

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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5 _____
6 August Term, 2004

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9 (Argued: March 2, 2005

Decided: October 24, 2005)

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11 Docket Nos. 03-40846(L), 03-40848(CON)

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14 NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

15
16 *Petitioner,*

17
18 — v . —

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20 STEPHEN L. JOHNSON, in his capacity as Administrator, United States Environmental
21 Protection Agency*

22
23 *Respondent.*

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25 _____
26 Before:

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28 CALABRESI, POOLER, and B.D. PARKER,

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30 *Circuit Judges.*

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33 _____
* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Stephen L. Johnson, Administrator, United States Environmental Protection Agency, is substituted as Respondent in this case.

1 The New York Public Interest Research Group, Inc. appeals the Environmental
2 Protection Agency’s denial of a petition seeking the agency’s objection to an operating
3 permit issued to two power plants by the New York Department of Environmental
4 Conservation under Title V of the Clean Air Act. *See* 42 U.S.C. § 7661d(b)(2).
5 Affirmed in part. Vacated and Remanded in part.

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26 B.D. PARKER, *Circuit Judge:*

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28 This proceeding challenges the Environmental Protection Agency’s (“EPA”)
29 refusal to object to Clean Air Act (the “Act”) operating permits issued by the New York
30 State Department of Environmental Conservation (“DEC”) to the Huntley and Dunkirk

1 power plants, two of New York State’s largest coal-fired power generation plants. In
2 May 2000, the DEC issued Notices of Violation (“NOV”) to the plants documenting non-
3 compliance with the Act. The DEC nonetheless issued them draft operating permits.
4 The New York Public Interest Research Group (“NYPIRG”) then challenged the permits
5 on grounds that they contained various deficiencies not permitted by the Act. After
6 rejecting NYPIRG’s request that the DEC impose additional conditions on the permits,
7 the DEC forwarded them to the EPA for review. Ultimately, the EPA declined to object
8 to the permits and this proceeding ensued. We have jurisdiction pursuant to 42 U.S.C. §§
9 7661d(b)(2) and 7607(b)(1). We affirm in part and vacate and remand in part.

11 **BACKGROUND**

13 **I. Regulatory Framework**

14 Title V of the Act requires that each major stationary air pollution source obtain
15 an operating permit. 42 U.S.C. §§ 7661-7661f. So that the source, the EPA, and the
16 public have easy access to a source’s obligations under the Act, the permit must contain
17 the applicable requirements. The EPA’s Regulations explain what it intended:

18 [R]egulations are often written to cover broad source categories, therefore, it may
19 be unclear which, and how, general regulations apply to a source. As a result,
20 EPA often has no easy way to establish whether a source is in compliance with
21 regulations under the Act. The title V permit program will enable the source,
22 States, EPA, and the public to understand better the requirements to which the
23 source is subject, and whether the source is meeting those requirements.
24 Increased source accountability and better enforcement should result. The
25 program will also greatly strengthen EPA’s ability to implement the Act and
26 enhance air quality planning and control, in part, by providing the basis for better

1 emission inventories.

2
3 57 Fed. Reg. 32250 (July 21, 1992).

4 The permitting process, which is somewhat complicated, works as follows: The
5 Act provides for states to issue Title V permits in conformity with the Act's guidelines.
6 42 U.S.C. § 7661a. In New York, for example, the DEC has authority to issue Title V
7 permits. A polluting source must apply to the DEC for an operating permit. After
8 negotiations between the DEC and the source and an opportunity for public comment, the
9 DEC must then submit the draft permit to the EPA for review. The EPA has forty-five
10 days to object. *See* 42 U.S.C. § 7661d(b). Also, for sixty days after the expiration of the
11 forty-five day EPA review period, any person may petition the EPA to object to the
12 permit. *Id.* The EPA then has sixty days to grant or deny the petition, and it "shall . . .
13 object" to the permit if the petition demonstrates that the permit does not comply with the
14 Act. *Id.* The denial of a petition is then subject to judicial review. *Id.*

15 Section 7661b(b)(1) requires that the permit application contain a compliance
16 plan, including a compliance schedule, outlining how the source plans to come into
17 compliance with the Act. The schedule of compliance must, pursuant to § 7661c(a), then
18 be included in the permit itself. This section also requires that the permit include all
19 enforceable emission limitations and standards, such as prevention of significant
20 deterioration ("PSD") limits. *See LaFleur v. Whitman*, 300 F.3d 256, 262 (2d Cir. 2002)
21 ("Although these operating permit programs do not impose new substantive air quality
22 control requirements, the permits themselves must include limitations on emissions and

1 other conditions (such as regular monitoring, record-keeping, and reporting) necessary to
2 ensure compliance with the provisions of the CAA, including the PSD program (if
3 applicable). *See* 42 U.S.C. §§ 7661a(a), 7661c(a); 40 C.F.R. §§ 70.1(b), 70.2.”). Also, §
4 7661b(b)(2) requires that the permittee promptly report any deviations from the permit’s
5 requirements.

6 The Act also contains a grandmothing clause: Polluting sources in existence in
7 1977 were not required initially to comply with emission limitations. But compliance by
8 grandmothed plants is triggered by plant modifications, defined as “any physical
9 change in, or change in the method of operation of, a stationary source which increases
10 the amount of any air pollutant emitted by such source or which results in the emission of
11 any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4).

12 Finally, under § 7413(a), when the EPA finds that a source has violated the Act,
13 the Administrator is required to notify the source and the state by issuing a NOV. Then
14 the Administrator has several options: to issue an order requiring compliance, to levy an
15 administrative penalty, or to bring a civil action. *Id.*

17 **II. Facts**

18 The Huntley and Dunkirk power plants, which were constructed in the 1950s and
19 now are New York State’s two largest coal-fired power plants, accounted for 21% of all
20 the Nitrogen Oxide (“NO_x”) and 38% of all the Sulfur Dioxide (“SO₂”) emissions from
21 New York power plants in 2000. They were owned and operated by Niagara Mohawk
22 Power Corporation until June 1999, when NRG Energy, Inc. (“NRG”) purchased them.

1 In May 2000, the DEC issued a NOV to the two plants indicating that they had
2 been modified without obtaining the PSD permits required prior to plant modification:

3 Commencing at various times since 1977, Niagara Mohawk and NRG have
4 modified and/or operated the [Huntley and Dunkirk power plants] without
5 obtaining a Prevention of Significant Deterioration (“PSD”) permit authorizing
6 the construction and operation of physical modifications of their boiler and
7 turbine units Niagara Mohawk and NRG have operated these modifications
8 without installing the required pollution control equipment. . . . Until these
9 violations are corrected, the facilities will continue to illegally release massive
10 amounts of SO₂ and NO_x into the environment.

11 In Re Violations of Article 19 of the Environmental Conservation Law by Niagara
12 Mohawk Power Corporation, NRG Energy, Inc., DEC Notice of Violation, (May 25,
13 2000). The NOV describes in considerable detail each modification and each emissions
14 violation. For instance, the first of many listed violations asserts: “Modifications on Unit
15 1 [in the Dunkirk Steam Station] from 1983 to 1985, including the following projects: (1)
16 Induced draft fan modification; (2) Replacement of wall lower slopes, burner corner,
17 arch; (3) Replacement of condenser tubes; (4) Replacement of economizer tubes; and (5)
18 Replacement of coal mill parts.” *Id.*

19 In April and May 2001, the DEC nonetheless released draft operating permits for
20 the Huntley and Dunkirk plants which did not include PSD limits or a compliance
21 schedule. During the ensuing public comment period, NYPIRG protested these
22 omissions. The DEC disagreed with NYPIRG, maintaining that the applicability of PSD
23 limits to the two plants was still a subject of negotiation and, until the matter was
24 resolved in some way, those limits and schedules were not required to be included in the
25 permits. The DEC then submitted the draft permits to the EPA for review. When the

1 EPA did not object, NYPIRG petitioned it to do so. The EPA denied NYPIRG's
2 petition on the basis that, so long as the source did not concede that particular PSD limits
3 applied, permits could issue subject to later amendment once the DEC and the source
4 reached agreement as to PSD limits. Furthermore, the EPA maintained that the DEC had
5 discretion under Title V not to include in the permits PSD limits not yet determined to be
6 applicable.

7 In January 2002, in connection with the Notice of Violation that the DEC had
8 issued in May 2000, the DEC sued Niagara Mohawk and NRG, the former and current
9 owners of Huntley and Dunkirk, in the District Court for the Western District of New
10 York, claiming that their failure to obtain preconstruction permits before making
11 modifications to the plants violated the Act. *See New York v. Niagara Mohawk Power*
12 *Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003). The DEC now takes the position that it is
13 entitled to resort to this type of enforcement litigation in lieu of otherwise available
14 administrative proceedings. Before the substantive issues between the plants and the
15 DEC were resolved, the District Court granted NRG's motion to dismiss on the basis that
16 it was not liable for the prior owners' failure to obtain preconstruction permits.¹ The
17 Court then permitted the DEC to amend its complaint to claim instead that NRG was in

¹ The District Court questioned the DEC at oral argument – and then preserved the exchange in a footnote to its decision – as to the State's motive for pursuing a claim concerning preconstruction permits, rather than a claim arising out of operating permits. The latter strategy, but not the former, would have afforded a valid claim against NRG, on the theory that NRG could be held liable for operating a plant without proper operating permits. The State conceded it had other avenues for enforcement, but chose litigation on this theory as the "most straightforward claim." *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 662 n.21 (W.D.N.Y. 2003)(citation and quotation marks omitted).

1 violation of the Act by operating without valid Title V permits. *State of New York v.*
2 *Niagara Mohawk Power Corp.*, 2003 WL 23356447 (W.D.N.Y. Dec. 31, 2003). The
3 Court explained:

4 The State alleges that the Title V operating permits require the NRG Defendants
5 to obtain operating permits that include emissions limitations that meet all
6 applicable requirements Because the NRG Defendants have allegedly not
7 done so, the State contends that they have violated their Title V operating permits,
8 and thus, have violated § 502(a) of the Clean Air Act, which makes it unlawful
9 for any person to violate any requirement of a permit issued under Title V, or to
10 operate any source, including a major source, except in compliance with a permit
11 issued by a permitting authority under Title V.

12
13 *Id.* at *2.

14 NYPIRG appeals, seeking our review of the EPA’s failure to object to the
15 Huntley and Dunkirk permits. NYPIRG’s main contentions are that the Act requires that
16 PSD limits,² a compliance schedule, and prompt deviation reporting requirements must
17 appear in any permit, and that the EPA and the DEC do not have discretion to enforce the
18 Act exclusively through non-administrative channels such as lawsuits. The EPA, on the
19 other hand, maintains that it has discretion to determine how best to enforce the Act and
20 that it need not include in a permit the three items identified by NYPIRG, particularly

² The EPA has challenged whether NYPIRG sufficiently raised to the EPA, during administrative proceedings below, its objection to omitting the PSD limits from the permits. NYPIRG has couched its objection as an argument for the permits to include compliance schedules. In discussing the need for a compliance schedule in the permit, NYPIRG also asserted, “It is DEC’s responsibility to determine whether a facility is in violation of an applicable requirement at the time that the facility receives a Title V permit. . . . [I]t appears that settlement negotiations over the plant’s PSD violations are floundering. It is under these circumstances that a Title V compliance schedule is needed the most.” In the Matter of the Proposed Operating Permit for Huntley Power LLC, NYPIRG Petition to EPA (January 11, 2002). From NYPIRG’s repeated focus on the PSD violations, we understand NYPIRG’s Petition to have presumed that the compliance schedule would necessarily include PSD limits. *See Nat’l Petrovhemical & Refiners Ass’n v. EPA*, 287 F.3d 1130, 1148 (D.C. Cir. 2002); *Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1142 n.23 (D.C. Cir. 1994).

1 when PSD limits are the subject of ongoing negotiations between the source and the EPA
2 and remain unresolved.

4 DISCUSSION

6 I. Standard of Review

7 Because the Act does not provide a standard of review, we review the EPA's
8 actions under the Administrative Procedure Act ("APA"), which contemplates setting
9 aside only agency actions that are "arbitrary, capricious, an abuse of discretion, or
10 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see NYPIRG v. Whitman*,
11 321 F.3d 316, 324 (2d Cir. 2003).

13 II. Degree of Deference

14 In reviewing the EPA's determinations, *Chevron* deference guides our steps. It
15 first instructs us to ask whether Congress has spoken directly on the issue, that is,
16 whether the statute in question is unambiguous. *Chevron USA, Inc. v. Natural Res. Def.*
17 *Council Inc.*, 467 U.S. 837, 842-843 (1984). We do this because "[w]e will not defer to
18 an agency's interpretation that contravenes Congress' unambiguously expressed intent."
19 *NYPIRG v. Whitman*, 321 F.3d at 324. However, if we determine that the statute is
20 ambiguous, in the second step of the *Chevron* analysis, we defer to an agency's
21 interpretation unless it fails the APA's "arbitrary and capricious" test.

22 NYPIRG contends that because the Act is unambiguous, we need not reach the

1 second stage of the *Chevron* analysis. NYPIRG directs us to § 7661d(b)(2), the relevant
2 statutory language in the permit-objection process: “The Administrator shall issue an
3 objection within such period if the petitioner demonstrates to the Administrator that the
4 permit is not in compliance with the requirements of this Act” According to
5 NYPIRG, “shall” is mandatory and indicates that Congress requires the EPA to object,
6 assuming that the other requirements of the statute are satisfied.

7 As every agency worth its salt does, the EPA cautions that we should be
8 especially mindful of the high level of deference it is owed when it interprets its own
9 regulations. *See N. Am. Fund Mgmt. Corp. v. F.D.I.C.*, 991 F.2d 873, 875 (D.C. Cir.
10 1993). The EPA does not disagree with NYPIRG’s understanding of “shall.” Instead, it
11 maintains that the agency actions in question fall within the discretionary part of §
12 7661d(b)(2) and reminds us that we have pinpointed an important distinction between
13 that part – whether the petition demonstrates non-compliance – and the nondiscretionary
14 part – if such a demonstration is made, objection must follow. *NYPIRG v. Whitman*, 321
15 F.3d at 333. We now turn to the EPA’s preliminary question “whether the petition
16 demonstrates non-compliance,” and look at whether a reasonable agency resolution of
17 that question deserves *Chevron* deference.

18 19 **III. Petitioner’s Demonstration of Non-Compliance**

20 *NYPIRG v. Whitman*, we noted, “[was] not a case in which the EPA remained
21 unconvinced [that the petitioner demonstrated non-compliance] and thus [was] not a
22 challenge to its exercise of judgment.” *NYPIRG v. Whitman*, 321 F.3d at 333. Similarly

1 here, the DEC, the Act's enforcement authority in New York, had previously determined
2 that the Huntley and Dunkirk plants were in violation of the Act, as evidenced by the
3 NOVs and by the suit it filed.³ The EPA contends that its judgment was still in play for
4 two reasons: First, notwithstanding the fact that the DEC issued NOVs and filed suit, the
5 EPA lacked certainty about the actual scope of the plants' non-compliance because
6 NOVs as well as complaints are inherently accusatory rather than conclusive documents.
7 Secondly, since the DEC undertook litigation with the plants and until the litigation had
8 run its course, the EPA could not determine the contents of the permits because the
9 deficiencies identified in the NOVs and in the complaint might be found inapplicable,
10 changed or mooted.

11 We disagree. We hold that the DEC's issuance of these NOVs and
12 commencement of the suit is a sufficient demonstration to the Administrator of non-
13 compliance for purposes of the Title V permit review process. The EPA, having
14 approved New York's State Implementation Plan (6 N.Y.C.R.R. §§ 200-317), has
15 granted the DEC the authority to enforce the Act. *See* 42 U.S.C. § 7661a(b)(5)(E); 40
16 C.F.R. § 70.4(b)(3). Indeed, the very structure of the Act requires regular interaction
17 and cooperation between the federal EPA and the relevant state agencies as they
18 implement their monitoring and enforcement responsibilities. Thus, the Act envisions

³ We acknowledge that *NYPIRG v. Whitman* did not offer the nuances presented here by the state agency's role in determining which sources are non-compliant. Despite this distinction, as we discuss in more detail below, we believe that a state implementing agency's determination that a source is non-compliant may well be a sufficient demonstration of non-compliance to the EPA Administrator.

1 thorough state enforcement. While the EPA retains enforcement authority – in a sense a
2 redundant authority where the state implementation plan has been approved – the EPA is
3 also charged with responding to incompetent state agencies. In particular, § 7413(a)(2)
4 of the Act delineates appropriate EPA action where the state implementing agency fails
5 to act: “Whenever, on the basis of information available to the Administrator, the
6 Administrator finds that violations of an applicable implementation plan or an approved
7 permit program under [] subchapter V of this chapter are so widespread that such
8 violations appear to result from a failure of the State in which the plan or permit program
9 applies to enforce the plan or permit program effectively, the Administrator shall so
10 notify the State.” 42 U.S.C. § 7413(a)(2). Thus the EPA retains an important
11 supervisory role as the states fulfill their responsibilities.

12 Under New York’s implementation plan, the DEC is authorized by 6 N.Y.C.R.R.
13 § 201-6.5(a)(2) to enforce permits: “Any permit non-compliance constitutes a violation
14 of the [A]ct and is grounds for enforcement action; for permit termination, revocation
15 and reissuance, or modification; or for denial of a permit renewal application.” Recall
16 that the EPA is authorized to issue a NOV by § 7413(a)(1), which provides:

17 Whenever, on the basis of any information available to the Administrator, the
18 Administrator finds that any person has violated or is in violation of any
19 requirement or prohibition of an applicable implementation plan or permit, the
20 Administrator shall notify the person and the State in which the plan applies of
21 such finding. At any time after the expiration of 30 days following the date on
22 which such notice of a violation is issued, the Administrator may, without regard
23 to the period of violation (subject to section 2462 of title 28)–
24 (A) issue an order requiring such person to comply with the requirements or
25 prohibitions of such plan or permit,
26 (B) issue an administrative penalty order in accordance with subsection (d) [of
27 this section], or

1 (C) bring a civil action in accordance with subsection (b) [of this section].

2
3 42 U.S.C. § 7413(a)(1). This provision means that, to issue a NOV, the Administrator
4 must first find a source in violation of an applicable plan or permit. Similarly, 6
5 N.Y.C.R.R. § 201-6.5(a)(2) permits the DEC to issue a NOV, or when the Act is violated,
6 to commence other enforcement proceedings. Both the Act and the New York
7 implementation plan direct enforcement for a “violation”– not merely for allegations.

8 Furthermore, the DEC, as the administering agency, has a certain expertise which
9 distinguishes its NOVs and complaints from, for instance, allegations by a private citizen
10 or by a non-profit organization. That is to say, ordinarily we may understand a complaint
11 as a series of allegations whose truth is ascertained over the course of a proceeding. But
12 in this case, the agency is required to reach certain conclusions and to make certain
13 findings before it may take enforcement action. Also, the agency is in a privileged
14 position to monitor and regulate. For instance, in addition to receiving regular auditing
15 reports, DEC “representatives must be granted access to any facility regulated by this
16 [act], during normal operating hours, for the purpose of determining compliance with this
17 and any other state and federal air pollution control requirements, regulations or law.” 6
18 N.Y.C.R.R. § 201-7.2(d). With this access, the DEC was able to compile specific
19 allegations in the NOVs, which listed in considerable detail thirty-one modifications,
20 “[each] of [which] resulted in a significant net emission increase for NO_x and SO₂.” The
21 access guaranteed to the DEC, its authority to find and remedy violations, and the
22 specificity of its NOVs and complaints, all indicate that the DEC can not reasonably
23 claim to be uncertain as to what emission limits apply to the Huntley and Dunkirk plants.

1 Since we are confident that the DEC does not issue NOV's lightly, we see no
2 reason why its findings for purposes of issuing NOV's under § 201-6.5(a)(2) do not
3 suffice to demonstrate non-compliance for purposes of objections under § 7661d(b)(1).
4 Nevertheless, during the permit petition process, the EPA concluded that the DEC's
5 issuance of a NOV does not demonstrate a violation for purposes of § 7661d(b)(1). We
6 believe this conclusion is inconsistent with the text of § 7661d(b)(1) read against § 201-
7 6.5(a)(2) and, therefore, not one to which we are required to defer.

8 The EPA also considers it premature to include PSD limits in a permit before they
9 are determined by the permitting authority to be applicable. It is not premature, precisely
10 because we believe that the DEC, in issuing the NOV's and filing suit, has determined
11 that these standards are, indeed, applicable. Moreover, the EPA's position places it
12 during the permitting process and subsequent appeals in the rather strange role of
13 minimizing – if not outright denying – the legal significance of the DEC's NOV's and
14 complaint. In reaching this conclusion, we are not called on to determine whether it is
15 reasonable for the EPA to exclude contested PSD limits from permits when the
16 permitting authority has not yet determined those limits applicable – this case does not
17 present that problem.

18 Finally, the EPA takes issue with NYPIRG's reliance on the DEC's actions,
19 specifically issuing the NOV's and filing a complaint, as opposed to NYPIRG's
20 undertaking its own fact-finding to demonstrate non-compliance. When the EPA or a
21 state implementing agency finds a source non-compliant (one of the grounds for the DEC
22 issuing a NOV under § 201-6.5(a)(2) and a prerequisite under § 7413(a)(1) for an EPA

1 NOV), we are unclear why a private citizen should be required to duplicate that
2 complicated and expensive effort by conducting its own fact-finding. Ultimately, we
3 need not further consider this problem because we believe that a previous DEC
4 determination of non-compliance, as evidenced by the NOVs and complaint, is sufficient.

6 **IV. Permit Compliance Schedule Requirements**

7 Where a source is non-compliant, the permit must include a compliance schedule.
8 *See* 40 C.F.R. § 70.6(c)(3). For essentially the same reasons we concluded that it was
9 unreasonable for the EPA to discount the NOVs and complaint as evidence that the
10 source was in violation of the Act, we also conclude that it was inconsistent with the Act
11 for the EPA to deny NYPIRG's petition insofar as it complained of the absence of a
12 compliance schedule. Issuance of a NOV indicates that the DEC has concluded that a
13 source is non-compliant. Once that has occurred, the EPA is obligated to include a
14 compliance schedule.

15 This conclusion is reinforced by the fact that, in similar past situations, the EPA
16 has required compliance schedules. For example, the EPA objected when the State of
17 Kentucky issued a permit to the Gallatin Steel Company without a compliance schedule:

18 The EPA filed a civil judicial complaint against the Gallatin Steel Company in
19 February 1999 for prior Clean Air Act violations and anticipates amending that
20 complaint to include violations cited in a January 27, 2000, Notice of Violation
21 (NOV). Therefore, the permit must include a schedule of compliance in
22 accordance with 40 C.F.R. 70.6(c) (3). In addition, EPA and Gallatin have been
23 engaged in settlement negotiations. If the permit is issued prior to completion of
24 these negotiations, any compliance schedule included may have to be revised.

25
26 August 7, 2000, Notification to Kentucky Department of Environmental Protection of

1 EPA objection to Title V Permit issued to Gallatin Steel Company pursuant to 40 C.F.R.
2 § 70.8(c), available at <http://www.epa.gov/region4/air/permits/gallatin-obj.htm> (last
3 visited October 14, 2005). In other words, in that proceeding the EPA took the position
4 that any permit issued pre-settlement must include a compliance schedule that reflects
5 up-to-date requirements although the permit could be amended post-settlement. The
6 EPA distinguishes *Gallatin* on the basis that the parties there reached agreement before
7 issuance of the permit. This settlement does not alter the fact that, in the Kentucky
8 action, before the parties reached a settlement, the EPA took precisely the same position
9 as NYPIRG now takes here. The EPA has failed to supply a reasoned basis for this 180°
10 turn. Although past agency practice is not binding precedent, this change of course
11 surely calls into question the EPA's current position. In *Ramaprakash v. F.A.A.*, 346
12 F.3d 1121, 1124 (D.C. Cir. 2003), the Court emphasized that "review under the APA is
13 highly deferential, but agency action is arbitrary and capricious if it departs from agency
14 precedent without explanation. Agencies are free to change course as their expertise and
15 experience may suggest or require, but when they do so they must provide a 'reasoned
16 analysis indicating that prior policies and standards are being deliberately changed, not
17 casually ignored.'" (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852
18 (D.C. Cir. 1970)). To conclude, because issuance of the NOV's manifested a prior finding
19 of non-compliance, the EPA should not have issued an operating permit without a
20 compliance schedule.

21 22 **V. Prompt Reporting Requirements**

1 Deviations from permit requirements must be “promptly” reported. 42 U.S.C. §
2 7661b(b)(2); *see* 40 C.F.R. § 70.6(a)(3)(iii)(B). A permitting authority has discretion to
3 define promptness “in relation to the degree and type of deviation likely to occur and the
4 applicable requirements.” 40 C.F.R. § 70.6(a)(3)(iii)(B). Still, the House Report
5 explains that “the permittee would presumably be required to report that violation
6 without delay.” H.R. Rep. No. 101-490, pt. 1, at 348 (1990). In commenting on the
7 DEC’s proposed operating permits program in 1996, the EPA explained: “In general, the
8 EPA believes that ‘prompt’ should be defined as requiring reporting within two to ten
9 days for deviations that may result in emission increases. *Two to ten days* is sufficient
10 time in most cases to protect public health and safety as well as to provide a forewarning
11 of potential problems.” Clean Air Act Proposed Interim Approval of Operating Permits
12 Program: State of New York, 61 Fed. Reg. 39617-02, 39619 (July 30, 1996) (to be
13 codified at 40 C.F.R. pt. 70) (emphasis added).

14 The Dunkirk and Huntley Permits require quarterly reporting of SO₂ and NO_x
15 emissions and opacity data. For all other monitoring provisions, the Permits require
16 reporting every six months. Also, § 7661c(a) generally requires reporting every six
17 months, regardless of the requirements in a particular source’s permit.

18 NYPIRG contends that quarterly reporting is not, by definition, prompt.
19 NYPIRG takes issue with the EPA’s statement, in its denial of NYPIRG’s petition, that
20 the plants’ daily monitoring (a practice, but not a requirement) will alert the facility to
21 any deviations and allow the plant to remedy the deviation. NYPIRG contends that the
22 Act’s prompt reporting requirements are not intended to alert the violating source, but are

1 intended to alert the EPA and the public of deviations. Particularly where, as here, the
2 plants have a history of violations, as evidenced by the NOV's and by the DEC's law suit.
3 NYPIRG also argues that quarterly reporting is arbitrary and was not justified by the
4 EPA when it denied the petition. Finally, NYPIRG contends that the six month reporting
5 requirement for all other violations (besides SO₂, NO_x, and opacity) is an invalid
6 interpretation of "prompt" because this would render irrelevant other provisions of the
7 Act that also require six month reporting.

8 The EPA responds that the permitting authority has discretion to define
9 promptness for each particular source. The EPA would place the burden on NYPIRG to
10 demonstrate that the reporting requirements are invalid with respect to each type of
11 emission, or in violation of regulatory standards. Quarterly reporting is not arbitrary, but
12 efficient, according to the EPA, and more prompt reporting would not lead to greater
13 compliance. Also, the EPA rejects the argument that because two separate provisions
14 require reporting, their timing cannot coincide. The EPA asserts that because Congress
15 did not clearly resolve this issue, the EPA's interpretation is reasonable under *Chevron*.

16 As an initial matter, it is clear that the DEC has authority to define "prompt" in
17 the permits. 40 C.F.R. § 70.6(a)(3)(iii)(B). Moreover, the DEC need not establish one
18 standard definition of "prompt" to be used consistently in all valid permits. However,
19 this discretion does not amount to *carte blanche* to define "prompt" arbitrarily.

20 Quarterly reporting certainly contradicts both Congress' explanation of prompt as
21 meaning "without delay," H.R. Rep. No. 101-490, pt. 1, at 348 (1990), as well as the
22 EPA's own explanation of prompt as two to ten days. Clean Air Act Proposed Interim

1 Approval of Operating Permits Program: State of New York, 61 Fed. Reg. 39617-02,
2 39619 (July 30, 1996) (to be codified at 40 C.F.R. pt. 70) . However, the Act’s grant of
3 authority to the permitting agency suggests that Congress contemplated varying
4 definitions of “prompt” depending on the particular source and particular emission. In
5 fact, the EPA maintains here that quarterly reporting is prompt “in light of the type of
6 deviations that could be expected at these sources.” (Resp. Br. at 51). To substantiate
7 this position, the EPA points out that quarterly monitoring of SO₂ is sufficient because it
8 is “highly unlikely that fuel-oil outside the specifications would be delivered and used.”
9 (Resp. Br. at 52). The EPA also maintains that the plants recently have complied with
10 SO₂ emission requirements.

11 With respect to the NO_x emissions, the plants are subject to limits for NRG’s five
12 facilities together, not individually. With this system in place, the EPA rationally
13 believes that more frequent individual reporting for these two plants of NO_x emissions is
14 not necessary, because calculations averaged over five plants incorporates room for
15 minor deviations at each individual plant. Thus, with respect to SO₂ and NO_x emissions,
16 the EPA characterizes its decision to permit quarterly reporting as reasonable.

17 Although NYPIRG takes issue with this interpretation of “promptly” and with the
18 EPA’s underlying reasoning, the EPA and the DEC have statutory discretion to define
19 “prompt” on a permit-by-permit basis. Because the EPA’s definition is at least
20 reasonable, if not the one that NYPIRG urges us to follow, we grant it *Chevron*
21 deference. We therefore affirm the EPA’s denial of NYPIRG’s petition with respect to
22 the SO₂ and NO_x emissions.

1 With respect to quarterly reporting of opacity requirements, the EPA asserts that
2 heightened reporting would not heighten compliance. However, the purpose of prompt
3 reporting is not exclusively to ensure compliance, but, as we have noted, to alert the EPA
4 and the public to emissions violations. *See* S. Rep. No. 101-228, at 347 (1989). The
5 EPA stated in its denial of NYPIRG’s petition: “[T]he facility and DEC are still in
6 negotiations to resolve the opacity issues at the Huntley facility. Until such time as a
7 conclusion on this matter is reached, the submission of quarterly [reports] . . . is
8 appropriate prompt reporting.”

9 The EPA does little else to convince us of the reasonableness of its interpretation
10 of promptly as quarterly with respect to opacity standards especially, as NYPIRG points
11 out, in view of the plants’ rich history of violating opacity requirements. We cannot
12 conclude that it was reasonable for the EPA to define “promptly” as quarterly for a
13 source with a history of violations simply because the DEC is still in negotiations with
14 that source. Surely, a non-compliant source’s long history of violations suggests the
15 permitting authority should monitor it with greater – not less – scrutiny. Moreover, it is
16 unreasonable for a permitting authority to overlook specific requirements of the Act just
17 because its negotiations with a non-compliant source have been protracted. Because the
18 EPA failed to demonstrate reasonableness, we need not defer. Thus, concerning opacity
19 requirements, we remand to the EPA to determine reporting requirements consistent with
20 the Act’s promptness mandate.

21 With respect to all other monitoring provisions in the permit, for which the permit
22 required only six month reporting, we vacate and remand. NYPIRG compares the

1 prompt reporting requirements of § 7661b(b)(2) (“The regulations shall further require
2 the permittee . . . to promptly report any deviations from permit requirements to the
3 permitting authority.”) to § 7661c(a) (“Each permit issued . . . shall include . . . a
4 requirement that the permittee submit to the permitting authority, no less often than every
5 6 months, the results of any required monitoring, and such other conditions as are
6 necessary to assure compliance.”), and points out that basic rules of statutory
7 construction require us to give effect to each provision. *Auburn Hous. Auth. v. Martinez*,
8 277 F.3d 138, 145 (2d Cir. 2002).

9 The EPA argues that even when reports are required in two separate provisions,
10 their timing may permissibly coincide. We disagree. Here, it is not that their timing
11 simply coincides. One provision requires biannual reporting, and the other requires
12 prompt reporting of deviations from permit requirements. To give both provisions
13 meaning, prompt must be interpreted at the very least as with greater speed than every six
14 months. Also, § 7661c(a) prescribes reporting for general monitoring and § 7661b(b)(2)
15 prescribes reporting for deviations; as deviations pose greater urgency than general
16 monitoring, we read prompt to mean at least more frequent than biannual.

17 In sum, we accord *Chevron* deference to the DEC and the EPA’s definition of
18 prompt as quarterly for purposes of SO₂ and NO_x emissions and affirm the denial of the
19 this section of the petition. But we do not defer to the agency’s interpretation that prompt
20 means quarterly for opacity violations and every six months for all other emission
21 deviations. Consequently, we remand this issue to the EPA.

1 **VI. Mootness**

2 Finally we note that the errors committed by the EPA are not mooted by a recent
3 consent decree between the plants and the DEC. “It is well settled that ‘a defendant’s
4 voluntary cessation of a challenged practice does not deprive a federal court of its power
5 to determine the legality of the practice.’” *Friends of the Earth Inc. v. Laidlaw Envntl.*
6 *Servs.*, 528 U.S. 167, 189 (2000)(quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455
7 U.S. 283, 289 (1982)). A claim does not become moot where it is not “absolutely clear”
8 that the offense “could not reasonably be expected to recur.” *Id.* at 190 (citing *United*
9 *States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)). We are
10 unpersuaded that the EPA and the DEC, on the basis of the voluntary agreement reached
11 here, would not in the future sidestep the mandated Title V permit objection procedures.

12 It is laudable that the parties have reached a settlement that significantly reduces
13 emissions. But because that agreement does not erase the very real dispute here between
14 NYPIRG and the EPA over the Congressionally authorized method for enforcement of
15 the Act, our conclusions are unaffected by that settlement. The EPA may choose to
16 enforce the Act by any additional channels it deems strategic, but an enforcement
17 proceeding does not relieve the EPA of its obligations under the permitting process.
18 Moreover, until the proposed permits conceived under the consent agreement are in place
19 – a process of unpredictable duration – the EPA is obligated to respond to NYPIRG’s
20 petition in accordance with this opinion.

21
22 **CONCLUSION**

1 We AFFIRM the EPA’s decision not to object to the draft permits with respect to
2 the prompt reporting of SO₂ and NO_x emissions. We VACATE the EPA’s decision not to
3 object to the draft permits with respect to the PSD limits, the compliance schedule, and
4 the prompt reporting of opacity violations and all other emission deviations, and
5 REMAND to the EPA for further proceedings consistent with this opinion.