

**UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**
September Term, 2015

SYLVANERGY, L.L.C.,

PETITIONER,

AND

SAVE OUR CLIMATE, INC.,

PETITIONER,

- v. -

**SHELLY 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 for Petitioner SYLVANERGY, L.L.C.

ORAL ARGUMENT REQUESTED

Team 4
Counsel for Sylvanergy, L.L.C.

Dated: December 1, 2015

STATEMENT OF THE ISSUES

- I. Under the Clean Air Act and the Administrative Procedure Act (“APA”), a Court of Appeals has jurisdiction to review final agency action. Final agency action is authoritative, bears a consummation of agency action, and determines rights and legal consequences. Does this Court have jurisdiction to review NUARB’s Non-applicability Determination, when that determination is final and authoritative and determines Sylvanergy’s future rights and legal consequences regarding its proposed facility?
- II. Under the Clean Air Act, a stationary source is subject to PSD review if it is a “major emitting facility.” A “major emitting facility” is a fossil-fuel fired source that emits regulated pollutants over 100 tons per year, or is a source that emits regulated pollutants over 250 tons per year. Was NUARB’s determination that Sylvanergy’s proposed EGU was a “major emitting facility” arbitrary and capricious, when it is neither a fossil-fuel fired source nor does it emit over the 250 tons per year threshold?
- III. Under the Clean Air Act, biogenic-fueled sources were subject to an exemption from PSD review at the time NUARB issued its final permit. A biogenic-fueled source burns biomass such as wood, triggering this exemption under EPA’s Deferral Rule set to expire in July, 2014. Was NUARB’s imposition of PSD review for Sylvanergy’s biomass-fueled EGU arbitrary and capricious, when the final permit issued in June, 2014, and the EGU was not a major emitting source?
- IV. Under the Clean Air Act, a PSD permit imposes BACT on a source to control emissions of regulated pollutants. Through a BACT analysis, an agency may not impose technology controls that redefine a source or facility nor may it be based on unproven technology. Was NUARB correct to reject SOC’s requested wood gasification and partial carbon capture and storage as BACT, when that option would redefine the proposed source and facility based on an unproven technology?
- V. Under the Clean Air Act, a PSD permit imposes BACT on a source to control emissions of regulated pollutants. Through a BACT analysis, an agency must choose the best option based on a collateral impacts analysis, b) overarching policy concerns, and c) measures that are inside the facility’s “fence.” Was NUARB’s imposition of a Sustainable Forest Plan as BACT arbitrary and capricious, when a collateral impacts analysis and policy concerns call for use of biofuels as BACT and when the Forest Plan is “outside the fence” regulation?

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STATEMENT OF THE CASE

Sylvanery, L.L.C. is a competitive power generation business that sells electricity by burning biogenic fuel and has a desire to protect this Nation's air sources by implementing technology to protect New Union's air quality. However, the State of New Union Air Resources Board ("NUARB"), the agency authorized to issue preconstruction permits under the Clean Air Act ("CAA"), determined that Sylvanery must obtain a Prevention of Significant Deterioration ("PSD") permit prior to constructing its biomass-fired electric generating unit ("EGU"). Under protest, Sylvanery received a final PSD permit from NUARB. In the wake of this final agency action, Sylvanery now appeals NUARB's PSD applicability determination and certain terms of the final PSD permit.

I. The Prevention of Significant Deterioration Program

The CAA establishes a comprehensive federal-state scheme for protecting and enhancing the nation's air quality. Pursuant to sections 108 and 109 of the CAA, EPA establishes National Ambient Air Quality Standards ("NAAQS") for six "criteria" air pollutants: sulfur dioxide ("SO₂"), particulate matter ("PM_{2.5}"), carbon monoxide ("CO"), ozone, nitrogen oxides ("NO_x"), and volatile organic compounds ("VOCs"). 42 U.S.C. §§ 7408, 7409. The PSD program, established in Part C, Title 1 of the Act, 42 U.S.C. §§ 7470-7479, applies to clean air areas of the country also known as "attainment areas." *Id.* § 7471. The PSD program imposes the need for a preconstruction and operating permit for a "major emitting facility" that exceeds certain emission thresholds of any of the criteria pollutants. *Id.* §§ 7470, 7475.

NUARB is authorized by EPA delegation to issue PSD preconstruction permits pursuant to section 165 of the CAA, 42 U.S.C. § 7475 (2012). A new facility must implement the Best Available Control Technology ("BACT") set out in their PSD permit for all regulated

pollutants¹. *Id.* § 7475(a)(4); 40 C.F.R. § 52.21(b)(23)(i), (j)(2) (2015).

II. Sylvanergy’s Request for a Non-applicability Determination

Because the permitting process is costly and time-consuming, EPA will decide if PSD review is unwarranted and issues a “non-applicability determination” (“NAD”). Sylvanergy hoped to receive a NAD because is it not a major emitting facility and applied for one on January 15, 2013. R. at 5.

The proposed facility has a advanced stoker design wood-fired boiler with two ultra-low sulfur diesel (ULSD) start-up burners, each containing a maximum heat input rate of 60 MBtu/hr. R. at 5. The facility, located near the Village of Forestdale, New Union, houses a 500 MBtu/hour EGU, with the capacity to process and combust 150,000 tons of dry weight biomass fuel per year, and with a wood pellet fuel production plant. R. at 5. The facility will have conventional pollution control equipment such as a multiclone, electrostatic precipitator and multi-pollutant catalytic reactor. R. at 5.

Due to limitations imposed by the Village of Forestdale, enforceable by the city’s building inspector, the facility will operate at 75 percent capacity. R. at 5. These operational limits result in the following amount of emissions of regulated pollutants in tons per year (“TPY”): PM2.5: 47; SO2: 32; NOx: 80; CO: 190; VOCs: 30. R. at 5. Because of Sylvanergy’s operational limitations, Sylvanergy sought a NAD as its potential to emit (“PTE”) pollutants falls short of the relevant thresholds under section 169(1) of the CAA, 42 U.S.C. § 7479(1). R. at 5-6.

But NUARB denied the NAD. R. at 6. NUARB believed the biomass-fueled EGU was a fossil-fuel fired steam electric plant, subject to a 100 TPY PTE threshold, and relied on the EGU’s PTE at full operation not the required 75 percent capacity. R. at 6.

¹ In addition to the aforementioned criteria pollutants, this includes each pollutant subject to regulation under the CAA.

III. Sylvanergy's Request for a PSD Preconstruction Permit

NUARB published a draft permit for public comments on September 12, 2013. R. at 6. A non-profit environmental protection group—Save Our Climate (“SOC”)—and the New Union Loggers Association filed comments in addition to Sylvanergy's comments on the draft permit that regard the challenges raised in this appeal. R. at 6.

NUARB issued the final PSD permit to Sylvanergy on June 12, 2014 and authorized construction of a new 500 MBtu/hour biomass-fired electricity generation and wood pellet fuel production facility near Forestdale, New Union. R. at 4. The permit approved Sylvanergy's proposed flue controls for particulates, but NUARB imposed BACT for greenhouse gas (GHG) emissions, despite the fact that the facility utilized renewable, biogenic fuel sources. These sources fall short of the relevant emissions thresholds to be deemed a “major emitting facility.” R. at 6. As BACT for GHGs, Sylvanergy must implement a Sustainable Forest Plan, requiring the purchase and management of a dedicated reforestation area, yet SOC argued that NUARB should impose partial carbon capture and storage using a system of wood fuel gasification and combined cycle combustion. R. at 6-7.

IV. Sylvanergy's Petition for Review of NUARB's PSD Applicability Determination and Final Permit

NUARB and SOC filed petitions for review of the PSD permit with the Environmental Appeals Board (“EAB”) under 40 C.F.R. part 124 (2015). R. at 4. Both parties sought remand to NUARB for further consideration; however, the EAB denied both petitions on June 1, 2015, for a failure to demonstrate clear legal or factual error in the BACT determination and for a lack of jurisdiction to review the PSD applicability determination. R. at 4, 13-14. After both parties timely filed petitions with this Court pursuant to section 307(b) of the CAA, 42 U.S.C. § 7607(b)(1) (2012), this appeal followed.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review NUARB's PSD applicability determination. NUARB's determination was arbitrary and capricious for three reasons. First, the Court has jurisdiction under the CAA because NUARB's denial of the NAD constitutes final agency action. Second, if this Court finds the CAA does not confer jurisdiction for judicial review, the denial of the NAD constitutes final agency action under the APA because it bears all the hallmarks of final agency action. Finally, Sylvanergy filed its application for a preconstruction PSD permit under protest, preserving this issue for appeal.

In denying Sylvanergy's request for a NAD, NUARB clearly erred in determining that the proposed biomass-fueled EGU was a "major emitting facility." Under EPA's interpretation of the CAA, the proposed facility is not a fossil-fuel fired source. And the proposed facility's potential to emit under its practically enforceable operational limits fall below the PSD applicable threshold limits.

Additionally, NUARB erred by imposing PSD review for GHGs because at the time the permit was issued, the EPA deferred such review for EGUs burning biogenic fuel sources. The D.C. Circuit opinion striking down this Deferral Rule was abated, and this exemption expired on its own terms in the month after the final permit issued. Thus, NUARB's noncompliance with the Deferral Rule constitutes clear error, and PSD review for GHGs is only appropriate for stationary sources deemed to be a "major emitting facility," which the proposed EGU is not.

Finally, NUARB properly rejected wood gasification and partial carbon capture and storage as BACT, but committed clear error by instead imposing a Sustainable Forest Plan. SOC'S requested BACT of wood gasification and partial carbon capture and storage would impermissibly redefine the source and facility and is based on unproven technology, making this

option proper for elimination at Step 1 of the BACT analysis. Conversely, NUARB's imposition of a Sustainable Forest Plan was improper for three reasons. First, using biomass fuels was the proper BACT option under the collateral impacts review regarding environmental, economic and energy effects. Second, as an important matter of policy, NUARB should have considered biomass fuels as the optimal BACT option. Third, the Sustainable Forest Plan as BACT is an impermissible "beyond the fence" regulation and should not be upheld.

Accordingly, this Court should uphold Sylvanergy's challenges and find that actions taken by NUARB and the EAB in this matter were arbitrary and capricious, requiring a redetermination of the prior conclusions.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW NUARB'S DENIAL OF A NON-APPLICABILITY DETERMINATION.

This Court has jurisdiction to review NUARB's denial of the requested NAD, despite the EAB's ruling that it lacked authority to review anything other than a "PSD final permit decision." *See* 40 C.F.R. § 124.19(a) (2013). Sylvanergy does not challenge the underlying substance of any of NUARB's factual determinations, but contends that NUARB's conclusory findings that the proposed facility is a "major emitting source" are insufficient as a matter of law, argued below in Section II of this brief.

NUARB's denial of Sylvanergy's request for a NAD was not published in the Federal Register's Applicability Determination Index, as the record is silent on this issue. If this action been taken, Sylvanergy may have pursued an immediate appeal of that determination. NUARB provided Sylvanergy written notice of its applicability determination, which, together with NUARB's draft PSD permit, included NUARB's relevant applicability determination conclusions. Accordingly, this Court's jurisdiction to entertain Sylvanergy's appeal of NUARB's

denial of a NAD relies on theories rooted in the CAA and the APA to allow judicial review of agency action under the circumstances of this matter.

Because NUARB’s denial of the requested NAD was final and authoritative, it constitutes final agency action under the CAA. An exception should be given to the “exhaustion of remedies” statutory requirement because the PSD applicability determination is substantially collateral to the subsequent PSD review. NUARB has taken a final position on the applicability issue, and requiring Sylvanergy to halt the PSD application process—and its entire business venture—for an interlocutory appeal would have caused substantial hardship. Alternatively, the APA confers jurisdiction to this Court to review NUARB’s NAD denial because it constitutes final agency action lacking an available remedy in court. Finally, Sylvanergy preserved for appeal its objection to NUARB’s denial of the NAD by filing its PSD preconstruction permit application under protest.

A. NUARB’s Denial of a PSD Non-Applicability Determination constituted final agency action under the CAA.

Contrary to the EAB’s determination, this Court has jurisdiction to review NUARB’s denial of Sylvanergy’s request for a NAD. Section 7607(b)(1) of the CAA provides in relevant part:

A petition for review of the Administrator’s action [under certain enumerated sections not at issue here], *or any other final action of the Administrator under this chapter . . .* which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

CAA § 307(b), 42 U.S.C. § 7607(b)(1) (2012) (emphasis added). This provision is construed in light of the “presumption in favor of judicial review of agency action.” *Asbestos Info. Ass’n v. Reich*, 117 F.3d 891, 893 (5th Cir. 1997).

In *Puerto Rican Cement Company, Inc. v. US EPA*, the First Circuit Court of Appeals found that EPA’s denial of a NAD was “sufficiently final” to warrant review under 42 U.S.C. §

7607(b)(1). *P.R. Cement Co. v. EPA*, 889 F.2d 292, 296 (1st Cir. 1989). Applicable to this Court's analysis, the First Circuit found that a PSD applicability determination was a final action under both lenses of "ripeness" and the "exhaustion of remedies" requirements. *Id.* Similarly, NUARB's denial of a NAD was a final action in this matter, subject to the same exception to the required exhaustion of remedies discussed below.

1. NUARB's denial of a NAD is final and authoritative, ripe for judicial review.

Although courts² have recognized a problem with the "finality" of actions when an agency must take further action to obtain an enforceable order, a PSD applicability determination is final and authoritative, sufficiently "ripe" for judicial review. That NUARB's NAD decision doesn't order Sylvanergy to refrain from constructing its EGU³ is irrelevant because "ripeness" turns on functional considerations such as "the fitness of the issues for judicial decision and the hardship to the parties withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). NUARB's denial of a NAD addresses the legal question of PSD applicability with a final and authoritative response, there is no danger that this Court's review will "deprive the agency of the opportunity to refine, revise or clarify the . . . matter at issue." *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1034, 1040 (1st Cir. 1982). This issue is fit for review and not subject to additional agency action that may moot the controversy.

Withholding review would impose an impermissible hardship on Sylvanergy. As noted in the *Puerto Rican Cement Co.* opinion, "forcing [the company] either to abandon its building plans, to compromise them by agreeing to emissions limitations, or to engage in a long, costly PSD review process" gave rise to a determination that EPA's NAD denial was sufficiently ripe

² See *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442-44 (9th Cir. 1984).

³ EPA would have to bring an enforcement action to stop Sylvanergy from building. See 42 U.S.C. § 7477.

for review. 889 F.2d at 295. Here, Sylvanergy faces similar prospective hardships in that it may be forced to abandon its building plans, compromise them by agreeing to unwarranted emissions limitations, or suffer additional harm proceeding with its expensive PSD review process. Thus, NUARB's NAD denial is ripe for judicial review.

2. Judicial waiver of the statutory exhaustion requirement is appropriate, rendering the issue appropriate for judicial review.

A second potential issue with finality arises because Sylvanergy may take further administrative steps⁴ to obtain its desired outcome of building its facility—a problem regarding “exhausting administrative remedies.” However, the First Circuit in *Puerto Rican Cement Co.* recognized an exception to this rule due to the nature of a NAD. 889 F.2d at 295. Because the effects of NUARB's denial of a NAD are of the same nature discussed in the *Puerto Rican Cement Co.* opinion, this Court should apply this exception and find this issue appropriate for judicial review.

Furthermore, the legal question presented by a request for a NAD—whether PSD review is applicable—is separable from, and collateral to, any subsequent matters NUARB would consider in its PSD review. This result makes it unlikely that further agency proceedings would moot the PSD applicability determination before a court could address it, and NUARB has taken a final position on Sylvanergy's claim of non-applicability. After NUARB denied the NAD request, Sylvanergy's only remedy to move forward with construction, other than this appeal, was to initiate the PSD permit application process.

Finally, requiring a costly PSD application prior to judicial review of an NAD would cause substantial hardship to Sylvanergy and on future appellants. Although Sylvanergy initiated the PSD permit application process, the company should be allowed to seek judicial review of

⁴ For example, obtain a PSD preconstruction permit.

the NAD denial because waiver of the “exhaustion of remedies” requirement is appropriate. *See Kuehner v. Schweiker*, 717 F.2d 813, 822-25 (3d Cir. 1983) (Becker, J., concurring) (judicial waiver of statutory exhaustion requirement appropriate when unexhausted claim substantially collateral, agency has taken final position on claim, and requiring exhaustion would cause substantial hardship), *vacated*, 469 U.S. 977 (1984) (remanding case for reconsideration in light of new statute).

B. Alternatively, NUARB’s Denial of a PSD Non-Applicability Determination constituted final agency action under the APA.

The APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702) . When determining whether an administrative action is subject to judicial review, the Court adheres to the APA’s “generous” review provisions and “hospitable” interpretation. *Abbott Labs.*, 387 U.S. at 141. *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”) Courts have emphasized that “[v]ery rarely do statutes withhold judicial review;” were it otherwise, then “statutes would in effect be blank checks drawn to the credit of some administrative officer or board.” *Id.* at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

In 2012, the Supreme Court confirmed that EPA’s pre-enforcement determinations can constitute “final action” subject to judicial review under the APA, which provides for judicial review of “final agency action for which there is no other adequate remedy in a court.” *Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012) ; 5 U.S.C. § 704. *Sackett* involved an EPA administrative compliance order (“ACO”) issued under the Clean Water Act. *Id.* The ACO contained a number

of “Findings and Conclusions,” including that the Sacketts violated the CWA by placing fill material in a wetland without a permit. *Id.* at 1371. The ACO directed the Sacketts to “restore the Site in accordance with [an EPA-approved] Restoration Work Plan” and to provide EPA access to the lot and to certain documents. *Id.* The Supreme Court unanimously held over EPA’s objection that the pre-enforcement order by EPA “ha[d] all of the hallmarks of APA finality that our opinions establish.” *Id.*

In so holding, the Supreme Court applied the two-part test for finality established in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) . That test requires that 1) “the action must mark the ‘consummation’ of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature;” and 2) “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* The Supreme Court in *Sackett* held that the ACO satisfied both prongs: 1) it marked the “end” of EPA’s decision-making process because, among other things, the Sacketts were not entitled to further agency review; and 2) it imposed an obligation on the Sacketts to “restore” their property and resulted in legal consequences—exposure to double penalties in possible future enforcement proceedings and limits on their ability in the future to obtain a CWA permit. *Sackett*, 132 S. Ct. at 1371-72.

NUARB’s denial of Sylvanergy’s request for a NAD likewise serves as the consummation of the agency’s decision-making process on PSD applicability, determines Sylvanergy’s subsequent rights and obligations, and results in legal consequences affecting Sylvanergy’s ability to construct its EGU. Moreover, Sylvanergy has no other adequate remedy in court, fulfilling the APA’s requirement for judicial review, which supports this Court’s jurisdiction to review NUARB’s denial of the requested NAD.

1. NUARB's denial of a NAD is final agency action because it marks the "consummation" of NUARB's decision-making process.

NUARB's letter denying Sylvanergy's request for a NAD marks the "consummation" of the agency's decision-making process. In *Sackett*, the EPA's ACO and its attendant "Findings and Conclusions" were not subject to further agency review, allowing the Supreme Court to find a consummation of the EPA's decision-making process. *Sackett*, 132 S. Ct. at 1372. The Court drew a bright line favoring a finding of consummation in this regard, noting that a portion of the ACO inviting the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate" was not sufficient to render the otherwise final agency action not final. *Id.*

Similarly, NUARB's denial of the NAD and its attendant findings and conclusions are not subject to further agency review. NUARB denied Sylvanergy's request for a NAD, requiring Sylvanergy to initiate the PSD preconstruction permit application process. R. at 6. Like the EPA's ACO in *Sackett*, this action constituted the consummation of NUARB's decision-making process. The fact that the EAB found it lacked authority to review NUARB's denial of the NAD under 40 C.F.R. § 124.19(a) (2013) because it was not a "PSD final permit decision" confirms NUARB's action was not subject to further agency review. Thus, the first prong of the *Bennett* test is satisfied.

2. NUARB's denial of a NAD is final agency action because it determined Sylvanergy's rights and resulted in legal consequences.

In deciding PSD applicability, NUARB determined Sylvanergy's subsequent rights and obligations. The *Sackett* ACO determined rights and obligations of the Sacketts by requiring them to restore their property according to an agency-approved Restoration Work Plan and to allow EPA access to their property as well as records and documentation related to the

conditions at the site. *Sackett*, 132 S. Ct. at 1371. In doing so, the EPA satisfied the first part of the second prong of the *Bennett* test to determine “final” agency action.

Much like the *Sackett* ACO order, NUARB’s denial of a NAD requires Sylvanergy to halt indefinitely its construction project, pending an approved PSD preconstruction permit. Moreover, the construction will be subject to NUARB’s permit emissions control limitations, and Sylvanergy will be required to furnish records, construction plans and modeling data related to the proposed EGU. As such, NUARB’s denial of a NAD determined Sylvanergy’s subsequent rights and obligations, demonstrating final agency action under the second prong of the *Bennett* test.

Additionally, legal consequences flow from NUARB’s PSD applicability determination because it exposes Sylvanergy to liability for constructing and operating its EGU without a PSD preconstruction and operating permit, limiting Sylvanergy’s ability to generate the electricity it intends to sell. In *Sackett*, the Supreme Court found legal consequences flowed from the ACO because it exposed the Sacketts to penalties in possible future enforcement proceedings and it severely limited their ability to obtain a required permit from the Army Corps of Engineers. *Sackett*, 132 S. Ct. at 1371-72. The Court found these factors alone sufficient to satisfy the second part of the second prong of the *Bennett* test for finality. *Id.*

Here, NUARB’s denial of a NAD subjects Sylvanergy to similar legal consequences. Where the Sacketts were exposed to possible future penalties from future enforcement proceedings, Sylvanergy would face definite penalties if it constructed and operated its EGU without first obtaining a PSD permit. Additionally, Sylvanergy faces limits on the amount of electricity it may generate due to operational limits imposed by a final PSD permit. Thus, the legal consequences prong of the *Bennett* test is satisfied and NUARB’s PSD applicability

determination should be found to constitute final agency action sufficient to warrant judicial review.

3. Sylvanergy has no other adequate remedy in a court.

The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court." 5 U.S.C. § 704. Judicial review under the CAA ordinarily comes by way of a civil action brought under the citizen-suit provision in section 7604 or under the "final action by the Administrator" provision in section 7607(b). Because Sylvanergy cannot initiate an action under the citizen-suit provision and this alternate theory assumes no jurisdiction under section 7607(b), the company has no other adequate remedy in a court, satisfying the requirement for judicial review under the APA.

C. Sylvanergy preserved its objection to NUARB's denial of a NAD by filing its PSD preconstruction permit application under protest.

When Sylvanergy filed its PSD preconstruction permit application under protest because it believed a NAD was warranted, it preserved its right to appeal NUARB's denial of a NAD. Due to the nature of the agency action in question—NUARB's denial of a NAD—the period of time to seek review should be tolled until a definitive final action is taken on the matter. As noted in the above arguments, a PSD applicability determination has all the hallmarks of a final agency action that sufficiently warrants judicial review; however, it was the issuance of the final PSD permit that started the clock running on the time for Sylvanergy to bring an appeal. Sylvanergy's appeal was timely following NUARB's issuance of the final PSD permit. R. at 7.

The record is silent as to whether the EPA did not include NUARB's PSD applicability determination in the Applicability Determination Index published regularly in the Federal Register, leaving open the question of ultimate finality of NUARB's action for purposes of imposing time limits to seek judicial review. Additionally, nothing in the controlling case law,

suggests Sylvanergy's theories of jurisdiction discussed in the above section imposes deadlines by which to bring appeal of agency action characterized as "final" for purposes of seeking judicial review. This Court should find that it has jurisdiction to review NUARB's denial of a NAD because that action was final under the CAA and APA and Sylvanergy properly preserved its right to appeal.

II. THIS COURT SHOULD FIND NUARB'S PSD APPLICABILITY DETERMINATION ARBITRARY AND CAPRICIOUS BECAUSE SYLVANERGY'S FACILITY IS NOT A MAJOR EMITTING FACILITY UNDER THE CLEAN AIR ACT.

Finding jurisdiction appropriate to review NUARB's PSD applicability determination, this Court should find that a NAD was required because one, the proposed facility is not a fossil-fuel fired source, and two, Sylvanergy has implemented federally enforceable limitations that prevent it from having the potential to emit pollutants above the CAA's threshold. Therefore, NUARB's action to deny a NAD was arbitrary and capricious, requiring this Court's remand with instructions to reverse.

Because the CAA does not set forth an independent standard of review, *see* 42 U.S.C. § 7607(b) , and because NUARB's denial of a NAD was a final agency decision, this Court must apply the "arbitrary and capricious" standard set forth in the APA. 5 U.S.C. §§ 701–706. NUARB's decision may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) . Under this standard, deference is given to a final agency decision by reviewing for clear error, as discussed in the following subsections. *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir.2002) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

A. NUARB clearly erred in determining that Sylvanergy's proposed EGU is a major emitting facility because it is not a fossil-fuel fired source.

While NUARB has the authority to issue PSD permits, it must conform to statutory requirements in the exercise of that authority. The term "major emitting facility" means a stationary source of air pollutants which emits, or has the potential to emit, one hundred tons per year or more of any air pollutant from a stationary source if that source is a fossil-fuel fired source. 42 U.S.C.A. § 7479 (1). A "major emitting facility" also includes any other source that has the potential to emit two hundred and fifty tons per year or more of any pollutant, addressed in more detail in the following subsection. *Id.*

In other words, for Sylvanergy to qualify as a "major emitting facility" it either (1) is a fossil-fuel fired source that emits, or has the potential to emit, one hundred tons of pollutant per year; or (2) the facility emits, or has the potential to emit, more than two hundred and fifty tons of a pollutant per year. Sylvanergy meets neither of those requirements.

The EPA has invented this definition and does not that Sylvanergy's proposed EGU is not a fossil-fuel fired source. The definition of fossil fuel in Merriam-Webster is "a fuel (as coal, oil, or natural gas) formed in the earth from plant or animal remains. Merriam Webster Dictionary, <http://www.merriam-webster.com> (last visited Nov. 30, 2015). The EPA has interpreted fossil fuel to mean "natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat." 40 C.F.R. § 60.41. The plain meaning of both the dictionary and the EPA's interpretation is clear: wood is not a fossil fuel.

Certainly, the diesel from the ultra-low sulfur diesel start-up burners meets the EPA's fossil-fuel interpretation. But the EPA has made clear that start-up burners do not make a facility a fossil-fuel fired source. In fact, the EPA has explicitly held that the use of start-up burners is a

completely separate process from generating electricity. U.S. Environmental Protection Agency, *Startup and Shutdown Provisions* (2012). In a guidance memo, the EPA expounded on start-up periods stating that certain limitations apply to start-up periods “to account for the fact that during startup and shutdown events, production is by definition nonexistent.” *Id.* A start-up period is defined as “the first-ever firing of fuel in a boiler for the purpose of producing electricity or use of thermal energy (such as heat or steam).” *Id.* The start-up period ends when the unit “makes useful thermal energy (such as heat or steam) for industrial, commercial, heating or cooling purposes.” *Id.*

The EPA makes a distinction between when the burners are used and when electricity is actually produced. The EPA was cognizant that facilities’ start up-periods vary according to the type of facility, and their operation standards and limitations should reflect that time when they are not generating energy. NUARB was remiss to consider the facility as a fossil-fuel fired source because the burners are not the fuel source. For example, to start a fire, one may use a butane lighter to light a piece of tinder. Once the wood is lit, the butane lighter is no longer needed. The burners serve the same purpose as the lighter. The burners are a small piece of the puzzle, and not part of the facility’s main process, which burns biomass for production.

Not only does the memo serve as further evidence that start-up burners are to be treated differently, the EPA has acknowledged in a final rule promulgated in 2012 that biomass-fired EGUs that utilize fossil fuels in start-ups are not considered fossil-fuel generating units. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial- Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 32,9304, 32,9309 (Feb. 16, 2012) (codified at 40 C.F.R. 60 and

63). Specifically, biomass-fired EGUs that use fossil fuels for start-up in amounts that are “less than or equal to 10.0 percent of the average annual heat input in any 3 consecutive calendar years or less than or equal to 15.0 percent of the annual heat input during any one calendar year” are *not* considered to be a fossil-fuel fired source. *Id.* (emphasis added).

The burners in the facility meet the rule’s requirements. The facility is a 500 MBtu/hour biomass-fired electricity generation unit with a maximum heat input rate of 60 MMBtu/hr. The maximum is 60 MMBtu/hr and more than likely it won’t operate at the input rate. However, even if it did, the facility is not considered a fossil-fuel fired source pursuant to rule. Ten percent of annual heat input for the facility is 50 MMBtu/hr. The facility’s start-up are unlikely to burn in perpetuity; regardless, it meets the requirements. The same goes for fifteen percent of annual heat input, 75 MMBtu/hr, which is not possible for the facility because it has a maximum of 60 MMBtu/hr. It is clear from the statute and EPA’s guidance memos that the facility is not a fossil-fuel fired source.

B. NUARB clearly erred in determining that Sylvanergy’s proposed EGU is a major emitting facility because the facility does not have the potential to emit pollutants above the PSD thresholds.

NUARB committed additional clear error in denying the requested NAD when it failed to determine that the facility does not qualify as a “major emitting source.” The CAA provides the threshold of a “major emitting facility” as any source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. 40 C.F.R. § 52.21(b)(1)(i)(b) (2011). The EPA has defined “potential to emit” as the “maximum capacity of a stationary source to emit a pollutant under its physical and operational design.” 40 C.F.R. § (b)(4) (2012).

First, the facility does not emit pollutants above the threshold. The below table illustrates that the facility emits below the threshold with its operational design:

Net Emission for PSD purposes (tons/year)					
	NO _x	SO ₂	VOC	PM _{2.5}	CO
PSD Significance Levels	250	250	250	250	250
Facility's Emissions	80	32	30	47	190
PSD Review Required	No	No	No	No	No

Second, physical and operational limitations must be accounted in calculating a facility's potential to emit. The limitations specifically refer to (1) air pollution control equipment, (2) restrictions on hours of operation, and (3) restrictions on the amount of material combusted, stored or processed. 40 C.F.R. § 52.21(b)(4) (2011).

The principal case of *US v. Louisiana-Pacific Corp.* illustrates the correct analysis of physical and operational limitations and shows the errors NUARB made in issuing its final permit. 682 F. Supp. 1122, 1131 (D. Colo. 1987). In that case, the defendants' permit, like Sylvanergy, contained limitations on the amount of wood materials that may be produced and number of hours the plant would operate. *Id.* The court stated that those limitations, like Sylvanergy's limitation of operation of hours, clearly met the requirements of § 52.21(b)(4) and were proper in calculating the facility's emissions. *Id.* ("permits issued... do contain restrictions that are properly considered in determining a source's potential to emit").

Contrary to the EAB's determination, Sylvanergy's limitations are federally enforceable. Under EPA's regulations, control is deemed to be federally enforceable if it is practically enforceable, and if the EPA has the ability to enforce restrictions and limitations imposed on a source. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 FR 80186-01, 80191 (Dec. 31, 2002) (codified at 40 C.F.R. parts 51 and 52). Generally, "federal enforceability means that

not only is a requirement practically enforceable, but in addition, EPA must have a direct right to enforce restrictions and limitations imposed on a source to limit its exposure to Act programs. *Id.*

The EPA expounded on “federal enforceability” in a January 25, 1995 memo, cited in cases today, making clear that federal enforceability “provides source owners and operators with assurances that limitations they have obtained from a state or local agency will be recognized by EPA.” United States Environmental Protection Agency, *Options for Limiting the Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act*, (1995); *State ex. Rel. Ohio Atty. Gen. v. Shelly Holding Co.*, 946 N.E.2d 295, 302 (Ohio Ct. App. 2010). The EPA listed various programs that fall under federally enforceable limitations, with Sylvanergy’s exact program applying to the list: federally enforceable local agency limitations. *Id.* Because Sylvanergy’s limitations are practically enforceable (the facility’s sources fall under the CAA and can be enforced) as well as federally enforced by both the local agency, NUARB and the EPA, the facilities limitations must be accounted for in analysis of “potential to emit.”

Even if this court finds that Sylvanergy’s limitations are not federally enforceable, the D.C. Circuit has held that controls do not need to be federally enforceable to be taken into account. The D.C. Circuit has made clear that effective controls should be considered in assessing a source’s potential to emit. *Natl. Mining Assn. v. United States Environmental Protection Agency*, 59 F.3d 1351, 1362 (C.A.D.C. 1995). The controls must be “demonstrably effective” and must stem from state or local or federal governmental regulations. *Id.*

The restrictions on the hours of operation are conditions that are demonstrably effective because they stem from local regulations—the Village of Forestdale’s site plan—and Sylvanergy’s compliance can be proven through records maintained by the building inspector of the Village of Forestdale. This method of confirmation, which Sylvanergy may demonstrate, is

exactly what the court in *US v. Louisiana Pacific Corp.*, deemed to be easily verified.” 682 F. Supp. 1122, 1133 (D. Colo. 1987) (holding “compliance ...easily verified through the testimony of officers, all manner of internal correspondence, and accounting, purchasing, and production records”). Thus, the operational limitations must be considered, and NUARB clearly erred when it failed to consider such limits. Accordingly, this Court should find that NUARB’s determination that Sylvanergy’s proposed biomass-fueled EGU was a “major emitting facility” was arbitrary and capricious.

III. THIS COURT SHOULD FIND NUARB’S APPLICATION OF GHG REGULATION TO THE PROPOSED EGU ARBITRARY AND CAPRICIOUS BECAUSE THE FACILITY WAS EXEMPT AND NOT A MAJOR EMITTING FACILITY.

In issuing its final permit, NUARB improperly imposed regulations of GHGs on Sylvanergy’s biomass-fired EGU through the PSD permitting program. This Court reviews a PSD permit to determine whether an agency’s actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2)(A); *Pan Am. Grain Mfg. Co. v. U.S. EPA*, 95 F.3d 101, 105 (1st Cir.1996) (reviewing state implementation plan); *Adams v. U.S. EPA*, 38 F.3d 43, 49 (1st Cir.1994) (reviewing NPDES permit); *Citizens for Clean Air v. U.S. EPA*, 959 F.2d 839, 845 (9th Cir.1992) (reviewing PSD permit). Although the EAB declined to review the PSD permit citing of a lack of a clearly erroneous factual or legal determination,⁵ this Court reviews the entire agencies’ actions under this standard rather than only the Administrator’s decision through the EAB. *See Citizens for Clean Air*, 959 F.2d at 845-56.

A court will not set aside those actions unless the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

⁵ R. at 13-14.

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In this case, NUARB’s decision to impose PSD limitations—and thus BACT requirements—on Sylvanergy for GHG emissions was arbitrary and capricious for two main reasons: first, at the time the final permit issued, EPA’s deferral of PSD permitting for biogenic sources of GHGs was the controlling rule exempting Sylvanergy’s proposed biomass-fired EGU from PSD limits for GHGs; and second, Sylvanergy’s proposed EGU is not a major emitting facility failing to trigger PSD limits for GHGs.

A. NUARB clearly erred in imposing PSD review for GHGs because the final permit was issued when EPA deferred for biogenic sources GHG regulation through its PSD program.

As the EAB noted, Sylvanergy argued to the Administrator that its facility was subject to an exemption from PSD review for GHGs afforded to biogenic sources through EPA’s “Deferral Rule.” *See* EPA Deferral Rule, 76 Fed. Reg. 43,490, 43,507-08 (July 20, 2011) (codified at 40 C.F.R. pts. 51, 52, 70, and 7). The EAB offered two faulty reasons for declining to review and overturn NUARB’s improper decision to impose PSD GHG limitations on Sylvanergy. The EAB first stated that the Deferral Rule would have expired by its own terms, depriving Sylvanergy of its claimed exemption. Second, the EAB cited as controlling the D.C. Circuit case, *Center for Biological Diversity v. EPA*, where the court struck down the Deferral Rule. 722 F.3d 401, 409-12 (D.C. Cir. 2013). However, in doing so, both NUARB and EAB acted arbitrarily and capriciously by failing to consider important aspects bound up with this issue.

1. The Deferral Rule had not yet expired when NUARB issued its final PSD permit to Sylvanergy, exempting the biomass-fueled EGU from GHG regulation.

NUARB and the EAB clearly erred in failing to apply the Deferral Rule to exempt

Sylvanergy's proposed biomass-fueled EGU because the permit was issued before the Rule's expiration. The Deferral Rule was set to expire on July 21, 2014, and NUARB issued its final permit on June 12, 2014. *See* EPA Deferral Rule, 76 Fed. Reg. 43,490, 43,507-08 (July 20, 2011) (codified at 40 C.F.R. pts. 51, 52, 70, and 7); R. at 4. The EPA has explained that a PSD permit issued before a new requirement takes effect does not need to be reopened. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,593 (June 3, 2010) (codified at 40 CFR Parts 51, 52, 70, and 71). Thus, by failing to adhere to the Deferral Rule before its terms had expired and instead imposing a not-yet-existing new requirement subjecting Sylvanergy to PSD review for GHGs, NUARB and the EAB committed clear error requiring this Court to find the agency action arbitrary and capricious.

2. The D.C. Circuit opinion striking down the Deferral Rule was temporarily stayed beyond the date of the final permit, exempting the biomass-fueled EGU from GHG regulation.

NUARB and the EAB committed additional clear error by giving effect to the D.C. Circuit's ruling in *Center for Biological Diversity v. EPA*, because the court stayed its ruling pending the outcome in *UARG v. EPA*, a matter set to be heard by the Supreme Court after the time the final permit was issued. Order, *Center for Biological Diversity*, 722 F.3d 401 (D.C. Cir. Aug. 26, 2013) (No. 11-1101), Document #1453559 . When that court issued its order on August 26, 2013, the effect of its ruling striking down the Deferral Rule was abated until the Supreme Court decided whether to grant a writ of certiorari in the *UARG* matter. However, the final permit was issued and the Deferral rule expired—as discussed in the above subsection—before the Supreme Court granted that writ, when the Deferral Rule controlled this PSD analysis. Accordingly, NUARB and the EAB committed its second clear error supporting a finding of arbitrary and capricious agency action.

B. NUARB clearly erred in imposing PSD review for GHGs because Sylvanergy’s proposed EGU is not a major emitting source.

Even if this Court finds that NUARB and the EAB acted properly within its discretion by ignoring the Deferral Rule, both agencies committed clear error by imposing PSD review for GHGs because as argued in Section II above, Sylvanergy’s proposed facility is not a “major emitting facility.” As the Supreme Court noted in *URG v. EPA*, the EPA exceeded its authority in promulgating its “Tailoring Rule,” because imposing BACT for GHGs under the PSD program is only proper when a facility exceeds the PSD thresholds for criteria pollutants.)In other words, a source’s GHG emissions at any amount or rate may not dictate PSD review, and thus Sylvanergy’s CO₂ emissions—at full or a reduced level of operation—may not require a PSD permit. Moreover, as demonstrated in Section II, because Sylvanergy’s proposed EGU is not a major emitting source, neither NUARB nor the EAB may impose a BACT determination for the biomass-fueled plant. Accordingly, both agencies committed clear error in doing so necessitating a finding by this Court that this action was arbitrary and capricious.

IV. NUARB PROPERLY REJECTED CONSIDERATION OF A WOOD GASIFICATION AND CARBON CAPTURE AND STORAGE PLANT AS BACT FOR GHG EMISSIONS.

NUARB’s rejection of a wood gasification and carbon capture and storage plant was not arbitrary and capricious. “[T]he PSD regulations require that new major stationary sources ... employ the “best available control technology,” or “BACT” to control emissions of regulated pollutants that the source would have the potential to emit in significant amounts”. *In re Prairie State Generating Co.*, 13 E.A.D. 1 (EAB 2006). *See* CAA § 165(a)(4); 42 U.S.C. §7475(a)(4); 40 C.F.R. § 52.21(j)(2) (2011). Assuming *arguendo* that Sylvanergy’s proposed facility meets the requirements of PSD applicability for GHGs, then in order to obtain a PSD permit, the stationary source must also adhere to NUARB’s BACT determination for GHGs.

BACT is emissions limitations “based on the maximum degree of reduction for each pollutant ... emitted from any proposed major stationary source.” 40 C.F.R. § 52.21(b)(12) (2011). BACT evaluations and determinations are site-specific due to the individualized operations, processes, inputs, emissions, and other conditions that vary by site. *In re Cardinal FG Co.*, 12 E.A.D. 153,161 (EAB 2005); *See* 40 C.F.R. § 52.21(b)(12) (2011). These determinations are made by the Administrator “on a case-by-case basis,” which include a review of energy, environmental, and economic impacts along with other costs to determine achievable control methods. *Id.*

Traditionally, courts and agencies have relied on the NSR Permitting guidance for a “top-down” approach noted in EPA’s 1990 New Source Review Workshop Manual. *See* EPA, *New Source Review Workshop Manual* (1990) [hereinafter *NSR Manual*]. The methodology of the *NSR Manual* provides a framework for careful and detailed review of BACT. *In re Cardinal FG Co.*, 12 E.A.D. 153, 162 (2005). The NSR methodology for BACT analysis includes five steps: Step 1: Identify all available control technologies; Step 2: Eliminate technically infeasible options; Step 3: Rank remaining control technologies; Step 4: Evaluate most effective controls and document results; and Step 5: Select BACT. *NSR Manual* at B.6. Using this “top-down” approach, an agency systematically reviews the various controls in each step of the process and eliminates control technologies until one method is chosen.

A. NUARB properly concluded that BACT requiring implementation of wood gasification would impermissibly redefine the source.

NUARB correctly dismissed wood gasification under Step 1 of the top-down BACT analysis because requiring a modification of Sylvanergy’s proposed facility to wood gasification would impermissibility redefine the source. When evaluating the source, NUARB determines the proposed facility’s purpose and basic design. *In re Prairie State*, 13 E.A.D. at 22. The BACT

review must account for which design elements may be changed to achieve emissions reductions without impacting the basic “business purpose” of the facility. *Id.* at 23.

In *American Electric Power Service Co.*, an impermissible source redefinition for an EGU was rejected as BACT because “the core process of gasification at a IGCC [coal-gasification] facility is fundamentally different than a [coal-fired] boiler.” *American Electric Power Service Corp.*, Petition No. VI-2008-01, 2009 WL 7698416 (EPA Dec. 15, 2009). Similarly, turning a biomass-fueled steam generating facility to a wood gasification facility would be a redefinition because it fundamentally changes the basic design and purpose of the facility. This modification would include different equipment and require different expertise to produce electricity, the very basis for which the redefinition was rejected in *American Electric Power Service Corp.*, Petition No. VI-2008-01, 2009 WL 7698416. Therefore, NUARB’s correctly rejected SOC’s proposed BACT.

B. NUARB properly concluded that the use of alternative fuels would constitute a redefinition of the facility and therefore cannot be considered BACT.

Step 1 of the top-down BACT review approach calls for the parties to identify all available control options. Although this first step considers a very broad evaluation of potential control technologies, “this step of the process is not without limits.” Air and Radiation, EPA., *Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production* 12 (2011) [hereinafter *2011 EPA Guidance*].

The CAA does not require the permit issuer to “perform an alternatives analysis.” *In re Prairie State*, 13 E.A.D. at 29. When a proposed biomass fueled facility “can demonstrate that utilizing a particular type of biogenic fuel is fundamental to the primary purpose of the project, then at the first step of the top-down process, permitting authorities can rely on that to determine the use of another fuel would redefine the proposed source.” *2011 EPA Guidance* at 15. Step 1

was proper. The design of the proposed facility is a 500 MBtu/hour biomass-fueled electric generator and will produce wood pellets for fuel. Any modification to an alternative fuel source would require a redesign of the facility as it would eliminate the wood pellet production facility and modify the fuel for the electricity generation.

Historically, EPA has not considered the “BACT requirement as a means to redefine the design of the source when considering available control technologies.” *NSR Manual* at B.13. Modifications to the fuel source have been found to redefine a facility and therefore are not within the role of BACT. *See In re Prairie State*, 13 E.A.D. at 28; *see also In re Hillman Power Co.*, 10 E.A.D. 673, 692 (EAB 2002). And changes to the basic design of facility have not been required. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 136 (EAB 1999).

Sylvanery’s facility’s purpose is biomass-fueled energy generation, and therefore any required deviation from this fuel source would ultimately be an improper redefinition of the facility.

C. Carbon capture and storage should not be considered under Step 1 of the BACT NSR Methodology.

According to the EPA’s memos, Step 1 BACT options for GHGs “may be limited to (1) utilization of the biomass fuel alone, (2) energy efficiency improvements, and (3) carbon capture and sequestration if the source meets” specific characteristics. *2011 EPA Guidance*, at 15. These options that allow for carbon capture and sequestration as an add-on pollution control technology are not applicable to fossil-fuel fired power plants and certain industrial facilities. *Id.* at 14. Thus, biomass-fueled facilities like Sylvanery’s proposed facility are inappropriate for carbon capture and sequestration as BACT. Based on the EPA’s guidance, the proposed facility’s BACT options should include only the utilization of biomass fuel alone or energy efficiency improvements, such as the pollution control equipment—multiclone, electrostatic precipitator and multi-

pollutant catalytic reactor—the facility will house. R. at 5.

D. NUARB correctly dismissed carbon capture and storage under Step 2 of the BACT NSR Methodology because removal of CO₂ from biomass combustion flue gas streams is not a proven technology.

In the case of Sylvanergy’s biomass-fueled facility, NUARB correctly found carbon capture and storage to be technically infeasible. R. at 6. If the agency determined that carbon capture and storage should be included in Step 1 analysis during the top-down BACT review, carbon capture and storage would still be eliminated during Step 2 analysis. The NSR top-down BACT review method second step is to eliminate “technically infeasible” options. *NSR Manual* at B.7. To determine if a control is technically feasible or infeasible, the technology is first reviewed to determine if it has been “installed and operated successfully elsewhere at a similar facility” and, therefore, considered “demonstrated.” *In re Prairie State*, 13 E.A.D. at 13; *See NSR Manual* at B.7. In this case regarding carbon capture and sequestration for biomass combustion dilute flue gas streams, the technology has not been proven according to NUARB and should not be considered “demonstrated.” R. at 6.

In the event that the technology has not been “demonstrated,” the technology is then reviewed for whether it is “available” and “applicable.” *In re Prairie State*, 13 E.A.D. at 13; *see NSR Manual* at B.17. A carbon capture sequestration sink is in the Union Shale geologic formation. Whether this carbon sequestration sink is available is unclear; however, as discussed above, it has not been demonstrated that the technology is commercially available with regards to biogenic flue gas.

Carbon capture and sequestration is not “applicable” to the proposed facility. In order for a technology to be considered “applicable,” it must be able to be reasonably installed and operated on the source. *Id.* at B.17. Because this technology cannot be reasonably installed or operated, NUARB was correct in determining it was not applicable.

Because carbon capture and sequestration technology is not “demonstrated” nor found to be available and applicable, NUARB properly dismissed this control method under Step 2 of BACT review.

V. THIS COURT SHOULD FIND NUARB’S FINAL PERMITTING ACTION ARBITRARY AND CAPRICIOUS BECAUSE THE AGENCY ERRED IN IMPOSING A SUSTAINABLE FOREST PLAN AS BACT FOR THE SYLVANERGY BIOENERGY FACILITY.

Again, NUARB’s imposition of a Sustainable Forest Plan as BACT for the proposed facility’s GHG emissions was arbitrary and capricious. When determining BACT for greenhouse gas emission, the EPA has stated “there is flexibility to apply the existing regulations and policies regarding BACT in ways that take into account their lifecycle effects on GHG concentrations.” Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31591 (June 3, 2010). However, NUARB far exceeded this flexibility in imposing a Sustainable Forest Plan as BACT for the proposed facility because Sylvanergy identified and implemented the use of biomass fuels as BACT, and a Sustainable Forest Plan is an impermissible “beyond the fence” alternative emission control plan.

A. NUARB clearly erred under Step 4 of the NSR BACT guidance because the utilization of biomass fuels inherently meets BACT for GHGs for bioenergy facilities under a collateral impacts analysis.

NUARB erred at step four when it failed to conclude that selecting biomass fuels as BACT was appropriate under the collateral environmental, economic and energy impacts analysis.

In its March 2011 guidance, EPA “provided a suggested framework for undertaking an analysis of the environmental, energy, and economic impacts of using biogenic fuels in Step 4 of the top-down BACT process.” *2011 EPA Guidance* at 11. Under Step 4, “permitting authorities must consider the economic, energy, and environmental impacts arising from each option

remaining under consideration.” *Id.* at 17. Additionally, a permitting authority is not restricted from assessing the impacts of all technologies under consideration and may review any technologies having applicability to the site operation. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 131 n.15 (EAB 1999).

1. Biomass fuel is the appropriate technology under the collateral environmental impacts analysis of Step 4 of the NSR methodology.

One of the methods for assessing remaining potential technologies under Step 4 is the environmental impact of both the direct and indirect emissions control strategy, thus creating a “collateral impacts analysis.” *In re Hillman Power*, 10 E.A.D. at 683. Specific to this analysis, the EPA reasoned that “[s]equestration of CO₂ emissions in living plant material . . . may counteract the emissions . . . on a continuous basis” and this “unique dynamic merits consideration in the BACT analysis.” *2011 EPA Guidance* at 8.

Biofuels have unique environmental impacts compared to traditional fossil-fuel stationary sources. Biofuels themselves are renewable and biofuel combustion should be considered BACT *per se* without any additional controls after evaluating the environmental impact in Step 4 of the top-down analysis.

Additionally, “Biogenic CO₂ emissions are distinct from other regulated pollutants at bioenergy facility because . . . CO₂ emissions can participate directly in the global carbon cycle through photosynthesis, which is critical for the maintenance of life on Earth.” *Id.* at 7. EPA specifically contends “CO₂ emissions from bioenergy merit unique considerations in the BACT analysis because land-based biomass carbon stocks can be replenished more quickly than fossil-fuel carbon stocks, and thus these biogenic carbon stocks can act as a sink on a shorter time scale....” *Id.* at 6. NUARB committed clear error in overlooking this when imposing a Sustainable Forest Plan instead as using biofuel to power Sylvanergy’s EGU is optimal under

Step 4 of the BACT analysis.

2. Biomass fuel is the appropriate technology under the economic impacts analysis of Step 4 of the NSR methodology.

The CAA and its PSD program were enacted by Congress in part “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” CAA § 160(3), 42 U.S.C. § 7470(3). Economic impact review under Step 4 traditionally focuses on direct economic impacts in terms of cost effectiveness of emission control (dollars per ton of emission reduction). “EPA recognizes that at present add-on controls for CO₂ are generally expensive technologies.” *2011 EPA Guidance* at 24. It is clear that implementing bioenergy production itself as BACT would have the lowest direct costs than any other proposed BACT. The use of bioenergy is already a built-in component of the standing operation of the plant, and any alternative BACT will impose a cost above standard operating costs for the facility. Therefore, an analysis of the direct economic impact demonstrates optimal cost effectiveness when bioenergy production itself serves as BACT.

Indirect economic impact reviews may be considered as part of the analysis in Step 4. There are a number of governmental policies and efforts such as tax credits and assistance programs to increase the use of renewable resources, including through bioenergy projects. *Id.* at 25-26. Additionally, “[s]uch policies can improve the economy, especially in rural communities, by generating jobs, income, and taxes through demand for local biogenic resources and ... facilities.” *Id.* at 26. Again, NUARB clearly erred by imposing a Sustainable Forest Plan as BACT when biofuel technology leads to a superior economic impact.

3. Biomass fuel is the appropriate technology under the energy impacts analysis of Step 4 of the NSR methodology.

Finally, Step 4 evaluates the energy impact of the proposed BACT technologies. This assessment evaluates impacts on the energy policy of a region or area. “For bioenergy facilities,

it is appropriate to broaden the scope of the energy impacts analysis to consider policies that seek to promote diversity in fuels used in a local area, within a state, or nationally.” *2011 EPA Guidance* at 27. As of 2011, 48 states have incentive programs for bioenergy production. *Id.* at 27.

Thus, according to the EPA, the role of bioenergy to the overall energy policy for local, state, and regional areas is crucial. Over 90% of states have incentive programs for bioenergy production making this a matter of national energy importance. *Id.* Accordingly, as the EPA itself has stated, “where a bioenergy facility is projected to provide the energy and economic benefits . . . these considerations may justify selecting the option of exclusively using a biomass fuel as BACT for biogenic CO₂ emission from a bioenergy facility.” *Id.* at 29. Moreover, the “EPA believes the energy and economic benefits of this fuel is sufficient at this time to justify selecting biomass fuel as BACT for greenhouse gases without further control.” *Id.* at 29. Again, NUARB committed clear error in overlooking the use of biomass fuel as proper BACT and instead imposing a Sustainable Forest Plan as part of Sylvanergy’s PSD permit.

B. The use of biomass fuels as BACT involves an important matter of policy or exercise of discretion that warrants review in accordance with 40 C.F.R. § 124.19(a).

The NSR Manual and top-down BACT approach are not binding and “strict application of the methodology described in the NSR Manual is not mandatory.” *In re Cardinal FG Co.*, 12 E.A.D. 153, 162 (EAB 2005). As an alternative to clear error, a party may show that the decision otherwise warrants review or involves an important matter of policy. *See* 40 C.F.R. § 124.19(a)(4) (2013); *Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997); *In re Masonite Corp.*, 5 E.A.D. 551, 557 (EAB 1994); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5,280, 5,281 (Jan. 25, 2013).

Bioenergy production plays an important role in the reduction of anthropogenic CO₂

emissions. The EPA has highlighted about how “mindful of the role that biomass or biogenic fuels and feedstocks could play in reducing anthropogenic GHG emissions.” Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31590. These emissions are part of the global carbon cycle and are derived and returned through photosynthesis of biomass, which effectively sequesters the CO₂. *2011 EPA Guidance* at 6-7. The EPA has considered the issue of CO₂ emissions for biomass energy facilities and has “not dispute[d] the commenters’ observations that many state, federal, and international rules and policies treat biogenic sources and fossil fuel sources of CO₂ emissions differently.” Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31591. This role clearly demonstrates that biomass energy generation is an important matter of policy. The analysis in V.A.1-3 shows the complexity and policy component of BACT analysis for biomass fueled energy production facilities. As such, this Court should remand the final PSD permit to reconsider these important policy issues that NUARB failed to consider when imposing a Sustainable Forest Plan as BACT.

C. Because the Sustainable Forest Plan is a “beyond the fence” mitigation and not directly related to the control of actual emissions from the facility, it should not be imposed as BACT.

NUARB has required the implementation of a Sustainable Forest Plan as BACT for Sylvanergy’s proposed facility. This Forest Plan entails the purchase and maintenance of suitable forestry land outside of the proposed Sylvanergy facility to offset carbon emissions from the combustion of biomass fuels. The imposition of the Sustainable Forest Plan as BACT exceeds the scope of the statute and therefore constitutes clear error by NUARB.

BACT itself is technology that “is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of such pollutant.” CAA 165(a). This CAA definition of BACT should be applied solely to the emission source, or

facility, itself since the definition states that BACT is “achievable for such facility.” The definition is clear that BACT relates directly to a facility. If BACT were to include “beyond the fence” measures, the agency could theoretically require that a preconstruction permit require a direct offset in another region or a more burdensome and overreaching control measure such as the acquisition and closure of an existing stationary source as another BACT offset.

BACT since its origination has been aimed at the control of actual emissions from the actual source. The CAA definition notes that production processes, methods, systems, and techniques can be determined to be BACT for a facility; however, these processes, methods, and systems are related to the facility and the emissions controlled. This is not present in NUARB’s determination of BACT for Sylvanergy’s facility; NUARB instead required that Sylvanergy purchase and maintain forestry lands outside of the facility boundaries without demonstrating that the lands would control the direct emissions from the facility.

Additionally, the requirement to purchase forestry lands does not meet the clear language definition of process, method, system, or technique. Merriam-Webster defines “process” as “a series of actions that produce something or lead to a particular result;” “method” as “a careful or organized plan that controls the way something is done;” “system” as “a group of related parts that move or work together;” and “technique” is defined as “a way of doing something by using special knowledge or skill.” Merriam Webster Dictionary, <http://www.merriam-webster.com> (last visited Nov. 30, 2015). These definitions all relate to a direct action – in this case actual control of emissions. The purchase of forestry lands does not produce an active control on emissions nor will it directly reduce GHG emissions from the Forestdale facility.

Moreover, EPA has stated in its guidance that three types of potentially applicable control options should be considered for BACT. *NSR Manual* at B.10. Imposition of a Sustainable Forest

Plan as BACT for the Forestdale facility does not fall within any of the three options EPA has outlined. The first option for BACT is inherently lower-emitting processes and practices, and the second option for BACT is add-on controls. The final option is a combination of the first two options. *Id.* at B.10. The imposition of a forestry plan does not inherently modify Sylvanergy's processes for lowering emissions and does not actively control the CO2 emissions from the proposed facility so it would not be considered "add-on controls" to the emission source. Based on this, the Sustainable Forest Plan would not meet the EPA guidance for available control options under BACT, demonstrating a need for this Court's finding of clear error by NUARB.

D. Governor's Executive Order 12-005 should not be considered when evaluating BACT.

In it's opinion, the EAB concludes that the Sustainable Forest Plan is required by the New Union Governor's Executive Order 12-005. R. at 12. However, addressing this on review constitutes clear error by the EAB because this Order does not provide a basis for further review but rather serves as an executive branch efficiency directive.

In an opinion from the First Circuit addressing a similar circumstance, a presidential executive order could not be given the effect to a PSD permit that NUARB gives to Order 12-005. *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). That order contained near identical language as Order 12-005, requiring that "[t]o the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission." *Id.* at 449. However, the First Circuit held that the order was "intended only to improve the internal management of the executive branch." *Id.*

Similarly here, this Court should not construe Executive Order 12-005 as creating an additional right of review by the EAB, and further conclude that the EAB clearly erred in doing so. Moreover, this Court should conclude that NUARB clearly erred in giving effect to the Order

in imposing a Sustainable Forest Plan because the order was intended to improve internal state management of the executive branch, which does not displace the EPA's requirements and regulations under the CAA.

CONCLUSION

For these reasons, Sylvanergy requests that this Court hold that it has jurisdiction to review NUARB's denial of the request for a non-applicability determination and find that NUARB's findings and conclusions therein were arbitrary and capricious. Sylvanergy also requests that NUARB's final PSD permit was arbitrary and capricious because it clearly erred by imposing PSD review for greenhouse gas emissions and by imposing as BACT a Sustainable Forest Plan. Finally, Sylvanergy requests, however, that this Court uphold NUARB's rejection of partial carbon capture and sequestration and wood gasification as BACT because such a finding is proper.

Respectfully submitted,

Team 4
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