No. 12-71506

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, PACIFIC ENVIRONMENT, RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, SIERRA CLUB, and THE WILDERNESS SOCIETY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent

SHELL OFFSHORE, INC.

Intervenor-Respondent

BRIEF OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Dated: July 26, 2012.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

FEDERAL REGISTER:

LEGISLATIVE MATERIALS:

LIST OF ABBREVIATIONS

CAA	Clean Air Act
EAB	Environmental Appeals Board
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
OCS	Outer Continental Shelf
Pet. Br.	Petitioners' Opening Brief
PSD	Prevention of Significant Deterioration

JURISDICTION

Respondent United States Environmental Protection Agency ("EPA" or "Agency") concurs in the Jurisdictional Statement in the opening brief of Petitioners Alaska Wilderness League, et al. ("Petitioners") ("Pet. Br."), at 2.

ISSUES PRESENTED

1. Section 504(e) of the Clean Air Act, 42 U.S.C. § 7661c(e), requires that temporary sources demonstrate that they will comply with, inter alia, "any applicable increment . . . requirements."

a. In the absence of any statutory definition or other elucidation, is the reference to "applicable increment . . . requirements" unambiguous?

b. Did EPA reasonably interpret "applicable increment . . . requirements" as referring to requirements applicable to sources of air pollutants, such that a temporary source seeking a permit need not make any greater demonstration regarding its impact on air quality increments than would a permanent source in the same location?

2. Did EPA act arbitrarily, capriciously, or not in accordance with law by interpreting its regulatory definition of ambient air, which does not include portions of the atmosphere inaccessible to the general public, in a manner that excludes the area surrounding the drilling unit *Kulluk* to which members of the

public are denied access by a safety zone established by the United States Coast Guard and by a public access control program?

STATUTES AND REGULATIONS

Except for the regulations included in the Addendum bound with this brief, all applicable statutes and regulations are in the Addendum bound with Petitioners' Opening Brief.

STATEMENT OF THE CASE

I. INTRODUCTION.

Petitioners challenge an air permit ("Permit") issued to Shell Offshore, Inc., ("Shell") authorizing Shell (subject to the terms and conditions of the Permit) to emit air pollutants while operating a drilling unit, the *Kulluk*, and its associated support vessels, for the purpose of oil exploration in the Beaufort Sea off the North Slope of Alaska. The Permit was issued by Region 10 of EPA pursuant to Section 328 of the Clean Air Act ("Act" or "CAA"), 42 U.S.C. § 7627, and its implementing regulations in 40 C.F.R. Part 55; Title V of the Act, 42 U.S.C. § 7661-7661f, and its implementing regulations in 40 C.F.R. Part 71; and applicable Alaska statutory and regulatory provisions. See Permit, I-ER-8; Mar. 30, 2012,

Order Denying Petitions For Review ("Order"), II-ER-94.[1] Petitioners appealed the Permit to EPA's Environmental Appeals Board ("EAB" or "Board"), which denied the petitions in a 100-page decision issued on March 30, 2012. Order, II-ER-95; see generally II-ER- 90-190.

Although multiple issues were presented to the Board, Petitioners raise only two arguments here. First, Petitioners contend that EPA erred in interpreting Section 504(e) of the Clean Air Act, 42 U.S.C. § 7661c(e), which provides in pertinent part that permits issued to temporary sources such as the *Kulluk* must ensure "compliance with . . . any applicable increment . . . requirements under part C of subchapter I of this chapter." See Pet. Br. at 26-49. Petitioners argue that the term "applicable" is unambiguous, and that even if the statute is ambiguous, EPA's interpretation is unreasonable. As demonstrated below, however, EPA reasonably interpreted an ambiguous statutory term.

Second, in considering permit applications under the Act, EPA evaluates proposed emissions relative to the "ambient air" to determine whether those emissions would cause or contribute to a violation of relevant air quality standards. EPA regulations define "ambient air" as "that portion of the atmosphere, external

[1] EPA has not submitted supplemental excerpts of record; thus, all record citations are to Petitioners' Excerpts of Record.

to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). Based on its longstanding interpretation of this regulation, EPA concluded that air within 500 meters of the *Kulluk* is not part of the "ambient air," because of Permit conditions requiring establishment of a United States Coast Guard ("Coast Guard") safety zone and access control programs to prevent public access. Petitioners argue that EPA's interpretation of its regulations was erroneous, Pet. Br. at 49-59; however, as demonstrated below, EPA's exclusion of air within the safety zone from the "ambient air" was both lawful and appropriate.

II. STATUTORY BACKGROUND.

A. The Clean Air Act.

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The Act "establishes a program for controlling and improving the nation's air quality through a system of shared federal and state responsibility." Alaska Dep't of Envtl. Conservation v. EPA, 298 F.3d 814, 816 (9th Cir. 2002), aff'd, 540 U.S. 461 (2004). Speaking generally, under the Act, EPA establishes National Ambient Air Quality Standards ("NAAQS") for certain air pollutants. See 42 U.S.C. §§ 7408(a), 7409; Whitman v. American Trucking Ass'n, 531 U.S. 457, 465 (2001). States then have the responsibility to adopt and submit for EPA's

approval state implementation plans ("SIPs") which provide for the implementation and maintenance of NAAQS in each air quality control region within the State's borders. 42 U.S.C. § 7410(a)(1); Alaska, 298 F.3d at 816.

In 1990, Congress amended the Act to grant EPA the authority to regulate air pollution from Outer Continental Shelf ("OCS") activities. Section 328 of the Act, 42 U.S.C. § 7627, authorizes EPA to establish requirements to control air pollution from OCS sources located off-shore of the States bordering the Pacific, Arctic, and Atlantic oceans, as well as certain areas of the Gulf Coast.[2] 42 U.S.C. § 7627(a)(1). An OCS source is defined in pertinent part as any equipment, activity, or facility which (1) emits any air pollutant, (2) is regulated or authorized under the Outer Continental Shelf Lands Act, and (3) is located in waters above the Outer Continental Shelf. 42 U.S.C. § 7627(a)(4)(C); see also 40 C.F.R. § 55.2

[2] On December 23, 2011, the President signed the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011) which amended Section 328 of the CAA to divest EPA of the authority to issue permits to OCS sources located off the North Slope Borough of the State of Alaska. Id. § 432 (b)-(c), 125 Stat. at 1048-49. This legislation included a provision stating that it did not invalidate or stay any existing or pending air quality permit or any proceeding related thereto. Id. § 432(d), 125 Stat. at 1049. At the time the Appropriations Act was signed, the *Kulluk* permit had already been issued by Region 10 and appealed to the Board. See infra at 11-13. EPA determined that the Permit was a pending permit and that the appeal was a proceeding related thereto; thus, the Permit was unaffected by the divestment of EPA's authority.

(setting forth criteria defining vessels as OCS sources). Section 328 further provides that for OCS sources located within 25 miles of the seaward boundary of a state, permit requirements "shall be the same as would be applicable if the source were located in the corresponding onshore area." 42 U.S.C. § 7627(a)(1).

B. Title V.

In 1990, Congress enacted Title V of the Act, 42 U.S.C. §§ 7661-7661f, which requires major stationary sources of air pollution, and certain other sources, to obtain operating permits to ensure compliance with applicable requirements of the Act. All requirements applicable to a particular source are set forth in a comprehensive permit, which then serves as "a source-specific bible for Clean Air Act compliance." Virginia v. EPA, 80 F.3d 869, 873 (4th Cir. 1996). Section 504(a) requires that Title V permits include emissions limitations and standards, a schedule of compliance, reporting requirements, and "such other conditions as are necessary to assure compliance with applicable requirements of this chapter." 42 U.S.C. § 7661c(a).

Section 504(e) authorizes the issuance of Title V permits to "temporary" sources, i.e., those that emit air pollutants from similar operations at multiple temporary locations. 42 U.S.C. § 7661c(e); see also 40 C.F.R. § 71.6(e). A permitting authority may issue a single permit to such a source (rather than

requiring the source to obtain a separate Title V permit for each location at which it will operate) as long as that permit

> includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter.

42 U.S.C. § 7661c(e).

C. The PSD Program.

Congress adopted the Prevention of Significant Deterioration ("PSD") program in 1977 to prevent air quality in relatively pristine areas from significantly deteriorating. 42 U.S.C. §§ 7470(1), 7471. The PSD program applies to areas of the country that have been formally designated by EPA either as in "attainment" with a NAAQS, or as "unclassifiable" because of lack of sufficient data to determine compliance or noncompliance with the NAAQS. See 42 U.S.C. § 7471.

In areas in which the PSD program applies, a party may not construct or modify a "major emitting facility" (referred to herein as a "PSD major source") without first obtaining a pre-construction permit that satisfies certain statutory criteria to prevent significant deterioration of the air quality in the area where the

facility will be located.[3] 42 U.S.C. §§ 7475(a)(1), 7479(1); Alaska, 298 F.3d at 819. A PSD major source is one that emits, or has the potential to emit, air pollutants in excess of certain statutory thresholds. CAA Section 169(1), 42 U.S.C. § 7479(1); 40 C.F.R. § 52.21(b)(1)(i).[4]

In order to obtain a PSD permit, an applicant must demonstrate that the facility "will not cause, or contribute to, air pollution in excess of any . . . [NAAQS] in any air quality control region." 42 U.S.C. § 7475(a)(3); see also 40 C.F.R. § 52.21(k). The applicant also must show that the facility will not cause or contribute to a violation of any established PSD "increment" – i.e., the maximum allowable increase in air pollutant concentration over a baseline.

42 U.S.C. §§ 7473(a)-(b), 7475 (a)(3); see also Great Basin Mine Watch v. EPA, 401 F.3d 1094, 1096 (9th Cir. 2005). The baseline concentration against which

[3] As Petitioners note, a Title V "major source" is defined differently than a PSD "major emitting facility," which is also typically referred to as a "major source." See Pet. Br. at 11, 40 n.4. The *Kulluk* is a "major source" for purposes of Title V (and thus requires a Title V permit), but it is not a "major emitting facility" for purposes of the PSD program (and thus is not subject to PSD preconstruction permitting requirements). To avoid confusion, EPA will use the terms "Title V major source" and "PSD major source" as appropriate.

[4] For certain sources identified in the statute, this threshold is 100 tons per year; for all other sources, it is 250 tons per year. CAA § 169(1), 42 U.S.C. § 7479(1). It is undisputed that the *Kulluk* is not a PSD major source. See infra at 12.

potential increases in air pollution are assessed is the ambient concentration of a pollutant existing at the time of the first PSD permit application in the relevant area. 42 U.S.C. § 7479(4); 40 C.F.R. § 52.21(b)(13)(i), (14)(ii).

The Act requires that SIPs include "such . . . measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality." 42 U.S.C. § 7471. More specifically, for sulfur dioxide and particulate matter, the Act requires that SIPs include "measures assuring that maximum allowable increases over baseline concentrations [i.e., increments] of . . . such pollutants shall not be exceeded." 42 U.S.C. § 7473(a). EPA has promulgated regulations to implement these requirements for SIPs governing major sources. 40 C.F.R. § 51.166(a)(1); 40 C.F.R. § 51.166(c). These regulations specify that SIPs must include a requirement that PSD major sources demonstrate that their construction will not cause or contribute to a violation of the PSD increments. 40 C.F.R. § 51.166(k)(1)(ii).

New or modified sources that do not qualify as PSD major sources remain subject to state minor source preconstruction permitting requirements. See 40 C.F.R. § 51.160. States are authorized – but not required – to include in such programs a requirement that any new minor source demonstrate that its construction will not cause or contribute to a violation of PSD increments. See Order, II-ER-140; Response to Comments, II-ER-214-15.

D. EPA Permitting And Review Procedures.

EPA follows the procedures contained in 40 C.F.R. Part 124 in reviewing OCS permit applications. See 40 C.F.R. § 55.6(a)(3). OCS sources that are Title V major sources are also subject to the procedural requirements contained in 40 C.F.R. Part 71. 40 C.F.R. § 71.4(d). Under the Act and its implementing regulations, EPA must provide the public with an opportunity to submit written and oral comments on proposed permits during the permit review process. See 42 U.S.C. § 7475(a)(2); 40 C.F.R. §§ 124.10(a)-(b), .11-.12; see also id. § 71.11(d)(1)-(2), (e).[5] After EPA reviews and responds to public comments, the Regional Administrator for the EPA Region responsible for reviewing the permit application (or his or her authorized delegate) must take action by granting or denying the permit application. See 40 C.F.R. §§ 124.15, 124.17, 124.18; see also id. § 71.11(i)-(j).

The Administrator of EPA established the Environmental Appeals Board ("Board") in 1992 to hear appeals of, among other things, permit decisions made by Regional Administrators or their delegates. See 57 Fed. Reg. 5320 (February

[5] As the Board noted, the part 71 regulatory language governing Title V permit appeals is virtually identical to the part 124 language governing other permit appeals. Order, II-ER-96 n.9.

13, 1992). The Administrator's goal was, in part, to "lend[] greater authority to the Agency's decisions," and to "confer[] on Agency appellate proceedings the stature and dignity that are commensurate with the growing importance of such proceedings." Id. at 5322. The Administrator has delegated authority to the Board to issue final decisions in permit appeals filed under 40 C.F.R. Part 124. See 40 C.F.R. § 124.2.

Within 30 days after a final permit is issued, "any person who filed comments on that draft permit or participated in the public hearing may petition the [Board] to review any condition of the permit decision." 40 C.F.R. § 124.19(a); see also id. § 71.11(*l*)(1). Filing a petition with the Board is a mandatory prerequisite to seeking judicial review. 40 C.F.R. § 124.19(e); see also id. § 71.11(*l*)(4). A permit decision becomes final agency action for the purposes of judicial review when the Regional Administrator issues a final permit decision after the conclusion of an appeal to the Board, or at the conclusion of any remand proceedings following such an appeal. See 40 C.F.R. § 124.19(f); see also id. § 71.11(*l*)(5).

III. STATEMENT OF FACTS.

In February 2011, Shell applied to Region 10 of EPA for three permits to cover the emission of air pollutants from the *Kulluk's* operations in multiple lease blocks in the Beaufort Sea: (1) an OCS/Title V permit for operations *beyond* 25

miles of Alaska's seaward boundary; (2) an air quality protection permit under Alaska regulations for operations *within* 25 miles of Alaska's seaward boundary and (3) a Title V permit for operations *within* 25 miles of Alaska's seaward boundary.[6] See Order, II-ER-94 n.3, 99; Permit, I-ER-8. Included in the Alaska air quality permit were emissions limitations which, if adopted (as they ultimately were), would ensure that the *Kulluk* was not a PSD major source.[7] See Permit, I-ER-42-44.

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[6] As already noted, Section 328 provides that requirements for sources located within 25 miles of a State's seaward boundary shall be the same as would be applicable if the source were located in the corresponding onshore area. 42 U.S.C. § 7627(a)(1). Some of the *Kulluk*'s operations will occur within 25 miles of Alaska's seaward boundary; thus, one component of the combined Permit is the state air quality permit that would be required if the *Kulluk* were located onshore.

[7] Petitioners allege that emissions from the *Kulluk* threaten the Arctic environment and local residents. Pet. Br. at 15-19. The Permit is fully protective of human health and the environment. Among other things, emissions from the *Kulluk* must comply with the NAAQS. "Primary" NAAQS are set at a level "requisite to protect the public health" with "an adequate margin of safety," after taking into consideration factors including impacts on sensitive populations. 42 U.S.C. § 7409(b)(1); American Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998). "Secondary" NAAQS are set at a level "requisite to protect the public welfare from any known or anticipated adverse effects," with "welfare" defined to include effects on, inter alia, water and wildlife. 42 U.S.C. §§ 7409(b)(2), 7602(h). Because the environmental impact of the *Kulluk*'s emissions is not at issue in this appeal, however, EPA will not respond further to Petitioners' factual assertions.

At Shell's request, all three permits were consolidated into a single draft permit, which was issued for public comment on July 22, 2011. Order, II-ER-99. EPA issued the final permit on October 21, 2011, together with its response to comments received during the review process.[8] Id. at II-ER-100. Petitioners thereafter sought review of the Permit from the Board, which denied review of the petitions on March 30, 2012.[9] Id. at II-ER-90. Although the Board addressed seven separate challenges to the Permit in its 100-page ruling, only two are at issue in this matter.

A. Interpretation Of Section 504(e).

As already stated, Section 504(e) of the Act provides that a permitting authority may issue a single Title V permit to a source that authorizes emissions from similar operations at multiple temporary locations, provided that the permit "includes conditions that will assure compliance with all the requirements of this

[8] On July 3, 2012, Shell submitted an application requesting a minor modification to the *Kulluk* permit. See http://yosemite.epa.gov/r10/airpage.nsf/permits/kullukap/ (last visited July 24, 2012). EPA has 90 days to consider Shell's application; however, none of the requested modifications affect the Permit terms at issue in this matter.

[9] The Board also denied petitions for review filed by the Iñupiat Community of the Arctic Slope and Mr. Daniel Lum. Order, II-ER-94. These petitioners did not pursue review by this Court.

chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter." 42 U.S.C. § 7661c(e). The parties' dispute before the Board lay in the interpretation of "any applicable increment . . . requirements under part C of subchapter I of this chapter," and, more specifically, in what constitutes an "applicable" increment requirement.

EPA's view is that the statute is ambiguous on this point, and that it is properly interpreted to describe an increment requirement that is "applicable" to a source – in other words, if a new permanent source would be required by a SIP's permitting provisions to show that it would not cause a violation of a PSD increment (either because it is a major PSD source, or because a state's minor source permitting program requires such a demonstration), then a new temporary source must make the same demonstration for each authorized location to obtain a Title V permit under Section 504(e). See Response to Comments, II-ER-215; Order, II-ER-149. Petitioners argued that the statute unambiguously requires a geographic approach to determining what is "applicable;" thus, in Petitioners' view, if one or more increments are generally applicable to a given geographic area (because a permit application has established the baseline date), any temporary source seeking a Section 504(e) permit to operate within that area must demonstrate that emissions from the source will not violate the increment(s),

regardless of whether a new permanent source of the same size would have had to make the same demonstration. See Order, II-ER-141-43.

After thoroughly analyzing both parties' arguments, the Board rejected Petitioners' claim that the statute is unambiguous, concluding that a source-based interpretation "more fully comports with the structure and language of the [Act] and [its] implementing regulations" than Petitioners' geographic approach. Order, II-ER-142; see generally id. at II-ER-136-47. The Board encapsulated its conclusion as follows:

> Increments . . . are not directly imposed by Section 504(e). Instead, they must be implemented (i.e., applied to a source) through either of two means: (1) a state implementation plan, . . . or (2) the PSD major source permitting program. . . . Thus, while Section 504(e) can serve as the direct source of NAAQS compliance requirements and other CAA requirements for temporary sources . . . it only imposes PSD increment requirements to the extent such requirements are "applicable" to the source.

Order, II-ER-144. The *Kulluk* is not a PSD major source, and Alaska's SIP does not require minor sources to demonstrate compliance with PSD increments. See Alaska Admin. Code tit. 18, § 50.540(c). This means that (under EPA's interpretation of the statute) there was no increment requirement "applicable" to Shell's application for a permit to construct and operate the *Kulluk*. See Order, II-ER-139-140.

B. The Coast Guard Safety Zone As The "Ambient Air" Boundary.

In determining whether a source will comply with the NAAQS, EPA evaluates emissions to the "ambient air." See Order, II-ER-155 at n.50. "Ambient air" is, in turn, defined as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). EPA's longstanding interpretation of this definition is that the atmosphere over land owned or controlled by a source may be excluded from the "ambient air" if public access is precluded by a fence or other barrier. Order, II-ER-156. In this case, Region 10 determined that it was appropriate and consistent with prior Agency interpretations of the applicable regulations to set the "ambient air" boundary at a 500 meter radius from the *Kulluk*, because the Permit requires that (1) the Coast Guard establish a safety zone of at least that size that the public is precluded from entering; and (2) Shell develop and implement a control program to restrict public access to this zone. Permit, I-ER-44-45; Order, II-ER-156-57. The Region explained in its response to comments that the criteria for determining what constitutes the ambient air surrounding a source on land must be adapted to some extent when they are applied to a source on the water, but that in the Region's view those criteria were satisfied by the inclusion of Permit conditions ensuring that the public will not have access to the area inside the safety zone. Response to Comments, II-ER-208-09.

Petitioners argued before the Board that exempting air within the safety zone from the "ambient air" was clear error, and represented a departure from EPA's longstanding interpretation of its regulations. Order, II-ER-155. After reviewing the record and the parties' arguments, the Board rejected this argument, concluding that the Response to Comments articulated "a reasonable interpretation of the ambient air regulation and the Agency's 'longstanding interpretation' of that regulation as applied in the [Outer Continental Shelf] context." Order, II-ER-159; see generally id., II-ER-155-61. The Board also found that the Region's approach in this case was "entirely consistent" with its approach in a prior similar case. Order, II-ER-159.

SUMMARY OF ARGUMENT

Temporary sources seeking a permit under Section 504(e) of the Act must demonstrate that they will comply with, inter alia, "any applicable increment . . . requirements under part C of subchapter I of this chapter." 42 U.S.C. § 7661c(e). The statute does not specify what constitute "applicable increment . . . requirements under part C of subchapter I." However, as the Board concluded, EPA has reasonably interpreted this ambiguous language to refer to "requirements" imposed on major PSD sources via the PSD permitting program, or on minor sources via state permitting programs included in a State's SIP at the discretion of

that State in accordance with sections 161 and 163 of the Act, 42 U.S.C. §§ 7471, 7473.

Petitioners claim that Section 504(e) unambiguously provides that "applicable increment . . . requirements" are increments "applicable" within a given geographic area, without regard to the nature of the source seeking a permit. This claim is not supported by anything other than Petitioners' own conclusory assertions that the statutory language is clear; thus, Petitioners have failed to demonstrate that the statute is unambiguous. Nor have Petitioners shown that EPA's interpretation of the statute is unreasonable – Petitioners attack interpretations that EPA has not put forth and arguments that EPA has not made, while failing to offer any sound reason to conclude that the interpretation EPA *has* adopted is in any way unreasonable. The Board's reasoned conclusion that EPA reasonably interpreted Section 504(e) should therefore be upheld.

Petitioners also attack EPA's interpretation of its regulatory definition of "ambient air" to exclude areas around the *Kulluk* to which the public is denied access by a Coast Guard safety zone and by Shell's access control program. EPA regulations define the "ambient air" against which potential emissions are evaluated as that portion of the atmosphere surrounding a source to which the public has access. For sources on land, EPA interprets this regulation to exempt the atmosphere existing over land (1) owned or controlled by the source, (2) from

which public access is precluded by a physical barrier. For sources on water, EPA has adapted this approach and considers whether analogous factors preclude public access to an area surrounding a source. Here, as in prior cases, EPA determined that the Coast Guard safety zone, coupled with Shell's access control program, satisfy the control and preclusion of access criteria for exempting an area from the "ambient air." EPA's interpretation of its own regulations was neither arbitrary nor capricious, and should be upheld.

ARGUMENT

I. STANDARD OF REVIEW.

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. EPA's action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Rather, the Court must consider whether the decision was based on consideration of relevant factors and whether there has been a "clear error of judgment." Id.; NRDC, Inc. v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992).

Judicial deference to an agency's decision extends to an agency's interpretation of a statute it administers. United States v. Mead Corp., 533 U.S.

218, 227-31 (2001); Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842-45 (1984). Under Chevron, if Congress has "directly spoken to the precise question at issue," Congress' intent must be given effect. Chevron, 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843; NRDC, 966 F.2d at 1297. To uphold EPA's interpretation of the Act, the court need not find that EPA's interpretation is the only permissible construction that EPA might have adopted, but only that EPA's interpretation is reasonable. Chemical Mfrs. Ass'n v. NRDC, Inc., 470 U.S. 116, 125 (1985); NRDC, 966 F.2d at 1297.

A. The Statutory Interpretation Articulated By The Board Is Entitled To Chevron Deference.

Chevron deference is warranted whenever an agency acts pursuant to an express or implied Congressional delegation of authority to address an ambiguity or fill a gap in the statute. Mead, 533 U.S. at 229; see also Chevron, 467 U.S. at 844 (where Congress has implicitly delegated authority to agency by leaving gap for agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). As the Court explained in Mead, administrative implementation of a statute "qualifies for Chevron deference when it appears that Congress delegated authority

to the agency generally to make rules carrying the force of law," and the agency interpretation at issue "was promulgated in the exercise of that authority." Mead, 533 U.S. at 226-27. Such Congressional delegation of authority may be shown in several ways, including "by an agency's power to engage in adjudication." Id. at 227.

Petitioners' claim that the Board's statutory interpretations are not entitled to Chevron deference is wholly without merit. Petitioners' efforts to dismiss the Board as a "sub-agency tribunal," Pet. Br. at 25, notwithstanding, the fact remains that the Board is exercising authority delegated by Congress to the Agency, and articulates the Agency's statutory interpretations in published decisions that have precedential weight and carry the force of law. Courts have thus found that Board decisions constitute the type of agency adjudication that is entitled to Chevron deference. See In re Lyon County Landfill, Lynd, Mn., 406 F.3d 981, 984 (8th Cir. 2005) (Board decisions are formal adjudications consistent with the Administrative Procedure Act and due Chevron deference); Sultan Chemists, Inc. v. EPA, 281 F.3d 73, 79 (3d Cir. 2002) (statutory interpretations by the Board are issued in course of "formal adjudication" and in exercise of authority to issue interpretations having force of law, and are therefore entitled to Chevron deference); see also Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md., 268 F.3d 255, 267-

68 (4th Cir. 2001) (Board decision in prior, unrelated matter that articulated reasonable statutory interpretation accorded Chevron deference).

Although this Court has not expressly addressed the level of deference owed to a statutory interpretation offered by the Board, it has accorded Chevron deference to the statutory interpretations provided by analogous agency boards or department heads when reviewing similar administrative appeals. For example, this Court accorded Chevron deference to an agency administrator's decision in a case-specific matter over which the agency had rulemaking authority because the administrative process afforded the challenger an opportunity to petition for reconsideration, brief its arguments, be heard at a formal hearing, and receive reasoned decisions at multiple levels of review. Alaska Dep't. of Health & Social Servs. v. Centers for Medicare & Medicaid Servs., 424 F.3d 931, 939 (9th Cir. 2005). The Court found that these "hallmarks of 'fairness and deliberation' are clear evidence that Congress intended the Administrator's final determination to 'carry[] the force of law.'" Id. (citation omitted).

Similarly, in this case, Congress expressly granted the EPA Administrator the rulemaking and permitting authority to govern air pollution from OCS activities, and the Administrator has in turn delegated authorities relevant to this case to the Board. See 42 U.S.C. § 7627; 40 C.F.R. § 124.2(a) (Environmental Appeals Board definition); supra at 10-11. EPA initially exercised its permitting

authority in the context of a proceeding that included notice of the proposed action and an opportunity to comment on it in writing and during a public hearing. Such formal administrative procedure, which "tend[s] to foster [] fairness and deliberation," has been recognized by the Supreme Court as "a very good indicator of delegation meriting Chevron treatment." Mead, 533 U.S. at 230, 237. The subsequent Board procedures are, moreover, similar to those that this Court previously found to carry the "hallmarks of 'fairness and deliberation.'" Alaska, 424 F.3d at 939 (citation omitted). Review before the Board can include (as in this case) the opportunity for briefing and the issuance of lengthy, reasoned decisions. The Board's statutory interpretations should therefore be given Chevron deference. See e.g., id.; Ariz. Health Care Cost Containment Sys. v. McClellan, 508 F.3d 1243, 1249 (9th Cir. 2007) (Department of Health and Human Services Appeals Board decision reviewing department program decision merits Chevron deference).

Petitioners claim that issuing a permit is not an action that carries the "force of law," and therefore that it is not entitled to deference. Pet. Br. at 24-25. The cases cited by petitioners, however, generally involved judicial review of permitting decisions made by individual agency offices that had not undergone

further agency review.[10] In this case, by contrast, the Court is reviewing permits issued following an order by EPA's national appeals board, and Board opinions carry precedential weight. See, e.g., United States v. Elias, 269 F.3d 1003, 1013 (9th Cir. 2001) (citing and applying Board decision setting forth proof required to establish violation); see also Order, II-ER-106-08 (citing and applying Board precedent to present case). The fact that the final permitting decision was published after the Board's denial of review, Pet. Br. at 25, is irrelevant – once the Board had spoken, there was no further decision-making by the Region. See 40 C.F.R. § 124.19(c) (if review is denied, conditions of permit become final agency action); 40 C.F.R. 124.19(f)(1)(i) (final permit decision "shall" be issued by

[10] See Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1055, 1058 (9th Cir. 2004) (judicial review of permits issued by Fish & Wildlife Service, with no intermediate agency review); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 635-36 (9th Cir. 2004) (judicial review of permits issued by Forest Service, with no intermediate agency review). The exception is Miranda Alvarado v. Gonzalez, 449 F.3d 915 (9th Cir. 2006), in which an individual immigration judge's decision was "summarily affirmed" by the Board of Immigration Appeals pursuant to a "streamlining procedure." Miranda Alvarado, 449 F.3d at 922, 924. The Court concluded that absent a written opinion, statutory analysis, or any indication of an intent to create precedent, the affirmance of the judge's decision did not render that judge's statutory interpretation entitled to Chevron deference. Id. at 923-24; see also id. at 920 (noting that streamlined cases are affirmed via form orders). In this case, by contrast, the Board issued a lengthy and thorough written opinion and detailed its statutory analysis, and Board opinions establish precedent.

Regional Administrator when Board issues notice that review is denied). Dismissing the Board as merely "one step" in the permitting process, Pet. Br. at 25, is thus inaccurate – the Board is the *final* step; the Board's decision articulates the Agency's considered interpretation of the law as to the disputed issues raised on appeal; and that decision subsequently carries the force of law. See, e.g., Piney Run, 268 F.3d at 267-69 (applying statutory interpretation articulated by Board in prior unrelated matter). Nor did the Board simply rubber-stamp an existing permitting decision; instead, it carefully and thoroughly analyzed each of the issues raised by the administrative petitioners, and issued a detailed written opinion explaining its reasoning and its view of the statute. See II-ER-90-190; compare Miranda Alvarado, 449 F.3d at 920 (immigration judge's opinion affirmed in two-line form order).

B. At A Minimum, The Statutory Interpretation Articulated By The Board Is Entitled To "Great Respect."

In the event the Court finds that the statutory interpretations articulated in the Board's decision are not entitled to Chevron deference, the statutory interpretation articulated by the Board is nonetheless entitled to "great respect" because of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

factors which give it power to persuade, if lacking power to control." Mead, 533 U.S. at 228 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

Petitioners have failed to demonstrate that EPA's interpretation of the statute is not entitled to at least this degree of deference. See Pet. Br. at 26. Petitioners' suggestion that EPA's interpretation has been inconsistent is, as discussed below, contradicted by the record. See infra at 37-38. Nor would a mere change in interpretation (if one had been demonstrated) mean that EPA was not entitled to deference. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) (change in interpretation is not basis for declining to analyze interpretation under Chevron framework). Petitioners' claim that EPA's interpretation of the statute is somehow lacking in rationality or is inconsistent with EPA's "statutory responsibilities," Pet. Br. at 26, is equally flawed – as discussed below, EPA's interpretation of the statute is entirely reasonable. See infra at 33-41. Petitioners have thus failed to demonstrate that EPA's statutory interpretation should not receive the "great weight" typically accorded an agency's construction of a statute that it is charged to administer. See Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389-90 (1984).

II. EPA'S CONCLUSION THAT "APPLICABLE INCREMENT . . . REQUIREMENTS" ARE INCREMENT REQUIREMENTS IMPOSED BY THE PSD MAJOR SOURCE PERMITTING PROGRAM OR A STATE MINOR SOURCE PERMITTING PROGRAM IS A REASONABLE INTERPRETATION OF AN AMBIGUOUS STATUTE.

Section 504(e) of the Act provides that permits issued to temporary sources must "assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and . . . any applicable increment or visibility requirements under part C of subchapter I of this chapter." 42 U.S.C. § 7661c(e); supra at 6-7. The key question is not whether Section 504(e) requires temporary sources to comply with "any applicable increment . . . requirements," see generally Pet. Br. at 26-32; EPA has never disputed that it does. The parties' dispute lies, instead, in determining what constitutes an applicable increment requirement in the first place.

Petitioners assert that (1) Section 504(e) is unambiguous with regard to what constitutes an applicable increment requirement; and that (2) even if this section is ambiguous, EPA's interpretation of that ambiguity is not reasonable. See generally Pet. Br. at 26-46. Petitioners' first claim is entirely unsupported, and their second line of attack is launched at straw men – for the most part, the interpretations that Petitioners dismiss as unreasonable bear little relation to EPA's actual interpretation of the statute. For the reasons discussed in the remainder of this

section, EPA has reasonably interpreted an ambiguous statute, and that interpretation should be upheld.

A. Section 504(e) Is Ambiguous.

Section 504(e) requires compliance with "any applicable increment . . . requirements" at all authorized locations. There is no dispute as to what constitutes an "increment." See supra at 8-9. Section 504(e) does not, however, specify what an "applicable increment . . . requirement" is, nor is this term defined elsewhere in the statute.

As discussed supra at 8-9, increments apply to certain geographic areas (i.e, those that are either in attainment or unclassifiable, and that therefore are governed by the PSD program) and the baseline concentration against which increments are measured is established at a specific time (i.e., as soon as at least one PSD permit application has been filed in an attainment or unclassifiable area). Any given source, however, is only subject to a "requirement" that it demonstrate that its construction will not cause an exceedance of the PSD increment if (1) it is a major PSD source, or (2) a state has opted to include a provision in its minor source preconstruction permitting program requiring minor sources to demonstrate compliance with increments to obtain a permit.

Petitioners assert that "there is nothing ambiguous about how increments apply," Pet. Br. at 33, and that Congress clearly intended Section 504(e) to refer

solely to geographic/temporal applicability. Id.; see also Pet. Br. at 32, 36. Petitioners fail to convert this assertion to anything more than an *ipse dixit.* They offer no discussions of statutory context, structure, or history that might support their claim that the language of the statute is unambiguous. See Pet. Br. at 23-24 (identifying factors used to illuminate statutory text). Instead, Petitioners write as if it were an acknowledged truth that applying increments and requirements derived from those increments to sources is solely a geographical issue. See, e.g., Pet. Br. at 29-30, 31. Petitioners wholly fail to grapple with the fact that, under the Act, the requirement to show that construction of a source will not cause an exceedance of the PSD increment depends on the nature of a source as well as the area in which it is located.

Instead of supporting their own argument that the statute is not ambiguous, Petitioners dedicate their efforts to rebutting arguments EPA has not made. Petitioners argue, for instance, that EPA's view is that Section 504(e) is ambiguous because that section "could refer to only some of several requirements of the PSD program pertaining to increments." Pet. Br. at 33. The passage cited by Petitioners explains why EPA's interpretation of the statute is reasonable, not why the statute is ambiguous in the first place – and EPA did not in any event say what Petitioners claim the Agency said. Instead, EPA pointed out that Section 504(e), 42 U.S.C. § 7661c(e), refers to "applicable increment . . . requirements *under part*

C of subtitle I" (emphasis added), and that there are two sources of such requirements in part C as applied to individual facilities: the PSD permitting program for major sources, and any additional requirements contained in SIPs to prevent significant deterioration of air quality under sections 161 and 163 of the Act, 42 U.S.C. §§ 7471, 7473.[11] II ER 197-98. Contrary to Petitioners' assertion, EPA has never argued that Section 504(e) refers to "only some" of these requirements; rather, it has adopted an interpretation that gives effect to *all* of the requirements that are applicable to individual sources obtaining permits.

Petitioners also attempt to obfuscate the issue by arguing that Section 504(e) creates an independent obligation to ensure compliance with three sets of standards: NAAQS, any applicable increment requirement, and visibility requirements. See Pet. Br. at 35-36; see also id. at 28 (noting parallel treatment of these three elements). This is not in dispute. Nor does EPA contest that Section 504(e) explicitly requires compliance with "any" applicable increment

[11] Petitioners' assertion that in EPA's view Section 504(c) "might not refer to the increment limits established under part C of subchapter I," Pet. Br. at 33-34, is simply nonsensical. In the passage that Petitioners cite, EPA expressly acknowledges that the statute on its face refers to "requirements under Part C of subtitle I." II-ER-197.

requirements. Pet. Br. at 34; see also id. at 35.[12] The question is not whether the statute is ambiguous with regard to whether a source may comply with only "*some* [applicable] increment requirements," Pet. Br. at 34 (emphasis added) – EPA has never argued that Section 504(e) permits this result. The question, rather, is *what constitutes* an "applicable increment . . . requirement" in the context of permitting an individual source. On this point, the statute is silent.

Petitioners further muddy the waters by combining the existence of an applicable increment requirement and the need to demonstrate compliance with that increment into a single portmanteau obligation. See, e.g., Pet. Br. at 34 (referring to requirement to conduct air quality analysis during preconstruction permitting as an "increment requirement").[13] Petitioners have not cited any

[12] Petitioners point out that temporary sources must comply with all requirements of the Act, "*including but not limited to* . . . applicable increment . . . requirements," which Petitioners contend includes "the limits themselves." Pet. Br. at 35. It is not clear what Petitioners mean by "the limits themselves." Assuming, however, that by "limits" Petitioners mean the limits imposed by an applicable increment requirement, this is merely yet another variation on a theme, and still fails to address the relevant question: what constitutes an "applicable increment . . . requirement" with which a source must comply?

[13] See also, e.g., Pet. Br. at 14 (alleging that parties disagree whether 504(e) requires temporary sources to demonstrate emissions will not cause violation of applicable increments), 41 (asserting that EPA relies on requirements for permanent sources "to define a temporary source's obligation to conduct a source

(footnote con't . . . .)

instance in which EPA has stated that some temporary sources seeking a permit under Section 504(e) need not demonstrate compliance with applicable increment requirements, and that is not EPA's position. EPA has stated that temporary sources such as the *Kulluk* that are not PSD major sources "do not need to demonstrate compliance with PSD increments . . . *unless otherwise required by the applicable implementation plan*," Response to Comments, II-ER-218 (emphasis added); however, this merely re-states EPA's view of what constitutes an applicable increment requirement in the first place.

Petitioners have thus failed to demonstrate that Section 504(e)'s reference to "applicable increment . . . requirements" unambiguously encompasses only the geographic aspects of applicability of the increment itself and cannot also describe particular requirements derived from the increment as they apply (or not) to an individual source seeking a Title V permit. Unfounded assertions of a lack of ambiguity in the statute constitute a significant portion of Petitioners' arguments; however, to the extent that Petitioners attack EPA's statutory interpretation, those attacks are equally without merit. As discussed in the following section, EPA's

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impact analysis demonstrating compliance with applicable increments"), 43-44 (asserting that EPA believes only "narrow" circumstances "trigger the obligation for a smaller temporary source to demonstrate compliance with increments").

interpretation of this ambiguous statute is entirely reasonable, and should be upheld.

B. EPA Has Reasonably Interpreted Section 504(e).

Contrary to Petitioners' assertion, there is nothing "complicated," Pet. Br. at 27, about EPA's interpretation of Section 504(e). Section 504(e) is designed to relieve a temporary source of the burden of applying for a separate Title V permit for each location at which it will operate, while ensuring that the source complies with the same requirements it would be subject to if it were a new permanent source at each such location. Response to Comments, II-ER-219; Order, II-ER-137. As the Board recognized, this view of the purpose of Section 504(e) (then numbered Section 404(e)) is supported by the legislative history:

> Some sources requiring [Title V] permits do not operate at fixed locations. . . . Subsection (e) allows the permittee to receive a permit allowing operations . . . at numerous fixed locations without requiring a new permit at each site. Any such permit must assure compliance at all locations of operation with all applicable requirements of the Act, including visibility protection and PSD requirements and ambient standards.

H.R. Rep. No. 101-490, pt. 1, at 350 (1990), reprinted in 2 Legislative History of the Clean Air Act Amendments of 1990, at 3374 (Comm. Print 1993); Order, II-ER-137.

EPA thus interprets "applicable increment . . . requirements" to mean increment requirements that a source would be required to comply with if it were a

new permanent source at any location at which it intends to operate. Even after the baseline concentration against which increments are measured has been established in a given geographic area, individual sources are not required to demonstrate that they will not cause an exceedance of those increments unless they are proposing construction that will increase their emissions. Furthermore, individual sources need only make such a showing in the permitting context if they are (1) major PSD sources, or (2) subject to a state minor source permitting program that requires such a demonstration. See supra at 8-9. Under EPA's interpretation of the statute, if a temporary source meets either of these criteria, any Section 504(e) permit issued to that source must assure compliance with this increment requirement at any location at which the source will operate; on the other hand, if the temporary source does not meet either of these criteria (as the *Kulluk* indisputably does not), the permit applicant need not provide such assurances.

EPA's reading of the statute gives effect to Congress' choice of words. Section 504(e) establishes requirements for "sources;" thus, in determining which increment requirements are "applicable," it is reasonable for EPA to consider whether an increment requirement would apply to a particular source (rather than whether an increment baseline concentration has been triggered and increment accounting is then applicable within a given geographic area, as Petitioners would have it). Section 504(e) also requires compliance with "any applicable

increment . . . requirements *under part C of subchapter I of this chapter*" (emphasis added), and there are two sets of part C "requirements" that apply directly to sources obtaining permits: Section 165(a)(3)(A), 42 U.S.C. § 7475(a)(3)(A), which requires that a PSD major source show that it will not cause or contribute to a violation of an increment to obtain a PSD permit, and any additional requirement contained in a SIP requiring such a demonstration as part of a state minor source permitting program. Response to Comments, II-ER-214-15.

1. Petitioners mischaracterize EPA's interpretation of Section 504(e).

Many of Petitioners' attacks on EPA's interpretation of Section 504(e) are based on a misstatement of EPA's position. Petitioners claim, for example, that "EPA . . . has adopted a complicated interpretation under which all Title V temporary sources must demonstrate compliance with ambient standards but few need to demonstrate compliance with applicable increments." Pet. Br. at 27. It is Congress, not EPA, that created a distinction in Section 504(e) between "ambient standards" (i.e., the NAAQS) generally and "*applicable* increment . . . requirements." 42 U.S.C. § 7661c(e) (emphasis added). By requiring all applicants for a Section 504(e) permit to demonstrate that they will comply with the NAAQS at each location at which the source will be located, while requiring only those sources to which an increment requirement is "applicable" to

demonstrate that they will not violate the increment at each location at which they will operate, EPA is merely giving effect to Congress' choice of words. Statement of Basis, II-ER-250; Order, II-ER-139, 142. Petitioners' additional claim that EPA interprets the statute such that "few [sources] need to demonstrate compliance with *applicable increments*," Pet. Br. at 27 (emphasis added), is simply false – although EPA differs with Petitioners as to what constitutes an applicable increment requirement, EPA has never stated that a source need not demonstrate compliance with whatever increment requirements apply to that individual source in the permitting process.

Petitioners similarly misstate EPA's view as being that Section 504(e) "generally confines the obligation to [demonstrate compliance with increments] to major emitting facilities within the meaning of the PSD program." Pet. Br. at 31. As the Board recognized, in making this assertion Petitioners rely on language in the Statement of Basis issued with the draft permit, but "fail[] to acknowledge the very substantial further interpretive exegesis" contained in the Response to Comments. Order, II-ER-143. In that Response, EPA explained that states have the authority to impose PSD requirements on minor sources through state preconstruction permitting programs, and that if a state has done so then a minor source seeking a Section 504(e) permit must demonstrate compliance with those increments. Response to Comments, II-ER-214-17; see also Order, II-ER-143.

Petitioners did not even address this response to comments before the Board, let alone demonstrate why this statutory interpretation is erroneous. Order, II-ER-143.

Nor have Petitioners demonstrated any inconsistencies in EPA's interpretation of Section 504(e) throughout the administrative proceedings. See Pet. Br. at 37-40, 44-45. It is true (as the Region acknowledged to the Board, see II-ER-198), that EPA articulated its statutory interpretation more fully in its response to comments than in the Statement of Basis that accompanied the draft permit. See Order, II-ER-143. There is, however, nothing improper about an agency refining or clarifying its view of a statute in response to public comments on a proposal. See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound.") Nor have petitioners demonstrated any radical change in EPA's interpretation of Section 504(e). The basis of that interpretation – i.e., the concept that "applicable increment . . . requirements" are those that would apply to a temporary source if it were a new permanent source in the relevant geographic area – remained the same; the only difference was that EPA made it clear that

increment requirements may apply to a source through state minor source permitting programs as well as through the PSD program.[14]

2. Petitioners have not demonstrated that EPA's actual interpretation of Section 504(e) is unreasonable.

To the extent that Petitioners do confront EPA's actual interpretation of Section 504(e), they fail to demonstrate that EPA's interpretation is unreasonable. First, Petitioners argue that EPA's interpretation is unreasonable because it supposedly requires making an inference about the statute. Pet. Br. at 41. The same could be said of Petitioners' preferred view of the statute – i.e., that it requires reading Section 504(e) as if it said "any increment or visibility requirements applicable to the geographic area in which a temporary source is located after the submission of a PSD permit application under part C of subchapter I." *Any* interpretation of an ambiguous statutory term requires assigning some meaning to that term beyond what appears explicitly in the statutory text – that is simply what interpretation is.

[14] There is nothing "theoretical[]" about this possibility. Pet. Br. at 39-40. States are free to require minor sources to demonstrate compliance with increments, and if a state does so that will be an "applicable increment . . . requirement" for Title V temporary sources.

Petitioners suggest that EPA's interpretation renders Sections 504(a) and 504(e) redundant, asserting that "*if* EPA were to read 504(e)" as requiring Title V sources to demonstrate compliance with increment requirements only when required to do so under the PSD permitting program, Section 504(e) would merely duplicate the requirements of Section 504(a). Pet. Br. at 38 (emphasis added); see generally id. at 38-40. As discussed above, and as explained in EPA's response to the comments that Petitioners cite, this is not EPA's interpretation of the statute. Petitioners failed to address EPA's response to comments in their arguments before the Board, and therefore cannot do so now. See Arsdi v. Holder, 659 F.3d 925, 928 (9th Cir. 2011) (if petitioner wishes to preserve issue for appeal, he must first raise it in the proper administrative forum); Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010) (party forfeits arguments not raised during administrative process). Beyond this flawed and belated argument, Petitioners offer nothing to support their claim that EPA's interpretation of Section 504(e) merely duplicates the requirements of Section 504(a).

This claim is in any event without merit, as EPA's interpretation of section 504(e) does not render it duplicative of section 504(a). EPA's reading gives effect to the purpose of section 504(e), which is to authorize issuance of a single permit to a source that operates at multiple locations, so long as the permit conditions assure that the source complies with all applicable requirements at each location

where it may operate. In certain circumstances, major PSD sources that relocate – known as "portable" sources – are exempt from demonstrating that they will not cause a violation of PSD increments when they relocate. See 40 C.F.R. § 52.21(i)(l)(viii); Response to Comments, II-ER-218. *Temporary* sources, however, are subject to the operating permit requirements established in Section 504(e) – including the obligation to demonstrate compliance with "applicable increment . . . requirements" *at every location at which they will operate.* EPA's interpretation gives meaning to this additional requirement.[15]

Petitioners conclude by arguing that EPA's interpretation requires assuming that Congress "intended to establish an extraordinarily limited obligation for smaller temporary Title V sources to conduct an analysis of increment compliance." Pet. Br. at 43; see generally Pet. Br. at 42-44. There is nothing inherently limiting in EPA's approach – if all 50 states opt to require a demonstration of compliance with increments as an element of their minor source

[15] Petitioners' related argument that EPA has adopted a "backward" interpretation of "applicable," Pet. Br. at 41-42, similarly confuses the requirements that apply to major PSD sources that relocate (portable sources) and those that apply to Section 504(e) (temporary sources). In addition, Petitioners again appear to advancing an argument raised in comments on the Permit that Petitioners failed to address before the Board.

permitting programs, then every temporary source proposing to locate in a attainment or unclassifiable area after the baseline concentration is established would be required to demonstrate compliance with those increments at all authorized locations in order to obtain a Section 504(e) permit. The fact that not all states may require minor sources to make this demonstration to obtain a permit is simply a function of the fact that the Act leaves states free to determine what measures are necessary to include in their SIPs in order to ensure compliance with increments within their borders.[16] See Order, II-ER-50-51 (noting Board precedent recognizing states' primary role in using PSD increments to manage growth); Safe Air For Everyone v. EPA, 488 F.3d 1088, 1092 (9th Cir. 2007) (states retain significant flexibility in establishing details of SIPs).

C. Any Issues Concerning The Adequacy Of The Administrative Record Should Be Remanded To The Board.

In response to comments on the draft Permit, EPA explained that the administrative record demonstrates that the Permit assures compliance with all

[16] Petitioners inexplicably assert that EPA's statutory interpretation requires assuming that Congress intended that temporary sources be required to demonstrate increment compliance "against the state's judgment." Pet. Br. at 43. To the contrary – EPA's interpretation gives full effect to a state's judgment by ensuring that *any* source located within that state, permanent or temporary, is required to make the same demonstration of compliance.

increments applicable to the areas within which the *Kulluk* will operate. Response to Comments, II-ER-217. In proceedings before the Board, EPA presented this as an alternative basis on which to uphold the Permit in the event that the Board rejected EPA's interpretation of the statute. EPA's Response to Petitions for Review, II-ER-202-04. Because the Board upheld EPA's interpretation of Section 504(e), it explicitly declined to reach Petitioners' challenge to the Region's finding that the *Kulluk*'s emissions would not violate any applicable increment. Order, II-ER-150 n.45.

Petitioners again attack EPA's finding regarding PSD compliance. Pet. Br. at 46-49. Assuming that the Court upholds EPA's statutory interpretation, Petitioners' record-based arguments are beside the point. Even if the Court finds legal error in EPA's interpretation, however, the proper course would be to remand the matter to the Agency for further proceedings, which could include the Board's resolution of record-based issues that it previously declined to reach. See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (if record does not support agency action or agency has not considered relevant factors, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); Sec. & Exch. Comm'n v. Chenery, 318 U.S. 80, 88 (1943) ("[J]udicial judgment cannot be made to do service for an administrative judgment."); Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952)

("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). EPA will not address Petitioners' record-based arguments further in this proceeding, but reserves the right to respond to those arguments in any further proceedings before the Agency.

III. EPA REASONABLY APPROVED AN AMBIENT AIR BOUNDARY THAT REQUIRES BOTH THE ESTABLISHMENT OF A SAFETY ZONE BY THE COAST GUARD AND SHELL'S IMPLEMENTATION OF A PUBLIC ACCESS CONTROL PLAN TO PREVENT PUBLIC ACCESS TO THE ZONE.

In determining whether a source has demonstrated that its proposed operations will comply with the NAAQS (as is required by Section 504(e)), EPA considers emissions to the "ambient air." For over 40 years, an EPA regulation has defined "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). EPA's interpretation of its own regulation – as articulated by the Board – is entitled to "substantial deference," and "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." NRDC, Inc. v. EPA, 638 F.3d 1183, 1192 (9th Cir. 2011) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)); see also Pepperell Assocs. v. EPA, 246 F.3d 15, 22 (1st Cir. 2001) ("To the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial

deference . . . "). This Court defers to EPA's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. NRDC, 638 F.3d at 1192. This broad deference is "all the more warranted" when the regulation concerns a complex and highly technical regulatory program like the Clean Air Act that necessarily requires significant expertise and entails the exercise of judgment grounded in policy concerns. Id.

EPA guidance sets two basic criteria for evaluating ambient air boundaries for land-based sources – control of, and accessibility to, the land surrounding the source. See Letter from Douglas M. Costle to The Hon. Jennings Randolf (Dec. 19, 1980) ("Costle Letter"), III-ER-380. In this case, EPA reasonably applied these criteria in the context of a water-based source, and determined that the Coast Guard safety zone surrounding the *Kulluk* constitutes an appropriate boundary to define the "ambient air." Petitioners argue that this determination was arbitrary and capricious. See generally Pet. Br. at 49-59. Petitioners have, however, failed to support their claim that EPA's interpretation and application of its own regulations and guidance in this case was somehow inconsistent with prior EPA interpretations, or was otherwise arbitrary or capricious. EPA's decision to include conditions in the Permit that establish an ambient-air boundary should thus be upheld.

A. EPA Reasonably Applied Its Regulations And Guidance In Determining That The Public Will Not Have Access To Air Within The "Safety Zone" Surrounding The *Kulluk*.

The touchstone for establishing the boundaries of ambient air for Clean Air Act regulatory purposes is the extent of public access. See Train v. NRDC., 421 U.S. 60, 65 (1975) ("ambient air" is "the [Act's] term for the outdoor air *used by the general public*") (emphasis added). When determining the portion of the atmosphere to which the general public has access in the permitting context, EPA conducts a "case-by-case evaluation of the facts." 50 Fed. Reg. 7056, 7057 (Feb. 20, 1985); see also Costle Letter, III-ER-380. In the Costle Letter, the former Administrator of EPA stated that an exemption from ambient air is available only for the portion of the atmosphere "over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." Costle Letter, III-ER-380.

EPA has previously adapted these land-based criteria to evaluate the ambient air boundary for sources located over water. In such cases, EPA has interpreted its regulations to exempt that portion of the atmosphere surrounding an overwater source that EPA determines is inaccessible to the public. Thus, in previously issuing a permit for an overwater source, EPA considered a Coast Guard safety zone that prohibited public entry, combined with a surveillance program, as meeting the regulatory requirement that public access be precluded. See Letter

from Steven C. Riva to Leon Sedefian (Oct. 9, 2007) ("Broadwater Letter"), III-ER-369-70. EPA followed this approach in drafting the *Kulluk* permit by prohibiting drill ship operations unless (1) the overwater area excluded from the ambient air is subject to a safety zone established by the Coast Guard, and (2) Shell takes additional steps to prevent public access to this area. Because air within this boundary (i.e., the area within approximately 500 meters of the hull of the *Kulluk*) is not part of the "ambient air," Shell appropriately excluded this area from the analysis it conducted to demonstrate its compliance with applicable regulations.[17] See Response to Comments, II-ER-208-09.

The use of a Coast Guard safety zone to establish the ambient air boundary for a water-based source is a reasonable application of EPA's regulatory definition of ambient air. Safety zones may be established by the Coast Guard around Outer Continental Shelf facilities to promote the safety of life and property on the facilities, their appurtenances and attending vessels, and on the adjacent waters within the safety zones. 33 C.F.R. § 147.1. Regulations adopted for safety zones may prevent access to the zone by vessels. Id. The terms and conditions of safety

[17] EPA followed a similar approach in issuing permits to the Shell vessel *Discoverer*. Those permits are under review in Resisting Environmental Destruction On Indigenous Lands (REDOIL), et al., v. EPA, No. 12-70518.

zones are established following notice-and-comment rulemaking initiated by the Coast Guard. Id. § 147.10.

The terms of the Permit represent a reasonable, case-specific determination of the portion of the atmosphere to which the public will not have access. The Permit expressly precludes *Kulluk* operations unless several measures are in place that prevent public access. First, the *Kulluk* must be subject to a currently effective safety zone established by the Coast Guard that encompasses an area within at least 500 meters from the center point of the *Kulluk*, and that prohibits members of the public from entering the area, except for attending vessels or vessels authorized by the Coast Guard. Permit, I-ER-44-45. The Coast Guard has already established a temporary safety zone for the *Kulluk* in the Beaufort Sea for the 2012 drilling season that prohibits public access within 500 feet of the outer edge of the *Kulluk* except for attending vessels and vessels authorized by the Coast Guard. 77 Fed. Reg. 39,164, 39,169 (July 2, 2012). Second, Shell must develop and implement a public access control program that will locate, identify, and intercept the general public in the vicinity of the *Kulluk* and inform members of the public that they are prohibited by Coast Guard regulations from entering the safety zone. Permit, I-ER-45. This program must also communicate the time period when exploration activities are expected to begin and end at a drill site, the location of the drill site,

and any restrictions on activities in the vicinity of exploration operations to the North Slope communities on a periodic basis. Id.

The Board found that these permit terms reflect a reasonable interpretation of EPA's regulatory definition of "ambient air" and an appropriate application of that definition to the specific circumstances associated with access to the atmosphere over the Beaufort Sea where the *Kulluk* will operate. Order, II-ER 159-61; see generally id. at 155-61. As discussed above, this regulatory interpretation is entitled to substantial deference. See NRDC, 638 F.3d at 1192; supra at 43-44.

Contrary to Petitioners' arguments, see Pet. Br. at 54-55, the fact that the Coast Guard bases the exclusion zone on safety concerns does not make that zone an inappropriate means of defining the ambient air. If a property owner built a fence around a land-based industrial source to exclude members of the public as a safety precaution, that fence could subsequently be used to establish an ambient-air boundary. Similarly, as the Board noted, regardless of the underlying reason for establishing the zone, access to areas within that zone will be strictly limited. Order, II-ER-160 at n.56.

Nor does the remote possibility that the Coast Guard would permit members of the general public to enter the safety zone make EPA's reliance on that zone unreasonable. See Pet. Br. at 55. In establishing the 2012 safety zone for the

Kulluk, the Coast Guard emphasized the danger that could occur to the drillship and its crew, to the vessel and crew of any third party vessel entering the safety zone, and to the environment in the event of a vessel collision or a fouling of the *Kulluk*'s anchor lines. 77 Fed. Reg. at 39,165-66. In light of these safety concerns identified by the Coast Guard, EPA reasonably determined that the Coast Guard will not allow members of the public to enter the safety zone.[18]

Although the Permit requires the establishment of a Coast Guard safety zone, restricting access to that zone is not left solely to the Coast Guard. The Permit also requires Shell to prepare and implement a public access control program to locate, identify and intercept the public by radio, physical contact, or other means to inform the public that they cannot enter the safety zone. The safety zone together with the public access control program gives not only the Coast Guard, but also Shell, the responsibility to help prevent the public from accessing the area within the zone, thus satisfying EPA's requirement that the source itself (and not a third party) control access to any area excluded from the ambient air. See Pet. Br. at 55.

[18] The Coast Guard even discussed the possibility of criminal sanctions to enforce the safety zone given the remote location and the need to protect the environment. 77 Fed. Reg. at 39,165.

B. The Permit Is Consistent with EPA's Prior Interpretation Of Its Regulations.

Contrary to Petitioners' argument, Pet. Br. at 53-57, the Permit is consistent with EPA's prior interpretation of its governing regulation in the context of overwater sources. As the Board observed, Region 10's analysis was "entirely consistent" with the 2007 Broadwater Letter, in which EPA Region 2 established an ambient air boundary around an offshore liquefied natural gas facility. Order, II-ER-159. In that earlier analysis, Region 2, in consultation with EPA's Office of Air Quality Planning and Standards, determined that it was appropriate to use a proposed Coast Guard safety zone to define an ambient air boundary around the overwater facility, reasoning that "[t]his safety zone in effect acts like a fence by precluding public access." Broadwater Letter, III-ER-369.[19] The Broadwater Letter in turn references previous permitting decisions involving overwater

[19] Petitioners assert that the Broadwater letter "appears to be inconsistent with EPA's longstanding interpretation" of the EPA regulation defining "ambient air," and that therefore it should be disregarded. See Pet. Br. at 52. Petitioners' argument is circular at best. The Broadwater letter is "inconsistent" with prior interpretations only to the extent that it does not require a fence or other physical barrier to define an ambient-air boundary around a water-based source. That is, however, precisely the point: although EPA has required such barriers for sources located on land, EPA has not required similar physical barriers for sources located on water.

facilities in which EPA regional offices used the Coast Guard's safety zone as the boundary for defining ambient air. III-ER-370; see also Order, II-ER-159. The Permit's use of a safety zone is thus consistent with prior EPA interpretations of its regulatory definition when applied to water-based sources.

Petitioners' arguments rely heavily on EPA's past interpretations of its regulatory definition of ambient air as applied to *land-based* sources. See Pet. Br. at 53-57. This argument was addressed by the Board, which properly concluded that those interpretations do not create an inconsistency with EPA's approach to the *water-based* sources covered by the Permit. Order, II-ER-159-60; see also NetCoalition v. S.E.C., 615 F.3d 525, 537 (D.C. Cir. 2010) (agency did not make an unexplained change because prior statements addressed different circumstances).

EPA agrees with Petitioners that, with regard to land-based sources, EPA evaluates ambient air boundaries based upon a source's ownership or control of land and the presence of physical barriers to prevent access. While these criteria are appropriate to evaluate access to air around land-based sources, sources located over waters of the Arctic Ocean cannot own or have exclusive control of the site, nor can they erect a fence or physical barrier on the open seas. However, in issuing the Permit, EPA applied the two principles reflected in the interpretation set forth in the Costle letter for the establishment of an exemption – control of

property and efforts to limit public access – to sources located over water, miles from the nearest coast. Response to Comments, II-ER-208-09. It determined that the Coast Guard safety zone provided legal authority to exclude the general public from the area inside the zone. Id. In addition, Shell must take steps to prevent access by implementing its public access control program.[20] Id. On this basis, the Board reasonably determined that the terms and conditions of the permit are consistent with EPA's regulatory definition of ambient air and the interpretation of those regulations offered in the Costle letter.

[20] EPA also considered the arctic environment in which the *Kulluk* will operate. Response to Comments, II-ER-52. EPA has previously found that natural physical features that limit public access, in combination with an access control program, can serve as a barrier equivalent to a fence or other physical boundary. See 50 Fed. Reg. at 7057 (man-made barriers, security measures, and inherently rugged nature of mountainous terrain combined to preclude public access); Memorandum from G.T. Helms (Apr. 30, 1987), III-ER-377-78 (river coupled with posting and regular patrols adequate to preclude public access). In this case, the *Kulluk* will be operating in harsh conditions and in remote locations. While EPA does not dispute that some subsistence activities may occur in these areas, see Pet. Br. at 14-15, 58 the local environment will nonetheless pose some barrier to public access even beyond those created by the safety zone and Shell's access control program.

C. To the Extent EPA Has Departed From Its Prior Interpretation of Its Regulatory Definition Of Ambient Air, It Fully Justified the Change.

Even if EPA's approach is deemed inconsistent with the Costle letter and other prior guidance addressing land-based sources, EPA fully explained its reasons for adapting its regulatory interpretation in the context of water-based sources. A change in policy does not justify heightened judicial scrutiny of agency action. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009). Rather, the agency need only display awareness that it is changing position and show that there are good reasons for the new policy. Id. at 515; see also River Runners for Wilderness v. Martin, 593 F.3d 1064, 1075-76 (9th Cir. 2010) (agency may change course, as long as it supplies reasoned analysis).

Here, while EPA did not view these permit decisions as a change in policy, it clearly displayed awareness that it was adapting its prior regulatory interpretation of its definition of ambient air to fit a different situation. This is not a case in which prior policy documents were "casually ignored" or disregarded. See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687-88 (9th Cir. 2007). Instead, the Board's decision and EPA's response to comments fully discussed the Costle letter and other informal guidance and prior decisions applying the criteria of ownership or control of land and physical barriers to access. Order, II-ER 155-161; Response to Comments, II-ER-208-09. Petitioners do not contend otherwise.

Petitioners incorrectly argue that EPA failed to adequately explain any departure from its prior interpretation. Pet. Br. at 57-59. Petitioners' argument overlooks the six pages of discussion of this issue in the Board's opinion, which includes the quotation of a portion of EPA's response to comments on this topic. As the Board recognized, EPA's interpretation of its regulatory definition articulated in the Costle letter was written with overland situations in mind. Order, II-ER-159-160. EPA has, however, explained:

- How it applied the principles of the Costle letter in the context of water-based sources, see Response to Comments, II-ER-208-09;
- The basis for its determination that the safety zone established by the Coast Guard is analogous to ownership or control of land, in that the safety zone provides legal authority to exclude the general public from the area inside the zone, see Response to Comments, II-ER-209;
- The fact that Shell demonstrated that it could limit access to the safety zone by proposing a public access control program that will locate, identify, and intercept members of the public to inform them that they are prohibited from entering the safety zone, see id.; and
- EPA's view that the program of monitoring and notification for an overwater location is sufficiently similar to a fence or physical barrier

on land that the safety zone qualifies for exclusion from ambient air. Order, II-ER-158; Response to Comments, II-ER-209.

EPA thus fully explained its reliance on a Coast Guard safety zone and public access control program in lieu of land ownership and a physical barrier. The Agency did not "ignore EPA's decades-old interpretation of the ambient air regulation," nor did it "gloss[] over" prior precedents. Pet. Br. at 58. Instead, as the Board confirmed, it addressed and adapted its interpretation of the governing regulations to the circumstances surrounding a water-based source.

IV. VACATUR OF THE COMBINED PERMITS IS NOT AN APPROPRIATE REMEDY.

For all of the reasons discussed above, Petitioners' challenge to the Permit should be rejected and the Board's decision should be upheld. Even if Petitioners prevail on some issues, however, they have not justified their demand for a single, sweeping remedy: complete vacatur of the Permit. Pet. Br. at 59-60. Petitioners ignore the fact that the Permit is actually three permits – two issued under Title V, and one issued under Alaska state regulations. See supra at 11-12. Depending on the Court's precise ruling, some of these individual permits could survive – for example, a rejection of EPA's interpretation of Section 504(e) would affect the Title V operating permits, but not necessarily the minor construction permit issued under state regulations.

Should the Court rule for Petitioners in any respect, the appropriate remedy would be to remand the Permit without vacating it. Doing so would allow the Agency the opportunity to assess the precise effect of the Court's ruling and to determine whether any unaffected portions of the Permit can be severed, while avoiding the potentially disruptive consequences of vacating a perfectly valid and sustainable element of the Permit. See, e.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993) (remand without vacatur appropriate where, inter alia, consequences of vacating would be "quite disruptive"). Nor would a remand without vacatur prejudice Petitioners, who offer nothing to support their broad and conclusory assertion that the Permit (which, as already noted, requires compliance with all applicable emissions standards, including the health-protective NAAQS) poses such a threat to health and the environment that it should not be allowed to stand during further Agency proceedings. Pet. Br. at 60.

CONCLUSION

EPA's interpretation of the Clean Air Act provisions and implementing regulations at issue in this appeal was entirely reasonable, and is entitled to deference from the Court. The petition for review should therefore be denied.

July 26, 2012

Respectfully submitted,
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RESPONDENTS' CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION AND TYPEFACE REQUIREMENTS

Respondent United States Environmental Protection Agency ("EPA") hereby represents that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,970 words, as counted by Microsoft Word, excluding the signature block and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

DATED: July 26, 2012

/s/ Angeline Purdy
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondent EPA have been served through the Court's CM/ECF system on all registered counsel this 26th day of July, 2012.

DATED: July 26, 2012

/s/ Angeline Purdy
Counsel for Respondents

[COLORED PAGE IN PRINTED BRIEF]

ADDENDUM

ADDENDUM TABLE OF CONTENTS

(2) Limit the requirements pertaining to emission control actions in Priority I regions to—

(i) Urbanized areas as identified in the most recent United States Census, and

(ii) Major emitting facilities, as defined by section 169(1) of the Act, outside the urbanized areas.

§ 51.153 Reevaluation of episode plans.

(a) States should periodically reevaluate priority classifications of all Regions or portion of Regions within their borders. The reevaluation must consider the three most recent years of air quality data. If the evaluation indicates a change to a higher priority classification, appropriate changes in the episode plan must be made as expeditiously as practicable.

(b) [Reserved]

Subpart I—Review of New Sources and Modifications

SOURCE: 51 FR 40669, Nov. 7, 1986, unless otherwise noted.

§ 51.160 Legally enforceable procedures.

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in—

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decision-making on an application for approval to construct or modify will prevent such construction or modification if—

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on—

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

[51 FR 40669, Nov. 7, 1986, as amended at 58 FR 38822, July 20, 1993; 60 FR 40468, Aug. 9, 1995; 61 FR 41840, Aug. 12, 1996]

(iii) If the owner or operator believes the basic design parameter(s) in paragraphs (h)(2)(i) and (ii) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(iv) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (h)(2)(i) and (ii) of this section.

(v) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(vi) Efficiency of a process unit is not a basic design parameter.

(3) The replacement activity shall not cause the process unit to exceed any emission limitation, or operational limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

[51 FR 40669, Nov. 7, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §51.165, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

EFFECTIVE DATE NOTE: At 76 FR 17552, March 30, 2011, §51.165, paragraphs (a)(1)(v)(G) and (v)(1)(vi)(C) *(3)* are stayed indefinitely.

§51.166 Prevention of significant deterioration of air quality.

(a)(1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) *Plan revisions.* If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) *Required plan revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) *Plan assessment.* The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) *Public participation.* Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in §51.102.

(6) *Amendments.*(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of the Act, shall adopt and submit such plan revision to the

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the least reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source impact analysis*—(1) *Required demonstration.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions), would not cause or contribute to air pollution in violation of:

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(2) *Significant impact levels.* The plan may provide that, for purposes of $PM_{2.5}$, the demonstration required in paragraph (k)(1) of this section is deemed to have been made if the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts less than the following amounts:

Pollutant	Averaging time	Class I area	Class II area	Class III area
$PM_{2.5}$	Annual	0.06 μg/m³	0.3 μg/m³	0.3 μg/m³
	24-hour	0.07 μg/m³	1.2 μg/m³	1.2 μg/m³

(l) *Air quality models.* The plan shall provide for procedures which specify that—

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) The plan shall provide that, with respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the reviewing authority determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maxiumum allowable increase.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act of Federal Pollution Control Act Amendments of 1972) Public Law 92–500, as amended by Public Law 95–217 and Public Law 95–576; 33 U.S.C. 1251 *et seq*.

Director means the Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative. When there is no approved State or Tribal program, and there is an EPA administered program, *Director* means the Regional Administrator. When there is an approved State or Tribal program, ''Director'' normally means the State or Tribal director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State or Tribal program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval; see §123.1) In such cases, the term ''Director'' means the Regional Administrator and not the State or Tribal director.

Draft permit means a document prepared under §124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a ''permit.'' A notice of intent to terminate a permit and a notice of intent to deny a permit as discussed in §124.5, are types of ''draft permits.'' A denial of a request for modification, revocation and reissuance or termination, as discussed in §124.5, is not a ''draft permit.'' A ''proposal permit'' is not a ''draft permit.''

Environmental Appeals Board shall mean the Board within the Agency described in §1.25(e) of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b). An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion under this subpart to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

EPA (''EPA'') means the United States ''Environmental Protection Agency.''

Facility or activity means any ''HWM facility,'' UIC ''injection well,'' NPDES ''point source'' or ''treatment works treating domestic sewage'' or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Federal Indian reservation (in the case of NPDES) means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit (NPDES and 404) means an NPDES or 404 ''permit'' authorizing a category of discharges or activities under the CWA within a geographical area. For NPDES, a general permit means a permit issued under §122.28. For 404, a general permit means a permit issued under §233.37.

Indian Tribe means (in the case of UIC) any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over a defined area. For the NPDES program, the term ''Indian Tribe'' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining

sources as well as all RCRA, UIC and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321.

(c) Material readily available at the issuing Regional Office or published material that is generally available, and that is included in the administrative record under paragraphs (b) and (c) of this section, need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis or the fact sheet.

(d) This section applies to all draft permits when public notice was given after the effective date of these regulations.

§ 124.10 Public notice of permit actions and public comment period.

(a) *Scope.* (1) The Director shall give public notice that the following actions have occurred:

(i) A permit application has been tentatively denied under § 124.6(b);

(ii) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) A draft permit has been prepared under § 124.6(d);

(iii) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404) and 271.14 (RCRA)).*) A hearing has been scheduled under § 124.12;

(iv) An appeal has been granted under § 124.19(c);

(v) (*Applicable to State programs, see § 233.26 (404).*) A State section 404 application has been received in cases when no draft permit will be prepared (see § 233.39); or

(vi) An NPDES new source determination has been made under § 122.29.

(2) No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under § 124.5(b). Written notice of that denial shall be given to the requester and to the permittee.

(3) Public notices may describe more than one permit or permit actions.

(b) *Timing (applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404, and 271.14 (RCRA)).* (1) Public notice of the preparation of a draft permit (including a notice of intent to deny a permit application) required under paragraph (a) of this section shall allow at least 30 days for public comment. For RCRA permits only, public notice shall allow at least 45 days for public comment. For EPA-issued permits, if the Regional Administrator determines under 40 CFR part 6, subpart F that an Environmental Impact Statement (EIS) shall be prepared for an NPDES new source, public notice of the draft permit shall not be given until after a draft EIS is issued.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

(c) Methods (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), 233.23 (404), and 271.14 (RCRA)). Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits);

(i) The applicant (except for NPDES and 404 general permits when there is no applicant);

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act), NPDES, 404, sludge management permit, or ocean dumping permit under the Marine Research Protection and Sanctuaries Act for the same facility or activity (including EPA when the draft permit is prepared by the State);

(iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, including any affected States (Indian Tribes). (For purposes of this paragraph, and in the context of the Underground Injection Control Program only, the term State includes Indian Tribes treated as States.)

(iv) For NPDES and 404 permits only, any State agency responsible for plan development under CWA section

general permits when there is no application.

(iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application; and

(v) A brief description of the comment procedures required by §§ 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

(vi) For EPA-issued permits, the location of the administrative record required by § 124.9, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant is available as part of the administrative record.

(vii) For NPDES permits only (including those for ''sludge-only facilities''), a general description of the location of each existing or proposed discharge point and the name of the receiving water and the sludge use and disposal practice(s) and the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application. For EPA-issued NPDES permits only, if the discharge is from a new source, a statement as to whether an environmental impact statement will be or has been prepared.

(viii) For 404 permits only,

(A) The purpose of the proposed activity (including, in the case of fill material, activities intended to be conducted on the fill), a description of the type, composition, and quantity of materials to be discharged and means of conveyance; and any proposed conditions and limitations on the discharge;

(B) The name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description of the site of each proposed discharge and the portions of the site and the discharges which are within State regulated waters;

(C) A description of the anticipated environmental effects of activities conducted under the permit;

(D) References to applicable statutory or regulatory authority; and

(E) Any other available information which may assist the public in evaluating the likely impact of the proposed activity upon the integrity of the receiving water.

(ix) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I , J, and N of this chapter.

(x) Any additional information considered necessary or proper.

(2) *Public notices for hearings*. In addition to the general public notice described in paragraph (d)(1) of this section, the public notice of a hearing under § 124.12 shall contain the following information:

(i) Reference to the date of previous public notices relating to the permit;

(ii) Date, time, and place of the hearing;

(iii) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures; and

(iv) For 404 permits only, a summary of major issues raised to date during the public comment period.

(e) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1) (i), (ii), (iii), and (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

[48 FR 14264, Apr. 1, 1983; 48 FR 30115, June 30, 1983, as amended at 53 FR 28147, July 26, 1988; 53 FR 37410, Sept. 26, 1988; 54 FR 258, Jan. 4, 1989; 54 FR 18786, May 2, 1989; 65 FR 30911, May 15, 2000; 66 FR 65338, Dec. 18, 2001; 69 FR 41683, July 9, 2004; 71 FR 35040, June 16, 2006; 75 FR 77286, Dec. 10, 2010]

§ 124.11 Public comments and requests for public hearings.

(*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) During the public comment period provided under

§ 124.10, any interested person may submit written comments on the draft permit or the permit application for 404 permits when no draft permit is required (see § 233.39) and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in § 124.17.

§ 124.12 Public hearings.

(a) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) (1) The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s);

(2) The Director may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision;

(3) For RCRA permits only, (i) the Director shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice under § 124.10(b)(1); (ii) whenever possible the Director shall schedule a hearing under this section at a location convenient to the nearest population center to the proposed facility;

(4) Public notice of the hearing shall be given as specified in § 124.10.

(b) Whenever a public hearing will be held and EPA is the permitting authority, the Regional Administrator shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

(c) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under § 124.10 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 17718, Apr. 24, 1984; 50 FR 6941, Feb. 19, 1985; 54 FR 258, Jan. 4, 1989; 65 FR 30911, May 15, 2000]

§ 124.13 Obligation to raise issues and provide information during the public comment period.

All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10. Any supporting materials which are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting materials not already included in the administrative record available to EPA as directed by the Regional Administrator. (A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted under § 124.10 to the extent that a commenter who requests additional time demonstrates the need for such time.)

[49 FR 38051, Sept. 26, 1984]

§ 124.14 Reopening of the public comment period.

(a)(1) The Regional Administrator may order the public comment period reopened if the procedures of this paragraph could expedite the decision-making process. When the public comment period is reopened under this paragraph, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Regional Administrator's tentative

decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting material, by a date, not less than sixty days after public notice under paragraph (a)(2) of this section, set by the Regional Administrator. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than twenty days after the date set for filing of the material, set by the Regional Administrator.

(2) Public notice of any comment period under this paragraph shall identify the issues to which the requirements of §124.14(a) shall apply.

(3) On his own motion or on the request of any person, the Regional Administrator may direct that the requirements of paragraph (a)(1) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying the requirements of paragraph (a)(1) of this section will substantially expedite the decisionmaking process. The notice of the draft permit shall state whenever this has been done.

(4) A comment period of longer than 60 days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they shall be granted under §124.10 to the extent they appear necessary.

(b) If any data information or arguments submitted during the public comment period, including information or arguments required under §124.13, appear to raise substantial new questions concerning a permit, the Regional Administrator may take one or more of the following actions:

(1) Prepare a new draft permit, appropriately modified, under §124.6;

(2) Prepare a revised statement of basis under §124.7, a fact sheet or revised fact sheet under §124.8 and reopen the comment period under §124.14; or

(3) Reopen or extend the comment period under §124.10 to give interested persons an opportunity to comment on the information or arguments submitted.

(c) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under §124.10 shall define the scope of the reopening.

(d) [Reserved]

(e) Public notice of any of the above actions shall be issued under §124.10.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 38051, Sept. 26, 1984; 65 FR 30911, May 15, 2000]

§124.15 Issuance and effective date of permit.

(a) After the close of the public comment period under §124.10 on a draft permit, the Regional Administrator shall issue a final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under §270.29). The Regional Administrator shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a RCRA, UIC, PSD, or NPDES permit under §124.19 of this part. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

(b) A final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under §270.29) shall become effective 30 days after the service of notice of the decision unless:

(1) A later effective date is specified in the decision; or

(2) Review is requested on the permit under §124.19.

(3) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 9607, Mar. 7, 1989; 65 FR 30911, May 15, 2000]

§124.16 Stays of contested permit conditions.

(a) *Stays.* (1) If a request for review of a RCRA, UIC, or NPDES permit under §124.19 of this part is filed, the effect of

the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. Uncontested permit conditions shall be stayed only until the date specified in paragraph (a)(2)(i) of this section. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action. See also §124.60.

(2)(i) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. The Regional Administrator shall identify the stayed provisions of permits for existing facilities, injection wells, and sources. All other provisions of the permit for the existing facility, injection well, or source become fully effective and enforceable 30 days after the date of the notification required in paragraph (a)(2)(ii) of this section.

(ii) The Regional Administrator shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit as of the date specified in paragraph (a)(2)(i) of this section . For NPDES permits only, the notice shall comply with the requirements of §124.60(b).

(b) *Stays based on cross effects.* (1) A stay may be granted based on the grounds that an appeal to the Administrator under §124.19 of one permit may result in changes to another EPA-issued permit only when each of the permits involved has been appealed to the Administrator and he or she has accepted each appeal.

(2) No stay of an EPA-issued RCRA, UIC, or NPDES permit shall be granted based on the staying of any State-issued permit except at the discretion of the Regional Administrator and only upon written request from the State Director.

(c) Any facility or activity holding an existing permit must:

(1) Comply with the conditions of that permit during any modification or revocation and reissuance proceeding under §124.5; and

(2) To the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed.

[48 FR 14264, Apr. 1, 1983, as amended at 65 FR 30911, May 15, 2000]

§124.17 Response to comments.

(a) (*Applicable to State programs, see §§123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) At the time that any final permit decision is issued under §124.15, the Director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing.

(b) For EPA-issued permits, any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in §124.18. If new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record.

(c) (*Applicable to State programs, see §§123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) The response to comments shall be available to the public.

§124.18 Administrative record for final permit when EPA is the permitting authority.

(a) The Regional Administrator shall base final permit decisions under

§ 124.15 on the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and:

(1) All comments received during the public comment period provided under § 124.10 (including any extension or reopening under § 124.14);

(2) The tape or transcript of any hearing(s) held under § 124.12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by § 124.17 and any new material placed in the record under that section;

(5) For NPDES new source permits only, final environmental impact statement and any supplement to the final EIS;

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

(c) The additional documents required under paragraph (b) of this section should be added to the record as soon as possible after their receipt or publication by the Agency. The record shall be complete on the date the final permit is issued.

(d) This section applies to all final RCRA, UIC, PSD, and NPDES permits when the draft permit was subject to the administrative record requirements of § 124.9 and to all NPDES permits when the draft permit was included in a public notice after October 12, 1979.

(e) Material readily available at the issuing Regional Office, or published materials which are generally available and which are included in the administrative record under the standards of this section or of § 124.17 (''Response to comments''), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

§ 124.19 Appeal of RCRA, UIC, NPDES, and PSD Permits.

(a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 270.29 of this chapter to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings. They may, instead, either challenge the general permit in court, or apply for an individual NPDES permit under § 122.21 as authorized in § 122.28 and then petition the Board for review as provided by this section. As provided in § 122.28(b)(3), any interested person may also petition the Director to require an individual NPDES permit for any discharger eligible for authorization to discharge under an NPDES general permit. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(b) The Environmental Appeals Board may also decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph

within 30 days of the service date of notice of the Regional Administrator's action.

(c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Environmental Appeals Board under paragraph (a) or (b) of this section shall be given as provided in §124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

(d) The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under §124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under §124.16(a) continue to apply.

(e) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action.

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC, NPDES, or PSD permit decision is issued by EPA and agency review procedures under this section are exhausted. A final permit decision shall be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(2) Notice of any final agency action regarding a PSD permit shall promptly be published in the FEDERAL REGISTER.

(g) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to §124.2 and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Environmental Appeals Board.

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 9607, Mar. 7, 1989; 57 FR 5335, Feb. 13, 1992; 65 FR 30911, May 15, 2000]

§124.20 Computation of time.

(a) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(b) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event.

(c) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(d) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.