened challenge to an agency action is available not only to businesses that are subject to permits, but also to residents who are affected by permits. If a challenge to an EPA rule can ripen when EPA requires a company to obtain a permit, a challenge to an EPA rule can ripen for residents when EPA grants a permit that affects them. *See Coal. for Responsible Regulation*, 684 F.3d at 131.

The Court should reject EPA’s suggestion that the 60-day period for review was triggered during the Prevention of Significant Deterioration permit application process, long before EPA even granted that final permit. *See* EPA’s Reply in Support of EPA’s Motion to Dismiss 5–7 (Oct. 6, 2014). EPA asserts that

Petitioners suffered a “substantial probability” of injury making the case ripe when EPA issued notice of a public comment period on that application. *See id.*, citing Notice dated May 14, 2012, JA165-167; 42 U.S.C. §7475(a)(2) (statutory requirement of a public hearing with opportunity for interested persons to appear and submit presentations relating to the application). EPA is mistaken.

In *Coalition for Responsible Regulation*, business and industry challenged the Tailpipe Rule as a trigger for the regulation of greenhouse gases for stationary sources under EPA rules dating back to the 1970s. *Coal. for Responsible Regulation*, 684 F.3d at 115–16. EPA objected to petitioners’ ability to challenge rules promulgated decades earlier:

EPA maintains that this challenge is untimely because its interpretation of the [Prevention of Significant Deterioration] permitting triggers was set forth in its 1978, 1980, and 2002 Rules.

Id. at 129. In response, petitioners argued that the challenge was timely because they commenced the action within the 60-day period after the promulgation of the final Tailpipe Rule:

Industry Petitioners thus maintain that because [National Association of Home Builders] and [National Oilseed Processors Association] filed their petitions on July 6, 2010, within 60 days of the promulgation of the Tailpipe Rule in the Federal Register on May 7, 2010, their challenges are timely.

Id. at 131. *See* 75 Fed. Reg. 25,324 (May 7, 2010) (final “Tailpipe Rule”), JA114.

It is noteworthy that petitioners would have been time-barred from making challenges to the 1978, 1980, and 2002 rules if the 60-day period had started from the date of the *proposed* Tailpipe Rule. EPA published the proposed Tailpipe Rule in September 2009, nine months before petitioners commenced that litigation. 74 Fed. Reg. 49,454 (Sept. 28, 2009), JA113. The Court rejected EPA’s claim that the challenge was untimely and allowed petitioners to present their challenge.

Coal. for Responsible Regulation, 684 F.3d at 131–32.

The Court should do the same here. In the present case, EPA’s notice of public comment dated May 14, 2012 is equivalent to EPA’s proposed Tailpipe Rule. Because neither action was a final agency action, neither action was sufficient to trigger the 60-day time period for challenging rules from 1980. 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. This is the very circumstance that led to the development of the Court’s doctrine allowing litigants to bring legal challenges to agency rules only when they become ripe to them. *Balt. Gas & Elec. Co.*, 672 F.2d at 147–48 (counsel for the company brought the legal challenge early because the rule “might be read to command a petition to contest the Commission’s interpretation now or never”).

The issue in this case is the validity of an EPA rule limiting the air pollutants whose potential to emit may trigger Nonattainment New Source Review.

Petitioners' legal challenge became ripe when EPA granted Energy Answers a permit to construct and operate an incinerator. The problem with the EPA rule in the specific context of the Arecibo nonattainment area did not come to light until recently. In this unique case, it is important that lead is the only air pollutant for which part of Arecibo is in nonattainment, and that lead tends to be emitted in amounts much less than the 100 tons/year threshold for a "major emitting facility" or "major stationary source."

ARGUMENT

I. Standard of Review

The Court reviews challenges to EPA's final rules under the Clean Air Act to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C. §7607(d)(9)(A). Challenges to EPA's interpretations of the Clean Air Act itself are governed by the two-pronged test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008).

Under Step One, the court asks "whether Congress has directly spoken to the issue." *Id.*, quoting *Chevron*, 467 U.S. at 842. If the intent of Congress is clear, "that is the end of the matter, for the court, as well as the agency, must give effect

to the unambiguously expressed intent of Congress.” *Id.*, quoting *Chevron*, 467 U.S. at 842–43. “[T]o avoid a literal interpretation at *Chevron* Step One, [EPA] must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” *Id.* at 582, quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

Only if the Court determines that “Congress has not directly addressed the precise question at issue,” then under Step Two “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 581, quoting *Chevron*, 467 U.S. at 843.

II. The Court has Jurisdiction because Petitioners are Challenging an EPA Rule of National Applicability.

In their petition for review, Petitioners made it clear they are challenging an EPA rule of national applicability:

This petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency entitled *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) (to be codified at 40 C.F.R. §51.18(j)), attached as Exhibit 2. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i).

Petition for Review 2 (July 16, 2014). For legal challenges to rules of national applicability, the first sentence of Section 307(b)(1) of the Clean Air Act makes the present Court the exclusive forum for judicial review:

(b) Judicial review

(1) *A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, ... or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter [the Clean Air Act] may be filed only in the United States Court of Appeals for the District of Columbia.*

42 U.S.C. §7607(b)(1) (emphasis added).

It is axiomatic that challenges to EPA rules under the Clean Air Act are made in the present Court. *See, e.g., White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (challenge by business and industry to EPA rule for hazardous air pollutants from the utility industry), *certiorari granted in part, Nat'l Mining Ass'n v. EPA*, ___ U.S. ___, 135 S.Ct. 703; *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2013) (challenge by business and industry to EPA rule for interstate transport of air pollutants), *reversed and remanded on other grounds*, ___ U.S. ___, 134 S.Ct. 1584; *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (challenge by business and industry to EPA rules for greenhouse gases in the Prevention of Significant Deterioration program), *affirmed in part, reversed in part on other grounds, Utility Air Regulatory Grp. v.*

EPA, ___ U.S. ___, 134 S.Ct. 2427. Accordingly, if Petitioners had filed this appeal in another Circuit Court of Appeals, EPA would have made a motion to dismiss on the grounds that the appeal belongs before the present Court.

The Court should reject EPA's assertion that this is only a local matter that belongs in the Circuit Court of Appeals having jurisdiction over Puerto Rico. While the motivation for this appeal was EPA's granting of a permit to construct an incinerator to Energy Answers under the Prevention of Significant Deterioration program, Petitioners have made it clear that they are challenging the final rule at 45 Fed. Reg. 31,307, 31,312, as codified at 40 C.F.R. §51.165(a)(2)(i). Petition for Review (July 16, 2014); Statement of Issues (Aug. 19, 2014). With respect to the decision of the Environmental Appeals Board, this appeal is addressed to its reasoning that Nonattainment New Source Review does not apply to this incinerator, based on EPA's rule. Board Opinion 22–28, JA265-271.

III. Petitioners Present Compelling Facts in Support of this Challenge to EPA's Rule.

Before addressing the two-part *Chevron* test applicable to this legal challenge, Petitioners will explain why this unusual case has arisen, and why it matters to public health and the integrity of the Clean Air Act.

A. EPA's rule allows an incinerator to circumvent new source review for lead emissions in a lead nonattainment area.

In the present case, the practical effect of EPA's rule is to exempt lead emissions from new source review entirely, whether under the Prevention of Significant Deterioration program or the Nonattainment New Source Review program. On the one hand, EPA asserts that Prevention of Significant Deterioration review does not apply to nonattainment pollutants. EPA's Responses to Public Comments 58 (¶3), 75 (¶1), 99 (¶¶4, 5), 107–08 (comment 2) (June 2013), JA205, 206, 207, 208-209. On the other hand, EPA asserts that the Energy Answers incinerator is not subject to Nonattainment New Source Review, based on its rule limiting the pollutants whose potential to emit may trigger this program, to only nonattainment pollutants. *Id.* at 99 (¶5), 107–08 (¶1), JA207, 208-209. EPA's rule creates a loophole that allows an incinerator to circumvent new source review for lead emissions in a lead nonattainment area.

B. Unlike other criteria pollutants, lead is persistent, bioaccumulative, and toxic.

The nature of lead emissions in general and the specific problem in this lead nonattainment area demonstrate why Congress was correct in requiring Nonattainment New Source Review to be triggered by the potential to emit for any air pollutant, and not just for a nonattainment pollutant. The incinerator's potential to emit lead is approximately 0.31 tons/year, or 630 pounds/year. *See* Prevention

of Significant Deterioration Permit Application Section 3.1.1, 3-1, 3-4, Table 3-1 (Feb. 2011), JA127, 130; Appendix A-Table 2, JA157. That number might appear low compared to the “major stationary source” threshold of 100 tons/year. But it would be wrong to dismiss this as something that does not matter. It matters a great deal.

Lead is different from other criteria pollutants. Although it tends to be released at lower concentrations and amounts by a limited number of stationary sources (e.g., incinerators and lead smelters), it is a toxic chemical that harms human health at low concentrations and amounts. In fact, EPA has designated lead and lead compounds as Persistent, Bioaccumulative, and Toxic chemicals, subjecting them to a more stringent threshold for chemical reporting under the Toxic Release Inventory program of the Emergency Planning and Community Right-to-Know Act of 1986. 66 Fed. Reg. 4,500, 4,547 (Jan. 17, 2001) (adding lead to 40 C.F.R. §372.28, “Lower thresholds for chemicals of special concern”), JA81, 83.

Under that rule, a facility must file a Toxic Release Inventory report if it manufactures, processes, or otherwise uses lead in amounts greater than 100 pounds per year. *Id.* In contrast, the default reporting thresholds are 25,000 pounds per year for toxic chemicals that are manufactured or processed, and 10,000 pounds per year for toxic chemicals that are otherwise used. 40 C.F.R.

§372.25(a), (b). The threshold is much lower for lead because it is toxic at low concentrations and amounts. 66 Fed. Reg. 4,504 (“[t]he nature of [Persistent, Bioaccumulative, and Toxic] chemicals, including lead and lead compounds, indicates that small quantities of such chemicals are of concern, which provides strong support for setting lower reporting thresholds than the current section 313 thresholds of 10,000 and 25,000 pounds”), JA82. Even among other toxic chemicals, lead is very bad.

As a Persistent, Bioaccumulative, and Toxic chemical, lead is like mercury. 64 Fed. Reg. 58,666, 58,671–72 (Oct. 29, 1999) (identifying mercury and mercury compounds as Persistent, Bioaccumulative, and Toxic chemicals, and setting reporting thresholds of 10 pounds per year), JA78, 79-80. Mercury is a hazardous air pollutant under Section 112 of the Clean Air Act. 42 U.S.C. §7412(b)(1). In fact, *lead compounds* were added to the list of hazardous air pollutants in the 1990 Amendments. *Id.*, Pub. L. 101-549, 104 Stat. 2399, 2537. As a result, EPA has promulgated Section 112 standards for lead acid battery manufacturers (Subpart P, 40 C.F.R. §63.11421), secondary lead smelters (Subpart X, 40 C.F.R. §63.541), and primary lead smelters (Subpart TTT, 40 C.F.R. §63.1541). Because a secondary lead smelter is responsible for the lead nonattainment problem in Arecibo, it is clear we are dealing with a particularly harmful air pollution problem.

C. Considering its toxic nature, the listing of lead as a criteria pollutant was an historical anomaly.

It is only for historical reasons that *elemental lead* was listed as a criteria pollutant under Section 108, as opposed to a hazardous air pollutant under Section 112. EPA did this in response to litigation in the 1970s. *Natural Res. Def. Council v. Train*, 411 F.Supp. 864, 871 (S.D.N.Y. 1976), *aff'd*, 545 F.2d 320, 328 (2nd Cir. 1976). The court ordered EPA to list lead as a criteria pollutant because lead emissions resulted from “numerous or diverse sources,” including automobiles burning leaded gasoline. *See Train*, 411 F.Supp. at 867; 545 F.2d at 324; 42 U.S.C. §7408(a)(1)(B). Because it was already regulated as a criteria pollutant, Congress barred EPA from regulating it as a hazardous air pollutant, in the 1990 Amendments. Pub. L. 101-549, 104 Stat. 2399, 2537; 42 U.S.C. §7412(b)(7) (“The Administrator may not list elemental lead as a hazardous air pollutant under this subsection”). But preserving it as a criteria pollutant does not mean that lead is any less toxic to human health.

D. The very low national ambient air quality standard for lead demonstrates it is more harmful than other criteria pollutants.

The actual numerical level of the national ambient air quality standard for lead demonstrates it is harmful at very low concentrations and amounts. The current standard is 0.15 micrograms per cubic meter, measured over a three-month period. 73 Fed. Reg. 66,964, 67,052 (Nov. 12, 2008), JA109,112; 40 C.F.R §50.16.

This is the most stringent of all the numerical levels in the national ambient air quality standards. *See* 40 C.F.R §§50.1–50.18. By comparison, fine particulates are the criteria pollutants most similar to lead. EPA has set its standards at numerical levels approximately 100 times greater than the lead standard of 0.15 micrograms per cubic meter. *See* 40 C.F.R §50.18(a) (annual standard of 12.0 micrograms per cubic meter and 24-hour standard of 35 micrograms per cubic meter). The reason for the difference is clear. In addition to presenting respiratory hazards common to particulates, lead is toxic. 73 Fed. Reg. 66,990 (recognizing “evidence of all particle sizes of Pb [lead] contributing to blood Pb [lead] and health effects by both ingestion and inhalation pathways”), JA111.

E. In setting the low national ambient air quality standard for lead, EPA was concerned especially about children, a particularly sensitive subgroup.

In 1978, EPA set the lead standard at 1.5 micrograms per cubic meter. 43 Fed. Reg. 46,246, 46,258 (Oct. 5, 1978), JA37, 38; 40 C.F.R §50.12. EPA was concerned especially about blood levels in children, a particularly sensitive population subgroup:

In establishing the level of the final standard. EPA has determined that young children (age 1–5 years) should be regarded as a group within the general population that is particularly sensitive to lead exposure. The final standard for lead in air is based on preventing most children in the United States from exceeding a blood lead level of 30 micrograms lead per deciliter of blood

43 Fed. Reg. 46,246, column 1 (emphasis added), JA37.

But in 2008, EPA made the standard more stringent, dramatically lowering it to 0.15 micrograms per cubic meter, or one-tenth of the original standard. 73 Fed. Reg. 66,964, 67,052, JA109, 112. This was a response to a large body of updated scientific evidence on the adverse public health impacts of lead. *Id.* at 66,987, column 1, JA110. This evidence included the neurological, hematological, and immune effects for children, as well as the hematological, cardiovascular, and renal effects for adults. *Id.* EPA made a finding that “air-related Pb [lead] exposure pathways contribute to blood Pb [lead] levels in young children, by inhalation and ingestion.” *Id.*, column 2. Although blood levels in children had fallen significantly since 1978, EPA actually saw a greater incremental impact associated with exposure to lead at lower blood levels:

Further, the Administrator notes the *current evidence that suggests a steeper dose-response relationship at these lower blood Pb [lead] levels than at higher blood Pb [lead] levels*, indicating the potential for greater incremental impact associated with exposure at these lower levels.

Id., column 2. (emphasis added). Given the revised scientific evidence, EPA concluded that the standard should be reduced substantially, to protect children and adults:

Further, the Administrator believes that *the current evidence indicates the need for a standard level that is substantially lower than the current level* to provide

increased public health protection, *especially for at-risk groups, including most notably children*, against an array of effects, *most importantly including effects on the developing nervous system*.

Id., column 2. (emphasis added). Consequently, EPA recognizes that lead is a toxic chemical that is harmful to public health, even at low concentrations and amounts.

F. Existing concentrations of lead in the air in Arecibo are not protective of public health, even with past emissions levels of approximately 1 ton/year.

EPA's designation of a lead nonattainment area around a battery recycling facility in Arecibo demonstrates that lead emissions already present a danger to public health. 76 Fed. Reg. 72,097, 72,098, 72,119 (designating the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility" as a nonattainment area), JA117, 118, 119; 40 C.F.R. §81.355. The primary national ambient air quality standards are set at levels which "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. §7409(b)(1). Because the air quality does not attain this standard, existing concentrations of lead in the air are not protective of public health.

The nonattainment problem was caused by a battery recycling facility, which is a secondary lead smelter. Letter from EPA Region 2 to Governor of Puerto Rico (June 14, 2011), Technical Support Document 7, JA220 ("[t]he Battery Recycling Company facility is the largest emissions source located upwind of the

violating monitor, and EPA believes this facility caused and/or contributed to the violating monitor during the period”). But the battery recycling facility’s emissions during the years 2007–2013 were actually *less than 1 ton/year* and actually *less* than those contemplated by Energy Answers. EPA Envirofacts Reports, JA222-226, JA354-358. Therefore, this lead nonattainment problem demonstrates that very low concentrations and amounts of lead present harm to human health.

G. Energy Answers may not construct the incinerator because it cannot obtain the offsets of lead emissions required by the Nonattainment New Source Review program.

Under Section 173, a new “major stationary source” in a nonattainment area must obtain offsets against increased emissions of air pollutants. 42 U.S.C. §§7503(a)(1)(A), 7503(c). Here, it is not possible for Energy Answers to obtain the required offsets because it would emit *more emissions* than the battery recycling facility. Applying the clear statutory language, it may not construct and operate its incinerator in this lead nonattainment area.

IV. Applying Step One of *Chevron*, EPA’s Rule Unlawfully Limits the Pollutants Whose Potential to Emit May Trigger Nonattainment New Source Review, to Nonattainment Pollutants.

A. Under its decision in *New Jersey v. EPA*, the Court should vacate EPA’s rule for violating the plain language of the statute.

The Court should follow the result in *New Jersey v. EPA*. A panel of the Court unanimously held that EPA’s attempt to de-list mercury from the list of

Section 112 hazardous air pollutants violated the statute, requiring the vacating of both the Delisting Rule and the Section 111 Clean Air Mercury Rule. *New Jersey v. EPA*, 517 F.3d at 577, 583. The Court decided that case at Step One. *Id.* at 582 (“EPA’s purported removal of [electric utility steam generating units] from the section 112(c)(1) list therefore violated the Clean Air Act’s plain text and must be rejected under step one of *Chevron*”). The Court rejected EPA’s efforts to proceed to Step Two. *Id.* (“EPA offers several arguments in an attempt to evade section 112(c)(9)’s plain text, but they are not persuasive”).

The Court has vacated other EPA rules at Step One for writing language out of a statute. It vacated Section 112 emission standards for brick and ceramics kilns, which EPA erroneously based on the technology that was “achieved” rather than on the “maximum achievable control technology” required by the statute:

EPA cannot circumvent Cement Kiln’s holding that section 7412(d)(3) requires floors based on the emission level actually achieved by the best performers (those with the lowest emission levels), not the emission level achievable by all sources, ***simply by redefining “best performing” to mean those sources with emission levels achievable by all sources.***

Sierra Club v. EPA, 479 F.3d 875, 880 (D.C. Cir. 2007) (emphasis added). *Id.* at 876, 880–81.

In another case, the Court vacated the Equipment Replacement Provision, in violation of the statutory requirement of a permit for “any physical change” that

increases emissions. *New York v. EPA*, 443 F.3d 880, 883, 890 (D.C. Cir. 2006) (“Congress defined ‘modification’ in terms of emission increases, but the [Equipment Replacement Provision] would allow equipment replacements resulting in non-*de minimis* emission increases to avoid [New Source Review]”). The Court also vacated EPA approvals of Total Maximum Daily Loads that limited pollution only on an annual or seasonal basis, rather than on a daily basis. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (“[n]othing in this language even hints at the possibility that EPA can approve total maximum ‘seasonal’ or ‘annual’ loads. The law says ‘daily.’”). *Id.* at 148. Accordingly, “achievable” means “achievable,” not “achieved.” “Any physical change” means “any physical change.” “Daily” means “daily,” not “seasonal” or “annual.” In the present case, “major stationary source” means “major stationary source.”

In addition, the Court has “consistently struck down administrative narrowing of clear statutory mandates.” *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997). In that case, the Court held unlawful an EPA regulation providing for a twelve-month grace period during which activities in nonattainment areas would be exempt from transportation conformity requirements:

We hold that the challenged grace period is contrary to the plain meaning of the Clean Air Act. ***The Clean Air Act categorically mandates that the transportation***

conformity requirements shall apply to nonattainment and maintenance areas.

Id. at 138 (emphasis added). The Court reasoned that “the Act does not authorize the EPA to limit the applicability of the conformity requirements by exempting some nonattainment areas, even for a limited period of time.” *Id.* at 142. In accordance with that holding, the Court vacated an EPA rule attempting to revoke the 1997 ozone national ambient air quality standard, for purposes of the transportation conformity requirements:

. . . [the statute] mandates application of the conformity requirements, without exception, for “a nonattainment area” and for a former nonattainment area “redesignated” as “an attainment area” and “required to develop a maintenance plan.”

Natural Res. Def. Council v. EPA, 777 F.3d 456, 470–71 (D.C. Cir. 2014)

(emphasis added). *Id.* at 473. Applying these cases, the statute does not allow EPA to limit the pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants.

A “major stationary source” in a nonattainment area triggers Nonattainment New Source Review if it has a potential to emit of 100 tons/year or more of “any air pollutant,” whether or not it is a nonattainment pollutant. 42 U.S.C. §7602(j) (“‘major stationary source’ and ‘major emitting facility’ mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant”). Sections 172 and 173

require a permitting program for “major stationary sources” in nonattainment areas. 42 U.S.C. §§7502 (program requirements), 7503 (permit requirements).

The statutory language is clear. The trigger is the potential to emit of 100 tons/year or more of “any air pollutant.” It does not matter whether the region is in nonattainment for that air pollutant.

The incinerator’s potential to emit for at least five pollutants other than lead (carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride, and coarse particulates) makes it both a “major emitting facility” for Prevention of Significant Deterioration review and a “major stationary source” for Nonattainment New Source Review. The actual amount of lead emitted by the incinerator and its potential to emit for lead do not change this result. Because the incinerator is a “major emitting facility” that triggers Prevention of Significant Deterioration review, it necessarily is a “major stationary source” that triggers Nonattainment New Source Review.

B. The legislative history of the Clean Air Act Amendments of 1977 demonstrates a congressional intent to require preconstruction permits for all “major stationary sources,” whether locating in attainment areas or nonattainment areas.

The Supreme Court held that the Clean Air Act does not allow EPA to consider costs in developing a national ambient air quality standard because the text of Section 109 does not mention costs, while other sections of the statute refer to costs. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 464–71 (2001); *Am.*

Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040–41 (D.C. Cir. 1999); *Accord*, *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Applying these principles to the present case, Congress did not intend to limit the scope of Nonattainment New Source Review in the manner that EPA has done.

Four days before the passage of the 1977 Amendments, the House Report stated that “preconstruction permits are required by the act for all new or modified major stationary sources, whether locating in significant deterioration or nonattainment areas.” H.R. Rep. No. 95-564 (1977) (Conference Report), 1977 U.S.C.C.A.N. 1502, 1508, JA348, 350. While Congress defined “major stationary source” and “major emitting facility” synonymously, it modified the definition of “major emitting facility” for the Prevention of Significant Deterioration program. *Id.* at 1553. In contrast, Congress did not modify the general definition of “major stationary source” for the Nonattainment New Source Review program. By modifying the definition for the former program, but not for the latter program, Congress did not intend to limit the applicability of the Nonattainment New Source Review program. EPA’s rule is inconsistent with the intent of Congress.

C. Because the statutory definition of “major stationary source” is based on the potential to emit for “any air pollutant,” the Court should vacate EPA’s rule limiting it to nonattainment pollutants.

EPA has unlawfully created an exemption from the statutory definition of “major stationary source” for an incinerator whose potential to emit for a nonattainment pollutant is less than 100 tons/year, even though it has a potential to emit of 100 tons/year or more for a number of other pollutants. In the statutory definition of “major stationary source,” the phrase “any air pollutant” means “any air pollutant,” rather than “any nonattainment pollutant.” *See Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007) (phrase “any air pollutant” is sufficiently broad to extend to greenhouse gases). The term “air pollutant” applies to “all airborne compounds of whatever stripe.” *Id.* at 528–29 (“the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any’”).

Although the Supreme Court has since limited the applicability of new source review to greenhouse gases, that case involved a unique set of facts that does not apply here. *See Utility Air Regulatory Grp. v. EPA*, ___ U.S. ___, 134 S.Ct. 2427 (2014). The Court held that for purposes of triggering the Prevention of Significant Deterioration program, the statute-wide definition of “air pollutant” does not apply to greenhouse gases, only because a contrary result would radically transform that program. *Id.*, ___ U.S. ___, 134 S.Ct. at 2442–43. That holding is

limited to the facts of that case, namely, the tremendous volume of greenhouse gases and the transformation of that program that would result from using them as a trigger for review.

There is a world of difference between *Utility Air Regulatory Group* and the present appeal. The present appeal involves lead, which is emitted by discrete industrial sectors (e.g., incinerators and secondary lead smelters) at relatively low concentrations and amounts. This case presents the *opposite* situation of greenhouse gases, which are universal pollutants. The concerns for avoiding absurd results in that case do not apply here.

D. The Court should follow *Alabama Power Company v. Costle*, which vacated an EPA rule limiting the applicability of technology requirements to only those pollutants whose potential to emit triggered Prevention of Significant Deterioration review.

When EPA was conducting rulemakings for nonattainment areas, it was also conducting rulemakings for attainment areas. *See* 43 Fed. Reg. 26,380 (June 19, 1978) (promulgating Prevention of Significant Deterioration rules), JA33. A challenge to those rules led to two decisions in *Alabama Power Company v. Costle*. In both decisions, the Court vacated an EPA rule that limited the applicability of technology requirements to only those pollutants whose potential to emit triggered Prevention of Significant Deterioration review. The Court did this because the exemption violated the statute. The Court should follow those decisions and vacate EPA's rule.

In *Alabama Power*, the Court addressed a statutory requirement that a new “major emitting facility” (an unspecified source with a potential to emit of 250 tons/year) install the Best Available Control Technology for each pollutant subject to regulation under the Clean Air Act. *Alabama Power I*, 606 F.2d at 1086. See 42 U.S.C. §7475(a)(4). While acknowledging that “potential emissions of 250 [tons/year] of a given pollutant” trigger Prevention of Significant Deterioration review, EPA agreed with commenters that “[Best Available Control Technology] should be required only for those pollutants for which the potential emissions exceed 250 tons.” Final Rule, 43 Fed. Reg. 26,380, 26,381–82 (June 19, 1978), JA33, 34-35. Accordingly, it limited the facilities subject to the Best Available Control Technology requirement, consistent with that interpretation:

(i) Review of major stationary sources and major modifications – ***Source applicability and general exemptions.*** (1) The plan shall provide that no major stationary source or major modification shall be constructed unless, as a minimum, requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), (p), and (r) of this section, have been met. ***The plan may provide that such requirements shall apply to a proposed source or modification only with respect to those pollutants for which the proposed construction would be a major stationary source or major modification.***

Id. at 26,385 (emphasis added), JA36. In other words, EPA determined that Best Available Control Technology should only be required for those pollutants whose potential to emit made the facility a “major emitting facility” in the first

place. *See id.* Essentially, EPA created a regulatory exemption from the statutory requirement that a “major emitting facility” comply with the Best Available Control Technology requirement.

In its first decision in June 1979, the Court vacated EPA’s exemption. *Alabama Power I*, 606 F.2d at 1086. The Court recognized an “unambiguous statutory command” that required the installation of Best Available Control Technology “for each pollutant subject to regulation under this Act” *Id.* Similarly, in the present appeal there is an unambiguous statutory command that a “major stationary source” comply with the requirements of Nonattainment New Source Review—including the requirements for offsets—if it has the potential to emit 100 tons/year or more of “any air pollutant.” 42 U.S.C. §§7502(c)(5), 7503(a)(1)(A), (c), 7602(j). The Court should follow *Alabama Power I* and vacate EPA’s rule.

In its second decision in December 1979, the Court reaffirmed its holding and provided additional reasoning. It characterized EPA’s rule as creating an exemption:

This provision exempts from [Prevention of Significant Deterioration] all pollutants not emitted in quantities of at least 100 tons per year by a major emitting facility of one of the twenty-eight types specified in the first sentence of section 169(1), and 250 tons per year by all other sources.

Alabama Power II, 636 F.2d at 404–05 (emphasis added). The Court stated that “[w]e find the regulation to be contrary to the clear statutory language.” *Id.* at 405. It reasoned that the Clean Air Act does not exempt pollutants emitted at quantities less than 100 tons/year (for specified sources) or 250 tons/year (for unspecified sources). *Id.* Because there was no statutory basis for this exemption, this was a “clear error of interpretation by EPA.” *Id.*

The same reasoning should apply in the present appeal, *a fortiori*. Just as EPA could not limit the pollutants subject to Best Available Control Technology to those triggering Prevention of Significant Deterioration review in the first place, it may not limit the pollutants whose potential to emit may trigger Nonattainment New Source Review to those that caused nonattainment in the first place. In *Alabama Power*, the result of EPA’s exemption would have been that some (but not all) pollutants would avoid the Best Available Control Technology requirement. But in the present appeal, the result of EPA’s exemption would be that a “major stationary source” would avoid Nonattainment New Source Review altogether, including the requirement to obtain offsets against new emissions. *See* 42 U.S.C. §§7502(c)(5), 7503(a)(1)(A), (c), 7602(j).

With its unlawful rule, EPA has done what was rejected in the *Alabama Power* decisions. The similarity in the language of the rules is remarkable. In *Alabama Power*, the rule provided that “[t]he plan may provide that such

requirements shall apply to a proposed source or modification only with respect to those *pollutants for which the proposed construction would be a major stationary source or major modification.*” 43 Fed. Reg. 26,385 (emphasis added), JA36. In the present case, EPA’s rule provides that “[s]uch 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 . . .*” *Id.* at 31,312 (emphasis added), JA23; 40 C.F.R. §51.165(a)(2)(i). In both cases, EPA’s rule tied the applicability of new requirements to the pollutants causing the facility to be a major stationary source. In both cases, this is contrary to the “clear statutory language.” The Court should vacate the rule under Step One. EPA is not entitled to any deference.

V. Applying Step Two of *Chevron*, EPA’s Rule Unreasonably Limits the Pollutants Whose Potential to Emit May Trigger Nonattainment New Source Review, to Nonattainment Pollutants.

Even if the Court finds that EPA’s rule is valid under Step One, the Court should still vacate it because it is unreasonable or “arbitrary and capricious” under Step Two.

A. EPA’s rule is unreasonable because it renders the statutory definition of “major stationary source” and the Nonattainment New Source Review program inoperative.

In addition to holding that EPA may not consider costs in setting a national ambient air quality standard under Step One, the Supreme Court rejected EPA’s

effort to extend ozone nonattainment deadlines under Step Two. *Whitman*, 531 U.S. at 476–86 (Part IV). Following the revision of the ozone standard in 1997, the issue was whether to apply the general provisions of Subpart 1 (which granted discretion to EPA to extend nonattainment deadlines) or the more specific provisions of Subpart 2 (which limited the discretion of EPA through a statutory table of nonattainment deadlines). *Id.* The Court found ambiguity because of the competing Subparts and proceeded to Step Two.

But the Supreme Court did not defer to EPA’s choice of Subpart 1 because it rendered Subpart 2 “utterly inoperative,” making the choice unreasonable:

To use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation. The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.

Id. at 485 (emphasis added). *Id.* at 484–86. In the present case, EPA’s rule renders inoperative the significance of being a “major stationary source” in a nonattainment area, as well as the construction moratorium imposed by Congress through the Nonattainment New Source Review program. It too is unreasonable.

Moreover, it is unreasonable, arbitrary, and capricious for EPA to inconsistently require compliance with statutory requirements of the Clean Air Act. *Env’tl. Def., Inc. v. EPA*, 509 F.3d 553, 560–61 (D.C. Cir. 2007) (rejecting EPA

interpretation of statute in its rule regulating “hot spot” analyses for transportation conformity determinations under the statutory nonattainment provisions). Under Section 176(c)(1), a federal agency must provide an “assurance of conformity” with a state implementation plan for activities supported by the agency. 42 U.S.C. §7506(c)(1). As part of this showing, the statute requires three things: (1) activities will not cause or contribute to a new violation of any standard “in any area,” (2) activities will not increase the frequency or severity of any existing violation of any standard “in any area,” and (3) activities will not delay attainment of any standard “in any area.” 42 U.S.C. §7506(c)(1)(B)(i), (ii), (iii). But EPA promulgated a rule that only included the first two requirements and not the third. *Env'tl. Def.*, 509 F.3d at 560; 40 C.F.R. §93.101 (definition of “cause or contribute to a new violation for a project”). The Court held this was arbitrary and capricious:

The fundamental problem, however, is that if, as EPA posits in the Final Rule, “any area” in (B)(i) and (B)(ii) properly means “a local area” under either Chevron step one or step two, ***then it is arbitrary and capricious not to define the term similarly in (B)(iii) or not to provide an explanation that satisfactorily addresses the purpose and function of the condition.*** EPA’s explanation, that individual projects are not required to reduce emissions, does not address this inconsistency. A remand is therefore required for EPA either to interpret (B)(iii) in harmony with (B)(i) and (B)(ii) or to explain why it need not do so.

Envtl. Def., 509 F.3d at 561. Similarly, it is also arbitrary and capricious for EPA to require a “major stationary source” to go through Prevention of Significant Deterioration review, but not Nonattainment New Source Review.

Although the Court’s general policy is to remand an unreasonable rule to an agency, in the present case the Court should vacate the rule because EPA cannot salvage its rule from unreasonableness:

When this court remands a rule to an agency for further consideration with little or no prospect of the rule’s being readopted upon the basis of a more adequate explanation of the agency’s reasoning, the practice of the court is ordinarily to vacate the rule. See Allied-Signal, Inc. v. USNRC, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (court takes account of “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed”) . . . [citing cases]

Ill. Pub. Telecomms. Ass’n v. Fed. Comm’n Comm’n, 123 F.3d 693 (D.C. Cir. 1997) (emphasis added) (vacating portions of agency’s rules).

In the present case, the seriousness of the deficiencies in EPA’s rule outweighs any potential disruptive consequences of a change. It circumvents the statutory moratorium, as well as the statutory requirement to obtain a permit and offsets under the Nonattainment New Source Review program. This allows for the worsening of air quality in a lead nonattainment area in Arecibo, Puerto Rico, for a chemical that is persistent, bioaccumulative, and toxic, and that causes nervous

system damage in children and adults. *See* Part III, *supra*. Therefore, the Court should vacate EPA's rule.

B. EPA's rule is unreasonable because it blurs the distinction between the concept of a "major stationary source" and the concept of a pollutant.

Although it initially followed the statutory definition of "major stationary source" in the 1977 Amendments, within two years EPA attempted to limit the pollutants whose potential to emit may trigger Nonattainment New Source Review. *See* 44 Fed. Reg. 38,471 (July 2, 1979) (Interpretive Rule), JA43. In that rule, EPA stated that only facilities emitting nonattainment pollutants were subject to restrictions on a "major stationary source" in a nonattainment area. *Id.* at 38,473 (construction moratorium and permit requirement applies "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"), JA44. This amendment is not necessarily inconsistent with Petitioners' position. That restriction applied to any facilities emitting pollutants "for which the nonattainment area was designated as nonattainment." *Id.* It was not limited to facilities emitting nonattainment pollutants in "major amounts."

But EPA took it a step further. In the preamble, EPA asserted that the restriction applied "only to major sources of the pollutant for which the area was designated as nonattainment of Part D." *Id.* at 38,473, column 1, JA44. This

assertion would not necessarily be inconsistent with Petitioner's position if it merely meant that the restriction applied to any major source emitting a nonattainment pollutant. But EPA completed the transformation of its unreasonable interpretation in a preamble to a subsequent proposed rule for the Prevention of Significant Deterioration program. 44 Fed. Reg. 51,924, 51,941 (Sept. 5, 1979) ("Nonattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts"), JA45, 48. By then, EPA's interpretation was clear and unreasonable.

C. EPA's justification for its rule—"the need for simplicity"—is not a reasonable justification in this case.

After *Alabama Power II*, EPA published its final rule limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. 45 Fed. Reg. 31,307, 31,312, JA19, 23. EPA buried its reasoning in a footnote, devoid of any meaningful analysis. It summarily based its rationale on the need for "simplicity" in referring to sources located in an air quality control region that may be in attainment for some pollutants but nonattainment for others:

[fn]3 A source may emit many different pollutants. Also, an area may be designated attainment for certain criteria pollutants and nonattainment for other criteria pollutants. *For simplicity*, in this notice, *EPA will use "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. at fn. 3.

The Court should reject the justification of “simplicity,” just as it has rejected the justification of “administrative convenience” in the past. *Ill. Pub. Telecomms. Ass’n*, 123 F.3d 693–94 (vacating portions of agency’s rules); *Ill. Pub. Telecomms. Ass’n v. Fed. Comm’n Comm’n*, 117 F.3d 555, 565 (1997) (“we also find that the [Federal Communications Commission] acted arbitrarily and capriciously in requiring payments only from large [interexchange carriers]—those with over \$100 million in toll revenues—for the first phase of the interim plan. The [Federal Communications Commission] based this decision on concerns of administrative convenience”). Here, EPA cannot explain why an incinerator in a nonattainment area should be exempt from Nonattainment New Source Review solely because its potential to emit for lead is less than 100 tons/year, when it has five other air pollutants whose potential to emit is greater than the “major stationary source” threshold of 100 tons/year.

D. To justify its rule, EPA unreasonably mischaracterized the Court’s holdings in the *Alabama Power* decisions.

In 1980, EPA attempted to justify its divergent rules for triggering Prevention of Significant Deterioration review and Nonattainment New Source Review under the Court’s decisions in *Alabama Power*. 45 Fed. Reg. 52,676 (Aug. 7, 1980) (final rules), JA51. To trigger Prevention of Significant

Deterioration review, the “major emitting facility” status was determined by the potential to emit for any air pollutant, and not just for an attainment pollutant:

Under today’s action, except with respect to nonattainment pollutants, ***[Prevention of Significant Deterioration] review will apply to any source that emits any pollutant in major amounts***, if the source would locate in an area designated attainment or unclassifiable for *any* criteria pollutant

Id. at 52,710–11 (emphasis added), JA52-53. In fact, EPA explicitly rejected the notion of tying the applicability determination to an attainment pollutant:

It should be noted that in order for [Prevention of Significant Deterioration] review to apply to a source, ***the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit any pollutant in major amounts*** (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment or unclassifiable for that or any other pollutant.

Id. at 52,711, column 1 (emphasis added).

On the other hand, EPA asserted that a “major stationary source” was subject to Nonattainment New Source Review only if it emitted a nonattainment pollutant “in major amounts,” and that this conclusion was based on the Court’s decision in *Alabama Power*:

However, implicit in Alabama Power and the structure of the Act is a recognition that where nonattainment pollutants are emitted in major amounts (i.e., where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment), Part D [New Source Review] rather

than Part C [Prevention of Significant Deterioration] review should apply to these pollutants (see below). [Prevention of Significant Deterioration] review does not apply to the nonattainment pollutants emitted by the source otherwise subject to review.

Id. at column 2 (emphasis added).

EPA's invocation of *Alabama Power* as a rationale is unreasonable. In *Alabama Power*, the Court used the phrase "major amounts" only once, in a general observation that "[t]he purpose of Congress was to require a permit before major amounts of emissions were released." *See Alabama Power I*, 606 F.2d at 1076; *see also Alabama Power II*, 636 F.2d at 353 (using substantially the same language). The context was the Court's consideration of an issue whether a facility could consider the effect of air pollution control equipment in calculating its potential to emit. *See Alabama Power I*, 606 F.2d at 1076; *see also Alabama Power II*, 636 F.2d at 353. The Court's observation was not intended to create a substantive distinction in the applicability of the two programs.

Nothing in the Court's decisions supports EPA's position that Nonattainment New Source Review applies only to facilities whose potential to emit for a nonattainment pollutant exceeds a "major amount." *See generally Alabama Power I*; *see generally Alabama Power II*. Unreasonably, EPA has misinterpreted a general observation by the Court and turned it into a substantive exemption from the Nonattainment New Source Review program.

E. To justify the rule, EPA unreasonably mischaracterized the statutory language relating to the construction moratorium from the 1977 Amendments.

In an attempt to support its rule with statutory authority, EPA asserted that the construction moratorium provisions in the 1977 Amendments were limited “to pollutants for which the source is major and for which the area is designated nonattainment”:

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.

...

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

45 Fed. Reg. 52,711, column 3 (emphasis added), JA53.

But EPA's assertion was incorrect. According to the plain language of the 1977 Amendments, it is clear that the construction moratorium applied to any sources that contributed to concentrations of nonattainment pollutants:

Section 110 (a)(2) of the Clean Air Act is amended by striking out “and” at the end of subparagraph (G), striking out the period at the end of subparagraph (H), and by adding the following new subparagraphs at the end thereof:

“(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 171(2)) to which such plan applies, 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, 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)

Pub. L. 95-95, §108(b), 91 Stat. 694 (adding new Section 110(a)(2)(I)) (emphasis added). Technical amendments did not change this result. *See* Clean Air Act Technical and Conforming Amendments, Pub. L. 95-190, §14(a), 91 Stat. 1393, 1399 (1977) (Safe Drinking Water Amendments of 1977). In other words, any “major stationary source” that had emissions of a nonattainment pollutant was subject to the permit requirement and construction moratorium. The statutory language did not redefine the statutory term “major stationary source” or otherwise limit applicability of Nonattainment New Source Review. Nor did it limit the pollutants whose potential to emit may trigger Nonattainment New Source Review,

to only nonattainment pollutants. The statutory language of the construction moratorium provides no legal support for EPA's rule and actually precludes it.

F. In relocating and consolidating its rule, EPA continued to unreasonably mischaracterize the Court's holdings in *Alabama Power*.

In a proposed rule in 1981, EPA incorrectly suggested that *Alabama Power* had ratified EPA's interpretation tying Nonattainment New Source Review to the emission of nonattainment pollutants in major amounts:

However, on December 14, 1979, the United States Court of Appeals for the District of Columbia Circuit issued its final opinion in *Alabama Power Co. v. Costle*, 13 ERC 1993, and ***held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C [Prevention of Significant Deterioration] review should not apply to those pollutants.***

46 Fed. Reg. 9,124, 9,125 (Jan. 28, 1981) (emphasis added), JA57, 58. Although EPA did not refer specifically to the Nonattainment New Source Review program in this quotation, the highlighted language was essentially a paraphrasing of its unlawful rule.

EPA's characterization of the holding of *Alabama Power* is incorrect. The Court never "held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C Prevention of Significant Deterioration review should not apply to those pollutants." *See Alabama Power I*, 606 F.2d at 1068–93; *see Alabama Power II*,

636 F.2d at 323–411. Rather, the Court only held that the Prevention of Significant Deterioration program did not apply to a “major emitting facility” in a nonattainment area simply because it affects air quality in a neighboring attainment area. *Alabama Power II*, 636 F.2d at 368. In making this holding, the Court was addressing the issue “whether a source becomes subject to the [Prevention of Significant Deterioration] review process because of its location within an area to which this part applies, or because of its impact upon the air quality of one.” *Id.* at 364. But the Court never tied this issue to whether a facility emits in “major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment.” EPA inserted that language into its federal register notice in an attempt to justify its unlawful rule. *See* 46 Fed. Reg. 9,125, JA58.

EPA’s mischaracterization of the holdings of *Alabama Power* and the statutory language of the construction moratorium tainted EPA’s codification of the rule at 40 C.F.R. §51.165(a)(2)(i), the current location of the rule. *See* Proposed Restructuring of Existing Rule, 48 Fed. Reg. 46,152 (Oct. 11, 1983), JA59; Final Rule, 51 Fed. Reg. 40,656 (Nov. 7, 1986), JA63; Final Rule, 67 Fed. 80,186, 80,248 (Dec. 31, 2002), JA84, 90. Accordingly, EPA’s rule is unreasonable and should be vacated.

CONCLUSION

EPA's rule unlawfully limits the air pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants. The rule violates the Clean Air Act, which requires a new "major stationary source" in a nonattainment area to undergo Nonattainment New Source Review and obtain offsets against increased emissions. In contrast, the statute does not limit the air pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants.

In addition, EPA's rule is unreasonable because it renders inoperative the requirements applicable to a "major stationary source" under the Nonattainment New Source Review program. EPA blurred the distinction between a "major stationary source" and a nonattainment pollutant, based its rule on the need for "simplicity," and then based it on a mischaracterization of the Court's holding in *Alabama Power* and the plain language of the 1977 Amendments relating to the statutory moratorium.

The Court should vacate the rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)**(Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word versions 2007 and 2010, in 14-point Times New Roman font.

DATED: August 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2015 I have served the foregoing **Brief of Petitioners** on the following registered counsel through the Court's electronic filing system (ECF).

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