



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

October 21, 2019

THE ADMINISTRATOR

Mr. John D. Walke  
Director  
Clean Air, Climate and Clean Energy Program  
Natural Resources Defense Council  
1200 New York Avenue, NW, Suite 400  
Washington, D.C. 20005

Dear Mr. Walke:

I am responding to your March 2, 2009, Petition for Reconsideration (the 2009 Petition) on behalf of the Natural Resources Defense Council regarding the U.S. Environmental Protection Agency's final rule titled "Prevention of Significant Deterioration, Nonattainment New Source Review and Title V: Treatment of Certain Ethanol Production Facilities Under the 'Major Emitting Facility' Definition" (final Ethanol Rule). 72 FR 24060 (May 1, 2007). The final rule amended EPA regulations to exclude ethanol manufacturing facilities from the listing of chemical process plants contained in the definitions of major source that apply for New Source Review and title V purposes. The result of this exclusion is to increase the applicability threshold for ethanol manufacturing facilities from 100 to 250 tons per year of any regulated pollutant for the Prevention of Significant Deterioration program. Additionally, the regulations, as amended, no longer require fugitive emissions to be accounted for in determining the major source status of ethanol manufacturing facilities for title V and NSR purposes.

The 2009 Petition contains four primary objections:

- (I) that the final Ethanol Rule violates the plain meaning of the term "chemical process plant" as used in section 169 of the *Clean Air Act*;
- (II) that the EPA did not provide opportunity to comment on the findings of environmental consequence in the rule, and that those findings are arbitrary and capricious;
- (III) that the rule violates the anti-backsliding provisions of CAA section 193 with regard to nonattainment areas; and
- (IV) that the EPA failed to conduct a proper "CAA Section 302(j) Rulemaking."

The NRDC alleges that each objection is related to regulatory language and the EPA interpretations that appeared for the first time in the May 1, 2007, final rule, and, thus, the grounds for these objections arose after the period for public comment. The NRDC also alleges that its objections are of central relevance to the outcome of the rule because they demonstrate

that the rule is “arbitrary and capricious.” The 2009 Petition concludes that section 307(d)(7)(B) of the CAA<sup>1</sup> requires the EPA to convene a proceeding for reconsideration of the rule and to provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

In a prior July 2, 2007, Petition for Reconsideration (the 2007 Petition), the NRDC raised objections similar, if not identical, to objections II, III and IV of the 2009 Petition described above. In a March 27, 2008, letter, the EPA denied the 2007 Petition in full for the reasons articulated in that letter. 73 FR 24174 (May 2, 2008).

After careful review of the objections raised in the NRDC’s 2009 Petition and after taking account of developments subsequent to the March 27, 2008, letter denying the NRDC’s 2007 Petition, the EPA hereby grants in part and denies in part the 2009 Petition. The EPA grants the 2009 Petition with regard to the third objection raised in the 2009 Petition (objection III above and as set forth below). Specifically, the EPA is granting the request to reconsider the portions of the final Ethanol Rule applicable to nonattainment areas, including 40 CFR §§ 51.165(a)(1)(iv)(C)(20), 51.165(a)(4)(xx) and 40 CFR part 51, Appendix S, (II)(A)(4)(iii)(t) and (II)(F)(20). The EPA will, therefore, convene a proceeding to reconsider these provisions, publish a public notice and provide opportunity for the public to submit comments.

The EPA otherwise denies the 2009 Petition with regard to the other three objections raised in the 2009 Petition (objections I, II and IV above), as well as the request that the rule be stayed. The NRDC has failed to establish that the objections meet the criteria for reconsideration under section 307(d)(7)(B) of the CAA. Section 307(d)(7)(B) of the CAA requires the EPA to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule “can demonstrate to the Administrator that it was impracticable to raise such objection within [the public comment period] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” The requirement to convene a proceeding to reconsider a rule is, thus, based on the petitioner demonstrating to the EPA both: (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e. within 60 days

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<sup>1</sup> Section 307(d)(7)(B) of the CAA, 42 U.S.C. § 7606(d)(7)(B), provides:

Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

after publication of the final rulemaking notice in the *Federal Register*, see CAA section 307(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule.

The claims in objections II and IV largely mirror claims previously denied in the March 27, 2008, letter denying NRDC's 2007 Petition. The discussion below largely tracks the rationale provided in the March 27, 2008, letter with some additional clarifications.

#### **I) Meaning of Chemical Process Plants**

The NRDC's first objection relates to the plain meaning of the term "chemical process plants" as found within the definition of "major emitting facility" in section 169(1) of the CAA. 42 U.S.C. § 7479(1). The NRDC argues that fuel ethanol facilities are "chemical process plants" within the plain meaning of the term as used in CAA section 169 and therefore must be considered major emitting facilities with a 100 tpy threshold for PSD purposes. Noting that the final Ethanol Rule refers to natural fermentation, the NRDC alleges that the EPA did not contend that fuel ethanol is created by anything other than a chemical process. The NRDC contends that fermentation is a chemical reaction and that the process of making fuel ethanol includes other chemical processes, such as distillation and dehydration. In addition, the NRDC claims that the EPA has never contended nor established that fuel ethanol facilities are distinct from other sources listed in the "chemical process plants" source category. Citing to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), the NRDC concludes that Congress has directly spoken to the issue, that ethanol facilities are "chemical process plants" under the plain meaning of the statute, and, thus, the final Ethanol Rule's exclusion of fuel ethanol facilities from the definition of "chemical process plants" violates the plain language of the statute.

The EPA finds that this claim does not satisfy the requirements of reconsideration under CAA section 307(d)(7)(B). This precise issue was presented at proposal, raised during the public comment period and addressed by the EPA in the preamble to the final Ethanol Rule. In the proposed Ethanol Rule, the EPA stated that Congress showed no specific intent to include ethanol fuel production facilities in the definition of chemical process plants and that it was the decision of the EPA alone to use Standard Industrial Classification codes to define the source categories listed under CAA section 169, resulting in the inclusion of ethanol fuel production facilities as chemical process plants via SIC Major Group 28. Proposal for Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Corn Milling Facilities Under the "Major Emitting Facility" Definition 71 FR 12240, 12242-45 (March 9, 2006) (proposed Ethanol Rule). Specifically, the EPA stated:

Although EPA's policy . . . has been to define wet and dry corn milling facilities which produce ethanol fuel as being within [SIC] Major Group 28, EPA has the discretion to modify its classification of these facilities through notice and comment rulemaking. Congress did not indicate an intent, either in the statutory provision, or in the legislative history, to define ethanol fuel production facilities or wet and dry corn milling facilities as being within the chemical process plants source category, nor did Congress assign such facilities to any particular 2-digit "Major Group" within the SIC system. Given this absence of Congressional intent on the issue, EPA has the discretion to promulgate reasonable regulations

on the appropriate treatment of plants that manufacture ethanol for fuel under section 169(1) of the CAA and under the PSD, nonattainment NSR, and title V programs.

*Id.* at 12245.

During the public comment period, two commenters (David C. Bender of Garvey McNeil & McGillivray on behalf of Legal and Safety Employer Research and Patrice Simms and yourself) specifically commented on the plain meaning of “chemical process plants” within section 169 of the CAA. These comments generally asserted “that EPA’s proposal to remove ethanol fuel production from the chemical production category and effectively categorize it as a food production process contravenes Congressional intent, in addition to the plain language of section 169(1).” Letter from David C. Bender of Garvey McNeil & McGillivray on behalf of Legal and Safety Employer Research Providing Comments on the Proposed Ethanol Rule, at 14 (May 8, 2006); see also Letter from Patrice Simms and John Walke of NRDC Providing Comments on the Proposed Ethanol Rule, at 12–13 (May 8, 2006); Summary of Comments and EPA’s Responses on EPA’s Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V Programs’ Proposed Treatment of Certain Ethanol Production Facilities Under the “Major Emitting Facility” Definition, 71 FR 12240, at 20–25 (April 12, 2007) (Ethanol Rule Response to Comment (RTC)).

In the Ethanol Rule RTC, the EPA explained that Congress has not directly spoken to the inclusion of fuel ethanol facilities in the term “chemical process plants” under CAA section 169, and, thus, there was no plain meaning in the CAA regarding this issue. See 72 FR at 24063. As further noted in the preamble to the final Ethanol Rule, the EPA stated:

There is not a universally accepted definition of chemical process, and accepted definitions differ depending on whether you view the term from a purely scientific sense, or from an engineering sense, or for economic purposes. The scope of the chemical industry is in part shaped by custom and excludes industries that nevertheless engage in chemical processes, e.g., petroleum refineries are a separate category in the CAA § 169(1) list.<sup>[2]</sup> . . . The specific chemical process relevant here, natural fermentation, is common to many industries. For example, natural fermentation is used by non-ethanol producing food manufacturers, which Congress chose not to subject to the 100 tpy [threshold]. We find no plain meaning definition of “chemical process plants” that can be applied in light of these facts. Accordingly, we do not believe that whether or not an industry engages in a “chemical process” and specifically whether it engages in “natural fermentation” can be used as the decisive factor in determining whether Congress intended the industry to be included within the “chemical process plants” category.

*Id.*

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<sup>2</sup> Chemical reaction. (2018). In Encyclopedia Britannica. Retrieved July 18, 2018, from Encyclopedia Britannica. Online: <https://www.britannica.com/science/chemical-reaction>; Chemical industry. (2018). In Encyclopedia Britannica. Retrieved July 18, 2018, from Encyclopedia Britannica. Online: <https://www.britannica.com/technology/chemical-industry>.

Therefore, as this precise issue was addressed in the proposed rule, raised in public comment and addressed again in the RTC and preamble to the final Ethanol Rule, the EPA finds that the NRDC's claim does not satisfy the requirements for reconsideration under CAA section 307(d)(7)(B). The NRDC has not demonstrated "that it was impracticable to raise such objection within such time or [that] the grounds for such objection arose after the period for public comment."

## II) EPA's Findings on Environmental Consequences

The NRDC's second objection relates to the EPA's findings on the potential environmental consequences of the rule. The NRDC claims that these findings first appeared in the preamble to the final Ethanol Rule. The NRDC alleges that the EPA took no position on the environmental consequences of the rule at the proposal stage. The 2009 Petition alleges that the EPA's finding that the final Ethanol Rule "is not likely to result in significant net environmental harm" and the EPA's specific reasons supporting that finding were wholly unknown during the comment period. The NRDC further states that the environmental consequences of the final rule are of central relevance to the outcome of the rule, and, thus, the Administrator must convene a proceeding for reconsideration pursuant to CAA section 307(d)(7)(B).

As was previously addressed in the March 27, 2008, letter denying the NRDC's 2007 Petition, NRDC's claim that the EPA took no position on the environmental effects of the rule at the proposal stage is unfounded. 73 FR 24174. In the preamble of the proposed Ethanol Rule, the EPA discussed that the proposed rule may result in emissions increases. 71 FR at 12246. Further, the EPA stated that the rule would allow "synthetic minor" sources<sup>3</sup> to expand capacity without triggering PSD permitting requirements (i.e. sources increasing permit restrictions up to the 250 tpy threshold). The EPA explained that existing minor sources could increase emissions by more than 149 tpy and still remain minor sources. *Id.* Further, the EPA acknowledged that other emissions increases could occur because some sources would no longer be required to count fugitive emissions. *Id.* In addition, and tellingly, the EPA specifically requested comments on "the potential environmental effects" of the proposed rule. *Id.* In short, the EPA put the public on notice that that the rule could have the effect of increasing air pollutant emissions. *See id.*

Pursuant to the request at proposal, the EPA received comments from 30 parties (including environmental groups, states and industry) providing additional information on the effect of the proposed Ethanol Rule on air pollutant emissions. RTC at 36–43. These included comments from the NRDC which asserted that the proposed rule would result in increased emissions and that the EPA has failed to assess those emissions. See "Letter from Patrice Simms and John Walke of NRDC Providing Comments on the Proposed Ethanol Rule, at 8, 11–12 (May 8, 2006)." However, the NRDC's comments did not attempt to show how much emissions might increase or provide the EPA with information on how such emissions might impact air-quality concentrations in any part of the country. In the time between the proposed and final rules, the EPA drew conclusions regarding the scale and significance of the expected emissions increases

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<sup>3</sup> A "synthetic minor" source means a source that, while capable of emitting regulated NSR pollutants in amounts that are at or above the thresholds for major sources in 40 CFR 49.167, 40 CFR 52.21 or 40 CFR 71.2, as applicable, has taken a legally enforceable restriction so that its potential to emit is below these thresholds.

based on all the information obtained via its request for comment on the subject. A detailed discussion of these conclusions is included in the RTC and preamble to the final Ethanol Rule. See *id.*; 72 FR at 24070–73. The additional information and analysis from the preamble to the final Ethanol Rule supplemented what was available at proposal and was based in part on information submitted during the comment period.

After analyzing the emissions data and information related to ethanol production provided by commenters, the EPA had a better understanding of the expected increase in emissions and then concluded based on this information that the final Ethanol Rule is “not likely to result in significant net environmental harm.” 72 FR at 24062. While the EPA noted that the rulemaking may result in increased emissions, the EPA observed that improved economies of scale and the replacement of numerous small sources with larger sources could result in lower emissions in the long term. *Id.* at 24071. The EPA also made the following observation with regard to whether the scale of emission increases expected to result from the rule:

Based on this rulemaking, existing facilities located in attainment areas would be required to maintain their existing permit limits and other permit requirements unless and until revised through a permitting procedure which, to be consistent with CAA section 110(a)(2)(C) and 40 CFR 51.160, must be shown not to cause or contribute to a violation of the NAAQS. In addition, any expansion would also have to comply with any applicable NSPS, NESHAP, or State regulation.

*Id.*

Thus, the observations the EPA made in the preamble to the final Ethanol Rule that supported the EPA’s statement that the final Ethanol Rule is “not likely to result in significant net environmental harm,” were consistent with, and a logical outgrowth of, the discussion of potential emission increases in the preamble to the proposed rule.

The Petitioners argue that the EPA’s conclusion, based on public comments, that the final Ethanol Rule was “not likely to result in significant net environmental harm” was new. However, the NRDC has not demonstrated that it did not have the opportunity to submit information on the environmental harm that could result from the proposed rule. It is perfectly appropriate for the EPA to further evaluate and characterize the scale and significance of the emissions increases that the EPA had identified in the proposed rule before the promulgation of the final rule without initiating a new round of public comment on the EPA’s assessment of the emissions information received in response to the proposed rule’s request for feedback. Indeed, one of the central reasons to request comment on an aspect of a proposal is to obtain additional information from the public on which the EPA may rely when finalizing a rule, which is what happened here. Notice requirements “are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These objectives were clearly met in this rulemaking as the EPA solicited information on the rule’s environmental effects and acknowledged potential emissions increases in the proposal and

then reached a conclusion in the final rule based on both the analysis at proposal and the information it received via public comment. Additionally, as the regulatory changes finalized mirrored those of Option 1 of the proposal, there is no logical outgrowth issue akin to the type of “surprisingly distant” final rules which courts have deemed to represent a notice and comment violation. See *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). The Petitioners have not demonstrated that any objection to the final Ethanol Rule based on its potential to increase air-pollutant emissions could not have been raised during the comment period for the proposal. After the EPA had provided notice that the Ethanol Rule could result in increased air-quality emissions, the NRDC had ample opportunity to apprise the EPA of its views regarding the scale and significance of those emissions increases.

The 2009 Petition (on pages 5 through 9) also takes issue with the merits of several EPA statements made in conjunction with the discussion of the emissions increase expected from the final Ethanol Rule. One example is an EPA statement that building fewer, larger ethanol plants to meet ethanol demand may be more desirable from an emissions standpoint than building a greater number of smaller plants. In the preamble to the final Ethanol Rule, the EPA concluded that, after appropriately considering environmental protection and economic growth, the rule was justified. While the EPA noted that a result of the final Ethanol Rule may be potential emission increases, the EPA explained that these potential marginal increases would be justified by the other benefits of the final Ethanol Rule such as increased economic growth, which Congress identified as the third purpose of the PSD program. CAA section 160(3). In the EPA’s view, an objection is of central relevance to the outcome of the final rule only if it provides substantial support for the argument that the promulgated regulation should be revised. See, e.g., the EPA’s Denial of Petitions to Reconsider the CAA 111(b) Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Fossil Fuel-Fired Electric Utility Generating Units, 81 FR 27443 (May 6, 2016); see also *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 125 (D.C. Cir. 2012) (acknowledging and applying the EPA’s interpretation of the central relevance criterion). Put another way, an objection is of central relevance to the outcome of the rule if the EPA would have reached a different outcome in the rulemaking if the objection has merit. *Id.* The central relevance requirement of section 307(d)(7)(B) of the CAA is not demonstrated merely because, after having an opportunity to comment on the scale and significance of emissions increases, the NRDC does not agree with the conclusions the EPA drew from the data provided and manner in which the EPA weighed and balanced this information against other considerations.

### **III) The CAA’s Anti-Backsliding Provisions**

The NRDC’s third objection relates to the EPA’s the discussion of the anti-backsliding provision of section 193 of the CAA. The NRDC claims that the EPA’s conclusions that the rule does not violate CAA section 193 and the reasons offered in support of that conclusion were wholly unknown to the public during the comment period. Therefore, the NRDC concludes that the EPA must convene a proceeding for reconsideration. As described in the 2009 Petition, in the preamble to the final Ethanol Rule, the EPA had stated its disagreement with the court’s decision in *South Coast Air Quality Mgmt. District v. EPA*, 472 F.3d 882, 901 (2006) regarding the definition of “control” in CAA section 172(e) and noted that the agency had filed an appeal. 72 FR at 24074. The 2009 Petition further explains that since the time of the final Ethanol Rule, the

EPA's requests for rehearing and a petition for certiorari were denied. *Reh'g denied*, 489 F.3d 1245 (D.C. Cir. 2007); *cert. denied*, 128 S. Ct. 1065 (Jan. 14, 2008).

The preamble to the proposed Ethanol Rule did not discuss anti-backsliding in nonattainment areas under CAA section 193. During the public comment period, two commenters (David C. Bender of Garvey McNeil & McGillivray and Patrice Simms and yourself) expressed concern that the states would not be able to adopt the proposed changes without violating the anti-backsliding provisions of CAA section 193. RTC at 27–29; see “Letter from David C. Bender of Garvey McNeil & McGillivray Providing Comments on the Proposed Ethanol Rule, at 24–25 (May 8, 2006)”; “Letter from Patrice Simms and John Walke of NRDC Providing Comments on the Proposed Ethanol Rule, at 10 (May 8, 2006).” In response, the EPA explained in the final Ethanol Rule that the agency was not requiring a CAA section 193 demonstration because the Ethanol Rule did not in and of itself modify any “control requirements” applicable to nonattainment areas as relevant to CAA section 193.

As was previously observed in the March 27, 2008, letter denying the NRDC's 2007 Petition, the EPA did not address CAA section 193 in the proposed rule due to its belief that this part of the law was inapplicable to the ethanol rulemaking. 73 FR at 24174. The EPA denied the NRDC's 2007 Petition stating that it “has no obligation to discuss all inapplicable provisions of law in a rulemaking proposal” and “no obligation to convene a reconsideration proceeding when, in response to a comment asserting that a particular provision of law is relevant to the rulemaking the EPA explains that the provision is not relevant.” Further noting that “as evidenced by the comments that the EPA did receive concerning the applicability of CAA section 193, the NRDC has not established that it was impractical to raise such issues during the comment period.” The NRDC raised substantive comments regarding the applicability of CAA section 193 during the comment period, and the EPA considered and responded to these comments in promulgating the final rule. Thus, the NRDC had the opportunity to fully apprise the EPA of its concerns and reasoning concerning the applicability of CAA section 193, and the EPA does not believe that reconsideration is required under section 307(d)(7)(B) of the CAA.

However, as the Petition notes, the U.S. Court of Appeals for the D.C. Circuit denied the EPA's requests for rehearing, and the U.S. Supreme Court denied a petition for certiorari of the *South Coast Air Quality Mgmt. District* decision after the final Ethanol Rule was issued. For this reason, and because the issue of whether states can adopt the proposed changes without violating the anti-backsliding provisions under CAA section 193 may be seen to be of central relevance to the outcome of the portions of the rule affecting nonattainment NSR, the EPA, based on its inherent authority, believes that it is prudent to convene a discretionary reconsideration proceeding of the portions of the final Ethanol Rule applicable to nonattainment areas. The EPA will convene a rulemaking to provide the public an opportunity to comment on this issue. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 9–10, 14 (D.C. Cir. 2017) (“Agencies obviously have broad discretion to reconsider a regulation at any time [but] they must comply with the [APA]. . . Although the EPA had no section 307(d)(7)(B) obligation to reconsider the methane rule, it is free to do so as long as. . .”). See also *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (“Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.”); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) (“It is widely

accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.”).

#### **IV) CAA Section 302(j) Rulemaking**

The NRDC’s final objection relates to the final Ethanol Rule’s amendment of NSR regulatory provisions that govern treatment of fugitive emissions. The NRDC states that the EPA’s conclusion that the contents of the final Ethanol Rule constitute a sufficient CAA section 302(j) rulemaking and the rationale for that conclusion were wholly unknown to the public during the comment period and that there was no opportunity to comment on this determination.

As was previously addressed in the March 27, 2008, letter denying the NRDC’s 2007 Petition, the NRDC has not demonstrated that it was impractical to raise the foregoing objection during the comment period. 73 FR at 24174. The EPA stated in the preamble to the proposed Ethanol Rule, and further explained in the preamble to the final Ethanol Rule, that a CAA section 302(j) rulemaking is not required because the EPA is redefining a category already on the CAA section 302(j) list, not adding a source category to the CAA section 302(j) list. See 71 FR at 12245; 72 FR at 24068–69. In fact, two commenters (David C. Bender of Garvey McNeil & McGillivray on behalf of Legal and Safety Employer Research, and Patrice Simms and yourself of NRDC) asserted that the EPA had not addressed the requirements for listing a source category under CAA section 302(j). See RTC at 29–33; Letter from David C. Bender of Garvey McNeil & McGillivray on behalf of Legal and Safety Employer Research Providing Comments on the Proposed Ethanol Rule, at 22–24 (May 8, 2006); Letter from Patrice Simms and John Walke of NRDC Providing Comments on the Proposed Ethanol Rule, at 10 (May 8, 2006). In response, the EPA reiterated that the proposed Ethanol Rule did not constitute a CAA section 302(j) rulemaking. RTC at 30. Further, the EPA provided as a supplemental basis for its decision that, even if the final Ethanol Rule “triggers the section 302(j) rulemaking requirement, we believe this rulemaking constitutes a sufficient section 302(j) rule.” RTC at 31–33; 72 FR at 24068. Thus, the EPA took comment on this issue, received comments requesting the EPA to conduct a rulemaking meeting the requirements of CAA section 302(j) and further explained the rationale for the EPA’s position in response to comments received. See, e.g., 72 FR at 24068–69.

The final Ethanol Rule excludes those ethanol plants that produce ethanol by natural fermentation from being considered a “chemical process plant,” as that term appears on the regulatory list of sources for which fugitive emissions are counted in determining major source status (“the 302(j) list”). Section 302(j) of the CAA requires the EPA to conduct a rulemaking before requiring that fugitive emissions from a source be counted in determining whether the source is a major source.<sup>4</sup> In the preamble to the proposal, the EPA stated that a CAA section

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<sup>4</sup> Section 302(j) of the CAA states in relevant part “including any major emitting facility or source of fugitive emissions of any such pollutant as determined by rule by the Administrator.” See *Alabama Power v. Costle*, 636 F. 2d. 323, 369 (D.C. Cir. 1979). Through a series of rulemakings, the EPA outlined criteria that it will consider when listing a source category under CAA section 302(j) and promulgated a list of source categories, including chemical process plants, using these criteria. See 44 FR 51924 (September 5, 1979); 45 FR 52676 (August 7, 1980); 49 FR 43202 (October 28, 1994). The two criteria are:

302(j) rulemaking was not required because the EPA was redefining a category on the 302(j) list, but not changing the list. 71 FR at 12245. In response to comments on this issue, the EPA explained that the criteria for listing a source category under CAA section 302(j) were developed “in light of our overall belief that listing a category involved the agency’s exercise of policy discretion for which we carry a very low analytical burden in deciding to list a source category.” RTC at 32. The EPA further explained as follows:

Under this interpretation, section 302(j) functions as a useful “safety valve,” while at the same time minimizing the expenditure of Agency resources. 49 FR 3202, 43208 (October 26, 1984). Notably, the 1984 final rule preamble did not address how or whether that requirement applies to EPA’s decision to interpret a category already on the list to exclude a narrow set of sources. . . . Consistent with the “safety valve” purpose served by a section 302(j) rulemaking, we believe that it is not necessary to require a negative finding with respect to the same criteria before we interpret a category on the list to exclude certain types of sources.

RTC at 32. The preamble to the final Ethanol Rule reiterated the EPA’s position that a CAA section 302(j) rulemaking is not required, while at the same time noting that, if a CAA section 302(j) rulemaking were required, the proposed and final rules constituted an adequate CAA section 302(j) rulemaking.<sup>5</sup> 72 FR at 24068.

Additionally, the Petitioners have not demonstrated that the objection is of central relevance to the outcome of the rule. As discussed above, an objection is of central relevance to the outcome of the rule if the EPA would have reached a different outcome in the rulemaking if the objection has merit. See, e.g., *The EPA’s Denial of Petitions to Reconsider the CAA 111(b) Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Fossil Fuel-Fired Electric Utility Generating Units*, 81 FR 27443; see also *Coalition for Responsible Regulation v. EPA*, 684 F. 3d 102, 125 (D.C. Cir. 2012) (acknowledging and applying the EPA’s interpretation of the central relevance criterion). The Petition takes issue with an alternative rationale that supported the EPA’s consistent determination that a separate CAA section 302(j) rulemaking was not required. At the same time, the EPA specifically solicited comments on the requirements of CAA section 302(j), and the

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[a] determination by the EPA that the sources in a category pose a threat of significant air quality degradation in effect establishes a presumption that the sources should be subject to PSD and nonattainment review . . . Commenters then may seek to rebut this presumption by producing a record that unreasonable social or economic costs relative to the anticipated benefits would occur if PSD or nonattainment review were applied to a particular category of sources.

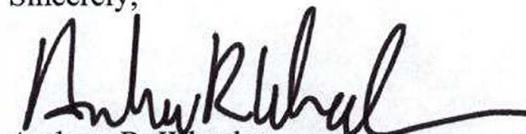
49 FR at 43203–08.

<sup>5</sup> Of note, the Petitioners do not point to any statute or regulation which governs the “302(j) list.” Rather, the Petitioners only identify the criteria described by the EPA in preamble language when adopting its fugitive emissions regulations. Petition at 11–12 (“At the time that the EPA adopted its fugitive emissions regulations it adopted two explicit criteria for such CAA section 302(j) determinations, namely: (1) whether sources in a category could degrade air quality; and (2) whether the cost of controlling fugitive emissions is unreasonable compared to the expected benefits. See 71 FR at 12244–45.”) The criteria identified in the 2009 Petition are not contained in statutory or regulatory text. The criteria reflect the EPA’s interpretation of an ambiguity in the CAA. The EPA is entitled to deference concerning its decision to not apply such criteria when redefining a listed source category rather than when adding one.

public was on notice that the EPA did not intend to conduct additional rulemaking to address CAA section 302(j). The EPA responded to comments arguing that the requirements of CAA section 302(j) had not been met by continuing to rely in the final rule on the agency's primary justification: *i.e.*, that a CAA section 302(j) rulemaking was not required. In the preamble to final Ethanol Rule, the EPA also explained that, in the alternative, even assuming that the EPA's reading of the statute was not correct, there would be no material error, insofar as the EPA had conducted a notice and comment process to amend the fugitive emission provisions. The Petitioners' objection that the agency's alternative CAA section 302(j) rationale was wholly unknown to the public during the comment period is not of central relevance to the outcome of the final rule as the EPA continued to rely on its primary rationale with regard to CAA section 302(j) as discussed in the proposal and would not have reached a different outcome in the rulemaking even if the Petitioner's objection to its alternative rationale had merit. Thus, the EPA is not required to convene a reconsideration proceeding to allow for additional comment on its determinations concerning the requirements of CAA section 302(j).

We appreciate your comments and interest in this matter.

Sincerely,



Andrew R. Wheeler