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1 them to the clerk.

2 The Court: Okay.

3 Mr. Holloway: Do you want me to identify them
4 now?

5 The Court: No, that's all right. And
6 we're here basically on cross motions for summary judgment;
7 is that right?

8 Mr. Carroll: Yes, Your Honor.

9 Mr. Holloway: Yes, sir.

10 The Court: And who wants to go first?

11 Mr. Carroll: I'll go first, Your Honor.

12 The Court: All right.

13 Mr. Carroll: Your Honor, before I begin oral
14 argument, and I will be addressing our motion for summary
15 judgment, does the Court have any rules with respect to
16 allotted time for argument?

17 The Court: I haven't made a hard and fast
18 rule, but I guess preliminarily I can throw out one rule that
19 I did make in about 1988 when I was first sworn in as a
20 district court judge. And that was that at 5 o'clock--when
21 the 5 o'clock whistle blows, I go home. I stop. I don't
22 care what anybody is saying or what they're doing. If
23 they're on the way to jail, I just go ahead and expedite that
24 process a little bit. But beyond that there's not a whole
25 lot of hard and fast rules.

1 I toyed with the idea of giving each of you maybe
2 an hour. But again, I recognize there's a lot to be said and
3 I don't want to tie anybody's hands, but at the end of the
4 day we will be done. Okay?

5 Mr. Carroll: Fair enough, Your Honor. I
6 would like to reserve some time for rebuttal argument because
7 we're dealing with cross motions and obviously I'm not quite
8 sure what my opposing counsel will say by way of argument.
9 And I'd like an opportunity to rebut if possible.

10 The Court: Well, let me also maybe throw
11 in something that may help. Usually when I have motions for
12 summary judgment, quite honestly, I'm not real big on oral
13 arguments. I figure you've got everything that you want me
14 to know reduced to writing for the most part.

15 I have to admit in this particular case I have not
16 sat down and poured over the paperwork beforehand. So if you
17 want to key in on the major points, that might help expedite
18 matters a bit. I realize there are stipulated facts that
19 really--there's no question about what the facts are. It
20 really is a matter of what the law is or should be or how it
21 should be interpreted. So if that's any guidance and helps
22 us point the way, maybe it will help.

23 Mr. Carroll: Okay. Your Honor, if I may,
24 I'd just like to begin my discussion with a little bit of
25 background information about who Saint-Gobain is---

1 The Court: (interposing) Okay.

2 Mr. Carroll: ---what they do because I think
3 it's important to understand why we are appealing this permit
4 condition, why it's important to the company that we bring
5 this appeal.

6 So let me start by explaining that this appeal
7 involves an air pollution control permit that was issued to
8 my client and a particular provision of that permit that
9 pertains to emissions from a glass melting furnace. And I'd
10 like to briefly explain with some visual aids what a glass
11 melting furnace is, Your Honor.

12 The Court: All right.

13 Mr. Carroll: This is not evidentiary per se.
14 It's illustrative, but it might--I've actually got this
15 loaded onto a program that my colleague can show on the
16 screen.

17 The Court: That works for me, as long as I
18 don't have to do the technology. I can barely work a cell
19 phone.

20 Mr. Carroll: I think he can work it. All
21 right. Your Honor, this is a cross section of the inside of
22 a glass melting furnace. This is a general cross section.
23 And you can see here that there is molten glass. The molten
24 glass is--and this is a cross section.

25 The actual dimensions of a furnace--it's sort of

1 like a swimming pool, if you will, Your Honor, covered with a
2 dome. And the molten glass is actually heated by flames that
3 come across the top of the glass. And the flames shoot from
4 one side of the glass to the other.

5 And if you look at the next picture, this is
6 actually a top view looking down into the furnace, and you
7 can see those flames. Let me clear first the--you can see
8 those flames shooting into the furnace.

9 And then they go across the furnace and they exit
10 out of something called the regenerator, and there's a
11 regenerator on either side. And this is called a regenera-
12 tive furnace. It's a type of furnace design.

13 And the intent is as the flames come across and
14 the heat goes out the regenerator--if we can see the next
15 picture here, this is now a cutaway of the furnace. And that
16 swimming pool area is down here with molten glass in it, and
17 flames are actually coming out of these ports. There are
18 four of them here. And they're actually going to go across
19 the furnace and out the other side.

20 And on either side are these structures here
21 (indicating), which are called checker packs. And you can
22 actually see down in this corner there's a cutaway of a
23 checker pack. And inside, those little black things are
24 actually brick-like. They are a honeycomb of refractory.

25 And as the exhaust gases go through that honeycomb

1 of refractory, they heat up the bricks. And then every 20
2 minutes the furnace firing cycle recycles and the flames go--
3 instead of from top to bottom or left to right, they go right
4 to left. And the air is preheated, the combustion air, by
5 going through these heated checker packs.

6 And that allows for the melting of the glass with
7 less natural gas consumption, so it results in lower
8 emissions because you're preheating the air. You're getting
9 value from the waste heat from the furnace by passing the
10 exhaust gases through the regenerators.

11 And as we're discussing the particular issue
12 today, I wanted the Court to understand what we meant--we're
13 going to use the phrase "checker pack." And the checker pack
14 refers to these refractories which are absorbing the heat and
15 then releasing the heat for the free--for the combustion of
16 the gas on the reverse cycle.

17 The Henderson facility has two regenerative glass
18 furnaces. We're talking about the permit conditions that
19 refer to furnace number 1 today. Furnace number 1--I'm
20 sorry, just leave that up. Furnace number 1 was a--is
21 subject to something called the New Source Performance
22 Standards, which is a set of federal regulations that are
23 incorporated in North Carolina under Rule .015--what is it,
24 .0154 or 24?

25 Mr. Kissling: .0524.

1 Mr. Carroll: .0524, thank you, .0524. .0524
2 is the North Carolina rule that encompasses the federal New
3 Source Performance Standards. And there is a federal
4 standard that was adopted under these federal regulations,
5 and these regulations--a copy of this was included as an
6 appendix to our motion, Your Honor, for the Court's benefit.

7 The particular rule is called subpart CC. It's a
8 subpart to part 60 of the Federal Code of Regulations at
9 Title 40, and it pertains to glass melting furnaces. And it
10 has within it, as was characterized by my opposing counsel in
11 his brief, two standards. It has a particulate standard and
12 it has a second standard, emissions standard, that is found
13 at 40 CFR Part 60.293(c)(5). Kurt, do we have a copy of that
14 regulation?

15 (Pause.)

16 Mr. Carroll: All right. This is the section
17 that has been characterized by Department DENR as one of the
18 applicable standards that applies to this furnace under Rule
19 .0524. This is an emissions standard that basically says--
20 well, it's quite simple.

21 It says for the purposes of another rule, which is
22 a reporting rule, report as excess emissions all of the
23 6-minute periods during which the average opacity as measured
24 by the continuous opacity monitor exceeds a particular
25 opacity value, 99 percent UCL. So that standard is

1 applicable to our client's facility.

2 We have--Kurt, let's walk through this presenta-
3 tion because I think we have time to lay this out. Your
4 Honor, I prepared an outline that I was planning to use for
5 the sake of argument, but I put it on a PowerPoint so we can
6 all look at it together, if that's helpful.

7 The Court: All right.

8 Mr. Carroll: I don't want the judge to be--
9 Your Honor to be bogged down reading, so--but I think that it
10 would be helpful to---

11 The Court: (interposing) Okay.

12 Mr. Carroll: ---guide our steps. I think
13 it's important first to know what this case is about. This
14 case is really about the issue of what is the visible
15 emissions standard. That's the legal dispute that the
16 parties have.

17 The Clean Air Act, the federal Clean Air Act,
18 pursuant to which those NSPS regulations were promulgated,
19 has a definition for the term "emission standard." And that
20 definition, which is also included in the appendix to our
21 brief, sets out a number of things that are included within
22 the definition of emission standard such as work practices or
23 monitoring.

24 So the emission standard is not under the federal
25 rules the same as a numerical limit. It can simply be a

1 standard that says, "You will operate a furnace in the
2 following manner or operate a source in the following
3 manner."

4 Although the term "visible emission standard" is
5 not expressly defined, it is an emission standard which in
6 addition to the other criteria that would qualify as an
7 emission standard has a visible component. Now, visibility,
8 Your Honor, is normally measured in terms of opacity. And
9 Your Honor, I don't know what the Court's experience is with
10 opacity. I can give you a 30 second explanation of what
11 opacity is.

12 The Court: All right. Go ahead.

13 Mr. Carroll: Opacity is actually taken from
14 the same root word as the word "opaque." And what it
15 basically means is the ability to see through or for light to
16 pass through a cloud or a vapor. And as light is attenuated,
17 the opacity percent becomes higher.

18 This table is 100 percent opaque. We can't see
19 through it. That's 100 percent opacity. Cigarette smoke is
20 much lesser opacity. You can see through it, but you can
21 also see it. And so it's measured in terms of percent of
22 light attenuation going through it.

23 And these days it's actually determined by a
24 device that's inserted in a stack, an exhaust stack, of a
25 furnace such as this, where there's a device that essentially

1 shoots a light beam across the stack and the percent of
2 attenuation is measured. And that data, which is an elec-
3 tronic signal, is converted by a computer into a percent
4 opacity. So that's basically what opacity is.

5 High opacity, 100 percent--smoke can, like a
6 table, get to 100 percent opacity. I was watching a NASCAR
7 race the other day. At the end of the race the driver did
8 what's called a burnout and his car disappeared in a cloud of
9 smoke. That cloud of smoke at that point in time was 100
10 percent opacity.

11 Now, in this particular permit that we have--and
12 we have a number of opacity related emission standards,
13 visible emission standards. There are some in permit
14 condition 3, which are according to the permit pursuant to
15 that Rule .0524, which is the State's incorporation of the
16 NSPS rule. And then there is another new visible emission
17 standard inserted in the permit pursuant to North Carolina
18 Rule .0521. And that latter one is the one that's at issue
19 today.

20 This furnace has been in operation for a number of
21 years. It has never been subject to that until we got this
22 new permit. And I'll explain very briefly why that's a
23 problem.

24 I mentioned we have glass furnaces. What do we
25 do? We make glass bottles, Your Honor, rum bottles for

1 bottling by Bacardi, for example. It's a bottle plant. We
2 melt glass and form that glass into bottles. The Henderson
3 plant has a permit that was recently revised, as I said. It
4 included Rule .0521. Each of them is a regenerative glass
5 furnace. We talked about the checkers. I think I've already
6 explained that, so we can go on to the next slide. Kurt, we
7 can skip through these pictures. Okay.

8 This is just a reminder of what I said. By
9 reversing the directional flow of heat, the heat exhausted is
10 absorbed by the checkers, and upon a flow reversal the
11 checkers that previously trapped heat now use the recycled
12 heat to preheat the combustion air.

13 Your Honor, you'll note at the bottom of this
14 slide, everything that I'm going to be talking about now by
15 way of factual background is supported by an affidavit on the
16 record. And so I've added to these slides as I'm discussing
17 this background the reference to the affidavit. I don't want
18 as the attorney here to be adding facts to the record.

19 The preheating of the combustion air by the
20 checkers reduces the overall fuel consumption of the furnace
21 and its emissions. But over time--and this is the problem--
22 the checkers accumulate soot and that soot requires checker
23 cleaning.

24 And the checker cleaning is done in several ways.
25 There's a physical cleaning, but there's also cleaning by

1 essentially burning out the particulate. Instead of
2 reversing the firing cycle every 20 minutes, we let the
3 firing cycle go longer so the checkers get hotter and the
4 soot is burned out. This is a routine maintenance activity
5 for a regenerative furnace.

6 And the checker cleaning activity usually lasts
7 between four and twelve hours. And that's an important fact,
8 Your Honor, because in that four or twelve hour period--four
9 to twelve hour period--there can be a short period of high
10 opacity. And so the visible emission limit or standard in a
11 permit that does not allow for an exception or exclusion for
12 this maintenance activity can restrict the ability of the
13 operator to keep the furnace clean and operating properly.

14 And that's why we're concerned because this new
15 permit condition not only imposes a different opacity value,
16 but it has no exclusion or time exception to allow for the
17 maintenance. As I said--and this is simply a citation, Your
18 Honor, referring to what I've said about reversing the normal
19 flow in order to increase the checker temperature. And
20 checker temperature, the increase can cause a opacity spike.

21 Now, we have and have had--we have some limits in
22 the permit and I'll get to those limits in a minute. But
23 what our affidavit indicates is that based on our experience,
24 we can--the company can perform this checker cleaning while
25 the furnace is operating in compliance with the visible

1 emission limitation provisions in section 3 of the permit,
2 and those are not being challenged.

3 But we cannot readily do the checker cleaning in
4 compliance with the newly imposed requirements in section 5
5 of the permit, which is the subject of this appeal. And part
6 of that problem is that the structure of that permit condi-
7 tion does not allow for checker cleaning because it does not
8 provide an exception, a time exception, that allows for this
9 type of maintenance activity.

10 So in section 3, as we'll see, there are several
11 opacity values. There are limits of 7.2 percent as a six
12 minute average and 12.6 percent as a three hour average. And
13 while they are lower than the 20 percent limit that we are
14 challenging, they allow for an exception period to allow for
15 the maintenance, whereas the 20 percent does not allow for an
16 exception period long enough to allow the maintenance to
17 occur.

18 And the inability to conduct the checker cleaning
19 on a regenerative furnace would likely contribute to
20 additional emissions, would likely contribute to premature
21 furnace deterioration, and would result in a costly furnace
22 shutdown and repair well before the time period that a repair
23 would be necessary if the furnace was properly maintained
24 with checker cleaning.

25 So checker cleaning we've been able to do at this

1 facility for years under our existing permit. Under the new
2 permit, because it doesn't have time exclusions and it
3 imposes a new opacity limit, we're not going to be able to do
4 this in full compliance.

5 So what we're appealing is the permit. We refer
6 to the permit as T18. A copy of the permit is included as an
7 appendix to our motion. It contains two permit conditions
8 that are at the heart of today's discussion, permit condition
9 3, which is entitled--and it's referenced to the subsections;
10 it's referenced to .0524, as I mentioned earlier, and to the
11 NSPS--and then new condition 5, which is referenced to .0521.

12 Now, I think I already said that the .0521 visible
13 emission standards, the ones in section 3 that we're not
14 challenging, are actually more lenient in terms of percent.
15 But as I indicated, the permit condition 5 under Rule .0521
16 does not allow sufficient time for necessary checker
17 cleaning, whereas the other visible emission standards
18 contain time exclusions, which allow the facility to conduct
19 maintenance activities without violating permit conditions.

20 Now, we're here today on oral argument. This case
21 can be decided on a motion because there are no genuine
22 issues of disputed facts. We have submitted stipulated
23 facts. We have also submitted an affidavit, which has not
24 been opposed, and DENR has not submitted any affidavits. So
25 the undisputed facts before you, Your Honor, are those set

1 forth in the stipulation of facts and in our supporting
2 affidavit.

3 The parties also agree, I believe, on several
4 legal issues. And obviously opposing counsel may have a
5 different view on this, but I don't think so. Permit
6 condition number 5 based on Rule .0521 cannot be imposed on
7 furnace number 1 if a visible emission standard is already
8 applicable based on Rule .0524, and that's from the plain
9 language of .0521. And I'll show Your Honor that language in
10 a moment.

11 But essentially what Rule .0521 says is that the
12 standard under Rule .0521, which is basically quoted at
13 condition 5 in the permit, says that it does not apply if a
14 visible emission standard pursuant to a number of other
15 rules, including Rule .0524, is in effect. So I don't think
16 we have a disagreement on that fact. Nothing in the briefing
17 of this case by DENR suggests disagreement with that basic
18 principle.

19 The other thing I think we can agree on is that
20 the definition of emission standard is broadly defined and
21 can include requirements such as work practices. And I
22 believe we're agreeing on that because in respondent's brief
23 on page 2, they indicated that the standard at 40 CFR Part
24 60.293(c) (5) is an NSPS emission standard under Rule .0524,
25 which they characterize as a work practice standard. So I

1 think that they've basically acknowledged that an emission
2 standard can be a work practice standard.

3 Our disagreement, I believe, is focused on what is
4 a visible emission standard and is the source subject to a
5 visible emission standard pursuant to Rule .0524. So I think
6 we're in agreement that if there is a visible emission
7 standard that is imposed on this facility pursuant to the
8 authority granted to the Agency under Rule .0524, then permit
9 condition 5 under Rule .0521 does not apply and should be
10 deleted.

11 We are in agreement that the definition of
12 emission standard is very broad and can include work
13 practices, monitoring, and other requirements. We are in
14 disagreement, Your Honor, as to what is meant by the visible
15 emission standard provision.

16 And we believe, Your Honor, that we are entitled
17 to summary judgment as a matter of law because furnace
18 number 1 is subject to the visible emission standard at
19 60.293(c)(5) pursuant to Rule .0524. We are directly subject
20 to that standard by the permit. The opposing counsel agrees
21 that we are subject to that standard. They disagree as to
22 whether that is a visible emission standard.

23 We are also entitled to summary judgment on the
24 separate grounds that we are subject to visible emission
25 standards added by the Agency pursuant to Rule .0524, and

1 those are two standards that appeared in the permit. The
2 subsections are subsection 3.e and 3.g, and I'll get back to
3 those in a moment.

4 All right. So we're in agreement as to--I believe
5 we're in agreement as to what is an emission standard. And
6 what I have on the screen is a quotation from the federal
7 statute that defines an emission standard. And it basically
8 defines it as a requirement which limits the quantity, rate,
9 or concentration of emissions on a continuous basis.

10 It includes requirements relating to the operation
11 or maintenance of a source to assure continuous emission
12 reduction. And it includes any design, equipment, work
13 practice or operational standard promulgated under this
14 chapter. And again, opposing counsel has essentially cited
15 and used this definition of emission standard in saying that
16 the condition in the permit is a work practice standard
17 pursuant to .0524 under subsection 293(c)(5).

18 I think it's important to take a look at
19 293(c)(5). You will see, Your Honor, that--I believe
20 opposing counsel will show from their brief that they
21 characterize section 293(c)(5) in their brief as a work
22 practice standard, a good operation and--a good practice and
23 operation standard I believe they call it.

24 But if you read the words of 293(c)(5), there is
25 nothing in this section that talks about good operation.

1 What does it say? It says that a permittee shall report
2 excess emissions all of the six minute periods during which
3 the average opacity as recorded by its continuous monitoring
4 system exceeds the opacity value corresponding to the 99
5 percent upper confidence level determined under paragraph
6 (c) (4).

7 Now, that last part is a little confusing, Your
8 Honor. What do they mean by 99 percent upper confidence
9 level? But that was actually calculated and that number was
10 put in the permit and the parties agree as to what that
11 number is, Your Honor. So that's not an issue here. That
12 number I believe is 7.2 percent, Your Honor.

13 And what we are required to do under the permit is
14 to continuously record the opacities every six minutes, every
15 day of the year. Now, there are 87,000 six minute periods in
16 a year. We record every one of those. And every time that
17 opacity value exceeds 7.2 percent, we must report that to the
18 state, which we do. And that's required by federal law and
19 it's required by the permit and it's required by section
20 .0524.

21 And where is that in the permit? Well, here it
22 is. It's in the permit under section 3.g. 3.g--3, you may
23 remember, is labeled as subject to .0524 and NSPS Part 60,
24 acceptable operation and maintenance under Rule .0524. For
25 the purpose of 293(c) (5), excess emissions, six minute

1 periods, exceed 7.2 percent, which is the value determined
2 pursuant to 293(e). So that's the requirement. It's in our
3 permit. We comply with that.

4 Now, in addition--and let me stop there, Your
5 Honor. We believe that that permit condition is so clearly a
6 visible emission standard because what is visible? Visible
7 is what you determine through opacity. What is standard?
8 Standard can be anything: work practice, monitoring, et
9 cetera. It does not have to be a hard and fast limit. It
10 can be, but it does not have to be a hard and fast limit. A
11 work practice, nevertheless, is a standard. And I believe
12 that point at least has been conceded.

13 But as I mentioned, there are two other grounds
14 under which we believe we are entitled to summary judgment.
15 That's because in addition to that clear visible emission
16 standard right out of the NSPS, there are two other visible
17 emission standards that are in the permit to which we have no
18 disagreement. In fact we negotiated these in settlement of a
19 prior permit.

20 They are one that includes a three hour average
21 and a six minute average. The three hour average limit sets
22 an opacity standard at 12.6 percent. But, and this is
23 critically important, the three hour opacity permit condition
24 does not apply--and this is expressly written in the permit--
25 does not apply during checker cleaning.

1 So while we're subject to this 12.6 percent limit,
2 Your Honor, we're not subject to it when we're doing checker
3 cleaning. That's the exception. So while that standard may
4 seem more stringent than the 20 percent standard, we have up
5 to 144 hours a year that we're allowed to clean the furnace
6 without being subject to the opacity standard.

7 So we can live with that. We can operate in
8 compliance with that limit all the rest of the time because
9 we have this exclusion written in the permit for the checker
10 cleaning operation.

11 And this is the exact language from the permit,
12 Your Honor. Again, a copy of the permit is in the pleadings.
13 It is in the record. But what this condition says is we use
14 a continuous opacity monitor to monitor and record the
15 opacity all the time. And as I highlighted in red on the
16 slide, that three hour average excludes periods of checker
17 cleaning, start-up, shutdown, and malfunction. So we have
18 the standard and we have some time exclusions.

19 There is also a six minute average opacity
20 condition and it's the same as that 7.2 percent, but in this
21 case it's inserted for a different purpose. The 7.2 percent
22 that I referenced in the NSPS, Your Honor, that is a
23 reporting standard. We have to report those excesses, but
24 they are not necessarily violations of law or a permit.
25 They're required to be reported. And the Agency will use its

1 judgment to determine--normally use its judgment to determine
2 whether that period of excess emissions is or is not indica-
3 tive of poor operations.

4 But this one--this one is a new one that says,
5 "Okay, report all those six minute opacity standards against
6 the same one and if all those six minute opacity standards in
7 a six month period are over the 7.2 percent more than 2
8 percent of the time"--basically, Your Honor, that's 87 hours
9 every six months. If you've got all these six minute periods
10 and they're over 7.2 percent and you add them all up and all
11 together they add up to more than 87 hours every six months,
12 then you're going to be cited for not operating your furnace
13 in good operating condition.

14 So this, again, although it's a new condition that
15 makes a bright line violation and it uses a very low opacity
16 limit of 7.2 percent, there is this exclusion. You're not
17 going to be punished unless the period of noncompliance
18 exceeds 87 hours every six months. That 87 hours, Your
19 Honor, is sufficient time, again, for my client to conduct
20 its checker cleaning, so it can meet that limit because it
21 has this time exclusion.

22 And this is the requirement that we are appealing,
23 Your Honor. This is a new permit condition that was never
24 imposed on this facility in all its years of operation until
25 this new permit was issued. It establishes pursuant to

1 Rule .0521--this is condition 5--a 20 percent limit that is
2 based on a six minute average.

3 But as you can see, the time exclusion in the
4 permit and in the rule says "No more than four six minute
5 periods shall exceed the opacity standard in any one day."
6 Well, Your Honor, that's--four times six is 24 minutes a day.
7 We cannot do--if you recall the earlier slide, the checker
8 cleaning takes between four and twelve hours. So there is
9 insufficient time allowed in this rule for us to do the
10 required maintenance. And that's why we're here today,
11 because it's vitally important to the company that we be able
12 to clean the checkers.

13 And that's just an explanation of what we just
14 read in the actual permit. It's a six minute average
15 opacity, 20 percent, with six--with four six minute periods
16 excluded each day, 24 minutes. It's insufficient time.

17 This is the rule being questioned, Your Honor.
18 This is the rule, .0521, pursuant to which that new permit
19 condition is imposed. It is a rule of general applicability
20 in the state of North Carolina that applies generally to many
21 sources.

22 But if you read the scope of the rule in sub-
23 section (b)--I've just blown up the relevant section here,
24 Your Honor--it says, "This rule shall apply to all fuel
25 burning sources. However, sources subject to visible

1 emission standard in Rules," and a list of rules and the one
2 we're talking about is .0524--"shall meet that standard
3 instead of the standard contained in this rule."

4 And again, the definition of standard is very
5 broad, but the requirements are very similar. You have to
6 have continuous opacity monitoring. That's in .0521 and
7 that's in .0524. You have to record every six minutes.
8 That's in both rules. You have to report. That's in both
9 rules.

10 The standard and all the things that make up the
11 standard are very similar. And ultimately, the issue is, is
12 there a visible emission standard in Rule .0524 because we
13 all agree that if there is, then this Rule .0521 does not
14 apply to this source.

15 So we have standards that are directly from Rule
16 .0524 and we have standards that are imposed on us in order
17 to demonstrate compliance with Rule .0524. They're virtually
18 the same, Your Honor. It doesn't matter whether, you know, a
19 standard is directly imposed or indirectly imposed. If it's
20 imposed under the legal authority of Rule .0524 as a visible
21 emission standard, then we have a visible emission standard.
22 And the rules say that that standard should apply in lieu of
23 Rule .0521.

24 Now, that's the basis for our argument. We appre-
25 ciate the Court's patience in allowing us to walk through

1 this. I hope that this manner of presenting oral arguments,
2 which I'm not used to, candidly--I hope that it was helpful
3 in explaining the very narrow legal issue about the fact that
4 we basically have agreement--agreement on the facts, that
5 is--and the issue is what is a visible emission standard
6 under Rule .0524.

7 We believe that we have an explicit standard and
8 we have two implicit standards, which are both there to
9 demonstrate compliance with other .0524 requirements. So we
10 believe because we have those in the permit--and we can live
11 with those. We've been living with those.

12 We desperately need for this court to find in our
13 favor on our motion for summary judgment and to direct the
14 Agency to delete condition 5 from the permit. That's the
15 relief that we've requested, Your Honor. Thank you very
16 much.

17 The Court: Thank you, sir. Thank you, Mr.
18 Carroll. Mr. Holloway?

19 Mr. Holloway: Okay. Four months ago we
20 reissued a permit to Saint-Gobain. It included the North
21 Carolina opacity standard, the .0521 that's been referenced.
22 That's entitled Control of Visible Emissions. I have an
23 explanation of what opacity is, but Mr. Carroll covered that
24 adequately.

25 The important issue in this case involves the fact

1 that the state opacity standard has an exemption as pointed
2 out by Mr. Carroll. That exemption provides that if the
3 source is subject to some other opacity standard, some other
4 visible emission standard other than the .0521 state opacity
5 standard, then the state opacity standard at .0521 does not
6 apply.

7 So the crux of the petitioner's claim is that the
8 state opacity standard does not apply because first one is
9 subject to some other visible emission standard. But as
10 explained in our June 2nd brief, and again here today they're
11 doing it, the petitioner equates monitoring provisions con-
12 tained in the permit that are in there to measure compliance
13 with emission standards--they equate monitoring provisions
14 with emission standards.

15 So the permanent provisions that petitioner states
16 for visible emission standards are compliance monitoring
17 provisions that the parties agreed to as a part of a permit
18 adjudication that was resolved last December. These moni-
19 toring provisions are necessary to ensure compliance with the
20 two emission standards imposed under the NSPS, the federal
21 new source performance for glass manufacturing plants that
22 Mr. Carroll mentioned.

23 And by and large, I should say that there was not
24 much that we disagreed with in there. The crux of the matter
25 is, is that they seem to equate monitoring methods with

1 emission standards. And we're saying that monitoring methods
2 is what--is the measurement to determine compliance with the
3 emission standard.

4 It's much the same that radar is not the speed
5 limit. Radar is the monitoring method to determine
6 compliance with the speed limit. And in that analogy, if you
7 will, the speed limit would be the emission standard and the
8 radar would be the monitoring method.

9 The federal NSPS regulation for glass melting
10 furnaces does not contain a visible emission standard. In
11 fact EPA was clear about this point and in fact a year or two
12 ago--and this was the only reason really for our filing last
13 Friday--Saint-Gobain agreed with us and convinced us that the
14 293(c)(5) in the federal NSPS was not a visible emission
15 standard. And so hence we added .0521, the state opacity
16 standard. So the federal NSPS regulation does not contain a
17 visible emission standard, so then the fallback visible
18 emission standard is .0521, the state opacity standard.

19 How--you know, where does this monitoring come
20 from? Why do we have monitoring in permits? This facility
21 is one of 300-some facilities in North Carolina that has and
22 is required to have something that's called a Title V permit,
23 which is named after a section of the Clean Air Act. It's
24 basically permits for big sources.

25 And each Title V permit must contain two things.

1 And the first is that the permit must identify each
2 applicable emission standard, each speed limit, if you will.
3 And that's really for the facility's benefit also because it
4 lets them know in the four corners of the document what they
5 are being held to.

6 And the second thing the Title V permits contain
7 beyond the emission standard is what monitoring is sufficient
8 to assure compliance with the emission standard. You know,
9 is radar, to use the analogy, going to be used to determine
10 compliance with the speed limit, the emission standard being
11 the speed limit.

12 So EPA was clear and the courts have confirmed--
13 *Sierra Club* is one example that we attached to our June 2nd
14 brief--that the monitoring provisions imposed to assure
15 compliance with the emission standards are not themselves
16 emission standards.

17 And *Sierra Club* is directly on point, and it says
18 that states are required to impose monitoring provisions to
19 assure compliance with emission standards. And then it
20 further says that the monitoring provisions themselves are
21 not emission standards.

22 So basically, on the chart, which is the same as
23 what is on page 3 of the June 2nd brief, there are three
24 emission standards, the two federal NSPS glass manufacturing
25 plant emission standards, the particulate in the first

1 horizontal row there, the acceptable operation and main-
2 tenance being the second, and then the third horizontal tier
3 there is state opacity standard.

4 As required by Title V permits, there are moni-
5 toring requirements in each permit sufficient to assure
6 compliance with each emission standard. Those monitoring
7 methods are off to the right on the chart.

8 It's important to note that the monitoring methods
9 employed to measure compliance with the emission standards,
10 they do use opacity. And all three of the monitoring methods
11 for the three emission standards do use opacity. And every-
12 one agrees that the monitoring methods do use opacity.

13 However, the compliance monitoring method, it
14 could have been stack tests. It could have been any number
15 of things rather than opacity to use as the monitoring
16 method. A large part of the reason why opacity is used is
17 because they had opacity there already. And so we thought
18 why not use that?

19 I mean we--for example, the State would be more
20 than happy to have stack tests as the monitoring method, but
21 we don't see too many facilities volunteering for a frequent
22 stack test because of the expense. So simply because the
23 method--simply because opacity is used as the monitoring
24 method does not turn that monitoring method into an emission
25 standard.

1 I mean for one thing, North Carolina cannot
2 establish emission standards without going through rule
3 making. So, you know, for us to take their argument or to
4 accept their argument that monitoring methods are emission
5 standards and they're all just sort of interchangeable, then
6 we've got 300 and something permits out there, Title V
7 permits, with, you know, several in each--hundreds and
8 thousands of monitoring methods that I guess are now emission
9 standards according to their argument.

10 And so we have a bunch of invalid permits running
11 around out there because we wouldn't have gone through--and
12 we did not go through rule making in setting all those
13 emission standards.

14 Mr. Carroll: Your Honor, I just want to---

15 Mr. Holloway: (interposing) I didn't inter-
16 rupt you, and believe me, it was---

17 The Court: (interposing) Hold on. Hold
18 on.

19 Mr. Holloway: ---difficult not to.

20 The Court: Hold on, Mr. Holloway. Hold
21 on. I've got control. Mr. Carroll, just briefly?

22 Mr. Carroll: I just want to raise an
23 objection for the record, Your Honor, to facts not of record
24 introduced by counsel.

25 The Court: All right, so noted. Go ahead.

1 Mr. Holloway; I mean petitioner admits that
2 the practical reason why--let's get right down to the nub of
3 it. The practical reason for their argument that the state
4 opacity standard does not apply to furnace number 1 because
5 there's some other floating out there visible emission
6 standard that applies is because they can't comply.

7 I believe I counted four, and I probably missed a
8 couple spots, in their May 13th brief where they say they
9 can't--and they said it again today--they can't comply
10 because of the checker cleaning with .0521.

11 So--you know, so now--so then they come up with
12 this argument that monitoring methods are emission standards
13 and emission standards are monitoring methods. It's to their
14 benefit to confuse them. I mean if monitoring methods are
15 the same as the emission standards, then the compliance
16 problem goes away for them.

17 But the fact that they cannot comply or may not be
18 able to comply at least during checker cleaning with the
19 state opacity standard, .0521, does not in our opinion excuse
20 compliance with the state opacity standard, .0521.

21 So I mean in short what we're saying is that there
22 is no other visible emission standard that applies to furnace
23 1 and that petitioners' argument that monitoring methods are
24 emission standards is not correct and that the courts have
25 made that determination and to find otherwise would

1 invalidate 300 plus permits that we've issued, permits by the
2 way that EPA has reviewed and not had objection to.

3 Mr. Carroll: Repeat my objection.

4 The Court: Sustained.

5 Mr. Holloway: So we say that they failed to
6 meet their burden and we'd ask that the summary judgment be
7 granted in our favor.

8 The Court: Thank you, sir. Anything
9 further, Mr. Carroll?

10 Mr. Carroll: Yes, Your Honor, briefly.

11 The Court: All right. Yes, sir.

12 Mr. Carroll: Counsel has referred to a chart
13 from his brief in which he has characterized certain things
14 as emission standards and certain other things as monitoring
15 methods. And yet in one of those, interestingly, the second
16 line, acceptable operation and maintenance, and he cites the
17 emission standard as 60.293(c)(5). I think we looked at that
18 rule earlier, Your Honor, in its totality.

19 Now, he characterizes the standard as acceptable
20 operation and maintenance, but I've put on the screen, Your
21 Honor, a full text of that rule. In the full text of that
22 rule you will not find the words "acceptable operation and
23 maintenance." What you will find is a requirement to report
24 excess opacity.

25 Now, it is a reporting obligation. And as we said

1 before, visible emission standards, a standard, is much more
2 than simply a limit. It can be reporting. In this case it's
3 reporting. That doesn't make it any less an opacity
4 standard. Just because it's not enforceable as a never to
5 exceed value does not make it less of a standard.

6 In fact they've characterized it as a standard.
7 They've characterized it, however, as acceptable operation
8 and maintenance and they've sought to break it into two
9 pieces and say, "Oh, but, you know, there's this six minute
10 average opacity. That's only monitoring."

11 No, it's part of the standard, Your Honor. It's
12 part of the federal law. It's part of the rule promulgated
13 pursuant to .0524. It's part of our permit. And Rule .0521
14 cannot apply where there is a direct rule requirement that's
15 a visible emission standard under .0524.

16 Mr. Holloway also used the radar analogy, and I
17 think that's a pretty good analogy for monitoring, Your
18 Honor. In the opacity field, instead of radar we use a
19 continuous opacity monitoring device. Now, I'll describe
20 briefly how that operates. And we are required by federal
21 law and by state law to operate that. So we have the radar
22 gun, Your Honor. We have the monitoring.

23 Now, he said that's somehow apart from the speed
24 limit. Well, if you'll look on his chart, he's got the speed
25 limits over on the right-hand side with the radar gun. Not

1 only do we operate a COM, but he said that part of the
2 monitoring method is these numbers, these speed limits: the
3 12.6, the 20 percent--excuse me, the 12.6 percent and the 7.2
4 percent. We believe, Your Honor, that they are not just
5 monitoring, that they are part of the standard. It's part of
6 the visible emission standard.

7 If we go over that number, they're going to cite
8 us for a violation of Rule .0524. And there's no question
9 about that, and we understand that. If we go over that,
10 we're going to be subject to an enforcement action for
11 exceeding that number under Rule .0524.

12 Now, it's going to be cited either to--it may be
13 cited as a violation of a 1 pound limit or what they
14 characterize as acceptable operation, but we're going to be
15 cited. We're going to be cited for violating a provision of
16 the NSPS.

17 Now, there is actually an acceptable operation and
18 maintenance requirement in the federal law, and it's brought
19 in under .0524. It's not in subpart CC. It's in section
20 60.011(d) of the federal rules, but it is an NSPS standard,
21 okay, and it is incorporated and enforced pursuant to an
22 opacity limit.

23 So again, Your Honor, there is a clear NSPS
24 standard. There are these other--two other standards which
25 are used to enforce the provisions of Rule .0524. We're not

1 trying to not comply with an existing law that is applicable
2 to us, Your Honor. The issue is, is that rule applicable to
3 us. And the reason we're here is not because we, quote, want
4 to violate that state law. It's because we cannot operate
5 our furnace in compliance with a law that shouldn't be
6 imposed on us anyway.

7 And if they do impose it, we have real problems,
8 and that's why I wanted to point out that this is not simply,
9 "Oh, my gosh, we don't want to be subject to another
10 standard. It really doesn't mean much." This means a lot
11 for us.

12 We don't want to be thrust--no one wants to accept
13 a permit that they can't live with. I mean the whole idea of
14 a permit is to define what you have to do to operate in
15 compliance with the law. So again, we urge Your Honor to
16 grant our motion and deny the North Carolina agency's motion.
17 Thank you.

18 The Court: Thank you, sir. Mr. Holloway,
19 anything further?

20 Mr. Holloway: Just a couple of minutes.
21 Earlier, if not just right now, Mr. Carroll said that
22 emission standards could include work practices, monitoring,
23 and the like. In our world emission standards cannot include
24 monitoring. They're not equivalents.

25 In the definition he put up at .7602(k) of the

1 U.S. Code on emission standard, that--emission standard may
2 be somewhat broader. It does not include monitoring.
3 There's nothing in there that says that monitoring is
4 included in the definition of emission standard. I mean
5 every monitoring method cannot be an emission standard.

6 He earlier said, and maybe he misspoke, but he
7 said a standard--to demonstrate compliance with a standard.
8 You know, they don't equate. The monitoring method is what's
9 demonstrating compliance with the emission standard.

10 And at 293(c)(5), you know, there's this from the
11 preamble of this, which seems contrary to what Mr. Carroll
12 has been saying: "However, repeated pattern in excess
13 emissions reports will alert EPA enforcement personnel to
14 consider whether the facility was being properly operated and
15 maintained consistent with air pollution control practices."
16 I believe he said that operated and maintained language was
17 not in there.

18 You know, if there was a violation, we would be
19 citing it as a violation. If there was a civil penalty, we
20 would be citing it as--the grounds for the civil penalty
21 would be violation of the emission standard, not of the
22 monitoring method. And we're trying to keep the two separate
23 because the two are separate. Thank you, Your Honor

24 The Court: Thank you, sir.

25 Mr. Carroll: Your Honor, I was--excuse me.

1 May I---

2 The Court: Yes, sir. Go ahead.

3 Mr. Carroll: Counsel cited to *Sierra Club*.

4 There are several references to the *Sierra Club* case in our
5 response in opposition to their motion at page 2, where the
6 court--and this is the D.C. Circuit Court--used phrases such
7 as "Where an emission standard already specifies a monitoring
8 requirement," "Where the emission standard lacks a periodic
9 monitoring requirement altogether," or "An emission standard
10 has a periodic monitoring requirement inadequate to the
11 task."

12 It was clear from the language used by the Court
13 that an emission standard can include a monitoring require-
14 ment. And since counsel cited to that opinion in his
15 argument for the fact that monitoring and standards are
16 entirely different animals, I think it's appropriate to point
17 that out.

18 In our brief also, Your Honor, we point out
19 similar language in the *Appalachian Power* case where the
20 courts have recognized that monitoring can be part of an
21 emission standard.

22 The Court: Thank you, sir. Anything else,
23 Mr. Holloway?

24 Mr. Holloway: No.

25 The Court: All right. Thank you, folks.

1 I will--I wish I could tell you I'd have this ready for you
2 tomorrow. I doubt that, but I will get it to you as quick as
3 I can, hopefully within---

4 Mr. Carroll: (interposing) Thank you.

5 The Court: ---30 to 45 days. All right.

6 Thank you.

7 (The hearing was closed at 3:02 p.m.)

STATE OF NORTH CAROLINA
COUNTY OF WAKE

C E R T I F I C A T E

I, Kay K. McGovern, do hereby certify that the foregoing pages 4 through 40 represent a true and accurate transcript of the proceedings held at the Office of Administrative Hearings, Raleigh, North Carolina, on Wednesday, June 24, 2009.

I do further certify that I am not counsel for or employed by any party to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto set my hand this 16th day of July, 2009.

Kay K. McGovern, CVR-CM