November 3, 2009

Cindy King
2963 South 2300 East
Salt Lake City, Utah 84109

Lisa P Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios building
1200 Pennsylvania Ave., N.W
Washington, D.C. 20460

And

Carol A. Rushin
Acting Regional Administrator
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

Dear Ms Jackson and Ms Rushin,

Enclosed you will find the following: Appeal of Title V Permit issued by the Utah Division of Air Quality to Tooele Army Depot Hazardous Waste Combustor; Written Comments Submitted by Cindy King; Memorandum from Robert Grandy (response to comments), and United States Court of Appeals Sierra Club vs. Environmental Protection Agency No. 02-1135. Please ignore anything that was received from me prior to this, regarding this matter. Also an electronic copy was sent to Mike Owens, environmental engineer in the Air Program of Region 8 EPA.

If there are any questions please feel free to contract me at 801-486-4220. Thank you for your assistance in this matter.

Respectfully yours,

Cindy King

Cindy King

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Carol Rushin
Acting Regional Administrator
United States Environmental Protection Agency
80-EISC
1595 Wynkoop Street
Denver, CO 80202-1129

# APPEAL OF TITLE V PERMIT ISSUED BY THE UTAH DIVISION OF AIR QUALITY TO TOOELE ARMY DEPOT HAZARDOUS WASTE COMBUSTOR

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## I. INTRODUCTION

Pursuant to Section 505 (b) (2) of the Clean Air Act, 42 U.S.C. Section 7661d(b), Cindy King, a concerned Salt Lake City resident (Petitioner) petitions the Administration of the United States Environmental Protection Agency (the "Administrator" or "EPA") to object to the Title V operating permit issued by the Utah Division of Air Quality (Utah DAQ or DAQ) for the Tooele Army Depot Hazardous Waste Combustor (TEAD). The Administrator is required to object to the Tooele Army Permit because, as demonstrated below:

(1) the contents of the permit do not meet requirements found in the Clean Air Act,

(2) the Utah DAQ did not adequately respond to comments and/or inquiries during the public comment process, and

(3) an important recent Federal Court ruling in Sierra Club vs. Environmental Protection Agency, changes the law regarding emission from the bypass stack, and the permit process should have considered and evaluated such emissions, and any applicable permit DAQ issues must comply with this decision. The decision is attached and incorporated into this appeal.

The Petitioner requests that EPA Region 8 assume oversight and deny the approval order of the Tooele Army Depot, issued by the Utah DAQ, under Title V of the Clean Air Act.

## II. BACKGROUND

The DAQ is in error in their authority as a regulatory agency by requiring the public to formally request information that should be part of holistic review, through a Governmental Record Access Management Act (GRAMA)[1] request of support documentation. DAQ is requesting pubic input through the public comment process, as in the Title V operating permit renewal process. Regardless of any incorporating applicable documentations such as background data that have or have not been through public comment process; the mere fact this is a "renewal" request requires a holistic review by the public.

The DAQ is abdicating their responsibility of the stewardship of the Clear Air Act for protecting against degradation and pollution caused by modern industrial society, such as CO2 emissions as adjudicated in the Environmental Appeals Boards United States EPA decision Deseret Power Electric Cooperative PSD Appeal No. 07-03. TEAD might not be PSD source, but their CO2 emissions need to be part of TEAD "actual" emissions analysis.

In 2006 EPA promulgated requirements for monitoring for PM-2.5; ergo TEAD would be require to monitor for PM-2.5 emissions as part of their "actual" emissions analysis. Ergo DAQ's response to public comment: *"Comment # 6: A comment was made that the Title V Permit renewal makes no mention of monitoring for PM 2.5 requirements. There are currently*

[1] UAC 301-63-2-301

*no applicable requirements for TEAD relating to PM 2.5."* [2] This is erroneous on DAQ's part. Recently EPA reevaluated non-attainment areas for PM-2.5; EPA's analysis now includes Tooele County (in which TEAD is located) as a non-attainment area for PM-2.5.

In addition, a recent U.S. Court of Appeals decision, Sierra Club vs. Environmental Protection Agency, eliminated the exemption of bypass emissions from the regulation and set forth a new requirement that emissions from bypass stacks during startup, shutdown and malfunction conditions must be regulated. The DAQ permit, which was issued after this court decision, does not conform to this court ruling. Ergo, the SSM plan would imply cause for reopening.[3]

## III. ARGUMENT

### A. LEGAL BACKGROUND AND STANDARD OF REVIEW

The Clean Air Act is *"Congress's response to well documented scientific and social concerns about the quality of the air that sustains life on earth and protects it from degradation ...and pollution caused by modern industrial society."* **Delaware Valley Citizens Council for Clean Air vs. Davis 932 F. 2d 256, 260 (3rr Cir 1991).** A key component of achieving the Clean Air Act's goal of protecting our precious air is the Title V operating permit program. Title V permits are supposed to consolidate all requirements for the facility into a single permit and provide for adequate monitoring and reporting to ensure that the regulatory agencies and the permittee are complying with its permit. See generally **S. Rep No 101-228 at 346-47; see also In re: Roosevelt Regional Landfill, (EPA Administrator May 11, 1999) at 64 FR 25.336.** When

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[2] Memorandum To: Tooele Army Deport (TEAD) Hazardous Waste Combustor (HWC) file; Through: David Beatty; From: Robert Grandy; Date: August 10, 2009; Subject: Response to Public Comment- Title V Operating Permit Renewal. Comments #5 and #6, page 2.

[3] UAC R307-415-7g

a state or local air quality permitting authority issues a Title V operating permit, the EPA will object if EPA determines that the permit is not in compliance with any applicable requirement or requirements under **40CFR part 70. 40 CFR Section 70.8 (c).** However, if EPA does not object on its own, then *"any person may petition the Administrator within 60 days after the expiration of Administrator's 45 day review period to make such a objection."* **40 CFR Section 70.8 (d); 42 U.S.C. Section 7661d (b)(2) CAA Section 505(b)(2).** *"To justify exercise of an objection by EPA to a [T]itle V permit pursuant to Section 505 (b)(2), a petitioner must demonstrate that the permit is not in compliance with applicable requirements of the Act, including the requirement of* ***Part 70 [40 CFR] Section 70.8(d). In re: Pacificorp's Jim Bridger and Naughton Plants, VIII-00-1 EPA Administrator Nov. 6, 2000) at 4.***

**B. Errors in the Permit that Warrant Objection by EPA to DAQ's permit Decision Establish: (1) Unnecessary Burden on Public Access of Necessary Documentation**

The public notice published in the local newspaper on May 19, 2009 contained the following statement:

*"Review of the draft permit and* ***support documentation [emphasis added]*** *is available by appointment only... To schedule an appointment during comment period please contract the Operating Permit Section ..."* Regardless of any incorporating applicable documentations such as background data that have or have not been through public comments, the fact is that this is a "renewal" request; ergo, it is a holistic review by the public. Yet in response to comments DAQ states:

*"Title V Permits incorporate existing applicable requirements that have already been through public comments. Background data on these requirements is* ***available through***

***the GRAMA** [Utah Government Record Access Management Act]. **DAQ believes that following the procedures of GRAMA is reasonable and legally accepted method making information available to the public.** [Emphasis added]"*[4]

GRAMA limits access in the following areas: private information (Section 202 (1)); controlled (Section 202 (2)); protected (Section 202 (4)) and extraordinary circumstance (Section 405)). Information as required in CAA Section 7661 a (b)(8) requires: *"Any permit application, compliance, plan, permit, and monitoring report under Title V must be made available to the public."* A key component of the Title V permits are supposed to consolidate all requirements for the facility into a single permit and provide for adequate monitoring and reporting to ensure that the regulatory agencies and the permittee are complying with its permit, such that a holistic review can be done by the public. See generally **S.Rep No 101-228 at 346-47; see also In re: Roosevelt Regional Landfill, (EPA Administrator May 11, 1999) at 64 FR 25.336.** Ergo, requiring the public to do any form of formal request such as GRAMA to obtain data during Title V operating permit "renewal" process makes the process unnecessarily burdensome.

**(2) DAQ's Permit Decision did not Properly Analyze Carbon Dioxide Emissions**

The Clean Air Act requires, and codified by Delaware Valley Citizens Council for Clean Air vs. Davis, 932 F. 2d 256,260 (3rr Cir 1991) *"Congress's response to well documented scientific and social concerns about the quality of the air that sustains life on earth and protects*

[4] Memorandum to: Tooele Army Depot (TEAD) Hazardous Waste Combustor (HWC) File. Through: David Beatty: From Robert Grandy: Dated: August 10, 2009. Subject: response to public comments-Title V operating Permit Renewal; Comments #1 and #2, Pg. 1-2.

*it from ...degradation and pollution caused by modern industrial society."* According to the United States Department of Energy:

> *"The most important greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorcarbons, perfluorocarbon, and sulfur hexafluoride. Typically, emissions of greenhouse gases are reported in terms of "carbon equivalent" which is a way of relating how effective the various chemicals are in trapping heat relating to carbon dioxide. Carbon dioxide was chosen as the standard because it is the most important greenhouse gas and was responsible for more than 84% of all effective emissions in 2000."*[5]

In June 2003 three States (Connecticut, Maine and Massachusetts) sued the Environmental Protection Agency for failing to regulate carbon dioxide emissions under the Clean Air Act.[6] The Intergovernmental Panel on Climate Change stated that carbon dioxide molecules persist for a hundred years. Ergo, these examples clearly establish and document scientific and social concerns of the effects of increasing of carbon dioxide emissions and their degradation effects on life on earth. On March 10, 2009, Lisa P. Jackson, EPA Administrator, stated in a press release by EPA regarding the signing of the Greenhouse Emission Rule *"Through this new reporting, we will have comprehensive and accurate data about the production of greenhouse gases. This is a critical step toward helping us better protect our health and environment."*[7] Granted TEAD

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[5] U. S. Department of Energy, "Emissions of Greenhouse Gases in the United States 2002," Energy Information Administration Office of Integrated Analysis Forecasting, October 2003, in Tables 4, 5, 13, 23, and 30, (DOE/EIA-0573).

[6] Thomas F. Reilly, Richard Blumenthal and G. Steven Rowe. Commonwealth of Massachusetts, State of Connecticut, and State of Maine, Plaintiffs v Christine Todd Whitman, in her capacity as Administrator of the United States Environmental Protection Agency, Defendant, United States District Court District of Connecticut, June 4, 2003.

[7] "EPA Proposes First National Reporting on Greenhouse Gas Emissions," news release dated March 10, 2009.

might not need to meet the "Prevention of Significant Deterioration" standards as adjudicated in Environmental Appeals Board U.S. EPA decision, Deseret Power Electric Cooperative PSD Appeal No. 07-03.[8] DAQ's stewardship of Clean Air Act needs to include analysis of carbon dioxide emissions data as part of DAQ's role in protecting our precious air from degradation and pollution caused by modern industrial society.

**(3) DAQ Does Not Adequately Address MACT Requirements**

DAQ's admits that TEAD must comply with MACT standards and implies that TEAD emissions are below major source emissions. There is no data to establish that emissions during startup, shutdown and malfunction would not excess emissions established by this Title V "renewal" or that there is "value." The use of the word "value" is subjective and not supportive. Merely implying that emissions will be under a set standard does not establish that they are; nor does it establish that actual emission data even if under a given standard which might change from year to year is not valuable. As demonstrated by DAQ's responds to comments:

*"Comment 8: Comments were made that the draft renewal permit contains "no emissions data of any kind" and does not identify what are the emission from the facility. TEAD's emissions are below major source quantities. In the abstract of Title V permits, there is usually information identifying which pollutants at the source are emitted in major qualities (each criteria pollutant that is emitted at rate of 100 tons per year or more). At TEAD, criteria pollutant emissions are below 100 tons per year, and HAP emissions are less tan 10 tons per year for each pollutant. For that reason, emissions of*

[8] Memorandum To: Tooele Army Depot (TEAD) Hazardous Waste Combustor (HWC) file. Though: David Beatty; From Robert Grandy; Date: August 10, 2009; Subject: Response to Public Comments- Title V Operating Permit Renewal; Comment #8, pg. 3.

*specific pollutants are not mentioned in TEAD abstract. While TEAD's annual emissions of criteria pollutant remain below 100 tons per year, and annual HAP emissions are below 10 tons per year for each pollutant, the numbers do vary from year to year. There would be no value added to the permit by including the detailed emissions data that change, yet remains below major source quantities."* [9]

**(4) DAQ's Permit Evaluation Failed to Consider the United States Court of Appeals Decision in <u>Sierra Club vs. Environmental Protection Agency</u> Regarding Bypass Emissions.**

On page 15 of Title V operating permit renewal development by DAQ for TEAD it states:

> *"II.B.1.c Condition: At all times, including periods of startup, shutdown, and malfunction, the permittee shall, to the extent practicable, maintain and operate any permitted plant equipment, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Executive Secretary which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures and inspection of the source. "*

This implies that TEAD is required to comply with acceptable operating and maintenance procedures during startup, shutdown and malfunction. The actual emissions from startup, shutdown, and malfunction must be analyzed and included into "actual" emissions from vide facility. **Title V permits are supposed to consolidate all requirements for the facility into a single permit** [emphasis added] and provide for adequate monitoring and reporting to ensure

[9] Ibid, page 3.

that the regulatory agencies and the permittee are complying with its permit. See generally **S.Rep No 101-228 at 346-47; see also In re: Roosevelt Regional Landfill, (EPA Administrator May 11, 1999) at 64 FR 25.336.** In discussion with Robert Grandy and Joe Randolph of DAQ staff in regard to vide Title V operating permit renewal Section II.B.1.c., both implied and insisted that SSM plan could only be reviewed through a formal GRAMA request.[10] Yet neither could inform me if and when the Start up, Shutdown, and Malfunction Plan would be brought up for pubic comment if independent of this Title V "renewal" review. Regardless, it would mean that the Title V "renewal" was not complete as required under the CAA.

DAQ's response to comments establishes that the Title V "renewal" document is not completed as required, in regards to the regulatory information on the Startup, Shutdown, and Malfunction plan. As a matter of fact, DAQ violated EPA Rule of 1994 in regards to Startup, Shutdown, and Malfunction plan (SSM). In brief, it requires the following: (1) SSM plan requires that a source comply during period of SSM. (2) SSM plans **must be reviewed and approved by permitting authorities, like any other applicable requirement.** [emphasis added]. (3) **SSM plans are unconditionally available to the public, such that they could participate in evaluating their adequacy in permit approval process.** [emphasis added]. Finally, (4) SSM plan provisions are a directly enforceable requirement. This was adjudicated in a recent decision of the U.S. Court of Appeals of the D.C. Circuit **Sierra Club v. EPA** [No. 02-1135]. This decision found that emissions during startup, shutdowns, and malfunctions are not exempted from meeting the Clean Air Act's requirement of MACT standards and/or other applicable requirements of the Clean Air Act. The SSM plan, as codified in both the 1994 Rule

[10] Ibid Comment #13, pg. 4.

and the recent adjudicated decision, needed be included in the Title V operating permit renewal process.

DAQ is asserting the following: (1) SSM plan is independent of a Title V operating permit renewal process. (2) They do not have to comply with adjudicate decisions. (3) The Start-up, Shutdown, and Malfunction Plan would be independently reviewed and (4) Title V operating permit can be reopened for "cause." As codified in the Roosevelt Regional Landfill case, it determined that a key component of achieving the Clean Air Act requires that the Title V operating permit be a holistic review of operations and emissions of a facility. The Rule regarding SSM has been in place since 1994, regardless of the recent adjudicated decision. Ergo the SSM plan needed to be part of a holistic review as in a single permit, as part of the Title V operating renewal process. DAQ's assertion that *"DAQ does not expect pending or decided cases to affect this Title V permit renewal..."* is erroneous. The recent adjudicate decision regarding SSM plans has a direct effect on this facility, as implied in the Title V "renewal" document that went out for public comment on page 15 "Section II.B.1.c Condition":

> *"II.B.1.c Condition: At all times, including periods of startup, shutdown, and malfunction, the permittee shall, to the extent practicable, maintain and operate any permitted plant equipment, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Executive Secretary which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures and inspection of the source."*

By DAQ's own admission, as stated in response to comment:

> *"DAQ does not expect pending or decided court cases to affect this Title V Permit renewal.* ***If air quality regulations affecting this source change for any reason, the permit will be revised in accordance with UAAC R307-415-7g: Reopening For Cause."***[11] [emphasis added]

The adjudicated decision codifies the 1994 Rule, and would require, as admitted by DAQ, that there is a "cause," as codified and confirmed by DAQ's own admission, that their own regulations have direct effects the vide facility; ergo "cause" for reopening the Title V Operating Permit renewal process.

## IV. REQUESTED REMEDIES FROM EPA REGION 8

The remedies that the Petitioner is requesting are:

(1) EPA Region 8 deny this approval order for Tooele Army Depot (TEAD) Hazardous Waste Combustor (HWC) Title V permit.

(2) EPA Region 8 proceeds with over-file procedures.

(3) EPA Region 8 requires TEAD and DAQ to be in compliance with all statutory and regulatory requirements and applicable adjudicated decisions prior to DAQ issuing any Title V operating permit to Tooele Army Depot, with EPA Region 8 oversight present.

(4) EPA Region 8 requires and provided analysis of degradation and pollution caused by greenhouse gases.

Submitted by,

Cindy King

Cindy King
2963 South 2300 East
Salt Lake City, Utah 84109

[11] Ibid Comment 4, pg. 2.

WRITTEN COMMENTS: TOOELE ARMY DEPOT
(PERMIT: # 4500006002) TITLE V RENEWAL

SUBMITTED BY: CINDY KING,
UTAH CHAPTER OF THE SIERRA CLUB
2963 SOUTH 2300 EAST
SALT LAKE CITY, UTAH 84109-2551

(SPECIAL NOTE: I am requesting written response to these comments as statutes and regulations require. These comments are based on information obtained from the Division of Air Quality web site on the vide facility.)

**GENERAL COMMENTS:** There seems to be generic standardization of how the Division of Air Quality submits their draft Title V renewal approval orders for public comments, such that there seems to be regurgitation of merely the regulatory standards and no substance for the specific facility. Ergo, pertinent information is lacking, requiring the public to submit GRAMA requests to gain access. For example: facility emission data, start-up, shutdown and malfunction data to name a few, but not limited to vide information, making the public participation process burdensome. The Clean Air Act requires this type of information to be unconditionally available to the public during comment period. Nowhere in the public information document was there information on how to gain access to vide information or if the information was available to begin with. This questions whether or not the draft Title V permit renewal is complete, such that the public could make a determination of its adequacy.

In addition to revising section 112, the 1990 Amendments also added Title V, which establishes a permit program to better monitor compliance with emissions standards. "Each permit . . . shall include enforceable emission limitations and standards, a schedule of compliance, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter." *Id.* § 7661c(a). Sources are required to certify that they are in compliance with the applicable requirements of the permit "and to promptly report any deviations from permit requirements to the permitting authority." *Id.* § 7661b(b)(2). Title V further creates a "permit shield" for sources, ensuring that compliance with the permit is "deemed compliance with
other applicable provisions" of the CAA. *Id.* § 7661c(f). "Any permit application, compliance plan, permit, and monitoring or compliance report" under Title V must be "ma[d]e available to

the public." *Id.* § 7661a(b)(8).

It is the regulatory agency's responsibility to keep track of judicial decisions that have a direct effect on a given facility. There are at least two judicatory cases that I believe have a direct effect on this draft Title V renewal. Yet the information is lacking, such that I could not make an evaluation on the adequacy of this draft Title V renewal process. Nor can I make a determination if the facility will be able to comply with conditions in the draft Title V renewal. In discussion with two different Division of Air Quality staff officials they were unable to make a determination of whether specific information was in the facility's file or if the information has been updated, as statutes and regulations require for a draft Title V renewal process. Ergo, this questions if this draft Title V renewal is complete or if the facility is able to comply to said conditions.

The vide Title V renewal makes no mention of the analyzing for CO2 emissions by the vide Division prior to issuances of a permit, as stated in Environmental Appeals Boards United States EPA decision, <u>Deseret Power Electric cooperative PSD Appeal No. 07-03.</u>

The section " Operating Permit History" (page 3) states that on September 2, 2008 "-- *PM10 limitation for incinerator has been removed per AO change."* There is no mention of monitoring for the PM 2.5 requirements that EPA promulgated in 2006. It should be noted that once it was promulgated to monitor for PM 2.5, regulatory agencies are required to limit the amount of PM 2.5 in the ambient air shed, such that there is no exceedance of the 35 micrograms per cubic meter concentration, averaged over a 24-hour period. To do this it seem to me that the Division would have to do some form of analyze to assure that the vide facility emissions were (and are) in compliance with the promulgated standard.

The Clean Air Act requires that MACT standards be met; yet there is no mention of MACT requirements in vide Title V renewal. "Technology-base" standards are not necessarily MACT standards. Clarification is needed.

The draft Title V renewal public participation document obfuscates terminology and/or does not state necessary terminology, such that the public can make an evaluation of adequacy. For example: the use of the following terminology: "actual emissions" and "allowable emissions" are: (1) not the same; ergo, are not be use interchangeably. And (2) there is no emission data of any kind in the draft Title V renewal document out for public comment. Ergo, this questions what are the emissions for vide facility, such that an evaluation can be made and

determination if the facility demonstrates that they can comply with the vide conditions of the Title V renewal permit?

SPECIFIC COMMENTS: Page 8-9 section states: *"I.N **Emergency Provision.***

*I.N.1 An "emergency" is any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under this permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error."*

There is no information on how "emissions" will be calculated into "allowable emissions" or "actual emissions" for the determination, such that "technology-based emission limitation" could be determined. Ergo, what is the "technology-based emissions limitation" and what analysis was done to determine that the vide facility will not exceed the limitation?

left off here.

Page 9: *"I.N.2.c During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in this Permit."*

There is no information on emission standards, such that a determination could be made that there will be no exceedence of said standards. Merely regurgitating the regulations does not mean that they are the facility's emissions, nor does it mean that the facility has demonstrated that they can comply within the regulatory parameters of said emission standards, such that there will not be an exceedence of the emission standards during a period of emergency.

Page 11: *"I.T.2 Additional requirements, including excess emissions requirements, become applicable to a Title IV affected source under the Acid Rain Program. Upon approval by EPA, excess emissions offset plans shall be deemed to be incorporated into this permit. (R307-415-7g(1)(b))."*

What are the additional requirements for excess emissions that are applicable under the Acid Raid program for vide facility? What is the "excess emissions offset plan" and why was it not part of this renewal process, such that the public could make the determination if the vide facility was in compliance?

Page 15: " II.B.1.c ***Condition:***

*At all times, including periods of startup, shutdown, and malfunction, the permittee shall, to the extent practicable, maintain and operate any permitted plant equipment, including associated air pollution control equipment, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Executive Secretary which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source."*

In discussion with two different Division of Air Quality staff I was unable to determine if the vide facility is complying with or if the vide Division is enforcing compliance with the EPA rule of 1994 regarding Start-up, Shutdown and Malfunctions (SSM) requirements. These requirements require the following: (1) SSM plan requires that source to comply during period of SSM. (2) SSM plans must be reviewed and approved by the permitting authorities, like any other applicable requirement. (3) **SSM plans are unconditionally available to the public, such that they could participate in evaluating their adequacy in the permit approval process** [emphasis added]. Finally (4) SSM plan provisions are a directly enforceable requirement. This was adjudicated in a recent United State Court of Appeals of D.C Circuit **Sierra Club v. EPA** [No. 02-1135]. This decision found that emissions during Start-up, Shutdown, and Malfunctions are not exempted from the Clean Air Act's requirement of MACT standards and/or another applicable requirements of the Clean Air Act. As a matter of fact, one of the vide Division staff informed me that: "...I have not looked at them [SSM plan] for a while... I cannot tell you if it was few days, weeks or months..." Ergo, the public is unable to determine if this Title V renewal is complete or if the vide facility has/can demonstrate compliance with SSM requirements.

In precise, regurgitation of the regulatory standards without substance does not establish whether or the vide facility has/can comply with conditions in the vide Title V renewal. Requiring that the public must GRAMA information during a public commenting period is an undo burden. The assumption that "technology-based" means the same as MACT is erroneous on the part the Division. It is the regulatory agency's responsibility to keep up on adjudicated cases and promulgated standards, such that some form analysis is done by them to establish that the vide facility will be and has establish compliance with the vide Title V renewal conditions. For example, there is no analysis for CO2, PM 2.5 to name a few. Nor are the various plans that were mentioned included in the vide Title V renewal. This questions whether or not the vide Title V is complete or if the vide facility can demonstrate (or has demonstrated) compliance.

In precise, regurgitation of the regulatory standards without substance does not establish whether or the vide facility has/can comply with conditions in the vide Title V renewal. Requiring that the public must GRAMA information during a public commenting period is an undo burden. The assumption that "technology-based" means the same as MACT is erroneous on the part the Division. It is the regulatory agency's responsibility to keep up on adjudicated cases and promulgated standards, such that some form analysis is done by them to establish that the vide facility will be and has establish compliance with the vide Title V renewal conditions. For example, there is no analysis for CO2, PM 2.5 to name a few. Nor are the various plans that were mentioned included in the vide Title V renewal. This questions whether or not the vide Title V is complete or if the vide facility can demonstrate (or has demonstrated) compliance.

**MEMORANDUM**

To: Tooele Army Depot (TEAD) Hazardous Waste Combustor (HWC) file.

Through: David Beatty DPB 8/10/09

From: Robert Grandy RJG

Date: August 10, 2009

Subject: Response to Public Comments- Title V Operating Permit Renewal

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TEAD's Title V Operating Permit is issued under Utah Administrative Code (UAC) R307-415-1 through 9. Sources subject to these rules are required to obtain a renewable operating permit that clarifies, in a single document, Clean Air Act requirements that apply to a source and assures the source's compliance with those requirements. These rules do not impose new substantive requirements.

A draft for the renewal of TEAD's Title V Operating Permit was made available for public comment. The public comment period ran for 30-days after being advertised in the Tooele Transcript Bulletin on May 19, 2009. This is a newspaper of general circulation in the area where the source is located. Notice was also sent to persons on an email list developed by the Executive Secretary, including those who requested in writing to be on the list.

Written comments were received from May 19, 2009 until June 18, 2009. A public hearing was not requested.

**Written comments.**

Two people submitted written comments. The comments submitted are summarized and addressed below followed by The Division of Air Quality's (DAQ) response in italics. Copies of the written comments are attached to this memo.

Comment #1: A request was made that the permit include documentation of TEAD's status regarding Compliance Assurance Monitoring (CAM) requirements.

*The following will be added to the Reviewer Comments section in TEAD's permit: Compliance Assurance Monitoring (CAM) applicability has been evaluated. There are no CAM requirements in this permit.*

Comment #2: Having to submit a GRAMA request to obtain information not included in the permit makes the public participation process burdensome.

*Title V Permits incorporate existing applicable requirements that have already been through public comment. Background data on these requirements is available through the GRAMA process by appointment, between the hours of 7:00 a.m. and 6:00 p.m., Monday through Thursday (excluding holidays) at the offices of the Division of Air Quality, 1950 West 150 North, Salt Lake City. DAQ believes that following the procedures of GRAMA is a reasonable and legally accepted method making information available to the public.*

Comment #3: The public can not determine the adequacy and completeness of this Title V Permit renewal due to lack and availability of supporting information. And the newspaper notice lacked guidance on how to obtain supporting documentation.

*The newspaper notice published on May 19, 2009, contained the following statement:*

> *"Review of the draft permit and support documentation is available by appointment only, between the hours of 7:00 a.m. and 6:00 p.m., Monday through Thursday (excluding holidays) at the offices of the Division of Air Quality, 1950 West 150 North, Salt Lake City. To schedule an appointment during the comment period, please contact the Operating Permit section at 801-536-4000. "*

*Information necessary to determine the adequacy and completeness of this Title V Permit renewal was available during the public comment period.*

Comment #4: DAQ did not make available judiciary decisions that the commenter believes have a direct effect on the Title V Permit Renewal.

*DAQ does not expect pending or decided court cases to affect this Title V Permit renewal. If air quality regulations affecting this source change for any reason, the permit will be revised in accordance with UAC R307-415-7g: Reopening For Cause.*

Comment #5: The Title V Permit Renewal does not mention analysis of $CO_2$ emissions prior to issuance of the permit per Environmental Appeals Boards United States EPA decision, Deseret Power Electric cooperative PSD Appeal No. 07-03.

*The court case related to concerns regarding "Prevention of Significant Deterioration" (PSD) permitting. This is not a renewal of a PSD permit, and TEAD is not a PSD source.*

Comment #6: A comment was made that the Title V Permit renewal makes no mention of monitoring for PM 2.5 requirements.

*There are currently no applicable requirements for TEAD relating to PM 2.5.*

Comment #7: A comment was made that there is no mention of MACT requirements in the Title V renewal.

*TEAD is subject to the MACT Standard 40 CFR Part 63, Subpart EEE. This standard is referenced in the permit abstract and cited as authority in conditions II.B.1.a, II.B.1.a1, II.B.1.a2, and II.B.1.a3.*

Comment #8: Comments were made that the draft renewal permit contains "no emissions data of any kind" and does not identify what are the emissions from the facility.

*TEAD's emissions are below major source quantities. In the abstract of Title V permits, there is usually information identifying which pollutants at the source are emitted in major quantities (each criteria pollutant that is emitted a rate of 100 tons per year or more, and each hazardous air pollutant (HAP) that is emitted at a rate of 10 tons per year or more). At TEAD, criteria pollutant emissions are below 100 tons per year, and HAP emissions are less than 10 tons per year for each pollutant. For that reason, emissions of specific pollutants are not mentioned in TEAD's abstract.*

*While TEAD's annual emissions of criteria pollutants remain below 100 tons per year, and annual HAP emissions are below 10 tons per year for each pollutant, the numbers do vary from year to year. There would be no value added to the permit by including detailed emissions data that change, yet remains below major source quantities.*

*The draft Title V Operating Permit contains emissions-limitations that identify and regulate pollutants found to be of concern by the State of Utah and USEPA.*

*Detailed emissions data for TEAD is maintained on file at the DAQ. It is available by appointment, between the hours of 7:00 a.m. and 6:00 p.m., Monday through Thursday (excluding holidays) at the offices of the Division of Air Quality, 1950 West 150 North, Salt Lake City.*

Comment #9: A comment was made regarding how emissions should be calculated under "Section I.N, Emergency Provision".

*"Section N, Emergency Provision" is an affirmative defense that may be invoked by a source after it has been established that a technology-based emission limitation has been exceeded. Invoking this provision presumes that a limitation has been exceeded. For that reason, there is no requirement to calculate emissions under this provision.*

Comment #10: A comment was made regarding "what is the technology-based emissions limitation" referred to under "Section I.N, Emergency Provision, and how are they monitored?"

*Technology-based emissions limitations and monitoring for compliance with those limitations are found in Section II of the Title V Permit.*

*The basis for these limitations are "Best available technology" (BACT), and "Maximum achievable control technology" (MACT); they are identified as such in Section II, of the Title V Permit.*

*BACT limitations are researched, applied, and submitted for public comment by the State of Utah during the approval order process and prior to construction and modification. MACT limitations for the incinerator are researched, developed, and submitted for public comment by the US EPA.*

*MACT limitations for TEAD's incinerator are monitored as specified by 40 CFR Part 63, subpart EEE. BACT limitations are monitored as determined during the approval order process.*

Comment 11: A comment was made regarding a lack of information on emissions standards referenced Section I.N.2.c "...such that a determination could me made that there will be no exceedence of said standards."

*The purpose of Section I.N.2.c is not to make a determination that there will be no exceedence of air quality standards. Section I.N.2.c refers to relevant evidence for the "Section N, Emergency Provision". As given in comment #9, the "Section N, Emergency Provision" is an affirmative defense that may be invoked by a source after it has been established that a technology-based emission limitation has been exceeded.*

*TEAD's compliance with State and Federal air quality standards is determined though their adherence to monitoring, recordkeeping, and reporting requirements prescribed by the Title V Operating Permit combined with routine site inspections by DAQ personnel. If violations occur, DAQ investigates, consults with the State Attorney General, and litigates as appropriate.*

Comment #12: A comment was made regarding Section I.T.2 (requirements for Title IV - Acid Rain Sources).

*Section I.T.2 refers to sources subject to the acid rain program. TEAD is not a Title IV Acid Rain Source and Section I.T.2 does not apply. This is noted in Section IV.A of the permit.*

Comment #13: A comment was made that during a telephone discussion, DAQ staff were unable recite details of TEAD's file. As a result it was not possible to determine TEAD's compliance status with regard to SSM requirements.

*Review of the draft permit and support documentation (including the SSM Plan) was and is available by appointment between the hours of 7:00 a.m. and 6:00 p.m., Monday through Thursday (excluding holidays) at the offices of the Division of Air Quality, 1950 West 150 North, Salt Lake City. To schedule an appointment, please contact the Division of Air Quality file clerk at 801-536-4000.*

# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued September 12, 2008 Decided December 19, 2008

No. 02-1135

SIERRA CLUB,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY
AND STEPHEN L. JOHNSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

AMERICAN CHEMISTRY COUNCIL, ET AL.,
INTERVENORS

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Consolidated with Nos. 03-1219, 06-1215, 07-1201

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On Petitions for Review of a Final Action
of the Environmental Protection Agency

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*James S. Pew* and *Keri N. Powell* argued the cause and filed the briefs for petitioner.

*Daniel R. Dertke*, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were *John C. Cruden*, Deputy Assistant Attorney General, and *Sheila*

*Igoe*, Counsel, U.S. Environmental Protection Agency.

*Leslie S. Ritts, Charles H. Knauss, Sandra P. Franco, Lorane F. Hebert, Leslie A. Hulse, Susan T. Conti, John P. Wagner, William H. Lewis Jr., Thomas J. Graves, Richard S. Wasserstrom*, and *Maurice H. McBride* were on the brief for intervenors in support of respondent. *Sam Kalen, Michael A. McCord, Jeffrey C. Nelson, Richard A. Penna, Michael B. Wigmore, David F. Zoll* entered appearances.

Before: ROGERS, TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

Dissenting opinion by *Senior Circuit Judge* RANDOLPH.

ROGERS, *Circuit Judge*: Petitioners challenge the final rules promulgated by the Environmental Protection Agency exempting major sources of air pollution from normal emission standards during periods of startups, shutdowns, and malfunctions ("SSM") and imposing alternative, and arguably less onerous requirements in their place.[1] Because the general duty that applies during SSM events is inconsistent with the plain text of section 112 of the Clean Air Act ("CAA"), even accepting that "continuous" for purposes of the definition of "emission standards" under CAA section 302(k) does not mean unchanging, the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. Accordingly, we grant the petitions and vacate the SSM exemption.

## I.

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1 40 C.F.R. § 63.6(e)(l)(i);, (f)(1), and (h)(1).

CAA section 112 designates over one hundred pollutants as "hazardous," 42 U.S.C. § 7412(b)(1), and directs the Administrator of EPA to list all categories of "major sources" of hazardous air pollutants ("HAPs"), *id.* § 7412(c)(1), and to establish for each "emissions standards" requiring "the maximum degree of reduction in emissions," *id.* § 7412(d)(2). These controls are referred to as maximum achievable control technology ("MACT") standards. *See Natural Resources Def. Council v. EPA*, 489 F.3d 1364, 1368 (D.C. Cir. 2007). Section 112 also sets a "MACT floor," *id.*, requiring that standards "shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source," 42 U.S.C. § 7412(d)(3). After eight years, under section 112(f), EPA is to revisit and potentially revise the emissions standards for each source category to ensure that they "provide an ample margin of safety to protect public health," *id.* § 7412(f)(2)(A). "Emission standard" is defined in section 302(k) as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. § 7602(k).

In addition to revising section 112, the 1990 Amendments also added Title V, which establishes a permit program to better monitor compliance with emissions standards. "Each permit . . . shall include enforceable emission limitations and standards, a schedule of compliance, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter." *Id.* § 7661c(a). Sources are required to certify that they are in compliance with the applicable requirements of the permit "and to promptly report any deviations from permit requirements to the permitting authority." *Id.* § 7661b(b)(2).

Title V further creates a "permit shield" for sources, ensuring that compliance with the permit is "deemed compliance with other applicable provisions" of the CAA. *Id.* § 7661c(f). "Any permit application, compliance plan, permit, and monitoring or compliance report" under Title V must be "ma[d]e available to the public." *Id.* § 7661a(b)(8).

In the 1970s EPA had determined that excess emissions during SSM periods are not considered violations of CAA emissions standards under section 111.[2] Although sources were "exempt[ed] from compliance with numerical emissions limits" during SSM events, 42 Fed. Reg. 57,125, EPA required that "[a]t all times, including periods of [SSM], owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions," 40 C.F.R. § 60.11(d). EPA refers to sources' obligation to minimize emissions to the greatest extent possible as the "general duty" standard. *See, e.g.*, 70 Fed. Reg. 43,992, 43,993 (July 29, 2005).

In 1994, EPA adopted the SSM exemption for section 112. *National Emission Standards for [HAPs] for Source Categories: General Provisions*, 59 Fed. Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").[3] Each source was thus exempted from the numerical

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2 *Standards of Performance for New Stationary Sources*, 42 Fed. Reg. 57,125 (Nov. 1, 1977); *see, e.g.*, 51 Fed. Reg. 27,956, 27,970 (Aug. 4, 1986). Section 111 left to the Administrator's discretion the establishment of emissions standards for pollutants from sources while section 112 mandated the establishment of emissions standards for over 100 HAPs. *See New Jersey v. EPA*, 517 F.3d 574, 580 n.1 (D.C. Cir. 2008).

3 "The General Provisions have the legal force and effect of standards, and they may be enforced independently of relevant

limits set for emission control pursuant to section 112 and only the general duty would apply. However, in order to avoid a blanket exemption, EPA required each source to develop and implement an SSM plan. "The purpose of the plan [was] for the source to demonstrate how it will do its reasonable best to maintain compliance with the standards, even during [SSMs]." *Id.* at 12,423. Each SSM plan was to "describe[], in detail, procedures for operating and maintaining the source during periods of [SSM] and a program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant standard." *Id.* at 12,439. The EPA Administrator could require changes to the SSM plan if it was inadequate. *Id.* at 12,440. The plan was incorporated by reference into the source's Title V permit, 59 Fed. Reg. at 12,439, and thereby subject to prior approval by the State permitting authority, 58 Fed. Reg. 42,760, 42,768 (Aug. 11, 1993). Under the CAA, the SSM plan was to be made publicly available, 42 U.S.C. § 7661a(b)(8), and served as a safe harbor during SSM events, *id.* § 7661c(f).

In 2002, EPA removed the requirement that a source's Title V permit incorporate the SSM plan, and instead determined that a source's Title V permit must simply require the source to adopt an SSM plan and to abide by it.[4] Because the SSM plan was no longer itself part of the permit and could be revised

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standards." 59 Fed. Reg. at 12,408. The requirements of the General Provisions are superceded by any category-specific standard. *See id.* at 12,409.

4 *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 67 Fed. Reg. 16,582 (Apr. 5, 2002) ("2002 Rule").

without formal revision of the permit, it was no longer subject to prior approval, and was no longer eligible for the permit shield. *Id.* Additionally, "to minimize the unnecessary production of the SSM plan," 66 Fed. Reg. 16,318, 16,326 (Mar. 23, 2001), the SSM plan was to be made publicly available only upon request. *Id.* The Sierra Club sought reconsideration and filed a petition for review of the 2002 Rule, and as part of a settlement agreement, EPA proposed "modest" changes to the SSM plan regulations, 67 Fed. Reg. 72,875, 72,879 (Dec. 9, 2002), namely that sources must submit their SSM plans to the permitting authority along with their Title V permit applications.

In the final rule adopted in 2003, however, EPA "decided instead to adopt a less burdensome approach,"[5] requiring members of the public to make a "specific and reasonable request" of the permitting authority to request the SSM plan from the source. 68 Fed. Reg. at 32,591. The Sierra Club challenged the 2003 Rule in a new petition for review, which was consolidated with its previous challenge. The Natural Resources Defense Council ("NRDC") also filed a petition for reconsideration on the ground that any limitation on the public availability of the SSM plans was unlawful. EPA agreed to take comment on the new SSM provisions, and the consolidated cases were held in abeyance pending reconsideration.

In 2006, EPA retracted the requirement that sources

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5 *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)*, 68 Fed. Reg. 32,586, 32,591 (May 30, 2003) ("2003 Rule")

implement their SSM plans during SSM periods.[6] According to EPA, "[t]his is consistent with the concept that the plan specifics are not applicable requirements [under Title V] and thus cannot be required to be followed. Nonetheless, the general duty to minimize emissions remains intact and is the applicable requirement." 70 Fed. Reg. 43,992, 43,994 (Jul. 29, 2005). Post-event reporting requirements provided that sources must describe what actions were taken to minimize emissions "any time there is an exceedance of an emission limit . . . and thus a possibility that the general duty requirement was violated." 71 Fed. Reg. at 20,448. EPA clarified that reporting and recordkeeping is only required when a start up or shut down caused the applicable emission standard to be exceeded, and "for any occurrence of malfunction which also includes potential exceedances." *Id.* at 20,447. EPA also eliminated the requirement that the Administrator obtain a copy of a source's SSM plan upon request from a member of the public and determined that the public may only access those SSM plans obtained by a permitting authority. The permitting authorities, in turn, "still have the discretion to obtain plans requested by the public, but will not be required to do so." *Id.*

Petitioners[7] now contend that the exemption from

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6 *National Emission Standards for Hazardous Air Pollutants: General Provisions*, 71 Fed. Reg. 20,446, 20,447 (Apr. 20, 2006) ("2006 Rule").

7 The Coalition for a Safe Environment ("CFASE") petitioned for reconsideration of EPA's conclusion that a source's "Title V permit will assure its compliance with the general duty to minimize emissions during [SSM] events merely by requiring the facility to file a report *after* such an event." CFASE, Comment Letter, Petition for Reconsideration of "National Emission Standards for Hazardous Air Pollutants: General Provisions," 71 Fed. Reg. 20,446 (June 19, 2006). EPA denied reconsideration, 72 Fed. Reg. 19,385

compliance with emissions standards during SSM events is both unlawful and arbitrary, and that the 2002, 2003, and 2006 rules unlawfully and arbitrarily fail to "assure compliance" with "applicable requirements" under Title V. Upon determining that we have jurisdiction, we turn to petitioners' challenges to the rules.

## II.

The CAA provides that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." 42 U.S.C. § 7607(b)(1). EPA maintains that petitioners have waived their challenge to the SSM exemption by not challenging the 1994 Rule articulating that the general duty standard replaces section 112 emissions standards during SSM events. Petitioners, noting that "EPA received repeated comments on the illegality of its SSM exemption in the course of its rulemaking -- which covered more than six years, generated three separate proposals and necessitated three petitions for reconsideration," Petrs. Br. 29, respond that "rulemakings that significantly change the context for a regulatory provision can re-open it for comment, even if an agency does not change the provision itself," *id.*, and that this is what happened here.

Under the reopening doctrine, the time for seeking review starts anew where the agency reopens an issue "by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the

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(Apr. 18, 2007), and CFASE petitioned for review. This petition along with the other challenges to the 2006 Rule were consolidated with the previous petitions for review.

regulation in its final form." *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989); *see P&V Enters. v. U.S. Army Corps of Eng'rs.*, 516 F.3d 1021, 1023-24 (D.C. Cir. 2008); *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988). In its 2003 rulemaking, EPA discussed revisions to its SSM plan requirements, but asserted that "[n]othing in these revisions is intended . . . to change the general principle that compliance with a MACT standard is not mandatory during periods of [SSM]." 67 Fed. Reg. at 72,880. In response to Sierra Club's comments questioning the legality of the SSM exemption, EPA stated: "We believe that we have discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply, and we, therefore, disagree with the legal position taken by the Sierra Club." 2003 Rule, 68 Fed. Reg. at 32,590. However, "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter." *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996); *see also Am. Iron*, 886 F.2d at 398. Moreover, when EPA received unsolicited comments on this issue in its 2006 rulemaking, it explained that "[t]hese commenters raise issues that are outside of the scope of this rulemaking. The general duty provision has been in place since 1994." 71 Fed. Reg. at 20,449; *cf. PanAmSat Corp. v. FCC*, 198 F.3d 890, 897 (D.C. Cir. 1999). Such agency conduct is not tantamount to an *actual* reopening.

However, petitioners contend that the 2006 Rule "has *completely* changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain that exemption." Petrs.

Br. at 29. In *Kennecott*, this court established that an "agency's decision to adhere to the *status quo ante* under changed circumstances" can "constructively reopen[]" a rule "by the change in the regulatory context." 88 F.3d at 1214. A constructive reopening occurs if the revision of accompanying regulations "significantly alters the stakes of judicial review," *id.* at 1227, as the result of a change that "could have not been reasonably anticipated," *Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006).

Petitioners recount, and EPA does not dispute, that:

> To avoid creating a "blanket exemption from emission limits," EPA's 1994 rule required that (1) sources comply with their SSM plans during periods of SSM; (2) SSM plans be reviewed and approved by permitting authorities like any other applicable requirement; (3) SSM plans be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions be directly enforceable requirements. 59 Fed. Reg. at 12423 []. In the rulemakings challenged here, however, EPA has eliminated <u>all</u> of these safeguards. SSM plans are no longer enforceable requirements, and EPA has expressly retracted the requirement that sources comply with them. 71 Fed. Reg. at 20447 []. EPA also has eliminated any requirement that SSM plans be vetted for adequacy and any opportunity for citizens to see or object to them. *Id.* [].

Petrs. Br. at 29-30. These are not mere "minor changes," *Envtl. Def.*, 467 F.3d at 1333. In so modifying the SSM plan requirements, EPA has constructively reopened the SSM exemption. While the text of the general duty itself did not

change, "EPA has completely changed the regulatory context for its SSM exemption by stripping out virtually all of the SSM plan requirements that it created to contain the exemption." Petrs. Br. at 29 (emphasis in original).

EPA's modifications to the SSM plan requirements created a different regulatory construct as to the means of measuring compliance with the general duty. Because the general duty does not include any "numerical emissions limits," 42 Fed. Reg. at 57,125, the general duty assumes new shape depending on the means used to capture that standard. In 1994, EPA determined that compliance with the general duty on its own was insufficient to prevent the SSM exemption from becoming a "blanket" exemption. It established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards. Because the general duty was defined in 1994 through and housed in the four walls of the SSM plan requirements, EPA's modifications to those requirements have eliminated the only effective constraints that EPA originally placed on the SSM exemption. The fact that the regulatory terms defining "the general duty" itself are unchanged is legally irrelevant because the other "extensive changes . . . significantly alter[ed] the stakes of judicial review," *Kennecott*, 88 F.3d at 1226-27. Just as the court in *Kennecott* agreed with industry that the agency had constructively reopened a regulation when it incorporated amended regulations that expanded available remedies and thus altered its financial incentives for challenging the regulation, so too here from the perspective of environmental petitioners' interests and allocation of resources the general duty "may not have been worth challenging in [1994], but the [revised] regulations gave [that duty] a new significance," *id.* at 1227. In *Kennecott*, there were "new and potentially more onerous provisions," *id.*, facing industry; here petitioners face a blanket exemption and a more

onerous task in effecting compliance with HAP emission standards during SSM events.

Although EPA asserts that "the duty to minimize emissions is not inextricably linked to the SSM plan," Resp. Br. at 24, the rulemaking record shows that "the general duty requirement and the SSM plan requirements were both elements of a package deal that EPA devised and sold to the public as adequate protection from [HAPs] during SSM events," Petrs. Reply Br. at 12. When commenters raised objections to the SSM exemption in 1994, EPA's direct response relied upon the SSM plan as a justification for the relaxed standard:

> The EPA believes, as it did at proposal, that the requirement for a[n] [SSM] plan is a reasonable bridge between the difficulty associated with determining compliance with an emission standard during these events and a blanket exemption from emission limits. The purpose of the plan is for the source to demonstrate how it will do its reasonable best to maintain compliance with standards, even during [SSMs]."

59 Fed. Reg. at 12,423. EPA attempts now to dismiss this statement as mere "inartful[] word[ing]," Resp. Br. at 27, but the fact that EPA's entire discussion of the proper standard to apply during SSM events invoked the SSM plan provisions confirms that the SSM plan and general duty standard are inextricably linked. Indeed, the explicit purpose of the SSM plan as devised in 1994 was to "ensure" that facility owners abide by the general duty. 59 Fed. Reg. at 12,439.

Shifting from a regulatory scheme based on a mandatory SSM plan that was part of a source's Title V permit, which is subject to prior approval with public involvement, *see* 42 U.S.C.

§§ 7661a(b)(6), to a regulatory scheme with a non-mandatory plan providing for no such approval or involvement but only after-the-fact reporting changed the calculus for petitioners in seeking judicial review, *id.*, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events. Petitioners' challenges to the SSM exemption are therefore timely.

**III.**

On the merits, petitioners contend that EPA's decision to exempt major sources from compliance with section 112 emissions standards during SSM events is contrary to the plain text of the statute and arbitrary and capricious in any event. EPA and Industry Intervenor respond that EPA's general-duty requirement during SSM events is a lawful interpretation of the statute and a reasonable way to reconcile the need to minimize emissions with the inherent technological limitations during SSM events. Challenges to EPA's interpretation of the CAA are governed by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984), in which "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Only if the statute is silent or ambiguous on a particular issue, may the court defer to the agency's reasonable interpretation. *Id.* at 844. The CAA provides that the court may reverse any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A).

Section 112(d) provides that "[e]missions standards" promulgated thereunder must require MACT standards. 42 U.S.C. § 7412(d)(2). Section 302(k) defines "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including

any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." *Id.* § 7602(k). Petitioners contend that, contrary to the plain text of this definition, "EPA's SSM exemption automatically excuses sources from compliance with emission standards whenever they start up, shut down, or malfunction, and thus allows sources to comply with emission standards on a basis that is not 'continuous.'" Petrs. Br. at 23. EPA responds that the general duty that applies during SSM events "along with the limitations that apply during normal operating conditions, together form an uninterrupted, *i.e.*, continuous, limitation because there is no period of time during which one or the other standard does not apply," Respt.'s Br. at 31. "Although *Chevron* step one analysis begins with the statute's text," the court must examine the meaning of certain words or phrases in context and also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C. Cir. 2001) (citations and quotation marks omitted).

EPA suggests that the general duty is "part of the operation and maintenance requirements with which all sources subject to a section 112(d) standard must comply," Respt.'s Br. at 33, pointing to section 302(k)'s statement that an "emission standard" includes "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction," 42 U.S.C. § 7602(k). Section 302(k)'s inclusion of this broad phrase in the definition of "emission standard" suggests that emissions reduction requirements "assure continuous emission reduction" without necessarily

continuously applying a single standard. Indeed, this reading is supported by the legislative history of section 302(k):

> By defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control would not be permitted as a final means of compliance.

H.R. Rep. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170. "Congress's primary purpose behind requiring regulation on a continuous basis" appears, as one circuit has suggested, to have been "to exclude intermittent control technologies from the definition of emission limitations," *Kamp v. Hernandez*, 752 F.2d 1444, 1452 (9th Cir. 1985).

When sections 112 and 302(k) are read together, then, Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard. Admitting as much, EPA states in its brief that the general duty is neither "a separate and independent standard under CAA section 112(d)," nor "a free-standing emission limitation that must independently be in compliance" with section 112(d), nor an alternate standard under section 112(h). Respt.'s Br. 32-34. Because the general duty is the only standard that applies during SSM events – and accordingly no section 112 standard governs these events – the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. EPA has not purported to act under section 112(h), providing that a standard may be relaxed "if it is not feasible in the judgment of the Administrator to prescribe or

enforce an emission standard for control of a [HAP]," *id.* § 7412(h)(1), based on either a (1) design or (2) source specific basis, *id.* § 7412(h)(2)(A), (B).

EPA's suggestion that it has "discretion to make reasonable distinctions concerning those particular activities to which the emission limitations in a MACT standard apply," 68 Fed. Reg. at 32,590, belies the text, history and structure of section 112. "In 1990, concerned about the slow pace of EPA's regulation of HAPs, Congress altered section 112 by eliminating much of EPA's discretion in the process." *New Jersey*, 517 F.3d at 578. In requiring that sources regulated under section 112 meet the strictest standards, Congress gave no indication that it intended the application of MACT standards to vary based on different time periods. To the contrary, Congress specifically permitted the Administrator to "distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards," CAA § 112(d)(1), 42 U.S.C. § 7412(d)(1). Additionally, while recognizing that in some instances it might not be feasible to prescribe or enforce an emission standard under § 112, Congress provided in section 112(h) for establishment of "work practice" or "operational" standards instead, but, as petitioners point out, "strictly limited this exception by defining 'not feasible . . .' to include only [two types of] situations," Petrs. Br. 9, and did not authorize the Administrator to relax emission standards on a temporal basis. *See NRDC*, 489 F.3d at 1374.

In sum, petitioners' challenge to the exemption of major sources from normal emission standards during SSM is premised on a rejection of EPA's claim of retained discretion in the face of the plain text of section 112. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent". *NRDC*, 489 F.3d at 1374 (quoting

*TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)). The 1990 Amendments confined the Administrator's discretion, *see New Jersey*, 517 F.3d at 578, and Congress was explicit when and under what circumstances it wished to allow for such discretion, *id.* at 582. "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *New Jersey*, 517 F.3d at 583 (quoting *Whitman*, 531 U.S. at 485).

Accordingly, we grant the petitions without reaching petitioners' other contentions, and we vacate the SSM exemption. *See New Jersey*, 517 F.3d at 583 (citing *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

RANDOLPH, *Senior Circuit Judge*, dissenting: I do not agree that we have jurisdiction over Sierra Club's petition for judicial review. The original regulations at issue, 40 C.F.R. § 63.6(e)–(h) (1994), exempt periods of startup, shutdown, and malfunction from opacity and non-opacity emission standards. When EPA promulgated these regulations in 1994, Sierra Club took no legal action. Yet under the Clean Air Act a petition for judicial review of an EPA regulation must be filed within 60 days of the regulation's publication in the Federal Register. 42 U.S.C. § 7607(b)(1).

Of course an agency may give notice and ask for comment on whether an existing regulation should be modified or repealed or retained, or it may indicate in response to comments that it has reconsidered the regulation. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996). Or an agency may give its regulation new significance by altering other regulations incorporating it by reference. *See id.* at 1226–27. In any one of these situations the 60-day period would begin to run again. But nothing of the sort occurred here. According to Sierra Club, EPA's rulemakings in 2002, 2003, and 2006 rendered enforcement of the 1994 startup, shutdown, and malfunction regulations more difficult. Petr.'s Br. at 29. Even if true,[1] that could hardly have amounted to agency "action" re-promulgating the 1994 regulations, which is what § 7607(b)(1) requires as a prerequisite for judicial review. After

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[1]The majority opinion makes a factual error when it suggests that the new startup, shutdown, and malfunction regulations have eliminated a prior requirement that EPA approve startup, shutdown, and malfunction plans in the course of its review of Title V permits. Maj. Op. at 12. In fact, the plans were merely incorporated by reference into Title V permits; there has never been any requirement that EPA review or approve the plans before approving permits. *See* 66 Fed. Reg. 16,318, 16,326 (2001); *see also* 40 C.F.R. § 63.6(e)(3)(viii) (1998); 67 Fed. Reg. 16,582, 16,587 (2002).

all, Sierra Club's complaint is not that the 1994 regulations are now hard to enforce; it is instead that the 1994 regulations are invalid and always have been. The recent rules did not alter the exemption for startup, shutdown, and malfunction events. The new rules simply modified requirements for each source's plan regarding implementation of the duty to minimize pollution during the exempt periods. Sierra Club had the option – which it exercised[2] – of challenging the new rules on the ground that the modifications will lead to unacceptable levels of pollution.

In *Kennecott*, regulated industries sought judicial review of an allegedly invalid regulation after changes in related regulations made its enforcement *more* likely and more punitive. Sierra Club has no comparable financial incentives capable of assessment by a court; instead, it presumably has an incentive to challenge any regulatory change that might lead to increased pollution. The majority's rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties. Such a regime, and the instability it generates, is intolerable. Perhaps that is why, until today, we have limited the constructive reopening doctrine to cases involving regulated entities. *See Envtl. Def. v. EPA*, 467 F.3d 1329, 1334 (D.C. Cir. 2006).

Although EPA did not reopen its 1994 regulations for judicial review, Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action.

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[2]The majority opinion does not reach Sierra Club's argument that the recent rules fail to guarantee enforcement of applicable emissions standards and therefore violate Title V of the Clean Air Act.

*See, e.g.*, *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990). There is no basis for permitting Sierra Club to circumvent that procedural requirement in this case. *See Kennecott*, 88 F.3d at 1214.

There is another problem with the majority opinion. It disposes of the case with an argument not addressed in the brief of either party – namely, that § 112(h) of the Clean Air Act provides the only basis for EPA to impose a non-numerical emissions standard and that the 1994 regulations are unlawful because they do not comply with the requirements of § 112(h). Sierra Club mentions § 112(h), *see* Petr.'s Br. at 24, but its argument that the 1994 regulations are unlawful rests on § 302(k)'s requirement that "emission standards" must regulate air pollutants on a "continuous basis," *id.* at 23–24. EPA refers to § 112(h) only to state that it is irrelevant to the question whether its "general duty to minimize" is an enforceable standard satisfying the statutory requirement to regulate sources on a continuous basis. Resp.'s Br. at 33 n.5. As we have recognized, a passing mention of an otherwise unbriefed issue does not normally suffice to preserve the issue. *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976).[3]

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[3]The majority attempts to shoehorn its holding into Sierra Club's "continuous basis" arguments, stating that it reads § 112 and § 302(k) together to "require[] that there must be continuous section 112-compliant standards." Maj. Op. at 15. But the discussion of § 302(k)'s continuous basis requirement does no work in the majority's legal analysis; without the "continuous basis" requirement, the majority would still hold that EPA's standards must be "section 112-compliant." The majority's point is not that EPA has failed to regulate emissions sources on a continuous basis. *See* Maj. Op. at 14 (stating that EPA need not continuously apply a uniform standard). It is instead that the 1994 rule's "general duty to minimize" does not

Though there have been exceptions, we have generally declined to consider issues not briefed by the parties, especially when the issue is not easy or the record is long and complex, *cf. United States v. Pryce*, 938 F.2d 1343, 1347–48, 1351 (D.C. Cir. 1991), when doing so would be unfair to the respondent, *Envtl. Def. Fund, Inc. v. Costle,* 657 F.2d 275, 284 n.32 (D.C. Cir. 1981), or when the legal issue is particularly important. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Here, the question whether EPA's interpretation of § 112 is permissible is a difficult one, and both the record and the statute are complex. Here too, EPA has never had a fair opportunity to address the issue.

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meet the requirements of § 112(h). Maj. Op. at 14–16.