No. 11-9559

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Administrator, U.S. EPA,

Respondents,

PUBLIC SERVICE COMPANY OF COLORADO d/b/a Xcel Energy, Inc.,

Intervenor.

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FINAL ANSWERING BRIEF FOR RESPONDENTS

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Div.

Of Counsel:

ELYANA SUTIN
U.S. EPA, Region 8
Office of Regional Counsel

RICHARD VETTER
U.S. EPA
Office of General Counsel

CHRISTINA L. RICHMOND
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3376
Christina.Richmond2@usdoj.gov

ORAL ARGUMENT REQUESTED

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There are no prior related cases.

GLOSSARY

CAA	Clean Air Act or the Act
CARE	*Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670 (7th Cir. 2008)
EPA	Respondent United States Environmental Protection Agency
JA	Joint Appendix
NAAQS	national ambient air quality standards
NOx	nitrogen oxide
NYPIRG	*New York Public Interest Research Group v. Johnson*, 427 F.3d 172 (2d Cir. 2005)
Pet. Br.	Petitioner WildEarth Guardians' Opening Brief
PSD	prevention of significant deterioration
SIP	State Implementation Plan
SO_2	sulfur dioxide
Xcel	Public Service Company of Colorado, d/b/a Xcel Energy

STATEMENT OF JURISDICTION

WildEarth Guardians ("Guardians") timely filed a petition for review of final agency action in accordance with Sections 307 and 505(b)(2) of the Clean Air Act, 42 U.S.C. §§ 7607 and 7661d(b)(2), and therefore this Court has subject matter jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Did EPA reasonably deny Guardians' petition asking EPA to object to the Pawnee Power Station's Title V operating permit where Guardians failed to demonstrate, as required by 42 U.S.C. § 7661d(b)(2), that the permit was not in compliance with the Clean Air Act's requirements?
2. Did EPA reasonably conclude that Guardians had failed to demonstrate the inadequacy of the Colorado Department of Public Health and the Environment's responses to Guardians' comments on the Pawnee Power Station's Title V operating permit?

STATEMENT OF THE CASE

This case involves a Clean Air Act ("CAA" or "the Act") Title V operating permit for the Pawnee Power Station ("Pawnee Station" or "Pawnee"), a coal-fired power plant located near Brush, Colorado. Title V of the CAA requires a "major source" of air pollutants to secure an operating permit, *see* 42 U.S.C. § 7661a(a), which must contain such conditions as necessary to assure compliance with the

applicable requirements of the Act. 42 U.S.C. § 7661c(a). Such applicable requirements include prevention of significant deterioration ("PSD") requirements for a "major modification" at the source. In Colorado, Title V operating permits are issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division ("Colorado"), but EPA retains the authority to review and object to any permit. 42 U.S.C. § 7661d. If the Administrator of EPA does not object to a proposed Title V permit, any person may petition the Administrator to object to the proposed permit, and the Administrator shall issue an objection if the petitioner "demonstrates to the Administrator" that the permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2).

In 2010, Guardians petitioned EPA to object to the draft Title V permit Colorado proposed for the Pawnee Station (the "Petition to Object"). Petition to Object [JA:41]. Among other things, Guardians alleged that the Pawnee Station had undergone major modifications in 1994 and 1997, triggering PSD requirements that were not included in the Title V operating permit. *Id.* at 3-7 [JA:43-47]. Guardians also alleged that Colorado had not adequately responded to Guardians' comments on that issue during the public comment period for the permit. *Id.* at 7-9 [JA:47-49]. In support of its Petition to Object, Guardians pointed to a Notice of Violation that EPA had issued regarding the Pawnee Station in 2002, which alleged that Pawnee had undergone major modifications triggering

PSD requirements. *Id.* at 3-5 [JA:43-45]. Guardians also submitted certain additional information that it asserted demonstrated that major modifications had occurred. *See id.* at 5-7 [JA:45-47].

On June 30, 2011, EPA granted Guardians' Petition to Object on two grounds, but denied it on the remaining issues, including the PSD and related response-to-comment issues raised by Guardians ("EPA Order" or "June 30, 2011 Order"). EPA Order [JA:194]. Guardians now brings the instant petition for review in this Court challenging EPA's partial denial. As shown below, EPA reasonably concluded that Guardians failed to make a sufficient demonstration to EPA that the permit is not in compliance with requirements of the Act or that Colorado had not adequately responded to Guardians' comments on the draft Title V permit for Pawnee. Thus, EPA's partial denial of Guardians' petition to EPA should be upheld.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. National Ambient Air Quality Standards

Under the CAA, "the States and the Federal Government [are] partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA establishes national ambient air quality standards ("NAAQS") for certain air pollutants, and States play a "statutory role as primary

implementers of the NAAQS." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001) (emphasis in original). Following EPA's establishment of NAAQS, States, in turn, draft and submit to EPA for approval a State Implementation Plan imposing regulatory requirements on individual sources in order to attain and maintain the NAAQS within the State's air quality control areas. *See* 42 U.S.C. §§ 7407(a), 7410; *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 66-67 (1975).

B. Prevention of Significant Deterioration

For air quality control areas with relatively clean air that have attained the NAAQS ("attainment areas"), 42 U.S.C. §§ 7470-92, or where NAAQS attainment status is "unclassifiable" due to insufficient data, *id*., a State Implementation Plan must "contain emission limitations and such other measures as may be necessary… to prevent significant deterioration of air quality." 42 U.S.C. §§ 7471, 7410(a)(2)(D)(i)(II); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470-71 (2004). Under this prevention program, known as "PSD," a permit prescribing emission limitations is required for any "major emitting facility" that is constructed or modified. 42 U.S.C. § 7475(a)(1); *see also* §§ 7479(1) (defining "major emitting facility"), 7479(2)(C) (defining "construction" to include "modification").

On September 2, 1986, EPA first approved a revision to Colorado's State Implementation Plan that granted Colorado the authority to implement the PSD

program within the State, except on tribal lands within Colorado's borders. 51 Fed. Reg. 31,125 (Sept. 2, 1986). This means Colorado's regulations for a PSD program were federally approved and made part of the State Implementation Plan. *Id.*; 40 C.F.R. § 52.343. At that time, the approved PSD program consisted of two sections referred to as "the Common Provisions" and "Regulation 3." *See* Addendum at ADD-001 & ADD-041 (Excerpts from the Colorado State Implementation Plan in 1994) [JA:258 & JA:298]. Colorado subsequently restructured its regulations so that "Regulation 3" was broken into four subparts (A, B, C, and D) and incorporated definitions that had formerly been contained within the Common Provisions. Relevant to this case, Regulation 3's Part A contained definitions and provisions that applied to, among other things, the PSD permit program. EPA approved Parts A and B as part of the Colorado State Implementation Plan effective February 20, 1997. 62 Fed. Reg. 2910 (Jan. 21, 1997); *see* Addendum at ADD-121 (Excerpts from the Colorado State Implementation Plan in 1997) [JA:379].[1]

C. Title V Operating Permits

Under Title V of the Clean Air Act, 42 U.S.C. §§ 7661-61f, a major stationary source of air pollution is required to obtain an operating permit

[1] The history of EPA's approval of the components of Colorado's State Implementation Plan is available on EPA's website. *See* https://yosemite.epa.gov/R8/R8Sips.nsf/Colorado?OpenView&Start=1&Count=30&Expand=1#1.

containing applicable emissions limitations and other requirements relevant to that source. *See generally Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792 (6th Cir. 2004). In contrast to the PSD permit program, a Title V operating permit does not generally impose new air quality control requirements. 40 C.F.R. § 70.1(b). Rather, "all Clean Air Act substantive and procedural requirements applicable to a pollutant emitter are written in the emitter's operating permit." *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 282 (9th Cir. 1996). Sources subject to Title V may not operate without, or in violation of, an operating permit. 42 U.S.C. § 7661a(a). In States with EPA-approved programs, Title V permits are issued by the state permitting authority, which in Colorado is the Colorado Department of Public Health and Environment, Air Pollution Control Division.

Section 503(b) of the Act requires operating permit applicants to submit a compliance plan that describes how the source will comply with all applicable requirements of the Act. 42 U.S.C. § 7661b(b)(1). Where a source is not in compliance at the time the permit is issued, it must develop a "schedule of compliance" that includes "an enforceable sequence of actions or operations" that would lead to compliance. 42 U.S.C. § 7661(3); *see also* 40 C.F.R. § 70.5(c)(8)(iii)(C).

Section 504(f) of the Act authorizes the permitting authority to include a "permit shield" in Title V operating permits so that sources have greater certainty as to their legal obligations. 42 U.S.C. § 7661c(f). Under the permit shield provision, compliance with a Title V permit is deemed compliance with applicable provisions of the CAA if the permit "includes the applicable requirements of such provisions" or the permitting authority makes a determination that such other provisions are not applicable and the permit includes the determination. 42 U.S.C. § 7661c(f); *see also* 40 C.F.R. § 70.6(f).

EPA has broad authority to oversee the operating permits issued by authorized States under Title V of the Clean Air Act. States are to provide EPA with the opportunity to review permit applications and proposed permits, *see* 42 U.S.C. § 7661d(a)(1), and EPA's Administrator "shall object" to any permit which he or she "determine[s]" contains "provisions that are . . . not in compliance" with applicable requirements of the Act. *Id.* § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If EPA objects to a permit, the permitting authority may not issue the permit unless it is revised to meet EPA's objection. *Id.* §§ 7661d(b)(3), (c). If the permitting authority declines to make such a revision, "the Administrator shall issue or deny the permit . . . ." *Id.* § 7661d(c).

Title V requires States to provide the public with notice of and an opportunity to comment on draft operating permits. *See* 42 U.S.C. § 7661a(b)(6);

40 C.F.R. § 70.7(h). Then, if the Administrator does not object to the issuance of a permit, "any person may petition the Administrator" to do so. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The Administrator shall issue an objection "if the petitioner *demonstrates* to the Administrator that the permit is not in compliance" with the requirements of the Clean Air Act, including the applicable State Implementation Plan. 42 U.S.C. § 7661d(b)(2) (emphasis added). Critically, the statute provides EPA only 60 days from the date of the petition to either grant or deny it. *Id*. ("The Administrator shall grant or deny such petition within 60 days after the petition is filed.").

D. Enforcement

The Clean Air Act provides both EPA and private citizens with enforcement options. Section 113(a)(1) of the Act, for example, provides:

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

42 U.S.C. § 7413(a)(1). Such notice is typically referred to as a Notice of Violation. When EPA issues a Notice of Violation, after 30 days following the date of the notice EPA may also issue a compliance order, issue an administrative penalty order, or bring a civil action for penalties and injunctive relief in accordance with 42 U.S.C. § 7413(b). 42 U.S.C. § 7413(a)(1).

Persons other than EPA may seek to enforce the Clean Air Act. The citizens' suit provision in CAA Section 304(a), 42 U.S.C. § 7604(a), generally authorizes any person to commence a civil action "against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation." 42 U.S.C. § 7604(a)(1). Section 304(a) also authorizes actions "against any person who . . . constructs any new or modified major emitting facility without a permit required under [the PSD program] . . . ." 42 U.S.C. § 7604(a)(3). The federal district courts have jurisdiction over such citizen suits. 42 U.S.C. § 7604(a).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Pawnee Station's Title V Permit

The Pawnee Station is a coal-fired power plant that is owned and operated by the Public Service Company of Colorado, d/b/a Xcel Energy ("Xcel"). EPA Order at 1, 3 [JA:194, 196]. Colorado issued Pawnee's original Title V operating permit on January 1, 2003. *Id.* at 3 [JA:196]. Xcel submitted a Title V renewal application to Colorado in 2006. *Id*. In 2009, Colorado put the draft permit through the public comment process and proposed the permit to EPA. Guardians submitted comments on July 3, 2009, raising concerns about the permit's ability to ensure compliance with applicable requirements of the CAA. Guardians' Comments at 1-5 [JA:001-05]. As relevant to this case, Guardians commented that

the Pawnee Station underwent major modifications in 1994 and 1997 without obtaining a PSD permit and that the Title V operating permit must include a compliance plan to bring Pawnee into compliance with the PSD program. *Id*. On November 6, 2009, Colorado responded to Guardians' comments ("Colorado Response"). [JA:015].

EPA did not object to the proposed final permit within the Agency's 45-day review period, and Colorado issued the final permit on January 1, 2010.[2] Subsequently, on February 22, 2010, EPA received a petition from Guardians requesting that EPA object to the issuance of the permit, pursuant to section 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2). Petition to Object [JA:041]. Guardians raised seven grounds for objecting to the permit, including that the permit fails to assure compliance with PSD requirements and that Colorado's response to Guardians' comments on this topic was inadequate. *Id.*

B. EPA's Order

EPA considered the issues raised in Guardians' Petition to Object, and on June 30, 2011 issued an Order granting that Petition in part and denying it in part. EPA Order [JA:194]. EPA granted the Petition to Object on two issues, finding (1) that Colorado had not provided an adequate rationale for why the permit does not

[2] Xcel subsequently requested a modification to the permit, which was issued as a minor modification on August 10, 2010, and is not at issue in this case. EPA Order at 3 [JA:196].

require records of good engineering practices or otherwise require monitoring to assure compliance with opacity limits for certain components within the Pawnee Station, and (2) that the permit did not provide for monitoring sufficient to assure compliance with the opacity limits for the transfer tower/tripper deck and crusher baghouses or provide a sufficient rationale for why annual observations are sufficient. EPA Order at 19 & 21 [JA:212 & 214].[3] EPA denied the Petition to Object on all other issues, including those related to PSD and the adequacy of Colorado's response to Guardians' comments. In partially denying the Petition to Object, EPA found that Guardians had not "demonstrat[ed]" that the permit does not comply with applicable requirements, and thus, Guardians had failed to satisfy 42 U.S.C. § 7661d(b)(2). EPA Order at 7-9 [JA:200-02]. EPA concluded that a petitioner cannot rely solely on the existence of a previously issued NOV to demonstrate a permit's noncompliance, but rather must provide additional information, and the information Guardians submitted did not demonstrate that PSD applies. *Id.* at 7 [JA:200]. Specifically, EPA found that the emissions information Guardians submitted did not demonstrate the existence of a "significant net emissions increase" because it failed to address several key elements of the criteria for determining whether PSD applied. *See id*. at 8-9 [JA:201-02].

[3] Colorado addressed these issues in a revised operating permit for the Pawnee Station, issued on November 15, 2011. These too are not at issue in this suit.

Notice of EPA's Order appeared in the Federal Register on July 21, 2011. 76 Fed. Reg. 43,684 (July 21, 2011). Guardians then filed its judicial petition in this Court challenging the Order within the time authorized by 42 U.S.C. § 7607(b).

STANDARD OF REVIEW

Because the CAA sets forth no independent standard of review applicable to EPA's decision not to object to a Title V permit, *see* 42 U.S.C. § 7607(b), this Court reviews EPA's action pursuant to the standard of review set forth in the Administrative Procedure Act ("APA"). Under the APA, EPA action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Ariz. Public Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009); *see also Sierra Club v. Johnson*, 436 F.3d 1269, 1273 (11th Cir. 2006) (applying APA standard of review to review of a petition for EPA to object to a Title V permit); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 674 (7th Cir. 2008) (same). This standard of review is narrow and deferential; an agency's action must be upheld if it has articulated a rational basis for the decision and has considered relevant factors. *Copart, Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 495 F.3d 1197, 1202 (10th Cir. 2007).

To prevail, a party challenging a final agency action must show that the agency "relied on factors which Congress has not intended it to consider, entirely

failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U. S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Even a decision of "less than ideal clarity" should be upheld so long as "the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defenders of Wildlif*e, 551 U.S. 644, 658 (2007).

The utmost deference is owed to an agency when it is reviewing fact-based issues, such as technical analyses and judgments that the agency performed and reached based on an evaluation of complex scientific information within the agency's technical expertise. *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc).

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under "*Chevron* Step One," the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress' intent is clear from the statutory language, the Court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is "silent or ambiguous with respect to the specific issue," the Court proceeds to "*Chevron* Step Two" and must defer to the agency's statutory interpretation if it is reasonable. *Id.* "The

court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id*. at 843 n.11. *See also Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *Salman Ranch, Ltd. v. Comm'r of Internal Revenue*, 647 F.3d 929, 937 (10th Cir. 2011).

EPA's interpretation of its own regulations is entitled to substantial deference. *Ariz. Public Service Co. v. EPA*, 562 F.3d at 1123. The agency's interpretation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

SUMMARY OF ARGUMENT

EPA acted reasonably in denying WildEarth Guardians' Petition to Object to the Title V operating permit for the Pawnee Station on the grounds that Guardians did not meet its burden of "demonstrat[ing]" that the permit was not in compliance with requirements of the Clean Air Act. 42 U.S.C. § 7661d(b)(2). EPA reasonably exercised its discretion under *Chevron* in determining what constitutes a demonstration of noncompliance with the Act, and reasonably determined that Guardians did not demonstrate noncompliance simply by (1) pointing to a Notice of Violation that EPA had issued in 2002 alleging PSD violations at the Pawnee

Station, and (2) submitting to EPA information that Guardians asserted showed that major modifications had occurred at the Pawnee Station in 1994 and 1997, thus allegedly triggering the application of PSD requirements. EPA concluded that the 2002 Notice of Violation was only an initial step in the enforcement process, and in and of itself was inadequate to *demonstrate* noncompliance with PSD requirements. EPA also reasonably exercised its technical expertise in reviewing the information submitted by Guardians and found that the information was insufficient to demonstrate noncompliance with PSD requirements, and that the permit, therefore, did not fail to comply with the CAA by not including those requirements. Finally, EPA reasonably concluded that Guardians did not demonstrate that Colorado had failed to adequately respond to Guardians' comments on the draft Title V permit for Pawnee. Because EPA acted reasonably in denying the Petition to Object as it related to these issues, this Court should deny Guardians' petition for review.

ARGUMENT

I. EPA IS ENTITLED TO DEFERENCE ON ITS INTERPRETATION OF THE TERM "DEMONSTRATES" AND ON ITS APPLICATION OF THAT INTERPRETATION TO GUARDIANS' PETITION TO OBJECT

Section 505(b)(2) of the Clean Air Act requires EPA to issue an objection to a Title V permit "if the petitioner *demonstrates to the Administrator* that the permit is not in compliance with the requirements of the [Clean Air Act]." 42 U.S.C. §

7661d(b)(2) (emphasis added). *See also* 40 C.F.R. § 70.8(c) and (d). In this section, we address, as an initial matter, why EPA's interpretation of the term "demonstrates" as used in Section 505(b)(2) is reasonable and entitled to deference under *Chevron*. We further address why this Court should reject Guardians' request for *de novo* review of Guardians' demonstration to EPA under Section 505(b)(2). *See* Petitioner's Brief ("Pet. Br.") at 28-31. Rather, the Court should review EPA's application of the term "demonstrates" to Guardians' Petition to Object under the highly deferential "arbitrary and capricious" standard, as EPA's determination involved the Agency's exercise of its technical judgment and expertise.

A. EPA's Interpretation of the Term "Demonstrates" is Reasonable and Entitled to Deference.

The Court should apply deference under *Chevron* to EPA's interpretation of the word "demonstrates" as that term is used in Section 505(b)(2), 42 U.S.C. § 7661d(b)(2). As a number of other Courts of Appeals considering Section 505(b)(2) have concluded, the term "demonstrates" is ambiguous and contains a discretionary component enabling EPA to determine the nature of the burden that petitioner must meet in order to make an adequate demonstration. *See MacClarence v. EPA*, 596 F.3d 1123, 1130-31 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 406-07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F. 3d 1257, 1266 (11th Cir. 2008); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670,

677-78 (7th Cir. 2008) ("*CARE*"). Because the term "demonstrates" is ambiguous, its use by Congress constitutes a "delegation[] of authority to the agency to fill the statutory gap in reasonable fashion." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This delegation of authority provides EPA with discretion to determine what quality and quantity of information constitutes a "demonstrat[tion]" of a Title V permit's alleged noncompliance with requirements of the Act. Even more delegation of gap-filling authority exists on account of the fact that the language of Section 505(b)(2) implicates process or procedure. The Supreme Court stated in *Vermont Yankee Nuclear Power Corp. v. NRDC* that it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." 435 U.S. 519, 544 (1978).

As relevant in this case, EPA reasonably interprets the "demonstration" requirement in Section 505(b)(2) as placing the burden on the petitioner to supply information to EPA "sufficient to demonstrate the validity of each objection raised" to the Title V permit. EPA Order at 4 [JA:197]. One critical reason for this, noted already, *see supra* at 8, is that Section 505(b)(2) allows EPA only 60 days in which to investigate, analyze, and rule on a petition such as that submitted by Guardians. As the Seventh Circuit noted in *CARE*,

> Congress deliberately gave the EPA a rather short time period to review proposed permits, resolve questions related to those permits,

> and decide whether to object. Because this limited time frame may not allow the EPA to fully investigate and analyze contested allegations, it is reasonable in this context for the EPA to refrain from extensive fact-finding.

535 F.3d at 678.

Thus, it is not surprising that EPA interprets the "demonstration" requirement as *not* being satisfied where a petitioner relies solely on the existence of an NOV previously issued by EPA. *Id.* at 7 [JA:200]. As EPA described in the Order, it will consider an NOV as *one* relevant factor when determining whether the "overall information" a petitioner presents demonstrates the applicability of a requirement for a Title V permit. *Id.* at 5-6 [JA:198-99] (emphasis added). EPA noted that other factors "that may be relevant" include "the quality of the information, whether the underlying facts are disputable, the types of defenses available to the source, and the nature of any disputed legal questions" and that if any of those factors are relevant and the petitioner does not present information concerning them, then EPA may find that the petitioner has failed to satisfy the "demonstration" requirement. *Id.; see also Sierra Club v. EPA*, 557 F.3d at 406-07 (citing similar factors as reasonable for EPA to consider when evaluating a petitioner's attempt to "demonstrate" a Title V permit's noncompliance).

As we discuss in Sections II and III below, EPA reasonably applied its interpretation to the facts at hand to conclude that Guardians' demonstration was insufficient where Guardians' attempt to "demonstrate" permit noncompliance

rests only on (1) an NOV previously issued by EPA and (2) the submission of limited additional information that fails to address several key elements of the applicable criteria for determining whether PSD applied to the source.

B. EPA's Decision to Partially Deny Guardians' Petition is Reviewable Under the Deferential "Arbitrary-and-Capricious" Standard of the Administrative Procedure Act, Not *De Novo* as Guardians Contends.

Guardians, relying on an isolated part of the Clean Air Act's legislative history, argues that this Court should review the question of whether Guardians "demonstrated" to EPA that the Pawnee Title V permit does not comply with applicable requirements of the Act *de novo*, without any deference to EPA's expert judgment and technical expertise. Pet. Br. at 28-29. This position should be rejected as contrary to the plain language of the statute and to the various Court of Appeals opinions that have considered the issue. Instead this Court should review EPA's application of the Agency's interpretation of the term "demonstrates" to the facts set forth in Guardians' Petition to Object under the highly deferential "arbitrary and capricious" standard.

As many other Courts of Appeals have already concluded, the "demonstrates" standard in Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), requires EPA to exercise its technical judgment and expertise. *See Sierra Club v. Johnson*, 541 F.3d 1257, 1265-66 (11th Cir. 2008) (language in Section 505(b)(2) "requires the Administrator to make a judgment" about whether a petition demonstrates

noncompliance); *Sierra Club v. EPA*, 557 F.3d 401, 406-07 (6th Cir. 2009) (observing that the statute's direction that the petitioner must demonstrate noncompliance "*to the EPA* suggests a role for the agency's expertise and judgment to play") (emphasis in original); *CARE*, 535 F.3d at 678 ("EPA has discretion under the statute to determine what a petition must show in order to make an adequate 'demonstration'").

Moreover, the legislative history cited and relied upon by Guardians is convoluted and of no probative value here. The cited legislative history refers to EPA's non-discretionary duty "to object to permits that violate the Clean Air Act" and indicates that this non-discretionary duty is enforceable in a federal district court in a citizen suit filed under Section 304 of the CAA. *See* Pet. Br. at 28-29; 136 Cong. Rec. S16895, S16944 (1990). It goes on to state that "[c]ourts in such [district court] citizen suits are as capable as is the Administrator to review the merits of the petition and to determine if such an objection should be entered to the permit." *See* 136 Cong. Rec. S16895, S16944 (1990). This snippet of legislative history therefore mixes and confuses Section 304 citizen suits with petitions for review of agency actions, which are two very different causes of action under the CAA. *Compare* 42 U.S.C. § 7604(a) (establishing a cause of action for citizen suits to enforce nondiscretionary duties) with 42 U.S.C. § 7607(b) (establishing a cause of action for petitions for review of agency action). By its terms, Section

505(b)(2) of the CAA does not create any nondiscretionary duty for EPA to object to a permit *unless* EPA first concludes that a petitioner has "demonstrated" to the Agency that the permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2). As relevant here, EPA did not reach such a conclusion, and therefore, there is no nondiscretionary duty at issue. Thus, the standard of review that a district court would apply to a nondiscretionary duty suit brought under Section 304 is not at issue. In any event, EPA has reasonably construed the plain text of the statute as conferring discretion upon EPA to exercise its technical judgment and expertise in determining whether a satisfactory demonstration of noncompliance has been made by a petitioner. *See* EPA Order at 3, 7-9 [JA:196, 200-02].

Indeed, applying *de novo* review to EPA's evaluation of whether a petitioner has demonstrated a permit's noncompliance would also contradict the well-established principle of administrative law that EPA is owed the utmost deference on its decisions regarding factual issues implicating technical analysis and judgments. *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. at 103. Moreover, to the extent the word "demonstrates" is ambiguous, "[c]ourts have generally accorded substantial deference to the EPA's interpretation of the Clean Air Act Amendments, reasoning that 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to

administer . . . .'" *Wisc. Elec. Power Co. v. Reilley*, 893 F.2d 901, 906 (7th Cir. 1990) (citation omitted). This deference "follows logically from the highly technical provisions of the Amendments . . . and is consistent with the Administrative Procedure Act, which provides that agency actions are to be set aside only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)." *Id.* at 906-07.

Thus, this Court should reject Guardians' request for *de novo* review of its demonstration to EPA under Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), and instead determine whether EPA's application of the "demonstrates" standard to Guardians' Petition to Object is reasonable under the highly deferential "arbitrary and capricious" test.

II. EPA REASONABLY CONCLUDED THAT GUARDIANS FAILED TO DEMONSTRATE THAT THE PAWNEE TITLE V PERMIT DID NOT COMPLY WITH THE CLEAN AIR ACT

EPA reasonably determined that Guardians failed to meet its burden to demonstrate to the Administrator that the Pawnee Title V permit does not comply with applicable requirements of the Clean Air Act. In attempting to meet its demonstration burden, Guardians (1) pointed to the Notice of Violation that EPA issued to Xcel regarding the Pawnee Station in 2002, and (2) submitted certain information that Guardians asserts shows that the Pawnee Station underwent "major modifications" that triggered PSD requirements. EPA considered

Guardians' arguments and the submitted information, and explained in the June 30, 2011 Order why, in the Administrator's judgment, this did not "demonstrate" that the permit is not in compliance with applicable requirements. EPA determined that citation to an EPA-issued NOV and the submission of limited additional information that failed to address several key elements of the applicable criteria for determining whether PSD applied did not constitute an adequate demonstration under Section 505(b)(2) of the Act compelling an objection. EPA's determination is reasonable and should be upheld.

A. EPA Reasonably Considered That the 2002 Notice of Violation Did Not Demonstrate that the Pawnee Title V Permit Was Not in Compliance with the Act.

Contrary to Guardians' argument (Pet. Br. at 31), EPA reasonably considered the NOV the Agency issued to Xcel regarding the Pawnee Station in 2002 and explained why the NOV did not "demonstrate" noncompliance. EPA Order at 4-7 [JA:197-200]. EPA's treatment of the 2002 NOV is consistent with the Clean Air Act and with the rulings of several other Courts of Appeals, and is entitled to deference as a reasonable application of EPA's interpretation of Section 505(b)(2) to the record that was before the Agency.

1. EPA Explained that an NOV Is a Nonbinding, Preliminary Step in EPA's Enforcement Process.

As explained in EPA's Order denying in part Guardians' Petition to Object, an NOV is a preliminary step in EPA's enforcement process under the Clean Air

Act. Although EPA does consider an NOV as one of several relevant factors when evaluating whether the information a petitioner submits "demonstrates" that a Title V permit does not comply with applicable requirements, the existence of a previously-issued NOV alone is not sufficient to make such a demonstration. EPA Order at 7 [JA:200].

As EPA explained, an NOV is not final agency action and has no binding legal consequences. *Id.* at 5 [JA:198]; *see also Pacificorp v. Thomas*, 883 F.2d 661, 661 (9th Cir. 1988) ("An EPA notice of violation is not reviewable because it is not a final agency action."); *West Penn Power Co. v. Train*, 522 F.2d 302, 310-11 (3d Cir. 1975). Rather, an NOV provides advance notice to a source that EPA may pursue enforcement. *See Sierra Club v. EPA*, 557 F.3d at 408. That the findings of violation in an NOV may be based on "any information available" underscores their preliminary nature. 42 U.S.C. § 7413(a)(1); *Sierra Club v. EPA*, 557 F.3d at 408. Unless and until a court enters a favorable judgment in a civil action in federal district court, EPA's "finding" in an NOV remains an unproven allegation. *See, e.g.*, 42 U.S.C. § 7413(b) (authorizing the United States to commence a civil action). After EPA issues an NOV, it may pursue additional investigation, information gathering, and other fact-finding regarding the alleged violations. EPA Order at 5 [JA:198]. The Agency may also later change its opinion regarding violations alleged in an NOV. *See, e.g., Sierra Club v. EPA*, 557

F.3d at 408 (discussing the possibility that EPA may learn after issuing an NOV that its allegations cannot be substantiated).

EPA has previously applied its view that the existence of prior Notices of Violation alone is not sufficient to "demonstrate" noncompliance in the context of denying similar petitions to object to Title V operating permits, and other Courts of Appeals have upheld EPA's approach. *See* EPA Order at 5-6 [JA:198-99] (describing similar petitions); CEMEX Order at 6 [JA:226]. In *Sierra Club v. Johnson*, 541 F.3d 1257, 1262 (11th Cir. 2008), EPA had issued Notices of Violation alleging violations of PSD requirements at two power plants in Georgia, and subsequently filed a complaint in an enforcement action based on the same allegations. Petitioners then asked the Administrator to object, relying solely on EPA's NOVs and complaint in their attempt to demonstrate that Title V operating permits for power plants did not comply with applicable requirements. The Administrator denied the petition to object, and in a subsequent challenge to that decision, the Eleventh Circuit denied the petition for review, ruling that it was reasonable for EPA to find that under such circumstances the petitioners had not demonstrated that the permits did not comply with applicable requirements. *Id.* at 1269. The court agreed with EPA that a Notice of Violation is "simply one early step in EPA's process of determining whether a violation has, in fact, occurred"

and observed that neither the issuance of the NOV nor did the initiation of a civil enforcement action *demonstrates* noncompliance. *Id.* at 1267.

Similarly, in *Sierra Club v. EPA*, 557 F.3d 401 (6th Cir. 2009), the Sixth Circuit upheld EPA's conclusion that the petitioner had not demonstrated the Title V permit's noncompliance with applicable requirements by relying solely on the existence of an NOV and a complaint. *Id.* at 411. In that case, EPA had issued an NOV alleging PSD violations, filed a complaint based on the allegations in the NOV, and had nearly resolved all PSD claims when it declined to object to a petition for objection to a Title V operating permit for the same plant. *Id.* at 405. Referencing the "any information available" standard applicable for Agency findings in NOVs, the court agreed that "[w]hatever it takes for the EPA to 'find' a violation at the outset, it could reasonably construe 'demonstrates' in [Section] 7661d(b)(2) to require something more in some settings." *Id.* at 408. The Sixth Circuit also agreed that, in evaluating a petitioner's attempt to demonstrate permit noncompliance, it was reasonable for EPA to consider other factors that include those EPA described in the June 30, 2011 Order, such as the quality of the information, whether the underlying facts are disputable, the type of defenses available to the source, and the nature of any disputed legal questions. *See id.* at 407-08; EPA Order at 6 [JA:199].

In attempting to distinguish these decisions, Guardians places heavy emphasis on developments in the accompanying enforcement actions and appears to demand that EPA disclose information related to its enforcement analysis and investigation in responding to Guardians' Petition to Object. Pet. Br. at 34-35. Unlike in some of the precedents cited above, no enforcement action has even been initiated with regard to the alleged PSD violations at the Pawnee Station since the NOV was issued ten years ago, in 2002. For this Court to find that an NOV – based on allegations and the "any information available" standard found in 42 U.S.C. § 7413(a) – constitutes a finding that must bind EPA's actions in a permitting action in 2012 under these circumstances would intrude sharply on the Agency's discretion to evaluate whether a petitioner has demonstrated a Title V permit's noncompliance. It could also create troubling implications for the Agency's enforcement discretion, as discussed in Section II.A.3 below.

Guardians also disregards the different standards EPA applies when it issues an NOV and when it evaluates a petition to object to a Title V permit. Guardians accuses EPA of reversing its position regarding whether major modifications occurred at the Pawnee Station and criticizes EPA for not explaining "whether or why it now believes that the modifications at Pawnee were not 'major modifications' triggering PSD requirements." Pet. Br. at 30. However, EPA has not changed its position. The Notice of Violation was issued based on the "any

information available" standard in CAA Section 113(a)(1), 42 U.S.C. § 7413(a)(1). In 2012 EPA, appropriately applying the different (and more rigorous) standard in CAA Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), found that Guardians' petition did not "demonstrate" to EPA that Pawnee had undergone major modifications necessitating PSD requirements.

Finally, Guardians' reliance on *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172 (2d Cir. 2005) ("*NYPIRG*"), is unavailing. *NYPIRG* is neither binding precedent in this Circuit nor persuasive precedent as it was based on a flawed reading of the Clean Air Act. *NYPIRG* held that the "text" of Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), together with the provisions of law governing administrative notices of violation, "obligated" EPA to object to a Title V operating permit that did not contain PSD emission limitations, where the State permitting authority had issued an NOV to, and commenced a Clean Air Act citizen's suit against, the source. *Id.* at 181-82,[4] 186. The Second Circuit observed that both the Clean Air Act and the New York law governing the issuance of NOVs "direct enforcement for a 'violation' not merely for allegations," and reasoned that the New York permitting authority's findings for purposes of issuing

[4] While the Second Circuit cites to 42 U.S.C. § 7661d(b)(1) on these pages, the context of its analysis and references throughout the decision to 42 U.S.C. § 7661d(b)(2) make it clear that the Court intended to refer to 42 U.S.C. § 7661d(b)(2) on these pages.

an NOV should suffice for demonstrating noncompliance with the Clean Air Act under Section 505(b)(2). *Id.* at 181.

NYPIRG is flawed, among other reasons, because it misconstrued the statutory text. As described above (see discussion, *supra*, at 15-18), the Clean Air Act does not command a standard for determining whether a "demonstration" has been made within the meaning of Section 505(b)(2), 42 U.S.C. § 7661d(b)(2). The Clean Air Act's NOV provision in Section 113(a)(1), 42 U.S.C. § 7413(a)(1), does not in and of itself fill that gap, but rather allows EPA to make findings of violations that constitute unproven allegations until adjudicated. This was one of the reasons why the Eleventh Circuit, later considering a similar situation, was not persuaded by *NYPIRG*. *See Sierra Club v. Johnson*, 541 F.3d at 1268. Thus, the Clean Air Act allows EPA to find that a "demonstration" that relies on EPA's issuance of an NOV is deficient.

In addition, *NYPIRG* is distinguishable because the NOV at issue had been issued by the State of New York under New York state law. *Id.* at 180-81. The Second Circuit interpreted the State's law authorizing a NOV as placing a high burden on the State before issuing an NOV. *Id.* at 181. *See also Sierra Club v. EPA*, 557 F.3d at 410 (distinguishing *NYPIRG* as turning on a state regulation that may have required the State to make a "more robust determination" than EPA

would before issuing an NOV; noting in particular that the state regulation did not employ the CAA's "any information available" standard for an NOV).

2. EPA Explained its Concerns about the Potential Impact on Enforcement Actions.

In determining how to weigh the 2002 NOV in the context of assessing Guardians' "demonstration" under CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(1), EPA also reasonably took into account the enforcement implications that its permitting actions might have. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (internal quotations and citations omitted).

First, EPA recognized that the short time frame the CAA gives EPA to review Title V permits may not allow for EPA to "fully investigate and analyze contested allegations." EPA Order at 6 [JA:199]; *see also CARE*, 535 F.3d at 678. Congress has allowed EPA a short time period to review proposed permits, resolve questions related to those permits, and either object to the permits or decline to object. Within 45 days after receiving a copy of the proposed permit, the EPA Administrator shall object if he or she "determines" that the permit is not in compliance with the CAA. 42 U.S.C. § 7661d(b)(1). If the Administrator does not object, any other person may petition the Administrator within 60 days after the

expiration of the 45-day review period, and the Agency is required to respond to a petition within 60 days. 42 U.S.C. § 7661d(b)(2). As EPA explained in the June 30, 2011 Order, this limited timeframe does not allow EPA the necessary time to fully investigate and analyze contested allegations of past violations. EPA Order at 6 [JA:199]. Permitting authorities also have a limited amount of time in which to investigate and analyze contested allegations of past violations since, at a minimum, they must provide a "streamlined" procedure for issuing permits. 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(d)(3)(ix).

In contrast to the short period of time the statute provides for EPA to review Title V permits and petitions, the investigation and resolution of alleged CAA violations, especially PSD violations, in the enforcement context can take years and involve a multitude of complicated factual issues. In one example, *National Parks Conservation Ass'n v. Tennessee Valley Authority*, 618 F. Supp. 2d 815 (E.D. Tenn. 2009), the district court denied summary judgment because fact issues existed regarding whether "major modifications" triggering PSD had occurred. *Id.* at 823.[5] In dispute, among other things, was whether a net emissions increase had

[5] Although the dispute in *National Parks* centered on the definition of a "major modification" under the Tennessee State Implementation Plan, the language and tests are similar to the definitions and language in Colorado's Regulation No. 3. *Compare National Parks*, 618 F. Supp. 2d at 822 (citing Tennessee's definition of a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation . . .") with EPA Order at 4

occurred. *Id.* This same issue is in dispute regarding the Pawnee Title V permit. *See* EPA Order at 7-10 [JA:200-03]. The court in *National Parks* found that the significant emissions increase analysis was not suited for resolution on summary judgment. 618 F. Supp. at 831. In another recent enforcement case hinging on liability issues related to "major modifications," the Seventh Circuit finally resolved in 2006 a legal question on interlocutory appeal arising from a case filed in 1999. *See United States v. Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006); Third Amended Complaint, filed in S.D. Ind., (No. 1:99cv1693), 1999 WL 34744777. It is reasonable in this context for EPA to expect a petitioner to make a demonstration that addresses the relevant issues rather than for EPA to undertake and resolve an investigation.

Second, EPA noted that the Pawnee Title V permit does not protect Pawnee from enforcement for any violations of the CAA that occur as a result of any modifications undertaken prior to the issuance of the permit. EPA Order at 7 [JA:200]. In other words, the issuance of the permit does not hinder EPA from

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[JA:197] (describing the definition of "major modification" in Colorado's State Implementation Plan during the time of the alleged modifications at Pawnee as "any physical change in the method of operation of, or addition to, a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation . . .").

taking future enforcement action regarding the alleged PSD violations.[6] The "permit shield" provision of Title V authorizes a permit to provide that compliance with the permit shall be deemed compliance with other applicable provisions that relate to the permittee, but only if the permit includes the applicable requirements of such provisions, or the permitting authority makes a determination that such other provisions are not applicable and the permit includes the determination or a concise statement thereof. 42 U.S.C. § 7661c(f); *see also* 40 C.F.R. § 70.6(f)(3)(ii) (EPA regulations stating that nothing in the Title V permitting program or Title V permit "shall alter or affect . . . [t]he liability of an owner . . . for any violation of applicable requirements prior to or at the time of permit issuance").

Here, EPA noted that the Pawnee Title V permit does not provide a safe harbor from enforcement of PSD. EPA Order at 7 [JA:200]. The permit does not contain PSD requirements, and PSD was not identified as a specific non-applicable requirement that would protect Xcel via a permit shield. As EPA noted in the June 30, 2011 Order, the permit shield does not protect the Pawnee Station from enforcement of "any violations that occur as a result of any modifications" for which construction preceded issuance of the permit. *Id.* at 7 [JA:200]; Final Pawnee Station Title V Permit at 43 [JA:116]. Thus, the fact that certain

[6] Nor does the Pawnee Title V permit preclude Guardians, or any other person, from commencing a citizen suit under CAA Section 304, 42 U.S.C. § 7604, based on such alleged violations.

requirements are not included in Pawnee's Title V permit does not shield Pawnee from liability in the event that it is later determined that those requirements were applicable. This permit shield provision of the CAA further illustrates that Congress expressly recognized the possibility that EPA and State permitting authorities may not be able to investigate fully and resolve violations of the CAA in the Title V permitting process. *See also CARE*, 535 F.3d at 678-79.

3. *Heckler v. Chaney* Should Inform Judicial Review Here.

The Court must also consider the longstanding rule that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and therefore "general[ly] unsuitab[le] for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As the Supreme Court has explained,

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. at 831. "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities[,]" *id*. at 831-32, and, as the Fifth Circuit stressed when dismissing a suit to compel the Agency to take enforcement action, EPA must allocate its "limited resources" "in the interest of

the general public as [the Agency] perceive[s] it, not in the causes deemed most important by individual citizens." *City of Seabrook v. Costle*, 659 F.2d 1371, 1375 (5th Cir. 1981).

Heckler v. Chaney provides pertinent guidance and should inform judicial review here. While Guardians does not seek review of a decision whether or not to bring an enforcement action, it does seek to compel EPA to enforce requirements of the PSD program through the Title V permit process. Guardians also appears to call for EPA to disclose information from its enforcement files when acting on a petition to object to a Title V permit. *See* Pet. Br. at 35 ("EPA failed to provide any reasoning or explain if or why it now believes [the Agency's prior findings in the 2002 NOV] were in error"); Pet. Br. at 36 (". . . the administrative record is devoid of any documents showing that EPA reviewed its enforcement files or conducted any review of the evidence that it relied upon in issuing the NOV . . ."). Principles of prosecutorial discretion are properly applied here so as not to second-guess EPA's enforcement decisions. At the very least, *Heckler v. Chaney* reinforces the highly deferential standard of the Administrative Procedure Act, the application of which, as explained in Section II.B, establishes that EPA acted reasonably on the record before it.

B. EPA Reasonably Concluded that Guardians' Evidence Did Not "Demonstrate" Noncompliance.

Beyond making reference to the Notice of Violation that EPA issued to Xcel in 2002 regarding the alleged violations at the Pawnee Station, Guardians submitted certain information in an attempt to "demonstrate" to EPA that "major modifications" at Pawnee had occurred in 1994 and 1997, triggering PSD requirements.[7] EPA considered the information submitted by Guardians and explained in the administrative record why that information did not demonstrate that major modifications had been made.

1. Guardians Failed to Submit Information Sufficient to Demonstrate a "Net Emissions Increase."

Under the Colorado State Implementation Plan ("SIP") in effect at the time of the alleged modifications in 1994 and 1997, a "major modification" was "any physical change in the method of operation of, or addition to, a major stationary source that would result in a significant net emissions increase of any pollutant subject to a regulation" under the CAA. EPA Order at 4 n.2 [JA:197]; *see also* Addendum at ADD-045 (1994 Colorado SIP, Reg. 3, I.B.2.) and ADD-136 (1997

[7] Guardians presented limited evidence in an attempt to support its allegations that Pawnee underwent modifications in 1989, 1998, and 2000, but focuses its arguments on the 1994 and 1997 alleged modifications and states that the 1997 alleged modification is the best example to demonstrate the permit's noncompliance. *See* Pet. Br. at 40 n.4. EPA described in the Order how Guardians' attempted demonstration regarding the 1989, 1998, and 2000 alleged modifications did not demonstrate noncompliance with the Act. EPA Order at 9 [JA:202].

Colorado SIP, Reg. 3, Part A.I.35.B) [JA:302 and JA:394].[8] A net emissions increase was defined under the Colorado State Implementation Plan as requiring:

> (1) a determination of the actual emissions increase that would result from a particular physical change or change in the method of operation; and (2) a determination of any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

EPA Order at 4 n.2, 7-8 [JA:197, 200-01]; *see also* Addendum at ADD-022 to ADD-025 (1994 Colorado SIP, I.G) and ADD-140 to ADD-143 (1997 Colorado SIP, Reg. 3, Part A.I.36) [JA:279-82 and JA:398-401]. A source's "actual

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[8] Guardians cites to the current version of Colorado Regulation No. 3, Part D, II.A.26.c.(i)-(iv), as the source of the net emissions test. *See* Pet. Br. at 42 n.5. However, as stated in the Order, EPA used the test found in the Colorado State Implementation Plan at the time of the alleged modifications in 1993 to 2000. *See* EPA Order at 4 n.2 & 8 [JA:197 & 201] (referring to Colorado Regulation 3, Part A.I.B.35.b for the definition of a major modification and Part A.I.B.36 for the definition of net emissions increase). Excerpts of the Colorado State Implementation Plan as of 1994 and 1997 are attached in the Addendum, as due to error they were not included on the courtesy electronic copy of the administrative record provided to Guardians and Intervenor. However, in relation to Guardians' arguments, the current and historic net emissions increase provisions do not differ materially. Both the 1990s versions of the test and the test cited by Guardians state that whether an emissions increase or decrease is "creditable" depends on the baseline actual emissions (established by Air Pollution Emission Notice ("APEN") or other emission information for the 1994 test and APEN for the 1997 test) as well as credible increases and decreases. *See* Addendum at ADD-023 (1994 Colorado SIP, subsection c of the definition of "net emissions increase") and ADD-141 (1997 Colorado SIP, Reg. 3, Part A.I.B.36.c]) [JA:280 and 399]. EPA notes that as of the date of the filing of this brief, the provision of Part D of Colorado's current version of Regulation 3 cited by Guardians (Pet. Br. at 42 n.5) has not yet been approved by EPA into the Colorado State Implementation Plan. *See* https://yosemite.epa.gov/R8/R8Sips.nsf/Colorado?OpenView&Start=1&Count=30&Expand=1.9#1.9.

emissions" are the average rate at which the unit emitted the pollutants in question "during a two-year period which precedes the particular date and is representative of normal unit operation." Addendum at ADD-007 (1994 Colorado SIP) and ADD-125 (1997 Colorado SIP, Reg. 3, Part A.I.B.1.a) [JA:264 and JA:383]. An increase or decrease in actual emissions is "creditable" (counts toward the calculation) only if certain conditions are satisfied. *See* Addendum at ADD-023, ADD-025 (1994 Colorado SIP) and ADD-141 (1997 Colorado SIP, Reg. 3, Part A.I.B.36.c) [JA:280, 282 and 399].

EPA found that the materials Guardians submitted regarding the 1994 reheater redesign and replacement project and the 1997 condenser tube upgrade were not sufficient to demonstrate that a major modification occurred. EPA Order at 7, 8 [JA:200, 201]. EPA explained in the Order that for both the 1994 and 1997 alleged modifications, the emissions information Guardians submitted did not demonstrate the existence of a "net emissions increase" because the information did not show the increase in actual emissions from the alleged physical change, identify the contemporaneous period, determine any other contemporaneous increases and decreases in emissions, or determine whether the contemporaneous increases and decreases were creditable. EPA Order at 8-9 [JA:201-02]. For example, the Colorado State Implementation Plan required a determination of "any other increases and decreases in actual emissions at the source that are

contemporaneous with the particular change and are otherwise creditable." EPA Order at 4 n.2, 7-8 [JA:197, 200-01]; *see also* Addendum at ADD-022 (1994 Colorado SIP) and ADD-141 (1997 Colorado SIP, Reg. 3, Part A.I.B.36.1.a(ii)) [JA:279 and 399]. An increase or decrease in actual emissions is "contemporaneous" with the increase from a particular change only if it occurs between five years before the construction of the physical change and the date that the increase from the particular change occurs. Addendum at ADD-023 (1994 Colorado SIP) and ADD-141 (1997 Colorado SIP, Reg. 3, Part A.I.B.36.b) [JA:280 and 399]. Guardians did not attempt to identify the contemporaneous period or determine any other contemporaneous increases and decreases in emissions. EPA Order at 8-9 [JA:201-02].

Guardians argues that Colorado's test for a "net emissions increase" is a "complex legal test" and that it is not reasonable for petitioners to have to demonstrate noncompliance with such a complex legal test. Pet. Br. at 44. However, nothing in the statute suggests that a citizen petitioner need not make a demonstration of noncompliance in instances where the applicable legal test is a "complex" one.

Unable to point to any statutory support for its position that it need not make a demonstration of "complex" violations, Guardians argues that demonstrating noncompliance with the applicable Colorado State Implementation Plan is

impracticable because it requires citizen petitioners to provide technical information to EPA that is not publicly available, such as information that owners and operators must provide to the State through submissions known as an Air Pollution Emission Notice ("APEN"). Pet. Br. at 42-44. But nowhere in the June 30, 2011 Order did EPA state that it required information that would not be available to citizens. Rather, EPA found that Guardians had not demonstrated or even attempted to demonstrate multiple parts of the test for a net emissions increase as established by the applicable Colorado State Implementation Plan. Further, Air Pollution Emission Notices are publically available information that can be requested under Colorado's Open Records Act. *See* COLO. REV. STAT. ANN. §§ 24-72-112 to 408.

Guardians asserts that the alleged 1997 modification is the best example demonstrating the Pawnee Title V permit's noncompliance, and that the evidence Guardians submitted in support demonstrated a significant net emissions increase. Pet. Br. 40 n.4, 41. However, the evidence Guardians points to actually highlights the deficiencies in the information submitted. For example, Guardians relies on a table that included Pawnee's annual emissions data for certain years as submitted by Xcel to EPA's Acid Rain Program. Pet. Br. at 20, 41. Guardians points out that the table shows that in 1996, before the alleged modification took place, Pawnee emitted 11,633.4 tons of SO_2 and 3,529.0 tons of NOx; that in 1997 Pawnee

emitted 13,928.7 tons of SO_2 and 3,817.8 tons of NOx; and that in 1998, which Guardians characterizes as the year after the modification, Pawnee emitted 15,325.6 tons of SO_2 and 3,906.1 tons of NOx. Citing the regulatory definition that 40 tons per year is considered "significant" for both SO_2 and NOx emissions, Guardians concludes that from 1997 to 1998, the increases in both SO_2 and NOx exceeded the "significance" threshold for a net emissions increase and, therefore, Guardians demonstrated that a major modification at the Pawnee Station occurred in 1997 and resulted in a significant net emissions increase. *See* Pet. Br. at 20-21, 40-41, 42.

Among the deficiencies with Guardians' reliance on this table is that it does not take into account the "net emissions increase" test in Colorado's State Implementation Plan. As EPA noted in the Order, to determine whether a physical change would result in a "net emissions increase," there must be an increase in the "actual emissions" from a particular change or change in the method of operation at a stationary source. EPA Order at 7-8 [JA:200-01]; Addendum at ADD-022 (1994 Colorado SIP) and ADD-140 (1997 Colorado SIP, Reg. 3, Part A.I.B.36.a.(i)) [JA:279 and 398]. A source's "actual emissions" baseline as of a particular date is "the average rate, in tons per year, at which the unit emitted the pollutant during a two-year period which precedes the particular date and is representative of normal operation." *See* Addendum at ADD-007 (1994 Colorado

SIP) and ADD-125 (1997 Colorado SIP, Reg. 3 Part A.I.B.1.a) (definition of "actual emissions") [JA:264 and 383]. The information provided by Guardians did not identify what Guardians believes to be the appropriate two-year period prior to the date of the alleged modification that represents normal operation.[9] As EPA noted, Guardians failed to show the increase in actual emissions from either the reheater design and replacement in 1994 or the upgrade of condenser tubes in 1997. *See* EPA Order at 8-9 [JA:201-02].

In sum, EPA appropriately considered the applicable criteria in Colorado's State Implementation Plan when evaluating Guardians' attempt to demonstrate that the Pawnee Title V permit does not comply with the Clean Air Act or the Colorado State Implementation Plan. It was reasonable for the Agency to find that Guardians' failure to even address multiple elements of the "net emissions increase" test – such as the increase in "actual emissions" from the physical changes, identification of the contemporaneous period, and determination of any other contemporaneous increases and decreases in emissions and whether those

[9] As discussed, EPA determined that Guardians failed to provide sufficient information to establish the actual emissions baseline, which is an element of evaluating whether a "net emissions increase" has occurred. Although not necessary for EPA's determination here, EPA notes that for electric utility steam generating units, the appropriate method to determine whether a significant net emissions increase has occurred is what is known as the "actual-to-future-actual test." *See* 57 Fed. Reg. 32,314 (July 21, 1992); 40 C.F.R. § 51.166(a)(21)(V) (1997); *Wis. Elec. Power Co. v. Reilly*, 893 F.2d at 917-18.

were creditable – did not "demonstrate" noncompliance of the permit with applicable requirements. EPA Order at 8-9 [JA:201-02].

2. EPA Has No Duty to Supplement a Petitioner's Demonstration in Responding to a Petition to Object to a Title V Permit.

Having failed to satisfy its demonstration burden, Guardians attempts to turn the burden of the demonstration around by arguing that the record contains "no evidence that EPA acted to refute or confirm any information" in Guardians' petition and that EPA has not explained "whether or why it now believes that the modifications at Pawnee were not 'major modifications' triggering PSD requirements." Pet. Br. at 30, 44-45. Guardians similarly suggests that EPA should include in the administrative record "documents showing that EPA reviewed its enforcement files or conducted any review of the evidence that it relied upon in issuing the NOV." Pet. Br. at 36. The Clean Air Act clearly places the burden on the *petitioner* to demonstrate *to* EPA that a Title V permit does not comply with applicable requirements. *See* 42 U.S.C. § 7661d(b)(2). Particularly in light of the short timeframe the statute provides for EPA to review and respond to a petition to object to a Title V permit (discussed *supra* at 17-18, 30-32), EPA reasonably interprets 42 U.S.C. § 7661d(b)(2) as not establishing an obligation for EPA to affirmatively review its records or to supplement information provided by

a petitioner through EPA's own independent investigation.[10] *See Chevron*, 467 U.S. at 842-43 (holding agency's reasonable interpretation of ambiguous statutory language should be accorded deference). EPA also reasonably interprets 42 U.S.C. § 7661d(b)(2) as not imposing any duty on EPA to disclose the nature of its confidential agency enforcement files, which would intrude upon the Agency's exercise of enforcement discretion (discussed *supra* in Section II.A.3). *Id.*

III. EPA REASONABLY CONCLUDED THAT COLORADO'S RESPONSE TO GUARDIANS' COMMENTS WAS ADEQUATE

Guardians additionally argues that Colorado "failed to provide any rational basis" supporting its conclusion that PSD does not apply to the modifications at issue, and that EPA's failure to object to Colorado's allegedly inadequate response was arbitrary and capricious. Pet. Br. at 49-50. Guardians seeks to support its argument by comparing this case to EPA's objection to the adequacy of Colorado's response to comments on a Title V permit for CEMEX, Inc. to operate the Lyons Cement Plant in Lyons, Colorado, about which EPA did find that Colorado failed to provide the petitioner with a meaningful response to its comment. Pet. Br. at 51-52. However, the record reveals that EPA reasonably concluded that Colorado's response to Guardians' comments was adequate and that the

[10] Guardians could also not reasonably expect to rely on EPA's records to make *Guardians'* demonstration under 42 U.S.C. § 7661d(b)(2) because Guardians would not know what was in those records.

comparison to the circumstances of EPA's objection to the adequacy of comments on the CEMEX Title V permit is unavailing.

The petitioner in the CEMEX case had alleged that PSD-triggering modifications occurred at the plant in 1979 or 1980 and in 1985, and had alleged increases in emissions contemporaneous with the modifications. Colorado's response had been limited to two sentences that referred vaguely to "rules that existed at the time of each modification" and conclusory statements that the modifications had been determined not to trigger PSD and that the emissions increases had been "determined to meet regulatory requirements at the time of application . . . ." CEMEX Order at 9 [JA:229]. In the CEMEX Order, EPA noted that in reviewing a petition to object to a Title V permit raising concerns regarding a permitting authority's PSD permitting decision, it will "generally" look at whether a petitioner has shown that the permitting authority did not comply with regulations in its State Implementation Plan "or whether the State's exercise of discretion under such regulations was unreasonable or arbitrary." *Id.* at 10 [JA:230]. EPA concluded that Colorado had "failed to provide the basis (e.g., citing to current or historical evidence, or the lack thereof) that supports its conclusion that PSD/NSR was not applicable at the time these two projects were undertaken." *Id.* [JA:230] EPA faulted Colorado for not providing "any citations

or summary of the rationale for its prior determination, or other basis to support its view that PSD was not violated." *Id.* at 9 [JA:229].

Contrary to Guardians' assertions, this case is not "exactly like CEMEX." Pet. Br. at 52. In responding to Guardians' comments and additional information, Colorado in this case provided a rationale as to why it was not determining that PSD had been triggered. Colorado described why EPA's 2002 NOV was not sufficient for a demonstration of noncompliance. Colorado Response at 3-4 [JA:017-18]. Colorado explained that it considers an NOV to be merely an allegation of a violation rather than a determination that violations actually occurred. *Id.* at 3 [JA:017]. For support, Colorado cited the CEMEX Order and excerpted a portion of that Order describing the preliminary nature of the allegations in an NOV, with citations to several opinions from U.S. Courts of Appeals holding that an NOV is not final agency action from which legal consequences flow. *Id.* at 3-4 [JA:017-18]. Colorado also cited a recent opinion from a Colorado state court holding that EPA's issuance of an NOV was not a finding that a violation had occurred and could not preclude the later issuance of a state permit. *Id.* at 4 [JA:018]; *Citizens for Clean Air & Water in Pueblo & S. Colo. v. Colo. Dep't of Public Health & Env't, Air Pollution Control Division*, 181 P.3d 393, 396 (Colo. App. 2008).

Further, Colorado articulated the test in Colorado's State Implementation Plan for a "major modification" – a physical change or change in the method of operation, or addition to, a major stationary source that would result in a significant net emissions increase – and noted that EPA and Xcel had disagreed on these issues. *See* Colorado Response at 7 [JA:021]. As described previously in Section II.A of this brief, whether a "major modification" has occurred is a highly fact-intensive question that can take years to resolve.

In declining to object to the adequacy of Colorado's response to Guardians' comments regarding the Pawnee Station, EPA provided a reasonable explanation as to why it was not objecting. *See* EPA Order at 9-10 [JA:202-03]. EPA observed: (1) that Colorado had described that "the fact certain projects took place does not necessarily indicate that a major modification occurred," (2) that Colorado had noted that EPA and Xcel disagreed on the facts at issue in the 2002 NOV, (3) that Colorado stated that an NOV is not conclusive evidence that PSD has been triggered, (4) that Colorado had explained that Xcel's characterization of the projects in question as a "major turbine overhaul" and "major boiler overhaul[s]" "does not necessarily contemplate the PSD definition of major," and (5) that Colorado provided a rationale in the context of a Title V permit proceeding describing why it was not determining that PSD had been triggered. *Id.*

Colorado's response far exceeds the two-sentence response Colorado provided to the CEMEX petition. As EPA described in the CEMEX Order, in reviewing a petition to object to a Title V permit raising concerns regarding a permitting authority's PSD permitting decision, EPA generally will look to see whether the petitioner has shown that the permitting authority did not comply with its State Implementation Plan-approved regulations governing PSD permitting or whether the exercise of discretion under such regulations was unreasonable or arbitrary. CEMEX Order at 3 [JA:223]; *see also Alaska Dep't Of Envt'l Conservation* v. *EPA,* 540 U.S. 461 (2004); *MacClarence v. EPA*, 596 F.3d at 1132-33. Here, EPA reasonably concluded that Guardians had not demonstrated that Colorado's explanations regarding the applicability of PSD requirements to Pawnee were inadequate to satisfy Colorado's responsibility to respond to Guardians' comments.

Guardians critiques Colorado for "fail[ing] to rebut EPA's findings in the NOV" that Xcel made major modifications in 1994 and 1997. Pet. Br. at 50. However, this argument ignores both that rebutting allegations in an NOV is not a standard Colorado is required to apply when evaluating a Title V permit and that Colorado discussed and provided legal citations supporting its consideration of an NOV's contents as merely allegations. Further, as described above in Sections I and III.A.2, the structure of the Title V permit process and the short period of

review for both the State and EPA to consider the permit's terms suggests that Congress did not require agencies to fully resolve all disputed issues in the Title V context.

In sum, EPA reasonably determined that Guardians failed to demonstrate that Colorado's response to Guardians' comments on the issue of PSD applicability arising from the alleged modifications at Pawnee was inadequate.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,
IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: July 2, 2012

By: */s/ Christina L. Richmond*

CHRISTINA L. RICHMOND
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3376
(202) 514-8865 (fax)
Christina.Richmond2@usdoj.gov

OF COUNSEL:

ELYANA SUTIN
U.S. EPA, Region 8
Office of Regional Counsel
Denver, Colorado

RICHARD VETTER
U.S. EPA
Office of General Counsel
Research Triangle Park, North Carolina

Counsel for Respondents

STATEMENT REGARDING ORAL ARGUMENT

Respondents believe oral argument would benefit the Court in this matter, as the Clean Air Act and its implementation present complex issues.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,707 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that 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 2007 in 14-point Times New Roman font.

Date: July 2, 2012

/s/ Christina L. Richmond
Christina L. Richmond
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Christina.Richmond2@usdoj.gov
(202) 514-3376

Attorney for Respondents

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

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July 2, 2012 */s/ Christina L. Richmond*

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

Ashley D. Wilmes
WildEarth Guardians
827 Maxwell Avenue, Suite L
Boulder, Colorado 80304
(505) 988-9126
awilmes@wildearthguardians.org
Counsel for Petitioner

A. Kent Mayo
Baker Botts L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700
kent.mayo@bakerbotts.com
Counsel for Intervenor

I further certify that pursuant to the Court's December 13, 2011 Order and Fed. R. App. P. 25(a)(2)(B)(ii), I have dispatched seven hard copies of the foregoing by a third-party commercial carrier for delivery to the clerk within 3 days.

Date: July 2, 2012

/s/ Christina L. Richmond
Christina L. Richmond
P.O. Box 7611
Washington, D.C. 20044
Christina.Richmond2@usdoj.gov
(202) 514-3376

Counsel for Respondents