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.

AMENDED FINAL BRIEF OF STATE OF OHIO

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

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August 28, 2003

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The State of Ohio respectfully requests that the Court hold oral argument in this matter. As set forth herein, this matter involves a challenge to EPA's interpretation and application of its governing statutes and regulations found in the Clean Air Act Amendments and 40 C.F.R. Part 50. The case presents a matter of great public importance as it affects both EPA's implementation of the Clean Air Act nationally and Ohio's implementation of the Clean Air Act locally. This Court has not addressed these issues previously.

JURISDICTIONAL STATEMENT

Petitioners bring this action pursuant to the jurisdiction granted to this Court by Clean Air Act ("CAA") § 307(b), 42 U.S.C. § 7607(b).

STATEMENT OF THE ISSUES

1. Whether CAA § 502(i), 42 U.S.C. § 7661a(i) authorizes the Administrator of EPA to exercise discretion not to take enforcement action where there is no statutory duty to do so, and whether the exercise of that agency discretion is subject to judicial review?

2. To the extent that the Administrator has discretion that is subject to judicial review, whether the Administrator's decision not to issue a notice of deficiency pursuant to CAA § 502(i), 42 U.S.C. § 7661a(i) was arbitrary or capricious where:

(a) Ohio's Title V regulations satisfy the requirements of the CAA and comport with EPA's interpretation of what constitutes a "Title I modification";

(b) Ohio, like many other permitting authorities in the nation, failed to meet the statutory deadline for permit issuance, but committed to issuing all Title V permits before December 1, 2003;

(c) Ohio's Title V regulations and permit terms and conditions requiring prompt reporting of deviations caused by "malfunctions" satisfy Title V of the CAA; and

(d) the statement of basis issued with Ohio's draft Title V permits adequately sets forth the legal and factual basis for the terms and conditions contained in the draft permits?

STATEMENT OF THE CASE

The State of Ohio, and its Environmental Protection Agency ("State," "Ohio" or "Ohio EPA") hereby submit this brief in opposition to the Petitions for Review filed by the Ohio Public Interest Research Group and Glenn Landers ("Petitioners").

On December 11, 2001, EPA solicited comments concerning any state's approved CAA Title V operating permit program. On March 10, 2001, Petitioner Ohio Public Interest Research Group ("Ohio PIRG") submitted comments to EPA concerning Ohio's federally approved Title V program. On May 22, 2002, EPA responded to Ohio PIRG's comments, but determined that none of the issues addressed by EPA's May 22, 2002 response to comments constituted deficiencies in Ohio's approved Title V program. Ohio PIRG and Glenn Landers (collectively "Petitioners") filed

the instant Petitions for Review challenging EPA's exercise of discretion in determining that the issues raised were not program deficiencies as contemplated by CAA § 502(i), 42 U.S.C. § 7661a(i).[1]

STATEMENT OF FACTS

I. The federal Clean Air Act sets the minimum standards the States must meet and enforce to protect the nation's air quality.

The Clean Air Act ("CAA"), as amended in 1970, 1977, and 1990, establishes a partnership between EPA and the states for the attainment and maintenance of national air quality standards. *See*, 42 U.S.C. §§ 7401-7515. Under this regime, EPA has set health-based primary "National Ambient Air Quality Standards" ("NAAQS") for six criteria pollutants. *See*, 40 C.F.R. part 50.

The states are responsible in the first instance for meeting the NAAQS through State Implementation Plans ("SIPs") that provide for attainment, maintenance and enforcement of the NAAQS in nonattainment areas and for the Prevention of Significant Deterioration ("PSD") in areas that are already

[1] While Glenn Landers is a Petitioner here, he was not a signatory to the comments submitted concerning Ohio's Title V program and did not submit a Declaration in support of Petitioners' Brief. *See*, Comments Requesting a Finding of Deficiency With Respect to the Title V Program Administered by the Ohio Environmental Protection Agency. JA 3.

in attainment or unclassifiable ("major NSR"). CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3).

Each state's SIP must set forth a permitting program that is at least as stringent as the requirements of the CAA. CAA § 110(a), 42 U.S.C. § 7410(a). States are required to promulgate both PSD and nonattinament new source review ("major NSR") permitting programs as part of their SIPs.

The CAA also authorizes states to require a third type of permit, known as a minor source ("minor NSR") permit, which is applicable to all new sources or modifications of existing sources, whether located in attainment or nonattainment areas, that are not subject to the PSD and major NSR permitting requirements. CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2).

EPA's approval and promulgation of a SIP renders the elements of the SIP the applicable state law for purposes of the CAA, and empowers the state to administer various CAA programs under its own authority. *See,* CAA §§110, 116, 161, 42 U.S.C. §§7410, 7416, 7471.

Ohio has had a fully approved SIP in place since 1972. *See,* 37 Fed. Reg. 19,806 (Sept. 22, 1972). Ohio's SIP includes a very extensive minor NSR program found at Ohio Admin. Code Chapter 3745-31. Ohio's minor NSR program regulates a significantly larger number of air contaminant sources than many other states by establishing a very low permitting

threshold. *See, e.g.*, Ohio Admin. Code 3745-15-05. Ohio's minor NSR program seeks to ensure that Ohio maintains attainment with the NAAQS. *Id.*

II. Title V of the Clean Air Act Amendments requires States to promulgate and implement a federal operating permit program for major facilities.

In 1990, Congress amended the CAA to adopt a federal operating permit program referred to as "Title V." CAA § 502, 42 U.S.C. § 7661a. Title V does not impose new substantive requirements for sources of air pollution, but rather, is a procedural means for gathering in a single document all of the federal and state substantive air pollution control requirements found in the CAA and/or state law that apply to all of the individual sources at a single facility. *See generally*, 56 Fed. Reg. 21,712, 21,712-15 (May 10, 1991).

Most importantly, Congress has made clear that the states have the primary responsibility for the day-to-day administration of the Title V program and that the states' procedures in administering their respective programs should not be unduly hindered. *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). Recognizing this Congressional directive, EPA has explained that a key principle in its development of the Title V regulations

was to provide the states with regulatory flexibility wherever possible, 56 Fed. Reg. at 21,714, and has committed to granting the states flexibility in designing their state programs. *Id.* at 21,714. EPA realized that unnecessary regulatory detail would simply serve to unduly hinder EPA approval of different, but effective, state programs. *Id.*

III. EPA is authorized to approve a State's Title V operating permit program only to the extent that the submitted program meets the requirements of the Clean Air Act.

CAA § 502(b), 42 U.S.C. § 7661a(b) and the corresponding regulations found at 40 C.F.R. § 70.4(b) set forth the "minimum elements" required of Title V programs. Generally speaking, a Title V program consists of enabling laws and regulations as well as adequate staff and resources necessary to administer and enforce an approved program. EPA is authorized to approve a submitted program if it meets Title V's minimum requirements. CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

Title V contains two distinct provisions authorizing EPA to act upon Title V programs submitted for approval. EPA "may approve a program to the extent that the program meets the requirements of [Title V], including the regulations issued under [the 'minimum elements' section of the CAA]." CAA § 502(d), 42 U.S.C. § 7661a(d)(1). The Administrator must "approve

or disapprove" a submitted program within one year of receipt. CAA § 502(d), 42 U.S.C. § 7661a(d). Approval under CAA § 502(d), 42 U.S.C. § 7661a(d) is final in that the permitting authority has full authorization to administer and enforce its entire Title V program.

Alternatively, CAA § 502(g), 42 U.S.C. § 7661a(g) authorizes the Administrator to grant "interim approval" to a submitted program that "substantially meets the requirements" of Title V. Such interim approval is effective for up to two years and is contingent upon the permitting authority remedying any changes specified by the Administrator as necessary to meet the requirements of Title V. *Id.* Once the permitting authority corrects all specified changes, the Administrator may grant full program approval.

IV. EPA fully approved Ohio's Title V operating permit program in 1995.

In 1993, the Ohio General Assembly enacted legislation authorizing the Director of Ohio EPA to develop and enact a Title V operating permit program. *See*, Ohio Rev. Code 3704.036. Following extensive public comment and hearings, Ohio enacted Ohio Admin. Code Chapter 3745-77, which encompasses Ohio's Title V regulations. *See*, Ohio Admin. Code 3745-77-01, *et seq.*

On January 5, 1995, Ohio EPA completed its submission of Ohio's Title V program, specifically including the regulations contained in Ohio Admin. Code Chapter 3745-77, to EPA for approval. 60 Fed. Reg. 18,790 (April 13, 1995). Following its review of Ohio's submission, on April 13, 1995, EPA proposed final approval of Ohio's Title V program pursuant to CAA § 502(d), 42 U.S.C. § 7661a(d) and solicited public comment. *Id.* at 18,791. Ohio's program did not require "interim" approval. EPA received comments concerning Ohio's proposed Title V program, and on August 15, 1995 simultaneously responded to those comments and granted Ohio's program full approval as submitted. 60 Fed. Reg. 42,045 (Aug. 15, 1995). The record indicates that Petitioners did not comment during EPA's review and approval of Ohio's program. *Id.*

V. EPA oversight of states' administration and enforcement of their approved Title V programs includes the imposition of sanctions.

Title V contains a provision separate and apart from the approval provisions authorizing EPA to take certain action where a permitting authority is not adequately "administering or enforcing" its approved Title V program. CAA § 502(i), 42 U.S.C. § 7661a(i), entitled "Administration and enforcement," states that:

> (1) Whenever the Administrator makes a determination that a permitting authority is not adequately *administering or enforcing* a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, [revoke the Title V program and] apply any of the sanctions specified in section 7509(b) of this Title.

(Emphasis added.) The notice authorized by CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1) is commonly referred to as a "notice of deficiency" ("NOD"). Once the Administrator "makes a determination" that a State is not adequately administering or enforcing its approved program and issues an NOD, the State must correct the alleged deficiency within 18 months or face the loss of its approved program as well as other sanctions, specifically including the loss of its approved program and federal highway funding for the state. *See*, CAA § 179, 42 U.S.C. §7509.

VI. As the result of the settlement of a federal lawsuit challenging the extension of "interim" program approvals, EPA invited comment concerning all Title V programs in the nation.

In 2000, the New York Public Interest Research Group and the Sierra Club filed a petition for review with the D.C. Circuit challenging the legality of EPA's extension of interim approvals granted to numerous Title V operating permit programs. *See, Sierra Club v. EPA*, No. 00-1262 (D.C. Cir.) ("Sierra Club Petition"). The Sierra Club Petition did not concern an

extension of an interim program approval for Ohio, as EPA had already granted Ohio full approval almost five years earlier in 1995. *See*, 60 Fed. Reg. 42,045 (Aug. 15, 1995).

EPA settled the Sierra Club Petition by agreeing to issue a Federal Register notice "announcing a 90-day comment period for members of the public to identify deficiencies they perceive exist in [Title V] operating permits programs . . ." 65 Fed. Reg. 77,376 (Dec. 11, 2000). EPA not only invited comment on the administration and enforcement of all Title V permit programs in the nation, but also "the substance of the approved program." *Id.*

Ohio was not a party to the Sierra Club Petition and did not consent to a reopening of its fully approved Title V program. Nonetheless, EPA accepted comments concerning Ohio's fully approved Title V program as well as Ohio's administration and enforcement of its program. *See*, Petitioners' Comments. JA 3.

VII. EPA and Ohio took appropriate action in response to the comments concerning Ohio's fully approved program.

Following the resolution of the Sierra Club Petition, the Ohio Public Interest Research Group, along with several other environmental groups and individuals, submitted a letter to EPA on March 10, 2001, commenting on Ohio's fully approved program. *See*, Petitioners' Comments. JA 3.

Upon receipt of Petitioners' comments, EPA conducted a review of Ohio's program. Based upon EPA's review, the Administrator made the determination that Ohio's regulations relating to "insignificant emissions units," "reporting of periodic monitoring" and "deviation reporting" did not adequately meet the requirements of Title V. As a result of that determination made by the Administrator, EPA published an NOD in the Federal Register on April 18, 2002 requiring Ohio to correct the alleged deficiencies. *See*, 67 Fed. Reg. 19,175 (April 18, 2002). JA 324.[2]

In response to Petitioners' remaining comments, EPA issued a letter dated May 22, 2002 ("Response to Comments"), addressing each issue separately. *See,* Response to Comments, Enclosure. JA 158. In its extensive Response to Comments, the Administrator determined that no

[2] Ohio appealed the April 2002 NOD. *See*, *Jones v. EPA*, CA No. 02-3668 (Sixth Cir.). The parties did not litigate the matter, but entered into negotiations that included Ohio PIRG and the Ohio Chamber of Commerce. Ohio is currently amending its regulations to remedy the April 2002 NOD.

issue, other than those identified in the April 2002 NOD, rose to the level of a program deficiency as contemplated under 40 C.F.R. Part 70. *Id.* Although there were particular concerns at one time, EPA found that Ohio took appropriate steps to correct those concerns. Therefore, the Administrator had no basis to determine that Ohio was not adequately administering and/or enforcing its Title V program. *Id.*; *see also*, March 15, 2002 and May 20, 2002 letters from Christopher Jones to Thomas Skinner. JA 131 and 153.

VIII. Ohio PIRG and Glenn Landers filed petitions seeking judicial review of EPA's response to the comments concerning Ohio's Title V program.

On July 17, 2002, Petitioners filed the first of their instant Petitions for Review (02-3805) challenging EPA's May 22, 2002 letter denying their remaining requests that EPA issue NODs to Ohio. On October 2, 2002, Petitioners filed their second Petition for Review (02-4116) challenging EPA's federal register notice denying Petitioners' NOD requests. The Administrator of the United States Environmental Protection Agency entered an appearance as Respondent and the State of Ohio was granted leave to intervene as a Respondent in both petitions.

Petitioners' comments raised some fifteen separate issues, only four of which were briefed and are before the Court. *Id.* Petitioners' comments are summarized as follows:

(1) EPA's interpretation, and Ohio's definition of the term "Title I modification" fail to comply with the permit modification procedures set forth at CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

(2) Ohio failed to timely issue permits to all Title V facilities in the State;

(3) Ohio's Title V permits fail to require prompt reports of deviations from permit requirements that are caused by "malfunctions;" and

(4) Ohio fails to generate an adequate "statement of basis" for "draft" Title V permits issued by the State.

In its Response to Comments, EPA determined that these issues did not rise to the level of a program deficiency as contemplated by CAA § 502(i), 42 U.S.C. § 7661a(i). EPA determined that Ohio's Title V regulations satisfy the requirements of the CAA and that Ohio adequately administers and enforces its Title V program. *See,* Response to Comments, Enclosure. JA 158.

SUMMARY OF ARGUMENT

In reviewing EPA's Response to Comments, this Court must recognize EPA's inherent discretion to determine whether Ohio is adequately administering and enforcing its approved Title V program. Where an agency exercises discretion not to invoke an enforcement mechanism provided by statute there is a presumption against judicial review.

Should the Court review EPA's exercise of discretion and consider the merits of the four issues briefed by Petitioners, it will find that EPA's action was neither arbitrary nor capricious where Ohio's approved Title V program meets the requirements of the CAA and Ohio adequately administers and enforces its Title V program.

STANDARD OF REVIEW

The CAA sets forth no independent standard of review. *See*, CAA § 307, 42 U.S.C. § 7607. Therefore, the Court must review the EPA's actions pursuant to the Administrative Procedure Act ("APA"). *See*, 5 U.S.C. § 706; *see also, Lafleur v. Whitman*, 300 F.3d 256, 267 (2d. Cir. 2002). Under the APA, the Court may only set aside an agency action that is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

When the agency action is based upon an interpretation of its governing statute, the Court must consider whether that interpretation is entitled to deference and, if so, how much. *See, United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also, Chevron v. USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (mandatory deference); *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944) (deference according to persuasiveness). When the question is not one of the agency's authority but of the reasonableness of its actions, the "arbitrary and capricious" standard of the APA governs. *See generally, Arent v. Shalala,* 315 U.S. App. D.C. 49 (D.C. Cir. 1995) (discussing relationship between *Chevron* and the APA); *see also, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983) (applying arbitrary and capricious standard).

ARGUMENT

I. The Administrator has inherent discretion to determine whether Ohio adequately administers and enforces its Title V program and that discretion is not subject to judicial review.

A. CAA § 502(i), 42 U.S.C. § 7661a(i) confers discretion upon the Administrator to determine whether Ohio is not adequately administering and enforcing its approved Title V program.

The Administrator chose not to issue an NOD to Ohio for two reasons. First, EPA disagreed that certain issues raised by Petitioners were in fact violations of Title V, or 40 C.F.R. Part 70. With regard to Petitioners remaining comments, EPA determined that Ohio had addressed or committed to address the issue and, therefore, no notice of deficiency was needed. *See*, Response to Comments, Enclosure. JA 158.

"Whenever the Administrator *makes a determination* that a permitting authority is not adequately administering and enforcing a program" the Administrator "shall" issue an NOD. CAA § 502(i), 42 U.S.C. § 7661a(i). (Emphasis added.) ("NOD provision"). EPA's decision as to whether to "make a determination" is purely discretionary, to be made in accordance with EPA's expertise and experience. *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981); *see, Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (statutory use of phrase

"whenever the Administrator has reason to believe" implies a degree of discretion).

The CAA does not define "adequately administering and enforcing" or "deficiency," and it offers no criteria for when the presence of such a status should be deemed to exist. Therefore, the NOD provision grants EPA discretion, based upon its expertise, in determining if and when a state's administration and enforcement of its approved Title V program warrants the issuance of an NOD.

In *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003) ("NYPIRG"), the Second Circuit held that the Administrator possesses discretion to determine whether or not to issue an NOD. Both the NYPIRG and Ohio Petitioners identified numerous issues in their respective states' Title V programs that they claimed constitute deficiencies requiring EPA to issue an NOD.[3] See *NYPIRG*, 321 F.3d at 321. In both instances EPA responded to the comments, acknowledging certain issues that required correction, but did not determine that the states were inadequately administering or enforcing their approved programs.

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[3] A third petition for review challenging EPA's decision not to issue an NOD to the State of Texas is currently pending before the Fifth Circuit. *See*, *Public Citizen, Inc., et al., v. United States Environmental Protection Agnecy, et al.,* CA 02-60069 (Fifth Cir.). The parties submitted supplemental briefs following *NYPIRG* and are awaiting a decision.

NYPIRG,321 F.3d at 322; Response to Comments, Enclosure. JA 158. In both cases, EPA also found that some of the alleged deficiencies were without merit. The NYPIRG Petitioner, like the Petitioners here, challenged the EPA's decision. Thus, the Second Circuit addressed the amount of discretion EPA has when deciding not to issue an NOD. *NYPIRG*, 321 F.3d at 330.

The Second Circuit agreed with EPA that the NOD provision gives the Administrator discretion to determine whether to issue a formal NOD. *NYPIRG*, 321 F.3d at 331. The Second Circuit recognized that the opening clause of the NOD provision stating "[*w*]*henever* the Administrator makes a determination . . ." is critical in this analysis. *NYPIRG*, 321 F.3d at 330 (Emphasis added). The Second Circuit held that, because the determination to issue a NOD occurs whenever EPA makes it, the NOD provision ". . . affords the EPA discretion whether to make a determination that a state permitting authority is not adequately administering and enforcing its permitting program." *Id.* at 331.

Therefore, unless and until EPA makes a determination pursuant to CAA § 502(i), 42 U.S.C. 7661a(i) that Ohio is not adequately administering and/or enforcing its Title V program, it cannot issue an NOD.

B. Pursuant to the Administrative Procedure Act and the Supreme Court's holding in *Heckler v. Cheney,* 470 U.S. 821 (1985), the Administrator's exercise of enforcement discretion is not subject to review.

In *NYPIRG,* the Second Circuit held that the Administrator's discretion to not issue an NOD is not subject to judicial review. *NYPIRG,* 321 F.3d at 331. In reaching this conclusion, the Second Circuit relied upon the APA's exemption for agency action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and the Supreme Court's application of this statutory provision in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). *NYPIRG*, 321 F.3d at 331.

In *Heckler,* the Supreme Court stated that government agencies' exercise of enforcement discretion is generally unsuitable for judicial review. *Heckler,* 470 U.S. at 831. The Court explained that:

> [T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorites.

Id. at 831-32 (citations omitted).

In applying both the APA and *Heckler*, the Second Circuit declined to entertain the NYPIRG Petitioners' individual challenges to New York's Title V program seeking the issuance of an NOD. The Second Circuit stated that deferring to an agency's exercise of enforcement discretion "avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes." *Id.*

While CAA § 307(b), 42 U.S.C. § 7607(b) grants the federal circuit courts jurisdiction to hear appeals of "any . . . action" of the Administrator, the courts must apply the appropriate level of review. Where, as here, the Court reviews the Administrator's application of a statutory enforcement mechanism, the Court must determine whether the statute in question affords the Administrator discretion and whether the exercise of that discretion is subject to review.

It does not follow, as Petitioners assert, that an administrative proceeding to compel a state to change its behavior or face sanctions is not an enforcement proceeding. When the Administrator issues an NOD and the state fails to correct the alleged deficiency within 18 months the Administrator shall promulgate, administer and enforce a federal program for that state. CAA § 502(i)(4), 42 U.S.C. § 7661a(i)(4). Furthermore, the

Administrator is authorized to impose sanctions up to and including the loss of federal highway funding. *See,* CAA § 179(b), 42 U.S.C. § 7509(b). To view the NOD provision as anything other than an enforcement mechanism is contrary to its express intent, i.e. to compel the states to act.

The Administrator of EPA has the discretion to make a determination that Ohio is not adequately administering or enforcing its Title V program. Unless and until the Administrator makes that determination, EPA cannot issue an NOD. Pursuant to both the APA and the Supreme Court's holding in *Heckler,* the Administrator's exercise of enforcement discretion is not subject to review.

II. Ohio's Title V program satisfies all Clean Air Act requirements.

Should this Court find that the Administrator's exercise of discretion is subject to review, it will find that the exercise of that discretion here was neither arbitrary nor capricious where: (1) Ohio's fully approved Title V regulations satisfy all CAA requirements, and (2) Ohio adequately administers and enforces its approved Title V program.

A. Ohio's fully approved definition of "Title I modification" or "modification under any provision of Title I of the Act" comports with the Clean Air Act and EPA's interpretation of what constitutes a "Title I modification" under CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10).

Ohio's definition of "Title I modification," was enacted in 1994 and approved by EPA in 1995. *See,* Ohio Admin. Code 3745-77-01(JJ) and 60 Fed. Reg. 42,045 (Aug. 15, 1995), respectively. Because Petitioners indirectly challenge EPA's interpretation of what constitutes a "Title I modification" under CAA § 502(b)(10), 42 U.S.C. § 7661a(b)(10), Ohio will defer to EPA on this issue and hereby adopts and incorporates by reference all of the arguments set forth in EPA's Brief on this issue.

B. EPA reasonably declined to issue a notice of deficiency relating to Ohio's rate of permit issuance.

CAA § 503(a), 42 U.S.C. § 7661b(a) required all existing Title V facilities in Ohio to apply for a Title V permit on or before August 15, 1998. CAA § 503(c), 42 U.S.C. § 7661b(a) required the State of Ohio to "act on" all Title V permit applications within three years of final approval of Ohio's program, or August 15, 1998. *See also*, 60 Fed. Reg. 42,045 (Aug. 15, 1995).

When EPA approved Ohio's program in 1998, there were approximately 1080 known Title V facilities in Ohio. [4] Because of the significant number of permit applications to process, the fact that Ohio EPA was implementing a new regulatory program subject to continuously developing guidance from EPA and the inherent complexity of Title V permits, Ohio EPA, like most other permitting authorities in the nation, did not meet the statutory deadline for permit issuance. Response to Comments, Enclosure page 1. JA 158.

In its Response to Comments, EPA stated that "a number of permitting authorities, including [Ohio], have not issued [Title V] permits at the rate required by the [CAA]." *Id.* Given the large number of permit applications remaining, EPA found that "many permitting authorities need up to two years to complete permit issuance." *Id.* Clearly, the deadline set forth in the Act was not realistic given the complexity of Title V operating permits. Therefore, EPA concluded:

> [i]f the permitting authority has submitted a commitment to issue all of the [Title V] permits by December 1, 2003, U.S. EPA will consider this commitment to mean that it has taken 'significant action' to correct the problem, and will not consider the permit issuance rate to be a deficiency at this time.

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[4] The number of Title V facilities in Ohio has dropped since EPA approved Ohio's program. As of June 20, 2003 there are 705 Title V facilities in the State. *See,* http://www.epa.state.oh.us/dapc/title_v/tracker.pdf.

Id. The commitment must establish expeditious semiannual milestones allowing EPA to monitor the rate of permit issuance in conjunction with the December 1, 2003 deadline. *Id.*

On March 15, 2002, Ohio committed to issuing all remaining Title V permits before *September* 1, 2003. March 15, 2002 letter from Christopher Jones to Thomas Skinner. JA 131. Ohio's commitment includes a schedule setting forth certain interim milestones for permit issuance. *Id.* EPA found that this commitment demonstrated that Ohio "has taken 'significant action' to correct its permit issuance rates" and declined to issue an NOD. Response to Comments, Enclosure pages 1-2. JA 158.

As of March 15, 2002, over one-half of Ohio's initial Title V permits, 392 of the 743 known facilities at that time, had been issued by Ohio EPA. March 15, 2002 letter from Christopher Jones to Thomas Skinner. JA 131. To date, Ohio EPA has met all interim milestones and continues to diligently work towards meeting its September 1 deadline. See, Ohio EPA website noted at fn 4, *supra.* Ohio EPA recognizes that should it fail to meet its commitment, EPA may issue an NOD. March 15, 2002 letter from Christopher Jones to Thomas Skinner. JA 131.

As of March 31, 2003, many permitting authorities in the nation had failed to meet the statutory deadline, and had still not issued all initial Title

V permits. *See*, EPA website at

www.epa.gov/oar/oaqps/permits/maps/permtbl.html. To require EPA to issue an NOD to every permitting authority that failed to meet the statutory deadline would force EPA to step in and implement its own Title V program where the remaining permits could not be issued in eighteen months. This overwhelming burden on EPA would undermine, rather than further, effective protection of the nation's air.[5]

Given these facts, EPA's decision to allow permitting authorities, including Ohio, to diligently work towards a realistic deadline for issuing all initial Title V permits was more than reasonable and should not be disturbed on appeal.

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[5] This is an example of the types of concerns identified by the Supreme Court in *Heckler, supra*. EPA is better equipped than the Courts to determine whether it has the capacity to take on the enormous burden of these states' Title V permitting programs, whether doing so would detract from other EPA efforts and programs, whether permits would ultimately get issued faster and, most importantly, whether the environment and the public would benefit from such action. This issue exemplifies those situations where the Supreme Court stated courts must defer to the discretion afforded a government agency by Congress.

C. Ohio's Title V regulations and permits meet the requirements for deviation reporting as set forth in 40 C.F.R. § 70.6(a)(3)(C)(iii).

40 C.F.R. § 70.6(a)(3)(C)(iii) states that all Title V permits shall contain provisions requiring:

> Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

Ohio's Title V program contains analogous deviation reporting regulations found at Ohio Admin. Code 3745-77-07(A)(3)(c)(ii) and (iii). These regulatory requirements are incorporated into every Title V permit issued in Ohio.

In addition to the Title V deviation reporting requirements, Ohio's SIP contains a separate provision applicable to all sources of air pollution in the State, including those located at Title V facilities, that requires immediate reports of "malfunctions." *See*, Ohio Admin. Code 3745-15-06. Ohio Admin. Code 3745-15-06(B)(1) describes what constitutes a "malfunction" and requires that such events shall be reported as follows:

> In the event that any emission source, air pollution control equipment, or related facility breaks down in such a manner as to cause the emission of air contaminants in violation of any applicable law, the person responsible for such equipment shall

> *immediately* notify the Ohio environmental-protection agency district office or delegate agency of such failure or breakdown. If the malfunction continues for more than seventy-two hours, the source owner or operator shall provide a written statement to the director within two weeks of the date the malfunction occurred . . .

(Emphasis added.) Ohio Admin. Code 3745-15-06 goes on to require written reports and other notifications once the malfunction ends and the source returns to service. *See*, Ohio Admin. Code 3745-15-06(B)(1), (2) and (3).

Malfunctions of a source of air pollutants and/or any associated pollution control equipment must be reported *immediately* to Ohio EPA, either verbally or in writing. If the malfunction continues for more than 72 hours, the operator must submit an initial *written* statement to the Ohio EPA that provides specific information concerning the malfunction. *See*, Ohio Admin. Code 3745-15-06(B)(1). When the malfunction ends, the source must notify Ohio EPA either verbally (if the malfunction lasted less than 72 hours) or in writing (if the malfunction lasted more than 72 hours) that "the condition causing the failure or breakdown has been corrected and the equipment is again in operation." Ohio Admin. Code 3745-15-06(B)(2); *see also*, May 20, 2002 letter from Christopher Jones to Thomas Skinner. JA 153.

Malfunctions result in the emission of air contaminants in excess of applicable law, i.e. an exceedance of an emission limitation. Therefore, a "malfunction" at a Title V facility, as described in Ohio Admin. Code 3745-15-06(B)(1), necessarily results in a "deviation" as that term is defined in 40 C.F.R. Part 70 and Ohio Admin. Code 3745-77-07(A)(3)(c)(ii) and (iii). Therefore, Title V permits issued in Ohio require Title V facilities to report *all* malfunctions lasting less than 72 hours *in writing* through the facilities' Title V deviation reports.

Petitioners' assert that Ohio's Title V permits fail to adequately set forth necessary deviation reporting requirements. Petitioners' Brief at page 19. Specifically, Petitioners rely upon a November 21, 2001 letter wherein EPA stated that Ohio's Title V permits excluded from quarterly deviation reports those deviations caused by malfunctions reported in writing in accordance with Ohio Admin. Code 3745-15-06. November 21, 2001 letter from Bharat Mathur to Robert Hodanbosi at page 4. JA 37.

Prior to EPA's November 21, 2001 letter, Ohio's Title V permits excluded from deviation reports malfunctions previously reported in writing pursuant to Ohio Admin. Code 3745-15-06, i.e. malfunctions lasting more than 72 hours. Ohio EPA did not require a second written report of these malfunctions through deviation reports because to do so would be redundant.

See, May 20, 2002 letter from Christopher Jones to Thomas Skinner. JA 153. This exclusion was based upon the premise that the immediate written malfunction reports required by Ohio Admin. Code 3745-15-06 satisfied the "prompt" deviation reporting requirements at 40 C.F.R. § 70.6(a)(3)(C)(iii) and Ohio Admin. Code 3745-77-07(A)(3)(c)(ii) and (iii) for malfunctions lasting more than 72 hours. *Id.* JA 153.

Despite this clear compliance with the deviation reporting requirements, Ohio EPA reviewed the deviation reporting terms and conditions in its Title V permits. On May 20, 2002, Ohio EPA committed to revising the deviation reporting terms and conditions to require reports of deviations caused by malfunctions even where the source previously submitted an immediate written report in accordance with Ohio Admin. Code 3745-15-06. *Id.* at pages 1-2. JA 153. EPA accepted Ohio's commitment and chose not to issue an NOD where the State committed to address the issue. Response to Comments, Enclosure page 8. JA 158.

On May 15, 2002, Ohio EPA submitted proposed revisions to its deviation reporting terms and conditions to EPA for its consideration and comment. *Id.* JA 158. After receiving EPA's comments, Ohio EPA began including the revised deviation reporting terms and conditions in all Title V permits issued after June 6, 2002. Regardless of the changes made, all

permits issued up to the implementation of the revisions contained terms and conditions that complied with the requirements of 40 C.F.R. § 70.6(a)(3)(C)(iii) for prompt reporting of all deviations.

EPA reasonably declined to issue an NOD where Ohio's Title V permit deviation reporting terms and conditions met the requirements of Title V and where the State committed to make a change in the permit terms to address EPA's concerns.

D. The statements of basis issued by Ohio EPA with "draft" Title V permits set forth the legal and factual basis for the terms and conditions contained in the permits.

The CAA requires that a state permitting authority provide an opportunity for public comment on "draft" Title V permits before they are issued. After considering public comments, the permitting authority must give EPA 45 days to review and to object to a permit that does not meet the requirements of Title V. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c).

Each "draft" Title V permit must be accompanied by a "statement of basis" that "sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 CFR § 70.7(a)(5). The statement of basis must be sent to

EPA and any other person requesting a copy. *Id.* Ohio's Title V program includes an analogous provision requiring that each "draft" Title V permit shall be accompanied by a statement of basis. Ohio Admin. Code 3745-77-08(A)(2).

The Administrator of EPA has stated that the statement of basis is not a part of the permit itself, but a separate document. *See, In the Matter of Columbia University: Order Granting in Part and Denying in Part Petition for Objection to Permit*, Petition No.: II-2000-08 (Dec. 16, 2002). JA 178. The Administrator also stated that the statement of basis, ". . . is to be used to highlight significant decisions or interpretations that were necessary to issuing the permit. These reports are not intended to be redundant to the permit but to assist in reviewing what is in the permit." *Id.* at 11.

The federal regulations provide no definition or guidance as to what constitutes the "legal and factual basis for draft permit conditions." The lack of a clear definition has led to a great deal of uncertainty regarding the content of an adequate statement of basis. *See, e.g.,* JA 37, 119, 153, 158 and 178. Ohio EPA and EPA Region 5 staff have exchanged correspondence and held discussions concerning the content of an adequate statement of basis in an attempt to clarify the ambiguity in the regulation.

JA 37, 119 and 153. As late as November 21, 2001, Ohio EPA was waiting on guidance from EPA to clarify this ambiguity. JA 37.

Petitioners assert that Ohio's statement of basis fails to meet the requirements of 40 CFR § 70.7(a)(5). Brief of Petitioners' pages 22-23. In its Response to Comments, EPA identified a need to improve the content of Ohio's statement of basis, but did not determine that this need constituted a program deficiency. EPA Response to Comments, Enclosure page 15. JA 158.

Ohio EPA remains satisfied that its statements of basis met the legal requirements of 40 C.F.R. § 70.7(a)(5). However, to satisfy the concerns of EPA, Ohio EPA committed to draft guidance for its permit writers to ensure that Ohio's statements of basis are consistent in meeting all regulatory requirements. May 20, 2002 letter from Christopher Jones to Thomas Skinner. JA 153. EPA concurred with Ohio's commitment to develop guidance to continue to ensure that the content of Ohio's statements of basis meet the requirements of 40 CFR § 70.7(a)(5). Response to Comments, Enclosure page 15.

As an indication that Ohio EPA's commitment and subsequent efforts resolved this issue, Petitioners have not petitioned the Administrator to object to any individual Title V permit issued by Ohio due to an inadequate

statement of basis.[6] Couple this with the fact that EPA has not of its own volition issued an objection to any Ohio Title V permit because of an inadequate statement of basis, and the Court can only find that Ohio EPA's May 20, 2002 commitment resolved this issue.

EPA's exercise of discretion in not issuing an NOD where Ohio's statements of basis met all statutory requirements and the State took action to ensure that the requirements continue to be satisfied was neither arbitrary nor capricious and should not be disturbed on appeal.

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[6] CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2) authorizes any person to petition the Administrator of EPA to object to a Title V permit and directs the Administrator to grant or deny such petitions and to issue an objection if the petitioner demonstrates that the permit is not in compliance with the applicable requirements of the CAA.

CONCLUSION

For the foregoing reasons, and the reasons articulated in the Brief of EPA, the State of Ohio respectfully requests that this Court dismiss Petitioners' petitions for review.

Respectfully submitted,

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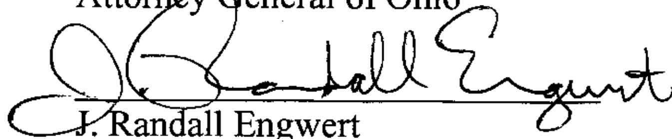

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