

Pace Environmental Law Review Online Companion

Volume 7

Issue 1 *Twenty-Eighth Annual Jeffrey G. Miller Pace
National Environmental Law Moot Court Competition*

Article 3

February 2016


Measuring Brief (Granger)

Christopher M. Becker
University of Alabama School of Law

Robert A. Marcum
University of Alabama School of Law

Bennett T. Richardson
University of Alabama School of Law

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Recommended Citation

Christopher M. Becker, Robert A. Marcum, and Bennett T. Richardson, *Measuring Brief (Granger)*, 7 Pace Env'tl. L. Rev. Online Companion 63 (2016)

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**TWENTY-EIGHTH ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION**

Measuring Brief*

UNIVERSITY OF ALABAMA SCHOOL OF LAW
CHRISTOPHER M. BECKER, ROBERT A. MARCUM, BENNETT T.
RICHARDSON

Docket Nos. 14-000123 and 14-000124
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

SYLVANERGY, L.L.C.,
Petitioner,

v.

SHANEY GRANGER, in her official capacity as Regional
Administrator for Region XIII of the United States
Environmental Protection Agency,
Respondent,

and

SAVE OUR CLIMATE, INC.,
Petitioner,

v.

SHANEY GRANGER, in her official capacity as Regional
Administrator for Region XIII of the United States
Environmental Protection Agency,
Respondent.

ON CONSOLIDATED PETITIONS FOR REVIEW OF A
FINAL ORDER OF THE REGIONAL ADMINISTRATOR

Brief of SHANEY GRANGER, Petitioner

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

STATEMENT OF JURISDICTION

EPA has delegated its permit-reviewing power to the EAB, thus granting the Board subject-matter jurisdiction over Prevention of Significant Deterioration (PSD) preconstruction permits. 40 C.F.R. § 124.19 (2015); *see* 42 U.S.C. §§ 7475, 7601 (2012). Both petitioners timely filed for review of the Board's order, *In re* Sylvanergy, No. 15-0123, slip op. at 1 (EAB June 1, 2015), so this Court has jurisdiction over all "final action[s]" taken under the CAA by the New Union Air Resources Board (NUARB) through its EPA-delegated authority, 42 U.S.C. § 7607(b)(1). At its root, this petition centers on an interlocutory order and a final decision: respectively, NUARB's denial of the Non-Applicability Determination (NAD) and its requirement of best available control technology (BACT) for Sylvanergy's greenhouse emissions. Thus, this Court has jurisdiction over the BACT determination, but *not* over the denial of the NAD.

STATEMENT OF THE ISSUES

- I. Does this Court have jurisdiction to review NUARB's denial of the requested NAD?
- II. Assuming jurisdiction over the denial of the NAD, is Sylvanergy's proposed plant a "major emitting facility" subject to PSD review?
- III. Did NUARB properly determine that a biomass-fueled facility subject to PSD review for its non-greenhouse emissions is also subject to review as an emitter of greenhouse gases?
- IV. Did NUARB permissibly reject wood gasification and partial carbon capture and storage as BACT?

V. Did NUARB properly impose the Sustainable Forest Plan as BACT?

STATEMENT OF THE CASE

I. FACTS

Sylvanergy, L.L.C. resolved to construct a biomass-fired electricity generation and wood pellet fuel production facility (the “Facility” or the “Power Plant”) in Forestdale, New Union. Sylvanergy, slip op. at 5. The Facility will produce 500 million Btu’s each hour, and at capacity would burn 150,000 tons of dry weight each year. *Id.* It will consist of an advanced stoker design wood-fired boiler and two ultra-low sulfur diesel start-up burners, each with a maximum heat input rate of 60 million Btu’s per hour. *Id.*

Based on a 96% capacity factor, the Facility has the potential to emit 255 tons per year of carbon monoxide, in addition to a host of other pollutants. *Id.* Worried about the impact of log-truck deliveries to the Facility, Forestdale limited its operation to no more than 6,500 hours per year. *Id.* Only Forestdale’s building inspector has the authority to enforce the limitation, which in effect restricts the Facility to 75% capacity. *Id.* At 75% capacity, the Facility will emit 190 tons per year of carbon monoxide. *Id.* The Facility has the potential to emit 350,000 tons per year of greenhouse gases in the form of carbon dioxide equivalents. *Id.*

EPA has delegated authority to NUARB to issue preconstruction permits under § 165 of the Clean Air Act. *Id.* On January 15, 2013, Sylvanergy petitioned NUARB for an NAD, a determination that it needed no PSD preconstruction permit under § 165 of the Act. *Id.* In an interlocutory order, NUARB denied Sylvanergy’s request on grounds that the Power Plant was a major emitting facility in an attainment area under the Act—notwithstanding the locally-enforced hours limitation—and thus subject to more rigorous PSD review. *Id.* at 6. This preliminary

finding ushered Sylvanergy into the heart of the PSD permitting process. *Id.*

In crafting Sylvanergy's permit, NUARB thoroughly analyzed the available control alternatives and determined the BACT for the pollutants emitted by the Facility, as required by § 165(a)(4). *Id.* at 6–7. Concerning greenhouse gases, NUARB employed a top-down approach in analyzing the available control alternatives. *Id.* First, NUARB considered carbon capture and storage as the technology capable of achieving the greatest reduction in emissions; the agency rejected the technology as technically infeasible. *Id.* at 6. Next, the agency considered the use of alternative fuels, like natural gas and oil; NUARB concluded that such fuels would impermissibly redefine the Facility. *Id.* at 7. NUARB also concluded that wood gasification and partial carbon capture and storage (WGPPCS) would impermissibly redefine the source. *Id.* Finally, NUARB considered a sustainable forest plan, requiring a dedicated reforestation area. *Id.* The agency concluded that acquisition of 25,000 hectares of forest land at a cost of approximately ten million dollars was economically feasible, and that at an assumed production rate of ten dry tons of wood per hectare per year, the area would offset approximately seventy percent of the Facility's emissions. *Id.*

On September 12, 2013, NUARB published its draft permit for the Facility, which included the Sustainable Forest Plan as BACT for the Facility's greenhouse gas emissions. *Id.* at 6. Save Our Climate, Inc. (SOC), a non-profit environmental protection group, commented extensively; the New Union Loggers Association also commented. *Id.* On June 12, 2014—after nine months during which the agency considered the permit's characteristics—NUARB issued its PSD permit for the Sylvanergy Facility. *Id.* It retained the Sustainable Forest Plan as BACT for greenhouse gas emissions at the Facility. *Id.* at 7.

II. PROCEDURAL HISTORY

After issuance of the permit, Sylvanergy and SOC both filed timely petitions for review with the Environmental Appeals Board. *Id.* at 7. Sylvanergy challenged the denial of the NAD and the permit's imposition of the Sustainable Forest Plan; SOC

challenged NUARB's refusal to require wood gasification and partial carbon capture and storage as BACT for the Facility. *Id.* The EAB denied both petitions, pointing to a lack of jurisdiction over the NAD and an absence of any clear factual or legal error that would justify overturning the BACT determination; it then ordered the Administrator of Region XIII to publish notice of final action. *Id.* at 13–14. The parties then petitioned this Court for judicial review. *Id.* at 1.

SUMMARY OF THE ARGUMENT

As a threshold matter, this Court lacks jurisdiction over the NAD denial. To protect the administrative process, Congress subjects only “final action” to CAA § 307 jurisdiction. Because the denial neither consummated NUARB's decisionmaking nor determined Sylvanergy's rights and obligations, it was not jurisdictional final action. Moreover, Sylvanergy cannot twist § 704 of the Administrative Procedure Act (APA) to dodge the plain rule of § 307, because the denial was committed to NUARB's discretion as a matter of resource management and agency inaction. Accordingly, APA § 704 simply does not apply.

Even assuming jurisdiction, this Court should not disturb NUARB's determination that the Power Plant is a major emitting facility. Although not a fossil-fuel fired source—as shown by the plain language of the CAA and EPA guidance—the Facility still has the potential to emit more than 250 tons per year of carbon monoxide when operating at 96% capacity. NUARB properly determined the Facility to be a major emitter because no *federally enforceable* limitation brings it below the emissions threshold. NUARB acted in accordance with EPA guidance, and the Agency's expertise on the law and science of the Clean Air Act commands deference. This Court should therefore affirm NUARB's classification of the Power Plant as a major emitting facility.

NUARB properly subjected the Power Plant to BACT for greenhouse gases. The Supreme Court recognizes that regulation

of greenhouse gases in other contexts triggered PSD requirements for these emissions, and has ruled that permitting agencies may require BACT for greenhouse gas emissions. Because neither the text nor the policy of the Act justify an exception for biogenic greenhouse gases, application of BACT to the Facility was proper.

This Court should uphold NUARB's determination that the Sustainable Forest Plan constitutes BACT for the Facility's greenhouse gas emissions. In making its determination, the agency properly employed a top-down approach to analyze the universe of available control alternatives. In line with EPA guidance, after deciding against WGPCCS, NUARB properly embraced the Sustainable Forest Plan as BACT. The agency permissibly rejected WGPCCS because it redefines the source—requiring it to undergo significant modifications, thereby changing its fundamental scope. Instead, the agency properly settled on the Plan as BACT; the Plan is economically feasible, effective at offsetting the Facility's emissions, and entirely within the control of Sylvanergy.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE NAD BECAUSE IT WAS NEITHER FINAL ACTION NOR REVIEWABLE UNDER THE APA.

Section 307 of the CAA grants this Court jurisdiction to review “final action[s]” taken by EPA under the Act. 42 U.S.C. § 7607(b)(1). By only opening the courthouse doors to final actions, the CAA seeks to preserve the integrity of EPA's robust administrative procedures—reflecting faith in EPA adjudications and congressional judgment that the Agency should not have to shoulder the burden of piecemeal judicial review. *FTC v. Standard Oil Co. of Cal. (SOCAL)*, 449 U.S. 232, 242 (1980). Because the NAD was not a “final action,” this Court lacks jurisdiction to review its denial. Similarly, APA § 704 does not

authorize this Court to review the NAD on review of the final permit, because the denial was committed to NUARB's discretion and hence unreviewable under APA § 701(a)(2).

As a question of jurisdiction, this Court reviews this issue on a de novo standard. *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091 (9th Cir. 2014). And as the party that would invoke judicial review, Sylvanergy must carry the burden of proving jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A. The NAD was not a “final action,” and therefore falls outside this Court’s jurisdiction under § 307(b)(1) of the Clean Air Act.

As explained by the Supreme Court, “final action” under § 307 carries the same meaning as “final agency action” under the Administrative Procedure Act. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001); see 5 U.S.C. § 704 (2012). The APA does not define “final agency action,” and the Supreme Court has wrestled with the term for decades. 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8397 (3d ed. 2004) (bemoaning the confused state of the case law). But the crux of the term is the word *final*, owing to the broad APA definition of “agency action” as well as the strong judicial policy in favor of protecting the administrative process. 5 U.S.C. § 551(13).

Under the Court's latest interpretation, agency action is *final* only if it meets two requirements. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights and obligations have been determined, or from which legal consequences will flow.

Id. (internal citations and quotation marks omitted). Only if both conditions are met is the action final for purposes of judicial review. *Bennett*, 520 U.S. at 178.

The finality of an NAD is an issue of first impression under the *Bennett* standard.¹ Thus, without persuasive case law, this Court should look to the NAD's place within the statutory scheme of the CAA to resolve the question. Because Sylvanergy cannot carry its burden of proof that the denial of the NAD satisfies one—let alone both—of *Bennett's* prongs, the NAD was not final and this Court lacks jurisdiction under § 307. See *Kokkonen*, 511 U.S. at 377.

i. The NAD was not final because it neither marked the consummation of the administrative process nor determined rights and obligations.

The NAD begins, rather than ends, the permitting process: it represents EPA's opinion that a stationary source qualifies as a "major emitting facility" subject to the PSD program, and presages a lengthy permitting review. See 42 U.S.C. § 7475. Although the NAD is the last word on the threshold question of PSD applicability, definitiveness on a preliminary issue does not itself make for final action. *Indus. Customers of Nw. Util. v. Bonneville Power Admin.*, 408 F.3d 638, 647 (9th Cir. 2005); *SOCAL*, 449 U.S. at 244 (recognizing that preliminary agency action is not final, even if it commits the regulated party to a full permitting proceeding of "substantial and unrecoverable cost").²

1. The two reported decisions on the finality of NAD-like determinations on PSD applicability were both pre-*Bennett* decisions—they did not address whether the action was *final* in the modern sense of the term. See *P.R. Cement Co. v. EPA*, 889 F.2d 292, 294 (1st Cir. 1989) (relying on the concepts of ripeness and exhaustion to find that an NAD was final action); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442–43 (9th Cir. 1984) (same); cf. *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (explaining that finality is distinct from ripeness and exhaustion). Accordingly, these cases should not persuade this Court.

2. This Court should not warp the collateral-order doctrine to find that the NAD is reviewable as an order "collateral" to the PSD-permitting process. Cf. *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007). The doctrine simply does not apply here: the PSD permit reflects the denial of the NAD, which means that the NAD necessarily merged into the final permit. *SOCAL*, 449 U.S. at 246 (declining to apply the doctrine to an agency complaint of a violation where the complaint was merely "a step toward" the final decision on the merits, and would merge into that decision). More importantly, the doctrine does not apply

Thus, because denying the NAD was merely the first step toward a PSD permit, the denial was an “interlocutory” decision that did not “consummat[e]” NUARB’s “decisionmaking process.” *Bennett*, 520 U.S. at 178. Accordingly, it cannot be a “final action” reviewable under CAA § 307.

Even assuming the satisfaction of *Bennett*’s first prong, the NAD is not final action because it is no more than NUARB’s opinion on the application of law to fact. Standing alone, the denial of the NAD has no legal force; all of Sylvanergy’s legal obligations under the PSD program stem from the CAA itself, not the NAD decision. *Luminant Generation Co., LLC v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (finding that EPA notices of violation did not meet *Bennett*’s second prong as the operator’s rights and obligations did not flow from the notices but from the Clean Air Act). Both before and after the NAD’s denial, Sylvanergy was under an obligation not to build a major emitting facility in Forestdale without a PSD permit—nothing changed when NUARB rejected Sylvanergy’s petition. 42 U.S.C. § 7475(a). Rather, the denial reflected NUARB’s opinion that, under § 169(1) of the CAA, the proposed plant would be a major emitting facility. Insofar as the NAD is just NUARB’s adoption of one particular view of the statute, it is a far cry from final action. *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (rejecting the argument that an agency “takes final action when it embraces one view of the law and rejects another,” even when “that view is adverse to the [regulated] party”). Thus, because the denial was neither the consummation of NUARB’s decisionmaking process nor a determination of Sylvanergy’s rights and obligations—and certainly not both—it was not the sort of final action that this Court can review. *Bennett*, 520 U.S. at 178; 42 U.S.C. § 7607(b)(1).

ii. Binding EPA regulations reinforce this result.

EPA regulations provide that “agency action on a . . . PSD permit” is only final upon the exhaustion of “agency review procedures” and the issuance of “a final permit decision.” 40

where Congress enacts a “special statutory review procedure” like § 307. See *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

C.F.R. § 124.19(l)(2). Those words bind this Court. Section 301 of the CAA expressly grants rulemaking authority to EPA as “necessary to carry out [its] function under the [Act],” and this Court well knows that such an express delegation engages the gears of *Chevron* deference. 42 U.S.C. § 7601(a)(1); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Because this regulation was promulgated by notice-and-comment rulemaking,³ *Chevron* limits this Court’s inquiry to whether the rule is “arbitrary or capricious in substance, or manifestly contrary to the statute.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

A look at the PSD-review process shows that EPA’s estimation of finality is not arbitrary, capricious, or contrary to the statute. Not only does EPA reach the same conclusion as it would by applying the *Bennett* standard, *supra* Part I.a.i, but postponing finality until the end of the permitting process furthers the statutory goal of avoiding piecemeal judicial review. *See Chevron*, 467 U.S. at 866 (finding agency interpretation reasonable because it advanced statutory purposes). Thus, any permitting actions taken before the final permit cannot be “final action[s]” reviewable under § 307; the denial of the NAD therefore falls outside this Court’s jurisdiction.

B. The NAD denial was a decision committed to NUARB’s discretion, and accordingly this Court’s jurisdiction over the PSD permit does not confer the ability to review the NAD.

Although the NAD denial was non-final action outside this Court’s § 307 jurisdiction, Sylvanergy may twist the APA to attempt an end-run around the statutory scheme. NUARB has undeniably taken final action by issuing the PSD permit, 40 C.F.R. § 124.19(l)(2), and Sylvanergy will argue that review of the preliminary NAD is proper on review of the final permit. *See* 5 U.S.C. § 704. This argument fails because the denial of the NAD was committed to NUARB’s discretion, and hence unreviewable under APA § 701(a)(2).

3. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290 (May 19, 1980) (codified at 40 C.F.R. pt. 124).

By their own terms, the judicial-review provisions of the APA do not apply where “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). The Supreme Court reads section (a)(2) as precluding review in two situations: first, where a statute is so broadly drawn that a court would lack a “meaningful standard” on which to judge the agency action; and second, where “the common law of judicial review of agency action” traditionally commits the question to the discretion of the agency. *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (recognizing that section (a)(2) can preclude judicial review by operation of either statutory law or the common law).

As illustrated by the presumptive unreviewability of an agency decision to enforce or not enforce, *see Heckler*, 470 U.S. at 832, the common law traditionally grants agencies unreviewable discretion in two relevant areas: (1) matters dealing with the allocation of agency resources, and (2) matters of agency inaction. As for the first category, courts traditionally give agencies especial leeway to manage their resources, as such questions require “a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise.” *Lincoln*, 508 U.S. at 191 (citation omitted). A massive statutory scheme like the CAA requires EPA to play an administrative game of Whack-a-Mole to identify and curtail violations of the Act. *See Heckler*, 470 U.S. at 831. In deciding when and where to flex its enforcement muscles to most effectively administer the Act, EPA’s “peculiar[] . . . expertise” demands a long judicial leash. *Id.* And as for the second category, courts treat agency inaction as discretionary because it does not involve the exertion of “coercive power over an individual’s liberty or property rights,” and hence steers clear of the traditional realm of the judiciary. *Id.* at 832. Rather, only when the agency “exercise[s] its power in some manner” is there sufficient “focus for judicial review.” *Id.* Because the denial of the NAD implicates both rationales, section (a)(2) bars application of § 704 to shoehorn review of the NAD into review of the final permit.

At its root, the NAD is a decision tied up in questions of resource allocation. The NAD serves as an informal method to streamline agency oversight of stationary sources that pose only a

minor threat to the environment, thus letting NUARB reserve its fullest permitting procedures for those emitters that require them. See Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 56 Fed. Reg. 27,630, 27,639 (June 14, 1991) (codified at 40 C.F.R. pts. 51, 52, 60). Insofar as the NAD allows NUARB to triage the calls for its attention, it implicates agency discretion. “The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities,” and accordingly courts will not review management decisions like the NAD denial. *Heckler*, 470 U.S. at 831–32.

This Court should also view the NAD denial as an instance of agency inaction. The denial had no independent legal effect and thus involved no exercise of NUARB or EPA’s “coercive power.” See *Heckler*, 470 U.S. at 832. Just as non-enforcement has no effect on the rights of the regulated party, neither did the NAD denial affect Sylvanergy’s rights and obligations. See *Luminant Generation Co.*, 757 F.3d at 442; see also *supra*, Part I.a.i. This distinction traditionally leads courts to decline review of agency decisions without legal effect. *E.g.*, *United States v. Gary*, 963 F.2d 180, 184 (8th Cir. 1992) (holding unreviewable an agency opinion that dealt with resource management and did not determine the regulated party’s rights and obligations). Accordingly, the denial of the NAD is an exercise of agency discretion “general[ly] unsuitab[le] for judicial review.” *Heckler*, 470 U.S. at 831.

II. THE POWER PLANT IS A “MAJOR EMITTING FACILITY” BECAUSE IT HAS THE “POTENTIAL TO EMIT” MORE THAN 250 TONS PER YEAR OF CARBON MONOXIDE.

The CAA requires PSD permits for facilities that both qualify as a “major emitting facility” and are located within an attainment or unclassifiable areas. 42 U.S.C. § 7475. These permits impose numerous requirements “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” *Id.* § 7470. This Court must decide whether Sylvanergy’s Power Plant qualifies as a “major emitting facility” subject to PSD review. A “major emitting facility” under

the Act must either (A) be one of the 28 types of facilities listed and “emit, or have the potential to emit, one hundred tons per year or more of any air pollutant,” or (B) simply have “the potential to emit two hundred and fifty tons per year or more of any air pollutant.” *Id.* § 7479(1).

Because the CAA does not specify a standard for judicial review of this sort of agency action, this Court applies the default standard of the APA and asks whether NUARB’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This Court may not upset NUARB’s decision “if the agency’s path may reasonably be discerned.” *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 496–97 (2004) (citation omitted). Assuming jurisdiction, the arbitrary and capricious standard compels this Court to affirm NUARB’s determination of PSD applicability. Although the Facility does not qualify as a “fossil-fuel fired” source subject to the 100 ton-per-year threshold under the Act, it does have the “potential to emit” 250 tons or more per year of any air pollutant—namely, carbon monoxide. Thus, NUARB did not act arbitrarily in determining that the Power Plant was a major emitting facility subject to the PSD program.

A. The Facility is not subject to the 100 ton-per-year threshold under CAA § 169(1) because it is not a “fossil-fuel fired” source.

Sylvanergy proposes a 500 million Btu/hour biomass-fired electricity generation unit in Forestdale, New Union. *Sylvanergy*, slip op. at 5. The facility will contain two ultra-low sulfur diesel (ULSD) start-up burners that each has a maximum heat input rate of 60 million Btu/hour. *Id.* It contains no other component parts potentially subject to the 100 ton-per-year limitation. *See* 42 U.S.C. § 7479(1). As a result, this Court must determine if the two burners qualify the Facility as a “fossil-fuel fired” source subject to the 100 ton-per-year threshold under Section 169(1). The unequivocal answer: They do not.

As the Supreme Court stated in *Chevron*, 467 U.S. at 842–43, courts take two steps to determine if an agency’s construction of a statute warrants deference. First, this Court must determine whether Congress spoke directly to the issue. *Id.* If so, its

unambiguously expressed intent controls. *Id.* If not, the second step of the analysis asks this Court to determine if the agency has interpreted the statute permissibly. *Id.* Here, this Court should stop at step one because the statutory language is clear. However, even if this Court finds some ambiguity in the statutory language, EPA's permissible construction of the statute should control.

i. The plain language of CAA § 169(1) only reaches sources with a heat input rate greater than 250 million Btu/hour.

Where language is plain, this Court's only function is to enforce a statute according to its terms. *Sebelius v. Coler*, 133 S. Ct. 1886, 1898 (2013). The Supreme Court has been adamant on this point: rather than looking for the "reasons for what Congress has plainly done," courts simply give effect to the clear text. *Great W. Life & Ins. Co. v. Knudson*, 534 U.S. 204, 217–18 (2002). Accordingly, the plain language of the CAA should end this Court's inquiry.

Congress explicitly aimed to regulate only fossil-fuel fired sources that have a heat input rate of 250 million Btu/hour or more. 42 U.S.C. § 7479(1). By contrast, the ULSD start-up burners each only have a heat input rate of 60 million Btu/hour. *Sylvanergy*, slip op. at 5. Neither burner meets the threshold. Even combined, the units would only have a heat input rate of 120 million Btu/hour—still below the regulatory threshold. As a result, Congress clearly and unambiguously exempted such small fossil-fuel fired sources based on the statutory language. To hold otherwise would "render what Congress has plainly done . . . devoid of . . . effect." *Great W.*, 524 U.S. at 217–18.

Accordingly, any argument by SOC that EPA should regulate the ULSD burners as an "embedded source" must fail. See *LaFleur v. Whitman*, 300 F.3d 256, 262 (2d Cir. 2002). This contention is rooted in EPA's guidance that "[a] source which, when considered alone, would be major (and hence subject to PSD) cannot 'hide' within a different and less restrictive source category in order to escape applicability." Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual* A.23 (draft Oct. 1990) ("NSR Manual"). Even considered

together, the burners are not “major”: they fail to reach even 50% of the threshold heat input rate, and there is no indication in the record that the burners themselves would emit 100 tons per year of any pollutant. *Sylvanergy*, slip op. at 5; 42 U.S.C. § 7479(1). As a result, this Court should find that Sylvanergy’s Facility is not a “fossil-fuel fired” source subject to the 100 ton-per-year threshold.

ii. Under EPA interpretations, the Facility is not a fossil-fuel fired source because the burning of fossil fuels is not its primary activity.

SOC will argue that the statute is ambiguous because it does not address how EPA should classify facilities that undertake more than one activity that may be regulated under the Act. *See* 42 U.S.C. § 7479(1). EPA’s interpretation of the statute resolves this alleged ambiguity, and should be afforded deference. Any ambiguity would shift this Court’s analysis to whether the agency’s interpretation of the statute is permissible. *Chevron*, 467 U.S. at 843.

In August 1980, EPA addressed the classification of multi-activity facilities by promulgating rules pursuant to its authority under § 301 of the Act. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980) (codified at 40 C.F.R. pts. 51, 52). Although the rules adopted the statutory definition of “major emitting facility” without substantial change, the regulatory preamble stated that a multi-activity facility will be classified by its primary activity. *Id.* at 52,695. EPA stated a source’s primary activity “is determined by its principal product or group of products produced.” *Id.* Thus, support facilities—defined as “those which convey, store, or otherwise assist in the production of the principal product”—do not alter a plant’s classification under the Act. *Id.*

Under this “primary-activity test,” the Facility is not a “fossil-fuel fired” source. The Facility will provide one product: electricity. *Sylvanergy*, slip op. at 5. This electricity comes from the Facility’s wood-fired boiler, which harnesses the combustion of wood pellets. *Id.* The ULSD burners start the fire, but have no further role in actually generating power. *Id.* Thus, these start-up burners are archetypal support facilities: they play the limited

role of “assist[ing] in the production of the principal product”—electricity—but do not produce it themselves. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. at 52,695. Accordingly, the primary activity of the Facility is biogenic electricity production, and Sylvanergy’s Facility does not qualify as a “fossil-fuel fired” source.

a. EPA’s primary-activity test warrants deference.

Where an agency fills a gap in the statutory scheme, “a court may not substitute its own construction of a statutory provision for” the agency’s “reasonable interpretation.” *Chevron*, 467 U.S. at 844. This remains the case, even though EPA set out the primary-activity test in the regulatory preamble rather than the regulation itself. An agency interpretation reached “through means less formal than ‘notice and comment’ rulemaking” may still be entitled to *Chevron* deference. *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002). Courts determine if *Chevron* applies by considering various deference-conferring factors, such as the agency’s expertise, “the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time.” *Id.* at 222. Here, several such factors militate in favor of *Chevron* deference.

To start, the CAA grants EPA extensive rulemaking authority, showing congressional intent that EPA’s words on the matter should carry the weight of law. *See* 42 U.S.C. § 7601; *Mead*, 533 U.S. at 229 (identifying congressional expectation that “the agency . . . be able to speak with the force of law” as an indicator that *Chevron* should apply). The scientific and technical complexity of the issue strongly favors judicial deference. *See Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (requiring courts to be at their “most deferential” when reviewing “this kind of scientific determination”). And so does the complexity of the Act itself. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (deferring to agency interpretation in light of the “technically complex statutory scheme”). Still more importantly, Congress left the “major emitting facility” definition alone when it enacted the Clean Air Act Amendments of 1990.

Pub. L. No. 101-549, 104 Stat. 2399; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (noting that when a statute is amended, Congress is presumed to adopt administrative interpretations of any sections left unchanged). Finally, the primary-activity test is a well-reasoned interpretation of the statute, as it allows EPA to efficiently classify multi-activity sources, and has been consistently applied for almost forty years. *LaFleur*, 300 F.3d at 261 (emphasizing EPA’s long-standing adherence to the primary-activity test); *Barnhart*, 535 U.S. at 220 (“[T]his Court will normally accord particular deference to an agency interpretation of ‘longstanding’ duration.”).

These factors should weigh heavily in this Court’s analysis. Accordingly, the primary-activity test should receive *Chevron* deference despite the preamble’s relative informality. *Barnhart*, 535 U.S. at 221–22; accord *Nat’l Auto. Dealers Ass’n v. FTC*, 864 F. Supp. 2d 65, 77–78 (D.C. Cir. 2012) (explaining that regulatory preambles are worthy recipients of *Chevron* deference).

Even if this Court determines that *Chevron* deference does not apply, EPA’s policy should receive substantial *Skidmore* deference. *Mead*, 533 U.S. at 234–35 (explaining that agency interpretations receive deference even outside of *Chevron*). Although not binding, agency policies and interpretations “constitute a body of experience and informed judgment,” and should be afforded deference based on “the thoroughness evident in [EPA’s] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Skidmore* deference carries persuasive rather than controlling weight, but is often a deciding factor in a complex statutory scheme like the CAA. *E.g.*, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 570 (1980) (reversing appellate court for failure to heed federal agency’s “expert judgment” contained in nonbinding guidance documents).

EPA’s thoroughness of consideration is evident in the language of the preamble itself. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 45 Fed. Reg. at 52,695. EPA considered and addressed various suggestions as to the breadth of the definition and ultimately decided to adopt the primary-activity test. *Id.* Additionally, EPA employed sound reasoning in its decision, citing a desire for

predictability, objectivity, and simplicity in determinations. *Id.* This, coupled with an understanding of the complexity of allocating resources, led EPA to a primary-activity determination to classify a source based on standard industrial classifications. *Id.* Not only did EPA thoroughly consider this well-reasoned policy, it has consistently applied it over the years. *See id.*; *LaFleur*, 300 F.3d at 261 (emphasizing EPA's long-standing adherence to the primary-activity test). At the very least, EPA's primary-activity test demands substantial *Skidmore* deference; this Court therefore should follow EPA's interpretation and find that the Facility is not a fossil-fuel fired source.

B. The Power Plant is a major emitting facility because it has the potential to emit more than 250 tons per year of carbon monoxide, notwithstanding the Village of Forestdale's operational limitations.

Although the proposed Facility is not a "fossil-fuel fired" source, it is still a "major emitting facility." Relevant here is the second statutory definition: a "source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C. § 7479(1). Congress did not define the term "potential to emit" within the confines of the PSD statute. *Id.* Accordingly, EPA promulgated regulations defining a plant's potential to emit as including "restrictions on hours of operation" so long as the restriction "is federally enforceable." See 40 C.F.R. § 52.21(b)(4). In an unpublished opinion, the D.C. Circuit vacated this definition because it limited the term "potential to emit" to include only EPA-enforceable limitations on operation. *Chem. Mfrs. Ass'n v. EPA*, 70 F.3d 637 (D.C. Cir. 1995). In response, EPA issued guidance to address the D.C. Circuit's concerns by broadening its definition. Office of Air Quality Planning & Standards, U.S. EPA, *Interim Policy on Federal Enforceability of Limitations on Potential to Emit* (Jan. 1996) ("Federal Enforceability Policy"). This guidance warrants sufficient deference to control this Court's inquiry, and establishes that Forestdale's site plan is not a federally enforceable limitation for purposes of the "potential to emit" calculation.

- i. Under EPA’s Federal Enforceability Policy, the Forestdale site plan is not a federally enforceable limitation, and therefore this Court must judge the Facility’s “potential to emit” on its 96% capacity factor.**

EPA’s guidance states that the regulatory term “federal[] enforceab[ility]” means “federally enforceable or legally and practicably enforceable by a state or local air pollution control agency.” *Id.* at 3–4; *see* 40 C.F.R. § 52.21(b)(4). In other words, operational limitations only come into play when calculating a facility’s “potential to emit” if they are enforceable by an environmental agency, whether on the federal, state, or local level. Federal Enforceability Policy at 3–4. Thus, the emissions decrease resulting from the Forestdale site plan’s limitation on hours of operation, though environmentally laudable, only affects the Facility’s “potential to emit” if the plan can be enforced by EPA or NUARB. *See id.*

But Forestdale has not empowered either agency to police the Facility’s hours of operation; rather, responsibility for enforcement falls to the Village of Forestdale’s building inspector. *Sylvanergy*, slip op. at 5. No matter how this Court feels about building inspectors, surely it must agree that they are not “state or local air pollution control agenc[ies].” Federal Enforceability Policy, at 4. Therefore, the hours limitation in the site plan does not enter into this Court’s “potential-to-emit” calculus, and the Facility’s 96% capacity factor determines its classification under the Act. Because the Facility will emit 255 tons per year of carbon monoxide when operating at this level, NUARB did not act arbitrarily in labeling it a “major emitting facility”; its decision should accordingly be affirmed. *See* 5 U.S.C. § 706(2)(A).

- a. This Court should defer to the Federal Enforceability Policy.**

This Court does not need to be reminded that *Chevron* deference reaches beyond the confines of notice-and-comment rulemaking. *Supra*, Part II.A.ii.a; *Barnhart*, 535 U.S. at 221–22. The congressional expectation that “the agency . . . be able to speak with the force of law” may apply independent of formal

agency procedures, *Mead*, 533 U.S. at 229, on a showing of deference-conferring factors, *Barnhart*, 535 U.S. at 222. Several such factors are present here.

First, the Policy's interpretation has been applied for almost twenty years. *Id.* at 220 (granting "particular deference to an agency interpretation of 'longstanding' duration"). Second, the complexity of the Clean Air Act compels a degree of deference to EPA's administrative efforts, as the Agency has enough experience with the Act to navigate its dense provisions. *Gen. Elec. Co.*, 53 F.3d at 1327. Third, the scientific expertise necessary to administer the Act commands still more deference to EPA's interpretation. *Marsh*, 490 U.S. at 377. Fourth, the Policy reflects thorough consideration. Not only did two high-ranking EPA officials sign off on it, but it also contains a thoughtful response to the D.C. Circuit's objections to the original regulation. *Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009) (explaining that policies generally demonstrate thoroughness of consideration when issued by upper-level officials); Federal Enforceability Policy at 3–4. And fifth, EPA's interpretation reaches a reasonable result. The Federal Enforceability Policy prevents the absurd result of putting the administration of the CAA in the inexperienced hands of entities without environmental know-how—reflecting congressional intent that EPA preside over the administration of the Act. *See* 42 U.S.C. § 7601. Therefore, this Court should grant *Chevron* deference to the Federal Enforceability Policy.

But even if this Court declines to apply *Chevron*, the Policy is still due substantial *Skidmore* deference. 323 U.S. at 140; *see supra*, Part II.A.ii.a. It bears repeating that, although merely persuasive, *Skidmore* can be a deciding factor in the interpretation of a complex statute like the CAA. *Milhollin*, 444 U.S. at 570. And as demonstrated by the sheer number of factors compelling deference in this case, EPA's Policy should decide the issue under whichever agency-deference rubric this Court chooses to apply. Accordingly, because the hours limitation is not federally enforceable, it does not decrease the Facility's potential to emit. Because the Facility will emit 255 tons per year of carbon monoxide at 96% capacity, NUARB did not act arbitrarily or capriciously in determining it to be a "major emitting facility."

**III. BECAUSE THE POWER PLANT IS A MAJOR
EMITTING FACILITY SUBJECT TO PSD REVIEW,
SYLVANERGY MUST INSTALL BACT FOR
GREENHOUSE GAS EMISSIONS.**

The Clean Air Act requires PSD-permit applicants to install “the best available control technology *for each pollutant* [that is] subject to regulation under [the Act]” and emitted by the facility. 42 U.S.C. § 7475(a)(4) (emphasis added). In other words, BACT applies not only to the pollutants that trigger the “major emitting facility” threshold, *see id.* § 7479(3), but to every emitted pollutant regulated by the CAA. *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2448 (2014) (“[T]he BACT provision [cannot] bear a narrowing construction.”). The notable breadth of this provision is no accident. Rather, it reflects congressional recognition that “preserv[ing], protect[ing], and enhanc[ing] the air quality” in our nation’s pristine areas requires across-the-board regulation. 42 U.S.C. § 7470(2).

This breadth ties the BACT requirement to the evolving CAA landscape—most importantly for purposes of this appeal, the long-overdue move toward regulation of greenhouse gases. Because of EPA’s promulgation of greenhouse gas emissions standards for motor vehicles, greenhouse gases are now air pollutants regulated under the CAA. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600) (“Tailpipe Rule”). Accordingly, the PSD program requires installation of BACT for these gases. 42 U.S.C. § 7475(a)(4). And because neither the Act nor the case law carves out an exception for the use of biomass fuel, Sylvanergy has no legal basis to claim its wood-burning plant is exempt from the BACT requirement. *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). Once again, this Court reviews NUARB’s decision on the markedly deferential arbitrary-and-capricious standard. *Alaska Dep’t*, 540 U.S. at 496–97; 5 U.S.C. § 706(2)(A).

A. Greenhouse gases are “subject to regulation” under the CAA, and therefore may be subject to the BACT requirement.

After *Massachusetts v. EPA* read the CAA to authorize regulation of greenhouse gases and required EPA to give a statutory justification for its failure to do so, *see* 549 U.S. 497, 532 (2007), the Agency revamped its air-pollution regulation. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,699 (Dec. 15, 2009) (codified at 40 C.F.R. ch. 1) (“Endangerment Finding”) (staking out EPA’s position that greenhouse gases endanger public health). The Endangerment Finding led to the promulgation of the Tailpipe Rule, in turn “automatically trigger[ing] regulation of stationary greenhouse gas emitters under” the PSD program. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012), *rev’d on other grounds, Util. Air*, 134 S.Ct. 2427.⁴

Sylvanergy cannot keep a straight face and contest the applicability of BACT to greenhouse gas emissions. Not only is the CAA’s “each pollutant subject to regulation” language so broad that the D.C. Circuit considered it beyond the realm of reasonable misinterpretation, *Ala. Power Co. v. Costle*, 636 F.2d 323, 404 (1979), but the Supreme Court has definitively closed the door on this argument. *Util. Air*, 134 S.Ct. at 2449. One year ago, the Court emphatically rejected this same contention and held that “each pollutant subject to regulation” does not “mean anything other than what it says.” *Id.* at 2448. Thus, where a source is a “major emitting facility” by virtue of non-greenhouse pollutants, EPA may require “compliance with greenhouse-gas BACT” so long as “the source emits more than a de minimis amount of greenhouse gases.” *Id.* at 2449.

4. EPA’s admittedly mistaken reading of the Act led it to draft further rules to help ease the administrative burden of regulating greenhouse gases, which are emitted more commonly and in greater amounts than other pollutants. *See Util. Air*, 134 S.Ct. at 2442–43. The Supreme Court struck these regulations down as exceeding the scope of the CAA, *id.*, but expressly approved EPA’s position that it may apply BACT to greenhouse gases emitted by a source that is a “major emitting facility” by reason of its emission of other pollutants. *Id.* at 2449.

Sylvanergy has proposed such a source. Not only do its non-greenhouse emissions qualify it as a major emitting facility, *see supra* Part II.B, but its full-capacity operation will cause the emission of a hardly *de minimis* 350,000 tons per year of greenhouse gases, *see Sylvanergy*, slip op. at 8. Accordingly, binding Supreme Court precedent authorizes NUARB's requirement of BACT for greenhouse emissions. *Util. Air*, 134 S.Ct. at 2449.

B. Sylvanergy's use of biomass fuel does not exempt the Facility from the operation of the Clean Air Act—including the requirement to install BACT.

Sylvanergy is left only with its argument that biomass-fueled polluters should be categorically exempt from BACT for greenhouse gases. *See Sylvanergy*, slip op. at 8. To support this contention, it points to a temporary EPA regulation that has both expired *and* been vacated by the D.C. Circuit, *Biological Diversity*, 722 F.3d at 409–12, and to controversial (if not outdated) science supporting a policy argument with no basis in the text of the Act. Neither should persuade this Court. Rather, because there is no statutory or regulatory authority for this biomass exemption, and the prevailing scientific views undermine Sylvanergy's stance, this Court should uphold NUARB's requirement of BACT for Sylvanergy's greenhouse gas emissions.

First, the so-called "Deferral Rule." Deferral for CO₂ Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011) (codified at 40 C.F.R. pts. 52, 52, 70, 71) ("Deferral Rule"). In the Deferral Rule, EPA sought to delay PSD review of biomass-fueled sources so that it could better understand the interplay between the greenhouse gases emitted by these sources and the carbon sequestration caused by regrowth of the biofuels. *Id.* at 43,496. But no matter how helpful this rule would be to Sylvanergy's present appeal, it is no longer valid. By its own terms the rule was to expire more than a year ago. *Id.* at 43,490. But even before its July 2014 expiration date, the D.C. Circuit vacated the rule as unjustified by the doctrines of administrative law that EPA invoked to justify the regulation. *Biological Diversity*, 722 F.3d at

409–12. As a result, Sylvanergy must turn to the statutory text to support its claimed exemption. But this, the petitioner cannot do.

The CAA plainly requires the installation of BACT in major emitting facilities. 42 U.S.C. § 7475(a). The Act defines a “major emitting facility” to include both “fossil-fuel fired” sources with potential to emit 100 or more tons per year, and “any other source with the potential to emit [250] tons per year or more of any air pollutant”; it gives no further qualification on which to base this biofuel exception. *Id.* § 7479(1). Nor do EPA’s definitional regulations provide a basis to claim this exception. *See* 40 C.F.R. § 52.21(b)(1)(i) (no mention of bioenergy). Sylvanergy would have this Court rewrite the CAA to add an exception for biomass-fueled sources—an exception that simply is not there. *See* 42 U.S.C. § 7479; *Comm’r v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121 (1987) (explaining that courts may not “disregard what Congress has plainly and intentionally provided” in statutory text). Such a result is unwarranted by the text, and flouts Supreme Court precedent. *Util. Air*, 134 S.Ct. at 2445 (rejecting an attempt to “rewrite[e] unambiguous statutory terms” in § 169(1) of the Clean Air Act).

Finally, hobbled by the lack of statutory and regulatory support for its position, Sylvanergy limps into a policy appeal. The petitioner argued before the EAB that the greenhouse gas emissions due to the burning of “biomass fuels such as wood . . . are fully offset” by forest regrowth and the resulting “carbon sequestration.” *Sylvanergy*, slip op. at 8. To be sure, this idea once warranted serious scientific consideration and was even the basis of EPA’s now-vacated Deferral Rule. *See* Deferral Rule at 43,492. But the intervening years of research have not been kind to this hypothesis. *E.g.*, Roger A. Sedjo, *Comparative Life Cycle Assessments: Carbon Neutrality & Wood Biomass Energy* 9 (2013) (“GHG emissions targets would not be assisted by the use of bioenergy.”); *accord* Carla Santos & Alisha Falberg, *Light My Fire: The Use & Policies of Woody Biomass as a Heat Source*, 15 Sustainable Dev. L. & Pol’y 41, 43 (2015) (reviewing the scholarship and concluding that “woody biomass for energy can no longer be considered a ‘carbon neutral source’”). Thus, not only is Sylvanergy’s claimed exemption completely detached from the text of the statute; it is bad policy. This Court therefore should

uphold NUARB's application of BACT to Sylvanergy's greenhouse gas emissions.

IV. NUARB PERMISSIBLY REJECTED WOOD GASIFICATION AND PARTIAL CARBON CAPTURE AND STORAGE AS BACT BECAUSE THE CONCEPT REDEFINES THE FACILITY.

Here also, this Court asks whether NUARB's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Alaska Dep't*, 540 U.S. at 496–97. It bears repeating—this standard of review is notably deferential. *See supra* Part II.

A. WGPCCS redefines the Facility because it changes the Facility's fundamental scope.

Historically, EPA has not asked applicants to redefine their sources when considering available control alternatives as part of the BACT requirement. NSR Manual at B.13. For example, EPA has not required applicants proposing a coal-fired electric generator to consider building a natural gas-fired electric turbine as part of their BACT analysis, despite the fact that the turbine may be inherently less polluting than the generator. *Id.* Admittedly, state agencies have the discretion to engage in a "broader analysis," which might include "the consideration of alternative production processes." *Id.* But the decision to engage or not engage in an analysis beyond standard control technologies is committed entirely to the permit authority's judgment. *See id.*; *accord Heckler*, 470 U.S. at 831. Here, NUARB permissibly chose not to consider alternative production processes as part of its BACT analysis. *See Sylvanergy*, slip op. at 7.

i. Changing a facility's "fundamental scope" redefines that facility.

In re Desert Rock Energy Co. outlines the test for whether an available control alternative redefines the relevant source. 14 E.A.D. 484 (EAB 2009). In *Desert Rock*, the EAB stated, "[T]he permit applicant initially 'defines the proposed facility's end,

object, aim, or purpose—that is the facility’s basic design” *Id.* at 530 (footnote omitted) (quoting *In re Prairie State Generating Co.*, 13 E.A.D. 1, 22 (EAB 2006)). The permitting agency does more than simply rubber stamp the applicant’s design, though: the permit issuer should take a “hard look” to determine which design elements are inherent and which might be changed without disrupting the design’s purpose. *Id.* (quoting *Prairie State*, 13 E.A.D. at 26). But the permitting agency has “broad discretion” to determine the mutability or immutability of design elements. *Id.*

Prairie State and *Desert Rock* outline the dichotomy between available control alternatives that redefine their source—and that might be permissibly rejected—and those that must be treated in the BACT analysis. In *Prairie State*, the EAB refused to require consideration of an alternative fuel (low-sulfur coal) as possible BACT for a proposed coal-fired power plant co-located with a high-sulfur coal mine. *Prairie State*, 13 E.A.D. at 28; see also *Sylvanergy*, slip op. at 13. The power plant in *Prairie State* was designed to burn the locally available coal, so requiring low-sulfur coal as BACT would have impermissibly “redefined” the source. *Prairie State*, 13 E.A.D. at 28; see also *Sylvanergy*, slip op. at 13.

The Seventh Circuit upheld the *Prairie State* decision in *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007). The appellate court emphasized that “to convert the design from that of a mine-mouth plant to one that burned coal obtained from a distance would require that the plant undergo *significant modifications*.” *Id.* at 655 (emphasis added). In light of EPA precedent, the court wrote against requiring proposed facilities to change their “fundamental scope” or an “inherent aspect of the proposed project.” *Id.* at 655–56. The court noted that when it is not obvious where to draw the line between control technology and redesign, “it makes sense to let the [agency] . . . draw it, within reason.” *Id.* at 655.

Post-*Prairie State* and *Sierra Club*, the EAB handed down its decision in *Desert Rock* and granted EPA’s motion for voluntary remand of a PSD permit it had issued for a proposed

coal-fired electric generating facility.⁵ *Desert Rock*, 14 E.A.D. at 540. The Board also remanded the permit on the independent ground that EPA had “abused its discretion” in declining to consider IGCC as part of its BACT analysis. *Id.* The Board found two facts important: first, EPA failed to provide a rational explanation why IGCC would redefine the source, particularly when the applicant itself had indicated that IGCC was a technology capable of satisfying its business purpose; second, EPA failed to adequately explain its conclusion when IGCC had been analyzed at similar facilities. *Id.* at 538. The Board remanded the PSD permit for EPA to provide further explanation for its determination that IGCC would redefine the source, or for the Agency to include IGCC in its BACT analysis. *Id.* at 539.

ii. WGPCCS changes the fundamental scope of the Facility.

The present case mirrors *Prairie State* and differs significantly from *Desert Rock*. Similar to *Sierra Club* (which upheld *Prairie State*), conversion of Sylvanergy’s proposed facility from one that “generate[s] electricity by burning wood” to one that generates electricity by “gasifying wood and burning gas” would require the Facility to undergo “significant modifications.” *Sylvanergy*, slip op. at 13; *Sierra Club*, 499 F.3d at 655. It would change the Facility’s “fundamental scope” by altering an “inherent aspect of the proposed project”—namely the primary means of electricity generation at the facility, burning wood. *Sierra Club*, 499 F.3d at 655–56.

Even if this Court believes that WGPCCS straddles the line between control technology and redesign of the Facility, NUARB’s determination of redesign was hardly arbitrary. *See id.* at 656 (citing *Alaska Dep’t*, 540 U.S. at 496–97) (“We hesitate in a

5. It bears emphasizing that the remand in *Desert Rock* was *voluntary*. The Board did nothing that EPA did not want it to do. EPA itself approached the Board seeking remand of the permit, for a variety of reasons. *Desert Rock*, 14 E.A.D. at 488–89. Among them: so that it might reconsider its failure to include integrated gasification combined cycle (“IGCC”) in its BACT analysis. *Id.* at 488. Unsurprisingly, the case for remand is stronger when the agency itself pushes for remand. *Cf. Heckler*, 470 U.S. at 831 (noting the peculiar expertise of agencies).

borderline case . . . to pronounce the [agency's] decision arbitrary . . ."). There is a distinction in this case between the tendency of WGPCCS to redesign the Facility and its availability as a potential control technology. But that distinction is one of degree, and potentially minute; the treatment of such differences in a technically complex field with limited statutory guidance "is entrusted to the judgment of the agency." *Id.* (citing *Chevron*, 467 U.S. at 842–43).

Different from *Desert Rock*, NUARB did not file a motion for voluntary remand of the PSD permit issued to Sylvanergy. To be sure, the Board in *Desert Rock* also found an independent ground for remand: EPA abused its discretion in declining to consider IGCC as part of its BACT analysis, based on the scant administrative record. *See Desert Rock*, 14 E.A.D. at 540. But with EPA's motion for voluntary remand firmly situated at the heart of the proceedings in *Desert Rock*, the Board's focus on remand rather than agency discretion was unremarkable. This Court should accordingly place little emphasis on the Board's independent ground for remand in *Desert Rock*.

Even so, the two factors that led the EAB to independently remand in *Desert Rock* are not present here. There is no evidence that Sylvanergy represented at any point that WGPCCS was a technology that could be considered for its facility, i.e., that could satisfy its business purpose. *See generally Sylvanergy*. Neither is there evidence of previously issued permits at facilities similar to Sylvanergy's in which WGPCCS was analyzed. *See generally id.* NUARB was under no obligation to offer an enhanced explanation, like that required under the tenets of *Desert Rock*, for its determination that WGPCCS redefines the Facility. The agency only had to give a traditional "hard look" at the facility's alleged purpose and had broad discretion to make its redesign determination from there. *See Desert Rock*, 14 E.A.D. at 530. NUARB did just that, and permissibly rejected WGPCCS as BACT for the Facility.

B. NUARB’s analysis was sufficiently rigorous because the agency considered carbon capture and storage generally, among other alternatives, in line with EPA guidance.

Lending support to the rigor of its BACT analysis, NUARB considered carbon capture and storage generally and rejected it as technically infeasible at the Facility. *See Sylvanergy*, slip op. at 6. Where greenhouse gas emissions are the subject of BACT analysis, EPA guidance classifies carbon capture and sequestration as an “available” add-on pollution control technology. *See* Office of Air and Radiation, U.S. EPA, *Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production* 13 (2011) (“Guidance—Bioenergy Production”). Furthermore, EPA guidance states that carbon capture and sequestration “should be listed” as part of BACT analysis for greenhouse gases, although “[t]his does not necessarily mean [it] should be selected.” *Id.* at 14. NUARB adhered to EPA’s guidance: “It first considered . . . carbon capture and storage,” but rejected that concept because “there was no proven technology.” *Sylvanergy*, slip op. at 6.

WGPPCS differs significantly from carbon capture and sequestration. The former partially incorporates the latter, but it also adds the specific design element of wood gasification to the generalized concept of carbon capture and storage. EPA directs that carbon capture and sequestration should be included, at least initially, in BACT analysis for greenhouse gases. *See* Guidance—Bioenergy Production at 14. But EPA leaves to the discretion of permitting agencies whether to include more specialized, design-specific forms of carbon capture and sequestration, such as WGPPCS, in BACT analysis. To understand otherwise—to require inclusion of specialized forms of carbon capture and sequestration—is to read into EPA guidance words that simply are not there. *See Schooler v. United States*, 231 F.2d 560, 564 (8th Cir. 1956) (“Confusion results when an attempt is made to read into the law words which are not there.”). Regardless, NUARB’s consideration of carbon capture and storage as BACT for the Facility demonstrates the agency’s commitment to EPA guidance and the overarching rigor with which it conducted its BACT analysis.

V. NUARB PROPERLY IMPOSED THE SUSTAINABLE FOREST PLAN AS BACT BECAUSE THE PLAN IS NOT A “BEYOND-THE-FENCE” MEASURE, AND REGARDLESS, THE CAA DOES NOT OUTLAW SUCH MEASURES.

Again, this Court may only ask whether NUARB’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Alaska Dep’t*, 540 U.S. at 496–97. It bears emphasizing—this standard of review is quite deferential. *See supra* Part II.

A. Biofuel combustion is not—of itself—BACT because the process can act as a net source of carbon.

Before the EAB, Sylvanergy took the position that NUARB impermissibly imposed the Sustainable Forest Plan as BACT because, “since all biofuels are renewable fuels, biofuel combustion should be considered BACT per se without any additional controls.” *Sylvanergy*, slip op. at 11. This position is untenable in light of EPA guidance and scientific authority. *See generally* Guidance—Bioenergy Production; *supra* Part II (concerning the deference due agency proclamations). In essence, Sylvanergy contends that “the combustion of biofuels, by its very nature, is fully offset by the carbon sequestration effects of biofuel production.” *Sylvanergy*, slip op. at 11. Sylvanergy glosses over a principle fatal to its position, though.

Carbon sequestration can indeed offset the combustion of biofuels, but it does not always do so *fully*. *See* Guidance—Bioenergy Production at 6; *accord* Santos & Falberg, *supra* Part III.B (concluding that biomass is not a “carbon neutral” source). EPA guidance states, “[B]iogenic carbon stocks can act as a sink . . .” Guidance—Bioenergy Production at 6 (emphasis added). But importantly, the guidance also notes that “if more carbon is released than is sequestered, plant biomass acts as a net *source* of carbon.” *Id.* (emphasis added). When plant biomass is a net source of carbon, “[g]reenhouse gases emitted by the facility are still pollutants, and they may still be subject to controls.” *See Sylvanergy*, slip op. at 11.

At the permitting stage, Sylvanergy did not provide evidence to NUARB that its facility will be a net sink for carbon, rather than a net source of carbon. *See generally id.* Sylvanergy’s proposed facility has the potential to emit 350,000 tons per year of carbon dioxide equivalents.⁶ *Id.* at 5. Yet Sylvanergy “made no commitment that its fuel sources [will] be *sustainably harvested*,” and thus no commitment that its facility’s “net atmospheric impact [will be] accounted for and . . . negative or zero.” *Id.* at 11 (emphasis added); Guidance—Bioenergy Production at 8 (highlighting the importance of a net-negative or zero atmospheric impact); *see also* Santos & Falberg, *supra* Part III.B.

B. The Sustainable Forest Plan is not a “beyond-the-fence” measure because it is entirely within the control of Sylvanergy, and regardless, the CAA does not outlaw such measures.

Sylvanergy also takes the position that NUARB impermissibly imposed the Sustainable Forest Plan as BACT for its facility because “BACT cannot include ‘beyond-the-fence’ mitigation measures unrelated to the control of the actual emissions from the facility.” *Id.* at 11. This argument fails for two reasons: first, because the Plan is not a beyond-the-fence measure; second, and regardless of the first reason, because the CAA does not proscribe such measures.

i. The Plan is entirely within the control of Sylvanergy.

To the first point, the Sustainable Forest Plan is not a “beyond-the-fence” measure. The decisive factor in whether a measure is beyond the fence is *control*. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,829, 34,888 (June 18, 2014) (codified at 40 C.F.R. pt. 60). For a measure to be beyond the fence, it must be “implemented outside of the affected units

6. The Facility will in fact emit 262,500 tons per year in light of its operating limits. *See Sylvanergy*, slip op. at 5. But those limits are not federally enforceable, and therefore do not affect the potential-to-emit calculation. *See supra* Part II.B.

and *outside their control*.” *Id.* (emphasis added). The Sustainable Forest Plan is not outside the control of Sylvanergy, though. *See Sylvanergy*, slip op. at 11–12 (finding that the Plan is “entirely within the control of Sylvanergy”). The Facility encompasses the dedicated reforestation area, such that one part of the Facility tempers emissions from another part of the Facility. *Id.*

ii. The CAA does not outlaw beyond-the-fence measures.

Second, even if the Sustainable Forest Plan is a beyond-the-fence measure, the CAA does not outlaw such measures: many provisions of the Act are open-ended and lend themselves—often intentionally—to agency discretion. *See Util. Air*, 134 S. Ct. at 2439 (“[W]e presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.”).

Given that statutory leeway, EPA guidance suggests that beyond-the-fence measures are appropriate for BACT consideration in the context of greenhouse gas emissions: “[B]ecause sequestration of CO₂ emissions in living plant material outside the boundaries of the facility may counteract the emissions from such facilities on a continuous basis, this unique dynamic merits consideration in the BACT analysis.” Guidance—Bioenergy Production at 8. Greenhouse gases are “well-mixed” in the atmosphere, so “the need to reduce them directly at the facility is of lesser importance so long as their net atmospheric impact is accounted for and is negative or zero.” *Id.*; *cf.* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,888–89 (“[W]e propose that the provisions of CAA section 111 do not by their terms preclude the BSER [Best System of Emission Reduction] from including [beyond-the-fence] measures.”). This Court should effectuate EPA’s reasonable understanding of greenhouse gas science and the BACT requirement and allow consideration of beyond-the-fence measures. *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 403 (2008) (holding that where ambiguity exists, “the agency may choose among reasonable alternatives”).

C. NUARB had a cogent rationale for selecting the Sustainable Forest Plan.

SOC argues that NUARB impermissibly imposed the Sustainable Forest Plan as BACT because the Plan “should have been rejected . . . as having unacceptable adverse environmental impacts.” *Sylvanergy*, slip op. at 12. Namely, SOC alleges that the Sustainable Forest Plan will “destroy biodiversity and promote tree diseases and pest invasions.” *Id.* The EAB noted that NUARB did not specifically address SOC’s concerns at permitting, but the Board also went on to find “no clear error” in the agency’s failure to treat them. *Id.*

NUARB is under no obligation to respond directly to every comment it receives from all interested parties. *See Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000); *see also Alaska Dep’t*, 540 U.S. at 497. The issuance of a PSD permit is an informal adjudication, as the CAA does not require that the determination be made “*on the record* after opportunity for an agency hearing.” 5 U.S.C. § 554(a) (emphasis added); *see also Phila. Newspapers, Inc. v. Nuclear Regulatory Comm’n*, 727 F.2d 1195, 1202 (D.C. Cir. 1984) (explaining that formal adjudications are only necessary where the statute requires a determination “*on the record* after opportunity for an agency hearing”) (emphasis added); *compare* 42 U.S.C. § 7475(a)(2) (no such requirement). And “an agency can define its own procedures for conducting an informal adjudication,” which do not have to include addressing each comment it receives. *Am. Airlines*, 202 F.3d at 797 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990)); *see also Sierra Club v. Peterson*, 185 F.3d 349, 367 n.26 (5th Cir. 1999) (quoting *Pension Benefit*, 496 U.S. at 655) (“An ‘informal adjudication [like the PSD-permit process] . . . contains only ‘minimal requirements[.]’”).

Moreover, in the context of a BACT determination, “[e]ven when an agency explains its decision with ‘less than ideal clarity,’ a reviewing court will not upset the decision on that account ‘if the agency’s path may reasonably be discerned.’” *Alaska Dep’t*, 540 U.S. at 497 (citation omitted). NUARB had a cogent rationale for selecting the Sustainable Forest Plan as BACT for the Facility. *See Sylvanergy*, slip op. at 7. The agency grounded its decision in the economic feasibility of the Plan, and its estimated

70% offset of the facility's greenhouse gas emissions. *Id.* Supreme Court precedent will not allow this Court to "upset" NUARB's decision. *Alaska Dep't*, 540 U.S. at 497.

CONCLUSION

This Court lacks jurisdiction over the NAD denial. The denial was neither the end of NUARB's decisionmaking process nor a determination of Sylvanergy's rights and obligations, and accordingly was not the sort of "final action" this Court has the power to review. Sylvanergy cannot avoid this result by twisting the words of the APA, because the denial was committed to NUARB's discretion and therefore outside the purview of the APA's judicial-review provisions.

Even if this Court can review the "major emitting facility" determination, NUARB did not act arbitrarily or capriciously in so classifying the Facility. Although the plain text of the CAA and EPA's primary-activity test show that the Facility's ULSD start-up burners do not make it a fossil-fuel fired source, the Facility is still a major emitter by reason of its potential to emit more than 250 tons per year of carbon monoxide. The site plan imposed by the Village of Forestdale is not a federally enforceable limitation under EPA guidance, and consequently does not affect the Facility's potential to emit. Accordingly, NUARB did not act arbitrarily in finding the Power Plant to be a major emitting facility.

Similarly, NUARB's requirement of BACT for the Facility's greenhouse gas emissions was neither arbitrary nor capricious. EPA regulation of greenhouse gases in the motor-vehicle context triggered PSD requirements for greenhouse emissions, as recognized by the Supreme Court. Because the Facility will emit a massive amount of greenhouse gases per year, and neither the Act itself nor sound policy allow for a biofuel-plant exemption, NUARB properly required Sylvanergy to install BACT for greenhouse emissions.

And finally, NUARB's robust procedures and peculiar expertise were at their zenith when the agency selected the Sustainable Forest Plan as BACT for the Facility. The agency employed a rigorous top-down approach to analyze the available control alternatives—the same diligent approach outlined by EPA guidance. The Plan represented the most effective, technically feasible alternative that did not require Sylvanergy to change the fundamental scope of its project. The Plan is a sensible alternative—economically manageable, technically effective, and accessible to Sylvanergy. NUARB properly selected it as BACT for the Facility.