

THE DEMONSTRATION REQUIRED TO COMPEL THE ADMINISTRATOR TO OBJECT UNDER TITLE V OF THE CLEAN AIR ACT

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This Note analyzes the emerging split among the federal circuit courts regarding the type of demonstration a petitioner must make under § 7661d(b)(2) of the Clean Air Act in order to compel the EPA Administrator to exercise his or her nondiscretionary duty to object to the issuance of a Title V permit. Whereas some courts require only a showing based on facts and data that a proposed operating permit does not contain all of the arguably applicable Clean Air Act provisions in order to overturn the EPA Administrator's decision not to object to the proposed permit, other courts have heightened the required demonstration to essentially require an adjudicated violation before compelling the Administrator to object to the issuance of a Title V permit. The author argues that the latter interpretation of "demonstrates" as used in § 7661d(b)(2) strains the statutory language and places too heavy a burden on petitioners, to the detriment of human and ecosystem health. The author suggests EPA rulemaking as a solution to clarify the type of demonstration required under § 7661d(b)(2). The author concludes that a flexible standard that allows a petitioner to compel the Administrator to object when the facts and data suggest that arguably applicable Clean Air Act provisions are not included in the proposed Title V permit should be implemented to end the discord in the federal circuit courts.

I. INTRODUCTION

Since 1970, stationary sources of air pollution in the United States have been regulated under the modern incarnation¹ of a statutory

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1. On December 17, 1963, President Lyndon B. Johnson signed the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. In 1965, Congress amended the CAA to regulate emissions from new automobiles, starting with the 1968 model year. Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965). Congress completely overhauled the CAA in 1970, incorporating some elements from the ineffective Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, into the mod-

scheme known as the Clean Air Act (CAA, or the Act).² The Clean Air Amendments of 1970 were heralded as a great experiment in federalism, capable of achieving major improvements in air quality at a relatively low cost.³ But the complicated science that underlies the Act and its often confusing provisions led to difficulties in implementation. As the Environmental Protection Agency (EPA), the states, and industry applied the complicated regulatory scheme to stationary sources, they encountered widespread uncertainty as to the appropriate emission limits and monitoring requirements that applied to any particular source.⁴ To address this confusion, Congress added Title V to the CAA in the Amendments of 1990.⁵ Title V created a national permitting program that requires major stationary sources of air pollution to obtain operating permits that incorporate all applicable CAA requirements, including emission limits and monitoring requirements.⁶

Through federal authorization of state-run Title V permitting programs, the EPA shares the authority to administer the operating permit program with the states.⁷ After the state permitting authority receives a permit application from a stationary source, it submits a draft permit to the EPA Administrator for review, and the Administrator then has forty-five days to object to the permit.⁸ If the Administrator does not object to the issuance of the permit, then any person may petition the Administrator to object to the permit within sixty days of the expiration of the Administrator's forty-five day review period.⁹ The Administrator has a nondiscretionary duty to object to the permit "if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements" of the CAA.¹⁰

Neither Congress nor the EPA have specified exactly what constitutes a sufficient demonstration to compel the Administrator to exercise his or her nondiscretionary duty to object to the issuance of a Title V permit under 42 U.S.C. § 7661d(b)(2). The United States courts of appeals have articulated varying standards, the merits of which constitute the subject matter of this Note.¹¹ Part II of this Note provides background on the CAA and the Title V permitting process. Part III discusses the discord among the circuit courts about the demonstration re-

ern statutory scheme implemented today. See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

2. 42 U.S.C. §§ 7401–7671 (2006).

3. See ARNOLD W. REITZE JR., STATIONARY SOURCE AIR POLLUTION LAW 23 (2005).

4. *Sierra Club v. EPA*, 536 F.3d 673, 674 (D.C. Cir. 2008) ("Before 1990, regulators and industry were left to wander through this regulatory maze in search of the emission limits and monitoring requirements that might apply to a particular source.").

5. Pub. L. No. 101-549, 104 Stat 2399, 2635 (1990) (codified at 42 U.S.C. §§ 7661–7661f).

6. *Sierra Club v. EPA*, 536 F.3d at 674.

7. See 42 U.S.C. § 7661a.

8. *Id.* § 7661d(a)–(b).

9. *Id.* § 7661d(b)(2).

10. *Id.*

11. See *infra* Part III.A.

quired under § 7661d(b)(2). Finally, Part IV suggests various resolutions to this problem and weighs the merits of each, ultimately suggesting EPA rulemaking as a solution.

II. BACKGROUND

Examining the context of Title V will allow for a better understanding of the difficulties the circuit courts face in determining the type of demonstration required to force the Administrator to object to the issuance of a permit. Based on the history and goals of Title V, it is reasonable to conclude that Congress did not intend for the threshold to compel the Administrator to exercise his or her nondiscretionary duty to object to be insurmountably high.¹²

A. *Brief History of the Clean Air Act*

On December 31, 1970, President Nixon signed the Clean Air Amendments of 1970 into law, creating a comprehensive nationwide air pollution control scheme.¹³ The EPA Administrator starts the process of air pollution regulation by publishing a list of air pollutants that “may reasonably be anticipated to endanger public health or welfare” and setting “air quality criteria” for each listed pollutant.¹⁴ The CAA requires the Administrator to promulgate a national ambient air quality standard (NAAQS) for each pollutant for which the Administrator has issued air quality criteria.¹⁵ Each state must submit to the EPA a state implementation plan (SIP) for each NAAQS that “provides for implementation, maintenance, and enforcement” of the NAAQS within the state.¹⁶ The EPA reviews each SIP, and in order to receive EPA approval, a SIP must show attainment with the NAAQS.¹⁷

Under the SIP process, a state has broad discretion over the pollution control methods by which it will show attainment with a NAAQS.¹⁸ The CAA gives the EPA “no authority to question the wisdom of a State’s choices of emission limitations” if the SIP shows attainment.¹⁹ “[S]o long as the ultimate effect of a State’s choice of emission limita-

12. See 136 CONG. REC. E3694 (daily ed. Nov. 2, 1990) (statement of Rep. Norman F. Lent).

13. REITZE, *supra* note 3, at 10.

14. 42 U.S.C. § 7408(a).

15. *Id.* § 7409(a)(1)(A). The EPA issued criteria for six pollutants in 1971: particulate matter, sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, and hydrocarbons. REITZE, *supra* note 3, at 27. Hydrocarbons were delisted but remain regulated as precursors of ozone air pollution. *Id.* In 1976, the EPA listed lead as a criteria pollutant. *Id.* at 27, 42. It has not added any new criteria pollutants since 1976. See *id.* at 42 (noting several additional pollutants that have been proposed, but never adopted, as criteria pollutants).

16. 42 U.S.C. § 7410(a)(1).

17. *Id.* § 7410(a)(3)(B).

18. See THE CLEAN AIR ACT HANDBOOK 45 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004); see also 42 U.S.C. § 7410(a)(2)(A).

19. Train v. Natural Res. Def. Council, 421 U.S. 60, 79 (1975).

tions is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”²⁰ In particular, a SIP may “limit emissions from particular sources within [a] state in a manner designed to attain the ambient air quality standards.”²¹

Despite the broad discretion the states have to design and implement the SIPs, the deadlines established in 1970 for attainment with the NAAQS proved too ambitious, and the Clean Air Act Amendments of 1977 extended the deadlines for attainment of most primary NAAQS from May 31, 1975 to December 31, 1982.²² The Amendments of 1977, however, significantly increased the complexity of the CAA through the addition of the “Prevention of Significant Deterioration” (PSD) program, the New Source Review (NSR) program, and new requirements for nonattainment areas, and the states continued to struggle to comply with the NAAQS.²³ The complex statutory scheme that emerged after the Amendments of 1977 left the EPA, states, and industry uncertain about exactly which provisions applied to which sources.²⁴

B. *The Goals of Title V*

In order to address confusion, to facilitate implementation of SIPs, and to create a comprehensive operating permit program to regulate emissions from major stationary sources of air pollution, Congress enacted Title V in the CAA Amendments of 1990.²⁵ Title V does not impose any additional requirements on sources, but rather provides for the consolidation of all “applicable requirements” from across the Act into one document to ensure that a source is aware of its obligations under the CAA and thus facilitate compliance.²⁶ Listing all applicable requirements in a single permit also prevents conflicting requirements from being imposed on a source.²⁷

20. *Id.*

21. *Duquesne Light Co. v. EPA*, 698 F.2d 456, 462 (D.C. Cir. 1983).

22. Pub. L. No. 95-95, § 129, 91 Stat. 685, 745–46; REITZE, *supra* note 3, at 32; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 6.

23. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127, 91 Stat. 685, 731 (PSD program); *id.* § 109, 91 Stat. at 697 (NSR program); *id.* § 129, 91 Stat. at 745 (nonattainment areas); REITZE, *supra* note 3, at 12–13.

24. See *Sierra Club v. EPA*, 536 F.3d 673, 674 (D.C. Cir. 2008); E. Kenneth Walley, Jr., Recent Developments in Environmental Law, *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008), 22 TUL. ENVTL. L.J. 175, 175 (2008) (“Until 1990, regulators and industry members seeking emission limits and monitoring requirements for stationary sources of air pollution were forced to search for rules scattered throughout a hodgepodge of state implementation plans, national hazardous air pollutant standards, and new source performance standards.”).

25. Pub. L. No. 101-549, 104 Stat. 2399, 2635 (1990) (codified at 42 U.S.C. §§ 7661–7661f (2006)); REITZE, *supra* note 3, at 227; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 524–25.

26. 42 U.S.C. § 7661b; *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 672 (7th Cir. 2008); ROY S. BELDEN, CLEAN AIR ACT 94–95 (2001); REITZE, *supra* note 3, at 227.

27. REITZE, *supra* note 3, at 227.

Consolidating all applicable requirements into the Title V permit facilitates enforcement by federal and state agencies.²⁸ During the Title V permitting process, a source must determine whether it is in compliance with the applicable statutory and regulatory provisions, and all sources must develop a “schedule of compliance” as a condition of obtaining a permit.²⁹ The EPA and the states can then use the schedule of compliance to determine whether a source is violating its permit and to initiate enforcement proceedings against a source.³⁰ Additionally, sources are required to promptly report any deviations from the permit requirements.³¹ Title V also requires sources to submit emissions data and other information during the permitting process, which assists states in determining whether they can demonstrate attainment with the NAAQS during the SIP process.³²

Prior to Title V, forty-eight states “already had state operating permit programs of varying stringency,” adding another layer of complexity to the CAA, especially for industry members operating in multiple states.³³ Title V sought to “increase nationwide consistency” in the regulation of air pollution by creating a comprehensive permitting program.³⁴ By mandating a nationwide permitting program that allows permits to be “issued in a streamlined and expeditious manner,” Congress sought to minimize the financial and administrative costs on the states and to avoid obstructing the effective operation of the regulated community.³⁵ States, however, may establish additional permitting requirements so long as those requirements are not inconsistent with the CAA.³⁶

Another goal of Title V was to facilitate public participation in the process of regulating air pollution.³⁷ The Title V program allows the public to more easily identify the requirements imposed on sources, which facilitates participation in the notice-and-comment process for permit applications at the state level.³⁸ The improved access to emissions data and other information, along with the consolidation of all applicable regulations in a single document, also facilitates the bringing of citizen

28. *Id.* at 228; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 525.

29. 42 U.S.C. § 7661b(b).

30. *See* THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 535–36.

31. 42 U.S.C. § 7661b(b)(2).

32. *See id.* § 7661c(a).

33. REITZE, *supra* note 3, at 227; *see also* THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 523–24.

34. REITZE, *supra* note 3, at 228; *see* Operating Permit Program, 56 Fed. Reg. 21,712, 21,713 (proposed May 10, 1991) (to be codified at 40 C.F.R. pt. 70).

35. CHARLES H. KNAUSS ET AL., THE CLEAN AIR ACT OPERATING PERMIT PROGRAM 4 (1993).

36. 42 U.S.C. § 7661e(a) (“Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter.”).

37. REITZE, *supra* note 3, at 228. In addition to § 7661d(b)(2), the CAA contains other provisions that facilitate citizen involvement in the CAA process. The citizen suit provision in § 7604(a) is the primary vehicle for citizen involvement in the CAA because it allows citizens to sue both the EPA and members of industry under the CAA. 42 U.S.C. § 7604(a).

38. REITZE, *supra* note 3, at 228.

suits against regulated entities and government agencies.³⁹ Public involvement in citing and permitting decisions for major sources also helps to achieve the stated environmental justice goals of the EPA.⁴⁰

Congress also intended to use Title V to allow the state permitting authority or the EPA to inspect major sources to assure compliance with the operating permit.⁴¹ Through acceptance of the Title V permit's terms and conditions, permitted sources are deemed to have consented to a search of the premises, which implicates Fourth Amendment issues.⁴²

Title V is also a significant source of funds that state permitting authorities can use to pay for their air pollution control programs.⁴³ As a condition for EPA approval of a state permitting program, the state must demonstrate that "the program will result in the collection . . . of an amount not less than \$25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program."⁴⁴ Owners or operators of major stationary sources subject to Title V must pay an annual fee sufficient to cover the costs of the permitting program.⁴⁵ The funding provided through Title V is crucial to financially strapped state permitting authorities who are charged with the costly task of drafting, implementing, and enforcing SIPs as well as the Title V permitting program.⁴⁶

C. *The Title V Permitting Process*

The first step in the Title V permitting process requires the Administrator to promulgate "regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency."⁴⁷ Such minimum standards include requirements for permit applications,⁴⁸ monitoring and reporting,⁴⁹ fee provisions,⁵⁰ adequate per-

39. See BELDEN, *supra* note 26, at 129; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 595-96.

40. See *Oversight of the EPA's Environmental Justice Programs: Hearing Before the S. Subcomm. on Superfund & Envtl. Health*, 110th Cong. (2007) (statement of Granta Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA), 2007 WLNR 14234538; Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321.

41. 42 U.S.C. § 7661c(c) (stating that each permit issued under Title V shall set forth inspection and entry requirements "to assure compliance with the permit terms and conditions").

42. See U.S. CONST. amend. IV. The Fourth Amendment issues raised by § 7661c(c) are beyond the scope of this Note.

43. REITZE, *supra* note 3, at 228; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 547.

44. 42 U.S.C. § 7661a(b)(3)(B)(i).

45. *Id.* § 7661a(b)(3)(A).

46. See STATE & TERRITORIAL AIR POLLUTION PROGRAM ADM'RS & ASS'N OF LOCAL AIR POLLUTION CONTROL OFFICIALS, FUNDING NEEDS OF STATE AND LOCAL AIR POLLUTION CONTROL AGENCIES 8 (June 2002), <http://www.4cleanair.org/FundingNeedsSurvey.pdf> (noting that CAA fees "are a critical source of revenue for state and local agencies").

47. 42 U.S.C. § 7661a(b).

48. *Id.* § 7661a(b)(1).

49. *Id.* § 7661a(b)(2).

50. *Id.* § 7661a(b)(3).

sonnel to administer the program,⁵¹ adequate authority under state law to administer the program,⁵² a streamlined system for processing permit applications that allows for public participation and judicial review in state court,⁵³ and provisions for permit modification and revision.⁵⁴ Title V initially gave the states three years to develop and submit to the Administrator for approval a permit program meeting the minimum standards.⁵⁵ Failure to submit a Title V program could result in sanctions.⁵⁶ If a program was not approved by the Administrator two years after the deadline for submission, the Administrator was required to promulgate, administer, and enforce a Title V program for any such state.⁵⁷

Once a state's permit program had been approved by the EPA, sources had twelve months to submit a permit application.⁵⁸ Title V requires that sources include specific information in their permit applications, including a "compliance plan describing how the source will comply with all applicable requirements" of the CAA.⁵⁹ A source that is in compliance must provide a statement that it will continue to comply with the requirements of the CAA and will meet applicable requirements that become effective during the permit term on a timely basis.⁶⁰ A source that is not in compliance must develop a schedule of compliance describing how it will achieve compliance with all applicable requirements of the CAA.⁶¹ Each permit application must also include a "description of the source's processes and products"; emission-related information including a description of all air emissions from the source and all points of emission, emission rates, and information on "fuels, fuel use, raw materials, production rates, and operating schedules"; a "description of air pollution control equipment and compliance monitoring devices" used at the facility; and any other information required by any applicable CAA requirement or the state permitting authority.⁶²

Title V also specifies requirements for the content of the permit itself.⁶³ A permit must contain "all applicable requirements for all [of the source's] relevant [regulated] emission units," as well as any SIP, and assure compliance with those requirements.⁶⁴ The schedule of compliance

51. *Id.* § 7661a(b)(4).

52. *Id.* § 7661a(b)(5).

53. *Id.* § 7661a(b)(6).

54. *Id.* § 7661a(b)(9)–(10).

55. *Id.* § 7661a(d)(1).

56. *Id.* § 7661a(d)(2).

57. *Id.* § 7661a(d)(3).

58. REITZE, *supra* note 3, at 232. A new source applying for a Title V permit for the first time must file an application within twelve months of becoming subject to the program. 40 C.F.R. § 70.5(a)(1)(i) (2009); THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 533.

59. 42 U.S.C. § 7661b(b)(1).

60. 40 C.F.R. § 70.5(c)(8)(ii).

61. *Id.* § 70.5(c)(8)(iii)(C).

62. *Id.* § 70.5(c)(2)–(3), (5).

63. 42 U.S.C. § 7661c.

64. *Id.* § 7661c(a); 40 C.F.R. § 70.3(c)(1).

developed by the source must be included in the permit, along with “enforceable emission limitations and standards”;⁶⁵ a requirement that the source submit the results of any required monitoring to the state permitting authority;⁶⁶ and a provision for “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.”⁶⁷ Permits may be issued “for a fixed term, not to exceed 5 years.”⁶⁸ Before the state permitting authority can issue a permit, however, the EPA must review the permit application and the proposed permit.⁶⁹

The process of EPA review of an individual permit application begins with the requirement that the state permitting authority transmit a copy of each permit application and a copy of the proposed permit to the Administrator.⁷⁰ After receiving the permit application from the state, the Administrator has forty-five days to object to the issuance of the permit.⁷¹ If the Administrator determines the proposed permit is not in compliance with any of the applicable requirements, including the requirements of an applicable SIP, the Administrator must object to the issuance of the permit.⁷² If the Administrator objects to the permit, the state permitting authority must respond in writing, and the Administrator must provide a statement of his or her reasons for objecting to the state permitting authority and the permit applicant.⁷³ The permitting authority may not issue the permit after the receipt of the Administrator’s objection until the permit application is revised to meet the objection, but if a permit has already been issued before the Administrator objects, the Administrator may modify, terminate, or revoke the permit.⁷⁴ If the state permitting authority fails to remedy the Administrator’s objection within ninety days, the Administrator shall issue or deny the permit.⁷⁵

If the Administrator does not object to the issuance of the permit within forty-five days, “any person may petition the Administrator within 60 days after the expiration of the 45-day review period” to object.⁷⁶ The petition to compel the Administrator to object may be based “only on

65. 42 U.S.C. § 7661c(a).

66. *Id.*

67. *Id.* § 7661c(c).

68. 42 U.S.C. § 7661a(b)(5)(B).

69. 40 C.F.R. § 70.7(a)(1)(v).

70. 42 U.S.C. § 7661d(a)(1); 40 C.F.R. § 70.8(a)(1). The permitting authority must also notify all contiguous states whose air quality might be affected and all states that are within fifty miles of the source of each permit application transmitted to the Administrator. 42 U.S.C. § 7661d(a)(2). The state permitting authority must provide the notified states with an opportunity to submit written recommendations about the permit, and the state permitting authority must notify the state that submitted the recommendation and the Administrator in writing of its reasons for failing to accept any recommendation. *Id.*

71. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c)(1).

72. 42 U.S.C. § 7661d(b)(1).

73. *Id.*

74. *Id.* § 7661d(b)(3); *see also* 40 C.F.R. § 70.8(d).

75. 42 U.S.C. § 7661d(c).

76. *Id.* § 7661d(b)(2).

objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency,” unless it was impracticable to object during the comment period or the grounds for objection arose after the expiration of the comment period.⁷⁷ After the petition is filed, the Administrator has sixty days to grant or deny the petition.⁷⁸ The Administrator shall object to the permit “if the petitioner demonstrates to the Administrator that the permit is not in compliance” with the applicable requirements of the CAA, including the requirements of the applicable implementation plan.⁷⁹

A recent line of cases has emerged focusing on the nature of the demonstration a petitioner must make under § 7661d(b)(2) to compel the Administrator to exercise his or her nondiscretionary duty to object to the issuance of a Title V permit.⁸⁰ A circuit split has developed between the Second Circuit, which has held that § 7661d(b)(2) is not ambiguous,⁸¹ and the Sixth, Seventh, and Eleventh Circuits, which have held the statute is ambiguous and therefore have deferred to the EPA’s interpretation of the statute.⁸² The following analysis of these cases argues that the Second Circuit’s approach is correct and that action is needed to remedy the discord among the circuit courts.

III. ANALYSIS

Although § 7661d(b)(2) states that a petitioner seeking to compel the Administrator to object to the issuance of a permit under Title V needs to demonstrate that “the permit is not in compliance with the requirements of [the CAA],”⁸³ some courts have required that petitioners show more than discord between the permit and the applicable requirements.⁸⁴ This Part explores a recent trend in which some circuit courts have moved away from the plain language of § 7661d(b)(2) to effectively require an adjudicated violation before requiring the Administrator to exercise his or her nondiscretionary duty to object to the issuance of a

77. *Id.*

78. *Id.*

79. *Id.*

80. See generally *Sierra Club v. U.S. EPA*, 557 F.3d 401 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257 (11th Cir. 2008); *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670 (7th Cir. 2008); *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172 (2d Cir. 2005).

81. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 181. By holding that the EPA’s interpretation of § 7661d(b)(2) was inconsistent with the text of the statute, *see id.*, the Second Circuit decided the case on *Chevron* step one grounds, implicitly holding that the statute is unambiguous.

82. *Sierra Club v. U.S. EPA*, 557 F.3d at 406; *Sierra Club v. Johnson*, 541 F.3d at 1266; *Citizens Against Ruining the Env’t*, 535 F.3d at 677–78.

83. 42 U.S.C. § 7661d(b)(2).

84. See, e.g., *Sierra Club v. Johnson*, 541 F.3d at 1269 (refusing to compel the Administrator to object when the EPA had already issued a notice of violation and the source did not add the requirements at issue to its permit application).

Title V permit.⁸⁵ After presenting the way the EPA has traditionally handled § 7661d(b)(2) petitions through the example of the Shintech controversy,⁸⁶ this Part delves into the case law, exploring the emerging circuit split. This Note explains how courts initially followed the regular practice of the EPA and the language of § 7661d(b)(2) in handling appeals from denials of petitions to compel the Administrator to object⁸⁷ before the Seventh, Eleventh, and Sixth Circuits broke away from this established practice.⁸⁸ This Part then critiques those cases and the apparent requirement of an adjudicated violation.

A. *How Must a Petitioner Demonstrate Noncompliance Under § 7661d(b)(2)?*

When Congress drafted § 7661d(b)(2), it did not describe exactly what a petitioner must show to demonstrate that a proposed permit does not comply with the provisions of the CAA.⁸⁹ While some courts have found the plain language of the statute unambiguous,⁹⁰ other courts have found ambiguity in the statute and have deferred to the Administrator's reasonable interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹¹ The following examples illustrate how the EPA and the courts have struggled to determine what constitutes a sufficient demonstration of noncompliance under § 7661d(b)(2). A survey of the limited case law on the topic reveals a circuit split between the Second Circuit and the Sixth, Seventh, and Eleventh Circuits.⁹²

1. *Shintech Controversy*

In the late 1990s, a Japanese firm, Shintech, Inc., sought to build a \$700 million polyvinyl chloride plant in an impoverished, predominantly African American neighborhood in rural Convent, Louisiana.⁹³ At the

85. See *Sierra Club v. U.S. EPA*, 557 F.3d at 411; *Sierra Club v. Johnson*, 541 F.3d at 1269; *Citizens Against Ruining the Env't*, 535 F.3d at 677–78.

86. See REITZE, *supra* note 3, at 251.

87. See *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 181 (2d Cir. 2005).

88. *Sierra Club v. U.S. EPA*, 557 F.3d at 411; *Sierra Club v. Johnson*, 541 F.3d at 1269; *Citizens Against Ruining the Env't*, 535 F.3d at 679.

89. See 42 U.S.C. § 7661d(b)(2) (2006).

90. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 181.

91. See cases cited *supra* note 82. Under the two-step test for judicial deference to administrative decisions articulated in *Chevron*, a court must first determine whether the statutory provision at issue is ambiguous, and if it is, whether the agency's interpretation of the statute it is charged with administering is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). When the agency's interpretation is based on a permissible construction of the statute, the court will not substitute its own construction of the statute. *Id.* at 843. Instead, the court will defer to the agency's reasonable interpretation of the challenged statutory provision. *Id.* at 842–43.

92. *Sierra Club v. U.S. EPA*, 557 F.3d at 411; *Sierra Club v. Johnson*, 541 F.3d at 1269; *Citizens Against Ruining the Env't*, 535 F.3d at 677–78; *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 180–81.

93. REITZE, *supra* note 3, at 251; Melba Newsome, *Slaying Goliath: Seeking Environmental Justice, Louisiana Activists Take On a Petrochemical Plant*, AMICUS J., Spring 1998, at 12, 12; R. Gregory

time the plant was proposed, unemployment in Convent was at sixty-two percent, half of the population lived below the poverty line, half of the adult population lacked a high school education, and sixteen other manufacturing facilities already existed in St. James Parish, where Convent is located.⁹⁴ Because employment at Shintech required at least a high school education and technical skills, about half of the community would not have qualified for employment at the plant.⁹⁵ In 1996, St. James Parish ranked third highest in Louisiana for total toxic releases and transfers, with 17.7 million pounds released or transferred annually,⁹⁶ and the Shintech plant would have added another 600,000 pounds annually.⁹⁷ Additionally, the proposed Shintech plant was to be built within one mile of an elementary school.⁹⁸

The citizens of Convent opposed the construction of the facility and petitioned the Administrator to object to the Title V permit issued by the Louisiana state permitting authority.⁹⁹ In determining whether the petitioners had adequately demonstrated noncompliance, Administrator Carol Browner evaluated data the petitioners provided and considered the applicable sections of the CAA and the Code of Federal Regulations (CFR) to assess the petitioner's claims.¹⁰⁰ On September 10, 1997, the Administrator objected to Louisiana's decision to issue a Title V operating permit because the petition adequately demonstrated the permit's failure to regulate all potential air pollution sources at the proposed facility.¹⁰¹ The Administrator found that the permit did not contain all of the applicable CAA requirements, based on the facts presented in the petition and the arguably applicable statutory and regulatory provisions.¹⁰² The Administrator also found the local residents were disproportionately subjected to environmental hazards.¹⁰³

Roberts, Comment, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 257 (1998). The plant would have been the second largest manufacturing facility of polyvinyl chloride, a known carcinogen, in the world. REITZE, *supra* note 3, at 251.

94. REITZE, *supra* note 3, at 251.

95. Roberts, *supra* note 93, at 258 n.160.

96. *Id.* at 258 n.158; Env'tl. Justice Res. Ctr., *Shintech Throws in the Towel on Environmental Racism Case*, <http://www.ejrc.cau.edu/shintechvic.html> (last visited Jan. 23, 2009). The average American is exposed to around ten pounds of toxic releases per year, but in 1996, St. James Parish residents were exposed to 4500 pounds of toxic releases per year without the Shintech plant. Env'tl. Justice Res. Ctr., *supra*.

97. Env'tl. Justice Res. Ctr., *supra* note 96.

98. Roberts, *supra* note 93, at 258.

99. REITZE, *supra* note 3, at 251.

100. See *In re Shintech Inc.*, Permits No. 2466-VO, 2467-VO, 2468-VO, at 5–20 (EPA Sept. 10, 1997) (order partially granting and partially denying petitions for objection to permits), http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/shintech_decision1997.pdf.

101. *Id.* at 5, 21.

102. *Id.* at 5–6.

103. *Id.* at 7–8; Roberts, *supra* note 93, at 262. The CAA does not authorize the Administrator to object to a permit for environmental justice reasons; rather, the Administrator may object to the issuance of a permit only for technical reasons. Roberts, *supra* note 93, at 260 n.174.

The Shintech example illustrates the typical procedure for an objection under § 7661d(b)(2). In the past, the Administrator has not required an adjudicated violation before making an objection to the issuance of a permit.¹⁰⁴ Rather, the Administrator has followed the language of § 7661d(b)(2) and simply required the petitioner to demonstrate that the permit is not in compliance with the requirements of Title V by showing that applicable CAA provisions were not included in the proposed permit or that the source will not be in compliance with the applicable provisions, based on the terms of the permit.¹⁰⁵ The Shintech example, the history of the EPA's treatment of petitions for an objection, and the language of the statute show that the Seventh, Eleventh, and Sixth Circuits each improperly heightened the standard for the required demonstration under § 7661d(b)(2) by deeming traditionally sufficient evidence inadequate and thereby requiring nothing less than an adjudicated violation before compelling the Administrator to object.

2. New York Public Interest Research Group, Inc. v. Johnson

In May 2000, the New York State Department of Environmental Conservation (DEC) issued a notice of violation (NOV) to the Huntley and Dunkirk power plants, which are owned and operated by NRG Energy, Inc.¹⁰⁶ A NOV, one of the first steps in the enforcement process under the CAA, is a formal warning letter notifying the source that it is in violation of an applicable permit.¹⁰⁷ Despite the outstanding violations, the DEC issued draft Title V permits to the plants in 2001 without PSD limits or a PSD compliance schedule.¹⁰⁸ The New York Public Interest Research Group (NYPIRG) objected to these omissions during the comment period, but the DEC refused to make any changes and submitted the draft permits to the EPA for review.¹⁰⁹ The Administrator did not object to the issuance of the permits within the forty-five day review period, so NYPIRG petitioned the Administrator to object, arguing

104. See, e.g., *In re Kerr-McGee Gathering, LLC*, Permit No. 95OPWE035 (EPA Feb. 7, 2008) (order granting petition for objection to permit), http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/kerrmcgee_frederick_decision2007.pdf. For more examples of the EPA's procedure for handling objections to the issuance of permits under Title V, see U.S. EPA, Title V Petition Database, <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitiondb.htm> (last visited Jan. 23, 2009).

105. KNAUSS ET AL., *supra* note 35, at 53.

106. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 177 (2d Cir. 2005). The notice of violation indicated that NRG Energy had modified the plants without obtaining the required PSD permits beforehand. *Id.* As a result of these unauthorized modifications, the plants were illegally emitting massive amounts of sulfur dioxide and nitrogen oxide. *Id.*

107. 42 U.S.C. § 7413(a)(1) (2006); REITZE, *supra* note 3, at 271. A NOV is a jurisdictional prerequisite before an enforcement action can be brought against a source for the violation of a Title V permit. REITZE, *supra* note 3, at 271.

108. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 177.

109. *Id.* The DEC maintained that the applicability of the PSD limits was still subject to negotiation and until the resolution of that issue with the EPA, the DEC would not require PSD limits or a compliance schedule in the permits. *Id.*

that without the PSD limits and a compliance schedule, the permits did not show compliance with the applicable requirements of Title V.¹¹⁰ The Administrator denied NYPIRG's petition on the ground that, "so long as the source did not concede that particular PSD limits applied, permits could issue subject to later amendment once the DEC and the source reached agreement as to PSD limits."¹¹¹ The Administrator also held that the DEC had discretion under Title V to decline to include in the permits requirements not yet determined to be applicable to the source.¹¹²

In January 2002, the DEC sued NRG Energy under § 7661a of the CAA, alleging NRG Energy was violating the Act by operating the Huntley and Dunkirk plants without valid Title V operating permits.¹¹³ The DEC alleged that the permits were deficient because they lacked emissions limits that met all of the applicable requirements under the CAA, including the PSD limits.¹¹⁴ After the DEC commenced its enforcement action against NRG Energy, NYPIRG appealed the Administrator's denial of its petition to object to the Second Circuit, alleging that the absence of PSD limits, a compliance schedule, and reporting requirements in the permit demonstrated that the permits did not comply with the provisions of the CAA.¹¹⁵ NYPIRG also relied on the Second Circuit's decision in *New York Public Interest Research Group v. Whitman*, in which the court held that the Administrator must object to the issuance of a permit when the EPA has concluded that a deficiency in the permit exists.¹¹⁶ NYPIRG sought an extension of *Whitman*, arguing that a state permitting authority's determination that a source's permit is out of compliance with the applicable CAA requirements constitutes a sufficient demonstration of noncompliance under § 7661d(b)(2).¹¹⁷

On appeal to the Second Circuit, the court held that the DEC's issuance of a NOV and the commencement of an enforcement suit against NRG Energy was "a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V permit review process."¹¹⁸ The court declined to defer to the EPA's conclusion that the DEC's issuance of a NOV to NRG Energy did not demonstrate noncompliance, holding that the conclusion was inconsistent with the text of

110. *Id.*

111. *Id.* It seems contrary to the expressed intent of Congress in enacting Title V that a source's opinion of what parts of the CAA apply to it should be a factor that the Administrator considers in determining whether to object to a permit. Rather, if the EPA and the petitioners agree, as they apparently did here, that a particular requirement applies that is absent from the proposed permit, the Administrator should be obligated to object to the issuance of the permit.

112. *Id.*

113. *Id.* at 177–78; *see also* *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003).

114. *Niagara Mohawk*, 263 F. Supp. 2d at 652–53.

115. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 178.

116. *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2d Cir. 2003).

117. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 179–80.

118. *Id.* at 180.

§ 7661d(b)(1) and the DEC's power to enforce the CAA.¹¹⁹ The Second Circuit also rejected the EPA's contention that it was premature to include the PSD limits in the permit before the permitting authority had determined such limits to be applicable, because by issuing the NOV and filing suit, the DEC had determined that the standards were applicable.¹²⁰ The court reversed the Administrator's "decision not to object to the draft permits with respect to the PSD limits, the compliance schedule," and some of the reporting requirements.¹²¹

The Second Circuit's decision comports with Administrator Browner's decision in the Shintech controversy. The court considered NYPIRG's factual allegations based on emissions data from the Huntley and Dunkirk plants, the language of the CAA and the CFR, and the DEC's allegations in both the NOV and the complaint in the enforcement action to conclude that NYPIRG had demonstrated that the proposed permits were not in compliance with the applicable CAA provisions.¹²² The combination of evidence from these sources constituted a sufficient demonstration of noncompliance under § 7661d(b)(2).¹²³ The Second Circuit's holding in *Johnson* is also consistent with its holding in *Whitman* because in both cases the court required the Administrator to object when a government enforcement agency had found a deficiency in the Title V permit.¹²⁴

3. Citizens Against Ruining the Environment v. EPA

In 1995, Commonwealth Edison, the predecessor of Midwest Generation, submitted applications for Title V operating permits to the Illinois Environmental Protection Agency (IEPA).¹²⁵ After the IEPA submitted the proposed permits to the EPA, several parties petitioned the Administrator to object to the permits, alleging that the draft permits did not show compliance with the applicable opacity and NSR requirements.¹²⁶ The Administrator instructed the IEPA to respond to the concerns about the need for compliance schedules for the alleged opacity and NSR violations, but the IEPA responded with proposed permits that did not contain the compliance schedules.¹²⁷ When the Administrator did

119. *Id.* at 181. The Second Circuit relied on the CAA's grant of dual enforcement power to the EPA and the states to conclude that the DEC's issuance of a NOV and commencement of an enforcement suit against NRG Energy would "suffice to demonstrate non-compliance for purposes of objections under § 7661d(b)(1)." *Id.* The court was essentially holding that the Administrator should have objected to the issuance of the permit in the first place under § 7661d(b)(1).

120. N.Y. Pub. Interest Research Group, Inc. v. Johnson, 427 F.3d at 181.

121. *Id.* at 186.

122. *See id.* at 179–81.

123. *Id.* at 181.

124. *See id.*; N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 333–34 (2d Cir. 2003).

125. Citizens Against Ruining the Env't v. EPA, 535 F.3d 670, 673 (7th Cir. 2008). The permit applications were for six coal-fired power plants in Illinois. *Id.*

126. *Id.*

127. *Id.* at 673–74.

not object to the IEPA's revised permits within the forty-five day window, the Illinois Attorney General and two environmental groups filed petitions to compel the Administrator to object.¹²⁸ The petitions again alleged that Midwest's power plants exceeded opacity limits, requiring schedules of compliance, and that Midwest had modified the power plants, triggering the NSR requirements, but that the proposed operating permits lacked schedules of compliance for both opacity and the NSR rules.¹²⁹

The Administrator denied the petitions as to both the opacity and the NSR requirements.¹³⁰ "[T]he Administrator found that the petitioners failed to demonstrate an ongoing [opacity] violation requiring a schedule of compliance" because the IEPA, upon review of Midwest's opacity data, had not found a sufficient basis to require a compliance schedule in the permits and because Midwest had submitted an opacity compliance certification.¹³¹ Further, the Administrator found that because Midwest had not applied for NSR permits and because neither the IEPA nor the EPA had made a determination that the NSR requirements applied to the Midwest plants, the petitioners had not demonstrated that the proposed permits were deficient for lack of an NSR schedule of compliance.¹³² Subsequently, the EPA issued a NOV to Midwest based on NSR and opacity violations, and the petitioners appealed to the Seventh Circuit from the denial of their petitions to object.¹³³

On appeal, the court accepted the EPA's argument that the term "demonstrates" as used in § 7661d(b)(2) is ambiguous and applied *Chevron* deference to the EPA's reasonable interpretation of the statute.¹³⁴ The Seventh Circuit declined to follow the Second Circuit's decision in *New York Public Interest Research Group, Inc. v. Johnson* and hold that

128. *Id.* at 674.

129. *Id.*

130. *Id.*

131. *Id.* ("The Administrator concluded that the Title V petition process is not the appropriate venue to drive discretionary enforcement decisions of the permitting authority, particularly when the petitioner fails to demonstrate that a violation of the Act has occurred." (internal quotation marks omitted)).

132. *Id.* The Administrator's conclusion that the lack of a determination by either the EPA or the state permitting authority that a specific provision of the CAA applies to a particular source undermines the purpose of the objection vehicle of Title V. The objection process is designed to allow citizens to catch the mistakes and omissions of the state permitting authority and the EPA. See Maria Farinella, Comment, *The Clean Air Act of 1990: Title V's Operating Permit Provision for Citizen Access to State Court Judicial Review*, 8 ADMIN. L.J. AM. U. 67, 73-74 (1994). If a citizen cannot raise the omission of an applicable provision from the permit application in its petition, then what good is § 7661d(b)(2)?

133. *Citizens Against Ruining the Env't*, 535 F.3d at 674. Specifically, the Illinois Attorney General sought review of both the opacity and the NSR issues, whereas the environmental groups sought review on only the opacity issue. *Id.* Due to procedural problems with the Illinois Attorney General appealing a decision of the IEPA, the court dismissed the Illinois Attorney General's appeal and proceeded only on the opacity appeal from the environmental groups. *Id.* at 677.

134. *Id.* at 677-78. The court rejected the petitioners' argument, which had been accepted by the Second Circuit in *New York Public Interest Research Group, Inc. v. Johnson*, that the plain language of the statute is unambiguous. *Id.*

the subsequent issuance of a NOV indicates that the petitioners demonstrated noncompliance.¹³⁵ The court reasoned that because the NOV in *New York Public Interest Research Group, Inc. v. Johnson* was issued before the Administrator declined to object to the permits, the case was distinguishable.¹³⁶ The court also held that because the Administrator relied on the findings of the IEPA that the source was in compliance with the opacity requirements and the source's own certification that it was in compliance, the Administrator did not act arbitrarily or capriciously in refusing to object to the permit.¹³⁷ The Seventh Circuit focused on the short amount of time the Administrator has to review permit applications (a mere forty-five days) in determining that the Administrator acted appropriately in not "fully investigat[ing] and resolv[ing] all allegations in the permitting context."¹³⁸

The Seventh Circuit rejected the petitioners' argument that a subsequent NOV indicates that their petitions demonstrated noncompliance with the provisions of Title V.¹³⁹ The court, however, reserved judgment on whether the prior issuance of a NOV would obligate the Administrator to object.¹⁴⁰ The Seventh Circuit's holding conflicts with the Second Circuit's decision in *New York Public Interest Research Group, Inc. v. Johnson*, in which the court found that both the prior NOV and the subsequent enforcement action filed after the Administrator denied NYPIRG's petition to object constituted a sufficient demonstration of noncompliance.¹⁴¹ The Seventh Circuit's decision also conflicts with *Whitman* because the Administrator's remand of the original proposed permit to the IEPA for lack of the allegedly applicable opacity and NSR requirements arguably constitutes a prior finding of a deficiency in the permit, requiring the Administrator to object to the issuance of the permit.¹⁴² In effect, the Seventh Circuit held that anything less than an adjudicated violation would not constitute sufficient demonstration of noncompliance to compel the Administrator to object to the issuance of a

135. *Id.* at 677. The court declined to rule on whether the prior issuance of a NOV obligates the Administrator to object to an operating permit. *Id.* The Eleventh Circuit, however, does not think that the Administrator has an obligation to object when a notice of violation has previously been issued. See *Sierra Club v. Johnson*, 541 F.3d 1257, 1259 (11th Cir. 2008); *infra* Part III.A.4.

136. *Citizens Against Ruining the Env't*, 535 F.3d at 677. The Seventh Circuit was splitting hairs when it distinguished *New York Public Interest Research Group, Inc. v. Johnson*. The Second Circuit held in *Johnson* that both the original NOV and the commencement of the enforcement action, which occurred after the Administrator had denied the petition to object, constituted a sufficient demonstration of noncompliance. See *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 180 (2d Cir. 2003).

137. *Citizens Against Ruining the Env't*, 535 F.3d at 679.

138. *Id.* at 678. The forty-five day time frame for the Administrator to review and object to a permit is surprisingly short, but it is the period mandated by Congress, and the Administrator should not shirk his or her responsibilities to review permits before allowing them to be automatically issued.

139. *Id.* at 677.

140. *Id.*

141. *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 180.

142. See *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2d Cir. 2003).

permit.¹⁴³ The Seventh Circuit's ruling presents a significant barrier to petitioners attempting to demonstrate noncompliance with the provisions of Title V, creates a circuit split with the Second Circuit, and contradicts the language of § 7661d(b)(2).¹⁴⁴

4. Sierra Club v. Johnson

In 1999, the EPA issued a NOV to the Georgia Power Company because the EPA found that the company's Bowen and Scherer plants were operating in violation of applicable PSD requirements.¹⁴⁵ Georgia Power denied that the PSD requirements applied to the Bowen and Scherer plants and failed to correct the violations, so the United States filed an enforcement action against Georgia Power seeking civil penalties and injunctive relief.¹⁴⁶ In 2001, the district court administratively closed the case during the pendency of "a potentially-relevant decision from a multi-district litigation panel."¹⁴⁷ After the district court denied without prejudice the United States' motion to reopen the case in 2002, there have been no further proceedings in the enforcement action.¹⁴⁸

When Georgia Power applied to the Georgia Environmental Protection Division (EPD), the state permitting authority, for a renewal of its Title V operating permits for the Bowen and Scherer plants in 2004, it did not include the PSD requirements in its permit application.¹⁴⁹ The Sierra Club protested the failure to include the PSD requirements during the public comment period, but the EPD issued the proposed permits without the PSD requirements.¹⁵⁰ The Administrator did not object to the permits, so the Sierra Club filed a petition under § 7661d(b)(2) to compel the Administrator to object to the permits because of the omitted PSD requirements and corresponding schedules of compliance.¹⁵¹ The Administrator denied the petition, finding that the Sierra Club had offered no evidence other than the NOV and the related civil enforcement action to show that the permits were required to contain PSD limits.¹⁵²

143. See *Citizens Against Ruining the Env't*, 535 F.3d at 679. If the subsequent issuance of a NOV is not sufficient evidence that the permit does not comply with the applicable provisions of the CAA, then the only demonstration that could be stronger evidence of noncompliance is an adjudicated violation.

144. See 42 U.S.C. § 7661d(b)(2) (2006).

145. *Sierra Club v. Johnson*, 541 F.3d 1257, 1262 (11th Cir. 2008). The NOV alleged that Georgia Power had constructed two new steam emission units at the Scherer plant and made numerous modifications to the boiler at the Bowen plant without obtaining permits. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1262–63.

150. *Id.* at 1263.

151. *Id.* The Coosa River Basin Initiative filed the petition against the Administrator with the Sierra Club as a co-plaintiff. *Id.*

152. *Id.* Although the Administrator found the evidence insufficient, the Second Circuit under both *New York Public Interest Research Group, Inc. v. Johnson* and *New York Public Interest Research Group v. Whitman* would have held that such evidence mandated an objection by the Administrator. See *supra* Part III.A.2. In *New York Public Interest Research Group, Inc. v. Johnson*, the Second Cir-

Accordingly, the Administrator found that the Sierra Club had not demonstrated that the permits were not in compliance with the applicable requirements of the CAA “because a violation notice and a complaint are merely ‘initial steps in the process of determining whether the source is in violation of any [Clean Air Act] requirements,’ and do not ‘definitively establish’ [that] PSD requirements apply to the Bowen and Scherer plants.”¹⁵³

The Sierra Club appealed to the Eleventh Circuit for review of the agency order, arguing that “the Administrator does not have discretion to refuse to object when the agency has already made administrative findings resulting in a violation notice and the filing of a complaint.”¹⁵⁴ The Eleventh Circuit admitted that the CAA does not provide a definition of “demonstrates” or context for how the Administrator should make a judgment on the demonstration.¹⁵⁵ The court accepted the EPA’s argument that § 7661d(b)(2) is ambiguous and then deferred to the EPA’s reasonable construction of the statute under *Chevron*.¹⁵⁶ The court went on to rule that the prior NOV and enforcement were insufficient, without more, to demonstrate a violation of the CAA.¹⁵⁷ Accordingly, the court held that the Administrator did not act arbitrarily in refusing to object to the Bowen and Scherer permits even though they did not contain PSD limits or compliance schedules.¹⁵⁸

The Eleventh Circuit’s holding directly conflicts with the Second Circuit’s holding in *New York Public Interest Research Group, Inc. v. Johnson*, in which the court held that the state permitting authority’s issuance of a NOV and commencement of a suit was a sufficient demonstration of noncompliance under § 7661d(b)(2).¹⁵⁹ The Eleventh Circuit’s decision also conflicts with the Second Circuit’s holding in *Whitman* that a prior finding by the EPA that an operating permit is deficient requires the Administrator to object to the issuance of a subsequent Title V permit.¹⁶⁰ The Eleventh Circuit’s unwillingness to hold that the NOV and enforcement action amounted to an adequate demonstration of noncompliance indicates that the court would have been satisfied with no less than an adjudicated violation before it would reverse the Administrator’s decision to deny a petition under § 7661d(b)(2). Following the Seventh

cuit held that relying on the NOV and the complaint in the enforcement action was appropriate, as it was “unclear why a private citizen should be required to duplicate that complicated and expensive effort by conducting its own fact-finding.” 427 F.3d 172, 182 (2d Cir. 2005).

153. *Sierra Club v. Johnson*, 541 F.3d at 1263 (first alteration in original) (quoting the EPA order issued by the Administrator in response to the Sierra Club’s petition).

154. *Id.* The Sierra Club’s argument on appeal is in line with the Second Circuit’s holding in *Whitman*. See *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 333–34 (2d Cir. 2003); see also *supra* note 116 and accompanying text.

155. *Sierra Club v. Johnson*, 541 F.3d at 1266.

156. *Id.* at 1264–66.

157. *Id.* at 1269.

158. *Id.*

159. 427 F.3d at 180.

160. See *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 333 (2d Cir. 2003).

Circuit in *Citizens Against Ruining the Environment*, the Eleventh Circuit improperly expanded the required demonstration under § 7661d(b)(2) to require, in effect, the showing of an adjudicated violation, rather than a showing of noncompliance with the applicable provisions of the CAA.¹⁶¹ Such a requirement strains the language of § 7661d(b)(2) and conflicts with the holdings of the Second Circuit.¹⁶²

5. Sierra Club v. U.S. EPA

In the late 1970s, the East Kentucky Power Cooperative (EKPC) built the Spurlock Station power plant in Maysville, Kentucky.¹⁶³ When the plant was originally built, the EKPC obtained a permit for one of the coal-powered steam generators at the Spurlock Station known as Unit 2. During the 1990s, the EKPC made several modifications to the plant that violated its original construction permit.¹⁶⁴ The EKPC applied for a Title V permit in 1996, but did not include in its permit application the PSD requirements resulting from the modifications, nor did it include a PSD compliance schedule.¹⁶⁵ The Kentucky Division of Air Quality (DAQ) issued the EKPC a Title V permit in 1999.¹⁶⁶

After discovering that the EKPC had modified Unit 2 in the 1990s, the EPA issued a NOV in January 2003, alleging that the EKPC's Title V permit for Unit 2 failed to address the PSD requirements, which it determined were applicable to the source.¹⁶⁷ One year later, the EPA followed up with the NOV by filing an enforcement action based on Unit 2's noncompliance with the PSD provisions.¹⁶⁸ During the pendency of the enforcement action, the EKPC applied for a renewal of its Title V permit, again omitting the PSD requirements from the permit application, and the DAQ submitted the proposed permit to the EPA for approval.¹⁶⁹ The Administrator did not object within forty-five days, so the DAQ issued the permit on July 31, 2006.¹⁷⁰

In August 2006, the Sierra Club filed a petition to compel the Administrator to object to the permit pursuant to § 7661d(b)(2), arguing that the proposed permit was noncompliant due to its failure to address

161. See *Sierra Club v. Johnson*, 541 F.3d at 1259; see *supra* Part III.A.3.

162. See 42 U.S.C. § 7661d(b)(2) (2006); *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d at 180; *Whitman*, 321 F.3d at 333.

163. *Sierra Club v. U.S. EPA*, 557 F.3d 401, 404 (6th Cir. 2009).

164. *Id.* Specifically, in August 1992, EKPC began using steam from Unit 2 to power a nearby factory, although its original construction permit application provided that Unit 2 would use steam exclusively for the purpose of generating electricity. *Id.* In January 1994, EKPC increased Unit 2's heat-input rate, "allegedly operating above the level specified in its original permits." *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

the PSD requirements.¹⁷¹ Just as it did in *Sierra Club v. Johnson*,¹⁷² the Sierra Club based its allegations in the petition “solely on the fact that the EPA previously had issued [a NOV] and had filed a civil-enforcement action based on the same allegations.”¹⁷³ During the pendency of the Sierra Club’s petition, the EPA and EKPC filed a proposed consent decree with the district court in July 2007, under which the EKPC maintained that it had not violated the CAA but agreed to pay a civil penalty, install pollution controls, and perform other remedial measures.¹⁷⁴ In August 2007, the Administrator declined to object to the Title V permit on the basis of the EKPC’s failure to include the PSD requirements in the permit, explaining that the NOV and enforcement action were merely “initial steps in the enforcement process and did not reflect the agency’s final position as to whether the Title V permit for Unit 2 needed to include a PSD compliance schedule.”¹⁷⁵ In September 2007, the district court approved the consent decree between the EPA and EKPC, and in December 2007, the Sierra Club appealed the Administrator’s refusal to object to the Title V permit to the Sixth Circuit.¹⁷⁶

On appeal, the Sixth Circuit found the meaning of “demonstrates” ambiguous and concluded that the case turned on whether the EPA’s interpretation of § 7661d(b)(2) was entitled to deference under *Chevron*.¹⁷⁷ The Sixth Circuit held that the Administrator had construed § 7661d(b)(2) to mean that

[a]lthough the agency’s prior notice of violation and enforcement action are “relevant factor[s]” in assessing a petitioner’s subsequent efforts to “demonstrate” permit non-compliance, they do not necessarily make the showing by themselves to the exclusion of other considerations, such as (1) the kind and quality of information underlying the agency’s original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the agency’s enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one, and

171. *Id.* at 405.

172. 541 F.3d 1257, 1269 (11th Cir. 2008) (“Here, Petitioners only offered evidence that the EPA had initiated proceedings to resolve the applicability of PSD requirements to the Bowen and Scherer plants.”).

173. *Sierra Club v. U.S. EPA*, 557 F.3d at 405. Again, the evidence provided by the Sierra Club showed that the EPA had previously found the Title V permit deficient, requiring the Administrator to object to the issuance of the permit under *Whitman*. See N.Y. Pub. Interest Research Group v. *Whitman*, 321 F.3d 316, 333 (2d Cir. 2003).

174. *Sierra Club v. U.S. EPA*, 557 F.3d at 405. According to the EPA, the new pollution controls would cost the EKPC over \$650 million. *Id.*

175. *Id.* (internal quotation marks omitted). The Administrator did grant a portion of the petition on an unrelated issue. *Id.*

176. *Id.*

177. *Id.* at 405–06. The issue on appeal was: “Does the Act require the EPA to object to a permit request when the agency previously has filed a notice of violation and enforcement action regarding the same allegations about the same plant?” *Id.* at 405.

(5) the likelihood that a pending enforcement case could resolve some of those issues.¹⁷⁸

The Sixth Circuit found the EPA's interpretation of the statute reasonable and deferred to it under *Chevron*, rejecting the Sierra Club's argument that the EPA's contradictory positions in maintaining the enforcement action while denying the petition to compel the Administrator to object meant that the EPA's interpretation was not entitled to deference.¹⁷⁹

The Sixth Circuit rejected the Sierra Club's argument that because § 7413(a)(1) requires the Administrator to make a "finding" that a source is in violation of a CAA requirement before he or she issues a NOV, such a finding by the Administrator constitutes a sufficient demonstration of noncompliance for purposes of § 7661d(b)(2).¹⁸⁰ The court held that a finding of a violation under § 7413(a)(1) is not a "definitive, once-and-for-all determination by the agency that estops it from arriving at a different conclusion in a different factual or legal setting."¹⁸¹ The court also concluded that the low evidentiary standard and lack of a formal adjudicated finding before issuing the NOV means that the prior issuance of a NOV is not sufficient evidence of noncompliance to compel the Administrator to object under § 7661d(b)(2).¹⁸²

The Sixth Circuit noted that its decision was, in some sense, in line with the decision of the Eleventh Circuit in *Sierra Club v. Johnson*, but that it was directly opposed to the Second Circuit's holding in *New York Public Interest Research Group, Inc. v. Johnson*.¹⁸³ In trying to reconcile its decision with the Second Circuit's decision, the Sixth Circuit distinguished the Second Circuit's holding on the ground that the DEC issued the NOV in that case, as opposed to the EPA, and that the DEC "may have required a more robust determination than the EPA must make before it issues [a NOV] or files a complaint, prompting the court to lean more heavily on the existence of that prior agency action."¹⁸⁴ The Sixth Circuit also distinguished the Second Circuit's decision based on the timing of the petition as compared to the filing of the enforcement action.¹⁸⁵

178. *Id.* at 406–07 (second alteration in original) (internal citation omitted).

179. *See id.* at 407–09.

180. *Id.* (quoting 42 U.S.C. § 7413(a)(1) (2006)).

181. *Id.* Although the issuance of a NOV is neither a final agency action nor appealable, it is still a formal warning letter that can become the basis for an enforcement action. REITZE, *supra* note 3, at 271.

182. *Sierra Club v. U.S. EPA*, 557 F.3d at 408.

183. *Id.* at 407, 409.

184. *Id.* at 410. The record in *New York Public Interest Research Group, Inc. v. Johnson* does not seem to indicate that the Second Circuit read the state regulation to mean that the DEC has a higher standard than the EPA before issuing a NOV, such as a formal adjudicated finding of violation. *See* 427 F.3d 172, 177 (2d Cir. 2005). In fact, the Second Circuit noted that the applicable provisions under New York state law and § 7413(a)(1) were analogous. *Id.* at 180–81. Therefore, it does not appear that the Second Circuit relied on the distinction between the state regulations and § 7413(a)(1) made by the Sixth Circuit.

185. *Sierra Club v. U.S. EPA*, 557 F.3d at 410. In *New York Public Interest Research Group, Inc. v. Johnson*, the DEC issued the Title V permits after the NOV was issued but before the enforcement

The court noted that in *New York Public Interest Research Group, Inc. v. Johnson*, the DEC filed the enforcement action the same month that NYPIRG filed its petition to compel the Administrator to object, whereas in the instant case, the petition was filed two and a half years after the enforcement action was filed.¹⁸⁶ The Sixth Circuit concluded that the timeline in the instant case was more akin to the timeline in *Sierra Club v. Johnson*, where six years had passed between the filing of the enforcement action and the filing of the petition, justifying the Sixth Circuit's alliance with the Eleventh Circuit.¹⁸⁷

The Sixth Circuit's decision in *Sierra Club v. U.S. EPA* deepens the circuit split between the Second Circuit and the Eleventh and Seventh Circuits. The Sixth Circuit's dismissive view of the EPA's NOV due to the lack of a formal adjudicated fact finding,¹⁸⁸ coupled with the court's unwillingness to find the filing and settlement of an enforcement action in federal district court to be a sufficient demonstration under § 7661d(b)(2) of noncompliance with applicable CAA provisions,¹⁸⁹ indicates that the court would consider nothing less than an adjudicated violation to be a demonstration sufficient to compel the Administrator to object to the issuance of the Title V permit. Although the Sixth Circuit indicated that it might be willing to compel the Administrator to object to the issuance of a permit if the enforcement action against the source and the petition were "filed in the same month (and close to the same day)," that concession provides only a narrow margin to the petitioners.¹⁹⁰ The court's deviation from the text of § 7661d(b)(2) that "[t]he Administrator shall issue an objection within [sixty days] if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]"¹⁹¹ strains the plain language of the statute and frustrates Congress's intent that a mere showing of noncompliance be a sufficient demonstration to compel the Administrator to exercise his or her nondiscretionary duty to object to the issuance of the permit.

B. *The Requirement of an Adjudicated Violation*

The recent cases from the Sixth, Seventh, and Eleventh Circuits indicate a shift away from the authority of *New York Public Interest Research Group, Inc. v. Johnson* and the text of § 7661d(b)(2). With both the Sixth and Eleventh Circuits unwilling to accept a previously issued NOV and enforcement action as a sufficient demonstration of noncom-

suit was commenced. 427 F.3d at 177–78. In *Sierra Club v. U.S. EPA*, however, the EKPC applied for its permit renewal during the pendency of the enforcement action. 557 F.3d at 404.

186. *Sierra Club v. U.S. EPA*, 557 F.3d at 410.

187. *Id.*

188. *Id.* at 407–08.

189. *Id.*

190. *Id.* at 410.

191. *See* 42 U.S.C. § 7661d(b)(2) (2006).

pliance to compel the Administrator to exercise his or her nondiscretionary duty to object to the issuance of a Title V permit, the courts imply that nothing less than an adjudicated violation will obligate the Administrator to object.¹⁹² Although the Seventh Circuit reserved judgment on whether a permitting authority's prior issuance of a NOV and the commencement of a citizen suit obligates the Administrator to object to an operating permit under Title V, the court held that the EPA has discretion to determine what a petition must show in order to make an adequate demonstration and that *Chevron* deference applies.¹⁹³ In *New York Public Interest Research Group, Inc. v. Johnson*, however, the Second Circuit held that the statute was unambiguous and that the mere issuance of a NOV and the commencement of the suit was a sufficient demonstration to the Administrator of noncompliance for purposes of the Title V permit review process.¹⁹⁴

To effectively require an adjudicated violation strains the language of the CAA¹⁹⁵ and creates a bad public policy. Nothing in § 7661d(b)(2) indicates that any sort of enforcement action, such as a NOV, a pending enforcement suit, or an adjudicated violation, is necessary to demonstrate noncompliance with the applicable provisions of the CAA.¹⁹⁶ Requiring an adjudicated violation before a party can petition the Administrator to object gives plaintiffs in citizens' suits against sources a disincentive to settle for fear of not being able to petition the Administrator should the need arise later.¹⁹⁷ Requiring an adjudicated violation would also decrease the number of petitions, removing an important check on the Title V process and decreasing opportunities for public participation in the permitting process. Ultimately, requiring an adjudicated violation would potentially prolong the release of harmful emissions that decrease air quality. It is in the public's best interest to facilitate the petition process to prevent agency capture and achieve environmental justice.¹⁹⁸

The varying standards articulated by the circuit courts will lead to confusion among petitioners, courts, and the EPA as to exactly what a petitioner must show in order to make a sufficient demonstration of noncompliance under § 7661d(b)(2). The differing standards will also lead to inconsistent results for petitioners, which conflicts with the goal of na-

192. See *supra* Parts III.A.4–5.

193. *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008).

194. 427 F.3d 172, 180–81 (2d Cir. 2005).

195. See 42 U.S.C. § 7661d(b)(2).

196. See *id.*

197. Section 7604(a)(3) of the CAA grants any person the authority to bring a civil action against a source that is in violation of the terms of its permit. *Id.* § 7604(a)(3).

198. Requiring an adjudicated violation would be a nearly insurmountable barrier for most petitioners under Title V. Few enforcement actions are fully adjudicated due to the cost of litigation, so more often than not the EPA and the source enter into a consent decree under which the source agrees to a series of judicially enforceable deadlines to achieve compliance with the CAA. See, e.g., JOHN SCALIA, U.S. DEP'T OF JUSTICE, FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS, 1997, at 1 (1999), <http://bjs.ojp.usdoj.gov/content/pub/pdf/feel97.pdf>.

tional consistency in air quality through the CAA.¹⁹⁹ The discord among the courts cries out for a resolution, whether judicial, legislative, or administrative.

IV. RESOLUTION AND RECOMMENDATION

To avoid inconsistency among jurisdictions, clarity as to the meaning of “demonstrates” as used in § 7661d(b)(2) is necessary. The stakeholders must reach a consensus as to what should constitute a sufficient demonstration of noncompliance based on the statutory language, congressional intent, and public policy concerns.²⁰⁰ Based on a proposed definition of “demonstrates,” this Part weighs the advantages of using administrative, legislative, or judicial measures to achieve a national standard for a demonstration of noncompliance. This Note concludes that the administrative process is the best recourse for defining the meaning of “demonstrates” as used in § 7661d(b)(2).

A. *What Should Constitute a Demonstration Under § 7661d(b)(2)?*

Under § 7661d(b)(2), “[t]he Administrator shall issue an objection within [sixty days] if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA], including the requirements of the applicable implementation plan.”²⁰¹ A textual analysis, as well as an analysis of congressional intent and public policy concerns, informs a discussion of the meaning of “demonstrates” as used in the statute. Due to the broad statutory language, the short time frame for objection, and the overriding interest in protecting public health through the CAA, the standard for what a petitioner must demonstrate should be flexible, allowing the Administrator to err on the side of caution and to object to a permit for a more thorough examination. The language of § 7661d(b)(2) is broad,²⁰² suggesting that petitioners should be able to use a wide range of evidence to demonstrate noncompliance, including emissions data; facts about the source, such as evidence of modifications without a preconstruction permit; any enforcement measures; prior communications between the source and the EPA or the state permitting authority; and more. Circumstantial evidence, such as the commencement of enforcement proceedings against a source after the denial of the petition to object, should be used as evidence on appeal to show that petitioners did in fact make a sufficient demonstration of

199. See 42 U.S.C. § 7409; see also *supra* notes 33–36 and accompanying text.

200. Stakeholders include parties interested in reaching a consensus on the meaning of “demonstrates” as used in § 7661d(b)(2), including the EPA, Congress, courts, industry, environmental groups, and private citizens.

201. 42 U.S.C. § 7661d(b)(2).

202. See *id.*

noncompliance.²⁰³ Courts have held that it is not necessary for a petitioner to collect its own data from a source and that petitioners may properly rely on data compiled by the EPA or the state permitting authority.²⁰⁴

Because Congress gave the Administrator a very short timeline for approval of Title V permits,²⁰⁵ the Administrator has time to perform only a cursory review of the petitions. With such a short amount of time available for review, Congress likely intended for the Administrator to identify red flags in the petition and object to the permit within the sixty-day time period to allow for a more thorough examination of the permit and remand of any issues to the state permitting authority.²⁰⁶ The public policy concern of protecting public health and air quality through the CAA also weighs in favor of a more flexible standard for exercising the nondiscretionary duty to object to permits, in order to give the Administrator more time to review the permits and ensure that they show compliance with all applicable requirements.²⁰⁷

A petitioner need not provide a laundry list of noncompliant provisions of the permit. In *New York Public Interest Research Group v. Whitman*, the petitioners identified mere procedural problems with the permitting process, including the lack of a proper public hearing, and the Second Circuit reversed the Administrator's decision not to object to the permit.²⁰⁸ *Whitman* shows that a petitioner need not identify a plethora of problems with a permit in order to make a sufficient demonstration; identifying a single noncompliant provision of a permit is sufficient to compel the Administrator to object.²⁰⁹

The above analysis indicates that the meaning of “demonstrates” is meant to be flexible, encompassing a wide variety of evidence and requiring only a single offending provision in the permit. The public policy concerns and congressional intent indicate that the Administrator should err on the side of objection in order to properly consider the issues raised in the petition and to protect human health. Thus, a showing based on facts and data that a source is not in compliance with an arguably applicable provision of the CAA should be a sufficient demonstration to compel the Administrator to object to the issuance of a Title V permit. With this expansive definition in mind, Section B weighs the pros and

203. This is the strategy petitioners attempted to use on appeal in *Citizens Against Ruining the Env't v. EPA*. See 535 F.3d 670, 678 (7th Cir. 2008).

204. See, e.g., *N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 181–82 (2d Cir. 2005).

205. The forty-five and sixty-day periods under § 7661d(b)(2) are very short compared to the years the Administrator has to perform other duties under the CAA, such as approving SIPs, some of which are not approved for several years after they are submitted to the Administrator. REITZE, *supra* note 3, at 66; THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 51–52.

206. See 42 U.S.C. § 7661d(b)(2).

207. See *id.* § 7409(b); see also THE CLEAN AIR ACT HANDBOOK, *supra* note 18, at 5.

208. 321 F.3d 316, 332–34 (2d Cir. 2003).

209. See *id.*

cons of administrative, legislative, and judicial methods for clarifying the appropriate nationwide standard for a demonstration of noncompliance under § 7661d(b)(2).

B. EPA Should Promulgate Regulations to Clarify “Demonstrates”

One way to implement a nationwide standard for a demonstration of noncompliance is through EPA rulemaking. Under § 7607(d) of the CAA, the Administrator could promulgate a rule explaining the types of evidence to be considered and the weight to be given such evidence, including evidence of a prior enforcement action against the source.²¹⁰ The rulemaking could also clarify how evidence of enforcement measures taken after a petition to object is denied by the Administrator should be used on appeal.²¹¹ The EPA could also codify the Second Circuit’s holding in *Whitman* that the Administrator shall object to the issuance of a permit when the EPA or the appropriate state agency has determined that the permit is deficient in some way.²¹² In jurisdictions that have concluded that § 7661d(b)(2) is ambiguous and that *Chevron* deference applies to the EPA’s determination of what constitutes an adequate demonstration of noncompliance, courts will defer to the EPA’s expressed interpretation of the CAA in the rulemaking.²¹³

Section 7607(d) contains several provisions providing for public participation in the rulemaking process, such as a public comment period and the creation of a docket available for public viewing.²¹⁴ Allowing the public to be involved in the development of a definition of “demonstrates” will facilitate a dialogue between the interested parties and the EPA, ensuring that the EPA will be aware of stakeholder concerns.²¹⁵ The administrative rulemaking process has the advantage of directly involving the public in the process of setting a standard for a demonstration of noncompliance, as opposed to the legislative process or the judicial process where the public is only indirectly involved, if at all.²¹⁶

Once the promulgated rule clarifying the meaning of “demonstrates” as used in § 7661d(b)(2) is codified in the CFR, future petitioners will have guidance on what to include in their petitions, allowing petitioners to craft better arguments. Courts will also be able to look at the rule for guidance as to what evidence of noncompliance to consider and

210. See 42 U.S.C. § 7607(d).

211. This would have helped the court in *Citizens Against Ruining the Env’t v. EPA*. See 535 F.3d 670, 672–74 (7th Cir. 2008).

212. See *Whitman*, 321 F.3d at 333. Appropriate evidence of an agency’s determination that a permit is deficient would include the issuance of a NOV as well as the commencement of an enforcement action against the source.

213. See *Citizens Against Ruining the Env’t*, 535 F.3d at 674–75.

214. 42 U.S.C. § 7607(d)(3)–(4).

215. See *id.* Using a rulemaking to clarify the meaning of “demonstrates” will also facilitate public participation, a stated goal of the CAA. See *supra* notes 37–40 and accompanying text.

216. See 42 U.S.C. § 7607(d)(3)–(4).

how to weigh such evidence, allowing for consistent results across jurisdictions. The Administrator will also have guidance on when to exercise his or her nondiscretionary duty to object, allowing for consistency between EPA Administrators, so long as the regulation remains in force. Using the rulemaking process to clarify what constitutes a demonstration of noncompliance seems like the best solution, as well as the most likely one.

C. Congress Could Clarify Its Meaning of “Demonstrates” to Facilitate Petitions for Objection

Twenty years have passed since Congress last amended the CAA.²¹⁷ Congress might consider the conflict in the courts regarding the meaning of “demonstrates” as a reason to amend § 7661d(b)(2) to clarify the type of demonstration it envisioned when it enacted the 1990 Amendments. With the Supreme Court sanctioning the regulation of greenhouse gases under the CAA,²¹⁸ Congress may also choose to amend § 7661d(b)(2) in the context of broad revisions to the CAA to include the regulation of greenhouse gases contributing to global climate change.

Although the circuit split between the Second Circuit and the Sixth, Eleventh, and Seventh Circuits presents discord in the law and creates inconsistency among jurisdictions, the issue is likely not high enough on the congressional agenda to interest Congress at this time. With two wars, an economic crisis, and an abundance of other domestic and foreign issues currently occupying Congress’s attention,²¹⁹ it seems unlikely that Congress will take the time to amend the CAA to address this issue. Instead, Congress will likely defer to the EPA and the courts to sort out the problem of determining what a petitioner must show to make a sufficient demonstration of noncompliance under § 7661d(b)(2).

D. The Supreme Court Could Adjudicate the Meaning of “Demonstrates”

Another way to establish a definition of “demonstrates” as used in § 7661d(b)(2) that would be nationally applicable would be to have the Supreme Court decide the issue. As of the writing of this Note, none of the decisions in *Sierra Club v. U.S. EPA*, *Sierra Club v. Johnson*, or *Citizens Against Ruining the Environment* have been appealed to the Supreme Court, although a rehearing was denied by the Eleventh and Se-

217. The last major overhaul of the Act was in the CAA Amendments of 1990. *See supra* note 25; *see also* BELDEN, *supra* note 26, at 8–9.

218. *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

219. *See, e.g.*, Edmund L. Andrews, *Fed Will Inject \$1 Trillion More to Aid Economy*, N.Y. TIMES, Mar. 19, 2009, at A1; Ethan Bronner, *Israel Confronts Deeper Isolation in Gaza’s Wake*, N.Y. TIMES, Mar. 19, 2009, at A1; Barbara Lee et al., Op-Ed., *Questions Remain About the War*, S.F. CHRON., Mar. 19, 2009, at A15.

venth Circuits.²²⁰ But given that two cases dealing with the meaning of “demonstrates” were decided in 2008 and one more in 2009,²²¹ it seems that more circuit courts are likely to weigh in on the issue in the coming years. In fact, the more the circuit split deepens, the more likely the Supreme Court is to decide the issue.²²²

Each year the Court receives nearly ten thousand petitions for a writ of certiorari, but the Court only hears about one hundred cases on its discretionary docket each term.²²³ Although the odds of any given petition for a writ of certiorari being granted by the Court are low, when circuit courts decide important questions of federal law in a conflicting manner, the Court is called upon to exercise its supervisory powers over the federal court system.²²⁴ The circuit split between the Second Circuit and the Sixth, Eleventh and Seventh Circuits merits the exercise of the Supreme Court’s supervisory powers in order to avoid inconsistent results between jurisdictions. Although the circuit split created by the four cases is a small one, if the Solicitor General were to appeal to the Supreme Court, the odds are substantially greater that the Court will grant certiorari.²²⁵ Petitions for a writ of certiorari filed by the Solicitor General are granted approximately 46% of the time, while any given paid case has only an approximate 3.5% chance of being granted.²²⁶

Although there are certain factors that increase the likelihood of the Supreme Court granting certiorari in a case that raises the issue of the meaning of “demonstrates” under § 7661d(b)(2), it seems that the Court will be unwilling to fill a spot on its discretionary docket with such a case because it is of limited national importance.²²⁷ If the Court were to grant certiorari in such a case, however, the issue would be disposed of relatively quickly, as opposed to the lengthy rulemaking process under § 7607(d) or the legislative process in Congress. Due to the waiting time for a case to be appealed to the Supreme Court and the uncertainty of whether such a writ of certiorari would be granted, it would be preferable for the EPA to use the rulemaking process rather than relying on the Supreme Court to resolve the issue.

220. *Sierra Club v. Johnson*, 541 F.3d 1257 (11th Cir. 2008), *reh’g denied*, 308 F. App’x 450 (11th Cir. 2008) (unpublished table decision); *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670 (7th Cir. 2008), *reh’g denied*, No. 07-3197 (7th Cir. Nov. 10, 2008).

221. *Sierra Club v. U.S. EPA*, 557 F.3d 401, 405–06 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d at 1266 (11th Cir. 2008); *Citizens Against Ruining the Env’t*, 535 F.3d at 677–79. The decision in *New York Public Interest Research Group, Inc. v. Johnson* was also decided relatively recently, in 2005.

222. See SUP. CT. R. 10(a).

223. The Supreme Court of the United States, The Justices’ Caseload, <http://www.supremecourtus.gov/about/justicecaseload.pdf> (last visited Jan. 23, 2009).

224. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 223 (8th ed. 2002).

225. *Id.* at 221.

226. *Id.*

227. Compared to *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); and other cases of similar national significance, a case involving a circuit split on a relatively obscure provision in the CAA will not be especially appealing to the Court.

V. CONCLUSION

This Note summarizes the deepening discord among the United States courts of appeals with regard to the meaning of “demonstrates” as used in 42 U.S.C. § 7661d(b)(2). A prompt resolution of this issue is necessary to end the uncertainty about what type of demonstration is required to compel the Administrator to object to the issuance of a Title V permit. Through rulemaking, the EPA should clarify the meaning of “demonstrates” such that a petitioner effectively demonstrates noncompliance when a petitioner provides facts and data about a source that show the permit does not comply with CAA requirements. Such a definition of “demonstrates” would be consistent with the intent of Congress in enacting § 7661d(b)(2) and would ultimately further the goal of the CAA to protect public health. Until the EPA, Congress, or the Supreme Court steps in, the inconsistency in the law will remain, to the detriment of air quality and human health in the United States.

