

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 02-3805 and 02-4116

OHIO PUBLIC INTEREST RESEARCH GROUP, *et al.*,

Petitioners,

v.

CHRISTINE TODD WHITMAN, Administrator, United States Environmental
Protection Agency, *et al.*,

Respondent,

STATE OF OHIO,

Intervenor.

**FINAL REPLY BRIEF OF PETITIONER
OHIO PUBLIC INTEREST RESEARCH GROUP AND GLENN LANDERS**

Petition for Review of Final Action of the
United States Environmental Protection Agency

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ORAL ARGUMENT REQUESTED

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GLOSSARY

APA	Administrative Procedure Act
Br.	Brief
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
FIP	Federal implementation plan
Ohio PIRG	Ohio Public Interest Research Group
SIP	State implementation plan
Title V	Clean Air Act § 501-507, 42 U.S.C. 7661a-7661f

Summary of Argument

JURISDICTION. Contrary to the United States Environmental Protection Agency's ("EPA's") characterization, the agency's determination whether Ohio is administering its Title V program in accordance with Title V requirements is not an unreviewable exercise of EPA's "enforcement discretion." When EPA assumes responsibility for administering a Clean Air Act ("CAA") program in a state, EPA is not punishing the state as in an "enforcement" action, but is instead employing the statutory mechanism that Congress enacted to ensure that all residents of the country receive the benefit of clean air, regardless of the State in which they reside.

However, even if the Court concludes that this case does involve "enforcement," EPA's decision is reviewable. First, this case is brought under CAA § 307(b)(1), which provides for judicial review of "any ... final action" of the Administrator, and contains no "committed to agency discretion" exception like that found in the Administrative Procedure Act ("APA"). Second, even if an APA-type presumption of unreviewability applies to actions brought under CAA § 307(b)(1), the presumption is rebutted by the plain CAA language (1) circumscribing the Administrator's discretion by requiring issuance of a § 502(i) notice whenever the Administrator determines that a state is not adequately administering Title V requirements, and (2) providing abundant "law to apply" concerning EPA decisions under § 502(i).

TITLE I MODIFICATION.

a. Statute of Limitations. Petitioners filed a timely challenge to EPA's final action in response to Ohio Public Interest Research Group's ("Ohio PIRG's") comments, and are not time-barred from challenging EPA's unlawful interpretation of what constitutes a "modification" requiring a Title V permit revision pursuant to CAA § 502(b)(10). EPA's argument that the challenged interpretation dates back to a 1992 rulemaking is refuted by the rulemaking notices in the 1992 proceeding, as well as by EPA's own subsequent characterizations of that proceeding. In any event, EPA reopened the issue in the present proceeding by publishing a *Federal Register* notice soliciting public comment on any and all program deficiencies.

b. Merits. Section 502(b)(10) of the Act requires sources to obtain a permit revision before making a "modification[]" under any provision of [Title] I." (Emphasis added.) It is undisputed that § 110(a)(2)(C) (1) is part of Title I, and uses precisely the same word as § 502(b)(10) -- *i.e.*, "modification." § 110(a)(2)(C) (providing *inter alia* for "regulation of the modification" of stationary sources) (emphasis added). Thus, EPA's refusal to issue a § 502(i) notice requiring Ohio to correct its unlawful exemption of § 110(a)(2)(C) modifications from permit revision requirements was unlawful and arbitrary.

IMPLEMENTATION DEFICIENCIES CONFIRMED BY EPA. In response to Ohio PIRG's comments, EPA expressly confirmed that Ohio is not

administering its Title V program in accordance with several significant Title V requirements. Accordingly, CAA § 502(i) requires that EPA “shall” notify Ohio that it must correct these deficiencies within 18 months.

In the alternative, if EPA’s documented conclusions do not amount to a determination under § 502(i) that Ohio is inadequately administering Title V requirements, then EPA’s refusal to make that determination was unlawful and arbitrary. Under CAA § 502(i), the standard that the Administrator must apply when determining whether a state is adequately administering its Title V program is whether the state is administering its program “in accordance with the requirements of [Title V].” EPA has expressly concluded that Ohio is not administering its permit program in accordance with several specific Title V requirements. All of EPA’s arguments for not determining that Ohio is inadequately administering its program are based on factors that are irrelevant under the statute and EPA’s own regulations.

With respect to the deviation reporting deficiency, the statements by EPA’s lawyer are insufficient to demonstrate that the deficiency has been mooted. Hundreds of Ohio facilities remain subject to deficient permits that do not comply with Title V reporting requirements, and no determination has been made by EPA concluding that the deficiency has been resolved.

ARGUMENT

I. REVIEW OF EPA'S FINAL ACTION REGARDING WHETHER TO ISSUE A § 502(i) NOTICE TO OHIO IS WITHIN THIS COURT'S JURISDICTION UNDER CAA § 307(b)

A. EPA's Decision Regarding Whether a State is Adequately Administering Title V Requirements is not "Enforcement"

EPA wrongly characterizes its state oversight activities under CAA § 502(i) as an exercise of its enforcement discretion. EPA Br. at 34. "Enforcement" by EPA under the CAA involves seeking an injunction or penalties against a person who is violating an emission limitation or standard under the Act. *See* CAA § 113, 42 U.S.C. § 7413. A state can be the subject of an EPA enforcement action when it acts as a regulated entity, e.g., when a state operates the power plant that serves a government office complex and EPA brings an enforcement action against the State for operating the plant in violation of CAA emission limits.

In sharp contrast, EPA's state oversight activities under CAA § 502(i) involve the interaction between the federal government in its regulatory capacity and the state government in its regulatory capacity. Though the CAA allows States an opportunity to administer CAA programs, Congress requires EPA to step in and administer a CAA program for a state if the state is unwilling or unable to administer the program in accordance with the Act's requirements. *See* CAA § 502(i), 42 U.S.C. § 7661a(i). When EPA assumes responsibility for administering a CAA program in a state, EPA is not punishing the state as in an "enforcement"

action. Instead, EPA is employing the mechanism that Congress placed in the Act to ensure that all residents of the country receive the benefit of clean air, regardless of the state in which they reside.

The Court should reject EPA's argument that a determination regarding whether to issue a § 502(i) notice to a State is unreviewable as an "enforcement action" because issuance of such notice could lead to the imposition of a federal permit program and sanctions. *See* EPA Br. at 34. Contrary to EPA's argument, courts regularly review EPA's approval of state implementation plans under CAA § 110, 42 U.S.C. § 7410, even though a successful challenge to such approval could lead to the imposition of a federal implementation plan ("FIP") under CAA § 110(c), 42 U.S.C. § 7410(c) and to the imposition of sanctions under CAA § 179(a), 42 U.S.C. § 7509(a). *See, e.g., Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975); *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002); *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990); *Sierra Club v. U.S. EPA*, 314 F.3d 735 (5th Cir. 2002); *Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. 2002). Just as courts have concluded that they have jurisdiction under CAA § 307(b), 42 U.S.C. § 7607(b) to review challenges to EPA approval of SIPs, the Court has jurisdiction to review EPA's determination under § 502(i) regarding whether Ohio is administering its operating permits program in accordance with the requirements of CAA Title V.

B. Even if this Case Involves “Enforcement,” the Act and Judicial Precedent Compel the Conclusion that EPA’s Decision Is Reviewable

Even assuming *arguendo* that EPA’s decision to give notice under § 502(i)(1) concerns “enforcement,” it is nonetheless reviewable.

1. The Heckler Standard Does Not Apply to this Clean Air Act Review Proceeding.

In arguing against reviewability, EPA primarily relies on *Heckler v. Chaney*, 470 U.S. 821 (1985), and on a Second Circuit decision that in turn relies on *Heckler*. EPA Br. 29, 32-38 (citing *Heckler* and *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d. Cir. 2003)). However, *Heckler*’s finding of nonreviewability was based on exemptions found in the Administrative Procedure Act. 470 U.S. at 832.

As the Second Circuit failed to recognize in *NYPIRG*,¹ however, the present case is brought not under the APA, but under Clean Air Act § 307(b)(1). Section 307(b)(1) broadly provides for judicial review of “any ... final action” of the Administrator,² without the exemptions contained in the APA. Indeed, because

¹ *NYPIRG*, 321 F.3d at 331 (“under the APA an agency’s decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review”) (emphasis added).

² See *Harrison v. PPG Industries*, 446 U.S. 578, 589 (1980)(declining to narrow scope of phrase “any other final action” in § 307(b)(1)). Accord, *Greater Detroit Resource Recovery Authority and Combustion Engineering v. EPA*, 916 F.2d 317, 321 (6th Cir. 1990).

§ 307(b)(1)'s mandate encompasses even pre-enforcement review,³ the *Heckler* standard does not apply even if the actions sought in this case may ultimately lead to EPA "enforcement" (such as sanctions or withdrawal of program approval).

2. Even if the *Heckler* Standard Does Apply, Judicial Precedent and the Clean Air Act Compel the Conclusion that the Standard Is Met Here.

Even if the *Heckler* standard does apply, that standard is plainly met here. *Heckler* emphasized that an agency enforcement decision "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 470 U.S. at 832-33. "[I]n establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The Court explained that if Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2) and courts may require that the agency follow that law." *Id.* at 834-835.

³ *Whitman v. American Trucking Ass'ns.*, 531 U.S. 457, 479 (2001) ("we have characterized the special judicial-review provision of the CAA, 42 U.S.C. § 7607(b), as one of those statutes that specifically provides for 'preenforcement review'").

The Second Circuit incorrectly failed even to consider whether the *Heckler* presumption was rebutted. *NYPIRG*, 321 F.3d at 331-332 (court merely recited the policy rationale underlying the general presumption that agency enforcement decisions are unreviewable, without considering whether presumption was rebutted). Consideration of the standards prescribed by *Heckler* compels the conclusion that the presumption is indeed rebutted.

(a) The Applicable Clean Air Act Provisions Circumscribe EPA's Discretion At Least As Much As the Prior Precedent Cited Approvingly by *Heckler*.

Clean Air Act § 502(i) expressly circumscribes EPA's "power to discriminate among issues or cases it will pursue." *Heckler*, 470 U.S. at 833. Once the EPA Administrator determines that a state is not adequately implementing Title V requirements, "the Administrator shall provide notice to the State." CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1)(emphasis added). "[U]nless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State." CAA § 502(i)(4), 42 U.S.C. § 7661a(i)(4)(emphasis added). Thus, unlike a prosecutor who has discretion with respect to whether to prosecute someone even after concluding that the person violated the law, the EPA Administrator has no discretion to refuse to

issue a § 502(i) notice to a State after determining that the State is not implementing Title V in accordance with requirements under the Act.

Indeed, these constraints on EPA's discretion equal or exceed those cited approvingly by *Heckler* as sufficient to rebut the presumption. Specifically, *Heckler* pointed to the statutory language interpreted in *Dunlop v. Bachowski*, 421 U.S. 560 (1975) as "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." 470 U.S. at 833. The petitioners in *Dunlop* sought review of a decision by the Secretary of Labor not to file suit to set aside a union election. *Id.* at 470 U.S. 833. The applicable statute provided that after a union member files a complaint with the Secretary, "[the] Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation ... has occurred ... he shall bring a civil action." *Id.* (emphasis added). *Heckler* explained that judicial review was appropriate in *Dunlop* because "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.* at 834 (emphasis added). For the same reasons, Clean Air Act § 502(i)(1) -- which closely tracks the *Dunlop* statute in providing that the agency "shall" take further action upon making a threshold determination -- "quite clearly" suffices to rebut the *Heckler* presumption even if it applies.

(b) The CAA Provides Abundant “Law to Apply” in Reviewing a Determination by the Administrator Under § 502(i)

The Clean Air Act not only contains law to apply -- it sets forth numerous detailed provisions relevant to agency decisions under § 502(i)(1), and to this Court’s review of them.

Section 502(i)(1). On its face, CAA § 502(i) plainly requires the Administrator to base a determination regarding whether a § 502(i) notice must be issued to a State on whether the State is administering the program “in accordance with the requirements of [Title V of the Act].” CAA §502(i)(1), 42 U.S.C. § 7661a(i)(1)(emphasis added). While EPA may find it expedient to avoid this language by eliding it and replacing it with dots, *see* EPA Br. at 2, 29, petitioners respectfully submit that the Court should not follow suit.

Other Title V provisions incorporated into § 502(i)(1). Moreover, by expressly referencing “the requirements of [Title V],” § 502(i)(1) incorporates a wealth of express statutory rules prescribed by other Clean Air Act provisions. *See* CAA §§ 501-507. Particularly relevant to this case are the requirements that a State:

- provide “public notice, including offering an opportunity for public comment and a hearing,” with respect to each permit application, revision, or renewal, CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6),

- allow a facility to make changes without applying for a permit revisions only where “the changes are not modifications under any provision of [Title I] and the changes do not exceed the emissions allowable under the permit,” CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10),

- issue all initial permits within three years after obtaining EPA approval to administer Title V requirements, CAA § 503(c); 42 U.S.C. § 7661b(c), and

- require sources to “promptly report any deviations” from permit conditions, CAA § 503(b)(2), 42 U.S.C. § 7661b(b)(2).

EPA’s implementing regulations. Title V also requires the Administrator to promulgate regulations “establishing the minimum elements of a permit program to be administered by any air pollution control agency.” 42 U.S.C. § 7661a(b). Those regulations, in turn, prescribe very specific requirements governing state issuance of Title V permits. *See* 40 C.F.R. Part 70. Regulatory requirements that are relevant to this case include, *inter alia*, the requirement that a state permitting authority “shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)” and “send this statement to EPA and to any other person who requests it.” 40 C.F.R. § 70.7(a)(5). Both the requirements set forth in the Act and those set forth in EPA’s regulations provide the Court with “law to apply” in reviewing a final action by EPA under § 502(i). *See Nationwide*

Building Maintenance, Inc. v. Reich, 14 F.3d 1102, 1105 (6th Cir.

1994)(“[R]egulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action.”)

(citation omitted).

The foregoing statutory and regulatory provisions amply suffice to constitute “law to apply.” Indeed, the extensive detail set forth in Title V and 40 C.F.R. Part 70 far exceeds that found in the statute at issue in *Dunlop*, (the Labor-Management Reporting and Disclosure Act, or “LMRDA”), which the Supreme Court cited to approvingly in *Heckler* as offering “clearly defined factors” to guide the Secretary of Labor’s decision with respect to whether to investigate and file suit to set aside a union election. 470 U.S. at 833-834 (statute stating that “[the] Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation ... has occurred ... he shall ...bring a civil action.”). Accordingly, EPA’s argument that Title V requirements are not specific enough to permit judicial review is without merit. See EPA Br. at 34-38.

(c) Final Action by the Administrator is Not Unreviewable Simply Because It Involves an Exercise of Discretion.

EPA argues that its decision is unreviewable because the agency allegedly possesses a degree of discretion in determining whether a state is administering its Title V program in accordance with Title V requirements. See EPA Br. at 29-30.

As the Supreme Court made clear in *Heckler*, however, an agency’s decision does

not become unreviewable simply because it involves some degree of agency discretion -- indeed, a key task of reviewing courts is to determine whether agencies have abused their discretion. *See Heckler*, 470 U.S. at 829 (noting that APA § 706(2)(A) directs courts to examine whether an agency's action was "arbitrary, capricious, or an abuse of discretion."(emphasis in original)). Thus, pursuant to its authority under CAA § 307(b)(1), the Court should vacate the Administrator's final action if it determines that, in exercising her discretion, she acted unlawfully or arbitrarily and capriciously.

3. The Possibility that EPA's Duty Might in Some Future Case Be Excused on *De Minimis* Grounds Does Not Justify Erasing that Duty Entirely.

EPA argues that judicial review of EPA's determinations under § 502(i) would result in the requirement that notices be issued to states "for every deficiency—presumably no matter how slight, isolated, or technical." EPA Br. at 37-38 (quoting *NYPIRG*). This argument must be rejected. It is "inherent in most statutory schemes" that an agency may "overlook circumstances that in context may fairly be considered *de minimis*." *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980). The possibility that EPA might at some point encounter *de minimis* deficiencies in a state's implementation of Title V requirements does not justify a blanket conclusion that EPA's determinations under § 502(i) are unreviewable. If EPA does encounter deficiencies that it considers *de minimis*,

“the agency will bear the burden of making the required showing.” *Id.* In this case, EPA did not assert that any of the deficiencies identified by Ohio PIRG would qualify as *de minimis*.

II. EPA’S APPROVAL OF OHIO’S EXCLUSION OF MODIFICATIONS UNDER CAA §110(a)(2)(C) FROM PERMIT REVISION REQUIREMENTS WAS UNLAWFUL AND ARBITRARY AND CAPRICIOUS

A. Petitioners’ Challenge to EPA’s Unlawful Interpretation of What Constitutes a “Title I Modification” is Timely

EPA argues that the Clean Air Act’s sixty-day statute of limitations bars petitioners’ claim concerning EPA’s unlawful interpretation of what constitutes a modification under CAA § 502(b)(10). *See* EPA Br. at 40-44. This argument must be rejected.

First, EPA’s argument is premised on the notion that the agency decided this issue in 1992, adopting a position contrary to the one petitioners advance here. EPA claims petitioners should have sought review of this adverse decision then. EPA Br. at 40. In reality, EPA made no such decision.

To the contrary, the language cited by EPA was in the preamble⁴ of a proposed rule. 56 Fed. Reg. 21712, 21746 fn. 6 (May 10, 1991) [JA186, 187] (*See* EPA Br. at 42). Moreover, that proposed preamble language was not repeated in the final rulemaking notice, which instead incorporated actual regulatory text

⁴ *See Nat’l Wildlife Fed. v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002) (preamble is not a binding part of a rulemaking notice).

adopting an approach opposite to that of the proposed preamble. 57 Fed. Reg. 32250 (July 21, 1992) (promulgating existing 40 C.F.R. § 70.4(b)(15), which “prohibit[s] sources from making, without a permit revision, changes that ... are modifications under any provision of title I of the Act”) [JA189].

Subsequent *Federal Register* notices confirm that the 1992 rulemaking did not promulgate an interpretation excluding § 110(a)(2)(C) modifications from the definition of “Title I Modification.” In a 1994 notice, EPA stated that “confusion” had resulted “from EPA’s failure to state explicitly whether or not ‘modification under any provision of title I’ includes [§ 110(a)(2)(C)] changes” when it promulgated the final Title V rules in 1992. 59 Fed. Reg. 44460, 44462-63 (Aug. 29, 1994) (emphasis added) [JA234, 236-37]. EPA’s 1994 statement that the agency had not previously stated explicitly a position on the issue at hand undermines EPA’s current argument that the 1992 proceeding contained an explicit statement on the issue. That conclusion is buttressed by the 1994 notice’s further statement that the 1992 regulations are best interpreted in a manner opposite to the interpretation EPA now wishes to give them. *Id.* (EPA “believes that ‘modifications under any provision of title I’ should be interpreted to include [modifications under § 110(a)(2)(C)]”) (emphasis added).

EPA’s current statute of limitations argument is further refuted by EPA’s post-1992 proceedings concerning approval of state Title V programs, which

applied an interpretation of “Title I modification” different from the one that EPA now claims to have finalized in 1992. Specifically, EPA interpreted the statute and its own regulations as requiring a source to obtain a permit revision before making a § 110(a)(2)(C) modification—an interpretation opposite to the one EPA now claims to have adopted in 1992. On numerous occasions, EPA refused to grant full approval to state programs based *inter alia* on the state’s failure to treat § 110(a)(2)(C) modifications as “modifications under any provision of [Title] I,” stating, *e.g.*:

The EPA believes the phrase ‘modifications under any provision of title I of the Act’ in 40 CFR 70.7(e)(2)(i)(A)(5) is best interpreted to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under title I of the Act. This would include State preconstruction review programs approved by EPA into the State Implementation Plan (SIP) under section 110(a)(2)(C) of the Act.

59 Fed. Reg. 43797, 43800 (Aug. 25, 1994) (proposing interim approval of Louisiana’s Title V program) [JA228]. *See also* 59 Fed. Reg. 55813, 55814 (Nov. 9, 1994) (granting interim approval of Washington’s Title V program) [JA262], 59 Fed. Reg. 47105, 47108 (Sept. 14, 1994) (proposing interim approval of Oregon’s Title V program) [JA253], 59 Fed. Reg. 50214, 50216 (Oct. 3, 1994) (proposing full approval of Mississippi’s Title V program) [JA259].

Subsequently, EPA proposed in 1995 to reverse course and adopt an alternative interpretation of its regulations that would exclude § 110(a)(2)(C)

modifications from what EPA considers to be a “Title I modification,” thereby allowing sources to make § 110(a)(2)(C) modifications without applying for a permit revision and without public notice and an opportunity for comment. 60 Fed. Reg. 45530 (Aug. 31, 1995) [JA269]. But EPA concedes that it never finalized its 1995 proposal and thus, never triggered the 60-day period for filing a petition for judicial review of final agency action under CAA § 307. EPA Br. at 42.

Even if EPA had finalized its unlawful interpretation in 1992—which it plainly did not—Petitioners’ challenge is timely because EPA reopened the issue when it published its December 11, 2000 *Federal Register* notice offering members of the public an opportunity to identify “deficiencies in the substance of the approved program or deficiencies in how a permitting authority is implementing its program.” 65 Fed. Reg. 77376 (emphasis added)[JA322]. EPA agreed to “consider information received from the public” and stated that “[w]here the Agency agrees there is a deficiency, it will publish a notice of deficiency.” *Id.* Thus, EPA indicated its willingness to reconsider the basis of its previous determination that a state’s program complied with Title V requirements. In light of precedent finding issues reopened even where agencies make “ambiguous”

statements that “suggest” a willingness to reopen,⁵ the unambiguous reopening notice cited above amply sufficed to reopen. Ohio PIRG submitted timely comments in response to that notice, and EPA does not dispute that Petitioners filed a timely petition for review of EPA’s final action in response to those comments.

B. Section 502(b)(10) of the Act Unambiguously Requires Sources to Obtain a Permit Revision Before Making a Modification Under § 110(a)(2)(C)

EPA concedes that “on its face, the phrase ‘modification under any provision of [title] I’ appears broad.” EPA Br. at 47. EPA also concedes that § 110(a)(2)(C) is in Title I of the Act. *Id.* Nonetheless, EPA argues that the lack of a definition for “modification” makes the Act ambiguous with respect to whether a “modification” under § 110(a)(2)(C) constitutes a “modification[] under any provision of [title] I.” *Id.* at 48-49. EPA’s argument is without merit.

Whatever the term “modification” means, it is the same word that Congress used in both § 110(a)(2)(C) and § 502(b)(10). Because § 110(a)(2)(C) is (by EPA’s own concession) in Title I, “modification” under § 110(a)(2)(C) unambiguously

⁵ See, e.g., *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1033 (D.C. Cir. 2001) (“Where a rulemaking notice is ambiguous and could fairly be read to suggest [] that the search for harmony might lead to the rethinking of old positions this Court has found that the earlier decision was reopened.” (quotation marks and citation omitted; emphasis added)); *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987).

constitutes a “modification under any provision of [title] I.” § 502(b)(1) (emphasis added).

Contrary to EPA’s assertions, effectuating § 502(b)(10)’s plain meaning would not create conflict with other Clean Air Act provisions.⁶ *See* EPA Br. at 49-53. Most of the arguments that EPA makes in its brief appeared in the preamble to EPA’s 1995 proposed Part 70 rule revisions and have already been addressed in Petitioners’ opening brief. *See* Pet. Br. at 35 (showing that Congress was aware that what constitutes a modification will vary from state to state depending on local air quality), at 33 (showing that requiring a permit revision for § 110(a)(2)(C) modifications would not eliminate the availability of off-permit changes), at 34-35 (showing that the ability for sources to make off-permit changes would be limited in the very states that have concluded that careful scrutiny of changes at sources is necessary to ensure that they do not cause or contribute to a violation of air quality standards). EPA’s brief fails to respond to Petitioners’ arguments. As discussed below, the handful of additional arguments raised in EPA’s brief are without merit.

First, EPA argues that variability from state to state regarding what constitutes a modification requiring a permit revision would contravene Congress’ intent to achieve “national uniformity” amongst state Title V programs—an intent

⁶ Though EPA argues that application of the plain language of § 502(b)(10) would lead to “absurd results” (*See* EPA Br. at 46), EPA never identifies any such absurd results.

allegedly revealed by the CAA requirement that state programs contain specified “minimum elements.” *See* EPA Br. at 49 (quoting CAA § 502(b)). EPA’s argument proves the opposite: one of the required “minimum elements” is that a state program may only allow off-permit changes where those changes “are not modifications under any provision of [title] I.” CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

Second, EPA argues that the various statutory provisions directing States to issue Title V permits expeditiously indicate that Congress did not intend to require a source to apply for a permit revision before making a § 110(a)(2)(C) modification. *See* EPA Br. at 50-51. This open-ended argument would, if accepted, allow EPA to override any of the numerous statutory requirements governing Title V permits -- and indeed, to do so based on mere vague assertions about alleged interference with prompt permit processing. EPA lacks authority to override express statutory provisions.

That is especially so here, where the precise provision relied on by EPA (*see* EPA Br. at 50) explicitly requires that a state’s “adequate, streamlined, and reasonable procedures” for “applications, renewals, or revisions” provide for “public notice, including offering an opportunity for public comment and a hearing.” CAA § 502(b)(6) (emphasis added). Thus, the Act expressly confirms that Congress viewed procedures for public notice and comment as fully consistent

with the requirement that a state provide for “expeditious review of permit actions.” *Id.*

Finally, the Court should reject EPA’s attempt to avoid the plain meaning of the statute by pointing to statements in legislative history indicating the need for “flexibility” in permitting. *See* EPA Br. at 52-53. These statements say nothing whatsoever regarding whether a permit revision is required under § 502(b)(10) for a modification under § 110(a)(2)(C) and cannot be relied upon to override the plain meaning of the statute. *See Independent Bankers Ass’n v. Farm Credit Admin.*, 164 F.3d 661, 668 (D.C. Cir. 1999)(“Given the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are insufficient to undermine that language”). If EPA could use these vague assertions about the need for “flexibility” to disregard the statutory requirement at issue here, EPA could use this same argument to disregard any permitting requirement.

Perhaps recognizing the weakness of its legislative history, EPA faults petitioners for not relying on legislative history. But the statute is clear, and there was no need for Congress to state in legislative history what is clear on the face of the statute. *See PPG Industries*, 446 U.S. at 592 (“[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.”).

III. EPA'S DECISION NOT TO ISSUE A § 502(i) NOTICE TO OHIO WITH RESPECT TO THE THREE CONFIRMED DEFICIENCIES IN OHIO'S IMPLEMENTATION OF TITLE V REQUIREMENTS WAS UNLAWFUL AND ARBITRARY

A. EPA Does Not Dispute That it Concluded in Response to Ohio PIRG's Comments That Ohio is Not Administering its Permitting Program in Compliance With Several Important Title V Requirements

With respect to the other three deficiencies at issue here, EPA concedes that the deficiencies exist, but denies that EPA "determine[d]" that Ohio is not adequately administering or enforcing its Title V program. EPA Br. at 32. To the contrary, in response to Ohio PIRG's comments EPA expressly determined that Ohio is inadequately administering a number of Title V requirements, including:

- Title V reporting requirements with respect to deviations caused by malfunctions,
- issuance of all initial permits within 3 years of EPA program approval (by 1998), and
- the requirement to prepare a lawful statement of basis to accompany each draft Title V permit.

See Letter from Bharat Mathur to Robert Hodanbosi, 11/21/01, enclosure at 1,2, 4-5 [JA39, 40, 42-43], EPA Response to Comments, Encl. at 1, 7-8, 14-15[JA160, 166-67, 173-74], *see also* 67 Fed. Reg. 53923, 53924 (Aug. 20, 2002)(stating that "EPA agreed in whole or in part with commenters that a program was not being

properly implemented but nevertheless did not issue a notice of deficiency.”).⁷ Having made these determinations, the Act expressly required that EPA “shall provide notice to the State.” CAA § 502(i)(1) (emphasis added). *See NYPIRG*, 321 F.3d at 331 (“NYPIRG is correct that § 502(i) imposes certain nondiscretionary obligations. Central among these is that, pursuant to § 502(i)(1), after the EPA has made a determination that a program is deficient, it must ‘provide notice to the State’ of this determination.”).

EPA does not deny that the challenged decision made the above-quoted determinations. Instead, the agency advances an untenable parsing of the Act. Specifically, EPA claims that the determination and the notice are one and the same. Thus, if EPA has not issued a § 502(i) notice to a State, EPA claims that the agency also has not made a determination that the State is inadequately administering Title V requirements. EPA Br. at 31.

This reading of the statute is nonsensical. If a determination were truly the same as a notice, then the making of a notice would *ipso facto* constitute the issuance of a notice, and Congress’ imposition of a duty would make no sense.

⁷ In its brief, EPA conceded that Ohio “did not issue all of its initial Title V permits before the statutory deadline in 1998,” and that Ohio still has not issued all of its initial permits. *See* EPA Br. at 53-54. EPA also conceded that it determined that Ohio does not provide a statement of basis with each draft permit that satisfies the requirements of 40 C.F.R. § 70.7(a)(5) and that “there is no doubt that this is a serious implementation issue worthy of EPA’s attention. *See* EPA Br. at 56-57.

Why provide that EPA “shall” do something that the agency has by definition already done? Congress’s separate enumeration of the determination and notice -- joined by a “shall” -- establishes that the two items constitute separate acts.

Accord, 40 C.F.R. § 70.10(b)(3) (EPA’s regulations clearly demarcate the two distinct steps in the process, stating, “Whenever the Administrator has made the finding and issued the notice”) (emphasis added).

EPA also characterizes the Ohio program’s deficiencies as “potential” ones. EPA Br. at 31. However, there was nothing “potential” about EPA’s categorical statements that Ohio’s program suffered from the above deficiencies. EPA’s conclusion that Ohio is not administering its Title V program in accordance with Title V requirements was unambiguous, and -- under the plain meaning of § 502(i)(1) -- triggered EPA’s duty to provide notice to Ohio.

B. EPA’s Decision Not to Invoke the Remedial Procedures Under CAA § 502(i) Was Unlawful and Arbitrary Because EPA Based its Decision on Irrelevant Factors

Even if the Court were to accept EPA’s argument that it has not made the determination that triggers the state notification requirement under § 502(i), EPA’s decision not to make that determination was unlawful and arbitrary. Under the plain terms of the statute and EPA’s regulations, the applicable standard is whether the State is administering its program “in accordance with the requirements of [Title V].” CAA § 502(i), 42 U.S.C. § 7661a(i). *See also* 40 C.F.R. § 70.10(b).

As discussed above, EPA concedes that Ohio is not administering its program in accordance with several important Title V requirements. All of EPA's arguments for not making a determination rest on factors that are irrelevant under the statute and regulations. *See Motor Vehicle Mfrs. Assn. v. State Farm*, 463 U.S. 29, 43 (1983)(Agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider.").

The first factor that EPA identifies—that it does not want to be required to develop and administer a Title V program for Ohio if deficiencies are not corrected within 18 months (*see* EPA Br. at 55)—is obviously not a factor that EPA is allowed to consider. The plain language of § 502(i) unambiguously requires that EPA "shall" issue the notice once it has made the threshold determination; that deficiencies in a State's implementation of Title V requirements then be addressed within 18 months of the notice; and that EPA assume permitting responsibility in any State where deficiencies are not corrected within that timeframe. The statute is clear, and does not allow EPA to circumvent the 18-month remedial period by refusing to issue the notice that starts the clock running.⁸

⁸ There is no basis for EPA's alarmist predictions with respect to the possibility that it could be required to withdraw Ohio's Title V authority if Ohio fails to correct deficiencies within 18 months. *See* EPA Br. at 56-57. EPA has assumed responsibility for issuing CAA permits in other states without encountering the administrative chaos that it purports to fear. *See* 67 Fed. Reg. 63551 (Oct. 15, 2002)(partial withdrawal of Title V approval from 34 California districts) [JA330],
(Footnoted continued on next page...)

The second factor identified by EPA—that Ohio “committed to work with EPA” to resolve the deficiencies (*See* EPA Br. at 57)—is also a statutorily irrelevant factor. As Petitioners explained in their opening brief, there is no exception under § 502(i) for states that commit to address deficiencies, and EPA may not create such an exception where none is provided in the statute. *See* Pet. Br. at 39. Moreover, such an exception would lead to absurd results, because the statute is clear that after EPA issues a § 502(i) notice, the State’s mere commitment to address a deficiency is not enough to prevent the State from losing authority to administer Title V requirements. *Id.* at 39-40. It would be absurd if EPA were able to refuse even to begin the 18-month remedial period based on a state commitment that would be insufficient to resolve the deficiency if a notice had been issued. *Id.*

Finally, the Court should reject EPA’s baseless claim that, due to Ohio’s commitment to address its permitting backlog, a § 502(i) notice would serve “no useful purpose.” *See* EPA Br. at 53. It is not up to EPA to discard statutory requirements based on the agency’s views concerning their “useful”-ness.

(...footnoted continued from previous page.)

68 Fed. Reg. 19371 (Apr. 21, 2003)(full withdrawal of Nevada’s authority to issue CAA construction permits) [JA332]. Indeed, federal takeover of Title V programs should not be a resource drain on EPA because all Title V activities must be fully funded through permit fees paid by regulated sources. *See* CAA §502(b)(3), 42 U.S.C. § 7661a(b)(3).

Moreover, Ohio's commitment does not make a § 502(i) notice any less useful or necessary. To the contrary, the § 502(i) procedures ensure that Title V implementation deficiencies are resolved promptly by requiring EPA to promulgate and administer a Title V program for a State if deficiencies persist for more than 18 months. CAA § 502(i). Though EPA argues that issuance of a § 502(i) notice would cause further delay (EPA Br. at 55), in reality it is EPA's alternative commitment letter approach that threatens loss of valuable time: if Ohio fails to meet its commitments, EPA cannot withdraw a state's authority to administer Title V requirements without starting from scratch by issuing a § 502(i) notice. *Id.*

IV. THE DEVIATION REPORTING DEFICIENCY IS NOT MOOT

EPA is incorrect in arguing that Ohio has corrected its failure to require sources to submit prompt written reports of all deviations caused by malfunctions. *See* EPA Br. at 58-64.

First, though EPA's lawyer claims that Ohio has corrected this deficiency based on his personal review of one recently-issued Ohio permit (*See* EPA Br. at 23-24), EPA's brief points to no determination by the EPA Administrator confirming that Ohio has resolved this problem program-wide. It is the EPA Administrator, not EPA's lawyer, that is charged with responsibility for

determining whether a State is administering its permit program in accordance with Title V requirements. *See* § 502(i).

Second, EPA does not dispute that hundreds of major polluters are still operating permits that do not require prompt written reports of all deviations from permit conditions as required by CAA § 503(b)(2), 42 U.S.C. § 7661b(b)(2). *See* EPA Br. at 62. So long as these deficient permits remain in place, Ohio's Title V program will not provide Petitioners with timely information regarding the health risks posed by illegal pollution from industrial sources located in their communities. EPA's attempt to downplay the significance of this deficiency by asserting that Petitioners can still find out about illegal emissions within a year of their occurrence (*See* EPA Br. at 61) is absurd. Petitioners seek timely information about air pollution that is harmful to their health, not a retrospective look at all of the excess pollution that they have been forced to breathe over the course of the previous year. That sources may report violations orally to the permitting authority is of no help to Petitioners, since they cannot gain access to these oral reports.⁹

EPA's argument that it cannot use the § 502(i) process to require Ohio to correct the hundreds of deficient permits that are at the heart of Ohio's Title V

⁹ Ohio's assertion that it revised its general permit conditions to "require reports of deviations caused by malfunctions even where the source previously submitted an immediate written report," (Ohio Br. at 29) is irrelevant to the deficiency in Ohio's program. Ohio PIRG and EPA were concerned about malfunctions that were only reported orally. *See* EPA Br. at 58.

program (*See* EPA Br. 63) is plainly wrong. Under 40 C.F.R. § 70.7(f), EPA must direct a state to reopen and revise a permit whenever EPA determines that it “contains a material mistake” or does not “assure compliance with the applicable requirements.” Here, EPA has determined that Ohio’s permits violate Title V requirements by failing to require prompt, written reports of deviations due to malfunctions that last less than 72 hours. Thus, not only does EPA have the authority to require Ohio to correct this pervasive deficiency in the Ohio Title V program, but under its regulations, EPA is required to do so. Contrary to EPA’s assertion, neither the statute nor federal regulations set forth an alternative procedure by which Petitioners can seek the reopening and revision of these clearly deficient permits. It would be arbitrary and capricious for EPA to conclude that Ohio’s “minor revision” to the template permit language to be included in future permits is sufficient to correct this serious implementation deficiency.

As made clear in the opening brief, the remedy sought by Petitioners is for the Court to vacate EPA’s unlawful and arbitrary action and direct EPA to take new final action within 60 days of the Court’s order. Pet. Br. at 49. To the extent that EPA determines at that time that any deficiency has been fully corrected, EPA will have the opportunity to identify such correction as a basis for deciding that a § 502(i) notice is not warranted. At present, EPA has not determined that this

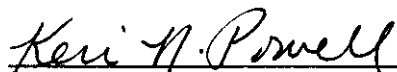
deficiency has been corrected and there is no basis for the Court to conclude that this issue is moot.

CONCLUSION

Petitioners respectfully request that the Court grant this petition and enter the relief requested in their opening brief and this brief.

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Respectfully submitted,



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