Public Citizen, Inc. v. EPA: The Fifth Circuit Allows an Informal Agreement with Texas to Substitute for Title V Requirements Under the Clean Air Act

I. OVERVIEW

The United States Court of Appeals for the Fifth Circuit denied petitions by environmental groups challenging the EPA's full approval of Texas's permit program pursuant to Title V[1] of the Clean Air Act (CAA),[2] as well as the EPA's decision not to issue specific notices of deficiency (NODs).[3] In 1993, Texas submitted its Title V permit program to the EPA for approval.[4] In 1996, the EPA granted interim approval while noting numerous deficiencies Texas needed to correct before its program could obtain full approval.[5] Texas then submitted revisions addressing the noted deficiencies, and the EPA published a notice in the Federal Register inviting public comments on Texas's program.[6]

Public Citizen objected to the EPA granting full approval to the Texas permit program because they contended that Texas failed to correct all the interim deficiencies set forth by the EPA.[7] Additionally, Public Citizen believed there were new deficiencies not recognized by the interim notice, which had to be corrected before the EPA could grant full approval.[8]

The EPA, however, determined that Texas's revisions addressed the deficiencies *identified during the interim process*, and granted Texas's program full approval.[9] According to the EPA, the failure to correct any

1. Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f (2000).
2. Clean Air Act §§ 107-617, 42 U.S.C. §§ 7401-7671q.
3. Pub. Citizen, Inc. v. EPA, 343 F.3d 449 (5th Cir. 2003).
4. *Id.* at 454.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 454-55.

alleged deficiencies *not identified by the interim approval* did not prohibit full approval, and it would respond to the newer alleged deficiencies in a separate ongoing administrative action.[10] While the EPA did issue a NOD identifying some of the deficiencies complained of in the public comments, it did not issue a NOD for other deficiencies identified by the petitioners.[11] In a response letter, the EPA expressed agreement with some of the issues raised by Public Citizen but declared that they were working with Texas to insure that the state's program complied with Title V.[12]

Public Citizen then sought judicial review challenging two EPA final actions relating to Texas's Title V permit program.[13] First, they alleged that the EPA lacked the authority to grant full approval without finding full compliance with Title V requirements.[14] Public Citizen also claimed that the EPA acted "arbitrarily and capriciously in granting full approval" because Texas failed to correct those deficiencies identified in the interim approval.[15] Second, Public Citizen objected to the EPA decision not to issue the additional NODs.[16] The Fifth Circuit, in agreement with the Second Circuit's decision in *New York Public Interest Research Group v. Whitman*,[17] found that Congress had not clearly expressed its intent on the requirements for full approval of state programs when interim approval had been granted.[18] Based on this ambiguity in the CAA, the Fifth Circuit *held* that the EPA's interpretation was based on a permissible construction of the CAA entitled to *Chevron*[19] deference and denied Public Citizen's petition for review. *Public Citizen, Inc. v. EPA*, 343 F.3d 449 (5th Cir. 2003).

II. BACKGROUND

The CAA, enacted in 1970, is a complex regulatory regime intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[20] The CAA places primary responsibility for

10. *Id.* at 455.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 456.
15. *Id.*
16. *Id.* at 463.
17. 321 F.3d 316 (2d Cir. 2003).
18. *Pub. Citizen, Inc.*, 343 F.3d at 457.
19. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
20. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (2000).

enforcement on state and local governments, while providing "[f]ederal financial assistance and leadership . . . essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution."[21] The CAA requires permitting authorities (usually states) to develop state implementation plans (SIPs), "which provide for implementation, maintenance, and enforcement of" the national ambient air quality standards.[22]

In 1990, Congress enacted Title V, an extensive amendment to the CAA.[23] Title V established procedures allowing the EPA to authorize states, or other permitting authorities, to issue stationary air pollution source operating permits.[24] The purpose of Title V permits was to facilitate compliance by consolidating all the applicable requirements in a single document.[25] For this reason, Title V permits have been described as "a source-specific bible for Clean Air Act compliance."[26]

Title V requires that the EPA enact regulations establishing minimum elements necessary in all SIPs.[27] Essential to the enforcement of Title V is the requirement that each state develop and submit to the EPA for approval a permit program meeting the regulations and requirements of the CAA.[28] If the state's permit program meets the requirements of the CAA, the EPA is authorized to grant the program full approval.[29] If, however, the operating program failed to qualify fully but "substantially met the requirements" of the CAA and its regulations, the EPA is authorized to grant the program "interim approval."[30] When granting interim approval, the EPA is required to "specify the changes that must be made before the program can receive full approval."[31] States are then required to make the necessary revisions and resubmit their operating programs to the EPA.[32] Interim approval may last no more than two years, and renewal is expressly forbidden.[33]

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21. CAA § 101(a)(4), 42 U.S.C. § 7401(a)(4).
22. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1).
23. *See* CAA §§ 101-617, 42 U.S.C. §§ 7401-7671q.
24. *See* CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f.
25. *See* Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996).
26. *Id.*; *see also* CAA § 502(a), 42 U.S.C. § 7661a(a).
27. CAA § 502(b), 42 U.S.C. § 7661a(b).
28. *See* CAA § 502(d)(1), 42 U.S.C. § 7661(d)(1).
29. *Id.*
30. CAA § 502(g), 42 U.S.C. § 7661a(g).
31. *Id.*
32. *See id.*
33. *Id.* ("An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed.").

If a program fails to gain approval before the statutory deadline, the CAA requires the EPA to impose serious financial penalties, including the loss of federal highway funds.[34] In addition, the EPA would then be obligated to "promulgate, administer, and enforce a program" for the state complying with the CAA's requirements.[35] Even after full approval of a state permit program, the EPA is required to maintain an oversight role.[36] If the EPA determines that a state is "not adequately administering and enforcing a program" in accordance with the Title V requirements, the EPA "shall provide notice to the State" and may thereafter apply financial sanctions.[37]

Constant throughout Title V are strict deadlines for each step in the approval process.[38] All states were required to develop and submit their permit programs by November 15, 1993.[39] The EPA then had one year to grant either full or interim approval or to deny approval entirely.[40] As previously mentioned, the EPA has the authority to take over state permit programs which are not granted full approval by the EPA within the statutory deadline.[41] All permit programs were to begin operating no later than November 16, 1996, or six years after the passage of Title V.[42]

After the states submitted their Title V programs for approval, the EPA responded by granting large numbers of states interim approval.[43] Despite the express statutory language forbidding either the extension of the two-year interim approval period or the renewal of that approval, the EPA repeatedly granted extensions and renewals to numerous states.[44] Environmental groups responded to this practice by challenging the legality of the EPA's actions in *Sierra Club v. EPA*.[45] The case settled with the EPA committing to operate a federal permit program in states

34. CAA § 502(d), 42 U.S.C. § 7661a(d); CAA § 179(b), 42 U.S.C. § 7509(b).
35. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3).
36. *See* CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1).
37. *Id.*
38. *See* CAA § 502, 42 U.S.C. § 7661a.
39. CAA § 502(d)(i), 42 U.S.C. § 7661a(d)(i).
40. *Id.*
41. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3).
42. *Id.*; CAA § 502(g), 42 U.S.C. § 7661a(g).
43. 40 C.F.R. § 70.4(d)(1) (2003); *see* Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 454 (5th Cir. 2003).
44. *See* Operating Permits Program Interim Approval Extensions, 61 Fed. Reg. 56,368 (Oct. 31, 1996); *see also* Extension of Operating Permits Program Interim Approvals, 62 Fed. Reg. 45,732 (Aug. 29, 1997); Extension of Operating Permits Program Interim Approval Expiration Dates, 63 Fed. Reg. 40,054 (July 27, 1998); Extending Operating Permits Program Interim Approval Expiration Dates, 65 Fed. Reg. 7290 (Feb. 14, 2000).
45. 322 F.3d 718 (D.C. Cir. 2003).

not fully approved by December 1, 2001.[46] Pursuant to the settlement agreement, the EPA also committed to invite, and respond to, public comments on the deficiencies in state Title V programs.[47] The EPA also agreed to issue a NOD "for any claimed shortcoming in an operating permits program that [the EPA agreed] constitutes a 'deficiency.'"[48]

In *New York Public Interest Research Group v. Whitman*, a public interest group questioned the EPA's commitment to complying with the settlement agreement.[49] The New York Public Interest Research Group (NYPIRG) appealed the EPA's final full approval of New York's Title V permit program, as well as its refusal to issue a NOD for alleged deficiencies.[50] Like many states, New York's permit program was initially granted interim approval.[51] The decision on the question of full approval of New York's permit program, therefore, depended upon the interpretation of the Title V requirements for full approval following an initial award of interim approval.[52]

The EPA interpreted Title V as allowing two distinct paths to full permit approval.[53] First, section 502(d) of the CAA, which governs the full approval of permit programs, states that the EPA "may approve a program to the extent that the program meets the requirements" of Title V and the CAA.[54] NYPIRG contended that section 502(d) was the only path available to achieve full approval, regardless of whether deficiencies were identified before of after interim approval.[55] The EPA interpreted section 502(g), governing interim approval, as permitting a second path to full approval.[56] Section 502(g) states:

> If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall

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46. *Id.* at 719-20. This case is about a lawsuit for attorney's fees. *Id.*
47. *Id.*
48. Operating Permits Program: Notice of Comment Period on Program Deficiencies, 65 Fed. Reg. 77,376 (Dec. 11, 2000).
49. N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003).
50. *Id.*
51. Clean Air Act Final Interim Approval at Operating Permits Program; New York, 61 Fed. Reg. 57,589 (Nov. 7, 1996).
52. *See Whitman*, 321 F.3d at 322.
53. 42 U.S.C. § 7661a(d)(1) (2000).
54. *Whitman*, 321 F.3d at 322.
55. *Id.*
56. *Id.*

> specify the changes that must be made before the program can receive full approval.[57]

The EPA interpreted this language to mean that once a state receives interim approval it may gain full approval by correcting only those deficiencies identified in the interim approval.[58] NYPIRG contended that no state program could achieve full approval while it was deficient, regardless of when that deficiency was identified.[59]

The EPA claimed that these provisions are ambiguous because they fail to clearly describe the process by which a program that initially receives interim approval, will be granted full approval.[60] The EPA stated that because its interpretation of Title V was a permissible construction of an ambiguous statute, it was entitled to *Chevron* deference.[61] The Second Circuit agreed,[62] noting that Congress had delegated to the EPA the responsibility of "administrative implementation" of Title V.[63] Because the court found that the EPA's interpretation of the CAA was a reasonable reading of an ambiguous statutory provision, the Second Circuit held that the EPA was entitled to *Chevron* deference.[64]

After upholding the EPA's full approval of New York's permit program, the court considered the EPA's obligation to issue NODs.[65] Both parties asserted that the key to determining this obligation lay in section 502(i), which provides:

> Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with requirements of this subchapter, the Administrator shall provide notice to the State and may . . . in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.[66]

NYPIRG claimed that section 502(i) requires that whenever a deficiency exists, "the Administrator shall provide notice [of deficiencies]" and the

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57. CAA § 502(g), 42 U.S.C. § 7661a(g).
58. *Whitman*, 321 F.3d at 322.
59. *See id.*
60. *See id.* at 328.
61. *See id.*; *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (holding that if Congress expressly or implicitly delegates law-interpreting power to an agency, the examining court must follow any reasonable agency interpretation of an ambiguous statute).
62. *Whitman*, 321 F.3d at 328-29.
63. *Id.*
64. *Id.* at 328 (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).
65. *Id.* at 330.
66. CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1) (2000).

EPA has a nondiscretionary obligation to issue NODs.[67] The EPA asserted that the statute grants the EPA discretion to determine when deficiencies requiring a NOD exist.[68]

The court determined, essentially, that both parties were correct.[69] While section 502(i) does impose nondiscretionary duties upon the EPA to issue NODs to states with deficiencies in their programs, the EPA may use its discretion to determine whether a state permit program is inadequately administered by the state authority.[70] Because the court held that the EPA has the discretion to determine when to issue a NOD, the court rejected NYPIRG's challenge.[71] The Second Circuit held that an agency's decision not to utilize an enforcement mechanism provided for by statute was not subject to judicial review.[72]

However, NYPIRG was successful in its claim that the EPA failed to issue NODs for specific permits which the EPA itself acknowledged were deficient.[73] NYPIRG pointed to section 505(b)(2) which specified that "the Administrator shall issue an objection" when there is a demonstration of noncompliance.[74] The EPA, while conceding that the specific draft permits were deficient, contended that it was not required to issue NODs where it found the deficiencies were harmless error.[75] The court rejected this argument by pointing out that this was not a challenge to the Agency's exercise of judgment because the EPA itself had conceded that deficiencies existed in the draft permits.[76] Thus, the EPA simply failed to take nondiscretionary actions.[77]

The court then noted that, though there was no need to consult the legislative history to understand Congress's intent, the conference report accompanying the bill that became Title V "emphatically confirms Congress's intent that the EPA's duty to object to non-compliant permits is nondiscretionary."[78] That report stated:

> This section sets out clearly the procedures required of EPA in reviewing permits. Simply put, the Administrator is required to object to permits that

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67. *Whitman*, 321 F.3d at 330; *see* CAA § 502(i), 42 U.S.C. § 7661a(i).
68. *Whitman*, 321 F.3d at 330.
69. *See id.* at 331.
70. *Id.*
71. *See id.*
72. *See id.*; *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement action should by presumed immune from judicial review.").
73. *See Whitman*, 321 F.3d at 333-34.
74. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2) (2000).
75. *Whitman*, 321 F.3d at 332-33.
76. *Id.*
77. *See id.*
78. *Id.* at 333 n.12.

> violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty. Therefore, in the event a petitioner demonstrates that a permit violates the Act, the Administrator must object to that permit.[79]

III. THE COURT'S DECISION

In the noted case, the Fifth Circuit began its analysis by recognizing that the EPA has congressionally delegated authority to make rules carrying the force of law.[80] For this reason, the court stated that it was governed by *Chevron* and was required to defer to any reasonable agency interpretations of ambiguities found within the statute.[81]

As it did in *Whitman*, the EPA interpreted the section 502 provision allowing for interim approval of permit programs to also allow a second path to full approval.[82] The EPA contended that once a State is granted interim approval, it can achieve full approval by correcting only those deficiencies specifically identified by the EPA at the time of interim approval.[83] Public Citizen, on the other hand, interpreted section 502(d) to mean that the EPA may not grant full approval to a program that is deficient.[84] According to Public Citizen, section 502(d) was the only path to full approval and the EPA's interpretation was arbitrary and capricious and contrary to the unambiguous intent of Congress.[85]

The EPA acknowledged an "apparent tension" between the section 502(d) requirement that it grant full approval only to programs that meet minimum requirements and the section 502(g) requirement that it grant full approval to any program that has corrected interim deficiencies.[86] It nevertheless concluded that its interpretation was the "more cohesive reading of the statute."[87] According to the EPA, interpreting section 502(d) to mean that the EPA can never grant full approval to a State permit program it knows to have some deficiency would dramatically disrupt the administration of Title V and cause further delay in its implementation.[88] The Fifth Circuit agreed with the EPA and held that, because Congress had not unambiguously expressed its intent in Title V,

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79. 136 CONG. REC. S16,895, S16,944 (1990).
80. *See* Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 455 (5th Cir. 2003).
81. *See id.* at 456.
82. *See id.*
83. *Id.*
84. *See id.*
85. *Id.*
86. *Id.* at 457.
87. *Id.*
88. *See id.*

this reasonable interpretation by the EPA was entitled to *Chevron* deference.[89]

The court next considered whether the EPA's interpretation was "based on a permissible construction" of the CAA.[90] The court specifically cited the language of section 502(g) stating that when granting interim approval, the EPA is required to "specify *the* changes that must be made before the program can receive full approval."[91] The court concluded that this language suggests that the interim approval notice "must identify *all* the changes required for full approval," and that the making of those specified changes, and (not all possible changes) triggers full approval.[92] Also supporting the EPA's interpretation were the strict timetables Congress required of the EPA.[93] The court questioned whether the States could correct those deficiencies identified in interim approval notices and any deficiencies identified later and still meet the Title V deadlines.[94] Finally, the court noted that the CAA specifically provides the NOD process as a mechanism for correcting deficiencies.[95] The court expressed doubt that Congress would have granted the EPA this ability if it believed that every deficiency would be corrected prior to full approval.[96] For these reasons the court held that the EPA's interpretation was based on a permissible construction of the CAA.[97]

Public Citizen, meanwhile, maintained that even if the EPA's interpretation was a permissible construction of the CAA, its full approval of the Texas permit program was arbitrary and capricious because it violated the EPA's own regulations.[98] They pointed to 40 C.F.R. § 70.10(a) as evidence that the EPA itself believes that programs must meet all the CAA's requirements prior to full approval.[99] The EPA, however, maintained that this regulation only applies where an interim approval expires in the absence of a fully approved program.[100] The EPA pointed out that because the Texas program did not expire, the regulation in question does not address the issue in this case.[101] The court held that

89. *See id.*
90. *Id.*
91. *Id.* (quoting 42 U.S.C. § 7661a(g) (2000) (emphasis added)).
92. *Id.*
93. *See id.* at 457-58.
94. *See id.* at 458.
95. *Id.*
96. *Id.*
97. *See id.*
98. *See id.*; 40 C.F.R. § 70.10(a) (2003).
99. *See Pub. Citizen*, 343 F.3d at 458-59; 40 C.F.R. § 70.10(a).
100. *See Pub. Citizen*, 343 F.3d at 458-59.
101. *See id.*

the EPA's interpretation of its own regulation was entitled to substantial deference and because that interpretation was not "plainly erroneous," it was entitled to "controlling weight."[102]

The court next considered Public Citizen's contention that the EPA acted arbitrarily and capriciously by granting full approval to Texas since it had not corrected certain deficiencies identified at interim approval.[103] The court began its analysis by noting that the EPA decisions at issue involved complex, highly technical evaluations that entitled the EPA to substantial deference.[104]

Public Citizen alleged that Texas failed to correct its exclusion of the minor new source review (NSR) component, a required CAA program that the EPA had identified as missing during the interim approval process.[105] The NSR provision requires new and existing sources "subject to modification to obtain a preconstruction authorization containing emission limitations and standards."[106] The EPA recognized the failure of Texas to include these requirements and identified them as a condition of Texas's full approval.[107] Public Citizen claimed that Texas failed to correct this deficiency prior to full approval and awarded Title V permits to sources without requiring that they include the mandated minor NSR permits during the interim period.[108] Public Citizen pointed out that, in the original interim approval, the EPA required Texas to implement procedures to reopen those Title V permits issued under interim approval to incorporate the excluded minor NSR permits.[109]

The EPA maintained that Texas had corrected these deficiencies by amending its rules to include minor NSR permits as part of its requirements for new Title V permits.[110] Regarding those permits already awarded, the EPA claimed that there was an agreement between itself and Texas in which Texas agreed to institute proceedings to reopen existing Title V permits and incorporate minor NSR permits.[111] The EPA concluded that this satisfied the interim deficiency.[112]

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102. *Id.* at 459 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).
103. *See Pub. Citizen*, 343 F.3d at 459.
104. *Id.*
105. *See id.* at 460.
106. *Id.*; *see* Clean Air Act Proposed Interim Approval Operating Permits Program for the State of Texas, 60 Fed. Reg. 30,037, 30,039 (June 7, 1995).
107. *See Pub. Citizen*, 343 F.3d at 460.
108. *See id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *See id.*

Public Citizen alleged that these steps were not sufficient to correct the deficiencies.[113] They claimed that Texas's schedule was too slow and violated EPA regulations by failing to ensure the sources' compliance upon full approval.[114] Resolving this tension, the court identified language in the EPA's regulations requiring that a program awarded interim approval that is missing a minor NSR requirement "must, upon or before granting of full approval, *institute* proceedings to reopen part 70 permits to incorporate excluded minor NSR permits as terms of the part 70 permits."[115] Therefore, the court held that the EPA's determination that Texas's agreement to institute re-opening proceeding met this requirement and was not arbitrary or capricious.[116]

Public Citizen next alleged that Texas failed to correct the minor NSR deficiency because they simply cross-referenced the permit numbers of other NSR permits.[117] The EPA argued that its decision to favor the "streamlining benefits" of incorporation by reference over the value of a more detailed Title V permit was reasonable.[118] The EPA did concede that in guidance memos it stated that emissions limitations and standards "should be restated on the face of the Title V permit" and not incorporated by reference until after a restatement.[119] However, the EPA maintained that this guidance was not binding and that it was not required to find that Texas failed to correct its interim deficiencies.[120] The court noted that nothing in the CAA or its regulations prohibits the incorporation of requirements by reference and held that the EPA's decision was neither arbitrary nor capricious.[121]

Public Citizen also challenged the alleged correction of Texas's minor NSR deficiencies by pointing out that the corrections impermissibly allow for the incorporation of minor NSR permits into the larger general operating permits.[122] The court refused to even consider this argument, concluding that the issue was not properly presented to the EPA during the full approval process.[123] The court stated that, barring exceptional circumstances, a party may not seek judicial review of an

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113. *Id.* at 460-61.
114. *See id.*; *see also* 40 C.F.R. § 70.4(d)(3)(ii)(D) (2003).
115. *Pub. Citizen*, 343 F.3d at 460-61 (alteration in original).
116. *Id.* at 460.
117. *Id.*
118. *Id.* at 460-61.
119. *Id.* at 460.
120. *See id.* at 460-61.
121. *Id.*
122. *Id.* at 461.
123. *Id.*

"agency action on grounds not presented to the agency at the appropriate time during the administrative proceeding."[124]

The court next turned to Public Citizen's allegation that Texas lacks adequate enforcement authority because its Audit Privilege Act provides certain privileges and immunities that prevent Texas from having the authority to insure that sources comply with CAA requirements.[125] The court acknowledged that the EPA noted its concern for this same issue and required Texas to demonstrate that the Audit Privilege Act did not prevent Texas from adequately enforcing and administering its permit program as required by Title V.[126]

The EPA pointed to several amendments Texas made to the Audit Privilege Act, which it claimed corrected previous deficiencies.[127] First, Texas's amendments "eliminated the application of immunity and privilege provisions to criminal actions."[128] The amendments also "eliminated application of immunity where violation results in a serious threat to health or the environment, or where the violator has obtained a substantial economic benefit that gives it a competitive advantage."[129] Next, Texas's amendments stated that the law would not penalize persons reporting violations of such laws to government agencies.[130] Finally, the amendments established that the privileges of the Audit Privilege Act do not impair the access to information required by federal or state law.[131]

Public Citizen countered that the Audit Privilege Act continues to prevent Texas from having appropriate enforcement authority, or the ability to assess adequate civil penalties for each violation of the CAA.[132] Additionally, it claimed that despite Texas's amendments, the audit documents remain privileged.[133]

The Fifth Circuit concluded that the EPA reasonably determined that the Audit Privilege Act did not deprive Texas of adequate enforcement authority.[134] Therefore, the EPA's finding that Texas retained

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124. *Id.*

125. *Id.*; *see* TEX. REV. CIV. STAT. art. 4447cc (2003).

126. *Pub. Citizen*, 343 F.3d at 461; *see* Clean Air Act Proposed Interim Approval Operating Permits Program for the State of Texas, 61 Fed. Reg. 32,693, 32,697 (June 25, 1996).

127. *Pub. Citizen*, 343 F.3d at 461; *see* Clean Air Act Proposed Full Approval Operating Permits Program for the State of Texas, 66 Fed. Reg. 51,895, 51,903 (Oct. 11, 2001); *see also* TEX. REV. CIV. STAT. art. 4447cc.

128. *Pub. Citizen*, 343 F.3d at 461.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 461-62.

133. *Id.* at 462.

134. *Id.*

the ability to seek declaratory or injunctive relief for violations, pursue criminal sanctions, and seek penalties for serious violations was not arbitrary or capricious.[135] The court described the discrepancies that Public Citizen noted between the federal penalty factors and those allowed consideration by the Audit Privilege Act as "minor semantic differences."[136] Thus, the court found the EPA's conclusion that Texas was not prohibited from considering the appropriate factors when imposing punishments to be reasonable.[137]

As an alternative argument, Public Citizen claimed that, even if the EPA possessed the authority to issue full approval to Texas's permit program, the EPA was still obligated to issue an NOD for those same deficiencies.[138] Further, Public Citizen insisted the EPA lacked the authority to depend upon Texas's informal commitments that it would address deficiencies.[139] Public Citizen supported this contention by pointing to section 502(i)(1) of Title V, which orders that whenever a state is not in compliance with its requirements, the EPA "*shall* provide notice to the state."[140] Public Citizen contended that by using the word "shall," Congress clearly indicated its intent that the EPA Administrator would have no discretion to issue a NOD when deficiencies exist.[141]

The court, however, agreed with the EPA's interpretation that it retains discretion to issue NODs because the opening portion of the statute contains the phrase "[w]henever the Administrator makes a determination," which, it believed, clearly retains discretion in the EPA.[142] The court quoted the Second Circuit's *Whitman* opinion stating:

> Presumably, the Congress could have fashioned a regime under which, for example, an interested party could initiate the process leading to a determination of whether 'a permitting authority is adequately administering and enforcing a program.' Congress, however, took a different path. Because the determination is to occur *whenever the EPA makes it*, the determination is necessarily discretionary.[143]

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135. *Id.*
136. *Id.*
137. *Id.*
138. *See id.* at 463-64; CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1) (2000).
139. *See Pub. Citizen*, 343 F.3d at 464.
140. *See id.* (emphasis added); CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1).
141. *Pub. Citizen*, 343 F.3d at 464.
142. *Id.*; CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1).
143. *Pub. Citizen*, 343 F.3d at 464 (quoting N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 331 (2d Cir. 2003) (emphasis added)).

IV. ANALYSIS

The Fifth Circuit's decision, though consistent with the Second Circuit, defeats the clear intent of the Title V amendments to the CAA. Facing an ambiguous set of statutory provisions, the court was forced to follow the *Chevron* doctrine and found that the EPA's interpretation of the CAA was reasonable and, thus, entitled to substantial deference. Unfortunately for the citizens of Texas who have to breathe the polluted air, the Fifth Circuit got it wrong.

Since the inception of Title V in 1990, the EPA has constantly required the prodding of courts before it fulfilled its statutory responsibilities.[144] Only six months prior to this decision the EPA was sued by another collection of environmental groups under very similar circumstances.[145] In a blatant display of hubris, the EPA in *Whitman* conceded the existence of deficiencies in New York state's permit plan, but stated that it possessed discretion allowing it to ignore the Congressional mandate that it "shall provide notice to the State" where deficiencies exist.[146]

In another example of the EPA's not fulfilling its statutory duties, the Sierra Club filed suit as a result of the EPA's persistent practice of renewing numerous states' interim approvals in direct violation of the express Title V prohibition on renewing interim approvals.[147] When that case settled, the EPA committed to taking over all state programs not fully approved by December 1, 2001.[148] This settlement explains the EPA's willingness to use its discretion in approving all of Texas's asserted corrections. In the instant case, the Texas permit plan was granted full approval on December 6, 2001.[149] At that point the EPA was again in violation of its duty under Title V of the CAA.[150] Had the EPA not granted full approval, it would have been forced to create a federal permit program overseeing all of the permit requests for the state of Texas.[151] This may explain the EPA's willingness to use its discretion to accept

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144. *See* Operating Permits Program Interim Approval Extensions, 61 Fed. Reg. 56,368 (Oct. 31, 1996); Extension of Operating Permits Program Interim Approvals, 62 Fed. Reg. 45,732 (Aug. 29, 1997); Extension of Operating Permits Program Interim Approval Expiration Dates, 63 Fed. Reg. 40,054 (July 27, 1998); Extending Operating Permits Program Interim Approval Expiration Dates, 65 Fed. Reg. 7290 (Feb. 14, 2000).

145. *See Whitman*, 321 F.3d at 331.

146. *Id.*

147. Sierra Club v. EPA, 322 F.3d 718, 719-20 (D.C. Cir. 2003).

148. *See id.* at 720.

149. Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 454-55 (5th Cir. 2003).

150. *See Sierra Club*, 322 F.3d at 720.

151. *See id.*

informal assurances from Texas that it would begin implementing a procedure to correct its recognized deficiencies. It is also worth noting that there is no deadline for Texas to complete its process of bringing all of its permits into compliance.[152] According to EPA regulations, the only requirement is that Texas "must, upon or before granting of full approval, *institute* proceedings to reopen" those permits not in compliance with Title V requirements.[153]

If the Fifth Circuit had investigated the legislative history of Title V, it would have found a clear indication of how the legislature envisioned the EPA Administrator's role. A conference report accompanying the final version of the bill which became Title V contains the following:

> This section sets out clearly the procedures required of EPA in reviewing permits. In other words, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object is a nondiscretionary duty. Therefore, in the event a petitioner demonstrates that a permit violates the Act, the Administrator must object to that permit.[154]

The legislators who promulgated Title V would be surprised to learn that today, instead of the Administrator having a "nondiscretionary duty" to object to permits violating Title V, the Administrator need only enter into an informal agreement with a state in which that state promises to some day correct the permit plans' deficiencies.

V. CONCLUSION

The Fifth Circuit's holding in *Public Citizen v. EPA* granted the Administrator of the EPA an excessive amount of discretion to interpret the requirements of the Title V amendment to the CAA. Though this decision is consistent with a similar ruling from another circuit, the danger is that it allows the Administrator to avoid nondiscretionary requirements set forth in Title V and its accompanying regulations. It was never Congress's intent that the EPA would grant full approval to permit plans containing deficiencies. This case, however, opens the door for just such a development. In light of the role both courts and environmental groups play in forcing the EPA to fulfill the statutory requirements of the CAA, such broad discretion in the hands of the EPA

152. *See Pub. Citizen*, 343 F.3d at 455.
153. *Id.* at 459-60.
154. 16 CONG. REC. S16,895, S16,944 (1990).

does little to inspire confidence that the goals of the CAA will be advanced.

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