IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. Nos. 14-000123 and 14-000124

SYLVANERGY, L.L.C.,

Petitioner – Appellant

v.

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

Respondent – Appellee

AND

SAVE OUR CLIMATE, INC.,

Petitioner – Appellant

v.

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

Respondent – Appellee.

On Consolidated Petitions for Review of a Final Order of the Regional Administrator

Brief For Petitioner – Appellant, Sylvanergy, L.L.C.
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JURISDICTIONAL STATEMENT

This case is on appeal from the U.S. Environmental Protection Agency’s Environmental Appeals Board (EAB). Sylvanergy, L.L.C. (Sylvanergy) and Save the Climate, Inc. (SOC) seek judicial review of EAB’s June 1, 2015 denial of review of a PSD permit issued to Sylvanergy by the New Union Air Resources Board (NUARB) pursuant to delegated authority under the Clean Air Act, 42 U.S.C. § 7475. Sylvanergy and SOC timely appealed NUARB’s PSD permit to EAB. EAB determined that it had jurisdiction to review the BACT determination related to GHG emissions of Sylvanergy’s proposed facility as final agency action pursuant to 40 C.F.R. § 124.19(a), but that it lacked jurisdiction to review NUARB’s denial of Sylvanergy’s application for a Non-Applicability Determination (NAD). Sylvanergy and SOC timely appealed EAB’s decision to this Court. As discussed below, this Court has jurisdiction to review NUARB’s denial of the NAD and EAB’s denial of the petitions for review because these constitute final agency action pursuant to § 307(b) of the Clean Air Act, 42 U.S.C. § 7607.

STATEMENT OF ISSUES PRESENTED

I. Whether this Court has jurisdiction to review NUARB’s denial of Sylvanergy’s request for a NAD because it was final agency action.

II. Whether NUARB incorrectly denied Sylvanergy’s request for a NAD when the only fossil-fuel fired parts of Sylvanergy’s biomass facility are two boilers with a heat input capacity of 120 MMBtu/hr and Sylvanergy’s Forestdale site approval plan provides for operational controls that restrict emission of regulated pollutants to levels below 250 tpy.

III. Whether the CAA grants EPA authority to subject Sylvanergy’s biomass facility to PSD review based upon its GHG emissions when the Supreme Court has held that emissions of GHGs alone cannot subject a source to the PSD program.

IV. Whether NUARB appropriately rejected wood gasification in the BACT analysis because doing so would improperly redefine the source.

V. Whether the forest plan was impermissibly implemented outside of the bounds of authority granted in § 169(3) of the CAA.
STATEMENT OF THE CASE

This case involves Sylvanergy’s promotion of clean energy through its Forestdale Facility, which is being unlawfully thwarted by the costs and burdens of permitting under the Prevention of Significant Deterioration (“PSD”) program of the Clean Air Act (“CAA”).

**Sylvanergy’s Contribution to Clean Energy.** Sylvanergy, L.L.C. (“Sylvanergy”), in doing its part to preserve the environment, proposed a new green energy facility (the “biomass facility”) in the Village of Forestdale, New Union (“Forestdale”). R. 5. The biomass facility will be located approximately 2 km from the center of Forestdale and will house a 500 MMBtu/hr biomass-fired electricity generation unit, with the capacity to process and combust 150,000 tons (dry weight) of biomass fuel per year. R. 5. The biomass facility will also house a wood pellet production plant. R. 5. The biomass facility will consist of an advanced stoker design wood-fired boiler, along with two ultra-low sulfur diesel (ULSD) start-up burners. R. 5. Each of the ULSD burners have a maximum heat input rate of 60 MMBtu/hr. R. 5. The facility will generate 40 MW of electricity and will employ conventional pollution control equipment in the form of a multiclone, electrostatic precipitator and multi-pollutant catalytic reactor. R. 5.

In order to mitigate the impact of traffic caused by log trucks bringing raw logs to the facility for processing into pellet fuel, Forestdale placed limits on the operational hours, reflected in the site plan and enforceable by the building inspector for Forestdale. R. 5. Specifically, the site plan limits operation of the facility to no more than 6500 hours per year. R. 5. Based on a 96-percent capacity factor, the facility would emit the following amounts of the following air pollutants (in tpy): PM 2.5: 63; SO2: 45; NOx: 110; CO: 255; VOC: 40. R. 5. However, due to the limitation on operating hours, the facility would be limited to a capacity factor of 75 percent.

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1 All citations in this section are made to the Court’s record as amended November 10, 2015.
R. 5. At a 75 percent capacity factor, the facility would emit the following amounts of the following air pollutants (in tpy):

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<th>NOx</th>
<th>CO</th>
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<td>47</td>
<td>32</td>
<td>80</td>
<td>190</td>
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R. 5. In addition, when operating at full capacity, the facility would emit 350,000 tpy of greenhouse gas (“GHG”) emissions in carbon dioxide equivalents (CO₂E). R. 5.

**NUARB’s Inappropriate Denial of Sylvanergy’s NAD.** Pursuant to delegated authority under the CAA, the State of New Union Air Resources Board (“NUARB”) is authorized to issue preconstruction permits. R. 5. The entire State of New Union is an attainment area. R. 5.

Pursuant to its obligation under the CAA, Sylvanergy petitioned NUARB for a Non-Applicability Determination (“NAD”) on January 15, 2013. R. 5. The basis of the NAD was that the facility does not qualify as a “fossil-fuel fired steam electric plant” subject to the 100-tpy “major emitting facility” threshold. R. 5–6. In addition, the NAD was based on the facility’s lack of potential to emit more than 250 tpy of regulated pollutants. R. 6. Despite the biomass facility’s primary reliance on biomass, NUARB denied the NAD, reasoning that the facility was a fossil-fuel fired source due to the use of ULSD start-up burners. R. 6. In addition, NUARB failed to recognize the operating hours contained in the site plan as federally enforceable controls. R. 6.

**Sylvanergy’s Further Steps to Comply with the CAA.** In response to NUARB’s denial of the NAD, and under protest, Sylvanergy filed a PSD preconstruction permit application. R. 6. NUARB published a draft permit for public comment on September 12, 2013. R. 6. Among the commenters were Save Our Climate (“SOC”), a non-profit environmental protection group, and Union Loggers Association. R. 6. On June 12, 2014, NUARB issued the final PSD permit. R. 6. NUARB approved Sylvanergy’s proposed flue controls for particulates, sulfur dioxide, nitrogen...
oxides, carbon monoxide, and VOCs as constituting the Best Available Control Technology ("BACT"). R. 6. These controls are not challenged here.

Again under Sylvanergy’s protest, NUARB conducted BACT review for GHG emissions from the facility based on a 96-percent capacity factor. R. 6. NUARB determined that the plant would emit GHGs and that control of these emissions was possible. R. 6. Yet again, SOC filed comments, arguing that BACT for GHGs was partial carbon capture and storage using a system of wood fuel gasification and combined cycle combustion. R. 6.

NUARB’s review first rejected carbon capture as BACT because there is “no proven technology for removing CO₂ from the dilute flue gas streams that result from biomass combustion.” R. 6. NUARB also rejected use of alternative fuels as BACT because “such alternative fuels would constitute a redefinition of the facility.” R. 7. Finally, NUARB rejected the implementation of wood gasification and partial carbon capture and storage as “an impermissible redefinition of the proposed source.” R. 7. Ultimately, NUARB determined that implementation of a forest plan would constitute the BACT. R. 7. This requires Sylvanergy to purchase and maintain 25,000 hectares of dedicated forest land at a cost of $10 million. R. 7.

**Procedural History.** Sylvanergy and SOC each filed timely petitions for review with the Environmental Appeals Board (“EAB”). R. 7. Sylvanergy challenged the denial of the NAD, as well as the imposition of the forest plan by NUARB. R. 7. SOC challenged NUARB’s final determination regarding the BACT, asserting that wood gasification and partial carbon capture and storage is BACT for the facility. R. 7. EAB concluded that it lacked jurisdiction to review NUARB’s denial of the NAD. R. 8. Moreover, EAB held that NUARB’s BACT determination was not clearly erroneous. R. 13–14. Sylvanergy and SOC filed timely appeals to the Twelfth
Circuit Court of Appeals pursuant to § 307(b) of the CAA because NUARB’s actions constituted final agency action. R. 1.

**Rulings Presented for Review.** Sylvanergy objects to the PSD permit as issued by NUARB, disputing NUARB’s determination that the biomass facility is subject to PSD review for GHGs and that the forest plan constitutes BACT for GHG emissions. Sylvanergy challenges NUARB’s denial of its request for a NAD, contending that the proposed facility is not a “major emitting facility” subject to PSD. EPA agrees it is not a fossil-fuel fired source but argues it is subject to PSD based on the 250 MMBtu/hr threshold. SOC agrees with the determination that the facility is subject to PSD for criteria pollutants and GHGs, but disputes NUARB’s BACT review due to adverse environmental impacts and its rejection of wood gasification and partial carbon capture and storage. This Court granted review and ordered briefing on the substantive merits of each of these rulings.

**SUMMARY OF THE ARGUMENT**

This Court has jurisdiction to review NUARB’s denial of Sylvanergy’s request for a NAD. Section 307(b) of the CAA confers jurisdiction over “any other final action . . . which is locally or regionally applicable” upon the circuit court which sits in that locale or region. Under Harrison’s broad interpretation of “any other final action,” NUARB’s denial of the NAD constitutes “any other agency action” because the question of whether Sylvanergy is subject to PSD review is ripe for judicial review and final agency action. Even if the denial is not final agency action, the denial of the NAD is collateral to the PSD permit process and EPA’s position on the issue would make further administrative process futile.

Sylvanergy’s biomass facility is entitled to a NAD because it cannot be classified as a major emitting facility. The plain language of the governing regulations requires the 250 MMBtu/hr heat input capacity for fossil-fuel fired sources to be that of the fossil-fuel fired
technology, thus Sylvanergy’s ULSD burners with a capacity of 120 MMBtu/hr exclude the facility from PSD review based on potential to emit 100 tpy. Moreover, its limit on hours of operation, enforceable by the Forestdale building inspector, sufficiently restricts the facility’s emissions to levels under the alternate 250 tpy threshold.

Furthermore, EPA is constitutionally forbidden from subjecting the facility’s GHG emissions to the PSD program as Congress and the Supreme Court have made it clear that the program was never intended to reach sources not otherwise subject to PSD. Until Congress legislates such requirements, GHG emissions from sources like Sylvanergy’s facility, that are not otherwise subject to PSD review, should be exempt from the PSD program altogether.

NUARB correctly determined that requiring Sylvanergy to redesign its facility to a wood gasification process would violate EPA policy and case precedent, because gasification runs contrary to the facility’s fundamental purpose. However, NUARB improperly interpreted its power under § 169(3) to impose a forest plan on Sylvanergy, and erred in failing to recognize the biomass facility as BACT per se. NUARB erred in its BACT environmental analysis, in applying system-based approaches that are only applicable under § 111, and in frustrating the intent of the numerous federal, state and agency policies encouraging biomass facility development.

**STANDARD OF REVIEW**

This Court must reverse final action by EPA and NUARB if it is “arbitrary, capricious, or contrary to law” or if it exceeds the CAA’s “jurisdiction, authority, or limitations.” *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). This Court must also reverse final agency action if EPA or NUARB relied on factors which Congress did not intend for them to consider, if they failed to consider an important aspect of the problem, or if they offered an explanation for their final decision that is contrary to the evidence or is “so implausible that it could not be

ARGUMENT

I. This Court has jurisdiction to review NUARB’s denial of Sylvanergy’s request for a NAD because the denial is a final action and ripe for judicial review.

Section 307(b) of the Clean Air Act provides a non-exhaustive list of agency actions which can trigger judicial review in the Court of Appeals for the appropriate circuit. 42 U.S.C. § 7607 (2012). In addition to those actions explicitly listed, § 307(b) also authorizes the Court of Appeals for the 12th Circuit to review “any other final action . . . which is locally or regionally applicable.” *Id.* In interpreting the meaning of “any other final action,” the Supreme Court determined that Congress intended the literal meaning of the phrase and, in doing so, recognized a radical expansion in the jurisdiction of the court of appeals. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). Therefore, “final action” is to be interpreted in the same broad manner as the term “final action” in the Administrative Procedure Act. *Id.* at 586. Moreover, the decisions of NUARB are attributable to the EPA itself where, as we have here, NUARB is acting pursuant to its delegated power. 42 U.S.C. § 7475 (2012). In determining whether a decision is final, within the meaning of the statute, courts look to whether the controversy is ripe for judicial review and whether the agency action is final, that is whether the party challenging the determination has exhausted its administrative remedies. *Puerto Rican Cement Co. v. E.P.A.*, 889 F.2d 292, 294 (1st Cir. 1989).

A. NUARB’s denial of Sylvanergy’s NAD is ripe because the issues are fit for judicial review and withholding review would work a substantial hardship on Sylvanergy.

The purpose behind the ripeness doctrine is to prevent courts from engaging in “abstract disagreements over administrative policies.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In addition, in the context of the finality of administrative decisions, the ripeness doctrine also
“protect[s] the agencies from judicial interference until an administrative decision has been formalized.” *Id.* Based on these considerations, courts have taken a functional approach, rather than a formalistic one, when analyzing whether a case is ripe for judicial review. *Id.* In determining whether an administrative action is ripe for judicial review, the Supreme Court has espoused a two-part test which evaluates: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding consideration. *Id.*

i. **The issue which Sylvanergy raises is ripe for judicial review because it is a questions of law and the factual record is fully developed.**

Where the question presented for review is a purely legal question, like we have in the present case, the question is ripe for judicial review. *Puerto Rican Cement Co.*, 889 F.2d at 295; *Roosevelt Campobello Int'l Park Comm'n, Campobello Island, New Brunswick, Canada v. E.P.A.*, 684 F.2d 1034, 1040 (1st Cir. 1982). In *Puerto Rican Cement Co.*, a case on all fours with the present case, the court held that a company’s request for a NAD was a question of law and thus ripe for judicial review. *Puerto Rican Cement Co.*, 889 F.2d at 295. In doing so, the court noted that its only job was to apply the developed record to the regulations to determine if PSD review was necessary. *Id.* The court reasoned that, due to the legal question presented, no further development of the facts was necessary in order for the issue to be ripe. *Id.* See also *Roosevelt Campobello*, 684 F.2d at 1040 (holding that extension of a permit was a pure legal question, making it ripe for review); *McCoy-Elkhorn Coal Corp. v. EPA*, 622 F.2d 260, 264 (6th Cir. 1980) (reasoning that the court would never be in a better position to decide the issue because it was a question of law).

Even if the issue is not a question of law, the issue is ripe for review where the factual record is fully developed. *Puerto Rican Cement Co.*, 889 F.2d at 295; *Hawaiian Elec. Co. v. E.P.A.*, 723 F.2d 1440, 1443 (9th Cir. 1984). Although the court in *Puerto Rican Cement Co.*
found the issue for review to be a legal question, the court also held that the factual record was fully developed, another factor which weighed in favor of finding ripeness. 889 F.2d at 295. Likewise, the court in Hawaiian Elec. Co. reached the same result. 723 F.2d at 1443. In that case, the company sought permission from EPA to use a fuel which contained higher concentrations of sulfur. Id. at 1442. In holding that the issue was ripe for review, the court noted that the record was developed and straightforward. Id. at 1443.

In the present case, the question presented for review is a legal question: whether, under the CAA, Sylvanergy should be subject to PSD review. Like in Puerto Rican Cement Co., this Court’s only duty is to apply the facts in the record to the regulations in order to determine if PSD review is necessary.

In addition to the issue being a question of law, the factual record regarding the NAD is fully developed in this case. Sylvanergy applied to NUARB for a NAD. The application contained details about the kinds of stationary sources which it planned on constructing at the biomass facility. In addition, the record outlines with specificity, the amounts of air pollutants that those stationary sources will emit. Those calculations include both the amounts which would be emitted at the 75 capacity factor, which is enforceable by the building inspector for Forestdale, as well as the amounts which would be emitted at full capacity. Moreover, Sylvanergy outlined the total amount of GHG emissions. This was all that factual information that NUARB needed in order to determine if Sylvanergy was subject to PSD review. Likewise, it is all the factual record that is necessary for this court to effectively review the denial of the NAD. Based on the fact that the issue presented in this case is a legal question and the factual record is fully developed, the first prong of the ripeness test has been met.
ii. Withholding review would work a substantial hardship on Sylvanergy.

Sylvanergy need only show that it has been subjected to an affirmative obligation in order to show substantial hardship. *Puerto Rican Cement Co.*, 889 F.2d at 295; *Hawaiian Elec. Co.*, 723 F.2d at 1443. The court, in *Puerto Rican Cement Co.*, held that denial of a NAD worked substantial hardship on the company requesting the determination. *Puerto Rican Cement Co.*, 889 F.2d at 295. In doing so, the court recognized that denial of the NAD forced the company down one of three paths: either the company could abandon its building plans, it could compromise its building plans by agreeing on emissions limitations, or it could engage in long, costly PSD review. *Id.* The court reasoned that all of the options imposed an affirmative obligation on the company and, therefore, worked a substantial hardship. *Id.* While recognizing the same hardships above, the court in *Hawaiian Elec. Co.* recognized that the potential of being subjected to more stringent affirmative obligations was a substantial hardship on the company. 723 F.2d at 1443. There the court found that if the company was subject to PSD review, it may eventually be subject to the more stringent BACT review as well. *Id.* In recognizing this fact, the court reasoned that subjecting a company to future affirmative obligations also worked a hardship on the company. *Id.*

Sylvanergy will be forced to endure substantial hardship if review is withheld in this case. All of the eventual hardships espoused in *Puerto Rican Cement Co.* and *Hawaiian Elec. Co.* have come to fruition. NUARB’s denial of the NAD subjected Sylvanergy to the same choices presented in *Puerto Rican Cement Co.*: abandoning its project, significantly changing plans by agreeing to emissions limitations, or engaging in long, costly PSD review. Sylvanergy chose the third option and, like in *Hawaiian Elec. Co.*, Sylvanergy was inevitably subjected to the even more stringent BACT review. The fact that Sylvanergy subjected itself to PSD review,
under protest, does not mitigate the hardship felt by the company. Sylvanergy is still faced with affirmative obligations. As always, it can choose to abandon the project altogether, which—in light of the extensive PSD and BACT review—would be even more of a hardship than when that option was presented before. Alternatively, Sylvanergy can choose to expend significant resources in order to comply with the stringent regulations that resulted from the PSD and BACT review—both of which are unlawful under the statutory framework. Due to the fact that Sylvanergy is faced with affirmative obligations to either abandon its project or expend significant resources in complying with NUARB’s orders, withholding review would work a substantial hardship on Sylvanergy.

B. NUARB’s denial of Sylvanergy’s NAD is final because Sylvanergy has exhausted all administrative remedies and it is the agency’s final word on the matter.

The Supreme Court does not focus on the word “action” but instead on the word “final,” which is defined as the “consummation of the agency’s decision-making process.” Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 478 (2001); Bennett v. Spear, 520 U.S. 154, 177–78 (1997). This is often articulated as whether the administrative remedies available have been exhausted. Puerto Rican Cement Co., 889 F.2d at 295. If the litigant has exhausted all remedies, as Sylvanergy has here, then EPA has rendered the final word on the matter and the action is final for purposes of § 307. Am. Trucking Ass’ns, 531 U.S. at 478. Even if the exhaustion requirement is not met, this Court can waive the requirement because the unexhausted claim is collateral and exhaustion is futile. Puerto Rican Cement Co., 889 F.2d at 295; City of New York v. Heckler, 742 F.2d 729, 737 (2d Cir. 1984) aff’d sub nom. Bowen v. City of New York, 476 U.S. 467, (1986).

Agency action is final where the agency’s actions, in themselves, indicate that it will not reconsider the issue. Am. Trucking Ass’ns, 531 U.S. at 479. In American Trucking Associations, the Court held that an interpretation issued by EPA constituted “any other final action” for
purposes of § 307. *Id.* at 478. The Court noted that after the interpretation was issued, EPA refused to reconsider the interpretation in subsequent rulemaking procedures. *Id.* Therefore, the Court reasoned that the interpretation was final even though EPA did not “dress[] its decision with the conventional procedural accoutrements of finality.” *Id.*; *but see Pub. Serv. Co. of Colo. v. E.P.A.*, 225 F.3d 1144, 1145 (10th Cir. 2000) (holding that a determination letter was not final agency action because the party seeking the letter was not the party that was seeking the permit).

Even if administrative remedies have not been exhausted, the exhaustion requirement will be waived where the issue is collateral. *Puerto Rican Cement Co.*, 889 F.2d at 295. In *Puerto Rican Cement Co.*, the court failed to reach the issue of whether administrative remedies were exhausted because the case clearly fit into the collateral exception. *Id.* The court held that the issue presented to EPA when requesting a NAD were “plainly separable from” all the matters that EPA would consider in the PSD review itself. *Id.* Since the issue was plainly separable, it was unlikely that any further agency action would moot the issue before the court. *Id.*

In addition, the exhaustion requirement should be waived if exhaustion of remedies is futile. *Heckler*, 742 F.2d at 737. In *Heckler*, the court held that the exhaustion requirement was waived because further administrative remedies would not vindicate the violation of the claimant’s procedural rights. *Id.* The claimants in *Heckler* complained that the secretary’s denial of social security benefits was not based on an individualized assessment. *Id.* The court reasoned that, although further administrative procedure may have resulted in the award of retroactive benefits, said procedure would not vindicate the right of the claimant to have an individual assessment. *Id.* Although *Heckler* dealt with provisions of the Social Security Act, the reasoning that exhaustion should be waived where no further administrative process could vindicate the right, is applicable to whether exhaustion is futile under any administrative scheme. *See also*
Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (holding that an erroneous termination of disability payments would damage the claimant irreparably through retroactive payments).

Denial of Sylvanergy’s NAD is final agency action because it is EPA’s final word on the issue. NUARB issued a letter to Sylvanergy opining that the biomass facility was subject to PSD review. In issuing the letter, NUARB was acting under the power delegated to it by the EPA. If the actions of a delegated agency could not constitute final agency action, then EPA would be forced to review every local decision before it constituted “final agency action.” Moreover, nothing in the letter indicated that the opinion was preliminary or that any further consideration would occur which would result in a reconsideration of the NAD. Moreover, EPA’s actions indicate that it will not reconsider the issue. Under protest, Sylvanergy subjected itself to a costly PSD and BACT review. These processes required Sylvanergy to submit a substantially larger amount of information than the NAD. Nevertheless, like in American Trucking Associations, EPA never revisited the determination that PSD review applies. Sylvanergy even went so far as to appeal the NAD to EAB. However, EAB determined that it did not have jurisdiction to review a NAD. If neither EPA nor EAB will revisit the question of whether denial of the NAD was appropriate, then the agency has issued its final word—or has at least ratified the decision—and, therefore, said determination was final agency action.

Even if the NAD is considered to be a preliminary decision, this Court should waive the finality requirement because the issue is collateral. As stated in Puerto Rican Cement Co., the issue raised while reviewing a NAD is plainly separable from those addressed in the PSD review itself. As stated above, this is made even clearer by the fact that there was no consideration of the NAD in the later PSD and BACT review. Although Sylvanergy has exhausted all of its remedies
in this regard, the question of whether a NAD should have been issued was never raised in subsequent review. Therefore the question is collateral to any further review.

Finally, even if the NAD is considered to be a preliminary decision, this Court should waive the finality requirement because further process would be futile. The action that Sylvanergy complains of is the denial of the NAD. If that action is not reviewable here, it is wholly unreviewable. Nothing in the subsequent PSD or BACT review will ever remedy the denial of the NAD. Like in Heckler, nothing that EPA could do at this point would ever remedy Sylvanergy’s right to be free of PSD review based on an appropriate interpretation under the statute. Based on the fact that the NAD is a final agency action, or at least that the NAD does not need to be final agency action because it is collateral and further agency action would be futile, this Court has jurisdiction to review the denial of Sylvanergy’s NAD.

II. **Sylvanergy’s biomass facility is entitled to a NAD because its primary reliance on biomass falls outside the enumerated source categories subject to PSD review and its operational controls render the plant a synthetic minor.**

Only “major emitting facilities” are subject to the PSD program. CAA § 165(a), 42 U.S.C. § 7475(a) (2012). A source is a “major emitting facility” if it (1) is one of twenty-eight enumerated facility types and emits or has the potential to emit 100 tpy of regulated air pollutants; or (2) emits or has the potential to emit 250 tpy of regulated pollutants. CAA § 169(l), 42 U.S.C. § 7479(1) (2012); 40 C.F.R. § 52.21(b)(l) (2015). Sylvanergy’s biomass facility fails to qualify as a fossil-fuel fired source subject to the 100 tpy threshold as it primarily relies on biomass. Sylvanergy’s facility also fails to qualify as a major emitting facility subject to the 250 tpy threshold because its enforceable operational controls render it a synthetic minor.
A. Sylvanergy’s biomass facility cannot be classified as a fossil-fuel fired source subject to the 100-tpy threshold because its maximum fossil-fuel heat input capacity falls well below the statutory threshold.

Fossil-fuel fired sources are only subject to the 100 tpy threshold if they operate with a maximum heat input of 250 MMBtu/hr. 40 C.F.R. § 52.21(b) (2015). It can be argued that the PSD program contemplates comprehensive applicability determinations that take into account plant-wide calculations of heat input capacity. See U.S. EPA, Opinion Letter on Fuel Combustion Equipment Counted Toward 250 MMBtu/hr Threshold for PSD Applicability (Sept. 30, 1987). However, the inclusion of the heat capacity of biomass-fired technology is contrary to the CAA and permitting agencies’ application of the Act.

A plain reading of the CAA and its governing regulations reveals that the relevant consideration is the heat input capacity of the fossil-fuel fired technology. The terms “fossil-fuel fired steam electric plant” and “fossil-fuel fired boilers” are not defined in either CAA § 169 or 40 C.F.R. § 52.21(b)(1)(i). Therefore, the definitions for New Source Performance Standards (“NSPS”) in 40 C.F.R. part 60 are controlling. 40 C.F.R. § 52.01 (2015). The NSPS regulations define “fossil fuel” as “natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials.” 40 C.F.R. § 60.41 (2015). These regulations make a clear distinction between “fossil-fuel-fired” systems and biomass or “wood-residue-fired” systems. See 40 C.F.R. § 60.40(a) (2015). Even where fossil fuel and biomass are considered in tangent, the regulations specify the threshold heat input rate as that of the unit “capable of firing fossil fuel.” 40 C.F.R. § 60.40(a)(2) (2015) (emphasis added). Thus, the threshold of 250 MMBtu required to meet the fossil-fuel fired source categories must be by the unit burning fossil fuel.

Courts reviewing the regulatory language also concluded that the term “fossil fuel” does not apply to a combination of fossil fuel and other fuels. See, e.g., PPG Indus., Inc. v. Harrison, 660 F.2d 628, 634 (5th Cir. 1981) (concluding that the language of regulations governing new
source emission standards for sulfur dioxide only suggested that the regulation was meant to apply to mixtures of fossil fuels and not mixtures of fossil fuels and waste heat).

State and local permitting agencies acting pursuant to delegated authority have also applied this standard. In August 2015, the San Joaquin Valley Air Pollution Control District in California issued a permit for the conversion of a coal-fired power plant to a biomass-fired plant subject to PSD based on a potential to emit 250 tpy of pollutants. San Joaquin Valley Air Pollution Control Dist., Auth. to Construct Application Review Biomass-Fired Power Plant (2015). This plant proposed to use a stoker-type unit with a 100 MMBtu/hr natural gas-fired startup burner. Id. at 3. Although the heat input capacity of the plant was 699 MMBtu/hr and the plant was fired on both natural gas and biomass, the agency only looked to the heat input of the natural gas firing unit for determining PSD applicability. Id. at 13. Similarly, Florida, under delegated authority, requires PSD permitting of facilities whose “total boiler heat input capacity” is at least 250 MMBtu/hr “while firing fossil fuels.” AMEC, Highlands Ethanol Air Permit Application 4-2 (2012) (emphasis in original).

EPA has also interpreted other source categories—not expressly characterized as fossil-fuel fired sources but subject to the 100 tpy threshold—as only relating to fossil-fuel fired technology. In a January 20, 1976 memorandum, for example, EPA defined “fuel conversion plant,” one of the enumerated source categories, as a plant which “accomplish[es] a change in state for a given fossil fuel.” D. Kent Berry, Clarification of Sources Subject to PSD Review (Jan. 20, 1976) (emphasis added). In fact, EPA has generally only found that sources are subject to PSD under the 100 tpy threshold when these plants have relied primarily on fossil fuels. See, e.g., U.S. EPA, Opinion Letter on PSD Applicability to Fossil Fuel Boilers at Rendering Facility
(June 27, 2011) (concluding that a plant fired by six fossil-fuel fired boilers whose total heat input capacity was 301.314 MMBtu/hr was subject to PSD review).

Here, Sylvanergy’s biomass facility is not subject to PSD review based on a potential to emit 100 tpy because the plant will primarily rely on biomass, and the heat input capacity of its fossil-fuel burning technology falls below the 250 MMBtu/hr threshold. Two ULSD burners are the only fossil-fuel fired part of the facility, and these are to be used only at start-up. As each burner has a heat input capacity of 60 MMBtu/hr, the total heat input capacity of the fossil-fuel fired technology is at most 120 MMBtu/hr. Thus, applying a plain language reading of the statutory and regulatory requirements, the relevant heat input capacity of Sylvanergy’s plant is far under the required 250 MMBtu/hr that triggers PSD applicability.

Furthermore, Sylvanergy’s biomass facility is similar to others that are not subject to the 100 tpy threshold. Like the biomass facility in San Joaquin Valley, Sylvanergy’s stoker design boiler relies only on fossil fuel for start-up. As the permitting agency there only took into account the start-up burners in determining the fossil-fuel source heat input capacity, so the Court here should only look at the heat input capacity of the ultra-low sulfur diesel burners. Even a plant-wide calculation of heat input capacity, as noted in the Highlands Air Permit Application, only takes into account the two burners with a maximum heat input capacity of 120 MMBtu/hr, excluding heat input capacity of the biomass-fired technology of Sylvanergy’s plant, and excluding the plant from the enumerated source categories subject to the 100 tpy threshold.

B. Sylvanergy’s biomass facility is a synthetic minor excluded from PSD review because its operational restrictions limit pollutant emissions to below-threshold levels and are legally and practically enforceable.

Sylvanergy’s biomass facility will only be subject to the PSD program if the controls restricting its emissions of regulated pollutants to levels below 250 tpy—rendering the facility a synthetic minor—are federally unenforceable or legally and practically unenforceable. 67 Fed.
Reg. 80,186, 80,190 (Dec. 31, 2002); CAA § 169(1), 42 U.S.C. § 7479(1). It is well settled that, in calculating a source’s potential to emit, a permitting agency is not to assume operation at full capacity but “must . . . take[ ] into account the anticipated functioning of the air pollution control equipment designed into the facility.” Ala. Power Co. v. Costle, 636 F.2d 323, 379 (D.C. Cir. 1979); Wisc. Elec. Power Co. v. Reilly, 893 F.2d 901, 918 (7th Cir. 1990) (holding that reliance on continuous operation as a basis for calculating potential to emit is baseless); United States v. La.-Pac. Corp., 682 F. Supp. 1141, 1158 (D. Colo. 1988) (noting that potential to emit “contemplates the maximum emissions that can be generated while operating the source as it is intended to be operated”) (emphasis added).


Furthermore, a source’s operational limits need only be effective as a practical matter to be considered in the potential to emit calculation. See La.-Pac. Corp., 682 F. Supp. at 1133; Nat’l Mining Ass’n v. E.P.A., 59 F.3d 1351, 1363–65 (D.C. Cir. 1995). In Louisiana-Pacific Corp., the court held that restrictions on hours of operation are an ideal control because they are easily enforceable. La.-Pac. Corp., 682 F. Supp. at 1133. The court reasoned that an enforcing
entity may readily verify compliance through testimony of officers, internal correspondence, and operational records including accounting, purchasing and production logs. *Id.*

EPA has also determined that a source’s controls are practically enforceable if they comply with three modest requirements: (1) a technically accurate restriction with specifications of parts of the source that are subject to the restriction, (2) the time period of the restriction, and (3) a method of compliance. 67 Fed. Reg. at 80,191.

Moreover, only when a locally-enforceable control contains no operational limitation or is solely intended to circumvent the PSD program should it be excluded from the “potential to emit” determination. See *Nat’l Mining*, 59 F.3d at 1362. When initially issuing guidance on the potential to emit application to PSD applicability determinations, EPA noted that the maximum achievable capacity of a source should be utilized only in the event that the source’s pre-construction permit failed to contain limits on hours of operation or capacity of utilization. U.S. EPA, *Limiting Potential to Emit in New Source Permitting* 2 (1989) ("PTE Guidance"). The D.C. Circuit subsequently held that only where operational limits are clearly "shams" should a source's "potential to emit" not account for the reductions in emissions achieved by such limits. *Nat’l Mining*, 59 F.3d at 1362. The court concluded that only those controls that are “chimeras” and that do not actually “restrain an operator from emitting pollution” fall outside of the CAA’s purview. *Id.*

The bar for constituting a “sham” or “chimera” is a high one, requiring EPA to demonstrate an intent on the part of the source to operate at major source levels in order to subject such a source to PSD program despite its operational limits. *Id.*; 40 C.F.R. § 52.21(r)(4) (2015). Suspicion arises when a source applies simultaneously for a minor source permit and a major source permit; when a source applies for funding or otherwise projects operations based on
projected major source operations; or when authorized representatives of the source make statements regarding operations at limits higher than those permitted. PTE Guidance at 14–15.

Here, Sylvanergy’s biomass facility is a synthetic minor and not subject to PSD review because its legally enforceable operational restrictions limit carbon monoxide emissions—the only emissions greater than 250 tpy at full operating capacity—to below-threshold levels. Under the rule of National Mining, Sylvanergy’s potential to emit calculation must take into account the controls imposed upon the facility which limit its projected annual emissions. The operational limitations restricting the plant’s annual hours of operation to 6500 are legally enforceable because they are expressly included in the Forestdale site plan approval and are enforceable by “some authority”—the building inspector of the Village of Forestdale. Thus, the biomass facility’s potential to emit is based upon operations at 75 percent capacity, and the plant will not emit any regulated pollutant in quantities at or higher than 250 tpy.

Sylvanergy’s operational limitations are also practically enforceable. Nothing in the record suggests that the operational limits set forth in the site approval plan are inaccurate, and the limitations imposed are specifically noted to be the restriction of hours of operation (of the entire plant) to a maximum of 6500 per year. Because the proposed limitations are on file with the Village, the building inspector may easily verify Sylvanergy’s compliance with the imposed limitations. Furthermore, as the operational limit is tied directly to the working schedule of log trucks and such trucks will be traveling to and from the plant located but two kilometers from the center of Forestdale, any increase in the coming and going of log trucks to and from Sylvanergy’s plant will be easily confirmed by log truck records and public observation.

Finally, Sylvanergy's operational restrictions are not a "sham" meant to circumvent the PSD program. Rather, Sylvanergy’s proposed limitations are included in the site approval plan,
on file with and enforceable by local authorities. In fact, the only potentially “suspect” characteristic is Sylvanergy's application for a PSD permit. This was done under protest, however, and only after NUARB's denial of Sylvanergy's NAD petition. Both EPA and NUARB have failed to even suggest, much less demonstrate, that Sylvanergy intends to operate its biomass facility at above-threshold emissions capabilities. Instead, Sylvanergy adopted the restricted hours of operation, not to avoid PSD permitting, but to mitigate the impact that operations at a higher capacity would have on Forestdale. The citizens of Forestdale will ensure compliance. Located a mere two kilometers from the center of Forestdale, Sylvanergy’s limited hours of operation were adopted in order to reduce any negative effects that the traffic of log trucks to and from the facility would have on the village. Therefore, because the operational limits are not a sham meant to circumvent PSD permitting requirements but are enforceable by governmental authority, Sylvanergy’s restricted hours of operation render its biomass facility a synthetic minor exempt from PSD review.

III. Sylvanergy’s biomass facility is not subject to PSD review as an emitter of GHG because it fails to meet the threshold for PSD review of another regulated pollutant, and independent PSD regulation of biogenic GHGs contravenes the purpose and scope of the PSD program and exceeds EPA’s rulemaking authority.

The Supreme Court recently held that it is impermissible to apply PSD review to GHG emissions of sources not subject to the PSD program for conventional pollutants (“non-anyway” sources). Util. Air Regulatory Grp. (UARG) v. EPA, 134 S. Ct. 2427, 2443 (2014). The Court further instructed EPA to establish and justify a de minimis threshold of GHG emissions for sources subject to PSD review for conventional pollutants (“anyway” sources), prior to requiring GHG emissions BACT analysis. Id. at 2449. Here, EAB impermissibly imposes PSD permitting requirements on Sylvanergy’s biomass facility when the facility is a “non-anyway” source and when EPA has failed to establish and justify a de minimis GHG emission threshold.
A. Sylvanergy’s biomass facility is a “non-anyway” source exempt from PSD permitting for GHG emissions.

The CAA does not subject GHG emissions from a “non-anyway” stationary source to PSD review. *UARG*, 134 S. Ct. at 2443; Carbon Pollution Emissions Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,661, 64919 (proposed August 3, 2015) (to be codified at 40 C.F.R. pt. 60). In *UARG*, the Supreme Court held that EPA may not treat GHGs as pollutants in its determination of whether a source is a "major source" and thus subject to PSD permitting requirements. *UARG*, 134 S. Ct. at 2442. The Court concluded that the Act does not compel the inclusion of GHGs in the scope of air pollutants subject to PSD threshold emission levels because such inclusion would be inconsistent with the statutory scheme. *Id.* at 2441–42. The Court reasoned that subjecting GHG emissions to the 100/250 tpy PSD thresholds would in fact overthrow the Act’s “structure and design” by expanding the scope of the PSD program to an unprecedented number of sources that Congress never intended to be subject to such permitting—including Sylvanergy’s 40 MW biomass facility. *Id.* at 2442–43.

The legislature itself confirms that EPA’s independent PSD regulation of GHG emissions is inconsistent with the intended scope of the program, which is limited to large polluting facilities relying primarily on fossil fuels. *See* H.R. REP. NO. 112-050 (2011). Immediately following EPA’s launch of GHG emissions regulation in 2011, the House of Representatives passed House Bill 910 with the express purpose of preventing EPA’s expansive regulation of GHG emissions. *Id.* at 4. The House noted that the number of sources subject to the PSD program would increase exponentially, from 280 to over 82,000. *Id.* at 5–6. Sponsors of the bill adamantly insisted on the legislature’s modest measures in addressing global warming, rather than EPA’s “extremely costly and ineffective means of addressing climate change.” *Id.* at 5.
In fact, since biogenic carbon dioxide emissions may have a negligible impact on the net atmospheric GHG concentrations, subjecting biomass facilities to PSD review based only on GHG emissions is likely to impose excessive costs on facilities that may exert a de minimis, or even a non-existent, effect on the atmosphere. See EPA Deferral Rule, 76 Fed. Reg. 43,490, 43,490–91 (July 20, 2011) (codified at 40 C.F.R. pts. 51, 52, 70, and 71); Ctr. for Biological Diversity v. E.P.A., 722 F.3d 401, 409, 411 (D.C. Cir. 2013). EPA acknowledges that PSD review is a “complicated, resource-intensive, time-consuming, and sometimes contentious process” that is suitable for “hundreds of larger sources” but not for “tens of thousands of smaller sources.” EPA Tailoring Rule, 74 Fed. Reg. 55,304, 55,321–22 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, and 71). Thus, without the ability to assess the actual need for regulating biogenic GHG emissions, application of PSD requirements to biomass sources is likely to result in unduly burdensome costs—costs, which without justification, would render EPA’s regulation of GHGs unreasonable and ultra vires. See Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (holding EPA’s interpretation of 42 U.S.C. § 7412(n)(1)(A) unreasonable because EPA failed to account for costs in its decision to regulate power plants).

Finally, PSD regulation of GHG emissions is a decision left to Congress—not EPA. The power to legislate clearly rests with Congress, not the executive. U.S. Const. art. I, § 1. EPA only retains rulemaking authority under the CAA at the behest of Congress. 42 U.S.C. §§ 7401, et seq. EPA is, thus, able to interpret and implement environmental laws passed by the legislature, but is constitutionally forbidden from engaging in the making of new laws. Indeed, both EPA’s action and inaction must be grounded in legislation enacted by Congress. See Mass. v. EPA, 549 U.S. 497, 533 (2007). Because of the “vast ‘economic and political significance’” of the regulation of biogenic GHGs emissions, EPA’s decision to regulate such under the PSD program is only a
valid exercise of its rulemaking authority if Congress “clearly” designates such authority to the
agency. *UARG*, 134 S. Ct. at 2444; *see also FDA v. Brown & Williamson*, 529 U.S. 120, 160
(2000). EPA has been given no such “clear congressional authorization.” *UARG*, 134 S. Ct. at
2444. In fact, Congress has emphasized the need to “return global warming policymaking
responsibility where it belongs—Congress.” H.R. Rep. No. 112-050 at 7. Accordingly, biogenic
GHG emissions from “non-anyway” should be excluded altogether from the scope of the PSD
program and Sylvanergy’s biomass facility deemed exempt from PSD review.

**B. EPA lacks authority to subject Sylvanergy’s biomass facility to PSD review of
GHG emissions even if it is subject to PSD review for conventional pollutants.**

Even if Sylvanergy’s biomass facility were an “anyway” source, its GHG emissions are
not subject to PSD requirements because EPA has failed to justify its 75,000 ton threshold as a
*de minimis* threshold. *See UARG*, 134 S. Ct. at 2449. Although EPA issued guidance providing
that it would continue to enforce the 75,000 tpy threshold for BACT applicability, it failed to
characterize this as a *de minimis* threshold per the Court’s ruling and has since failed to justify
the continued reliance on the threshold. *See J. McCabe, Acting Assistant Dir., Office of Air &
Radiation, U.S. EPA, Memorandum to EPA Reg’l Adm’rs (July 24, 2014); David Friedland &
Geoffrey Goode, *UARG v. EPA: Practical Implications for GHG PSD Permitting in the Field* 46
No. 1 ABA Trends 2 (2014). Even in its proposed Clean Power Plan, EPA fails to comply with
the *UARG* Court, and simply notes that “*under existing EPA regulations*, a modifying major
stationary source would trigger PSD permitting requirements for GHGs if it undergoes a change .
. that results in a significant increase in the emissions of a pollutant other than GHGs.” 80 Fed.
Reg. at 64919 (emphasis added). The proposed rule does nothing to amend the regulations which
currently fail to justify the *de minimis* threshold. Accordingly, until EPA establishes and justifies
a *de minimis* threshold for BACT review of GHG emissions from “anyway” biogenic sources, such “anyway” sources are not subject to BACT for their GHG emissions.

**IV.** NUARB correctly determined that wood gasification would improperly redefine the source and frustrate the business purposes of Sylvanergy’s biomass facility.

Under the BACT analysis, EAB has a long standing policy against requiring a PSD permittee from considering technologies that will redefine the source. *In re Russell City Energy Ctr., LLC*, 2010 EPA App. LEXIS 45, 96 (E.P.A. 2010). Whether a control technology will redefine the source requires the agency to take a “hard look” at the inherent design elements that are a part of the fundamental purpose of the facility to determine if a control technology will impermissibly redefine the source. Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual*, B.13 (draft Oct. 1990) (“NSR Manual”); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (E.P.A. 1999). It is impermissible for an agency to regulate the applicant’s purpose or business objective for the proposed facility, although an agency has the discretion to consider clean fuel alternatives. *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779 (E.P.A. 1992). The primary focus of determining the fundamental design of the facility is the permittee’s articulated purpose in the permit; location can only be considered to the extent the permittee designates it as essential to the facility’s design. *In re Prairie State Generating Co.*, 13 E.A.D. 1 (E.P.A. 2006); *Russell City Energy*, 2010 EPA App. at 96.

Focusing on the permittee’s purpose expressed in its application for a mine-mouth coal power plant EAB upheld the state agency’s determination that requiring low-sulfur coal would redefine the source. *Prairie State*, 13 E.A.D. at 22. Although environmental groups argued that the agency erred by failing to include low-sulfur coal as an additional SO2 control in the BACT analysis, the agency explained that requiring coal from western states would be inconsistent with the scope of the project. *Id.* at 15–16. EAB declined to find clear error by the agency because the
co-located mine was essential to the mine’s design. *Id.* at 20. Particularly, EAB highlighted the parties' agreement that "Congress intended the permit applicant to have the prerogative to define certain aspects of the proposed facility that may not be redesigned through application of BACT." *Id.* Therefore, the statutory language indicates that a facility’s purpose of basic design must be determined by the agency looking at the permittee’s characterization of the facility in the permit application. *Id.* at 22.

Focusing on the applicant’s stated purpose for designing a 1,500-megawatt coal-fired electric generating facility, EAB remanded the PSD permit because the agency failed to consider IGCC as a potential control technology at Step 1 of the BACT analysis. *In re Desert Rock Energy Co., LLC*, 2009 EPA App. LEXIS 28, 145 (E.P.A. 2009). Because the applicant indicated that IGCC was consistent with the facility's business purposes and elements inherent in its basic design, and IGCC had been considered BACT in two prior permits for similar facilities, EAB concluded that the agency failed to adequately explain its dismissal of IGCC as redefining the source. *Id.* at 122–23. *See also In re N. Mich. Univ. Ripley Heating Plant*, 2009 EPA App. LEXIS 5 (E.P.A. 2009) (remanding the PSD permit because the agency failed to explain why the use of alternative coal sources would redefine the source).

Moreover, a facility’s purpose is as narrowly construed as the permittee intends. In *Prairie State* EAB rejected arguments that a facility’s purpose is viewed as broadly as producing electricity from coal. *Prairie State*, 13 E.A.D. at 25. *See also In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673 (E.P.A. 2002) (rejecting an environmental group's assertion that limiting TDF burning to levels of a previous permit would not redefine the source).

The location of a facility can only be considered in the BACT analysis if it is integral to the facility’s design. Accounting for the location and the specific design features of a 600-MW
natural gas-fired combined-cycle power plant in California, EAB upheld the agency’s issuance of a PSD permit. *Russell City Energy*, 2010 EPA App. LEXIS at 96. There, the plant was specifically designed to take advantage of the city’s nearby wastewater effluent by using recycled water as part of the wet cooling process. *Id.* at 98. Because the facility’s use of the wastewater was integral to its design EAB reasoned that agency was not required to analyze dry cooling which would redefine the source. *Id.* at 99.

Consistent with the long line of EAB decisions, NUARB properly determined that requiring Sylvanergy to undertake a complete and unnecessary overhaul of its proposed design in order to implement wood gasification would impermissibly redefine the source. Just as in *Prairie State* and *Russell City Energy*, Sylvanergy has made fundamental design choices that do not require unnecessary consideration of alternative sources of fuel. Sylvanergy has sought a permit based on wood combustion, not gasification. Further, unlike *Desert Rock*, Sylvanergy has not promoted gasification as a viable option because, while theoretically possible, it frustrates Sylvanergy’s business purposes. Moreover, economic feasibility is only one portion of the BACT analysis; simply because SOC has promulgated some research indicating that there is a potential for Sylvanergy to gain carbon credits through the offsets created by wood gasification, this completely redesigns the entire facility and neglects the wood pellet production component of the facility. Sylvanergy may wish to use any byproducts of the combustion process for wood pellet production, or may choose to supplement available biomass with wood pellets for electric generation; these options are hindered by restructuring the facility for gasification, thus inhibiting the facility from maximizing internal efficiency. Additionally, the fact that the facility is located near the Union Shale geologic unit is irrelevant. As illustrated by *Prairie State* and *Russell City Energy*, location is only considered when central to the proposed design.
Accordingly, wood gasification is not a required analysis as it flies in the face of long standing precedent prohibiting such redefinition of the biomass combustion facility.

V. Clean energy policies and the intent of the CAA exclude imposition of a forest plan and instead render Sylvanergy’s biomass facility BACT per se.

In 2014, the Supreme Court warned of “the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation,” which is precisely the unreasonable and unlawful regulation that NUARB has imposed on Sylvanergy. UARG, 134 S. Ct. at 2449. Determining BACT for an emitting facility requires a case-by-case analysis which takes into account the “energy, environmental and economic impacts” to determine the achievability of emissions limitations. CAA § 169(3), 42 U.S.C. § 7479(3) (2012); 40 C.F.R. § 52.21(b)(12) (2015). EAB misinterpreted this statutory language to arbitrarily allow NUARB to unlawfully force adoption of the forest plan. The BACT analysis does not grant NUARB the power to require such beyond-the-fence measures.

It is a fundamental canon of statutory construction that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” UARG, 134 S. Ct. at 2441 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). Even under Chevron’s deferential framework an agency’s interpretation must still be “within the bounds of reasonable interpretation.” Id. at 2442.

Properly applying this canon of construction, NUARB’s BACT analysis incorrectly applies the environmental impact assessment, inappropriately uses the system-based approach of § 111 of the CAA, and unjustifiably contravenes federal and state policies encouraging sustainable energy development.
A. Implementation of the forest plan confuses appropriate consideration of collateral impacts with improper imposition of collateral environmental offsets.

In Step 4 of the BACT analysis, the “permitting authority must balance the positive effect likely to result from requiring a particular source to install a particular technology against a variety of negative effects that are likely to occur.” UARG, 134 S. Ct. at 2457. EPA has long interpreted the BACT assessment to include collateral environmental impacts, with an “affirmative duty” to evaluate the degree of effects different BACT technologies may have. U.S. EPA, Office of Air and Radiation, Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions From Bioenergy Production 1, 18 (2011) (“BACT Guidance”); U.S. EPA Subgroup 3, Final Report, How do technologies get eliminated based on cost, energy, environmental factors? 1, 2 (2010) (“Final Report”). The BACT applicability determination does not encompass offsite land use changes associated with the fuels used in permitting any new facility. Final Report at 6. The collateral impacts analysis excludes beyond-the-fence measures aimed at mitigating lawful emissions. Final Report at 2.

This application of the analysis is further supported in EPA guidance directly addressing BACT for bioenergy facilities. BACT Guidance at 18. EPA has explained that the intended purpose of the BACT analysis is to assess impacts such as “solid or hazardous waste generation, discharges of polluted water from a control device, visibility impacts, demand on local water resources” and to concentrate on the adverse impacts from the emissions of the pollutant. Id. Similarly, the Intergovernmental Panel on Climate Change (IPCC) accounts for emissions and sequestration related to land use separately. Final Report at 7.

Unlike NUARB’s incorporation of offsets into the environmental impacts analysis, EAB illustrated the correct impact analysis in a PSD review for a coal fire steam plant, by looking only at environmental degradation. In re Indeck-Elwood, LLC, 13 E.A.D. 126 (E.P.A. 2006).
There, EAB overturned the state permitting agency because it failed to fully account for the environmental impacts on the vegetation preserve adjacent to, and downwind from, a new coal-fire plant. *Id.* at 156. Further, the agency neglected to include in its analysis the impact on the adjacent national prairie, where the U.S. Forest Service was reestablishing historic vegetation. *Id.* at 152. *See also In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429 (E.P.A. 2005) (assessing impacts on adjacent water and land in the BACT analysis of a pulverized coal-fired facility).

The unwarranted addition of the forest plan is incompatible with the requirement that a “BACT limitation must reflect the maximum degree of reduction achievable.” *BACT Guidance* at 18. The purchase of a tract of forest land is not a limitation and certainly is not a control measure. Moreover, it is notably missing from EPA’s guidance listing the types of impacts to assess. In fact, because Sylvanergy’s biomass facility already minimizes GHG emissions there is no further reduction available. Instead, tacking on an ad hoc forest plan runs contrary to EPA’s guidance which requires assessment of impacts and defies the IPCC’s instruction on accounting for land use separately from BACT.

NUARB strays from the case precedent in *Indeck-Elwood* and *Newmont*, which illustrate the proper accounting of offsite environmental degradation. Unlike NUARB’s offset forest plan, these cases correctly focus on the risk of destroying an adjacent vegetation preserve, impeding historic vegetation restoration or contaminating a nearby water source. Rather than properly address these types of environmental concerns, NUARB misuses its discretion under BACT to create what is equivalent to a cap and trade system, with the intent to offset the minimal GHG emissions of Sylvanergy’s biomass facility. Such an application flies in the face of the purpose and scope of BACT’s environmental impacts analysis, and only serves as an agency power grab.
B. Inclusion of the forest plan as a system-based requirement is fundamentally incompatible with regulation of GHGs under § 169(3).

Beyond-the-fence requirements impose a system-based compliance standard that is incompatible with the purpose and scope of § 169(3). Section 169(3) of the CAA centers on individual compliance rather than setting national performance standards through similar beyond-the-fence measures under § 111. UARG, 134 S. Ct. 2427, 2457 (2014)(J. Breyer, dissenting in part) (“Trying to fit [GHGs] into the BACT analysis badly distorts the scheme that Congress adopted.”). NUARB erred by confusing § 111 system-based concepts of cap and trade, or offsets, with the individualized technological controls required under the BACT analysis.

EPA has previously used beyond-the-fence measures to authorize trading among sources under § 111 only in the context of establishing emissions thresholds—not in evaluating controls. See, e.g., Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources; Municipal Waste Combustors, 60 Fed. Reg. 65,387 (Dec. 19, 1995) (authorizing states to establish a nitrogen oxides trading program for municipal waste combustors); Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28606, 28657 (May 18, 2005) (authorizing States to create mercury trading programs for coal-fired power plants).


Yet, even under § 111 beyond-the-fence measures are not without significant criticism. See, e.g., Potts & Zappo, EPA's Clean Power Play: Who Needs Congress?, 27 Elec. J. 26 (2014) (criticizing EPA’s use of § 111 to “to effectively force states to implement a cap-and-trade program, a federal renewable portfolio standard, and an energy efficiency standard § 111’s overall intention is an integrated emission standards”).

Under § 169(3), however, BACT has a much more limited role. BACT requires controls on a case-by-case basis, which cannot take on the same system-based measures as the language of § 111 may permit. Therefore, because the forest plan only serves to offset Sylvanergy’s minimal CO₂ emissions, NUARB lacks the power to implement the plan under § 169(3). Offsets are only required when a project triggers nonattainment, which is completely inapplicable here. Moreover, because Executive Order 005-12 is only applicable to the “maximum extent allowed by law,” the order cannot override federal law and thus lacks authority to require implementation of the forest plan. Accordingly, NUARB and EAB improperly extrapolated § 111 principles that are inapplicable to the BACT analysis; therefore the forest plan cannot be upheld.

C. Sylvanergy’s biomass facility is BACT per se because biomass combustion has a zero net increase in CO₂ and furthers clean energy policy goals.

Sylvanergy’s biomass facility embodies clean technology that is essential to a national strategy to reduce dependence on fossil fuels, reduce emissions of GHGs and enhance air quality,
as intended by the CAA. See CAA § 101(a)–(c), 42 U.S.C. § 7401(a)–(c) (2012); Exec. Office of the President, The President’s Climate Action Plan (June 2013) (“Climate Action Plan”). Bioenergy policies urge the carbon neutral development of biomass facilities, because “combustion of biomass can play an important role in addressing climate change and energy security issues.” Final Report at 1. When a BACT control option counteracts policies intended to promote renewable energy and biomass technology, elimination of the option is warranted. BACT Guidance at 25. Further, consideration of biomass CO$_2$ neutrality is independent of any consideration of the sustainability of the biomass source. Final Report at 7. Therefore, inclusion of the forest plan is impermissible.

Biomass combustion “merit[s] unique consideration” in BACT analysis because the biogenic sources can sequester CO$_2$ and act as a sink on a much shorter time scale than fossil carbon. BACT Guidance at 2, 21. Accordingly, in its 2011 guidelines, EPA explicitly permits a bioenergy facility’s exclusive use of biomass fuel as BACT for biogenic CO$_2$ because of the significant energy, economic, and state and federal policies promoting biomass. Id. at 20. The agency further recognizes the potential for permitting authorities to determine that bioenergy facilities like Sylvanergy, are “inherently BACT for GHGs.” Id. at 10. In fact, EPA specifically argued in favor of accepting residue material as BACT per se, thus leaving the door open.

Accepting Sylvanergy’s biomass facility as carbon neutral also has vast support from guidance and policy documents. The EPA Workgroup urges incentives for energy efficiencies, pointedly warning that the costly BACT process itself “can discourage beneficial projects from

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2 Initial research has shown biomass as carbon neutral. See, e.g., Am. Forest & Paper Ass’n, Biomass Carbon Neutrality (2014) www.afandpa.org/issues/carbon-neutrality-of-biomass (Biomass Neutrality); Miner, et. al, Forest Carbon Accounting Considerations in U.S. Bioenergy Policy, J. For. 112(6):591–606 (2014). Even if not completely carbon neutral, research is ongoing and far from definitive. Therefore, NUARB has no basis for imposing the forest plan.
being undertaken” therefore “streamlining BACT steps for energy efficiency projects . . . can help reduce emissions.” Id. at 4. EPA has already accepted the carbon neutrality of biofuels in its Energy Independence and Security Act of 2007 (EISA). Id. at 7.

Treating Sylvanergy’s biomass facility as BACT per se is further supported by the United Nations Framework Convention on Climate Change (UNFCCC), which recognizes the carbon neutrality of biomass. Id. UNFCCC has further concluded that “case by case lifecycle assessments [of carbon neutrality of individual biomass facilities] are not relevant to atmospheric concentrations of GHG and therefore not warranted.” Final Report at 7. Therefore, as the EPA Workgroup warns, such analysis will create “huge uncertainty, cost inequities and an unlevel playing field” for facilities using biomass fuels, such as Sylvanergy’s. Id.

Further, while EPA cautions that the use of a small proportion of biomass fuels with a large portion of fossil fuels may not justify “bypassing opportunities to reduce GHG emissions by improving energy efficiency,” it is critical to recall that Sylvanergy’s biomass facility only uses fossil fuels for startup, a far cry from the 70 to 90 percent fossil-fuel based facilities that concerned EPA. BACT Guidance at 30.


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3 See Database of State Incentives for Renewables & Efficiency, http://www.dsireusa.org/.
neutrality of biomass eliminates the fundamental tenet underlying its favorable consideration,” which would thwart investment in clean energy technology and undermine the significant legislative effort to promote exactly such technologies. Biomass Neutrality at 1. The federal government itself has demonstrated dedication to biomass energy development. See Climate Action Plan, at 7 (stating that the Department of Defense is committed to deploying 3 gigawatts of renewable energy, including biomass, on military installations by 2025). Sylvanergy’s biomass facility is not only providing clean energy electricity to the grid, it is providing the citizens of Forestdale an alternative fuel through its wood pellet production.

Accounting for the strong political goals promoting clean energy technology we must restrain agencies from inhibiting biomass energy facilities through improper BACT analysis, which only serves to increase the costs of clean energy development without a statutory basis.

CONCLUSION

This Court has jurisdiction to review NUARB’s denial of the NAD and EAB’s denial of the petition for review because they are ripe for review and constitute final agency action under CAA § 307(b). Accordingly, this Court should reverse and remand the NAD because NUARB acted arbitrarily in denying it. Sylvanergy’s biomass facility is exempt from PSD review because it is excluded from the enumerated fossil-fuel fired sources, and its operational controls render it a synthetic minor. This Court should reverse and remand the PSD determination because EAB exceeded its authority in subjecting GHG emissions to PSD. This Court should affirm NUARB’s determination that BACT does not require analysis of wood gasification, but should reverse and remand the implementation of the forest plan because the biomass facility is BACT per se.

Respectfully Submitted,
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