ORAL ARGUMENT HELD SEPTEMBER 14, 2017
DECISION ISSUED FEBRUARY 16, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	Case No. 15-1123 (consolidated with Case No. 15-1115)

UNOPPOSED MOTION TO ENLARGE WORD LIMIT FOR PETITION FOR PANEL REHEARING

Respondent U.S. Environmental Protection Agency ("EPA") respectfully moves for a 642-word enlargement of the 3,900-word limit for petitions for rehearing, and leave to file the attached 4,542-word Petition for Panel Rehearing. No party opposes this relief. In support of its motion, EPA states:

1. These consolidated cases challenged a final agency action entitled "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements," 80 Fed. Reg. 12,264 (March 6, 2015) (hereafter "SIP Requirements Rule"). The cases were argued on September 17, 2017, and on February 16, 2018, the Court issued an opinion and order which upheld the SIP Requirements Rule in part and vacated it in part.

2. EPA has prepared the attached Petition for Panel Rehearing ("Petition"), identifying several significant substantive and remedy issues that the Agency believes merit rehearing. EPA acknowledges that rehearing petitions are limited to 3,900 words, and further recognizes that "[t]his court disfavors motions to exceed length limits and such motions will be granted only for extraordinarily compelling reasons." D.C. Cir. R. 35(b); Fed. R. App. P. 40(b)(1). EPA therefore has worked diligently to present the issues in the attached Petition within the prescribed 3,900 words. EPA respectfully submits that "extraordinarily compelling reasons" exist for providing the attached 4,542-word Petition.

3. As explained more fully in EPA's Petition and the declarations, this case involves extremely important legal and policy issues that are fundamental to implementation of the Clean Air Act's national ambient air quality standards. The practical effects of the Court's decision affect not only EPA, but also other federal agencies, states, the regulated community, and citizen stakeholders.

4. EPA has made best efforts to prepare a rehearing petition that is as concise as possible, and has tried to limit the petition to highlight only the most important points. (In fact, as mentioned in the petition, EPA suggests that if the Court grants the requested rehearing, that it also accept supplemental briefing from the parties on the issues raised.) The Agency has nonetheless found that limiting the petition to the standard 3,900 words would inevitably result in omission of certain points that EPA feels are critical to fully explaining the basis for its petition to the

panel. EPA respectfully submits that the interests of justice are best served by allowing the relatively modest extension of applicable word limits requested herein so that the Court may have the benefit of a relatively more complete explanation in considering the petition.

5. Should the Court request responses to the rehearing petition, EPA would not oppose a corresponding expansion of the word limit for those responses.

6. EPA therefore respectfully requests a 642-word enlargement of the 3,900-word limit in Circuit Rule 35 for petitions for panel rehearing, and leave to file the attached Petition for Rehearing.

7. Undersigned counsel for EPA consulted with counsel for all parties to this case, and none of them oppose the relief requested.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

Dated: April 23, 2018

/s/ Heather E. Gange

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned counsel certifies as follows:

A. Parties, Intervenors and Amici (Case No. 15-1123)

Petitioners: Sierra Club; Conservation Law Foundation; Downwinders at Risk; Physicians for Social Responsibility – Los Angeles

Respondents: U.S. Environmental Protection Agency; E. Scott Pruitt, Administrator

Intervenors: None

Amici: Ventura County Air Quality Management District; South Coast Air Quality Management District

B. Rulings under Review

The Petitioners in both underlying consolidated cases sought review of a final EPA Rule entitled "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements," 80 Fed. Reg. 12,264 (March 6, 2015) (hereafter "SIP Requirements Rule"). The ruling under review in this Petition for Rehearing is the Court's Decision dated February 16, 2018 (Dkt 1718293).

C. Related Cases

Case No. 15-1115 was consolidated with Case No. 15-1123, but briefed and argued separately. Case No. 15-1465 was severed and is being held in abeyance pending further order of the Court. There are no other related cases pending in this or other courts.

/s/ Heather E. Gange
HEATHER E. GANGE
Counsel for Respondents

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(e)(1), the foregoing Motion is proportionately spaced, has a typeface of 14 points, and contains 495 words, exclusive of those parts exempted by Rule 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1). I have relied on Microsoft Word's calculation feature.

Date: April 23, 2018

/s/ Heather E. Gange
Heather E. Gange

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2018, I served the foregoing Motion on all registered counsel through the Court's electronic filing system (ECF) and United States Postal Service, postage prepaid.

Date: April 23, 2018

/s/ Heather E. Gange
Heather E. Gange

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SIERRA CLUB, *et al.,*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.,*

Respondents.

PETITION FOR PANEL REHEARING BY RESPONDENTS THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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April 23, 2018

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/s/ Heather E. Gange
HEATHER E. GANGE
Counsel for Respondents

GLOSSARY

1997 NAAQS	The national ambient air quality standard limiting daily maximum eight-hour average ozone concentrations to 0.08 parts per million. *See* 40 C.F.R. § 50.10(a).
2008 NAAQS	The national ambient air quality standard limiting daily maximum eight-hour average ozone concentrations to 0.075 parts per million. *See* 40 C.F.R. § 50.15(a).
CAA or Act	The Clean Air Act, 42 U.S.C. §§ 7401-7671q.
EPA	The U.S. Environmental Protection Agency
NAAQS	National Ambient Air Quality Standard
SIP	State Implementation Plan

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INTRODUCTION AND SUMMARY

Respondent United States Environmental Protection Agency ("EPA") respectfully seeks panel rehearing of the Court's February 16, 2018 decision "Decision"). Rehearing is warranted because the Court overlooked two critical points of law. *See* Fed. R. App. P. 40(a)(2). In both instances, the Court failed to recognize that the Clean Air Act ("CAA" or the "Act") is silent or ambiguous as it applies to the specific issues presented here. As a result, the Court never meaningfully considered—as it should have—why EPA's construction of these fundamental provisions in the present context was reasonable.

First, the Court's analysis is grounded on the apparent assumption that the Clean Air Act's anti-backsliding provision, 42 U.S.C. § 7502(e), requires retention of all pre-existing "controls" when, as in this case, a national ambient air quality standard ("NAAQS") is revised to be more stringent and the earlier standard is revoked. However, that provision, by its express terms, only applies in the event of "relaxation" of a NAAQS, and even then, only requires controls that are "not less stringent" than those that previously applied (*i.e.,* not *all* controls). *Id.* While the Court in prior cases upheld, as a reasonable exercise of the Agency's discretion, EPA's decision to take guidance from these anti-backsliding principles even when a more stringent NAAQS is adopted, the Court has never held that such an approach is *required* by the statute at all

in this context, let alone in the expansive and inflexible manner reflected in the Court's Decision here.

Second, the Court erred in construing 42 U.S.C. § 7506(c)(5) as unambiguously requiring transportation conformity determinations for the less stringent, now-revoked 1997 ozone NAAQS ("1997 NAAQS"), even where those areas were formally redesignated from nonattainment to attainment before that standard was revoked, and where those areas have been designated as being in attainment of the more stringent 2008 ozone NAAQS.[1] The Court based this aspect of its Decision entirely on the use of the past tense of a single word—"was"—in 42 U.S.C. § 7506(c)(5), a statutory construction that the Court advanced *sua sponte*. Decision, at 27-28. The Court's construction of the statute—reached without the benefit of full briefing—is not only unwarranted under traditional tools of statutory construction, but also stands in stark conflict with prior decisions of this Court—a conflict the Court's Decision did not recognize or attempt to resolve.

These are not academic or purely doctrinal concerns. For example, with regard to the anti-backsliding issue, at present there are seven different NAAQS, each of which is subject to review at five-year intervals. 42 U.S.C. § 7409(d). Every time a NAAQS is revised, there arise a host of complex, resource-intensive administrative and

[1] A transportation conformity determination is a determination that a transportation plan, program, or project is consistent with the area's implementation plan. 42 U.S.C. § 7506(c)(1).

regulatory implications for EPA, States, the regulated community, and affected citizens. Congress simply did not intend the complete regulatory infrastructure for every revoked and superseded NAAQS (especially *less* stringent NAAQS that are superseded by more stringent ones) to live on automatically and indefinitely, draining State and federal resources that would be better directed to compliance with a more stringent and up-to-date standard.

These legal issues and their associated policy implications are important and complex. This petition can only highlight the most important points. EPA therefore requests that, if the Court grants rehearing, it allow supplemental briefing on these issues. Alternatively, if the Court does not grant rehearing on these substantive issues, EPA requests that the Court revise the relief granted in the Decision to remand without vacatur, to provide EPA the opportunity to implement the Court's Decision, certain targeted portions of the rule at issue (hereafter "SIP Requirements Rule") that do not impose anti-backsliding requirements for the 1997 NAAQS in Orphan Nonattainment Areas and do not impose transportation conformity requirements for Orphan Maintenance Areas. To vacate those specific provisions immediately upon issuance of the Court's mandate risks creating substantial confusion and disruption. As discussed below, while remedy issues were not briefed or analyzed in detail, the targeted approach suggested by EPA herein fully comports fully with *Allied-Signal, Inc.*

v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993), and related precedent of this Court on remand and vacatur issues.

BACKGROUND

Under the Act, EPA establishes NAAQS to protect public health with an adequate margin of safety for specified pollutants (*e.g.*, ozone). 42 U.S.C. § 7408. Once a NAAQS is promulgated or revised, EPA must designate areas as meeting or not meeting it ("attainment" or "nonattainment," respectively). *Id.* § 7511(a). The Act also provides for EPA to redesignate areas from "nonattainment" to "attainment" once they attain a NAAQS and fulfill five requirements (including a NAAQS attainment determination and related SIP, maintenance plan, permitting, and nonattainment area requirements). *Id.* § 7407(d)(3)(E). Once redesignated to attainment, these are called "Maintenance Areas."

States have primary responsibility for ensuring that air quality within their jurisdiction meets each NAAQS. CAA requirements can include, *inter alia*: transportation conformity demonstrations and development of a State implementation plan ("SIP") that addresses new source review permitting. *Id.* §§ 7502(c), 7503, 7506(c).

The Act requires EPA to review the NAAQS every five years and make appropriate revisions. *Id.* §§ 7409(d)(l), 7502(a)(2)(A). When such revisions "relax" a NAAQS, EPA must promulgate anti-backsliding requirements for "all areas which

have not attained that standard as of the date of such relaxation . . . [that] provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." *Id.* § 7502(e). Because the CAA does not speak to situations where EPA *strengthens* a NAAQS by promulgating a more stringent standard and then revoking an older, less-stringent one, EPA has exercised its gap-filling authority. There, EPA looks to the principles in 42 U.S.C. § 7502(e) regarding whether and how anti-backsliding measures should be imposed in particular circumstances. *South Coast Air Qual. Mgmt Dist. v. EPA,* 472 F.3d 882, 900 (D.C. Cir. 2006) (hereafter "*South Coast I*"); *see NRDC v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011).

EPA promulgated the first ozone NAAQS in 1979 ("One-Hour NAAQS"), followed by the second, generally[2] more stringent 1997 NAAQS. 62 Fed. Reg. 38,856 (July 18, 1997). EPA later revoked the One-Hour NAAQS, including all related area designations and classifications. 69 Fed. Reg. 23,951 (Apr. 30, 2004); *see South Coast I*, 472 F.3d at 898.

EPA's full revocation of the One-Hour NAAQS was challenged in this Court, which held that "EPA retains the authority to revoke the one-hour standard so long as adequate anti-backsliding provisions are introduced." *South Coast I,* 472 F.3d at 899.

[2] Because the 1-hour NAAQS and the 8-hour NAAQS are measured over different averaging times, the relative "stringency" of these two standards is not as simple to measure as is the relative stringency of the 1997 and 2008 versions of the 8-hour ozone NAAQS, which are the two NAAQS involved here.

The Court further stated that "[t]he only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations." *Id.* at 899-900; *see also South Coast Air Quality Mgmt. Dist. v. EPA,* 489 F.3d 1245, 1248 (D.C. Cir. 2007) (reh'g petition for *South Coast I*).

In 2008 EPA promulgated an even more stringent ozone NAAQS (the "2008 NAAQS"). 73 Fed. Reg. 16,436 (Mar. 27, 2008).[3] In 2012, EPA issued a rule revoking the less stringent 1997 NAAQS solely for purposes of transportation conformity. 77 Fed. Reg. 30,160 (May 21, 2012). A decision resolving a challenge to that rule reiterated, "Because the [] rule considered in *South Coast* revoked the prior NAAQS 'in full, including the associated designations,' there remained no nonattainment areas or maintenance areas for purposes of the previous, fully revoked [One-Hour] standard." *NRDC v. EPA*, 777 F.3d 456, 471-72 (D.C. Cir. 2014) (quoting *South Coast I*, 472 F.3d at 898).

In 2015, EPA issued the SIP Requirements Rule at issue in this case to implement the more stringent 2008 NAAQS. The SIP Requirements Rule revoked the 1997 NAAQS in full, including all designations and classifications. 80 Fed. Reg. 12,264, 12,296 (Mar. 6, 2015). EPA also exercised its gap-filling discretion by looking

[3] Because the averaging times of the 1997 8-hour NAAQS and the 2008 8-hour NAAQS are the same, the 2008 NAAQS is definitively "more stringent" than the 1997 version, a consideration that has obvious relevance to the "not less stringent" criterion in the Act's anti-backsliding provision, 42 U.S.C. § 7502(e).

to the principles of Section 7502(e) to establish anti-backsliding requirements for areas that were designated nonattainment for both the 1997 and 2008 NAAQS at the time the 1997 NAAQS was revoked, and establish two processes whereby those requirements subsequently could be lifted, including the "Redesignation Substitute." *Id.* at 12,299.

On February 16, 2018, the Court issued its Decision granting in part and denying in part challenges to the SIP Requirements Rule. The Decision upheld the revocation of the 1997 NAAQS, and reaffirmed that "EPA may revoke a previous NAAQS in full 'so long as adequate anti-backsliding provisions are introduced.'" Decision, at 12 (quoting *South Coast I,* 472 F.3d at 899).

Contrary to *South Coast I* and the rehearing decision for that case, however, the Court appeared to proceed on the assumption that 42 U.S.C. § 7502(e) applies directly in this case. Decision, at 16. The Court did not evaluate the reasonableness of EPA's determinations with respect to each anti-backsliding measure using the standard of review in the second step of the analysis established in *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). This Court's Decision also held, among other things, that anti-backsliding requirements must apply for the 1997 NAAQS until an area receives formal redesignation to attainment of the 1997 or 2008 NAAQS under 42 U.S.C. § 7407(d)(3)(E), Decision, at 16, 21, and that the plain language of 42 U.S.C. §

7506(c)(5) requires transportation conformity demonstrations in areas that were redesignated to attainment of the 1997 NAAQS prior to its revocation *and* designated attainment for the 2008 NAAQS ("Orphan Maintenance Areas"). The Court also vacated all nine specific portions of the SIP Requirements Rule that were successfully challenged. Decision, at 3.

ARGUMENT

I. THE COURT SHOULD RE-EVALUATE EPA'S ANTI-BACK-SLIDING DETERMINATIONS UNDER *CHEVRON* STEP II.

The CAA anti-backsliding provision does not speak to situations where, as here, a NAAQS is strengthened. The Court therefore should have performed a *Chevron* Step II analysis when evaluating EPA's determinations of what is necessary to provide sufficient anti-backsliding protection for the 1997 NAAQS.

The plain language of Section 7502(e) "[by] its terms . . . applies only when EPA '*relaxes*' a primary NAAQS," not when it strengthens one. *South Coast I*, 472 F.3d at 900 (emphasis added); *see South Coast Air Qual. Mgmt. Dist.*, 489 F.3d at 1248; *NRDC v. EPA*, 643 F.3d at 319; *NRDC v. EPA*, 779 F.3d 1119, 1121 (9th Cir. 2015). In the SIP Requirements Rule, EPA therefore looked to the principles of 42 U.S.C. § 7502(e), as reasonably applied in the specific contexts presented here, to fill the statutory gap, instead of applying that provision directly.

The Agency first found that Section 7502(e) by its terms was never intended to apply to areas attaining a standard at the time of its relaxation, and that in nonattainment areas the purpose of anti-backsliding is "to ensure that the *level of protection* provided by requirements for the [revoked NAAQS] would remain in place as areas transition[] to implementing the more stringent[] standard." 78 Fed. Reg. 34,178, 34,214/1 (June 6, 2013) (emphasis added); *see* 80 Fed. Reg. 12,299.

The Agency next found that the air quality in Orphan Nonattainment Areas—which were designated attainment for the more stringent 2008 NAAQS at the time the 1997 NAAQS was revoked—were not "areas which have not attained [the 1997 NAAQS] as of the date of" revocation, 42 U.S.C. § 7502(e), because it is mathematically impossible to attain the 2008 NAAQS without having already attained the weaker 1997 NAAQS. JA-354; 80 Fed. Reg. at 12,297/3; 78 Fed. Reg. at 34,219/1; EPA Brief, at 17. EPA therefore determined that it did not need to promulgate anti-backsliding measures for these areas, because Section 7502(e) was not designed to apply to areas that have attained a standard as of the date of revocation. In contrast, anti-backsliding measures are needed in areas that *failed* to attain the 1997 NAAQS as of its revocation. 40 C.F.R. § 51.1105(a)(3); EPA Brief, at 38-42; 80 Fed. Reg. at 12,297/3; 78 Fed. Reg. at 34,219/1; JA-363.

With respect to areas where anti-backsliding measures *are* needed (*i.e.*, those designated nonattainment for both the 1997 and 2008 NAAQS), EPA explained why the 17 requirements codified by the SIP Requirements Rule are more than adequate to ensure that projected improvements in air quality provided by requirements for the 1997 NAAQS would not be frustrated, while also not "imposing burdensome intermediate requirements left over from obsolete standards." JA-349; 80 Fed. Reg. at 12,284; 78 Fed. Reg. at 34,215. That explanation included the record basis for these conclusions,

including evidence of continuous improvement in air quality where the same 17 anti-backsliding requirements were implemented for the formerly-revoked One-Hour NAAQS. 80 Fed. Reg. at 12,284; *see* JA-349.

Each of those determinations reasonably addressed issues that the statute does not address, and therefore should have been entitled to deference. *See Chevron,* 467 U.S. at 866. As noted above, even where the Act's anti-backsliding provision applies directly, it still only requires that current controls be "not less stringent" than prior controls, and does not establish a blanket requirement that *all* prior controls must be retained, including in Orphan Nonattainment Areas attaining the more stringent NAAQS. In this case, however, the Court erroneously presumed based on *South Coast I* that "EPA is required by statute to keep in place measures intended to constrain ozone levels," and based on that fundamentally incorrect presumption, proceeded to apply Section 7502(e) directly to hold that particular measures must be retained simply because, in the Court's view, they constituted a "control[]." Decision, at 16. EPA submits that the Court erred by failing to perform the required *Chevron* Step II analysis for each of these determinations. It therefore seeks rehearing so that the Court may do so based upon the parties' earlier briefing and/or any supplemental briefing that the Court may deem appropriate.

II. THE COURT ERRED WHEN IT CONSTRUED 42 U.S.C. § 7506(c)(5) TO REQUIRE TRANSPORTATION CONFORMITY DEMONSTRATIONS IN ORPHAN MAINTENANCE AREAS.

The Court also erred by construing 42 U.S.C. § 7506(c) to require transportation conformity demonstrations in Orphan Maintenance Areas (i.e., areas formally redesignated attainment for the 1997 NAAQS prior to revocation), Decision, 27-28. This both conflicts with prior decisions of this Court and is flawed as a matter of statutory construction.

A. The Court's Construction of 42 U.S.C. § 7506(c)(5) To Require Transportation Conformity in Orphan Maintenance Areas Conflicts with Prior Decisions of This Court.

The Court's Decision that 42 U.S.C. § 7506(c)(5) requires transportation conformity demonstrations in areas redesignated to maintenance for the revoked 1997 NAAQS conflicts with *South Coast I*, 472 F.3d at 899, and *NRDC v. EPA*, 777 F.3d 456, 470-71, with respect to the consequences of a full NAAQS revocation. At the very least, this constitutes an important legal issue that the Court failed to acknowledge and address. Arguably, it also violates the law-of-the-circuit doctrine, which requires that "the *same issue* presented in a *later case* in the *same court* should lead to the *same result*." *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (emphasis in original) (quoting *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) and *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996)).

The *South Coast I* decision held that, because EPA revoked the prior One-Hour NAAQS in full, including the associated designations, "there remained no . . . maintenance areas for purposes of the previous, fully revoked standard," and "the only remaining requirements as to the one-hour NAAQS are the anti-backsliding limitations." *NRDC v. EPA*, 777 F.3d at 471 (quoting *South Coast I*, 472 F.3d at 898, 899).

This Court not only reaffirmed that result, but also did so with respect to Section 7506(c)(5) and the 1997 NAAQS in *NRDC v. EPA*, 777 F.3d at 471-72. In that decision, the Court vacated part of an earlier rule in which EPA partially revoked the 1997 NAAQS solely for purposes of transportation conformity. In so doing, the Court distinguished *South Coast I*, reiterating that because the One-Hour NAAQS had been *fully* revoked, "there remained no nonattainment areas or maintenance areas for purposes of the previous, fully revoked standard." *Id.* at 471. The Court also expressly held that the *partial* revocation at issue in *NRDC v. EPA* left the designations and redesignations for the 1997 ozone NAAQS in place, and EPA could not lift Section 7506(c)(5) requirements "for areas that remain in nonattainment or maintenance status under the 1997 NAAQS." 777 F.3d at 470.

In this case, the SIP Requirements Rule revoked the 1997 ozone NAAQS in full, including all existing designations and classifications. Decision, at 9; *see* 80 Fed. Reg. at 12,297/1-2. Consequently, under the Court's precedent, there simply no longer are any "remain[ing]" maintenance areas for the 1997 NAAQS, and thus, there

exist no areas of this type to which transportation conformity for that now-revoked standard could apply. The Court's construction of Section 7506(c)(5) to nonetheless require transportation conformity demonstrations based on an area's pre-revocation status as a maintenance area conflicts directly with this precedent. The Court's Decision on this issue never acknowledged this precedent or attempted to reconcile it with its present analysis. *See* Decision, at 27-28. For this reason alone, the Court should grant rehearing regarding the construction of 42 U.S.C. § 7506(c)(5).

B. When 42 U.S.C. 7506(c)(5) Is Viewed In Context, It Is Clear That the Court's Construction Frustrates Its Statutory Purpose.

The Court also erred in finding that Section 7506(c)(5) unambiguously requires transportation conformity demonstrations in Orphan Maintenance Areas based solely upon the use of the past tense "was" in that provision (an argument that was not specifically advanced by Petitioners in their briefing here). Decision, at 27 ("an area that *was* designated as a nonattainment area but that *was* later redesignated . . . as an attainment area") (quoting 42 U.S.C. § 7506(c)(5)) (emphasis in original)). It is well-established that "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997)) (citations omitted); *see also Deal v. United States*, 508 U.S. 129, 132 (1993); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605 (D.C. Cir. 2016). It is at least

ambiguous whether Congress intended the word "was" to mean an area "was designated as a nonattainment area" under the *current* standard as EPA reasonably construes the word, rather than "was" *ever* designated nonattainment—even pursuant to a former standard now revoked. But when Section 7506(c)(5) is viewed in context, it is clear that that provision is intended to facilitate the implementation of operative (*i.e.,* not revoked) NAAQS

Section 7506(c)(5) is a sub-section of the CAA conformity provision, 42 U.S.C. §7506(c), which bars federal funding, support or approvals for activities that do not conform to applicable implementation plans. 42 U.S.C. § 7506(c)(1), (c)(2). Conformity to an implementation plan is defined to implement presently-applicable NAAQS:

> Conformity to an implementation plan means --
>
> (A) conformity to an implementation plan's purpose of eliminating or reducing . . . violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
> (B) that such activities will not . . . cause or contribute to any new violation of any standard. . . increase the frequency or severity of any existing violation. . . or . . . delay timely attainment of any standard. . . .

42 U.S.C. § 7506(c)(1). Substituting "revoked national ambient air quality standards" into these provisions is not consistent with the apparent purpose of 42 U.S.C. § 7506(c). In fact, as this Court has recently stressed in an analogous statutory construction issue in another Clean Air Act case, where a statute refers to events that happened in the past, it is not presumed to have continuing effects into the future.

See Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 459 (D.C. Cir. 2017) ("For example, President Obama replaced President Bush at a specific moment in time: January 20, 2009, at 12 p.m. President Obama did not 'replace' President Bush every time President Obama thereafter walked into the Oval Office."). Therefore, Congress' use of the past tense does not unambiguously require that Section 7506(c)(5) apply when maintenance areas no longer even exist due to the revocation of the 1997 NAAQS. *See also General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 585-86 (2003) (commonly used terms can have several commonly-understood meanings). The Court therefore should grant rehearing regarding the construction of 42 U.S.C. § 7605(c)(5) for this reason as well, to consider whether EPA's construction of this provision to refer, in this context, to *current* NAAQS conformity obligations is reasonable.

III. THE COURT SHOULD REMAND TWO COMPONENTS OF THE SIP REQUIREMENTS RULE WITHOUT VACATUR.

Finally, to the extent these issues are not resolved by the requested substantive rehearing, EPA seeks rehearing with respect to vacatur of certain provisions of the SIP Requirements Rule, as opposed to a simple remand of those provisions of the rule to EPA, without vacatur, for further proceedings consistent with the Court's Decision. Specifically, EPA seeks this revision of the relief order with respect to the provisions that: (1) do not impose anti-backsliding measures on Orphan Nonattainment Areas; and (2) establish that transportation conformity requirements for the revoked 1997 NAAQS are not applicable in Orphan Maintenance Areas.

The Court has long a long-established test for exercising its discretion to remand rule provisions without vacatur, based upon the disruptive consequences of an immediate change and the level of doubt regarding the correctness of the Agency's choices. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In appropriate cases, disruptive consequences in and of themselves can be a sufficient basis for remand without vacatur, notwithstanding the Court's merits finding that the rule at issue was legally flawed. *See, e.g., North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). Here, the disruption caused by immediately vacating these provisions of the SIP Requirements Rule would be substantial and profoundly inequitable. Affected federal and State agencies, State and local planning organizations, and members of the regulated community have complied with the Rule in good faith since 2015, including the full revocation of the 1997 NAAQS in their planning decisions. Immediate vacatur also would create significant gaps in EPA's implementation program.[4] EPA therefore requests that these components be remanded without vacatur to enable the Agency to implement the Court's Decision in an orderly and equitable fashion.

[4] EPA is currently evaluating the impact of the Decision on the specific requirements that would apply as anti-backsliding measures. For example, EPA has detailed regulations addressing how transportation conformity and NSR permitting determinations are made in different areas and different circumstances, and the Agency is evaluating how they would apply in areas affected by the Court's decision.

Immediately vacating the SIP Requirements Rule provisions and guidance excusing the 13 Orphan Nonattainment Areas from anti-backsliding provisions for the revoked 1997 NAAQS would impose a significant burden on these areas, without conferring a comparable benefit. Decl. of William Wehrum ("Wehrum Decl.") ¶¶ 8, 17. All of these areas factually did attain the 1997 NAAQS by their respective attainment dates, all currently have Clean Data Determinations for the standard (*i.e.,* EPA already determined that their air quality meets the NAAQS), and many are likely eligible for formal redesignation under 42 U.S.C. § 7407(d)(3)(E)—which also would excuse them from anti-backsliding. *Id.* ¶ 17-18; *see e.g., WildEarth Guardians v. EPA*, 830 F.3d 529, 533, 536 (D.C. Cir. 2016).

But these areas were prevented from seeking such redesignation, because the SIP Requirements Rule reflects EPA's long-standing position that areas cannot be redesignated for revoked standards. *See* 80 Fed. Reg. at 12,304-305; JA-352; Wehrum Decl. ¶ 17. EPA estimates that States will need 18 months to develop the necessary SIP revisions that comprise the core of the application through state-level notice-and-comment rulemaking, after which EPA will need approximately 12 months to review them and then take final action through federal notice-and-comment rulemaking. Wehrum Decl. ¶ 19; *see* 42 U.S.C. § 7407(d). A remand without vacatur of the Rule provisions exempting them from anti-backsliding requirements—which they likely would be excused from by now, but for the SIP Requirements Rule—would allow

States to efficiently obtain this relief without the burden and disruption caused by the revival of unnecessary controls.

Absent a remend without vacatur, the disruption that government entities and regulated parties will experience will be particularly severe. For example, transportation conformity would apply to all Orphan Nonattainment Areas for anti-backsliding purposes—as well as to all 69 Orphan Maintenance Areas under the Court's construction of Section 7605(c)(5). Wehrum Decl. ¶¶ 7-11, 18-20. Planning and construction of infrastructure projects is a continuous process that cannot simply stop without significant economic and potential safety implications. *See* Declaration of Matthew Welbes ("Welbes Decl.") ¶¶ 4-5, 9-11; Declaration of Walter Waidelich, Jr. ("Waidelich Decl.") ¶¶ 4-7, 9, 12. These 82 Orphan Nonattainment and Maintenance Areas, where millions of Americans reside, include large metropolitan areas such as Boston, Detroit, Indianapolis, Milwaukee and Las Vegas; mid-size cities such as Birmingham, Louisville, Norfolk, and Raleigh-Durham; and smaller cities such as Erie, PA, Lansing, MI, Charleston, WV and Rochester, NY. Wehrum Decl. ¶ 11.

Under the SIP Requirements Rule, as of April 2015 these areas were no longer required to demonstrate conformity for the 1997 NAAQS. In addition, many of them make no conformity determinations *at all*, because they are designated attainment for all current NAAQS for which transportation conformity applies. *Id.* ¶ 10. The corresponding State and local agencies therefore likely lack altogether, or have insufficient, administrative and technical capacity to implement transportation

conformity. *Id.* Consequently, many Orphan Maintenance Areas *and* Orphan Nonattainment Areas—that have in actuality attained the 1997 NAAQS and are also meeting the more stringent 2008 NAAQS—could be subject to substantial harm, because new or revised transportation plans, improvement programs and non-exempt highway or mass transit projects cannot be approved, with the effect that billions of dollars appropriated for infrastructure improvements could be frozen or lost. *See* 40 C.F.R. §§ 93.102, 93.104; Wehrum Decl. ¶¶ 12-13; Waidelich Decl. ¶¶ 12-13; Welbes Decl. ¶¶ 6, 9-11. Imposition of other anti-backsliding measures also would cause additional turmoil and be equally burdensome in affected Orphan Nonattainment Areas that factually attained the 1997 NAAQS. *See* Wehrum Decl. ¶¶ 14-16.

CONCLUSION

This petition for rehearing should be granted for the substantive reasons discussed above. Alternatively, the vacatur of the SIP Requirements Rule provisions excusing Orphan Nonattainment Areas from anti-backsliding requirements for the 1997 NAAQS and removing transportation conformity requirements for Orphan Maintenance Areas should be converted to a remand without vacatur.

Respectfully submitted,

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April 23, 2018

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(e)(1), the foregoing Petition is proportionately spaced, has a typeface of 14 points, and contains 4,542 words, exclusive of those parts exempted by Rule 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1). I have relied on Microsoft Word's calculation feature.

Date: April 23, 2018

/s/ Heather E. Gange
Heather E. Gange

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2018, I served the foregoing Petition on all registered counsel through the Court's electronic filing system (ECF) and United States Postal Service, postage prepaid.

Date: April 23, 2018

/s/ Heather E. Gange
Heather E. Gange

ORAL ARGUMENT HELD SEPTEMBER 14, 2017
DECISION ISSUED FEBRUARY 16, 2018

Case No. 15-1123
(consolidated with 15-1115)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.,*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.,*

Respondents.

ADDENDUM TO PETITION FOR PANEL REHEARING BY RESPONDENTS THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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April 23, 2018

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[1] No Corporate Disclosure Statement is required from Respondents the United States Environmental Protection Agency ("EPA") and E. Scott Pruitt, Administrator of the EPA, under Federal Rule of Appellate Procedure 26.1 or Circuit Rule 26.1.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned counsel certifies as follows:

A. Parties, Intervenors and Amici (Case No. 15-1123)

Petitioners: Sierra Club; Conservation Law Foundation; Downwinders at Risk; Physicians for Social Responsibility – Los Angeles

Respondents: U.S. Environmental Protection Agency; E. Scott Pruitt, Administrator

Intervenors: None

Amici: Ventura County Air Quality Management District; South Coast Air Quality Management District

B. Rulings under Review

The Petitioners in both underlying consolidated cases sought review of a final EPA Rule entitled "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements," 80 Fed. Reg. 12,264 (March 6, 2015) (hereafter "SIP Requirements Rule"). The ruling under review in this Petition for Rehearing is the Court's Decision dated February 16, 2018 (Dkt 1718293).

C. Related Cases

Case No. 15-1115 was consolidated with Case No. 15-1123, but briefed and argued separately. Case No. 15-1465 was severed and is being held in abeyance pending further order of the Court. There are no other related cases pending in this or other courts.

/s/ Heather E. Gange
HEATHER E. GANGE
Counsel for Respondents

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2017 Decided February 16, 2018

No. 15-1115

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S
CLEAN AIR PROJECT, ET AL.,
INTERVENORS

Consolidated with 15-1123

On Petitions for Review of a Final Action
of the Environmental Protection Agency

Megan E. Lorenz Angarita argued the cause for petitioner South Coast Air Quality Management District. With her on the briefs were *Kurt R. Wiese* and *Barbara Baird*.

Seth L. Johnson argued the cause for Environmental Petitioners. With him on the briefs was *David S. Baron*.

Kelvin J. Dowd and *Andrew B. Kolesar III* were on the brief for *amicus curiae* Ventura County Air Pollution Control District in support of petitioner South Coast Air Quality Management District.

Heather E. Gange, Trial Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief was *John C. Cruden*, Assistant Attorney General at the time the brief was filed.

Seth L. Johnson argued the cause for Environmental Movant-Intervenors. With him on the brief was *David S. Baron*.

Megan E. Lorenz Angarita, *Kurt R. Wiese*, and *Barbara Baird* were on the brief for *amicus curiae* South Coast Air Quality Management District in support of respondent's opposition to Sierra Club's argument regarding reasonably available control technology in Case No. 15-1123.

Leslie Sue Ritts was on the brief for intervenor for respondent National Environmental Development Association's Clean Air Project in support of U.S. Environmental Protection Agency.

Before: GARLAND, *Chief Judge*, ROGERS, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: In this consolidated proceeding, we consider petitions for review of an Environmental Protection Agency ("EPA") final rule entitled "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Review Requirements," 80 Fed. Reg. 12,264 (Mar. 6, 2015). In Case No. 15-1115, petitioner South Coast Air Quality Management District ("South Coast") contends that the EPA incorrectly concluded that precedent of this Court requires emissions reductions that demonstrate reasonable further progress all come from within the nonattainment area. In Case No. 15-1123, petitioners Sierra Club, Conservation Law Foundation, Downwinders at Risk, and Physicians for Social Responsibility (Los Angeles) ("Environmental Petitioners") contend that in enacting the Final Rule, the EPA acted arbitrarily and capriciously in its revocation of 1997 National Ambient Air Quality Standards and relaxation of previously applicable requirements under the Clean Air Act.

For the reasons stated below, we deny South Coast's petition for review, and grant in part and deny in part that of the Environmental Petitioners.

I. BACKGROUND

A. The Clean Air Act Framework

The Clean Air Act ("CAA" or "Act") directs the EPA to set National Ambient Air Quality Standards ("NAAQS") for air pollutants "allowing an adequate margin of safety . . . requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The CAA also requires the EPA to establish air quality control regions and designate them as "attainment" for "any area . . . that meets" the NAAQS, "nonattainment" for "any area that does not meet" the NAAQS, and "unclassifiable" for "any area

that cannot be classified on the basis of available information." § 7407(d)(1)(A).

The EPA must classify each area "designated nonattainment for ozone" as "marginal," "moderate," "serious," "severe," or "extreme" based on the degree to which the ozone level in the area exceeds the NAAQS. § 7511. "An area that exceeds the NAAQS by a greater margin is given more time to meet the standard but is subjected to progressively more stringent emissions controls for ozone precursors, namely, volatile organic compounds (VOCs) and oxides of nitrogen (NO_x)." *Natural Res. Def. Council v. EPA* (*NRDC 2009*), 571 F.3d 1245, 1250 (D.C. Cir. 2009).

The Act places on the states "the primary responsibility for assuring air quality" by submitting state implementation plans ("SIPs") that specify how they will achieve and maintain compliance with the NAAQS. 42 U.S.C. § 7407(a). States must formally adopt SIPs through state notice and comment rulemaking and then submit the SIPs to the EPA for approval. § 7410(a). For those areas designated as "nonattainment," SIPs must show how the areas will achieve and maintain the relevant NAAQS. *Id*.

A nonattainment area may be redesignated to attainment if the EPA (1) has determined that the area has attained the applicable NAAQS; (2) has fully approved the applicable SIP under § 7410(k); (3) has determined that the attainment is due to permanent and enforceable emissions reductions; (4) has fully approved a § 7505a "maintenance plan," which demonstrates that the area will maintain the NAAQS for at least 10 years after the redesignation, *see* § 7505a(a); and (5) has determined that the state containing the area seeking redesignation has met all applicable SIP requirements.

§ 7407(d)(3)(E). Areas redesignated as attainment are referred to as "maintenance areas."

B. SIPs for Nonattainment Areas

As is relevant to this case, the Clean Air Act requires SIPs for nonattainment areas to include the following provisions:

1. Reasonable Further Progress

SIPs for nonattainment areas "shall require reasonable further progress." § 7502(c)(2). "Reasonable further progress" is defined as "such annual incremental reductions in emissions of the relevant air pollutants as are required by this part or may reasonably be required by [the EPA] for the purpose of ensuring attainment of the applicable [NAAQS] by the applicable date." § 7501(1). The Clean Air Act requires an area in a moderate or greater degree of nonattainment to reduce emissions of VOCs by fifteen percent in the first six years after November 15, 1990. § 7511a(b)(1)(A). For areas in a serious or greater degree of nonattainment, subsequent reductions in VOC emissions must average three percent per year over each consecutive three-year period until the area reaches attainment. § 7511a(c)(2)(B).

2. Reasonably Available Control Technology

SIPs for ozone nonattainment areas must also "provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology)." § 7502(c)(1). For nonattainment areas classified as moderate and above, SIPs

must "require the implementation of reasonably available control technology" with respect to all major sources of VOCs in the area and any sources that emit VOCs in the area that are covered by a control technique guideline. § 7511a(b)(2). The reasonably available control technology requirement also applies to major sources of NO_x. § 7511a(f).

3. New Source Review

SIPs governing nonattainment areas must require permits for the construction of new or modified sources of air pollution. §§ 7502(c)(5), 7503, 7410(a)(2)(C). The goal of New Source Review is to require permits to ensure that new or modified sources will not exacerbate the pollution problem in the nonattainment area. § 7503(a)(1)(A), (a)(2), (c). New Source permits for major sources of VOCs require the proposed source (1) to comply with the lowest achievable emissions rate and (2) to obtain pollution offsets representing equal or greater reductions of a pollutant at issue in the area. *Id.*

4. Conformity

The Act mandates that nonattainment and maintenance areas are subject to "conformity requirements," so that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan." § 7506(c)(1), (5). Federally funded projects must "conform" to SIPs, meaning that the projects will not "cause or contribute to any new violation," "increase the frequency or severity of any existing violation," or "delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." § 7506(c)(1)(B). These areas are also subject to the more specific transportation conformity

requirements, whereby federal agencies may not "approve, accept or fund any transportation plan, program or project unless" it conforms to an applicable SIP. § 7506(c)(2). With respect to transportation conformity requirements, the EPA is responsible for promulgating, and periodically updating, "criteria and procedures for demonstrating and assuring conformity in the case of transportation plans, programs, and projects." § 7506(c)(4)(B).

5. Contingency Measures

SIPs must include contingency measures that take effect automatically "if the area fails to make reasonable further progress, or to attain the [NAAQS] by the attainment date." §§ 7502(c)(9), 7511a(c)(9).

C. Anti-Backsliding Measures for Revoked NAAQS

The Clean Air Act requires the EPA to "complete a thorough review" of each NAAQS every five years and "make such revisions . . . and promulgate such new standards as may be appropriate." § 7409(d)(1). In promulgating new standards, if the EPA relaxes a NAAQS, it shall promulgate anti-backsliding measures for all areas that have not attained that standard as of the date of the relaxation. § 7502(e). The anti-backsliding measures "shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." *Id.*

D. Ozone NAAQS

In 1979, the EPA promulgated the first ozone NAAQS based on a one-hour average concentration of 0.12 parts per million (ppm). Revisions to the NAAQS for Photochemical Oxidants, 44 Fed. Reg. 8202, 8202 (Feb. 8, 1979). In 1997,

after determining that the one-hour NAAQS was inadequate to protect public health, the EPA promulgated a new NAAQS based on an eight-hour average of 0.08 ppm. NAAQS for Ozone, 62 Fed. Reg. 38,856, 38,858 (July 18, 1997). Although the EPA replaced the one-hour NAAQS with an eight-hour NAAQS, it determined that it would continue to enforce the one-hour NAAQS until "an area has attained air quality that meets the 1-hour standard." Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38,421, 38,424 (July 18, 1997). In a 2004 rule, the EPA revoked the one-hour NAAQS effective June 15, 2005. Final Rule to Implement the 8-Hour Ozone NAAQS—Phase 1, 69 Fed. Reg. 23,951, 23,951 (Apr. 30, 2004). This Court held that the EPA has the "authority to revoke the one-hour standard so long as adequate anti-backsliding provisions are introduced." *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 899 (D.C. Cir. 2006), *clarified on denial of reh'g*, 489 F.3d 1245 (D.C. Cir. 2007).

In 2008, the EPA determined that the 1997 NAAQS was inadequate to protect public health. The EPA therefore promulgated a new NAAQS of 0.075 ppm of ozone averaged over eight hours. NAAQS for Ozone, 73 Fed. Reg. 16,436, 16,436 (Mar. 27, 2008). "The 2008 ozone NAAQS retains the same general form and averaging time as the 0.08 ppm NAAQS set in 1997, but is set at a more stringent level." Implementation of the 2008 NAAQS for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12,264, 12,265 (Mar. 6, 2015).

E. The Final Rule

On March 6, 2015, the EPA finalized a rule that "revises existing regulations and guidance as appropriate to aid in the implementation of the 2008 ozone NAAQS." 80 Fed. Reg. at

12,265. As part of the Final Rule, the EPA revoked the 1997 NAAQS "for all purposes and establish[ed] anti-backsliding requirements for areas that remain designated nonattainment for the revoked NAAQS." *Id.*

II. STANDARD OF REVIEW

We will not set aside EPA action under the Clean Air Act unless we determine that such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). The EPA's interpretation of the Clean Air Act is reviewed under the familiar two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), whereby we first look to the statute's language to determine if Congress has "directly spoken to the precise question at issue." *Id.* at 842. If Congress has directly spoken to the precise question, then we must "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, "the statute is silent or ambiguous with respect to the specific issue," we defer to the EPA's interpretation of the Act so long as it "is based on a permissible construction of the statute." *Id.*

Under those standards, we review in turn the cross-petitions of South Coast and the Environmental Petitioners.

III. SOUTH COAST'S PETITION

We begin with the simpler of the two petitions, that of South Coast. South Coast petitions this Court to invalidate the EPA's interpretation of the CAA in the Final Rule that "states may not take credit for VOC or NO_x reductions occurring from sources outside the nonattainment area for purposes of meeting the 15 percent [rate-of-progress] and 3 percent [reasonable further progress] requirements." 80 Fed. Reg. at 12,273. South

Coast argues that the EPA was not required to interpret "in the area" in the context of the reasonable further progress requirement to mean "in the nonattainment area." *See* 42 U.S.C. § 7511a(b)(1)(B). In promulgating the Final Rule, the EPA explained that in light of this Court's decision in *NRDC 2009*, 571 F.3d at 1256, "there is no legal basis" for "allowing states to credit reductions achieved at sources outside the nonattainment area." 80 Fed. Reg. at 12,273. South Coast counters that our decision in *NRDC 2009* does not mandate the EPA's interpretation. Instead, South Coast contends that because downwind nonattainment areas are impacted by emissions from upwind areas, the EPA could reasonably interpret "in the area" in the context of the reasonable further progress requirement to mean the "transport couple area"—"a larger area consisting of the nonattainment area in question plus the upwind area from which emission reductions would be obtained."

The text here is unambiguous. The Clean Air Act requires nonattainment areas that are classified as moderate or above to plan for "reasonable further progress" measured from "baseline emissions," which are defined as "the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the" baseline year. 42 U.S.C. § 7511a(b)(1)(A), (b)(1)(B), (c)(2)(B), (d), (e). These statutory provisions refer to only one area, "the area." Further, the term appears in a section entitled "Moderate Areas," not a greater area. § 7511a(b); *see also* § 7511(c)(1).

South Coast contends that limiting the phrase "in the area" to nonattainment areas would produce absurd results. According to South Coast, it may be impossible for certain areas to achieve the necessary emissions reductions. Where the purpose of the Clean Air Act is served by interpreting "in the

area" to mean "transport couple area," South Coast argues that the statutory language is ambiguous.

However, the Clean Air Act provides for an alternative to reducing emissions of pollutants by fixed percentages. § 7511a(b)(1)(A)(ii), (c)(2)(B). Nonattainment areas may reduce emissions by less than 15 percent if they (1) implement controls on a broader range of new and existing stationary sources and (2) include in their SIP "all measures that can feasibly be implemented in the area, in light of technological achievability" and "measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher category." § 7511a(b)(1)(A)(ii). Likewise, nonattainment areas may reduce emissions by less than three percent if the SIP "includes all measures that can feasibly be implemented in the area, in light of technological achievability" and "measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification." § 7511a(c)(2)(B)(ii). Moreover, states may also ask the EPA to approve new boundaries for air quality control regions. *See* 42 U.S.C. § 7407(b)-(c). In light of the alternatives provided for in the Clean Air Act, South Coast has failed to meet the "exceptionally high burden" required to demonstrate absurdity. *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006).

In sum, considering the grammar and context of § 7511a(b)(1)(B), we hold at *Chevron* step one that "in the area" unambiguously refers to baseline emissions within the nonattainment area. Accordingly, we deny South Coast's petition.

IV. ENVIRONMENTAL PETITIONERS' PETITION

Environmental Petitioners petition this Court to vacate several parts of the Final Rule. We take each challenge in turn.

A. Waiver of Statutory Attainment Deadlines Associated with the 1997 NAAQS

Environmental Petitioners seek to invalidate the Final Rule's revocation of the 1997 NAAQS. 80 Fed. Reg. at 12,296. They argue that by revoking the 1997 NAAQS, the Final Rule arbitrarily waives the obligation to attain the 1997 NAAQS by the statutory deadline. The EPA counters that the Clean Air Act authorizes revocation of a superseded NAAQS so long as adequate anti-backsliding measures are in place.

We have already held that the EPA may revoke a previous NAAQS in full "so long as adequate anti-backsliding provisions are introduced." *South Coast*, 472 F.3d at 899. But in the Final Rule, the EPA failed to introduce adequate anti-backsliding provisions.

Pursuant to the Clean Air Act, anti-backsliding provisions "shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Penalties for not meeting attainment deadlines such as fees and activation of contingency measures are unambiguously "controls" because they are "designed to constrain ozone pollution." *South Coast*, 472 F.3d at 902-03. Likewise, reclassification is also a control because it is "designed to constrain ozone pollution." *See id.* Areas that fail to timely attain are required to reclassify and be subject to more stringent emissions controls. 42 U.S.C. §§ 7511(b)(2), 7511a(i). If the EPA were allowed to remove

the deadlines that trigger those penalties, "a state could go unpenalized without ever attaining" the NAAQS. *South Coast*, 472 F.3d at 902-03.

The Final Rule provides that "the EPA is required to determine whether an area attained the 1-hour or 1997 ozone NAAQS by the area's attainment date solely for anti-backsliding purposes to address an applicable requirement for nonattainment contingency measures and CAA section 185 fee programs." 80 Fed. Reg. at 12,315. But the Final Rule specifically waives the obligation "to reclassify an area to a higher classification for the 1997 ozone NAAQS" based on a failure to meet the 1997 NAAQS attainment deadlines. *Id.* As a result, the Final Rule allows areas that fail to timely attain to avoid being subject to more stringent emissions controls. Therefore, the Final Rule relaxed the controls applicable to areas designated nonattainment under the 1997 NAAQS in contravention of the anti-backsliding requirement. Accordingly, we grant this part of Environmental Petitioners' petition and vacate the Final Rule as to the waived statutory attainment deadlines associated with the 1997 NAAQS.

B. Removal of Anti-Backsliding Requirements for Areas Designated Nonattainment Under the 1997 NAAQS

Environmental Petitioners also seek to invalidate other provisions of the Final Rule that they allege contravene the Clean Air Act's anti-backsliding requirements. The Final Rule provides for three procedures by which areas designated nonattainment under the 1997 NAAQS may remove certain anti-backsliding requirements and shift other requirements from the active portion of their SIPs to the contingency measures portion. 80 Fed. Reg. at 12,299-12,304.

1. Orphan Nonattainment Areas

The first procedure applies to areas designated attainment for the 2008 NAAQS, but nonattainment for the 1997 NAAQS. *Id.* at 12,301-12,302. Environmental Petitioners refer to these areas as "orphan nonattainment areas." For orphan nonattainment areas, "states are not required to adopt any outstanding applicable requirements for the revoked 1997 standard." *Id.* at 12,302. Under the Final Rule, orphan nonattainment areas "are not subject to transportation or general conformity requirements." *Id.* at 12,300. In addition, orphan nonattainment areas are no longer required to retain New Source Review programs in their SIPs. *Id.* at 12,299. Instead, these areas are subject to Prevention of Significant Deterioration ("PSD") requirements. *Id.* States may also request that other anti-backsliding requirements be shifted to their list of contingency measures based on initial 2008 designations. *Id.* at 12,314. Finally, the Final Rule does not require orphan nonattainment areas to submit maintenance plans under § 7505a, and deems the requirement for maintenance under § 7410(a)(1) to be satisfied by the area's approved Prevention of Significant Deterioration SIP. *Id.* at 12,302, 12,314.

(a) Environmental Petitioners argue that elimination of New Source Review and conformity in orphan nonattainment areas violates the anti-backsliding requirements. The EPA argues that the Final Rule lawfully lifts the requirement for New Source Review and conformity for orphan nonattainment areas because the 2008 NAAQS is more stringent than the 1997 NAAQS. According to the EPA, areas that have attained the 2008 NAAQS have necessarily attained the 1997 NAAQS.

This Court previously held that New Source Review is unambiguously a "control" under § 7502(e). *South Coast*, 472

F.3d at 901-02. Environmental Petitioners also contend that conformity is a "control" under § 7502(e). The EPA does not address general conformity requirements, but argues that our decision in *South Coast* does not require transportation conformity as an anti-backsliding control. According to the EPA, in *South Coast* we held that only existing motor vehicle emissions budgets are required anti-backsliding controls, not the conformity requirement itself.

The Final Rule provides that 1997 nonattainment areas are "no longer . . . required to demonstrate transportation conformity for the 1997" NAAQS after the 1997 NAAQS is revoked. 80 Fed. Reg. at 12,284. Pursuant to the Final Rule, "the latest approved or adequate emission budgets for a previous ozone NAAQS . . . would continue to be used in conformity determinations for the 2008 ozone NAAQS until emission budgets are established and found adequate or are approved for the 2008 ozone NAAQS." *Id.* But the Final Rule provides that areas "designated attainment for the 2008 ozone NAAQS are not subject to transportation or general conformity requirements regardless of their designation for the 1997 ozone NAAQS at the time of revocation of that NAAQS." *Id.* at 12,300.

The EPA is correct that *South Coast* held only that "one-hour conformity emissions budgets constitute 'controls' under section 172(e)." 472 F.3d at 904. Furthermore, on rehearing, we clarified that our decision with respect to conformity determinations "speaks only to the use of one-hour motor vehicle emissions budgets as part of eight-hour conformity determinations until eight-hour motor vehicle emissions budgets are available." *South Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007). But our decision that emissions budgets constitute controls does not preclude that "conformity" requirements in general are controls.

Conformity requirements are designed to constrain ozone pollution as they have the "purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards." 42 U.S.C. § 7506(c)(1)(A). Therefore, conformity requirements also are unambiguously "controls" under § 7502(e).

Although orphan nonattainment areas were originally designated attainment under the 2008 NAAQS, they have never been redesignated to attainment pursuant to § 7407(d)(3)(E) under the 1997 NAAQS. The EPA may not permit termination of New Source Review and conformity in the absence of formal redesignation under § 7407(d)(3)(E). *See Natural Res. Def. Council v. EPA*, 643 F.3d 311, 322-23 (D.C. Cir. 2011) (rejecting final rule that allowed attainment of the 1997 NAAQS to permit termination of the fees control for the one-hour NAAQS). As we stated in our prior *South Coast* opinion, "EPA is required by statute to keep in place measures intended to constrain ozone levels—even the ones that apply to outdated standards—in order to prevent backsliding." *South Coast*, 472 F.3d at 905. Accordingly, we grant Environmental Petitioners' petition and vacate the Final Rule as to the removal of New Source Review and conformity controls from orphan nonattainment areas.

(b) Environmental Petitioners argue that permitting states to shift other anti-backsliding requirements to contingency measures violates the Clean Air Act. The EPA responds that states must continue implementing all such measures in previously approved SIPs unless the EPA approves requests to amend SIPs to convert such requirements into contingency measures. For the same reasons that the EPA may not permit states to eliminate New Source Review and transportation conformity, the EPA also may not permit states to shift other anti-backsliding requirements to their list of contingency

measures without complying with the statutory requirements for redesignation. Therefore, we grant Environmental Petitioners' petition and vacate the Final Rule as to permitting states to move anti-backsliding requirements for orphan nonattainment areas to their list of contingency measures based on initial 2008 designations.

(c) Likewise, without requiring nonattainment areas to meet the requirements for reattainment under § 7407(d)(3)(E), the EPA improperly waived the requirement that states adopt outstanding applicable requirements for the revoked 1997 NAAQS. Therefore, we grant Environmental Petitioners' petition and vacate the Final Rule as to waiving the requirement that states adopt outstanding applicable requirements for the revoked 1997 NAAQS.

(d) Environmental Petitioners argue that the Final Rule impermissibly waives the maintenance requirements under § 7410(a)(1) for orphan nonattainment areas. The Final Rule allows approved Prevention of Significant Deterioration SIPs to satisfy the obligation to submit a maintenance plan under § 7410(a)(1). 80 Fed. Reg. at 12,302. Prevention of Significant Deterioration SIPs bar the construction of major sources of emissions without compliance with certain statutory requirements. *See* § 7475(a).

The Final Rule also does not require orphan nonattainment areas to submit a maintenance plan under § 7505a. 80 Fed. Reg. at 12,302. The EPA contends that there is no statutory requirement for a separate maintenance plan for orphan nonattainment areas. However, one of the five requirements for redesignation under § 7407(d)(3)(E) is that the EPA "approve[] a maintenance plan for the area as meeting the requirements of section 7505a of this title." § 7407(d)(3)(E)(iv). Therefore, the Final Rule is inconsistent

with the clear text of § 7407(d)(3)(E) in waiving the § 7505a(a) maintenance plan requirement for orphan nonattainment areas.

Environmental Petitioners also appear to contend that even with a § 7505a maintenance plan, the Final Rule would violate the maintenance requirement under § 7410(a)(1) because § 7410(a)(1) requires something more than a Prevention of Significant Deterioration SIP and a § 7505a maintenance plan. Specifically, Environmental Petitioners argue that a SIP for an orphan nonattainment area must include a plan to ensure that pollution from existing sources and new sources not subject to the PSD requirements does not cause those areas to fall into violation of the 2008 NAAQS. According to Environmental Petitioners, without such safeguards, existing measures have proved insufficient to provide for continuing attainment of the 2008 NAAQS.

Section 7410(a)(1) provides that SIPs must provide for "implementation, maintenance, and enforcement" of the NAAQS. The statute clearly requires "maintenance" provisions to be included in SIPs, but the statute does not require a separate SIP component entitled "maintenance plan." In fact, the statute provides no guidance for what SIPs must include in order to comply with the § 7410(a)(1) maintenance requirement beyond the criteria laid out in § 7410(a)(2). Environmental Petitioners do not allege the agency has eliminated § 7410(a)(2)'s requirements. Therefore, the Final Rule will be upheld so long as it is neither unreasonable nor arbitrary.

The EPA justified the rule by explaining that a § 7471 "PSD SIP, in conjunction with the other already-existing statutory and regulatory provisions . . . are generally sufficient to prevent backsliding, and to satisfy the requirement for maintenance under" § 7410(a)(1). 80 Fed. Reg. at 12,302.

According to the EPA, the "control measures implemented by these areas and included in their SIPs have already produced sufficient emissions reductions to achieve air quality that attained the 1997 ozone NAAQS, and resulted in an attainment designation for the more stringent 2008 ozone NAAQS." *Id.* The EPA therefore concluded that "the burden of developing an approvable [§ 7410(a)(1)] maintenance plan for the 2008 ozone NAAQS would outweigh any compensating benefit for an area that is already attaining that NAAQS and that is subject to prior nonattainment requirements which are already incorporated into the SIP and have been sufficient to bring the area into attainment of both the 1997 and 2008 standards." *Id.*

The EPA adequately explained why measures that achieved attainment of both the 1997 NAAQS and the 2008 NAAQS should be adequate to maintain the same 2008 NAAQS that has already been attained. The EPA also thoughtfully responded to comments that suggested the measures on which the EPA relies are insufficient to satisfy the § 7410(a)(1) maintenance requirement. Under these circumstances, the EPA's determination is neither unreasonable nor arbitrary.

Environmental Petitioners contend that the EPA has not addressed comments that identified examples of orphan nonattainment areas that purportedly were in fact not attaining the 2008 NAAQS. These comments were not raised in regard to the § 7410(a)(1) maintenance requirement. Instead, they appear to have been raised in response to other alleged shortcomings with the proposed rule. Moreover, the EPA appears to have addressed those arguments in its response to comments. Response to Comments on Implementation of the 2008 NAAQS for Ozone: SIP Requirements (Feb. 13, 2015) at 133. In any event, the comments are directed toward enforcement issues with the current NAAQS, not issues with

the underlying rule. Accordingly, the EPA's decision not to implement a separate § 7410(a) maintenance plan is neither arbitrary nor unreasonable.

Therefore, we grant Environmental Petitioners' petition and vacate the Final Rule with respect to the EPA's waiving of the § 7505a(a) maintenance plan requirement for orphan nonattainment areas, and we deny Environmental Petitioners' petition with respect to the § 7410(a)(1) maintenance requirement's application to orphan nonattainment areas in other respects.

2. Formal Redesignation

The second procedure by which areas designated nonattainment under the 1997 NAAQS may remove certain anti-backsliding requirements and shift other requirements from the active part of their SIPs to the contingency measures part involves areas designated nonattainment under both the 2008 NAAQS and the 1997 NAAQS. 80 Fed. Reg. at 12,303-04. The Final Rule allows states to seek formal redesignation to attainment based on the 2008 NAAQS with an approved maintenance plan that addresses the current and revoked NAAQS. *Id.* at 12,304. Under this procedure, states may terminate and remove any applicable anti-backsliding requirements, including New Source Review requirements, from the active part of their SIPs. *Id.*

The EPA properly subjected these areas to anti-backsliding requirements when the 1997 NAAQS was revoked because they were still in nonattainment at the time of revocation. *See* § 7502(e). The Act is ambiguous as to whether such areas must retain these anti-backsliding requirements after they are successfully redesignated as attainment areas under the 2008 NAAQS. Unlike orphan nonattainment areas, these areas

have met the statutory requirements for redesignation under § 7407(d)(3)(E). Therefore, these areas have shown, for example, that "the[ir] improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan." § 7407(d)(3)(E)(iii). Although these areas may not have been redesignated with respect to the 1997 NAAQS, by meeting the statutory requirements for redesignation with respect to the 2008 NAAQS, they necessarily also meet the less restrictive requirements for redesignation under the 1997 NAAQS. Accordingly, it is reasonable for these areas to shed their anti-backsliding controls by virtue of meeting the five statutory criteria for redesignation. Therefore, we deny Environmental Petitioners' petition with respect to this aspect of the Final Rule.

3. Redesignation Substitute

The third procedure by which areas designated nonattainment under the 1997 NAAQS may remove certain anti-backsliding requirements and shift other requirements from the active part of their SIPs to the contingency measures part also involves areas designated nonattainment under both the 2008 NAAQS and the 1997 NAAQS. This procedure allows states "to submit a redesignation substitute request for a revoked NAAQS." 80 Fed. Reg. at 12,304. The redesignation substitute request "is based on" the Clean Air Act's "criteria for redesignation to attainment" under § 7407(d)(3)(E), 80 Fed. Reg. at 12,305, but it does not require full compliance with all five conditions in § 7407(d)(3)(E). The Clean Air Act unambiguously requires nonattainment areas to satisfy all five of the conditions under § 7407(d)(3)(E) before they may shed controls associated with their nonattainment designation. The redesignation substitute lacks the following requirements of § 7407(d)(3)(E): (1) the EPA has "fully approved" the

§ 7410(k) implementation plan; (2) the area's maintenance plan satisfies all the requirements under § 7505a; and (3) the state has met all relevant § 7410 requirements. 80 Fed. Reg. at 12,305. Because the "redesignation substitute" does not include all five statutory requirements, it violates the Clean Air Act. Therefore, we grant Environmental Petitioners' petition and vacate the Final Rule as to the "redesignation substitute."

C. Baseline Year

The Clean Air Act measures Reasonable Further Progress by using a baseline year as the starting point. Nonattainment areas must reduce emissions of pollutants by fixed percentages compared to the pollutant level in a baseline year. 42 U.S.C. § 7511a(b)(1)(A), (B). The initial baseline year under the statute is 1990, *id.*, but the statute does not define baseline years for future NAAQS. In the Final Rule, the EPA defined the baseline year as 2011, which is the "calendar year for the most recently available triennial emission inventory at the time [rate-of-progress/reasonable further progress] plans are developed." 80 Fed. Reg. at 12,272. The Final Rule also allows states to select an alternative baseline year between 2008 and 2012 if they provide appropriate justification. *Id.*

Environmental Petitioners argue that this rule is unlawful because the Clean Air Act requires the baseline year to be the year of designation/classification, which in the case of the 2008 NAAQS is 2012. While an initial baseline year of 1990 is specified by statute, the Clean Air Act is silent regarding future baseline years. Therefore, this question is governed by *Chevron* step two. The Reasonable Further Progress requirement ensures that states make regular emissions reductions to achieve timely attainment. *See* § 7511a. To monitor their progress in achieving regular emissions reductions, states are required to prepare an emissions

inventory every three years. § 7511a(a)(3)(A). The EPA's selection of 2011 as the baseline year is reasonable because it is tied to the three-year statutory cycle for emissions inventories. *Id.* Therefore, we deny Environmental Petitioners' challenge to the setting of 2011 as the baseline year.

With respect to selection of an alternative baseline year between 2008 and 2012, the EPA has failed to provide a statutory justification. The "EPA must 'ground its reasons for action or inaction in the statute,' rather than on 'reasoning divorced from the statutory text.'" *Natural Res. Def. Council v. EPA* (*NRDC 2014*), 777 F.3d 456, 468 (D.C. Cir. 2014) (quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)). The EPA based its creation of the alternative baseline year option on the convenience of allowing nonattainment areas to receive credit for emissions reduction measures adopted prior to the baseline year. Because the EPA has no statutory basis for the alternative baseline year provision, we grant Environmental Petitioners' petition and vacate the Final Rule as to the alternative baseline year option.

D. Fifteen-Percent Rule

The Clean Air Act requires an area in a moderate or greater degree of nonattainment to reduce emissions of VOCs by fifteen percent within six years of the baseline year. 42 U.S.C. § 7511a(b)(1)(A). The Final Rule interprets this requirement as meaning that "an area that has already met the 15 percent requirement for VOC under either the 1-hour ozone NAAQS or the 1997 ozone NAAQS (for the first 6 years after the [reasonable further progress] baseline year for the prior ozone NAAQS) would not have to fulfill that requirement again." 80 Fed. Reg. at 12,271; *see also id.* at 12,276. The Environmental Petitioners argue that the rule is unlawful because the

interpretation allows areas to avoid actually achieving emissions reductions to satisfy the fifteen-percent requirement.

The Final Rule does not require nonattainment areas that have previously revised their SIPs to address the Clean Air Act's fifteen-percent requirement to revise their SIPs again. If an area fails to achieve this reduction according to their plan, a petitioner may file for injunctive relief or the EPA may pursue an enforcement action. Environmental Petitioners argue that the Final Rule allows nonattainment areas to omit the fifteen-percent requirement even if they never previously achieved a fifteen-percent reduction. The EPA has represented that the provision at issue in this case is the same as that at issue in *NRDC 2009*, 571 F.3d 1245. In *NRDC 2009*, the EPA rule allowed areas that had revised their SIPs to include a fifteen-percent VOC emissions reduction to not be subjected to a second fifteen-percent requirement under the new NAAQS. *Id.* at 1261. We held that "the EPA reasonably resolved a statutory ambiguity under step 2 of the framework set out in *Chevron*." *Id.* at 1262. We accept the EPA's representation that the fifteen-percent requirement in the Final Rule is the same as the provision at issue in *NRDC 2009*. Therefore, because the EPA's interpretation is permissible, we deny Environmental Petitioners' challenge to the fifteen-percent reduction plan waiver.

E. Area-Wide Emissions Reductions

The Clean Air Act requires nonattainment areas to achieve "such reductions in emissions from existing sources in the area" as can be achieved by the adoption of Reasonably Available Control Technology ("RACT"). 42 U.S.C. § 7502(c)(1). The Final Rule allows nonattainment areas to satisfy the NO_x RACT requirement by using averaged area-wide emissions reductions. 80 Fed. Reg. at 12,278-79. Thus,

"states may demonstrate as part of their NO_x RACT SIP submittal that the weighted average NO_x emission rate from all sources in the nonattainment area subject to RACT meets NO_x RACT requirements." *Id.* at 12,278. Environmental Petitioners argue that this rule violates the clear terms of the Clean Air Act, which require each individual source to meet the NO_x RACT requirement.

They contend that § 7511a(b)(2) requires implementation of RACT with respect to "all" major sources, and "all" means "each one of." Section 7511a(b)(2) requires states to submit revisions to SIPs "to include provisions to require the implementation of reasonably available control technology under section 7502(c)(1) of this title with respect to each of" three specific categories of VOC sources, including "all . . . major stationary sources of VOCs that are located in the area." Pursuant to § 7511a(f), that plan provision applies to "major stationary sources" of NO_x. Section 7511a(b)(2) refers to "all" "major stationary sources" and requires implementation of RACT "with respect to" that entire category of sources. The statute does not specify that "each one of" the individual sources within the category of "all" "major sources" must implement RACT. Environmental Petitioners argue that the only reasonable dictionary definition of "all" when used with a plural noun (major stationary sources) is "each one of." Instead, when used to refer to a plural noun, the word "all" may express an aggregate and be defined as the "whole number or sum of." *Black's Law Dictionary* 74 (6th ed. 1990). This definition is consistent with the categorical approach taken by the EPA. In short, the plain language—in the context of the interrelationship between §§ 7511a(b)(2) and 7502(c)(1)—does not mandate RACT for each individual source.

Therefore, as discussed above, we cannot strike down the EPA's reasoned interpretation of the ambiguous term at

Chevron step one, *see* Section II, *supra*. We must instead uphold the EPA's interpretation, provided it is reasonable, under *Chevron* step two. *See Chevron*, 467 U.S. at 842-43.

We further note that § 7511a(b)(2) refers to § 7502(c)(1), which provides that SIP "provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology)." § 7502(c)(1). Section 7502(c)(1) does not require reductions from each individual major source. Instead, it requires "reductions in emissions from existing sources in the area," and other than mandating that implementation be as "expeditious[] as practicable," the section is ambiguous as to how areas are required to achieve those reductions.

The EPA's interpretation reasonably allows nonattainment areas to meet RACT-level emissions requirements through averaging within a nonattainment area. Therefore, we deny Environmental Petitioners' petition as to the EPA's construction of the RACT requirement.

F. Waiving Requirements for Areas Designated Maintenance Under the 1997 NAAQS

Environmental Petitioners seek to have us invalidate several provisions of the Final Rule that apply to areas designated attainment for the 2008 NAAQS after being designated maintenance areas under the 1997 NAAQS ("orphan maintenance areas").

1. Elimination of Transportation Conformity

As with orphan nonattainment areas, the Final Rule declares that orphan maintenance areas are "no longer . . . required to demonstrate transportation conformity for the 1997 ozone NAAQS after the 1997 ozone NAAQS is revoked." 80 Fed. Reg. at 12,284. Environmental Petitioners argue that the elimination of transportation conformity in orphan maintenance areas violates the Clean Air Act. Section 7506(c)(5) provides that conformity requirements apply to "(A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and (B) an area that was designated as a nonattainment area but that was later redesignated . . . as an attainment area and that is required to develop a maintenance plan under section 7505a."

We previously explained that the EPA lacks the authority to revoke transportation conformity for orphan nonattainment areas. *See* Section IV.B.1(a), *supra*. The EPA argues that it is permitted to remove conformity requirements for orphan maintenance areas because such areas became attainment areas for the 1997 NAAQS prior to the date on which it was revoked. As a result, the EPA argues that these areas are not subject to anti-backsliding requirements, so there is no statutory requirement that they maintain the transportation conformity requirement. We disagree.

In contrast to nonattainment areas, which § 7506(c)(5) references by their status as "nonattainment area[s]," maintenance areas are referenced by previous events: "an area that *was* designated as a nonattainment area but that *was* later redesignated . . . as an attainment area and that is required to develop a maintenance plan under section 7505a." § 7506(c)(5) (emphases added). Although the Final Rule

revoked the 1997 NAAQS, it cannot revoke the statutory status of orphan maintenance areas. Even after revocation of the 1997 NAAQS, an orphan maintenance area is "an area that *was* designated as a nonattainment area but that *was* later redesignated . . . as an attainment area."

It is irrelevant that this previous designation and redesignation occurred before the prior NAAQS was revoked because nothing in the Clean Air Act allows the EPA to waive this unambiguous statutory requirement. Moreover, the Act clearly contemplates new NAAQS being promulgated within ten years of an area's redesignation to attainment because the statute requires the EPA to review NAAQS every five years and to "promulgate such new standards as may be appropriate." § 7409(d)(1). Therefore, the revocation of the 1997 NAAQS does not waive the unambiguous mandate that conformity requirements apply to orphan maintenance areas. Accordingly, we grant Environmental Petitioners' petition as to the elimination of transportation conformity in orphan maintenance areas.

2. Section 7410(a)(1) Maintenance Planning Requirement

Environmental Petitioners contend that the Final Rule unlawfully waives the § 7410(a)(1) maintenance planning requirement for the 2008 NAAQS. 80 Fed. Reg. at 12,301. The Final Rule provides that an orphan maintenance area's § 7505a(a) maintenance plan for the revoked 1997 NAAQS and the state's approved Prevention of Significant Deterioration SIP satisfy the area's obligations for maintenance of the 2008 NAAQS under § 7410(a)(1) of the Clean Air Act. 80 Fed. Reg. at 12,301, 12,314. Environmental Petitioners argue the Prevention of Significant Deterioration SIP is the sole maintenance plan requirement for the 2008 NAAQS, and it

only addresses pollution from very large sources. According to Environmental Petitioners, the EPA has no statutory authority to waive the § 7410(a)(1) maintenance requirement.

The EPA justified its rule on the ground that orphan maintenance areas have already been redesignated to attainment for the 1997 NAAQS and designated attainment for the more stringent 2008 NAAQS. 80 Fed. Reg. at 12,301. According to the EPA, "[a]ny further [§ 7410(a)(1)] maintenance plan requirement under the 2008 . . . NAAQS would be unnecessarily burdensome." *Id.* Although the § 7505a(a) maintenance plans for orphan maintenance areas "were established for maintenance of the 1997 . . . NAAQS, . . . they also provide a foundation for maintenance of the 2008 . . . NAAQS, which, in combination with other active requirements for the 2008 ozone NAAQS, contribute to maintenance of the new standard." *Id.* The Final Rule explained that "no additional measures beyond the prior [§ 7505a(a)] maintenance plans and the PSD plans for the 2008 [NAAQS] should be necessary to provide for maintenance in those areas." *Id.*

We previously addressed the alleged waiver of the § 7410(a)(1) maintenance requirement with respect to orphan nonattainment areas. *See* Section IV.B.1(d), *supra*. As we explained, § 7410(a)(1) does not provide clear requirements as to what SIPs must include in order to comply with the § 7410(a)(1) maintenance requirement beyond the criteria laid out in § 7410(a)(2). As with orphan nonattainment areas, with respect to orphan maintenance areas, the EPA adequately explained why no additional measures beyond the § 7505a(a) maintenance plans and the Prevention of Significant Deterioration plans for the 2008 NAAQS are necessary to provide for maintenance of the 2008 NAAQS. Therefore, we deny Environmental Petitioners' petition with respect to the

§ 7410(a)(1) maintenance requirement's application to "orphan maintenance areas."

3. Elimination of Second Maintenance Plan

Environmental Petitioners challenge the Final Rule's elimination of the requirement that orphan maintenance areas prepare a second maintenance plan under § 7505a(b). 80 Fed. Reg. at 12,301. Section 7505a(b) provides that "8 years after redesignation of any area as an attainment area," states "shall submit . . . an additional revision of the" maintenance plan "for 10 years after the expiration of the 10-year period referred to in subsection (a)." The EPA argues that the requirement for a second 10-year maintenance plan is based on an area's designation status under an operative NAAQS. When the 1997 NAAQS was revoked, the orphan maintenance areas' designations as maintenance under the 1997 NAAQS were revoked as well.

The statutory requirement for a second maintenance plan is unambiguous. § 7505a(b). And the Clean Air Act clearly contemplates new NAAQS being promulgated within eight years of an area's redesignation to attainment because the statute requires the EPA to review NAAQS every five years and to "promulgate such new standards as may be appropriate." § 7409(d)(1). Therefore, the revocation of the old NAAQS does not waive the unambiguous requirement for second maintenance plans under § 7505a(b). Accordingly, we grant Environmental Petitioners' petition and vacate the Final Rule provision waiving the second 10-year maintenance plan for "orphan maintenance areas."

V. Conclusion

For the reasons set forth above, we deny South Coast's petition for review and grant in part and deny in part the Environmental Petitioners' petition. Specifically, we grant Environmental Petitioners' petition and vacate as to (1) waiver of the statutory attainment deadlines associated with the 1997 NAAQS; (2) removal of New Source Review and conformity controls from orphan nonattainment areas; (3) grant of permission to states to move anti-backsliding requirements for orphan nonattainment areas to their list of contingency measures based on initial 2008 designations; (4) waiver of the requirement that states adopt outstanding applicable requirements for the revoked 1997 NAAQS; (5) waiver of the § 7505a(a) maintenance plan requirement for orphan nonattainment areas; (6) creation of the "redesignation substitute"; (7) creation of an alternative baseline year option; (8) elimination of transportation conformity in orphan maintenance areas; and (9) waiver of the requirement for a second 10-year maintenance plan for orphan maintenance areas. In all other respects, Environmental Petitioners' petition is denied.

So ordered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sierra Club, et al.,	)	
Petitioners,	)	
v.	)	No. 15-1123
	)	(consolidated with 15-1115)
United States Environmental Protection Agency, et al.,	)	
Respondent.	)	

DECLARATION OF WILLIAM WEHRUM

1. I, William L. Wehrum, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my own personal knowledge or on information supplied to me by United States Environmental Protection Agency ("EPA") employees under my supervision.

2. I am the Assistant Administrator for the Office of Air and Radiation ("OAR") at EPA, a position I have held since November 13, 2017. Previously I served as EPA's Acting Assistant Administrator for Air and Radiation from 2005 to 2007, as well as Principal Deputy Assistant Administrator and Counsel to the Assistant Administrator for Air and Radiation from 2001 to 2005.

3. OAR is the EPA office that develops national programs, technical policies, and regulations for controlling air pollution. OAR's assignments include protecting public health and welfare, pollution prevention, and air quality and addressing air pollution impacts of industrial air pollution, pollution from vehicles and engines, toxic air pollutants, acid rain, stratospheric ozone depletion, and climate change.

4. Of particular relevance to the above-captioned case, OAR is the office within EPA that is primarily responsible for the development and implementation of regulations, policy, and guidance associated with national ambient air quality standards ("NAAQS") under the Clean Air Act ("CAA"), including implementation of the NAAQS.

5. Accordingly, I am providing this declaration to explain EPA's analysis of the impacts of the Court's vacatur of certain provisions of the 2008 Ozone SIP Requirements Rule. Specifically, this declaration explains the impacts of the Court's vacatur of the Rule with respect to: (1) controls in "Orphan Nonattainment Areas," i.e., areas that were designated nonattainment for the 1997 standard, have not been formally redesignated to attainment for that standard, but were designated attainment for the 2008 standard; and (2) the transportation conformity requirement in "Orphan Maintenance Areas," i.e., areas that were initially designated nonattainment for the 1997 standard, were later formally redesignated to attainment for the 1997 standard,

and met the requirement to have a maintenance plan for that standard under section 175A of the Act, and additionally were designated attainment for the 2008 standard.

6. Immediate vacatur of these provisions upon issuance of the mandate will cause significant gaps in the Agency's implementation structure and will injure state and local planning organizations and regulated entities that were acting in accordance with and good-faith reliance on the SIP Requirements Rule. A remand of the SIP Requirements Rule without vacatur will allow the Agency time to implement the effects of the decision and assess what policy changes are necessary or advisable in light of the decision; to provide guidance to affected agencies, including federal, state, local, and tribal air agencies and regulated entities; and to provide adequate planning time to those entities.

Summary of Affected Areas[1]

7. There are 69 Orphan Maintenance Areas. As shown in the Tables 1 and 2, 63 of these areas are complete Orphan Maintenance Areas and 6 of these areas are partial Orphan Maintenance Areas—"partial" meaning only certain counties within the 1997 ozone NAAQS maintenance area were designated attainment for the 2008 ozone NAAQS, while the remainder of the area was designated as nonattainment for the 2008 ozone NAAQS.

[1] Analysis in this section is based on information that is publicly available on EPA's "Green Book" webpage (https://www.epa.gov/green-book).

Table 1: Orphan Maintenance Areas

1997 Ozone NAAQS Area Name	State
Allegan County	MI
Altoona	PA
Beaumont-Port Arthur	TX
Benton Harbor	MI
Benzie County	MI
Birmingham	AL
Boston-Manchester-Portsmouth (SE)	NH
Canton-Massillon	OH
Cass County	MI
Charleston	WV
Clarksville-Hopkinsville	TN, KY
Clearfield and Indiana Counties	PA
Dayton-Springfield	OH
Detroit-Ann Arbor	MI
Door County	WI
Erie	PA
Evansville	IN
Flint	MI
Fort Wayne	IN
Franklin County	PA
Fredericksburg	VA
Grand Rapids	MI
Greene County	IN
Greene County	PA
Hancock, Knox, Lincoln and Waldo Counties	ME
Harrisburg-Lebanon-Carlisle	PA
Haywood and Swain Counties (Great Smoky National Park)	NC
Huntington-Ashland	WV, KY
Huron County	MI
Indianapolis	IN
Jackson County	IN
Johnstown	PA
Kalamazoo-Battle Creek	MI

Kent and Queen Anne's Counties	MD
Kewaunee County	WI
La Porte County	IN
Lansing-East Lansing	MI
Las Vegas	NV
Lima	OH
Louisville	KY
Macon	GA
Madison and Page Counties (Shenandoah National Park)	VA
Manitowoc County	WI
Mason County	MI
Muncie	IN
Murray County (Chattahoochee National Forest)	GA
Muskegon	MI
Norfolk-Virginia Beach-Newport News (Hampton Roads)	VA
Parkersburg-Marietta	WV, OH
Portland	ME
Raleigh-Durham-Chapel Hill	NC
Richmond-Petersburg	VA
Rocky Mount	NC
Scranton-Wilkes-Barre	PA
South Bend-Elkhart	IN
State College	PA
Steubenville-Weirton	OH, WV
Terre Haute	IN
Tioga County	PA
Toledo	OH
Wheeling	WV, OH
York	PA
Youngstown-Warren-Sharon	OH, PA

Table 2: Partial Orphan Maintenance Areas

1997 Ozone NAAQS Area Name	State	Orphan Portion of the Area
Atlanta	GA	Barrow, Caroll, Hall, Spalding and Walton Counties
Charlotte-Gastonia-Rock Hill	NC, SC	Parts of Cabarrus, Gaston, Lincoln, Rowan and Union Counties in NC and part of York County, SC
Cincinnati-Hamilton	OH, KY, IN	Parts of Boone, Campbell and Kenton Counties in KY
Knoxville	TN	Jefferson, Loudon and Sevier Counties, part of Anderson County and part of Cocke County
Milwaukee-Racine	WI	The entire area with the exception of the eastern part of Kenosha County
St. Louis	MO, IL	Jersey County, IL

8. There are 13 Orphan Nonattainment Areas. As shown in Tables 3 and 4, 9 of these areas are complete Orphan Nonattainment Areas and 4 of these areas are partial Orphan Nonattainment Areas—"partial" meaning only certain counties within the 1997 ozone NAAQS nonattainment area were designated attainment for the 2008 ozone NAAQS, while the remainder of the area was designated as nonattainment for the 2008 ozone NAAQS.

Table 3: Orphan Nonattainment Areas

1997 Ozone NAAQS Area Name	State	Within the OTR?[2]
Albany-Schenectady-Troy	NY	Yes
Buffalo-Niagara Falls	NY	Yes
Essex County (Whiteface Mountain)	NY	Yes
Jefferson County	NY	Yes
Poughkeepsie	NY	Yes
Providence (all of Rhode Island)	RI	Yes
Rochester	NY	Yes
Springfield (Western Massachusetts)	MA	Yes
Sutter County (Sutter Buttes)	CA	No

Table 4: Partial Orphan Nonattainment Areas

1997 Ozone NAAQS Area Name	State	Within the OTR?	Orphan Portion of the Area
Boston-Lawrence-Worcester (Eastern Mass)	MA	Yes	Entire area except for Dukes County
Amador and Calaveras Counties (Central Mountain Counties)	CA	No	Amador County
Mariposa and Tuolumne Counties (Southern Mountain Counties)	CA	No	Tuolumne County
Philadelphia-Wilmington-Atlantic City	PA, NJ, MD, DE	Yes	Kent County, DE

[2] If an area is in the ozone transport region (OTR) under CAA section 184, 42 U.S.C. § 7511c, it is subject to certain minimum statutorily defined control technology and nonattainment permitting requirements regardless of its designation and classification status.

Impacts Related to Transportation Conformity

9. EPA has issued regulations to implement the transportation conformity requirements contained in section 176(c) of the Clean Air Act. See 40 C.F.R. part 93. In general, those regulations require both: (1) areas designated as nonattainment; and (2) areas redesignated from nonattainment to attainment and required, as a condition of redesignation, to have an approved maintenance plan under section 175A of the Act (commonly referred to as "maintenance areas"), must demonstrate that transportation plans, transportation improvement programs (TIPs), and transportation projects "conform to" the applicable SIP. The regulations also describe how transportation conformity determinations are made. The transportation conformity process involves state air quality and transportation agencies, metropolitan planning organizations, transit agencies, EPA, and the Department of Transportation.

10. The Court's vacatur of EPA's determination that transportation conformity requirements do not, after the 1997 ozone NAAQS was revoked, apply to areas that had been required to show conformity to that standard when it was in effect will significantly disrupt transportation planning in both orphan nonattainment areas and orphan maintenance areas. EPA has received communications from potentially affected state and local agencies detailing the disruptive impacts of the Court's decision. See Attachment 1. Most of the complete Orphan Nonattainment and Maintenance Areas are not determining transportation conformity for any CAA pollutant because they have been designated as attainment for all currently existing

NAAQS. State and local governments for affected areas may no longer have the administrative and technical capacity to implement the transportation conformity-related aspects of the Court's decision, and may not be able to resume such implementation without investing considerable time and resources. For example, in order to complete transportation conformity determinations, the interagency consultation process that involves federal, state and local air quality and transportation agencies may need to be restarted. 40 C.F.R. 93.105. Significant additional state and local technical capacity in transportation and emissions modeling and data collection may also be needed, as described in paragraph 11.

11. Both the Orphan Nonattainment and Orphan Maintenance Areas include: large metropolitan areas including Boston, Detroit, Indianapolis, Milwaukee, and Las Vegas; mid-size cities including Birmingham, Louisville, Norfolk, and Raleigh-Durham; and smaller cities including Erie, PA, Lansing, MI, Lima, OH, Macon, GA, South Bend-Elkhart, IN, Charleston, WV, and Rochester, NY. With the exception of one county in the Boston area[3] and part of one county in the Milwaukee area[4], *none* of the Orphan Areas enumerated in the prior sentence has demonstrated transportation conformity for ozone since the 1997 ozone NAAQS was revoked in 2015, in accordance with the SIP Requirements Rule.

[3] Dukes County, MA is a nonattainment area for the 2008 ozone NAAQS.
[4] Part of Kenosha County, WI is a nonattainment area for the 2008 ozone NAAQS.

12. If the Court's decision remains unchanged, all of these areas could be subject to substantial harm, because new or revised transportation plans, improvement programs and non-exempt highway or mass transit projects cannot be approved, with the effect that billions of dollars appropriated for infrastructure improvements could be frozen or lost. *See* 40 C.F.R. §§ 93.102, 93.104.

13. By contrast, if the Court were to remand the transportation conformity aspects of the SIP Requirements Rule to EPA *without* vacatur, the Agency would be able to take further action needed to avoid the potential disruption to ongoing transportation planning, including issuance of regulatory revisions or guidance to assist areas in meeting transportation conformity requirements, particularly given the large number of areas that are not determining conformity for any other pollutants. It is likely that areas would need additional start-up time and possibly additional resources to use the latest emissions model (under 40 C.F.R. 93.111), for conformity modeling as well as time to collect and assemble the latest available planning assumptions (under 40 C.F.R. 93.110), to project on-road emissions into the future. As another example, areas which have not been conducting the conformity process will also need time to re-start their interagency consultation process. A wide range of local, state and federal agencies are required to be included in the consultation process, 40 C.F.R. 93.105, and restarting the process after a hiatus of several years may take time. Some areas may also need time to update their motor vehicle emissions budgets, which serve as the limits on transportation emissions when a conformity

determination is made. See 40 C.F.R. 93.101. For some areas, estimates of highway and transit emissions using a more current emissions model and planning assumptions may warrant updating motor vehicle emissions budgets, a process that involves a revision to the relevant SIP. A remand will allow EPA and the states time to put the necessary resources, programs, and framework in place to allow areas to appropriately meet the transportation conformity requirements.

Impacts from Other Requirements in "Orphan Nonattainment Areas"

14. With respect to Orphan Nonattainment Areas—areas that were designated nonattainment, and never redesignated to attainment, for the 1997 NAAQS, but were designated as attainment for the more stringent 2008 NAAQS and thus attaining the 1997 NAAQS as a factual matter—planning agencies and regulated entities have been following the anti-backsliding requirements outlined in the SIP Requirements Rule. Accordingly, some planning agencies and regulated entities in these areas have not been applying certain other requirements, including nonattainment new source review (NSR), with regard to the now-revoked 1997 standard; and, pursuant to the SIP Requirements Rule, *no* air agencies have made any further SIP revisions to address previously unaddressed nonattainment requirements for the revoked 1997 NAAQS. The Court held that EPA's suspension of all these activities was improper for any area that had not undergone a formal redesignation for the 1997 NAAQS pursuant to CAA § 107(d)(3)(E).

15. The nonattainment NSR permit requirements apply to any proposed new and modified major stationary sources locating in an area designated nonattainment on the date such permit is to be issued. Such proposed new and modified sources must meet specific preconstruction requirements, including: (1) the installation of air pollution controls known as Lowest Achievable Emission Rate; (2) acquisition of emissions offsets from other existing sources; (3) certification that all other sources owned by the applicant in the state are complying with all applicable requirements in the state implementation plan; and (4) an analysis of alternative sites, sizes, production processes, and environmental control techniques to show that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

16. Under the requirements set forth in the 2008 ozone NAAQS SIP Requirements Rule, after the 1997 NAAQS was revoked, Orphan Nonattainment Areas outside the implemented the Prevention of Significant Deterioration ("PSD") permitting requirements for attainment areas, rather than the nonattainment NSR requirements for nonattainment areas. If EPA's rule is immediately vacated upon issuance of the mandate, permit authorities in these areas will no longer be able to issue PSD permits, and applicants with pending permits will have to reapply to satisfy the applicable nonattainment NSR requirements. This is both highly disruptive and potentially burdensome.

17. Nearly all of the Orphan Nonattainment Areas are likely eligible for formal redesignation,[5] but have not sought one from the Agency because EPA took the position in the SIP Requirements Rule that the Agency *could not* formally redesignate areas for a revoked NAAQS. As shown in Table 5, all 13 areas factually did attain by their respective attainment dates, and currently have Clean Data Determinations.[6]

Table 5: Status of Orphan Nonattainment Areas

1997 Ozone NAAQS Area Name	State	1997 Ozone NAAQS Attainment Date	Attainment Year Design Value (ppm)[7]	Clean Data Determination Federal Register Notice
Amador and Calaveras Cos. (Central Mountain Cos.)	CA	6/15/2010	0.082	77 Fed. Reg. 71551

[5] In order to approve a redesignation request, a State must demonstrate that an area (1) has attained the NAAQS; (2) has a fully approved applicable implementation plan; (3) attained due to permanent and enforceable emission reductions; (4) has an approved maintenance plan; and (5) has met all requirements applicable to the area. 42 U.S.C. § 7407(d)(3)(E).

[6] A determination by EPA under 40 C.F.R. 51.918 that a nonattainment area has air quality that meets the applicable NAAQS. This determination suspends the requirements for such area to submit attainment demonstrations and associated reasonably available control measures, reasonable further progress plans, contingency measures, and other planning SIPs related to attainment of the 8-hour ozone NAAQS until such time as the area is redesignated to attainment, or EPA determines that the area has again violated the 8-hour ozone NAAQS.

[7] The 1997 NAAQS is based on an eight-hour average concentration of 0.08 ppm. 62 Fed. Reg. 38,856, 38,858 (July 18, 1997). Compliance with the 1997 NAAQS is determined based on data derived from air monitors operated in accordance with 40 C.F.R. Part 58. This data is used to calculate a statistic known as the "Design Value" for each monitor, which is "the 3-year average annual fourth-highest daily maximum 8-hour [ozone] concentration." 40 C.F.R. Part 50, App.I.

Boston-Lawrence-Worcester (E. Mass)	MA	6/15/2010	0.081	77 Fed. Reg. 31496
Mariposa and Tuolumne Cos. (Southern Mountain Counties)	CA	6/15/2011	0.083	77 Fed. Reg. 71551
Philadelphia-Wilmington-Atlantic City	PA, NJ, MD, DE	6/15/2011	0.083	77 Fed. Reg. 17341
Albany-Schenectady-Troy	NY	6/15/2007	0.078	73 Fed. Reg. 15672
Buffalo-Niagara Falls	NY	6/15/2010	0.076	74 Fed. Reg. 63993
Essex County (Whiteface Mtn.)	NY	6/15/2007	0.071	74 Fed. Reg. 63993
Jefferson County	NY	6/15/2010	0.074	73 Fed. Reg. 15672
Poughkeepsie	NY	6/15/2010	0.078	74 Fed. Reg. 63993
Providence (all of Rhode Island)	RI	6/15/2010	0.077	75 Fed. Reg. 31288
Rochester	NY	6/15/2007	0.072	73 Fed. Reg. 15672
Springfield (Western Mass)	MA	6/15/2010	0.084	77 Fed. Reg. 36404
Sutter County (part) (Sutter Buttes)	CA	6/15/2007	0.081	77 Fed. Reg. 71551

18. If the Court does not reconsider its substantive holdings with respect to Orphan Nonattainment Areas, the states of New York, Massachusetts, Rhode Island, California, and Delaware will need to submit redesignation requests, and EPA will need to approve those requests, to stop implementation of nonattainment areas' controls for the 1997 standard. As noted earlier, EPA believes nearly all of the Orphan Nonattainment Areas are likely eligible for formal redesignation.

19. In order for an area to be redesignated, the state must submit a redesignation request to the Agency, which can only be submitted after completing a state-level notice and comment rulemaking process. EPA must then act on that request through notice-and-comment rulemaking. The preliminary estimate is that these states will need 18 months to develop and submit the SIP revision necessary for a redesignation, following all applicable SIP adoption procedures. Upon receipt, EPA will need approximately 12 months to review, propose and finalize action on the states' requests.

20. Immediate vacatur of the SIP Requirements Rule upon issuance of the mandate will not allow states time to prepare and submit such requests, let alone allow EPA to act on them, before various nonattainment requirements will spring into place. A remand without vacatur would allow the states responsible for these areas (which are all factually attaining the 1997 NAAQS) and EPA a reasonable period of time to carry out the necessary redesignation work, and would avoid confusion and disruption in the short term on the part of state and local governments that have been relying in good faith on the rule under review.

SO DECLARED:

WILLIAM L. WEHRUM

Dated: 4-23-18

Attachment 1

AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

AASHTO

AMPO

March 16, 2018

The Honorable Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: EPA Response to D.C. Circuit Decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115

Dear Administrator Pruitt:

The American Association of State Highway and Transportation Officials (AASHTO) and the Association of Metropolitan Planning Organizations (AMPO) jointly request that the Environmental Protection Agency (EPA) file a petition for rehearing and request for stay of the February 16, 2018 decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115 in the U.S. Court of Appeals for the District of Columbia. This letter sets forth the reasons for this urgent request.

In the *South Coast* decision, the court vacated major portions of a 2015 final rule that established procedures for transitioning from the 1997 National Ambient Air Quality Standard (NAAQS) for ozone to the stricter 2008 NAAQS for the same pollutant.[1] The 2015 rule included several important provisions to avoid imposing duplicative and unnecessary regulatory burdens. Of most importance to transportation agencies, the 2015 rule ensured that areas designated as nonattainment or maintenance for the 1997 standard would not be subject to air quality conformity requirements if those areas are in attainment for the stricter 2008 standard.

The court decision overturned this common-sense provision in the 2015 rule, holding that areas designated as nonattainment or maintenance for the 1997 standard—but as attainment for the 2008 standard—must remain subject to conformity requirements for the 1997 standard to avoid "backsliding" on efforts to meet that standard. But the court also *agreed* with EPA's finding that the "measures that achieved attainment of both the 1997 NAAQS and the 2008 NAAQS should be adequate to maintain the same 2008 NAAQS that has already been attained." The contradiction is clear: on one hand, the court finds that conformity must continue to apply for the 1997 standard to avoid backsliding; but on the other, the court agreed that the measures already in effect in those areas should be sufficient to maintain compliance with the stricter 2008 standard.

[1] See "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Review Requirements," 80 Fed. Reg. 12,264 (Mar. 6, 2015).

The court also vacated several other provisions in the rule that provided flexibility in transitioning to the 2008 ozone standard, and appears to have invalidated EPA's revocation of the 1997 standard. If the revocation of the 1997 standard is invalidated, the implications of this decision are even broader: it would mean that areas designated as nonattainment or maintenance for the 2008 standard must make conformity determinations for the 1997 standard, in addition to making conformity determinations for the stricter 2008 standard for the same pollutant.

The practical effects of this decision on transportation agencies will be severe. As of February 16, 2018, air quality conformity requirements for the 1997 ozone standard have been re-imposed on dozens of areas around the country that have fully attained the stricter 2008 ozone standard, and possibly on dozens of additional areas that are in nonattainment or maintenance for the 2008 standard. The immediate re-imposition of conformity requirements will prevent States and metropolitan planning organizations (MPOs) from approving transportation plans and transportation improvement programs (TIPs) until the necessary air quality analysis and conformity determinations can be completed. Without an approved plan and TIP, the flow of federal funds for highway and transit projects in many areas will be halted.

Moreover, the invalidation of EPA's 2015 rule potentially calls into question the validity of *existing* every plan and TIP approvals made in reliance on that rule. MPOs across the country have approved plans and TIPs since March 2015 without making conformity determinations with respect to the revoked 1997 ozone standard. If EPA were to conclude that those previous plan and TIP approvals are now invalid, given the lack of a conformity determination for the 1997 standard, the effects of this decision would be even more immediate and far-reaching, potentially including a halt to ongoing construction projects.

As an indication of the potential magnitude of the problem, there were 35 nonattainment areas and 80 maintenance areas for the 1997 standard at the time the 1997 standard was revoked. These 115 areas are located in 32 states and 434 counties.[2] The immediate re-imposition of conformity requirements for the 1997 standard could disrupt transportation projects in all of those counties. In Atlanta alone, the MPO has approximately $1.5 billion of projects in its TIP; in Houston, the MPO has approximately $4.37 billion of projects in is TIP; in Hampton Roads, Virginia, the TIP includes $4.89 billion of projects. The re-imposition of the 1997 standard threatens the ability of these and other MPOs to continue moving forward with billions of dollars in projects.

To avoid immediate and far-reaching disruption to transportation projects, it is critical to seek every available means to obtain relief from this court decision. We therefore request that EPA file a petition for rehearing in the D.C. Circuit and seek a stay of the court's decision within the 45-day period allowed for such a petition (by April 2, 2018). If EPA files a petition for rehearing, our organizations intend to seek the court's permission to file an amicus brief in support of the rehearing request.

[2] See EPA website, https://www3.epa.gov/airquality/greenbook/gbtc.html.

In addition, we request that EPA issue interim guidance as soon as possible regarding implementation of the court decision, and that any such guidance provide maximum flexibility and minimize disruption to ongoing projects. Specifically, we ask EPA to confirm that:

- In nonattainment or maintenance areas where the 1997 ozone standard was revoked and no other conformity determinations for other pollutants or standards were required, all existing transportation plans, TIPs and projects are valid for twelve months from the date of the Court decision; at the end of the twelve-month period, a conformity determination for the 1997 ozone standard would be required.

- In areas where the 1997 ozone standard was revoked and conformity requirements for other pollutants or standards apply, all currently approved conformity determinations are valid until the next required conformity determination is made in each such nonattainment or maintenance area. At the time of the next required determination, the nonattainment or maintenance area would meet the conformity requirements for the 1997 ozone standard and any other pollutants or standards for which conformity is required.

While not a complete solution, such guidance may provide some relief from the regulatory burdens and project delays caused by this decision.

We also note that this court decision highlights the need for a permanent legislative solution to resolve the uncertainty about what the Clean Air Act requires when EPA issues a new, stricter NAAQS to replace a previous one for the same pollutant. In its recent infrastructure reform proposal, the White House specifically recommended "[a]mending the Clean Air Act to clarify that conformity requirements apply only to the latest NAAQS for the same pollutant."[3] We strongly support this recommendation for legislative change.

We appreciate your attention to this urgent request. We would welcome the opportunity to meet with you and your staff to discuss these issues. Should you have any questions, please contact: Melissa Savage from AASHTO at (202) 624-3638, or Bill Keyrouze from AMPO at (202) 624-3683.

Sincerely,

Bud Wright
Executive Director
AASHTO

DeLania Hardy
Executive Director
AMPO

[3] "Legislative Outline for Rebuilding Infrastructure in America," (Feb. 12, 2018), p. 44.

cc:
Brandye Hendrickson, Acting Administrator, Federal Highway Administration, U.S. Department of Transportation
K. Jane Williams, Acting Administrator, Federal Transit Administration, U.S. Department of Transportation
Jeffrey Wood, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
D.J. Gribbin, Special Assistant to the President for Infrastructure, The White House
Alex Herrgott, Associate Director for Infrastructure, Council for Environmental Quality, The White House

Atlanta Regional Commission

March 8, 2018

The Honorable Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Request for EPA to Seek an Appeal and Stay of the South Coast Air Quality Management District Ruling

The recent court ruling in the South Coast Air Quality Management District v. EPA et al., No. 15-1115 (D.C. Cir. Feb. 16, 2018) vacated portions of the 2008 Ozone Implementation Rule (80 Fed. Reg. 12,264) revoking transportation conformity for the 1997 ozone standard. This action appears to result in EPA being unable to render conformity determinations for pending transportation plans and programs in areas originally classified as nonattainment for the 1997 standard. The attached summary details the impacts on the Atlanta region as we understand the court ruling.

Since Georgia's Metropolitan Planning Organizations (MPOs) have ceased demonstrating conformity to the 1997 ozone standard, per the 2008 Ozone Implementation Rule, several urbanized areas in the state of Georgia are now without a 1997 ozone standard conforming transportation plan, thereby restricting the ability of EPA to approve conformity determinations for amendments to Regional Transportation Plans (RTPs) and Transportation Improvement Programs (TIPs). Currently in Georgia, the Atlanta Regional Commission (ARC) has two RTP/TIP amendments in progress that are impacted by this decision. This court decision threatens the implementation of over $1.5 billion in federal transportation funds in FY 2018 and FY 2019.

The Atlanta Regional Commission, Georgia Department of Transportation, and Georgia Regional Transportation Authority request that EPA appeal this ruling and request a stay on the previous decision to ensure the transportation planning and project delivery process can continue on schedule. This action will ensure a smooth transition - and prevent delays in the delivery of transportation projects and programs - that will impact the lives of millions of Georgians.

atlantaregional.org
International Tower
229 Peachtree St, NE | Suite 100
Atlanta, Georgia 30303

Sincerely,

Doug Hooker
Executive Director
Atlanta Regional Commission

Kerry Armstrong
Chairman
Atlanta Regional Commission

Russell McMurry
Commissioner
Georgia Department of Transportation

Jamie Boswell
Chairman
Georgia Department of Transportation

Christopher Tomlinson
Executive Director
Georgia Regional Transportation Authority &
State Road and Tollway Authority

Walter M. "Sonny" Deriso, Jr.
Board Chairman
Georgia Regional Transportation Authority

C: Ken Wagner, EPA

Attachment: Ozone Implementation Ruling Impacts

ANTICIPATED IMPACTS ON THE ATLANTA REGION TRANSPORTATION PROGRAM FROM THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, PETITIONER v. ENVIRONMENTAL PROTECTION AGENCY, ET AL., RESPONDENTS NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT, ET AL., INTERVENORS

Background

When a new ozone or particulate matter standard is put in place, the Environmental Protection Agency (EPA) provides a rule that informs States on how to implement the new standard. This rule is colloquially called the "Implementation Rule." When the nation transitioned from the 1997 to the 2008 ozone standard, EPA laid out a process in its Implementation Rule to remove requirements for the 1997 standard, including transportation conformity requirements, for areas that were designated for the new, stricter 2008 ozone standard and had attained the 1997 standard.

The goal of this process was to lower the burden on governments to meet requirements for multiple standards simultaneously, especially in the case where areas were already determined to be in nonattainment for a stricter standard.

In the Atlanta region, the transition from the 1997 to the 2008 ozone standard resulted in a smaller 15-county nonattainment area, replacing the 20-county 1997 ozone area. Conformity was then revoked for the outer 5 counties - including the Gainesville-Hall MPO - in 2015. In 2015-2016, ARC worked with the Georgia Environmental Protection Division (GA EPD) to establish new motor vehicle emissions budgets for the 2008 ozone standard and altered the conformity process to reflect the new procedures outlined in the Implementation Rule.

Lawsuit and the United States Court of Appeals for the District of Columbia Circuit Ruling

In 2017, the South Coast Air Quality Management District filed suit against EPA over the Implementation rule, citing removing conformity requirements (among other items) violates rules that help areas uphold air quality standards. As a result, on February 16, 2018 the DC Circuit Court of Appeals vacated portions of the EPA's 2008 Ozone Implementation Rule, agreeing with the plaintiffs. This ruling vacated the revocation of transportation conformity requirements for the 1997 ozone standard.

Implications and Unknowns

As ARC staff currently understands the ruling, all areas that were nonattainment for the 1997 ozone standard at one time must now continue to demonstrate conformity to that standard to receive a positive conformity determination on their Regional Transportation Plan (RTPs) and Transportation Improvement Program (TIP).

ARC has two TIP amendments in the pipeline that staff believes cannot be approved by federal partners, effectively stalling the transportation planning process. It is important to understand that this stall will be temporary, but threatens the implementation of over $1.5 billion in federal transportation funds in FY 2018 and FY 2019 – and has the potential of trickling into future years as delays accrue. This action is the result of a court ruling, and is NOT a conformity lapse due to the inability to demonstrate conformity to established motor vehicle emissions budgets, as was the case in the Atlanta region during the conformity lapse of 1999. ARC will continue to work with our state and federal partners to pursue the best path forward. ARC can respond to the recent court ruling (processing a RTP/TIP amendment and demonstrating conformity to the 1997 Ozone standard) – if this is what EPA requires, but this will take time.

EPA should immediately seek an appeal and stay of the ruling, allowing states and MPOs to respond to the ruling and avoid threatening billions in federally-funded transportation projects.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents	Nos. 15-1115, 15-1123 (consolidated) **DECLARATION OF WALTER C. WAIDELICH, JR.**

I, Walter C. Waidelich, Jr., declare as follows:

1. I am the Executive Director for the Federal Highway Administration (FHWA), an operating administration of the U.S. Department of Transportation (DOT). I have served in that capacity since March 15, 2016. Over the past 30 years, I have held a variety of other positions within FHWA, and have been intimately involved in virtually all aspects of highway planning and project delivery.

2. FHWA supports State and local governments in the planning, design, and construction of Federal-aid highways. FHWA administers the $44 billion annual Federal-Aid Highway Program, thereby providing significant financial assistance for the over one million miles of Federal-aid highways. Under FHWA's governing

statutes, FHWA's primary purpose is to provide oversight and "monitor the effective and efficient use of funds" on these Federal-aid highway projects.

3. As a part of executing its statutory obligations, and as relevant in this case, FHWA provides federal oversight and approval for the complex environmental planning processes that such projects require, including "transportation conformity" determinations imposed by the Clean Air Act (CAA). FHWA's field offices work in collaboration with State Departments of Transportation and Metropolitan Planning Organizations (MPOs) to ensure compliance with the CAA procedural requirements as a prerequisite to implementing Federal-aid highway and related transportation projects.

4. If a State determines it will seek Federal-aid assistance for a highway project, the project must first be submitted to FHWA on the Statewide Transportation Improvement Program ("STIP"), which lists the various proposed federally-funded projects that the State wishes to pursue. States are required to submit their STIPs to FHWA and the Federal Transit Administration (FTA), another operating administration of DOT, for joint approval. In metropolitan planning areas, the proposed project must also be included in a Metropolitan Long Range Plan (Plan) and Transportation Improvement Program (TIP). The TIP then becomes a subset of the statewide STIP. In order for a transportation project to receive Federal-aid highway funds, FHWA's planning statutes at 23 U.S.C. §§

134(j)(1) & (2) and 135(g)(5) require the project to be consistent with the statewide and metropolitan long-range transportation plans and be included in the STIP and TIP.

5. Under the CAA, the Environmental Protection Agency (EPA) reviews air pollution conditions in state and metropolitan areas, and may designate areas as either in "attainment" or "nonattainment" for a national ambient air quality standard (NAAQS) of a pollutant. Once a nonattainment area has attained the NAAQS for a specified pollutant, the State may submit a request to the EPA for the re-designation of the nonattainment area and revises its State Implementation Plan to provide for the "maintenance" of its air quality status (i.e., remaining in "attainment" for that NAAQS). The area is then known as a "maintenance area" for that NAAQS.

6. As a prerequisite to receive federal funding, Plans and TIPs in nonattainment and maintenance areas for the transportation-related pollutants, including ozone, must meet "transportation conformity" requirements under the CAA. The purpose of a transportation conformity determination is to ensure that federal funds go to transportation activities that are consistent with (i.e., "conform to") a State's air quality goals and plans that are set forth in the State Implementation Plan. Conformity means that FHWA funding and approvals are given to highway

activities that will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or any interim milestone.

In addition to the metropolitan transportation planning documents, individual projects in nonattainment and maintenance areas must also meet transportation conformity requirements. If a highway project in a nonattainment or maintenance area is not in the conforming Plan and TIP, then FHWA cannot obligate the funds that were programmed for the project, and the project may not advance to construction.

7. The transportation conformity determination process involves complex technical analysis and assessment. For Plans and TIPs, the major components of a conformity determination include: interagency coordination on critical issues; public involvement; use of the latest planning assumptions and the latest EPA-approved emissions model; regional emissions analysis; demonstrations that on-road mobile source emissions are within a motor vehicle emissions budget; a demonstration that there is timely implementation of transportation control measures; and meeting of fiscal constraint requirements of the planning regulations.

8. EPA has identified 82 nonattainment and maintenance areas for the 1997 ozone NAAQS, which encompass as many as 228 counties in 24 States. These are the areas addressed by this Court's February 16, 2018 decision. The Petitioners

referred to them as "orphan" areas (which is not a term of art used in transportation planning and project delivery or transportation conformity).

9. In many of the 82 "orphan" areas to which this court's decision applies, the process of making the transportation conformity determinations for the 1997 ozone NAAQS that are required pursuant to the Court's decision may take up to a year or longer to complete. The time involved in completing the transportation conformity determination process depends on a variety of factors, including the planning organization's technical capabilities to perform the modeling processes, the degree of technical complexity for a given State or area, and the relative freshness or staleness of prior studies and data inputs. The attached timeline provides details of the steps and time that FHWA expects will be necessary for most of the "orphan" areas to complete their conformity determinations for the 1997 ozone NAAQS, in the absence of further guidance or relief from EPA. Exhibit 1. We do not expect that this exercise will impact emissions of ozone pollution precursors, because EPA considers all 82 "orphan" areas as currently in attainment, not only with the 1997 NAAQS but also with the more stringent 2008 NAAQS.

10. This Court's decision raises numerous implementation questions about exactly what should be done in these "orphan" areas to comply with the CAA, particularly with respect to transportation conformity determinations for Plans and TIPs, as well as future project funding and/or approval actions. As the

transportation planning process and project approvals are continuously ongoing processes, the regulated community is straining under the considerable uncertainty that now exists with respect to moving forward with actions currently pending or that will be pending in the near future. EPA has not yet provided guidance that addresses this uncertainty, and will need adequate time to do so.

11. The criteria and procedures that EPA has established for making transportation conformity determinations currently only applies to non-revoked NAAQS. FHWA is not aware of any EPA regulations or guidance on preparing a transportation conformity determination for a revoked NAAQS, such as would be the case with the 1997 ozone NAAQS.

12. The impacts of the Court's decision will negatively affect FHWA's abilities to determine that pending Plans and TIPs meet conformity requirements. It also may impact FHWA's ability to approve STIPs. Consequently, advancing the projects in those Plans and TIPs and STIPs may be halted until the necessary air quality analysis and conformity determinations can be completed. Although it is difficult to quantify the immediate impacts of the Court's opinion given the vast array of projects being planned and implemented around the country, we estimate that there are substantial impacts on major highway projects in as many as 228 counties in 24 states. Literally billions of dollars in construction projects could be impacted through the end of this calendar year if there is no relief. All of these

projects are located in areas that have cleaned up their ozone air pollution, and currently meet the more stringent 2008 ozone NAAQS.

13. State and local planning organizations and transportation agencies involved in transportation conformity and project decisions have requested EPA to provide guidance on how to proceed with their work in light of the Court's opinion. These organizations have justifiably relied on a decision-making environment where, based on EPA's 2008 Ozone SIP Requirements Rule at issue in this case, they no longer needed to make conformity determinations for the 1997 ozone NAAQS because they had already reached attainment with the stricter 2008 NAAQS. The Court's opinion has sweeping practical implications for these organizations and agencies. For instance, in a joint letter to the EPA Administrator dated March 16, 2018 (see Exhibit 2), the American Association of State Highway and Transportation Officials (AASHTO) and the Association of Metropolitan Planning Organizations (AMPO) implored the EPA to provide immediate guidance because "[t]he practical effects of this decision on transportation agencies will be severe." The letter continued: "The immediate re-imposition of conformity requirements [for the 1997 ozone NAAQS] will prevent States and metropolitan planning organizations (MPO's) from approving transportation plans and transportation improvement programs (TIPs) until the necessary air quality analysis and conformity determinations can be completed."

14. As part of FHWA's efforts to implement this Court's decision while in a temporary vacuum of EPA guidance, FHWA has identified a critical need for technical assistance among its partner State and local governments. FHWA has therefore organized a technical support team located in various parts of the country to serve as a partial resource for affected stakeholders to use over the next twelve months. This team is composed of air quality modelers and other subject matter experts, who can help guide the necessary work for affected stakeholders to satisfy the re-instated requirements for 1997 ozone conformity determinations.

In addition, on April 23, 2018, FHWA and FTA issued Interim Guidance (Exhibit 3) to FHWA and FTA field offices. The interim guidance demonstrates FHWA and FTA's good faith effort to comply with the Court's decision by halting planning and project actions in all of the "orphan" areas for the time being. FHWA would use the time allowed by a remand without vacatur to work with EPA to develop guidance and to help its stakeholders implement this Court's decision without disrupting the delivery of necessary highway projects to the millions of citizens who depend on FHWA to provide safe and efficient highway travel.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/23/18,

WALTER C. WAIDELICH, JR.

Exhibit 1

EXHIBIT 1:

Timeline of Typical Steps to Complete Conformity Determinations on Plans and TIPs in "Orphan" 1997 Ozone Areas Not Completely Covered by 2008 Ozone Areas*

Metropolitan Planning Organization (MPO) Activities/Responsibilities	Months to Complete, from start	FHWA Actions
• Identify impacts and determine technical needs – resources, staff, expertise (modeling needs)	0-1	Reach out to each affected FHWA Division office and associated State to determine scope and extent of federal assistance needed
• Initiate interagency consultation (40 CFR 93.105) • Prepare for emissions modeling (e.g., download/install latest emissions model, complete training, secure contractors for work if necessary) (40 CFR 93.111) • Obtain data for travel networks (40 CFR 93.122) • Develop latest planning assumptions (e.g., collect new vehicle activity data, socioeconomic forecasts, etc.) (40 CFR 93.110)	1-3	Provide technical assistance related to impacts
• Prepare assumptions and reach consensus (40 CFR 93.110) • Review assumptions via MPO committees • Conduct interagency consultation (required) (40 CFR 93.105) • Build travel networks – horizon years (40 CFR 93.106)	4-5	Participate in interagency consultation on assumptions (40 CFR 93.105)
• MPO Board approves project lists • Conduct travel and emissions modeling and off-network analysis (40 CFR 93.105) • Document analyses and interagency review (40 CFR 93.105)	5-10	Provide technical assistance on data collection, travel modeling, emissions analysis and other conformity requirements, etc.
Conduct public involvement (generally 30 days) on metropolitan long range Plan, TIP, and conformity documentation (40 CFR 93.105, 93.112)	9-10	• Participate in interagency consultation related to conformity documentation (40 CFR 93.105) • Provide technical assistance (e.g., on modeling comments)
• Respond to interagency and public comments (40 CFR 93.105, 93.112) • MPO Board makes conformity determination (40 CFR 93.102)	11	

Publish final conformity determination (40 CFR 93.105)	11-12	• Review MPO conformity determination and consult with EPA • Make conformity determination in coordination with FTA (40 CFR 93.102)

*This timeline was developed by staff in FHWA's Office of Planning, Environment & Realty/Air Quality and Transportation Conformity Team as a supplement to the declaration.

Exhibit 2

AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS

AASHTO

AMPO

March 16, 2018

The Honorable Scott Pruitt
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: EPA Response to D.C. Circuit Decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115

Dear Administrator Pruitt:

The American Association of State Highway and Transportation Officials (AASHTO) and the Association of Metropolitan Planning Organizations (AMPO) jointly request that the Environmental Protection Agency (EPA) file a petition for rehearing and request for stay of the February 16, 2018 decision in *South Coast Air Quality Management District v. EPA*, Case No. 15-1115 in the U.S. Court of Appeals for the District of Columbia. This letter sets forth the reasons for this urgent request.

In the *South Coast* decision, the court vacated major portions of a 2015 final rule that established procedures for transitioning from the 1997 National Ambient Air Quality Standard (NAAQS) for ozone to the stricter 2008 NAAQS for the same pollutant.[1] The 2015 rule included several important provisions to avoid imposing duplicative and unnecessary regulatory burdens. Of most importance to transportation agencies, the 2015 rule ensured that areas designated as nonattainment or maintenance for the 1997 standard would not be subject to air quality conformity requirements if those areas are in attainment for the stricter 2008 standard.

The court decision overturned this common-sense provision in the 2015 rule, holding that areas designated as nonattainment or maintenance for the 1997 standard—but as attainment for the 2008 standard—must remain subject to conformity requirements for the 1997 standard to avoid "backsliding" on efforts to meet that standard. But the court also *agreed* with EPA's finding that the "measures that achieved attainment of both the 1997 NAAQS and the 2008 NAAQS should be adequate to maintain the same 2008 NAAQS that has already been attained." The contradiction is clear: on one hand, the court finds that conformity must continue to apply for the 1997 standard to avoid backsliding; but on the other, the court agreed that the measures already in effect in those areas should be sufficient to maintain compliance with the stricter 2008 standard.

[1] See "Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Review Requirements," 80 Fed. Reg. 12,264 (Mar. 6, 2015).

The court also vacated several other provisions in the rule that provided flexibility in transitioning to the 2008 ozone standard, and appears to have invalidated EPA's revocation of the 1997 standard. If the revocation of the 1997 standard is invalidated, the implications of this decision are even broader: it would mean that areas designated as nonattainment or maintenance for the 2008 standard must make conformity determinations for the 1997 standard, in addition to making conformity determinations for the stricter 2008 standard for the same pollutant.

The practical effects of this decision on transportation agencies will be severe. As of February 16, 2018, air quality conformity requirements for the 1997 ozone standard have been re-imposed on dozens of areas around the country that have fully attained the stricter 2008 ozone standard, and possibly on dozens of additional areas that are in nonattainment or maintenance for the 2008 standard. The immediate re-imposition of conformity requirements will prevent States and metropolitan planning organizations (MPOs) from approving transportation plans and transportation improvement programs (TIPs) until the necessary air quality analysis and conformity determinations can be completed. Without an approved plan and TIP, the flow of federal funds for highway and transit projects in many areas will be halted.

Moreover, the invalidation of EPA's 2015 rule potentially calls into question the validity of *existing* every plan and TIP approvals made in reliance on that rule. MPOs across the country have approved plans and TIPs since March 2015 without making conformity determinations with respect to the revoked 1997 ozone standard. If EPA were to conclude that those previous plan and TIP approvals are now invalid, given the lack of a conformity determination for the 1997 standard, the effects of this decision would be even more immediate and far-reaching, potentially including a halt to ongoing construction projects.

As an indication of the potential magnitude of the problem, there were 35 nonattainment areas and 80 maintenance areas for the 1997 standard at the time the 1997 standard was revoked. These 115 areas are located in 32 states and 434 counties.[2] The immediate re-imposition of conformity requirements for the 1997 standard could disrupt transportation projects in all of those counties. In Atlanta alone, the MPO has approximately $1.5 billion of projects in its TIP; in Houston, the MPO has approximately $4.37 billion of projects in is TIP; in Hampton Roads, Virginia, the TIP includes $4.89 billion of projects. The re-imposition of the 1997 standard threatens the ability of these and other MPOs to continue moving forward with billions of dollars in projects.

To avoid immediate and far-reaching disruption to transportation projects, it is critical to seek every available means to obtain relief from this court decision. We therefore request that EPA file a petition for rehearing in the D.C. Circuit and seek a stay of the court's decision within the 45-day period allowed for such a petition (by April 2, 2018). If EPA files a petition for rehearing, our organizations intend to seek the court's permission to file an amicus brief in support of the rehearing request.

[2] See EPA website, https://www3.epa.gov/airquality/greenbook/gbtc.html.

In addition, we request that EPA issue interim guidance as soon as possible regarding implementation of the court decision, and that any such guidance provide maximum flexibility and minimize disruption to ongoing projects. Specifically, we ask EPA to confirm that:

- In nonattainment or maintenance areas where the 1997 ozone standard was revoked and no other conformity determinations for other pollutants or standards were required, all existing transportation plans, TIPs and projects are valid for twelve months from the date of the Court decision; at the end of the twelve-month period, a conformity determination for the 1997 ozone standard would be required.

- In areas where the 1997 ozone standard was revoked and conformity requirements for other pollutants or standards apply, all currently approved conformity determinations are valid until the next required conformity determination is made in each such nonattainment or maintenance area. At the time of the next required determination, the nonattainment or maintenance area would meet the conformity requirements for the 1997 ozone standard and any other pollutants or standards for which conformity is required.

While not a complete solution, such guidance may provide some relief from the regulatory burdens and project delays caused by this decision.

We also note that this court decision highlights the need for a permanent legislative solution to resolve the uncertainty about what the Clean Air Act requires when EPA issues a new, stricter NAAQS to replace a previous one for the same pollutant. In its recent infrastructure reform proposal, the White House specifically recommended "[a]mending the Clean Air Act to clarify that conformity requirements apply only to the latest NAAQS for the same pollutant."[3] We strongly support this recommendation for legislative change.

We appreciate your attention to this urgent request. We would welcome the opportunity to meet with you and your staff to discuss these issues. Should you have any questions, please contact: Melissa Savage from AASHTO at (202) 624-3638, or Bill Keyrouze from AMPO at (202) 624-3683.

Sincerely,

Bud Wright
Executive Director
AASHTO

DeLania Hardy
Executive Director
AMPO

[3] "Legislative Outline for Rebuilding Infrastructure in America," (Feb. 12, 2018), p. 44.

cc:
Brandye Hendrickson, Acting Administrator, Federal Highway Administration, U.S. Department of Transportation
K. Jane Williams, Acting Administrator, Federal Transit Administration, U.S. Department of Transportation
Jeffrey Wood, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
D.J. Gribbin, Special Assistant to the President for Infrastructure, The White House
Alex Herrgott, Associate Director for Infrastructure, Council for Environmental Quality, The White House

Exhibit 3

U.S. Department of Transportation
Federal Highway Administration
Federal Transit Administration

Memorandum

Subject: Interim Guidance on Conformity Requirements for the 1997 Ozone NAAQS

Date: April 23, 2018

From: Walter C. Waidelich, Jr.
FHWA Executive Director – HOA-3

Matthew J. Welbes
FTA Executive Director – TOA-3

In Reply Refer To:
HCC-30
TCC-Helen Serassio

To: FHWA Division Administrators and
FTA Regional Administrators

This guidance provides important information regarding transportation conformity requirements for certain pending planning and project development actions in programs administered by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA). The U.S. Court of Appeals for the D.C. Circuit recently issued a decision in *South Coast Air Quality Management District v. EPA*, No. 15-1115, which struck down portions of the *2008 Ozone NAAQS SIP Requirements Rule* concerning the ozone National Ambient Air Quality Standards (NAAQS). These portions of the *2008 Ozone NAAQS SIP Requirements Rule* addressed implementation requirements for the 2008 ozone NAAQS as well as the anti-backsliding requirements associated with the revocation of the 1997 ozone NAAQS. The impact of the decision addresses two groups of ozone areas described in the decision:

> Areas that were maintenance areas for the 1997 ozone NAAQS at the time of revocation and are designated as attainment for the 2008 Ozone NAAQS. These areas have not been required to make transportation conformity determinations for any ozone NAAQS since the 1997 ozone NAAQS were revoked in April 2015 by EPA's Rule.
>
> Areas that were designated as nonattainment for the 1997 ozone NAAQS at the time of revocation and are designated as attainment for the 2008 Ozone NAAQS. These areas have not been required to make transportation conformity determinations for any ozone NAAQS since the 1997 ozone NAAQS were revoked in April 2015 by EPA's Rule.

Based on the information in EPA's Greenbook,[1] we have identified 82 such areas encompassing as many as 228 counties in 24 States that are potentially affected by the

[1] https://www.epa.gov/green-book/green-book-8-hour-ozone-1997-area-information-naaqs-revoked

Court's decision.[2] Please refer to 40 CFR Part 81 and/or EPA's Greenbook for a full description and maps of these 1997 ozone areas.

While we are waiting for guidance from EPA clarifying the possible impacts, *all routine planning and project development actions may proceed throughout the country, except for the following actions within the identified areas that should be considered "on-hold" for now:*

- New Metropolitan Long Range Plan and Transportation Improvement Programs (TIP), *updates* and *amendments* that include the addition of a project that is *not exempt* from transportation conformity may not proceed until transportation conformity with the 1997 ozone NAAQS is determined. Exempt projects are listed in 40 CFR 93.126 and 93.127. *Administrative modifications* to Metropolitan Plans and TIPs may proceed because, by definition in 23 CFR 450.104, those actions do not require a conformity determination.

- Statewide Transportation Improvement Program (STIP) approvals and amendments that include TIPs or non-exempt projects from the 82 identified areas may not proceed, unless the TIP or project is determined to conform with the 1997 ozone NAAQS or is limited to projects that are exempt from transportation conformity. Exempt projects are listed in 40 CFR 93.126 and 93.127. Partial STIP approvals, i.e., those limited to other areas of the state may proceed as described in 23 CFR 450.220(b)(1)(iii).

- Within the 82 identified areas, NEPA approvals for FHWA/FTA projects (40 CFR 93.101) may not proceed unless the existing Metropolitan Plan and TIP include the project. For projects that already completed NEPA, there is no need to delay further action, including: grant obligations; approvals of plans, specifications and estimates; and authorizations to begin construction.

If your office receives questions from a state or local transportation partner related to the impacts of this court decision on proposed planning actions or project approvals beyond what is described above, the most appropriate response is that FHWA and FTA, in coordination with OST and EPA, are reviewing the decision and evaluating next steps, and that we will provide updates as soon as possible. You should not speculate regarding the next steps that may be under review.

For technical assistance, please contact at FHWA Cecilia Ho (202-366-9862), Karen Perritt (202-366-9066) or David Kall (202-366-6276), and at FTA Dwayne Weeks (202-493-0316) or Megan Blum (202-366-0463). You may also contact Gloria Shepherd, Associate Administrator for the FHWA's Office of Planning, Environment and Realty (202-366-0116), or Sherry Riklin, Acting Associate Administrator for FTA's Office of Planning and Environment (202-366-5407) with any questions.

Thank you for your immediate attention to this guidance.

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[2] The 82 areas are set forth in the tables below. We have requested confirmation of the affected counties and States from EPA and are awaiting its response.

1997 Ozone Areas Not Covered in Full by the 2008 Ozone Standard, by State (24) and 1997 Ozone Area Name (82)

State	1997 Ozone NAAQS Area Name
AL	Birmingham, AL
CA	Amador and Calaveras Cos. (Central Mountain Cos.), CA
CA	Mariposa and Tuolumne Cos (Southern Mtn), CA
CA	Sutter Co (Sutter Buttes), CA
DE	Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE
GA	Atlanta, GA
GA	Macon, GA
GA	Murray Co (Chattahoochee Nat Forest), GA
IL	St. Louis, MO-IL
IN	Evansville, IN
IN	Fort Wayne, IN
IN	Greene Co, IN
IN	Indianapolis, IN
IN	Jackson Co, IN
IN	La Porte Co., IN
IN	Louisville, KY-IN
IN	Muncie, IN
IN	South Bend-Elkhart, IN
IN	Terre Haute, IN
KY	Cincinnati-Hamilton, OH-KY-IN
KY	Clarksville-Hopkinsville, TN-KY
KY	Huntington-Ashland, WV-KY
KY	Louisville, KY-IN
MA	Boston-Lawrence-Worcester (E. Mass), MA
MA	Springfield (W. Mass), MA
MD	Kent and Queen Anne's Cos, MD
ME	Hancock, Knox, Lincoln and Waldo Cos, ME
ME	Portland, ME
MI	Allegan Co, MI
MI	Benton Harbor, MI
MI	Benzie Co, MI
MI	Cass Co, MI
MI	Detroit-Ann Arbor, MI
MI	Flint, MI
MI	Grand Rapids, MI
MI	Huron Co, MI
MI	Kalamazoo-Battle Creek, MI
MI	Lansing-East Lansing, MI
MI	Mason Co, MI

MI	Muskegon, MI
NC	Charlotte-Gastonia-Rock Hill, NC-SC
NC	Haywood and Swain Cos (Great Smoky NP), NC
NC	Raleigh-Durham-Chapel Hill, NC
NC	Rocky Mount, NC
NH	Boston-Manchester-Portsmouth (SE), NH
NV	Las Vegas, NV
NY	Albany-Schenectady-Troy, NY
NY	Buffalo-Niagara Falls, NY
NY	Essex Co (Whiteface Mtn), NY
NY	Jefferson Co, NY
NY	Poughkeepsie, NY
NY	Rochester, NY
OH	Canton-Massillon, OH
OH	Dayton-Springfield, OH
OH	Lima, OH
OH	Parkersburg-Marietta, WV-OH
OH	Steubenville-Weirton, OH-WV
OH	Toledo, OH
OH	Wheeling, WV-OH
OH	Youngstown-Warren-Sharon, OH-PA
PA	Altoona, PA
PA	Clearfield and Indiana Cos, PA
PA	Erie, PA
PA	Franklin Co, PA
PA	Greene Co, PA
PA	Harrisburg-Lebanon-Carlisle, PA
PA	Johnstown, PA
PA	Scranton-Wilkes-Barre, PA
PA	State College, PA
PA	Tioga Co, PA
PA	York, PA
PA	Youngstown-Warren-Sharon, OH-PA
RI	Providence (all of RI), RI
SC	Charlotte-Gastonia-Rock Hill, NC-SC
TN	Clarksville-Hopkinsville, TN-KY
TN	Knoxville, TN
TX	Beaumont-Port Arthur, TX
VA	Fredericksburg, VA
VA	Madison and Page Cos (Shenandoah NP), VA
VA	Norfolk-Virginia Beach-Newport News (Hampton Roads), VA
VA	Richmond-Petersburg, VA
WI	Door Co, WI

WI	Kewaunee Co, WI
WI	Manitowoc Co, WI
WI	Milwaukee-Racine, WI
WV	Charleston, WV
WV	Huntington-Ashland, WV-KY
WV	Parkersburg-Marietta, WV-OH
WV	Steubenville-Weirton, OH-WV
WV	Wheeling, WV-OH

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
	)	
Petitioners,	)	
	)	No. 15-1123
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,	)	**DECLARATION OF MATTHEW J. WELBES**
	)	
Respondents	)	
	)	

I, Matthew J. Welbes, hereby declare:

1. I am the Executive Director of the Federal Transit Administration (FTA), an operating administration of the U.S. Department of Transportation (DOT). I have served in this capacity since 2008. As Executive Director, I direct the daily operations of the agency in support of public transportation services in communities across the United States, including providing local public transit systems with federal funding from FTA consistent with all the statutory and regulatory prerequisites to the award of funding. FTA currently has an annual budget of over $13 billion.
2. With some limited exceptions, transportation conformity applies to metropolitan and statewide transportation planning and projects funded by FTA and the Federal Highway Administration (FHWA), another operating administration of DOT, in nonattainment and maintenance areas for

transportation-related pollutants. FTA and FHWA must make transportation conformity determinations on metropolitan long-range plans, transportation improvement programs (TIPs), and non-exempt projects prior to accepting, approving or funding these transportation activities. 42 U.S.C. § 7506(c)(2).

3. The recent decision by the Court in this case has potential impacts to the FTA process for approvals and award of funds. Section 176(c) of the Clean Air Act (CAA) establishes conformity requirements for metropolitan transportation plans, TIPs, and projects in areas designated as nonattainment or maintenance. *Id.* § 7506(c). Section 176(c)(2)(B) of the CAA establishes requirements for timely implementation of transportation control measures that are contained in a TIP and are funded or approved by FTA or FHWA. *Id.* 42 U.S.C. § 7506(c)(2)(B). 23 U.S.C. § 109(j) establishes requirements to ensure that transportation project development is consistent with approved plans for air quality.

4. The CAA requires that each State environmental agency develop a plan called a State Implementation Plan (SIP) that shows how the State will implement measures designed to improve air quality enough to meet National Ambient Air Quality Standards, 42 U.S.C. § 7407. The transportation conformity process attempts to ensure that metropolitan transportation plans (20-year planning horizon), TIPs, and projects are consistent with meeting air quality goals in order to be eligible for federal funding and approval. Whenever a metropolitan transportation plan or TIP is updated or amended, unless the amendment only adds or deletes projects that are exempt from transportation conformity such as safety related projects, the Metropolitan Planning Organization (MPO) must comply with

the conformity requirements.[1]

5. FTA and FHWA jointly, in consultation with Environmental Protection Agency (EPA), make the determination of whether or not a metropolitan transportation plan and TIP is in conformance with the SIP for air quality. A project needs to be in an approved TIP before it can be added to a Statewide Transportation Improvement Program (STIP). The STIP is then forwarded to FTA/FHWA for joint approval. A project must be in an approved STIP for the appropriate phase of project development before the National Environmental Policy Act (NEPA) process can be completed. A NEPA determination is a mandatory precondition to award of either FTA or FHWA funding.

6. The Court's decision potentially impacts FTA and FHWA projects in various stages of funding, as well as projects that are in various stages of the planning process. Together with EPA, FTA and FHWA have identified 82 impacted areas of the country, encompassing as many as 228 counties in 24 States, that are potentially affected by the Court's decision. Specifically, it has the potential to impact projects in the following categories:

a. Projects that do not yet have a conformity determination; and

b. Projects that are in a TIP and have been added to a STIP, but the STIP has not yet been approved.

7. The decision potentially could halt projects in each of these stages of the process if they are located in one of the 82 impacted areas:

[1] See 40 CFR 93.104(b)(2) and (c)(2). The projects that are exempt from the transportation conformity requirement are set forth in 40 CFR §§ 93.126 and 127.

a. An "orphan"[2] non-attainment area;

b. An "orphan" maintenance area;

c. A partial "orphan" non-attainment area; and

d. A partial "orphan" maintenance area.

8. Here is a chart that shows the number of areas in each category:

Type of Area	Number of 1997 Ozone Areas
Partial "Orphan" Maintenance Areas	6
Partial "Orphan" Nonattainment Areas	4
Sub-total	**10**
"Orphan" Maintenance Areas	63
"Orphan" Nonattainment Areas	9
Total	**82**

9. FTA must award most Federal funds within a specific period of time prescribed by statute. *See, e.g.* 49 U.S.C. § 5309(n)(1); *Id.* § 5336(g). All of the program funds apportioned or awarded by FTA have an administrative period for obligation of six years or less. Any apportioned or awarded funds that remain unobligated at the end of that period will revert to FTA for redistribution in the following year and the grantee will not have another opportunity to utilize those funds. If the funds are not awarded by the statutory deadline, then those funds lapse and the project sponsor no longer has the

[2] The term "orphan" is not a transportation term, but is used in the litigation.

ability to receive those funds. If there is no relief from the immediate application of the Court's decision, tens of millions of FTA funds could potentially lapse in approximately five months, at the end of Fiscal Year 2018.

10. Additionally, for the projects that are awaiting STIP approval and may now need to conduct new conformity determinations, the funding delays and disruptions are likely to be significant and likely could take as long as a year or more. [3] If funds lapse, as a result of the delay, project sponsors will have no recourse.

11. The potential harm from this decision to transportation projects in the impacted areas is extremely significant in scope and dollars. FTA has projects in the 1997 "orphan" maintenance and non-attainment areas that have lapsing funds. In addition, those areas will not be able to advance new projects funded from DOT's discretionary funding programs, including the Better Utilizing Investments to Leverage Development (BUILD)[4] Transportation program, or Section 5307, 5310, or 5311 (of Title 49 of the U.S. Code) funds sub-allocated by State Departments of Transportation. FTA estimates that approximately $800 million in Section 5307 grant funds, which may not already be in approved STIPs, could potentially be impacted. Additionally, the impact as a result of the delay to conducting conformity determinations will delay metropolitan transportation plan, TIP and STIP approvals, which in turn will delay grant awards.

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[3] *See*, Exhibit 2, Declaration of Walter C. Waidelich, Jr., Executive Director for the Federal Highway Administration, dated April 23, 2018, attached to Respondents' Petition for Panel Rehearing.

[4] This program replaces the Transportation Investment Generating Economic Recovery (TIGER) program.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/23/18

Matthew J. Welbes

MATTHEW J. WELBES
Executive Director for
Federal Transit Administration