No. 12-60482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Action by the
United States Environmental Protection Agency

FINAL BRIEF FOR RESPONDENT

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division
EILEEN T. MCDONOUGH
United States Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3126
(202) 514-8865 (fax)
eileen.mcdonough@usdoj.gov
Counsel for Respondents

OF COUNSEL:

JAMES HAVARD
MELINA WILLIAMS
BRIAN DOSTER
ELLIOTT ZENICK
KRISTI SMITH
Office of General Counsel
United States Environmental Protection Agency

March 1, 2013

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Fifth Circuit Rule 28.2.1 that the following listed persons and entities potentially have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusals.

Parties and Counsel

1. Louisiana Department of Environmental Quality ("LDEQ"), Petitioner

2. Herman Robinson and the LDEQ Legal Division, counsel for Petitioner, including the following attorneys:

Mr. Donald Trahan
Ms. Kathy Wright
Ms. Jackie Marve
Ms. Deidra Johnson
Mr. Elliot Vega
Ms. Dwana King

3. Consolidated Environmental Management, Inc., a Delaware entity, Intervenor-Petitioner

4. Counsel for Intervenor-Petitioner:

David R. Taggart, Jerald N. Jones, Bradley R. Belsome, Michael C. Mims and the law firm of Bradley Murchison Kelly & Shea LLC.

Maureen N. Harbourt, Tokesha M. Collins and the law firm of Kean Miller LLP

Eric L. Hiser and the law firm of Jordan Bischoff & Hiser, PLC

5. United States Environmental Protection Agency ("EPA"), Respondent

6. Counsel for Respondent:

Eileen T. McDonough and the U.S. Department of Justice, Environment & Natural Resources Division

James Havard, Melina Williams, Brian Doster, Elliott Zenick, Kristi Smith and the Office of General Counsel, United States Environmental Protection Agency

Other Interested Persons

1. Peggy Hatch, Secretary, LDEQ

2. Sanford Phillips, Assistant Secretary, Office of Environmental Services, LDEQ

3. Tegan Treadaway, Administrator, Air Permits Division, LDEQ

4. Lisa P. Jackson, Administrator, EPA

7. Nucor Corporation, a Delaware entity

8. Nucor Big Iron Holdings, Inc., a Delaware entity

9. Nucor Steel Louisiana LLC, a Delaware entity

Respectfully submitted,

/s/ Eileen T. McDonough
Counsel for Respondent

Dated: March 1, 2013

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Respondent United States Environmental Protection Agency ("EPA") respectfully requests oral argument. Given the complex and technical nature of the arguments raised by the parties with respect to the merits of the claims raised by Petitioner and Petitioner-Intervenor, EPA believes that oral argument will be helpful to the Court. Oral argument will be less useful if the petition can be resolved on jurisdictional grounds as the arguments pertaining to jurisdiction are pure questions of law.

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GLOSSARY

CAA	Clean Air Act
DRI	Direct reduced iron
EPA	United States Environmental Protection Agency
LDEQ	Louisiana Department of Environmental Quality
NAAQS	National ambient air quality standard
PSD	Prevention of significant deterioration
SIP	State implementation plan

STATEMENT OF JURISDICTION

The Court is without jurisdiction in this matter. Petitioner Louisiana Department of Environmental Quality ("LDEQ") and Intervenor Consolidated Environmental Management, Inc. ("Nucor"), seek review of the "Order Granting Petitions for Objection to Permits" ("Objection") issued by Respondent United States Environmental Protection Agency ("EPA"), on March 23, 2012. Appendix ("App.") 6396. *See* 77 Fed. Reg. 24,200 (Apr. 23, 2012) (giving notice of the Objection). The Objection was issued pursuant to EPA's authority under section 505(b)(2) of the Clean Air Act ("CAA"), 42 U.S.C. § 7661d(b)(2). Objection at 13. App. 6408. Section 505(c) of the Act explicitly bars judicial review of EPA's Objection. 42 U.S.C. § 7661d(c) ("No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.").

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction to hear a petition for review of the Objection, given that 42 U.S.C. § 7661d(c) expressly bars such review until EPA takes final action to grant or deny a permit.

2. Whether EPA's failure to issue its decision on the Petitions for Objections within the time period allowed by 42 U.S.C. § 7661d(b)(2) terminated

EPA's authority to grant those petitions and issue an objection where the statute does not provide for that consequence.

3. Whether where EPA has decided two overarching issues in an administrative petition for an objection, EPA is required to answer each of over 80 specific issues in those petitions for an objection, even though a response by LDEQ to the two overarching issues that EPA decided could moot such issues or change EPA's substantive response.

4. Whether EPA can assert an objection based on its conclusion that the permitting record lacks a clear explanation of the basis for key determinations by LDEQ.

5. Whether EPA reasonably concluded that the permitting record does not adequately explain why LDEQ concluded that the CAA allows for a title V permit to omit terms and conditions from an underlying Prevention of Significant Deterioration ("PSD") permit, although such provisions are applicable requirements under title V, where emission units are removed from a title V permit without modification of the PSD permit.

6. Whether EPA reasonably concluded that the permitting record does not explain why LDEQ concluded that the CAA allows the permitting authority to incorporate terms and conditions from a title V permit into a PSD permit by reference.

7. Whether EPA reasonably concluded that the permitting record does not explain why LDEQ concluded that a single major stationary source can be divided into two projects to be permitted separately, without consideration of the cumulative emissions from the source as a whole for every relevant pollutants through an ambient air quality impact analysis.

8. Whether EPA acted reasonably in adhering to its longstanding position that, in considering a petition objecting to a title V permit and questioning whether the permit is consistent with the requirements of the applicable state implementation plan ("SIP"), EPA should consider whether the concurrently-issued PSD permits were issued in compliance with the CAA's requirements.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioner LDEQ, supported by Intervenor Nucor, seeks review of EPA's Objection to the three Clean Air Act title V operating permits issued by LDEQ to Nucor for an ironmaking facility in Convent (St. James Parish), Louisiana. The facility includes a pig iron manufacturing process ("pig iron process") and a direct reduced iron manufacturing process ("the "DRI process"). Both processes produce feed stock to be used in steelmaking. The title V permits were issued in conjunction with two PSD permits, which required installation of pollution controls and authorized the construction of the pig iron and DRI processes.

Nucor's facility required both title V and PSD permits under the CAA. LDEQ has authority to issue title V and PSD permits through two distinct permitting programs that have been independently reviewed and approved by EPA.

Zen-Noh, Inc., which operates a grain export facility adjacent to Nucor's planned facility, petitioned EPA for an objection to the title V permits pursuant to CAA section 505(b)(2), which authorizes the filing of such petitions and requires EPA to issue an objection if "the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA], including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2). EPA granted the petitions and issued the Objection challenged in this proceeding.

II. STATUTORY BACKGROUND

A. State Implementation Plans

The CAA, 42 U.S.C. §§ 7401-7671q, enacted in 1970 and extensively amended in 1977 and 1990, establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation. Under title I of the Act, EPA is charged with identifying air pollutants that endanger the public health and welfare, and with formulating the National Ambient Air Quality Standards ("NAAQS" or "standards") that specify the maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-09. The EPA Administrator has promulgated NAAQS for various pollutants.

The Act, in turn, gives States the primary responsibility for adopting control measured to reduce pollution so that the ambient air meets the NAAQS for the identified pollutants. 42 U.S.C. § 7407(a). In this regard, under the Act, each State must prepare an implementation plan, or "SIP," that provides for the implementation, maintenance and enforcement of the NAAQS in each air quality control region within the State. *Id*.; 42 U.S.C. § 7410(a)(1)-(2). The Act specifies minimum elements that States must include in the SIP. 42 U.S.C. § 7410(a)(2). The SIP must be adopted by the State after reasonable notice and a public hearing and submitted to EPA for review and approval. 42 U.S.C. § 7410(a)(1). EPA must approve the SIP if it meets all of the applicable requirements of the Act. *Id*. § 7410(k)(3).

B. Title V

In 1990, Congress enacted title V of the CAA, 42 U.S.C. §§ 7661-61f, establishing a permit program covering the operations of stationary sources of air pollution. Congress designed the title V permit program to be administered and enforced primarily by State and local air permitting authorities pursuant to EPA-approved permit programs and subject to EPA oversight. *See* 42 U.S.C. § 7661a(d)(1) 42 U.S.C. § 7661a(i); 42 U.S.C. § 7661d. Each State must develop and submit to EPA a permit program meeting the requirements of title V and the applicable regulations promulgated by EPA. *Id*.; 42 U.S.C. § 7661a(b). EPA has

granted most States, including Louisiana, approval to administer the title V permit program. 40 C.F.R. pt. 70, App. A.

Under the title V program, all CAA requirements applicable to a particular source must be set forth in a comprehensive permit, often called a title V permit or an operating permit, which serves as "a source-specific bible for Clean Air Act compliance." *Virginia v. EPA*, 80 F.3d 869, 873 (4th Cir. 1996). The title V program itself does not generally impose new substantive air quality control requirements; rather, sources of air pollution subject to title V are required to apply for, and operate pursuant to, an operating permit that includes emission limitations, standards, monitoring requirements, compliance schedules, and other conditions and requirements necessary to assure compliance with the CAA, including the requirements of the applicable state implementation plan. *See* 42 U.S.C. §§ 7661a(a), 7661c(a).

C. Prevention of Significant Deterioration

For areas such as St. James Parish that have been designated as in attainment for at least one of the NAAQS, the applicable requirements under title V include compliance with the requirements of the PSD program when that program applies. 42 U.S.C. §§ 7475(a)(l), 7661c(a); *see also* 40 C.F.R. § 70.2 (defining "applicable requirements" for state operating permit programs to include requirements of both implementation plans, and the terms and conditions of

preconstruction permits issued under title I of the Act). The PSD program, established in Part C of Subchapter I of the CAA, is designed to protect air quality in areas in which the air is relatively clean, while assuring economic growth consistent with such protection, and it requires pre-construction permitting for major stationary sources of air pollutants. *See generally* 42 U.S.C. §§ 7470-79.

Many States and local permitting authorities implement PSD permitting programs approved by EPA into their SIPs. *See* 42 U.S.C. § 7410(a)(2)(J); 40 C.F.R. § 51.166. For Louisiana, the PSD permitting program has been approved by EPA as part of the Louisiana SIP, and, as such, both the requirements of that program and any terms and conditions of PSD permits issued by LDEQ are applicable requirements for purposes of Louisiana's title V permits. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.2 (subparts (1) and (2) of the definition of "applicable requirement").

To secure a PSD permit, the applicant must show, in relevant part, that the proposed source "will not cause, or contribute to, air pollution in excess of any . . . [NAAQS]" or any PSD increment and that it is "subject to the best available control technology for each pollutant subject to regulation under [the CAA] emitted from, or which results from" the facility. 42 U.S.C. § 7475(a)(3), (4); *see also* 40 C.F.R. § 51.166(k), (j); L.A.C. 33:III.509. Thus, a PSD permit is required prior to construction to assure compliance with applicable PSD requirements both

before the facility is built and during its subsequent operation, while a title V permit must assure compliance with all applicable requirements under the Act (including the terms and conditions of any PSD permit, requirements of the SIP, and many other requirements under the Act) during the on-going operation of the source.

D. EPA Review of Title V Permits

Title V of the CAA and the applicable EPA regulations require state permitting authorities to submit any proposed title V permits to EPA for review. 42 U.S.C. § 7661d(a)(1); 40 C.F.R. § 70.8(a)(1). Title V calls for EPA, within 45 days of receipt of a proposed title V permit, to object to that permit on its own initiative if it "determine[s]" that the proposed permit "contains provisions that are . . . not in compliance" with "applicable requirements of [the Act], including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(1); *see* 40 C.F.R. § 70.8(c). If EPA does not object on its own, "any person may petition the Administrator" to do so within 60 days after the expiration of the 45-day period. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). Section 505(b)(2) provides that "[t]he Administrator shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA], including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). The

statute states that "[t]he Administrator shall grant or deny such petition within 60 days after the petition is filed." 42 U.S.C. § 7661d(b)(2). The statute does not specify what happens if EPA does not act on the petition to object within the provided 60 days.

If the permitting authority *has not* issued a permit before receiving an objection from EPA, "[u]pon receipt of an objection by the Administrator . . . the permitting authority may not issue the permit unless it is revised" "to meet the objection." 42 U.S.C. § 7661d(b)(3), (c); *see also* 40 C.F.R. § 70.8(c), (d). Section 505(c) provides the permitting authority 90 days after the date of EPA's objection to submit a revised permit that meets the objection. 42 U.S.C. § 7661d(c). If the permitting authority does not act, EPA "shall issue or deny the permit in accordance with the requirements of [title V]." *Id*.; *see also* 40 C.F.R. §§ 70.8(c), (d), 71.4(e). If the permitting authority *has* issued a permit before receiving an objection, EPA "shall modify, terminate or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with [section 505(c)]." *Id*. § 7661d(b)(3).[1]

[1] EPA's implementing regulations state that if the permit has been issued prior to EPA's objection, the Administrator will "modify, terminate, or revoke such permit" consistent with the procedures in 40 C.F.R. § 70.7(g)(4)-(5). 40 C.F.R. § 70.8(d). Section 70.7(g)(4) states that the permitting authority shall have 90 days from receipt of an EPA objection to resolve that objection and to "terminate, (footnote continued . . .)

E. Judicial Review

Section 307(b)(1) permits judicial review of certain specified actions of EPA taken pursuant to the Clean Air Act, none of which pertain here, as well as of "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the Act, and it provides that a petition for review of a final action by EPA under the CAA that is locally applicable may be filed in the United States Court of Appeals for the appropriate circuit. 42 U.S.C. § 7607(b)(1). Section 307(b)(2) provides that a petition challenging a final decision by EPA to "defer performance of any nondiscretionary statutory action to a later time" may be filed under paragraph (b)(1). *Id*. § 7607(b)(2). Of critical importance here, section 505(c) expressly bars judicial review of an objection under title V until EPA takes final action to issue or deny the title V permit. *Id*. § 7661d(c).

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modify or revoke and reissue the permit in accordance with the Administrator's objection." Section 70.7(g)(5) provides that if the permitting authority fails to resolve the objection, the Administrator will "terminate, modify, or revoke and reissue the permit." *See also* 40 C.F.R. § 71.4(e).

III. ADMINISTRATIVE BACKGROUND

EPA issued its Objection based on its oversight of the three title V permits issued by LDEQ to Nucor for two processes at a single site in Convent (St. James Parish), Louisiana: the pig iron process and the DRI process. Both processes produce feedstock for steelmaking. Concurrent with the respective title V permits, LDEQ also issued two PSD permits, one for the pig iron process and one for the DRI process.

The first set of permits, issued on May 24, 2010, comprised a title V permit and a PSD permit for the construction and operation of the pig iron process.[2] Administrative Record ("AR") No. 4, Exhibits 14-15. App. 2424, 2548. In August 2010, Nucor submitted an application for the permits to construct the DRI process. *Id*. Exhibit 17. App. 3337. Two months later, Nucor applied for a modification of the title V permit for the pig iron process to: (1) reduce production capacity; (2) add more emission controls; (3) remove certain vents; and (4) remove material handling and road haul units from the pig iron title V permit and transfer those items to the DRI process permits. *Id.* Exhibit 20-21. App. 3763, 3772-73.

The second set, issued on January 27, 2011, comprised three permits. First, LDEQ issued a modified title V pig iron permit that incorporated the changes

[2] This discussion is derived from the Objection, 5-6. App. 6400-01.

requested by Nucor as described above. AR No. 4, Exhibit 3. App. 5761. LDEQ simultaneously issued an administrative stay of this modified permit that precluded the commencement of construction of the pig iron process until certain conditions were satisfied. *Id*. Exhibit 7. App. 5897. The record for the modification of the title V pig iron process permit stated that LDEQ was not revising the PSD permit for that process. AR No. 4, Exhibit 5, Statement of Basis, 1. App. 5898.

On the same day, LDEQ also issued the title V and PSD permits for the DRI process. AR No. 4, Exhibits 1-2. App. 5925, 6040. As requested by Nucor, the material handling and road haul units removed from the modified pig iron title V permit were included in the title V and PSD permits for the DRI process. The DRI process PSD permit also included a specific condition incorporating requirements from the DRI process title V permit, stating that "[a]ll emission limitations, monitoring, recordkeeping, and reporting requirements of [the DRI process title V permit] related to emissions [of specifically-named pollutants] are also terms and conditions of this PSD permit." *See* AR No. 4, Exhibit 6, LDEQ Public Comments Response Summary ("LDEQ Response Summary"), at 56. App. 6186.

On June 25, 2010, Zen-Noh Grain Corporation ("Zen-Noh") petitioned EPA to object to the pig iron process title V permit issued by LDEQ on May 24, 2010. AR 3. App. 3179. After LDEQ issued the modified pig iron process title V permit and the DRI process title V permit, Zen-Noh filed a second administrative petition

requesting that EPA object to those permits as well. AR 4. Supplemental App.

The administrative petitions filed by Zen-Noh raised over 80 specific issues. Objection at 7-10. App. 6402-05. EPA stated that it was reviewing the allegations under the standard set forth in 42 U.S.C. § 7661d(b)(2), Objection at 2, and determined that an objection to the title V permits should be issued pursuant to that section and 40 C.F.R. § 70.8(d). Objection at 17. EPA's Objection was based on the Agency's consideration of two threshold issues:

> (1) LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects [rather than as a single source] for purposes of PSD analysis; and (2) LDEQ has not provided permit records from which the full scope of applicable requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

Id. at 10-11. EPA thus granted Zen-Noh's petitions for an objection to the title V permits for the pig iron and DRI processes based on its consideration of these threshold issues. EPA also determined, however, that it made little sense to proceed further to address the remaining possible grounds for objection, stating:

> Because LDEQ's response to these issues could affect the EPA's analysis of many of the other issues raised in the petitions, the EPA is granting the petitions on the threshold issues, and is not addressing the other issues raised in the petitions in this Order.

Id. at 11. EPA "direct[ed] LDEQ to establish a clear permit record in accordance with this Order and to make any necessary changes in the permits." *Id*. at 16. Finally, EPA explained that, if LDEQ responded, Zen-Noh, as well as Sierra Club and Louisiana Environmental Action Network ("LEAN"), which had also petitioned EPA for objections to the same permits, could submit new petitions raising any issues from the earlier petitions that they believed were not resolved by LDEQ's response; they could also identify any new issues raised by the response, as additional or separate grounds for an objection. *Id*. at 16, 17 n.9.

The title V process for these permits did not end with EPA's Objection. LDEQ submitted a response to EPA's objection on June 21, 2012.[3] Though it could have, Zen-Noh did not petition EPA for another objection following LDEQ's response. Zen-Noh did file a district court suit seeking to compel EPA to terminate or revoke the title V permits for Nucor. *Zen-Noh Grain Corp. v. Jackson*, Case No. 12-cv-02535 (E.D. La.).

Sierra Club and LEAN did file a petition for objection after LDEQ's response. EPA has not yet responded to that petition. Furthermore, Sierra Club and LEAN have both sued EPA in district court to compel a response to their

[3] Because the Response post-dates the Objection, it is not part of the administrative record on which the instant petition for review is based.

earlier administrative petitions. *Louisiana Environmental Action Network v. Jackson*, Case No. 12-1096 (D.D.C.). That action does not involve the petition submitted after LDEQ's response.

STANDARD OF REVIEW

The determination of jurisdiction is a "threshold issue" for the federal courts; if subject matter jurisdiction does not exist, "the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted). Petitioner bears the burden of demonstrating the Court's subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). To meet this burden in suits against the United States, the plaintiff must identify an applicable waiver of the United States' sovereign immunity. Absent such a waiver, the courts lack jurisdiction to entertain a suit against the United States. *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

Courts must construe any waiver of sovereign immunity strictly in favor of the United States. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Any limitations that Congress has seen fit to impose upon its consent to be sued must be strictly applied and may not be modified by implication. *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Thus, the terms of the United States' consent to suit define the court's jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

To the extent that final action by EPA is subject to judicial review under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), this Court has consistently held that the standard of review applicable is the "arbitrary or capricious" standard set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003). In *BCCA*, this Court explained the deferential nature of the APA's standard of review.

> The APA's standard of review is narrow. A rule is "arbitrary and capricious" only where the agency has considered impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, agency decisions will be upheld so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (citation omitted). A reviewing court must be "most deferential" to the agency where, as here, its decision is based upon its evaluation of complex scientific data within its technical expertise. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

355 F.3d at 824. In reviewing agency action under the APA, the agency action is presumed to be valid. *City of Seabrook v. EPA*, 659 F.2d 1349, 1359-60 (5th Cir. 1981). Petitioners have the burden of demonstrating that

the agency's action is arbitrary, capricious or otherwise inconsistent with law. *Mississippi Hosp. Ass'n, Inc. v. Heckler*, 701 F.2d 511, 517 (5th Cir. 1983).

SUMMARY OF ARGUMENT

LDEQ's petition for review should be dismissed for lack of subject matter jurisdiction. Under the statutory structure in section 505, 42 U.S.C. § 7661d, EPA's Objection is no more than an intermediate point in a title V administrative oversight process that has not yet fully played out. Congress has authorized judicial review of an objection by EPA under CAA section 7661d(b)(2) *only* after EPA takes final action to issue or deny a permit. Because EPA has not taken such final action for these title V permits, judicial review of EPA's Objection is expressly barred by section 7661d(c). The argument that section 7661d(c) is inapplicable because EPA did not issue the Objection within the timeframe allowed by section 7661d(b)(2) must be rejected. The Supreme Court and this Court have established that, where a statute imposes a deadline for agency action, missing the deadline will not deprive the agency of authority to act unless Congress has explicitly provided such a consequence. No such language of consequence can be found in the Clean Air Act with respect to EPA's review of title V permit objection petitions, and the petition for review must therefore be dismissed.

Should the Court nonetheless conclude that jurisdiction is present, it should deny the petition because LDEQ and Nucor have failed to show that EPA's action in issuing the Objection was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). EPA's decision to limit its response to two threshold issues, rather than to address all of the more than 80 issues raised by Zen-Noh, was reasonable given that LDEQ's response on the two threshold issues could alter the outcome of many of the others. In taking this approach, EPA acted much as courts do when they dispose of cases on threshold issues without then proceeding to resolve all the other issues raised by the parties; it did not, in the process, impermissibly expand the rights of other entities to raise objections to the title V permits.

EPA's conclusion that LDEQ had an obligation to explain the rationale behind its decisions was reasonable and consistent with the CAA. EPA, after reviewing the record from LDEQ's permitting process, reasonably concluded that LDEQ had failed to explain how three components of its permitting decisions were consistent with the CAA.

First, LDEQ did not adequately explain how its decision to modify the title V permit for the pig iron process without changing the underlying PSD permit, thereby creating an incongruity between the two, could be justified, given that a title V permit must include the terms and conditions of a PSD permit. Here,

following LDEQ's modification, the two no longer matched, and EPA reasonably objected and called for an explanation.

Second, LDEQ did not adequately explain its conclusion that it could incorporate by reference terms and conditions from a title V permit into a PSD permit. One reason this is of concern is that LDEQ failed to explain what would happen to the terms incorporated into the PSD permit when the title V permit expired according to the statute's requirements. Unlike the PSD permit, the title V permit is for a fixed term: the permit expires after five years.

Finally, LDEQ did not give an adequately reasoned explanation of its decision to permit the pig iron and DRI processes separately, even though LDEQ had described them as located at a single major stationary source. As a result of this decision, the ambient air impact analysis required for a PSD permit did not consider the cumulative effect of the emissions from both the DRI and pig iron processes for some pollutants. Without an explanation from LDEQ, EPA could not readily determine whether the ambient air impact analysis was conducted appropriately. Therefore, EPA was reasonable in concluding that additional explanation was necessary.

ARGUMENT

I. CONGRESS HAS EXPRESSLY BARRED JUDICIAL REVIEW OF EPA'S OBJECTION TO A TITLE V PERMIT UNTIL EPA EITHER ISSUES OR DENIES A PERMIT

A. CAA Section 7661d(c) Prohibits Judicial Review of EPA's Objection at This Time.

In CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), Congress provided the federal Courts of Appeals with jurisdiction over final actions by EPA that have local or regional applicability. Congress, however, specifically limited this grant of jurisdiction by barring judicial review of a title V permit objection raised by EPA "until the Administrator takes final action to issue or deny a permit under this subsection." 42 U.S.C. § 7661d(c).[4] *See Ocean County Landfill Corp. v. EPA*, 631 F.3d 652, 656 (3d Cir. 2011) ("We therefore regard § 7661d(c) as indicating Congress's intent to subject those objections to judicial review only *after* the EPA's issuance or denial of a permit.") (emphasis added).

Here EPA has issued an objection to the title V permits issued by LDEQ, but has neither issued nor denied a title V permit. EPA's Objection made clear that EPA reviewed the claims in the petitions for objection under the standard set forth

[4] In contrast, Congress expressly authorized judicial review of action by EPA to *deny* a petition for the Agency to raise an objection to a title V permit. 42 U.S.C. § 7661d(b)(2).

in section 7661d(b)(2), and that EPA was relying solely on its authority under that section and the title V implementing regulations in granting the petitions and objecting to the title V permits. Objection at 2, 17. App. 6397, 6412. Accordingly, section 7661d(c) governs this case. The plain language of section 7661d(c) bars judicial review pursuant to section 7607(b)(1) in this matter and requires that the Court dismiss LDEQ's petition.[5]

B. The Date of EPA's Objection Does Not Affect the Application of the Limit on Judicial Review Imposed by Section 7661d(c).

CAA section 7661d(b)(2) provides that EPA "shall grant or deny such petition within 60 days after the petition is filed." EPA did not grant the Zen-Noh petitions within the statutory time frame. LDEQ argues that, because EPA did not act within the statutory time period, the limitations on judicial review imposed by section 7661d(c) do not apply. LDEQ Brief ("Br.") at 17-18. *See also* Nucor Br. at 27-28. This argument, however, is not supported by the statutory text and also flies in the face of the well-settled rule that waivers of sovereign immunity,

[5] LDEQ makes a summary effort to assert jurisdiction under section 307(b)(2), which allows judicial review where the Agency has taken final action to defer "performance of any nondiscretionary statutory action." LDEQ Br. at 2, 18. *See also* Nucor Br. at 1. First, jurisdiction under this provision is also barred by section 505(c). Second, LDEQ has not identified any deferred duty. The Objection fully satisfied EPA's obligation to grant or deny the Zen-Noh petitions under section 505(b)(2). Objection at 2. App. 6397. EPA reasonably declined to answer the issues that could be affected by a further response from LDEQ. *See infra* 35-37.

including waivers allowing judicial review, are to be narrowly and strictly construed in favor of the sovereign. *See Nordic Village, Inc.*, 503 U.S. at 33-34.

Section 7661d(c) does not differentiate between timely and late objections in defining the point at which judicial review may be sought. Because section 7661d(c) is a limitation on the waiver of sovereign immunity, its language must be strictly applied and may not be modified by implication. *See Block v. North Dakota*, 461 U.S. at 287. Thus, LDEQ's claim that section 7661d(c) precludes judicial review of an order granting an objection only if EPA acts within the statutory time frame must be rejected as unsupported by the plain language of the statute.

LDEQ's reasoning that section 7661d(c) applies only where EPA acts within the statutory time period is further undermined by the plain fact that section 7661d(b)(2) does not prohibit EPA from issuing an objection after the 60-day period has expired. LDEQ's argument that the statute should be read as terminating on the 61st day EPA's authority to grant a petition for an objection is contrary to the principles of statutory interpretation established by the Supreme Court.

In *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), the Supreme Court stated:

> a statute directing official action needs more than a mandatory "shall" before the grant of power can sensibly be read to expire when the job is supposed to be done.

Id. at 161.[6] *See Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 883 (5th Cir. 1992) ("[A] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and imposes a consequence for failure of compliance.").

In *Peabody Coal*, the Supreme Court rejected the argument that, because the Commissioner of Social Security had missed a statutory deadline for assigning responsibility for the pension of a particular coal industry retiree to a specific coal company, the Commissioner lost her authority to make such assignments. 537 U.S. at 161-62. The Court pointed to the lack of any statutory language indicating that Congress intended that this loss of authority would be the consequence of the any failure by the Commissioner to take timely action. *Id*. After analyzing Congress' intent with respect to the purpose of the statute, the Court concluded: "The way to reach the congressional objective, however, is to read the statutory date as a spur to prompt action, not as a bar to tardy completion." *Id.* at 172.

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[6] The Court, 537 U.S. at 158-59, pointed to the following decisions to demonstrate that this rule is a well-established principle: *Regions Hosp. v. Shalala*, 522 U.S. 448, 459, n.3 (1998); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993); *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990); *Brock v. Pierce County*, 476 U.S. 253, 257-61 (1986).

Section 7661d(b)(2) requires EPA to act on a petition for an objection within 60 days, but it does not address the consequences of a failure by EPA to act by the deadline. LDEQ fails to cite any language in the statute that could support its argument that the consequence should be a termination in the Agency's authority to grant the petition. Indeed, section 7661d contains no such language. LDEQ does point to statements in the legislative history, LDEQ Br. at 18-20, but these statements show no more than that some individual legislators intended that EPA should act on a petition within 60 days and should avoid delay. None indicates any intent to terminate the Agency's authority to grant a petition after the sixtieth day.[7]

In fact, reading section 7661d(b)(2) as terminating the Agency's authority to object after the 60th day would interfere with the rights that Congress provided to parties petitioning for an objection. Under LDEQ's proffered interpretation of the statute, EPA could avoid answering a petition for an objection simply by allowing

[7] Moreover, LDEQ has not established that consideration of the legislative history is even appropriate here, given the lack of ambiguity in the statute. *See Hightower v. Texas Hosp. Ass'n*, 65 F.3d 443, 448 (5th Cir. 1995) ("Only if the language is unclear do we turn to the legislative history.") (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)). Furthermore, LDEQ relies entirely on the statements of individual legislators, which are of limited using in evaluating congressional intent. *See Maher v. Strachan Shipping Co.*, 68 F.3d 951, 957 (5th Cir. 1995) ("isolated statements in the legislative history, particularly those speaking to the motives of individual legislators, are not relevant to the issue of what Congress actually did.").

the 60 days to expire without action. The statute does not support the claim that Congress intended for the petitioner's rights to be extinguished so easily.

Finally, LDEQ's interpretation must be rejected because it is inconsistent with the fact that Congress provided a specific remedy for parties injured by EPA's failure to meet a statutory deadline established under the CAA. In *Brock v. Pierce County*, the Supreme Court explained that

> [w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

476 U.S. at 260. In that case, the Court addressed the proper interpretation of section 106(b) of the Comprehensive Employment and Training Act ("CETA"), 92 Stat. 1926, 29 U.S.C. § 816(b) (1976), which allowed the Secretary of Labor to recover certain funds misused by grant recipients. The statute provided that the Secretary "shall" issue a final determination as to the misuse of CETA funds within 120 days after receiving a complaint alleging such misuse. "The question presented in this case is whether the Secretary loses the power to recover misused CETA funds after that 120-day period has expired." 476 U.S. at 255. The answer was a definite "no":

> We hold that CETA's requirement that the Secretary "shall" take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time. There is simply no indication in the statute or its legislative history that Congress intended to remove

> the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days.

Id.

The Court's decision was premised in part on the conclusion that a party with standing to challenge the Secretary's inaction could obtain relief by filing an action in federal district court under the APA to "compel agency action unlawfully withheld or unreasonably delayed." *Id*. at 260 & n.7.[8] Because the APA provided a "less drastic remedy" for the Secretary's failure to meet the deadline, the Court declined to conclude that the consequence for missing the deadline should be the termination of the Secretary's authority to recover misused funds.

So too here. In CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), Congress provided a "less drastic" remedy than termination of the Agency's authority where EPA fails to take timely action on a petition under section 7661d(b)(2). Section 7604(a)(2) authorizes a party with standing to bring a district court action to compel EPA to perform any duty that is not discretionary under the Act. *Id*. A duty is properly classified as nondiscretionary where Congress has "categorically

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[8] The Court did not find it necessary to determine whether the respondent, Pierce County, had standing to bring such a suit. Instead, the Court explained that there was no need to provide any remedy at all, much less the termination of the Secretary's authority to act, for a party outside the zone of interest protected by the statute. *Id*. at 260 n.7 (citing *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

mandate[ed] that all specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (quotation marks omitted). Because section 7661d(b)(2) imposes a deadline for EPA to act on a petition, EPA's obligation can be enforced through section 7604(a)(2) by a party with standing.[9] *Id*. Under *Pierce County*, the availability of this "less drastic remedy" for delay by EPA means that the Court should reject LDEQ's claims that section 7661d(b)(2) deprives EPA of the authority to grant or deny a petition for an objection from the 61st day after the petition is filed.

C. The Claim That the Objection Exceeds EPA's Authority Under Title V Cannot Justify Circumventing the Plain Language of Section 7661d(c).

Nucor asserts that section 7661d(c) does not bar judicial review of the Objection because EPA

> reached well beyond title V to attack a PSD permit issued under title I and the limited preclusion of review for objections to title V permits does not apply. Review is necessary to prevent [EPA's] purported course of conduct that violates the Clean Air Act and the Supreme Court's decision in [*Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004)].

Nucor Br. at 2. *See also* LDEQ Br. at 3-4. This argument effectively puts the cart before the horse in that it asks the Court to rule on the merits of the challenge to

[9] Consistent with *Brock v. Pierce County*, 476 U.S. at 260 n.7, the Court need not address whether LDEQ or Nucor would have standing to seek this remedy to resolve the issue of statutory interpretation in EPA's favor. *See supra* 26 n.8

the Objection in order to establish whether there is jurisdiction to review it. The Court must have jurisdiction before it can decide the merits of the challenges to the Objection. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 94.

The allegation that EPA has misconstrued the limits of its authority under title V can be addressed consistent with the restriction on the timing of judicial review established by section 7661d(c), by allowing review of that issue after EPA issues or denies the permit. Alternatively, when the permitting authority submits a permit revised to meet EPA's objection, EPA has explained that this creates another petition opportunity on the revised permit (or permit record), including for the source. *See* Objection at 16-17 & n.9. App. 6410-11. *See also In Re Kerr-McGee/Anadarko Petroleum Corp., Frederick Compressor Station* (Order Responding to Title V Petition No. VIII-2008-02), at 2 (Oct. 8, 2009) 2009 WL 7,584,281 (E.P.A.) (interpreting State's record response to a Title V objection as creating another opportunity to petition). If EPA denies such a subsequent petition, that denial would be subject to immediate judicial review pursuant to section 7661d(b)(2).[10]

[10] LDEQ suggests that the Objection should be regarded as an objection to the PSD permit. The Objection, however, is squarely based on section 7661d(b)(2), *infra* 20-21, and does not have the same effect as action under 42 U.S.C. § 7477. *Infra* 54,57.

D. Review of EPA's Title V Objection Is Not Available under CAA Section 7607(b)(1)

Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), provides for judicial review of "final action" of the Administrator under the Act. LDEQ argues that this section provides this Court with jurisdiction to review EPA's Objection. LDEQ Br. at 1-2. *See also* Nucor Br. at 1. These arguments must be rejected.

Neither party has identified any EPA action they can challenge other than EPA's grant of Zen-Noh's petition for an objection, which action was expressly taken pursuant to EPA's authority under section 7661d(b)(2). Regardless of whether the Objection meets the criteria for "final action" under CAA section 7607(b)(1), the specific exception to reviewability contained in section 7661d(c) bars judicial review. *See Hobbs v. United States*, 209 F.3d 408, 412 (5th Cir. 2000) ("a precisely drawn, detailed statute preempts more general remedies.") (internal citation omitted).

Because LDEQ has failed to show that its petition for review is not subject to the explicit restriction on jurisdiction imposed by section 7661d(c), the petition must be dismissed.

II. EPA'S OBJECTION IS REASONABLE, CONSISTENT WITH THE CAA, AND SUPPORTED BY THE ADMINISTRATIVE RECORD

If the Court agrees with EPA on the jurisdictional argument, it should dismiss the petition for review and look no further at the challenges to the merits of

EPA's Objection. However, even if the Court disagrees with EPA on jurisdiction it should still uphold EPA's Objection under the deferential standard of review authorized by the APA. Although the Objection is unreviewable under title V, the Objection was a reasonable exercise of EPA's authority under section 7661d(b)(2) and consistent with both the CAA and the permitting record that was before EPA at the time it reviewed Zen-Noh's petitions. Furthermore, although LDEQ and Nucor contend that EPA's Objection is based on the Agency's policy preferences, this contention is without merit. As explained below, each ground for the Objection is premised on the applicable statutory and regulatory requirements.

A. EPA Applied the Proper Standard In Deciding to Grant the Petition and Issue the Objection.

Section 7661d(b)(2) provides:

> The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan.

Several circuit courts have held that the term "demonstrates" is ambiguous, thereby entitling EPA's interpretation of the provision to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Sierra Club v. EPA*, 557 F.3d 401, 406 (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, 678 (7th Cir. 2008). Under *Chevron*, where a statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843.

EPA determined that Zen-Noh's petition for an objection to the title V permits should be granted because

> The respective permit records for the pig iron and DRI title V permits, including the responses to comments, fail to provide an adequate basis and rationale for EPA to determine that these permits ensure compliance with applicable requirements and are in compliance with the Act.

Objection at 10; *see id*. at 16. App. 6405, 6411. LDEQ questions whether lack of an adequate explanation by a permitting authority can be valid grounds for an objection and suggests that, in order to object, EPA must be able to point to a specific statutory or regulatory provision that has been violated. LDEQ Br. at 39. EPA's interpretation of section 7661d(b)(2), however, is permissible and should be upheld.

There is a fundamental requirement in the Act that a permitting authority must have a reasoned basis for its decisions that is supported in the record. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 494.[11] As a requirement of the Act, this is by definition a subject that is within the scope of EPA's review of a title V petition. *See* 42 U.S.C. § 7661d(b)(2). Furthermore, title V permitting decisions are necessarily complex proceedings. Without an adequate explanation of the many decisions involved, it is not possible for EPA to evaluate fully whether the permit at issue "is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2).

To hold otherwise would require EPA to guess at the permitting authority's basis for a particular decision in deciding whether to grant or deny a title V petition for an objection. Such an unsatisfactory approach can be avoided only if the

[11] *See* 40 C.F.R. § 70.7(a)(5) (requiring permitting authority to "provide a statement that sets forth the legal and factual basis for the draft permit conditions"); *id*. § 70.8(c)(3)(ii) (providing that a permitting authority's failure to provide information sufficient to adequately review the proposed permit is grounds for an objection); *In Re Murphy Oil USA, Inc. Meraux Refinery*, (Order Responding to Title V Petition No. VI-2011-02), at 7 (Sept. 21, 2011), 2009 WL 7,584,310 (E.P.A.) (granting petition to object where permit record, including information in LDEQ's response to comments, failed to provide an adequate rationale for LDEQ's determination that PSD did not apply to the project and citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) for the proposition that agencies must provide an adequate response to public comments).

Agency can raise an objection where the permitting authority's reasoning is unclear or insufficient. Otherwise, EPA could be forced to assert a substantive objection to permit terms or conditions that could be unnecessary if additional explanation were available.

Accordingly, EPA's conclusion that, in evaluating a petition for an objection, the Agency should consider "the adequacy of the permitting authority's rationale in the permitting record, as appropriate, including the response to comments," is a permissible interpretation of the statute. Objection at 5. App. 6400. As the Act requires a permitting authority to provide an adequate rationale properly supported in the record, an inadequate rationale is a proper basis for an objection.

B. EPA Properly Limited Its Objection to the "Threshold" Issues.

EPA did not reach all the issues raised in Zen-Noh's petitions for an objection. Instead, EPA limited its objection to two "threshold" issues:

> (1) LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis; and (2) LDEQ has not provided permit records from which the full scope of applicable requirements for the pig iron and DRI title V permits can be determined and, in particular, has not adequately explained the basis for its transfer of emissions units between the pig iron and DRI processes via the title V permits, and its incorporation by reference of permit requirements established in a title V permit into a PSD permit.

Objection at 10-11. App. 6405-06. EPA explained that:

> Because LDEQ's response to these issues could affect the EPA's analysis of many of the other issues raised in the petitions, the EPA is granting the petitions on the threshold issues, and is not addressing the other issues raised in the petitions in this Order.

Id. at 11.

LDEQ complains that EPA did not address each of the more than 80 underlying issues raised by Zen-Noh's petition. LDEQ Br. at 21-23. Such an effort, however, would have been a waste of agency resources: some questions could be moot and others could be substantively different depending on LDEQ's response to the threshold issues. LDEQ fails to articulate any reason why Congress would have required the Agency to expend effort on such an exercise in futility.

C. EPA's Decision to Limit its Objection to the Threshold Issues Is Not Ripe for Review and Did Not Expand the Procedural Rights for Opponents of the Permits.

LDEQ further argues that, by taking this approach, EPA has somehow broadened the opportunity for objections beyond that provided by Congress. LDEQ Br. at 21-23. *See* Nucor Br. at 27-28. LDEQ takes issue with the fact that EPA explained that, if LDEQ submitted a response to the Objection, Zen-Noh and other interested parties could submit another petition for an objection that could

present new issues related to the response or raise issues from the prior petition that had not been resolved. *See* Objection at 16-17. App. 6411-12.

Petitioners fail to show that this claim is ripe for review. This Court has held that an issue is not ripe unless the petitioner can show "some hardship" if judicial consideration is deferred. *Central & South West Serv., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000). The fact that additional petitions may be submitted to EPA does not cause any hardship to either LDEQ or Nucor. At this point, any claims of hardship are mere speculation. Therefore, the Court should disregard this particular claim as unripe.

Moreover, the fact that additional petitions can be submitted after a response from LDEQ is consistent with the process following the issuance of any objection. Under the structure of section 7661d, EPA's grant of a petition to object is an intermediate point in a larger administrative oversight process. Section 7661d(b) and (c) recognize that LDEQ may respond to an objection by revising the title V permit. *See also* 40 C.F.R. §§ 70.8(d), 70.7(g)(4)-(5). Interested parties may file petitions on the revised permit if EPA does not object on its own accord, just as they may submit petitions raising issues with any other title V permit. Otherwise, even an obviously inadequate permit revision, one that still does not comply with the Act's requirements, might escape further examination and correction.

In this case, depending on LDEQ's response, some issues raised may be the same as raised in the first petition. That possibility, however, does not detract from the conclusion that the process authorized by section 7661d(b) allows for more than one round of petitions for objections. Accordingly, the fact that EPA did not address all the issues in Zen-Noh's petitions does not alter the procedural rights under the statute.

D. EPA Properly Granted the Petition on the Ground That the Title V Permit For the Pig Iron Process Contains Different Requirements Than the PSD Permit for That Process.

EPA's regulations specify that the applicable requirements that must be included in a title V permit include:

> Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act [i.e., the PSD provisions].

40 C.F.R. § 70.2 (defining "applicable requirements"). Thus, as part of reviewing a petition for an objection, EPA considers whether the title V permit at issue includes the terms and conditions of the PSD permit for the source.

EPA's review of the permit records at issue confirmed Zen-Noh's contention that there were significant differences between the title V and PSD permits for the pig iron process. Objection at 14-15. App. 6409-10. During modification of the title V permit for the pig iron process, LDEQ transferred certain emissions units

from that permit to the DRI permit application. AR No. 4, Exhibit 6, LDEQ Public Comments Response Summary ("LDEQ Response Summary"), at 54. App. 6184. The pig iron process PSD permit, however, was not modified; the same emission units that were transferred to the DRI permit for purposes of title V were still treated as part of the pig iron process for purposes of the PSD permit. *Id*. Thus, the PSD permit authorizes activities outside the scope of the title V permit and contains terms and conditions that are not in the title V permit.

In addition, LDEQ also incorporated conditions from the title V permit for the DRI process into the DRI PSD permit, rather than establishing these requirements in the PSD permit and then incorporating them into the title V permit. *See* LDEQ Response Summary, at 56. App. 6186. EPA issued its Objection on the ground that LDEQ had failed to explain how these actions were consistent with the EPA-approved permit programs or with the CAA. EPA concluded that, because the permitting record did not clearly define the applicable requirements, there was not sufficient information for EPA or the public "to determine whether the requirements of the SIP and of title V were met for the pig iron and DRI processes." Objection at 16. App. 6411.

LDEQ does not take issue with EPA's conclusions regarding the content of the permit record, but rather challenges EPA's conclusions regarding their significance. LDEQ complains that the problem is simply that EPA is not focusing

on how the state program functions. LDEQ explains that, as a matter of state law, it normally treats its title V program as a preconstruction review program and processes PSD, state preconstruction, and title V permits simultaneously and that construction cannot begin until the title V permit has been issued. LDEQ Br. at 39-41. LDEQ further suggests that EPA's concerns are not grounded in law, but are based on policy preferences or excessive demands for formality. *Id*.

LDEQ asserts that it has the authority to process the permits simultaneously as a matter of state law, but that does not change the CAA's requirements with respect to the PSD and title V permits. Under the CAA, a PSD permit imposes substantive terms and conditions. A title V permit, generally, "does not impose additional requirements on sources but rather consolidates all applicable requirements in a single document to facilitate compliance." *Citizens Against Ruining The Env't*, 535 F.3d at 672; *see also Sierra Club v. Johnson*, 541 F.3d at 1260 (Title V "does not generally impose new substantive air quality control requirements" but can require permits to contain monitoring, record keeping, reporting, and other conditions to assure compliance with existing requirements). Because of LDEQ's modification to the pig iron title V permit, as a matter of federal law, the title V permit authorizes the operation of a more limited facility than authorized for construction under the PSD permit. Objection at 16. App.

6411. As a result, the modified title V permit does not incorporate all the terms and conditions of the PSD permit, but instead omits a portion.

As a legal matter, the omitted terms and conditions of the PSD permit are applicable requirements for purposes of title V. *See* 40 C.F.R. § 70.2 (definition of "applicable requirement" subpart 2). LDEQ's failure to incorporate these terms and conditions into the title V permit does not ensure compliance with those applicable requirements. Under title V, there must be a title V permit for the pig iron process that includes (or otherwise ensures compliance with) all the terms and conditions of the underlying PSD permit. EPA's Objection is based in relevant part on LDEQ's failure to explain in the permitting record whether those PSD requirements are applicable requirements for purposes of title V and, if so, how the title V permit assured compliance with them. Objection at 16. App. 6411.

LDEQ contends that its approach is permissible because the PSD permit remains unchanged:

> LDEQ simply removed authorization for certain activity in the title V/preconstruction permit review context, which is its right under the CAA and SIP. In short, the terms and conditions of the PSD permit pertaining to the emissions units removed in the title V modification do not constitute "applicable requirements" because Nucor is no longer authorized to construct or operate the units in question.

LDEQ Br. at 40-41.[12] *See* Nucor Br. at 24-25. Regardless of how LDEQ characterizes its action, however, the fundamental result is that Nucor holds a PSD permit that allows construction of and sets emission limits (and other requirements) for emission units that are not addressed by its operating permit. Even if this is a viable result under state law, LDEQ did not explain in the record (and does not explain in its Br.) how this incongruity can be reconciled with the requirements of the CAA, which does not authorize the use of a title V permit to change the terms and conditions of a PSD permit. Nor did LDEQ explain how this can be reconciled with the regulatory definition of "applicable requirements."

Likewise, LDEQ's action in incorporating by reference the terms from the DRI title V permit into the PSD permit also confuses the purpose of the title V and PSD permits. The title V permit is supposed to include the applicable requirements from the PSD permit, not the other way around.[13] LDEQ regards EPA's question on this point as "entirely a matter of form over substance." LDEQ Br. at 41. *See* Nucor Br. at 24-25. This characterization is mistaken. Unlike the

[12] The permit record does not include the post hoc explanation that is in LDEQ's brief. Tellingly, this portion of LDEQ's brief does not cite to its permit record.

[13] While EPA has approved merged Title V and PSD programs for some state or local permitting authorities under which the Title V and PSD permits may be issued as one document, Louisiana has never requested approval of such a merged program, and EPA has never approved such a program for Louisiana.

PSD permit, the title V permit is for a fixed term: the permit expires after five years. LDEQ did not address whether there is an explicit means of ensuring that the title V permit could not be altered upon renewal and whether such a change would require modification of the PSD permit. Moreover, even if this characterization were accurate, it is immaterial. Congress established the relationship between the PSD and title V programs and so that relationship must be maintained, even if administratively inconvenient.

E. EPA Properly Granted the Objection on the Ground That the Underlying PSD Permit Proceedings Did Not Establish a Basis for LDEQ's Decision to Issue Two Permits to One Source.

EPA also objected to the title V permits because "LDEQ has not adequately justified its decision to permit the DRI and pig iron processes as two separate projects for purposes of PSD analysis," rather than as a single project and source of emissions. Objection at 13. App. 6408. Permitting the processes separately rather than as part of a single major stationary source had significant consequences: LDEQ did not evaluate the cumulative effect of the emissions from both facilities in the ambient air quality analysis for some relevant pollutants. Without an adequate rationale for LDEQ's approach, neither EPA nor the public can be confident that Nucor has demonstrated that it will not cause or contribute to a violation of any NAAQS or PSD increment, as is required by section 165(a)(3) for obtaining a PSD permit. 42 U.S.C. § 7475(a)(3).

LDEQ challenges EPA's conclusion on two grounds. First, LDEQ maintains that LDEQ's decision to issue separate permits for the pig iron and DRI processes is adequately explained. Second, LDEQ claims that section 7661d(b) does not authorize EPA to review the substance of LDEQ's permitting decisions under the PSD program. Neither argument has merit.

1. LDEQ did not adequately explain the basis for permitting one source as two separate projects.

Defining the scope of the facility to be permitted is the foundation for the rest of the permitting process. LDEQ recognizes that the pig iron and DRI processes form a single new major stationary source.[14] LDEQ Br. at 28. By issuing two permits for a new stationary source and not basing the PSD evaluation on the combined emissions from the two processes for some pollutants, however, LDEQ has effectively treated the DRI and pig iron processes as two separate construction activities for PSD purposes. The consequence of this approach, as explained by LDEQ, is that "emissions from the DRI plants need not be aggregated with those from the pig iron manufacturing facility to determine applicable

[14] EPA's Objection refers to "greenfield construction," a term that causes LDEQ consternation. LDEQ Br. at 27. The phrase is used simply to differentiate between construction of a new facility and the modification of an existing source, since both activities may require a PSD permit.

requirements from the PSD program." LDEQ Response Summary, 52-53. AR No. 4, Exhibit 6. App. 6182-83.

EPA's Objection is based on LDEQ's failure to provide any legal basis in the permitting record for the conclusion that the initial construction of a single major stationary source can be divided into separate components or "projects" for permitting purposes, thereby avoiding the need to consider the cumulative effect of the emissions from both the DRI and pig iron processes.[15] Section 165(a)(3) of the CAA requires that a source demonstrate that it will not cause or contribute to a violation of any NAAQS or PSD increment before obtaining a PSD permit. 42 U.S.C. § 7475(a)(3); *see also* 40 C.F.R. § 51.166(k). EPA explained that LDEQ's two-project approach may have affected the scope of this required ambient air impact analysis. Objection at 13. App. 6408.

This is because EPA has recognized that in some circumstances, if the emissions from a source are below Significant Impact Levels ("SILs"), the source may not need to conduct a more thorough cumulative air quality analysis to make the demonstration required under section 165(a)(3). *Id*. LDEQ's permitting record shows that, when considered separately, the emissions from the DRI and pig iron

[15] It is important to note that EPA did not conclude that the approach was prohibited by the CAA, but only that LDEQ had not explained how its approach satisfied the requirements for the PSD and title V program. *See* Objection at 16. App. 6411.

processes are below the SILs for certain pollutants. LDEQ did not evaluate whether the combined emissions from both processes would be below the SILs for some pollutants subject to PSD review. *Id*. Therefore, EPA concluded:

> [w]ithout an adequate rationale to allow the public and the EPA to understand the scope of the source that must be evaluated and the basis for LDEQ's two-project approach, the public and EPA cannot readily evaluate whether the requirement to conduct an ambient air impact analysis was adequately met for this source.

Id.

EPA raised this same point in commenting on the draft title V permits. LDEQ responded only with the assertion that there is no requirement that a single stationary source must be covered by a single permit. LDEQ Response Summary, 52-53. AR No. 4, Exhibit 6. App. 6182-83. *See also* LDEQ Br. at 28. This cursory answer, however, does not analyze the relevant regulatory and statutory terms, such as the definitions of "project," "modification" or "major stationary source." Objection at 13. App. 6408. It was reasonable for EPA to raise this question because the federal regulations that govern SIP-approved PSD programs define "project" as "a physical change in, or change in method of operation of, an *existing* major stationary source." 40 C.F.R. § 51.166(b)(51) (emphasis added). Without further explanation from LDEQ, EPA could not evaluate LDEQ's basis for applying the concept of "project" to new construction.

LDEQ now seeks to challenge the validity of the Objection by pointing to other EPA actions where the Agency applied the concept of "project" in the PSD permitting context. LDEQ Br. at 25-35. LDEQ, however, did not explain in its Response to Comments how these other actions should be applied to clarify or support its own decision to separate the PSD permitting procedures for the one source at issue here. *See* LDEQ Response Summary, 50-53. AR No. 4, Exhibit 6, App. 6180-83. LDEQ now seeks to provide that explanation in its brief to this Court, but the explanation is post hoc and comes too late. Given that EPA had no opportunity to consider the analysis *before* the Objection was issued, the analysis cannot be considered as a basis for arguing that EPA's action was arbitrary or capricious.

LDEQ's permit record focused on EPA's policy on project aggregation, but as EPA noted, "those terms generally apply in the context of modification of an *existing* facility." Objection at 12 (emphasis added). App. 6407. As explained above, EPA reasonably objected to the Nucor permits because LDEQ failed to adequately justify how those concepts, applicable to modification of an existing source, would apply in the context of the *initial construction* of a single source, and how they would allow such a source to be divided into two projects for purposes of PSD permitting, with the result that there is not a cumulative analysis

of the emissions for every relevant pollutant subject to PSD review from the one source before construction begins.

In sum, given that LDEQ failed to identify any plain statutory or regulatory language authorizing the division of a single stationary source into two components, with the result that that there is not a cumulative analysis of total emissions for PSD purposes for every relevant pollutants or to provide legal analysis supporting its approach, EPA reasonably concluded that there was no adequately reasoned explanation in the record for LDEQ's approach.

2. EPA properly considered the validity of the PSD permit in reviewing the petition for an objection under Title V.

With regard to LDEQ's claim that section 7661d(b)(2) does not authorize EPA to review the substance of LDEQ's permitting decisions under the PSD program, this section provides that "[t]he Administrator shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d).[16] EPA has defined the "applicable requirements," in relevant part, as:

[16] Section 504(a), which defines the conditions that must be included in a title V permit, requires that such a permit include "such other conditions as necessary to ensure compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661c(a).

> Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

40 C.F.R. § 70.2.

Louisiana's PSD program is part of its implementation plan approved by EPA under title I of the Act. *See* 40 C.F.R. § 52.970. As explained by EPA in the Objection,

> [t]he title V operating permits program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.
>
> Applicable requirements include the requirement to obtain a preconstruction permit that complies with the applicable new source review requirements (e.g. PSD requirements).

Objection at 3.[17] App. 6398.

This conclusion is fully consistent with both the statute and the regulatory definition of "applicable requirements." Section 7661d(b)(2) plainly authorizes EPA to review whether a title V permit assures compliance with the requirements of the applicable SIP, including the requirements of PSD, in determining whether to grant or deny a petition to object to a title V permit.

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[17] *See also* Objection at 4 ("if a PSD permit that is incorporated into a title V permit does not meet the requirements of the SIP, the title V permit will not be in compliance with all applicable requirements."); *id*. n.5. App. 6399.

Nucor also suggests that EPA's Objection is inconsistent with a statement by EPA in the preamble to the final title V regulations. The particular comment was made in the context of addressing issues pertaining to States that wished to consolidate the procedures for certain revisions to title V permits and new source review permits (a broad category that includes PSD permits). The Agency explained:

> The primary intent of these "enhancements" of the [new source review ("NSR")] process is to allow the permitting authority to consolidate NSR and title V permit revision procedures. As stated in the May 10, 1991 proposal, it is not to second-guess the results of any State NSR determination. For example, if a State does provide for EPA's 45-day review in its NSR program, EPA would only be reviewing whether the State had conducted a [best available control technology ("BACT")] analysis, if applicable, and whether that analysis is faithfully incorporated in the title V permit. The EPA will not use its review period to object to or attempt to revise the State's BACT determination. Correspondingly, EPA's failure to object to the substance of the BACT determination will not limit any remedies EPA might otherwise have under the Act to address a faulty BACT determination.

57 Fed. Reg. 32,250, 32,289 (July 21, 1992) (quoted in Nucor Br. at 19). Nucor argues that this statement is contrary to EPA's position that, in the course of reviewing the adequacy of the title V permit, the Agency *should* consider whether the PSD permits comply with the CAA. Nucor Br. at 19.

Nucor, however, reads EPA's preamble statement too broadly. EPA did not state that the Agency would refrain from considering *any* issues as to whether a

PSD permit complies with the Act. In fact, the statement acknowledges that EPA will be performing some review of the PSD permit in the title V context. In subsequent rulemakings, EPA further addressed the review of PSD permits in the title V permit review process; for example, EPA explained that:

> Thus, EPA may not intrude upon the significant discretion granted to states under new source review programs, and will not "second guess" state decisions. Rather, in determining whether a title V permit incorporating PSD provisions calls for EPA objection under section 505(b) or use of enforcement authorities under sections 113 and 167, EPA will consider whether the applicable substantive and procedural requirements for public review and development of supporting documentation were followed. In particular, EPA will review the process followed by the permitting authority in determining best available control technology, assessing air quality impacts, meeting Class I area requirements, and other PSD requirements, to ensure that the required SIP procedures (including public participation and Federal Land Manager consultation opportunities) were met. *EPA will also review whether any determination by the permitting authority was made on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements.* Finally, EPA will review whether the terms of the PSD permit were properly incorporated into the operating permit.

63 Fed. Reg. 13,795, 13,797 (Mar. 23, 1998) (approval of Virginia PSD program) (emphasis added) (quoted in part in *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 487). *See also e.g.* 68 Fed. Reg. 9892, 9894-95 (Mar. 3, 2003) (conditional approval of Indiana PSD program); 68 Fed. Reg. 2909, 2911 (Jan. 22, 2003) (approval of Ohio PSD program).

The italicized sentence in the quotation above makes clear that, while EPA will not second-guess decisions on issues where the permitting authority has some discretion, EPA could address in the course of the title V permit review whether a key PSD determination, such as whether a single source must be permitted in one action so that all emissions are considered cumulatively, is reasonable and supported by the administrative record. EPA has taken this position in reviewing a number of title V permits, including a very early title V petition order issued to Louisiana. *See In Re Shintech, Inc.*, at 3, n.2 (Sept. 10, 1997) 1997 WL 34,738,345 (E.P.A) (noting that "the applicable requirements of the Shintech Permits include the requirement to obtain a PSD permit that in turn complies with applicable PSD requirements under the Act, EPA regulations, and the Louisiana SIP").[18] Though prior title V orders do not have the same force as notice-and-comment rulemakings, they are nonetheless instructive in demonstrating that EPA has consistently interpreted and applied the term "applicable requirements" in the title V permit review context to include consideration of PSD permitting requirements that must be incorporated in that operating permit. *See Alaska Dep't*

[18] *See also In Re Kawaihae Co-generation Project*, at 2-3 (Mar. 10, 1997), 1997 WL 34,770,509 (E.P.A.); *In Re Wisconsin Power and Light, Columbia Generating Station* (Order Responding to Petition Number V-2008-l), at 3 (Oct. 8, 2009), 2009 WL 7,513,860 (E.P.A.).

of Envtl. Conservation, 540 U.S. at 487 (prior EPA actions relevant in analyzing interpretation).

Finally, the statement on which Nucor relies addresses EPA's decision whether to raise an objection of its own initiative during the first 45-day period for review, and not EPA's decision in response to a petition to object, which is the decision at issue in this case and which is guided by a different standard under the Act. *Compare* 42 U.S.C. § 7661d(b)(1) (requiring an objection only after the Administrator makes a discretionary determination that permit provisions are not in compliance with the Act) *with id*. § 7661d(b)(2) (requiring the Administrator to object when a third party – the petitioner – demonstrates that permit provisions are not in compliance with the Act).

3. CAA section 7477 does not preclude EPA's consideration of the PSD permit during Title V review.

LDEQ is also mistaken in arguing that EPA cannot address the compliance of the PSD permit with the applicable SIP in the context of the title V review process, on the ground that CAA section 7477 mandates a specific remedy by which EPA must address a noncompliant PSD permit. Section 7477 provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major

> emitting facility which does not conform to the requirements of this part[19] . . .

42 U.S.C. § 7477. LDEQ contends that this section of the Act establishes a mandatory duty for EPA to take action under its provisions whenever the Agency finds that a PSD permit does not comply with the applicable SIP. LDEQ Br. at 47. *See* Nucor Br. at 14. According to LDEQ, the mandatory nature of section 167 demonstrates that Congress intended it to be an exclusive remedy, thereby foreclosing any use of the title V permit review process to address the validity of a PSD permit.

This argument must fail because section 7477 does not impose a mandatory duty upon EPA. As the D.C. Circuit has held, the question of whether to initiate an enforcement action under section 7477 is "committed to agency discretion by law." *Sierra Club v. Jackson*, 648 F.3d 848, 856-57 (D.C. Cir. 2011). In reaching this result, the D.C. Circuit relied on *Heckler v. Chaney*, 470 U.S. 821, 828, 832-33 (1985), which established that agency decisions to initiate enforcement actions are "presumptively unreviewable." "The presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 648 F.3d at 856.

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[19] The term "this part" refers to Part C ("Prevention of Significant Deterioration of Air Quality") of Subchapter I of the CAA.

Section 7477 provides no such guidelines. It says only that EPA "shall . . . take *such measures*, including issuance of an order, or seeking injunctive relief, *as necessary* to prevent the construction or modification of a major source." 42 U.S.C. § 7477 (emphasis added). Thus, the statute leaves EPA the discretion to decide what measures may be necessary to accomplish the goal. Commencement of enforcement proceedings are merely *examples* of the types of action EPA may use to prevent the improper construction or modification of a major source. Because the list of measures in section 7477 is not exclusive, EPA may also avail itself of others. Title V is one of these others.

As the court in *Sierra Club* noted, in some circumstances, EPA may decide that *no* measures are necessary. 648 F.3d at 856. Furthermore, the court explained that EPA's decision would also be influenced by considerations such as "'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*. (quoting *Chaney*, 470 U.S. at 831). The D.C. Circuit concluded:

> [g]iven the broad range of options open to the Administrator and the strength of the precedent from *Chaney*, in the context of § 7477, the use of the mandatory "shall" is not sufficient to provide legal standards for judicial review of the Administrator's decision not to act.

Id. *See also Public Citizen, Inc. v. EPA*, 343 F.3d 449, 463 (5th Cir. 2003) (applying *Chaney* to reject claim that EPA had mandatory duty to take enforcement action under different CAA provision).

Thus, the central premise of LDEQ's argument – the claim that section 7477 imposes a mandatory duty for EPA to take enforcement action (and no other) when a PSD permit does not comply with the SIP – must be rejected. Even within the PSD enforcement context, section 7477 is not an exclusive authority because section 113(a)(5) of the Act also grants EPA PSD enforcement authority. 42 U.S.C. § 7413(a)(5). In the context of the Act as a whole, section 7477 does not establish any exclusive remedy or preclude EPA from using other CAA authority to address the compliance of a PSD permit with the SIP or the Act. *See Citizens Against Ruining The Env't v. EPA*, 535 F.3d at 679 (describing title V as a "complement" to EPA's enforcement authority). In short, nothing in section 7477 *precludes* an objection under title V. Moreover, reading Section 7477 to *allow* EPA to use its title V review as a means for assuring PSD compliance makes sense in light of Congress's instruction that EPA should use "such measures . . . as necessary" to ensure that sources are not constructed or modified except in compliance with applicable PSD requirements.

4. The Remaining Arguments Lack Merit

LDEQ argues that EPA's authority under section 7661d(b)(2) cannot extend to allow consideration of whether a PSD permit complies with the CAA; that section only authorizes EPA to issue or deny permits "in accordance with the requirements of this subchapter [title V]." LDEQ Br. at 45 (citing 42 U.S.C. § 7661d(b)(2)). LDEQ also cites other provisions of title V that refer to "this subchapter" or "subchapter V," meaning title V. LDEQ Br.. at 45.

These citations miss the point. EPA has never claimed that title V provides EPA the authority to issue a PSD permit, which is part of the requirements of a different subchapter, title I. 42 U.S.C. §§ 7470-92. Section 7661d(b)(2), however, requires EPA to address whether the permit complies the requirements of "this chapter," a term that refers to the entire CAA, which is codified as chapter 85 ("Air Pollution and Control") of title 42 of the United States Code. Accordingly, LDEQ's suggestion that EPA's review authority does not extend to the question of whether an underlying PSD permit is compliant with the SIP is contrary to the language of section 7661d(b).

LDEQ further suggests that allowing EPA to consider the compliance of the PSD permit with the Act and the SIP in the course of a title V permit review would effectively void the PSD permit. LDEQ Br. at 46. This argument is inaccurate. As LDEQ itself observes, section 7661d(b) only allows EPA to issue or deny a title

V permit (assuming that the objection is not addressed). EPA may choose to bring an enforcement action (including issuance of an order to enjoin construction under section 7477) if the PSD issues are not resolved, but that is a separate matter. The section 7661d(b) process, regardless of the outcome, does not void a PSD permit.[20]

LDEQ also complains that allowing EPA to consider the adequacy of a PSD permit in a title V review will allow the Agency to avoid meeting the burden of persuasion imposed on EPA for the issuance of a section 7477 order by *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. at 493-94. LDEQ Br. at 50. *See* Nucor Brief at 14-15. LDEQ is comparing apples and oranges. First, a title V objection does not have the same consequences as a section 7477 order. Such an order requires action by the permittee, which may include a halt in construction; a title V objection does not directly impose any obligations or restrictions on the permittee. Moreover, a permittee may be subject to penalties for failing to comply

[20] If the permitting authority does not issue a title V permit revised to meet the title V objection and EPA ultimately issues the title V permit consistent with section 505(c), the Agency can address any outstanding PSD requirements through a compliance schedule issued with the permit. EPA title V permits are issued under 40 C.F.R. part 71. These regulations provide for preparation of a "compliance plan," which includes a "schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 71.5(c)(8)(iii)(C). Thus, EPA need not itself issue or modify a PSD permit in order to issue a title V permit that assures compliance with applicable requirements, although the permittee may need to seek a properly revised PSD permit to satisfy a compliance schedule.

with a section 7477 order. *See Alaska Dep't of Envtl. Conservation*, at 483 (analyzing availability of penalties under § 7477 as part of the court's finality analysis). That is not the case for a title V objection. Furthermore, to the extent that the burden of proof may be different, that is Congress' choice and so cannot be challenged.[21]

LDEQ also complains because an order under section 7477 is subject to immediate judicial review, unlike an objection to a title V permit. This distinction is a result of how Congress drafted the statute, however, and is not a basis for limiting EPA's authority under title V. Moreover, under both section 167 and section 505(c), the permittee is entitled to judicial review once there is an agency action that has immediate effect. EPA's Objection did not revoke either the title V permit or the PSD permits issued by LDEQ. Thus, Nucor's permits remain in place; EPA has not taken any action to prevent Nucor from constructing or operating its facility. If EPA were to issue a section 167 order or to issue or deny Nucor's title V permit, judicial review would be available.

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[21] Notably, EPA looks to *ADEC* in articulating a deferential standard of review for PSD issues in the context of responding to title V petition. *See, e.g., In Re of East Kentucky Power Coop., Hugh Spurlock Generating Station* (Order Responding to Title V Petition No. IV-2006-4) at 4-5 (Aug. 30, 2007) (http://www.epa.gov/Region7/air/title5/petitiondb/petitions/east_kentucky_spurlock_response2006.pdf).

Finally, LDEQ complains that allowing EPA to examine the PSD permit as part of a title V review will enable the Agency to invalidate a PSD permit long after it has been issued. In this case, however, the PSD permits were issued simultaneously with the title V permits to which EPA objected. In *Alaska Dep't of Envtl. Conservation*, the Supreme Court stated that it was "confident" that EPA would not "indulge in inequitable conduct" and seek to invalidate preconstruction permits long after they are issued. 540 U.S. at 495. As explained above, however, the Objection does not invalidate the PSD permits for the pig iron or DRI processes. Accordingly, the concern addressed by the Supreme Court is not relevant here.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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

/s/ Eileen T. McDonough
EILEEN T. MCDONOUGH
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3126

(202) 514-8865 (fax)
eileen.mcdonough@usdoj.gov
Counsel for Respondents

OF COUNSEL:

JAMES HAVARD
MELINA WILLIAMS
BRIAN DOSTER
ELLIOTT ZENICK
KRISTI SMITH
Office of General Counsel
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

March 1, 2013

Certificate of Compliance

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,903 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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/s/ Eileen T. McDonough
Counsel for Respondent

Dated: March 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of March, 2013, served a copy of the foregoing pleading on all counsel of record and the parties named herein by serving the following counsel through the Court's ECF system.

Mr. Donald Trahan
Ms. Kathy Wright
Ms. Jackie Marve
Ms. Deidra Johnson
Mr. Elliot Vega
Ms. Dwana King
Legal Division
Louisiana Department of Environmental Quality
P.O. Box 4302
Baton Rouge, LA 70821

David R. Taggart, T.A.
Jerald N. Jones
BRADLEY MURCHISON KELLY & SHEA LLC
401 Edwards Street, Suite 1000
Shreveport, LA 71101

Bradley R. Belsome Michael C. Mims
BRADLEY MURCHISON KELLY & SHEA LLC
1100 Poydras St., Ste. 2700
New Orleans, LA 70163-2700

Maureen N. Harbourt
Tokesha M. Collins
KEAN MILLER LLP
Post Office Box 3513
Baton Rouge, LA 70821-3513

Eric L. Hiser
JORDAN BISCHOFF & HISER, PLC
7272 E. Indian School Road
Scottsdale, AZ 85252

/s/ Eileen T. McDonough
Counsel for Respondent

STATUTORY ADDENDUM

42 U.S.C. § 7477

42 U.S.C. § 7661d

42 U.S.C.A. § 7477

Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C.A. § 7661d
Notification to Administrator and contiguous States

(a) Transmission and notice

(1) Each permitting authority--

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States--

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section, or (B) within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement

of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) Waiver of notification requirements

(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this subchapter for any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) of this section shall not apply. The preceding sentence shall not apply to major sources.

(3) The Administrator may exclude from any waiver under this subsection notification under subsection (a)(2) of this section. Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

(e) Refusal of permitting authority to terminate, modify, or revoke and reissue

If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit under this subchapter, the Administrator shall notify the permitting authority and the source of the Administrator's finding. The permitting authority shall, within 90 days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such 90 day period for an additional 90 days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within 90 days, the Administrator may, after notice and in accordance with fair and reasonable procedures, terminate, modify, or revoke and reissue the permit.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

January 14, 2013

Ms. Eileen Therese McDonough
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

No. 12-60482, Louisiana Dept of Env Quality v. EPA
Agency No. 77 Fed. Reg. 24200

The following pertains to your brief electronically filed on January 9, 2013.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: Misty Lisotta
Misty L. Lisotta, Deputy Clerk
504-310-7716

cc: Mr. Bradley Russell Belsome
Ms. Maureen Noonan Harbourt
Mr. Eric Lynn Hiser
Ms. Deidra L. Johnson
Ms. Dwana Christy King
Ms. Jackie Marie Marve
Mr. Michael C. Mims
Mr. Herman H. Robinson
Mr. David Richard Taggart
Mr. Donald James Trahan
Mr. Paul Newman Vance
Mr. Elliott Bee Vega
Ms. Kathy Michelle Wright