ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1385 (Consolidated with Nos. 15-1392, 15-1490, 15-1491, & 15-1494)

MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PAGE PROOF BRIEF FOR RESPONDENT EPA

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RESPONDENTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel for Respondents United States Environmental Protection Agency and Gina McCarthy, Administrator, United States Environmental Protection Agency, certifies as follows:

A. Parties and Amici.

All parties and intervenors appearing in this Court are accurately identified in the Petitioners' Opening Briefs. The Court has granted the following organizations leave to participate as *amicus curiae*: the American Thoracic Society, the Institute for Policy Integrity, the National Association of Home Builders, and the American Lung Association.

B. Rulings Under Review.

The final agency action under review is EPA's *National Ambient Air Quality Standards for Ozone*, published at 80 FR 65,292 (Oct. 26, 2015).

C. Related Cases.

These consolidated cases were not previously before this Court or any other court.

/s/ *Justin D. Heminger*
JUSTIN D. HEMINGER

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Cases

* Authorities upon which we chiefly rely are marked with an asterisk.

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GLOSSARY

APA	Administrative Procedure Act
ATS	American Thoracic Society
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
FR	Federal Register
HREA	Health and Risk Exposure Assessment
ISA	Integrated Science Assessment
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
ppb	Parts Per Billion
ppm	Parts Per Million
PA	Policy Assessment
RTC	Response to Comments
SIP	State Implementation Plan

STATEMENT OF JURISDICTION

The Court has jurisdiction under 42 U.S.C. § 7607(b).

STATEMENT OF THE ISSUES

In 1970, Congress created the National Ambient Air Quality Standards (NAAQS) program as the Clean Air Act's principal vehicle for improving the Nation's air quality. Congress directed the United States Environmental Protection Agency (EPA) to set NAAQS that are requisite to protect public health (the primary standard) and public welfare (the secondary standard), and required the Agency to periodically review and revise those standards as appropriate.

In 2015, EPA revised the NAAQS for ozone. First, EPA Administrator McCarthy determined that the old standards, last revised in 2008, were no longer requisite. Then she exercised her judgment—as directed by Section 7409(b) of the Act—to lower the level of the primary and secondary standards for ozone from 75 parts per billion (ppb) to 70 ppb. This case presents five issues:

1. Did the Administrator rationally exercise her judgment in concluding that the 2008 primary standard for ozone was inadequate to protect public health with an adequate margin of safety and in lowering the level of the revised primary standard to 70 ppb?
2. Did the Administrator rationally exercise her judgment in concluding that the 2008 secondary standard for ozone was inadequate to protect public

welfare from any known or anticipated adverse effects and in lowering the level of the revised secondary standard to 70 ppb?

3. Did EPA rationally find that background ozone levels will not prevent states from attaining the revised NAAQS?
4. Does the Clean Air Act unambiguously require EPA to set the NAAQS above the highest background concentration of an air pollutant anywhere, even when that background concentration is atypical and isolated, and when the Act contains particular provisions addressing background ozone?
5. Did EPA reasonably interpret Section 7475 of the Act to allow grandfathering of a narrow category of pending preconstruction permit applications from demonstrating compliance with the new ozone NAAQS?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in this brief's addendum.

STATEMENT OF THE CASE

Ozone is a powerful lung irritant and the primary component of smog. It can cause difficulty breathing, heart problems, and even premature death. EPA estimates that 99 million Americans, more than one in every four people in the Nation, live in areas with unhealthy levels of ozone. 80 Fed. Reg. (FR) 65,292, 65,300/1 (Oct. 26, 2015). These high ozone levels are largely caused by domestic, manmade emissions of air pollutants, for example, from cars, trucks, and power plants. *Id.* at 65,300/3.

In 1970, Congress enacted a "drastic remedy" to the "serious and otherwise uncheckable problem" of air pollution: the modern Clean Air Act (CAA or the Act). *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). Under the Act, EPA sets national ambient air quality standards (NAAQS) for common air pollutants like ozone, which the states then implement. EPA must establish, and periodically review, a primary NAAQS that is "requisite"—that is, neither more nor less stringent than necessary—to protect public health with an adequate margin of safety, and a secondary NAAQS that is requisite to protect public welfare.

Over the past forty years, EPA has issued and revised several ozone NAAQS, in 1971, 1979, 1997, and 2008. Though reducing ozone pollution is difficult, states have risen to meet the challenge. Today, almost all areas meet the 1997 NAAQS, and of the areas that did not meet the 2008 NAAQS when it was established, about forty percent now do. 80 FR 65,438/2.

In 2015, EPA again revised the ozone NAAQS. After considering over one thousand new studies, several rounds of public comments, and input from the Clean Air Scientific Advisory Committee (CASAC), a group created at Congress's direction to provide unbiased scientific advice to EPA, EPA Administrator McCarthy determined that the 2008 standards were inadequate. She then judged that revising the level of the primary and secondary standards from 75 to 70 parts-per-billion (ppb), while retaining the other three elements of the standards, would provide requisite protection for public health and welfare.

As in prior NAAQS cases, Environmental Petitioners argue that EPA set the standards too high, while State and Industry Petitioners argue that EPA set the standards too low. The Petitioners begin their briefs with stories about three children and one town. Though Petitioners focus on different subjects, their perspectives are equally flawed. On the one hand, Environmental Petitioners argue that EPA must require the air everywhere to be so clean that people could exercise outside continuously, 24 hours a day, however unlikely that is. On the other hand, State and Industry Petitioners argue that EPA must allow the air everywhere to be as dirty as the dirtiest air crossing the border from Texas and Mexico into Sunland Park, New Mexico. Both of these arguments fail for the same reason: the NAAQS must be requisite to protect all Americans as they live, where they live.

And the revised NAAQS do protect all Americans, including children and the people of Sunland Park. The Administrator lowered the primary standard level

especially to protect children, people with asthma, and other at-risk groups. 80 FR 65,294/1; *id.* at 65,295 n.1 (primary standard should be set to protect sensitive groups, but not a single person in that group). For example, she relied on an exposure assessment that helped her estimate how often children and asthmatic children would likely encounter potentially harmful ozone levels during their daily lives. In this way, she set a standard that provides increased protection for the millions of children across the Nation, including asthmatic children. But she declined to set a standard that requires clean air in the abstract, even when it may have no benefits for public health or welfare. That would lead to an overprotective standard—one that is more than requisite.

By contrast, State and Industry Petitioners champion an under-protective standard. They contend that EPA cannot set requisite NAAQS for the Nation because they claim that background ozone—ozone formed from sources other than domestic, manmade emissions—poses an insurmountable obstacle to attainment in some areas. But EPA considered numerous studies and applied two scientific models to conclude that background ozone would not preclude attainment in any area. And several provisions in the Act specifically address attainment concerns posed by background ozone, including the sources of background ozone most pertinent to this case—natural events and international emissions. Indeed, Sunland Park can address the impact of international emissions on attainment under a provision that directly addresses that issue, just like its neighbor, El Paso, Texas, has successfully done. 80

FR 65,444/2; *see also* 77 FR 71,145/1 (Nov. 29, 2012) (Sunland Park's air quality has improved over a period of ten years). The Act does not require that EPA abandon its duty to set requisite NAAQS simply to spare states and areas from applying the Act's more specific background ozone provisions. To do so would leave millions of Americans across the Nation, including children, exposed to harmful ozone levels—something the Administrator refused to do.

In sum, the Administrator did consider children, and she did consider background ozone. And although she did not reach the preferred outcomes of Environmental Petitioners or State and Industry Petitioners, her decisions are reasonable and should be upheld.

I. Statutory and regulatory background

A. The National Ambient Air Quality Standards

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program to protect and enhance the Nation's air quality through a system of shared federal and state responsibility. *Id.* § 7401(b)(1). Central to this program are the NAAQS, which EPA sets to limit the concentration of certain air pollutants in the "ambient," or outside, air to protect against the pollutants' effects on public health and welfare. *Id.* §§ 7408-09. EPA has established NAAQS for six common air pollutants, including ozone. 40 C.F.R. pt. 50.

At the beginning of the NAAQS process, EPA develops "air quality criteria," which must "accurately reflect the latest scientific knowledge." 42 § 7408(a)(2). The

criteria are not themselves guidelines or standards, but the scientific bases for the standards. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1136-37 (D.C. Cir. 1980). To ensure that the NAAQS keep pace with scientific advances, EPA must review the criteria and the NAAQS every five years and revise the NAAQS as "appropriate in accordance with [Sections 7408 and 7409(b)]." 42 U.S.C. § 7409(d)(1).

During the five-year review, an independent scientific review committee, CASAC, must also assess the science and recommend revisions as appropriate to the criteria and the NAAQS. *Id.* § 7409(d)(2). CASAC is a seven-member body currently comprising scientists from universities, research institutes, and a state government organization. Although EPA is not bound by CASAC's recommendations, if EPA's revisions to the NAAQS differ significantly from those recommendations, EPA must explain the reasons for its departure from CASAC's advice. *Id.* §§ 7607(d)(3), (d)(6); *see Mississippi v. EPA*, 744 F.3d 1334, 1355 (D.C. Cir. 2014).

The Act establishes two types of NAAQS. The "primary" NAAQS protect public health, and the "secondary" NAAQS protect public welfare. The EPA Administrator must set both NAAQS at levels that are "requisite" in her judgment, based on the air quality criteria developed by EPA and reviewed by CASAC. 42 U.S.C. § 7409(b). In setting primary NAAQS, EPA must allow an "adequate margin of safety," *id.* § 7409(b)(1), so that the standard will "protect against effects which have not yet been uncovered by research and effects whose medical significance is a matter of disagreement." *Lead Industries*, 647 F.2d at 1154. The secondary NAAQS

provision is phrased differently, requiring protection against "any known or anticipated adverse effects" on "public welfare." 42 U.S.C. § 7409(b)(2). The Act defines "welfare effects" to include effects on soils, water, crops, vegetation, wildlife, and climate. *Id.* § 7602(h).

Each NAAQS has four basic elements: (1) the "indicator," which defines the chemical species or mixture to be measured; (2) the "form," which defines the air quality statistic to be compared to the level of the standard; (3) the "level," which defines the concentration of the indicator pollutant used to determine whether the standard is achieved; and (4) the "averaging time," which sets the time period over which pollution must be measured. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 516 (D.C. Cir. 2009) (*Farm Bureau*).

B. Attainment and nonattainment designations

Once EPA promulgates the NAAQS, the Agency must designate areas as being in "attainment" or "nonattainment" of the NAAQS, or "unclassifiable." 42 U.S.C. § 7407(d). For ozone, nonattainment is further split into five classifications, ranging from marginal to extreme nonattainment, each with progressively more time to attain. *Id.* §§ 7511, 7511a. EPA generally makes designation and classification decisions based on data collected from air quality monitors situated throughout the country. *Id.* § 7619.

States may petition EPA to exclude monitoring data directly influenced by "exceptional events" so that those events do not impact designations. 42 U.S.C.

§ 7619(b)(3)(B)(iv). Under Section 7619(b), an "exceptional event" is an event that EPA determines is "not reasonably controllable or preventable" that "affects air quality" and is "caused by human activity that is unlikely to recur at a particular location or a natural event." *Id.* § 7619(b)(1)(A). EPA considers certain wildfires and stratospheric ozone intrusions to be "natural events" under the Act's exceptional events provision. Treatment of Data Influenced by Exceptional Events, 72 FR 13,560, 13,566 (Mar. 22, 2007). Once EPA determines that an event is "exceptional" under Section 7619(b), it will exclude the data directly influenced by that event and base its determination of whether an area meets the NAAQS on the remaining monitoring data.

C. NAAQS implementation

Congress assigned the states the primary responsibility to implement the NAAQS. 42 U.S.C. § 7407(a). Thus, once EPA promulgates the NAAQS, states must develop state implementation plans (SIPs). A state's SIP must contain measures to "implement[], maintain[], and enforce[]" the NAAQS within its jurisdiction, and to curtail "significant contribut[ions] to nonattainment" and "interfere[nce] with maintenance" of the NAAQS in other states. *Id.* §§ 7410(a)(1), (a)(2)(D)(i)(I). After adopting a SIP, a state will submit its SIP to EPA, *id.* § 7410(a), and EPA must approve the SIP if it meets the Act's requirements, *id.* § 7410(k)(3).

The Act does not require states to demonstrate attainment of the NAAQS in all areas. Areas that are significantly affected by emissions outside their control may

receive special consideration. For example, if a state can demonstrate that its attainment plan would be sufficient to attain the NAAQS by the attainment date "but for" international emissions, EPA will approve the state's attainment demonstration. 42 U.S.C. § 7509a(a)(2). Another exception is for "[r]ural transport areas"—nonattainment areas with emission sources that "do not make a significant contribution" to measured ozone concentrations and that are not within or adjacent to a "Metropolitan Statistical Area." *Id.* § 7511a(h). Rural transport areas need not submit a plan demonstrating attainment of the NAAQS. *Id.* § 7511a(h) (rural transport areas must meet "marginal area" requirements); *id.* § 7511a(a) (specifying requirements for marginal areas).

D. Permits under the Prevention of Significant Deterioration program

The CAA also contains a Prevention of Significant Deterioration (PSD) program that prohibits new or modified major sources of emissions from being constructed in any area that attains the NAAQS, or that cannot be classified, without first obtaining a permit. 42 U.S.C. § 7475. To obtain a permit, the applicant must satisfy several requirements, including demonstrating that emissions from the facility to be built will not cause or contribute to an exceedance of any NAAQS. *Id.* § 7475(a)(3)(B). The PSD program requires the permitting authority to grant or deny a completed permit application within one year after filing. 42 U.S.C. § 7475(c).

II. EPA's prior ozone regulations

A. Early regulation of ozone

Ozone is not emitted directly into the air but is formed when volatile organic compounds and nitrogen oxides (precursors) combine in the presence of sunlight. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981) (*API*). EPA first promulgated NAAQS for photochemical oxidants in 1971 using ozone as the indicator, and revised the ozone NAAQS in 1979 and 1997. 36 FR 8186 (Apr. 30, 1971); 44 FR 8202 (Feb. 8, 1979); 62 FR 38,856 (July 18, 1997).

Several parties challenged the 1997 NAAQS, and in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), the Supreme Court resolved several issues pertinent to this litigation. The Supreme Court held that Congress established an "intelligible principle" in the Act by requiring EPA to set NAAQS that are "requisite" to protect public health and welfare, meaning "not lower or higher than is necessary." *Id.* at 475-76. The Supreme Court also upheld this Court's longstanding position that the Act "unambiguously bars cost considerations from the NAAQS-setting process." *Id.* at 470. The Supreme Court then remanded the case to this Court, which rejected the petitioners' remaining arguments. *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 378-80 (D.C. Cir. 2002) (*ATA III*).

B. ct's preconstruction perm

In 2008, EPA revised the primary and secondary ozone NAAQS by lowering the level of both to 75 ppb. 73 FR 16,436 (Mar. 27, 2008). In setting the primary

standard, EPA relied on clear evidence that ozone causes health effects at and above 80 ppb, as well as on new studies, including two new clinical studies that showed effects at lower levels. *Mississippi*, 744 F.3d at 1340. Though CASAC reviewed the same scientific evidence and recommended a primary standard with a level between 60 and 70 ppb, EPA explained that the scientific data regarding effects at 60 ppb was "too limited" and "inconclusive" to support a level below 75 ppb. *Id.* In *Mississippi*, the Court upheld the primary standard on this basis. *Id.* The Court also held that EPA had not adequately explained its revision of the secondary standard, concluding that EPA had not determined what level of public welfare protection was requisite and remanding for further explanation or reconsideration. *Id.* at 1359, 1360-62.

III. The 2015 ozone rulemaking process

Shortly after issuing the 2008 NAAQS, EPA began another comprehensive review of the standards and underlying science. When the secondary standard was remanded by *Mississippi*, EPA consolidated its review on remand with the ongoing review. 80 FR 65,298. EPA's review proceeded in several steps. Integrated Review Plan at 1-7 (Figure 1.1) (flow chart showing NAAQS review process), JA____.

EPA developed three key "assessment" documents to support its review and revision of the ozone NAAQS. *First*, EPA synthesized all of the science that it collected and received in an exhaustive Integrated Science Assessment (which EPA called the "Criteria Document" in prior NAAQS reviews). Integrated Science Assessment at 1ii, JA___. The final Integrated Science Assessment, published in 2013,

is over 1,000 pages long and discusses the short- and long-term health effects of ozone, health risks for sensitive populations, effects on vegetation, atmospheric chemistry, and many other issues. *Second*, EPA developed health and welfare Risk and Exposure Assessments, which estimate exposures and evaluate risks under different potential NAAQS. 80 FR 65,298. *Third*, EPA staff prepared a Policy Assessment (called the "Staff Paper" in prior NAAQS reviews), which analyzed the policy implications of the previous two sets of documents to inform the Administrator's decision to retain or revise the ozone NAAQS. Policy Assessment Executive Summary 1, JA___; *see also Farm Bureau*, 559 F.3d at 521. In preparing each document, EPA went through multiple drafts, considered public comments, and consulted with CASAC. CASAC Letter 2014c, JA____-____. Further, CASAC independently assessed the science, held public meetings, and wrote letters of advice to EPA. *Id.*

In December 2014, EPA published a proposed revision of the primary and secondary ozone NAAQS, proposing to lower the level for both standards to between 65 and 70 ppb (that is, making the level more stringent), while maintaining the indicator, averaging time, and form. 79 FR 75,234 (Dec. 17, 2014).

Three public hearings and 430,000 written comments later, EPA promulgated revised primary and secondary NAAQS. 80 FR 65,294. For both revised standards, EPA lowered the level from 75 to 70 ppb, while retaining the other three elements: the indicator (ozone), the averaging time (8 hours), and the form (the three-year average of the fourth-highest daily maximum 8-hour concentration). *Id.* at 65,347/1,

65,350/2. Under the form of the standard, at each location, EPA first identifies which days each year have the highest daily levels of ozone,[1] then takes the fourth-highest daily level per year, and finally calculates a 3-year average of those levels.

IV. The final 2015 ozone NAAQS rule

On October 26, 2015, EPA published the final 2015 ozone NAAQS rule. Collectively, the Petitioners challenge four features of the rule: (1) the revised primary standard; (2) the revised secondary standard; (3) the consideration of background ozone and other implementation issues; and (4) the revised PSD permitting program regulations. Each of these four features is discussed below.

A. Revision of the primary standard

First, EPA revised the primary standard. 80 FR 65,301-66. The Administrator made her decision based on an assessment of the entire body of scientific evidence in the record (as reflected in the Integrated Science Assessment (ISA), the Health Risk and Exposure Assessment (HREA), and the Policy Assessment (PA)), public comments, and CASAC's advice. An overview of that evidence and the Administrator's conclusions follows.

1. Evidence of health effects associated with ozone exposure

EPA has amassed an extensive body of scientific evidence about the health effects associated with ozone exposure, including many new studies that provided

[1] Throughout the brief, "daily" levels refer to daily maximum 8-hour averages.

evidence that "substantially strengthens what was known about [ozone]-related health effects in the last review." 80 FR 65,294/1. The evidence shows that exposure to ozone can cause reduced lung function, airway inflammation, heart rate changes, and premature death, among other health effects. *Id.* at 65,302-11.

a. The clinical studies

EPA had the highest level of certainty that short-term ozone exposure is causally related to respiratory effects, such as lung function decrements (a decrease in the amount of air one can expel from the lungs), lung inflammation, and respiratory symptoms (such as wheezing or shortness of breath). 80 FR 65,303.

When assessing these effects, EPA focused heavily on evidence from clinical studies (controlled human exposure studies). In these studies, healthy, young adult volunteers breathe air containing known ozone concentrations while engaging in quasi-continuous moderate physical activity for a defined period (6.6 hours), and scientists then measure the volunteers' lung function and other health effects. *Id.* at 65,303. In the 2008 review, many clinical studies reported statistically significant group mean lung function decrements, with some individuals experiencing moderate decrements of 10% or greater following exposures to 80 ppb. PA 3-10, JA____. Two studies (the 2002 and 2006 Adams studies) reported these decrements at levels lower than 80 ppb. *Id.* In this review, new clinical studies strengthened the conclusion that lung function decrements of 10% or greater occur in some healthy individuals at concentrations down to and including levels of 60 ppb. 80 FR 65,303/2.

New clinical studies also reported statistically significant associations between short-term ozone exposure and other health effects at levels lower than previously observed. The 2011 Kim study reported a statistically significant increase in airway inflammation following exposure to 60 ppb. PA 3-17 to 3-22, JA___-____; 80 FR 65,334/3 & n.96. EPA placed particular emphasis on the 2009 Schelegle study that reported respiratory symptoms occurring in combination with lung function decrements in some individuals. CASAC considered, and the American Thoracic Society (ATS) guidelines treated, this combination of health effects to be adverse. 80 FR 65,330/1-/2. The Schelegle study showed a statistically significant decrease in group mean lung function capacity and a statistically significant increase in respiratory symptoms in healthy, young adults following 6.6-hour exposures to average ozone concentrations of 72 ppb. *Id.* at 65,330/2-/3. Other studies at levels below 72 ppb did not find this combination of statistically significant effects. *Id.* at 65,357/3 (studies conducted at 60 ppb and 63 ppb).

b. The epidemiologic evidence

EPA also evaluated hundreds of epidemiologic studies, which strengthened the evidence of health effects associated with ozone exposure. *Id.* at 65,364/3-65/1. In contrast to clinical studies, epidemiologic studies provide statistically relevant information about a broader population of individuals who are exposed to uncontrolled air pollutants. EPA gave particular weight to one new epidemiologic study, Mar & Koenig, because it showed statistically significant health effects (asthma

emergency department visits) associated with ozone exposure in Seattle, an area that would have been in compliance with the 2008 primary standard, but which would not have met a standard with a level of 70 ppb. *Id.* at 65,344/1, 65,359/2, 65,364/3 & n.151.

c. EPA's exposure and risk assessments

EPA also conducted a new exposure assessment to estimate how many people would be exposed to ozone concentrations of 80, 70, or 60 ppb while working or playing or otherwise experiencing elevated breathing rates while outdoors. 80 FR 65,312/2. This assessment is informative because only people whose breathing is elevated have been shown to be at risk for adverse health effects from exposures to ozone concentrations that could be expected outdoors. *Id.* at 65,312/3. The exposure assessment estimates how often groups of people will be exposed to specific ozone concentrations when experiencing elevated breathing rates, which EPA termed "exposures of concern." *Id.* at 65,312/3 n.48.

To understand when and where people experience elevated breathing levels outside, EPA analyzed daily activity diaries of real people. Adults, children, asthmatics, seniors, and other subgroups recorded the location of all of their activities and their physical exertion levels minute-by-minute. ISA 4-33, JA____. Altogether, EPA collected 41,474 days of detailed activity data. HREA 5-39, JA___. Next, EPA modeled where and when the populations of fifteen cities across the United States, including Atlanta, Denver, Los Angeles, New York, and Washington, D.C., would

experience elevated breathing levels. 80 FR 65,311/2 & n.40. Then EPA combined the activity model with new air quality modeling that CASAC endorsed as "important" and "scientifically more valid." *Id.* at 65,311/2-/3.

Because EPA identified children as an important at-risk population, EPA specifically modeled exposures of concern for all school-age children in the fifteen cities, ranging in age from 5 to 18 years old, and for asthmatic school-age children. *Id.* at 65,312/3, 65,313 & Table 1. That is, for different potential NAAQS levels, EPA estimated the percent and number of children and asthmatic children in the fifteen cities who could be exposed to specified ozone levels while engaged in enough outdoor physical activity to elevate their breathing rates.

In addition to the exposure assessment, EPA developed risk assessments that provided quantitative estimates of ozone-related health risks. 80 FR 65,314/1-17/1. Among the risk assessments, EPA emphasized its estimates of lung function decrements from short-term ozone exposure, which it calculated using a new model. 80 FR 65,314/3, 65,303/3; HREA 6-9, 6-13, JA____, JA____. EPA applied this new model to the same fifteen-city population group from the exposure assessment, again focusing on children, to estimate the number of children (including asthmatic children) expected to experience lung function decrements of 10% or greater. HREA 6-6, JA____; 80 FR 65,314/3 & Table 2. CASAC agreed with EPA that the new model marked a significant technical advance over the risk assessment modeling in the

last review. *Id.* at 65,303/3 (CASAC found the McDonnell-Stewart-Smith model "to be scientifically and biologically defensible" and "of tremendous importance").

2. CASAC's advice

From 2008 through 2014, CASAC advised EPA about the primary standard. 80 FR 65,321/3. Shortly after EPA issued the 2008 primary NAAQS, with a level of 75 ppb, CASAC "strongly questioned" whether the standard was "requisite." *Id.* In this review, CASAC concluded that "there is clear scientific support for the need to revise the standard" and consistently recommended that the level should be set within a range of 60 to 70 ppb, leaving the other elements of the standard (form, averaging time, and indicator) unchanged. *Id.* at 65,322/2.

CASAC based this recommendation on its review of the scientific evidence. In CASAC's view, the clinical studies showed with "scientific certainty" that exposure to ozone concentrations at or above 80 ppb cause "clinically relevant decrements of lung function." *Id.* at 65,322/1. And CASAC highlighted the Schelegle study's finding that exposure to average ozone concentrations of 72 ppb caused a statistically significant decrease in group mean lung function combined with a statistically significant increase in respiratory symptoms. *Id.* at 65,322/2. CASAC concluded that the healthy, young adult volunteers in that study had experienced "adverse health effects," as defined by the American Thoracic Society guidelines, and that asthmatics and other sensitive subgroups might experience adverse health effects at lower concentrations. *Id.* at 65,322/2-3. Finally, CASAC also noted that exposures to 60 ppb resulted in lung

function decrements "that could be adverse in individuals with lung disease." *Id.* at 65,322/3.

CASAC acknowledged that a choice of level within its recommended range of 60 to 70 ppb involved a "policy judgment," but advised that "based on the scientific evidence, a level of 70 ppb provides little margin of safety for the protection of public health, particularly for sensitive subpopulations." CASAC 2014c Letter at ii, JA___. It then offered policy advice to set the level lower than 70 ppb. *Id.* Further, CASAC endorsed the form of the standard (the three-year average of the fourth-highest daily level) because it "provides programmatic stability by allowing for atypical meteorological conditions that can lead to abnormally high ambient ozone concentrations while providing health protection." *Id.*

3. The Administrator's conclusions

EPA Administrator McCarthy decided that in her judgment, the 2008 primary standard for ozone, with a level of 75 ppb, was not "requisite to protect the public health" while "allowing an adequate margin of safety." 80 FR 65,342-47. Further exercising her judgment, the Administrator concluded that the level of the revised primary standard should be lowered to 70 ppb, while the other three elements of the standard—the indicator, averaging time, and form—should stay the same. *Id.* at 65,347-65.

In reaching these conclusions, the Administrator placed particular weight on the clinical studies. 80 FR 65,343/1, 65,363/1. She recognized that the clinical studies

showed that at and above 80 ppb, people experienced the largest respiratory effects, and the broadest range of effects. *Id.* at 65,363/2. She also stressed the Schelegle study's results showing a combination of lung function decrements and respiratory symptoms in healthy, young volunteers who engaged in quasi-continuous moderate exertion after being exposed to 72 ppb ozone for 6.6 hours. *Id.* at 65,353/1, 65,363/1. Consistent with CASAC's advice and the American Thoracic Society guidelines, the Administrator found that this combination of lung function decrements and respiratory symptoms was an adverse health effect that could be experienced at a level allowed by the 2008 primary standard. *Id.*

The Administrator reasoned that a level of 70 ppb was "well below" 80 ppb level and below the 72 ppb level at which the Schelegle study showed a combination of health effects that were adverse. *Id.* at 65,363/2. A 70 ppb level was also consistent with the Mar & Koenig study, the only statistically significant epidemiologic study that showed an association between adverse effects in a city with air quality that would comply with the 2008 standard, but did not meet a standard with a level of 70 ppb. *Id.* at 65,364/3. A 70 ppb standard would also provide "substantial protection against the broader range of [ozone] exposure concentrations that have been shown in [clinical studies] to result in respiratory effects, including exposure concentrations below 70 ppb." *Id.* at 65,363/2. Moreover, the Administrator concluded that "the large majority of days in areas that meet the revised standard" will have 8-hour ozone concentrations

below 70 ppb, with "most days" having 8-hour concentrations "well below this level." *Id.*

The Administrator also relied on EPA's exposure assessment, which estimated how many people with elevated ventilation rates would likely experience exposures of concern. *Id.* Not every exposure of concern results in an adverse effect, but there are plausible explanations for how repeated exposures of concern could cause adverse effects. *Id.* at 65,363/3. The Administrator therefore emphasized repeated exposures of concern, and she focused on estimates of two or more such exposures. *Id.* She concluded that a revised standard with a level of 70 ppb would "eliminate the occurrence of two or more exposures of concern to [ozone] concentrations at or above 80 ppb and virtually eliminate the occurrence of two or more exposures of concern to [ozone] concentrations at or above 70 ppb for all children and children with asthma, even in the worst-case year and location evaluated." *Id.* So too, the revised standard would protect 96% to 99% of children in the fifteen-city study areas from experiencing two or more exposures of concern at or above 60 ppb—a reduction of more than 60% when compared to the 2008 standard. *Id.* at 65,364/1, 65,313 (Table 1).

The Administrator also carefully considered EPA's risk assessment that estimated lung function decrements. First, a level of 70 ppb resulted in significant reductions in the number of people experiencing decrements of 10% and 15% when compared to the 2008 standard. *Id.* at 65,364/2. The Administrator also noted

"important uncertainties in using lung function risk estimates as a basis for considering the occurrence of adverse effects in the population." *Id.* Neither the American Thoracic Society guidelines nor CASAC conclusively determined that decrements of this magnitude are by themselves an adverse health effect. *Id.* And no level within CASAC's recommended range would completely eliminate these effects. *Id.* The Administrator also noted that variability in the lung function risk estimates for different cities created overlaps between the estimates for different potential levels of the standard. *Id.* All of this led her to place limited weight on the lung function risk estimates in judging between alternative levels. *Id.*

Citing uncertainties in the available evidence, the Administrator concluded that a level below 70 ppb would be more than "requisite." *Id.* at 65,365/1-/2. When compared to a level of 70 ppb, she was notably less certain about the extent to which a lower standard could result in further public health improvements. *Id.*

Finally, the Administrator retained the form of the standard, finding that it protects public health while providing a stable target for improving air quality where needed. *Id.* at 65,352 (citing CASAC's advice).

B. Revision of the secondary standard

EPA also revised the secondary standard. 80 FR 65,369-410. In reaching her decision, the Administrator thoroughly considered the extensive body of scientific evidence available in the last review, as well as more than four hundred new studies.

Id. at 65,369. What follows is an overview of the evidence and the Administrator's conclusions.

1. Evidence of welfare effects associated with ozone exposure

EPA's assessment of public welfare impacts focused on vegetation effects associated with ozone exposure. *Id.* at 65,373/3-74/1. Based on the extensive body of scientific evidence, EPA concluded that a causal relationship exists between ozone exposure and vegetation effects, including reduced vegetation growth, reduced yield of agricultural crops, visible leaf injury, reduced productivity in terrestrial ecosystems, and "alteration of below-ground biogeochemical cycles." 80 FR 65,370/1; ISA 2-36 to 2-37, JA____-____. EPA gave primary consideration to three main types of vegetation effects: (1) tree growth impacts; (2) crop yield loss; and (3) visible leaf injury. 80 FR 65,370/3. EPA's assessment of these effects is discussed below in turn.

The first vegetation effect that EPA considered was tree growth (technically, the "relative biomass loss"). 80 FR 65,371/2 & n.159. EPA assessed how ozone exposure affected important tree species growing in the United States, including impacts to the trees' growth, productivity, and carbon storage capacity. 80 FR 65,371/1. EPA found that newly available evidence supported and strengthened its previous conclusions on tree growth impacts. *Id.* at 65,371/2-72/1, 65,383/3. To assess growth effects, EPA looked to a tree growth analysis, initially for twelve tree species that are native to the United States, focusing on the median of the studied species. *Id.* at 65,371-72, 65,380/2. The tree growth analysis drew from a collection of

52 studies of tree seedlings, where the seedlings were exposed to specific, controlled concentrations of ozone, measured using a cumulative, seasonal ozone exposure index, called the "W126 index." *Id.* This index measures the aggregate amount of ozone that a plant or tree is exposed to over a growing season (such as the daylight hours from April through June). *Id.* at 65,373/2 n.164.

The second vegetation effect that EPA considered was crop yield loss. 80 FR 65,372, 65,375-76. Although EPA found that the newly available evidence strengthened its previous conclusions that ozone exposure reduces crop growth and yields, the Agency also recognized challenges in assessing the public welfare significance of such impacts to commodity crops, where humans heavily manage them to obtain a particular output. *Id.* at 65,372/2, 65,379.

The third vegetation effect that EPA considered was "visible foliar injury," a technical term for leaf injury that certain plants and trees experience from ozone exposure. 80 FR 65,370-71, 65,376. This leaf injury occurs when sensitive plants are exposed to elevated ozone concentrations, particularly in moist soil conditions. *Id.* at 65,370/3. The "visible" aspect of leaf injury is the discoloration and marking of the leaves of the plant or tree. ISA 9-38, JA____. But whether leaf injury indicates that a plant is experiencing effects beyond changes in leaf color depends on many factors, such as the total leaf area affected, the age of the plant, and its size. 80 FR 65,370/3. Although numerous studies suggest that higher ozone exposures result in greater leaf injury in sensitive species, studies on the influence of other factors, like soil moisture,

do not yet provide a reliable means of predicting the extent of leaf injury at specific ozone concentrations. *Id.* EPA similarly faced difficulties relating leaf injury to other vegetation effects. *Id.*

2. CASAC's advice

CASAC's recommendations to EPA on vegetation effects had many components. For instance, CASAC agreed with EPA that tree growth loss was an appropriate way to assess "a wide range of damage that is adverse to public welfare." 80 FR 65,393/3. CASAC also endorsed EPA's tree growth analysis as a basis for estimating tree growth effects caused by ozone exposure. *Id.* at 65,380/2, 65,371-72. But as to one of the twelve tree species, the eastern cottonwood, CASAC cautioned EPA against placing too much emphasis on the data because (1) the cottonwood data came from a single study, (2) the study "did not control for ozone and climatic conditions," and (3) the results "show extreme sensitivity to ozone compared to other studies." *Id.* at 65,372/2 n.160.

Further, CASAC urged EPA to revise the secondary standard by adopting the W126 exposure index as the form and averaging time of the standard, and advised EPA that tree growth loss of 6% in the median tree species was "unacceptably high." 80 FR 65,393, 65,392/2. CASAC also recommended that EPA identify a range of alternative standard levels "that include levels that aim for not greater than 2% [tree growth loss] for the median tree species." *Id.* at 65,382/1.

Based on its review of EPA's second draft of the Policy Assessment, CASAC advised the Agency to consider a range of standards corresponding to ozone exposures between 7 and 15 parts-per-million hours (ppm-hrs). *Id.* at 65,393-94 & n.197, n.199. In the second draft Policy Assessment, those exposures corresponded to tree growth loss estimates of less than 2% to 5.2%. *Id.* Yet the tree growth loss estimates in the second draft Policy Assessment included the eastern cottonwood data—data that, as part of its advice, CASAC warned EPA to handle with caution. *Id.*; *id.* at 65,372/2 n.160. When EPA removed the cottonwood data, the tree growth loss estimates and associated ozone exposures changed. *Id.* at 65,396/2. For example, the estimated tree growth loss for an exposure of 17 ppm-hrs became 5.3%, instead of the "unacceptably high" 6% estimate that CASAC had advised EPA to avoid. *Id.*

CASAC also recommended that the secondary standard have an annual W126 form, but recognized that policy reasons may exist for adopting a three-year average, and recommended that if the Administrator chose a three-year average W126 form, then she should select a somewhat lower level. *Id.* at 65,396/3.

3. The Administrator's conclusions

The Administrator revised the secondary standard in three steps. In the first step, she judged that the 2008 secondary standard, with a level of 75 ppb, was inadequate to protect the public welfare from known and anticipated adverse effects. 80 FR 65,389-90.

In the second step, mindful of the Court's remand of the secondary standard in *Mississippi*, the Administrator identified the degree of public welfare protection that was appropriate. *Id.* at 65,403-07. In so doing, she focused on tree growth loss as a surrogate for the broader array of effects associated with ozone exposure that could have public welfare significance, including crop yield loss and leaf injury. *Id.* at 65,369/1, 65,406/1. Taking into consideration CASAC's clear statement that 6% tree growth loss was "unacceptably high," the Administrator decided to adopt a revised standard that would generally limit ozone exposures to those associated with tree growth loss somewhat less than 6%. *Id.* at 65,407/1.

In the third step, the Administrator exercised her judgment to decide what revised secondary standard would provide air quality that would achieve the degree of public welfare protection that she identified. 80 FR 65,407-10. To assess the relationship between ozone exposures and the air quality afforded by a revised secondary standard, she relied on an extensive air quality analysis that EPA conducted in two technical memoranda, the 2014 and 2015 Wells Memos. *Id.* at 65,408/3-09/1. She also considered CASAC's recommendation to revise the form of the standard to an exposure index. *Id.* at 65,408/2. But she concluded, based on the Wells Memos' extensive air quality analysis, that a revised form was unnecessary to provide the appropriate degree of public welfare protection. *Id.*

Finally, the Administrator considered what level for the revised secondary standard would ensure air quality that provided the appropriate degree of public

welfare protection. *Id.* at 65,408-10. The tree growth analysis showed that ozone exposures of 17 and 18 ppm-hrs are associated with tree growth loss below 6%. *Id.* at 65,407/1. And the Wells Memos showed that a revised standard with a level of 70 ppb would limit exposures to at or below 17 ppm-hrs in nearly all instances. *Id.* at 65,409/1. Accordingly, the Administrator judged that a revised secondary standard with a level of 70 ppb would be requisite to protect public welfare. *Id.*

C. EPA's consideration of background ozone

State and Industry Petitioners challenge EPA's treatment of background ozone in the context of the Agency's decision to lower the level of the NAAQS. This section explains how EPA defined, estimated, and considered background ozone in revising the NAAQS.

The type of background ozone most pertinent to this case is what EPA terms "U.S. background ozone." U.S. background ozone is all ozone that does not result from U.S. manmade emissions. 80 FR 65,327/3 n.84. For example, ozone formed by natural events, such as wildfires, and ozone formed by manmade emissions in other countries, are components of U.S. background ozone. EPA does not consider ozone formed by manmade emissions in any state to be background, even when that ozone crosses state lines, because the CAA regulates emissions of air pollutants in all states, including interstate transport of pollutants. *Id.* at 65,436. Industry and State Petitioners are sometimes imprecise in discussing background ozone, but Industry Petitioners' argument focuses on U.S. background ozone, while State Petitioners seem

to consider ozone that does not come from manmade emissions in a given state to be background ozone. Industry Br. 23; State Br. 7. In this brief, the term background ozone refers to U.S. background ozone.

Measuring background ozone's actual contribution to ozone levels across the country is a complex scientific challenge. Background ozone cannot be measured directly by monitoring air quality because it is chemically indistinguishable from other ozone and because ozone pollution can travel great distances. ISA 2-5, JA____; PA 2-13 to 2-14, JA____-____; Response to Comments (RTC) 352, JA____. The air quality in rural Nevada, for example, is influenced by manmade ozone pollution from southern California. RTC 349, JA____. To accurately estimate background ozone levels, EPA utilized two state-of-the-art scientific models, both of which perform at least as well as other models published in the scientific literature. PA 2A-7 to 2A-9, 12-13, JA____-____, JA____-____. EPA also considered other background ozone studies, including studies that State and Industry Petitioners discuss in their briefs. RTC 343-50, JA____-____.

EPA concluded that domestic, manmade emissions, not background ozone, drive nonattainment. 80 FR 65,328. EPA modeled both seasonal mean[2] and daily background ozone levels throughout the country. *Id.* EPA found that seasonal mean background ozone levels range between 25 ppb (in the Eastern United States) and 50

[2] Seasonal means are calculated by averaging daily levels from April to October, when ozone levels are generally highest.

ppb (in the Intermountain West[3]). *Id.* More pertinently, even as total daily ozone levels rise, daily background ozone typically stays around the seasonal mean. *Id.* Thus, on those days when total ozone levels do exceed 70 ppb, U.S. manmade emissions largely tip the scales, accounting for more than 65% of ozone concentrations on average. *Id.*

EPA models predicted that on rare instances in a few locations, daily background ozone levels will exceed 70 ppb, but never so frequently as to violate the NAAQS. *Id.* Modeling daily ozone levels at over a thousand locations spanning the country during an ozone season, one model predicted only 2 modeled location-days, and the other model predicted 22 modeled location-days, on which daily background ozone levels exceeded 70 ppb, out of a total of 276,916 modeled location-days. PA 2A-25, Figures 5c & 5d, JA____-___. PA 2-17, JA____ (April to October modeling period spans 214 days); PA 2A-14 to PA 2A-15, JA____-____ (models cover 1,294 locations).

Because the form of the NAAQS is based on the fourth-highest daily level, averaged across three years, the standards allow daily ozone levels to occasionally exceed 70 ppb without violating the NAAQS. Given that form, EPA models predict that background ozone levels will never exceed 70 ppb so frequently that they would prevent attainment. 80 FR 65,328/1.

[3] The Intermountain West region includes Colorado, Nevada, Utah, Wyoming, northern Arizona, eastern California, and parts of New Mexico. PA 2A-15, JA____.

The high background ozone outliers predicted by the EPA models are typically associated with wildfires or stratospheric ozone intrusions. 80 FR 65,436/2; PA 2-21, JA____. A stratospheric ozone intrusion is an influx of stratospheric ozone down to ground level. ISA 3-32 to 3-33, 3-43, JA____-____, JA____. These intrusions generally occur at high altitudes in the Intermountain West, following cold fronts in the late winter and early spring. 80 FR 65,436/2; PA 2-10, 2-17, JA____, JA____. Correspondingly, the EPA models estimate that the highest daily background ozone levels occur in the spring, even though the highest total ozone levels occur in the summer. PA 2-31, JA____.

EPA scientists determined that their models returned results consistent with other published models, including those cited in State and Industry Petitioners' briefs. Industry Br. 24; State Br. 9. For example, both the Zhang and Emery models showed that background ozone levels tend to stay near the seasonal mean even when total ozone levels rise above 55 to 60 ppb. RTC 345, JA____. Other studies corroborated EPA's findings that while background ozone levels may infrequently approach or exceed 70 ppb on a given day, "locations that are most strongly influenced by background [ozone] are relatively limited in scope, i.e., rural areas in the [Intermountain West]." *Id.* at 347, JA____. EPA concluded that some studies, specifically those that claimed to directly measure background ozone levels, were flawed because background ozone levels cannot be measured so easily. *Id.* at 348-49, JA____-____ (addressing the Langford study cited in Industry Br. 24).

After considering the models, the scientific literature, CASAC's advice, and public comments, EPA concluded that while background ozone may cause exceedances of 70 ppb on few days in certain areas, background ozone would not preclude attainment in any area. 80 FR 65,328/1.

EPA further noted that the CAA did not require it to set a NAAQS above a level that would provide appropriate protection for public health and welfare for the entire Nation solely because a few rural areas in the Intermountain West may infrequently experience background levels above 70 ppb. RTC 342, JA____. EPA emphasized that in 1981, this Court rejected the City of Houston's argument that the NAAQS had to be set above natural concentrations of ozone in its area. *Id.* (citing *API*, 665 F.2d at 1184-86). This Court held in *API* that "attainability" was "not [a] relevant consideration in the promulgation of the NAAQS," and observed that Congress had anticipated and addressed difficulties in meeting the NAAQS through various mechanisms in the Act. *API*, 665 F.2d at 1185; RTC 342, JA____; 80 FR 65,328/1, 65,296/2.

EPA specifically discussed three provisions in the Act that allow states and areas flexibility to accommodate background ozone. *Id.* at 65,436/3. The Exceptional Events, International Transport, and Rural Transport provisions address attainment concerns posed by background ozone, including "natural events" such as stratospheric intrusions and wildfires, and international emissions. *Id.*

In light of the limited number of incidents in which background ozone may exceed 70 ppb, governing case law, and the statutory mechanisms for addressing background ozone, EPA decided that background ozone did not prevent it from setting the NAAQS at the health- and welfare- protective level of 70 ppb. *Id.* at 65,328.

D. Ozone monitoring seasons

As part of the NAAQS program, EPA requires all states to operate air quality monitors that record ozone levels during an annual ozone monitoring season. EPA sets the length of the monitoring season to cover the months when there is a reasonable possibility that ozone levels may exceed the NAAQS. 80 FR 65,416/2. In this NAAQS rule, EPA lengthened the ozone monitoring seasons in 32 states and the District of Columbia using past occurrences of concentrations of 60 ppb, a level 15% lower than that of the NAAQS, as a primary guideline for determining the appropriate months of the monitoring season. *Id.* EPA determined that 60 ppb was the appropriate threshold on which to base monitoring requirements because "seasonal [ozone] patterns vary year-to-year due primarily to highly variable meteorological conditions," and "it is important that [ozone] monitors operate during all periods when there is a reasonable possibility of ambient levels approaching the level of the NAAQS." *Id.* at 65,416/2-/3.

E. The PSD program grandfathering provision

In the final NAAQS rule, EPA also revised the regulations for the Prevention of Significant Deterioration (PSD) permitting program. 80 FR 65,431-34. EPA added provisions grandfathering pending permit applications that met one of two permitting milestones from the requirement to demonstrate that the proposed project's emissions would not cause or contribute to a violation of the new ozone NAAQS. *Id.* Instead, those permit applications could make that demonstration for the ozone NAAQS in effect when the application met the permitting milestone. *Id.*

V. The challenges to the rule

Twenty-two parties filed five petitions for review challenging the 2015 ozone NAAQS rule. In this brief, we refer to the petitioners in three groups: State Petitioners, Industry Petitioners, and Environmental Petitioners.

SUMMARY OF ARGUMENT

As in *Mississippi*, EPA once again "finds itself in a situation reminiscent of *Goldilocks and the Three Bears*." 744 F.3d at 1348. On the one hand, State and Industry Petitioners argue that EPA went too far by concluding that the 2008 standards were inadequate. And they seek to derail the health and welfare goals of the NAAQS by arguing that EPA should have set the standards above every background ozone level anywhere in the Nation, however rare and isolated. On the other hand, Environmental Petitioners argue that the Administrator did not go far enough to protect the public's health and welfare when she revised the standards by lowering the level from 75 to 70 ppb (making them more stringent). And, as in *Mississippi*, neither side is right.

Argument Point I. The Administrator rationally concluded that the 2008 primary standard was insufficient to protect public health with an adequate margin of safety. Industry and State Petitioners challenge this conclusion, but they rely on a flawed legal standard and an incomplete account of the record evidence. The Administrator also rationally revised the primary standard. Environmental Petitioners challenge her decision to retain the form of the standard, but their argument assumes that the NAAQS should protect air quality in the abstract, without considering whether real people will actually be exposed to harmful ozone levels. Although Environmental Petitioners argue that the Administrator should have selected a revised level even lower than 70 ppb, likely 60 ppb, the Administrator properly considered

CASAC's advice and the scientific evidence in concluding that a level of 70 ppb is neither more nor less stringent than necessary.

Argument Point II. The Administrator rationally exercised her judgment to conclude that the 2008 secondary standard was insufficient to protect the public welfare from known or anticipated adverse effects. Industry Petitioners challenge this conclusion, but they repeat the same legal and factual errors that infect their challenge to the revised primary standard. The Administrator also rationally identified the appropriate degree of public welfare protection that the secondary standard should provide. Although Environmental Petitioners seek to employ CASAC's advice to attack her conclusion, the Administrator fully considered CASAC's science- and policy-based recommendations. Further, the Administrator rationally revised the secondary standard. Environmental Petitioners challenge her decision to retain the form of the standard, but she reasonably concluded that the form, when combined with a lower level, would provide requisite public welfare protection. Although Environmental Petitioners challenge the Administrator's decision to lower the level of the revised secondary standard to 70 ppb, they do not dispute the extensive air quality analysis in the Wells Memos that supported her conclusion.

Argument Point III. EPA need not reduce national protection for public health and welfare to accommodate State and Industry Petitioners' overstated implementation concerns. Background ozone will not prevent states from attaining the NAAQS and does not justify subjecting millions of Americans to unhealthy levels of ozone. Though stratospheric intrusions and wildfires may cause background ozone levels to spike infrequently in a few locations, EPA reasonably decided to address those events through the form of the NAAQS, which allows three exceedances a year without causing any violations, and through implementation provisions that directly govern background pollution, instead of making the standards less stringent nationwide. The Agency's task in setting the NAAQS is to provide "requisite" protection, not to minimize implementation burdens or costs, and while that task is challenging, there is no doubt that it is also constitutional.

Argument Point IV. Environmental Petitioners' *Chevron* step one challenge to EPA's new grandfathering regulation in the PSD program fails because the CAA contains an ambiguity, and EPA permissibly interpreted the Act to allow it to establish a narrow grandfathering regulation for a limited set of PSD permit applications.

STANDARD OF REVIEW

The Court may reverse EPA's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency acts arbitrarily if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342, 1350 (D.C. Cir. 2012) (citations and quotations omitted). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its decisions should be upheld. *State Farm*, 463 U.S. at 43. When EPA interprets scientific evidence within its expertise, the Court gives the Agency extreme deference. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1087-88 (D.C. Cir. 2014) (sampling circuit law).

In reviewing EPA's interpretation of the CAA, the Court must apply the statute's plain language where it reflects "the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). But where the Act is "silent or ambiguous with respect to the specific issue," the Court defers to EPA's interpretation if it is "based on a permissible construction" of the Act. *Id.* at 843.

ARGUMENT

I. EPA set a revised primary standard for ozone that is neither more nor less health-protective than necessary.

In revising the primary standard for ozone, the Administrator reasonably exercised her judgment based on substantial scientific evidence in the record. As in *Mississippi*, the Court should uphold her decision.

In Argument Point I.A., we explain how the Administrator rationally exercised her judgment to conclude that the 2008 primary standard was insufficient to protect public health with an adequate margin of safety. Industry and State Petitioners' challenge to that conclusion rests on incorrect legal principles and an incomplete picture of the evidence that the Administrator considered. In Argument Point I.B., we explain how the Administrator rationally exercised her judgment to set a revised primary standard that is neither more nor less stringent than is necessary to protect public health with an adequate margin of safety. Environmental Petitioners challenge that decision by inviting the Court to make independent scientific conclusions and policy judgments. This Court should once again decline that invitation.

A. The Administrator made a rational judgment that the 2008 primary standard failed to protect public health with an adequate margin of safety.

The Administrator concluded that the 2008 primary standard, with a level of 75 ppb, was insufficient to protect public health with an adequate margin of safety. 80 FR 65,342-47. She did so in reliance on a broad array of scientific evidence showing

adverse health effects from ozone, most particularly, clinical and epidemiologic evidence showing that large numbers of people experience or can experience adverse effects when exposed to air quality allowed by the 2008 standard. And she relied on EPA staff's recommendations in the Policy Assessment, and CASAC's repeated advice that the 2008 standard was not health-protective.

Because State and Industry Petitioners focus their briefs on the issue of background ozone, they devote comparatively few words to challenging the Administrator's conclusion that the 2008 standard should be revised. Industry Br. 36-41; State Br. 50-53. Their skeletal arguments should be rejected because (1) they rely on an incorrect legal standard for reviewing the Administrator's decision, and (2) they paint an incomplete and inaccurate picture of the record evidence and the Administrator's reasoning.

1. The Administrator properly fulfilled her statutory role to judge whether the 2008 standard was requisite.

The starting point for judicial review of EPA's NAAQS is the CAA itself, which "gives EPA significant discretion to decide whether to revise NAAQS." *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 813 (D.C. Cir. 2012); *see* 42 U.S.C. § 7409(d)(1) (directing the Administrator to review and revise the NAAQS "as may be appropriate"). In reviewing EPA's NAAQS decisions, the Court does not "determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence

when considered on the record as a whole." *Mississippi*, 744 F.3d at 1349 (quotations and citation omitted). The Court's role is "merely to determin[e] if [EPA] made a rational judgment, not to weigh the evidence anew and make technical judgments." *Id.* (quotations and citation omitted).

Ignoring these fundamental principles, Industry Petitioners urge the Court to review the 2015 NAAQS by comparing it to the 2008 NAAQS. Industry Br. 36-41. They argue that the newly available evidence in this review does not "alter in any fundamental way the information on which EPA relied in 2008." *Id.* at 37. And they contend that, absent a "fundamental change" in the science, the "main change" between 2008 and 2015 is EPA's conclusions from the evidence—conclusions that EPA purportedly failed to explain. *Id.* at 40.

This is all wrong. Industry Petitioners' fundamental change standard is untethered from the text of Section 7409(d). And this Court has repeatedly rebuffed similar arguments. *See Mississippi*, 744 F.3d at 1343 ("[T]hat does not mean the initial assessment is sacrosanct . . . until every aspect of it is undermined."); *Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921, 925 (D.C. Cir. 2014) ("[W]e do not assign presumptive validity to the prior NAAQS; the question is whether EPA reasonably explains the current standards.") (citation and quotations omitted). Indeed, the fundamental change standard advanced by Industry Petitioners is just another flavor of the mistaken argument that the Court rejected in *Mississippi*.

There, Mississippi argued that the "2008 science added nothing new to the 1997 NAAQS conversation" and that EPA "misrepresented the science on which it relied." 744 F.3d at 1344. The Court rejected these arguments because they depended on the "conceptual error" that EPA is "somehow bound by the 1997 NAAQS" and on the "legal error" that it is the Court's "job to weigh the evidence anew." *Id.* (citation and quotations omitted). To the contrary, when EPA reviews a NAAQS, "it (presumably) does so against contemporary policy judgments and the existing corpus of scientific knowledge." *Id.* at 1343. Thus, when the Court reviews the Administrator's decision, the "statutory framework requires" it to ask "only whether EPA's proposed NAAQS is 'requisite,'" and the Court "need not ask why the prior NAAQS once was 'requisite' but is no longer up to the task." *Id.* The Court will defer to EPA's decision "as long as [the Agency] reasonably explains its actions." *Id.*

Here, the Administrator reasonably explained why the 2008 standard was inadequate. 80 FR 65,317-42 (EPA's proposed decision that the primary standard should be revised); *id.* at 65,342-47 (Administrator's conclusions on the need for revision); *id.* at 65,294/1 (describing EPA's "integrative assessment of an extensive body of new scientific evidence, which substantially strengthens what was known about [ozone]-related health effects in the last review"); *see Mississippi*, 744 F.3d at 1343 (concluding that "EPA reasonably explained how the scientific evidence had in fact changed since the 1997 review").

2. The Administrator relied on substantial evidence and CASAC's advice to conclude that the 2008 standard was inadequate.

Industry and State Petitioners briefly argue that the scientific evidence does not support the Administrator's decision to revise the primary standard, Industry Br. 37-41, State Br. 50-53, but their account of the evidence is incomplete.

Here, as in *Mississippi*, the Administrator "considered the entire body of scientific evidence available," 744 F.3d at 1349, through an integrated synthesis, or "weight of evidence" approach, *id.* at 1344. 80 FR 65,329/2 (discussing the "weight of evidence" approach); *id.* at 65,342/3. While Industry Petitioners focus their criticism on a "handful" of new clinical studies, Industry Br. 37, they ignore the larger body of evidence. Ultimately, the Administrator identified four categories of information most relevant to her consideration of the 2008 standard: (1) clinical studies; (2) epidemiologic studies; (3) human exposure and health risk assessments; and (4) CASAC's advice. *Id.* at 65,342-47. This information fully supports her conclusion that the 2008 standard allows ozone levels that are harmful to millions of people, including children and asthmatics.

a. The Administrator relied on clinical studies showing health effects below 75 ppb.

The Administrator followed CASAC's advice by placing the most weight on the clinical studies (the controlled human exposure studies). *Id.* at 65,343/1. In the last review, EPA concluded that two clinical studies, the Adams studies, provided

evidence of adverse health effects at and below a level of 80 ppb but that the studies' results at 60 ppb were inconclusive. *Mississippi*, 744 F.3d at 1350. This Court held that EPA's interpretation of the studies was rational. *Id.* at 1349-50. At the same time, the Court noted that "[p]erhaps more studies like the Adams studies will yet reveal that the [60 ppb] level produces significant adverse decrements that simply cannot be attributed to normal variation in lung function." *Id.* at 1350.

In this review, EPA considered two new clinical studies, Schelegle and Kim, that filled some of the evidentiary gap between 80 ppb and 60 ppb. 80 FR 65,343/2 (new studies show a "variety of respiratory effects in healthy adults following exposures to [ozone] concentrations of 60, 63, 72, or 80 ppb, and higher."). The Schelegle study showed statistically significant decreases in lung function and statistically significant increases in respiratory symptoms in healthy, young adults under clinical conditions, exposed to an average of 72 ppb ozone—less than the 2008 standard allowed. *Id.* at 65,303, 65,352-53. This is especially probative because both the American Thoracic Society guidelines and CASAC concurred that the combination of lung function decrements and respiratory symptoms is an adverse health effect. *Id.* at 65,322/2-/3. The Kim study showed statistically significant decreases in lung function and statistically significant increases in airway inflammation effects at exposures as low as 60 ppb. *Id.* at 65,343/2; PA 3-58 (Table 3-1), JA____. Although the Administrator was less confident that those respiratory effects were adverse, she found that the 2008 standard did not provide an adequate margin of

safety to protect against repeated occurrences of potentially adverse effects associated with ozone levels of 60 ppb. 80 FR 65,344/3, 65,346/1.

Industry Petitioners seek to minimize the importance of the new clinical studies. Industry Br. 37-39. They claim that the studies merely confirm that a range of respiratory effects occur at ozone levels between 80 and 60 ppb. Again, this argument hinges on their erroneous "fundamental change" standard.

Moreover, the record refutes their position. The new clinical studies provided statistically sound scientific evidence of respiratory effects *below* 75 ppb—information that EPA staff and CASAC agreed was significant in evaluating whether the 2008 standard was requisite. 80 FR 65,317-18 (EPA staff views); *id.* at 65,321-22 (CASAC advice). This new evidence gave the Administrator enough certainty to conclude that the 2008 standard was inadequate. *Id.* at 65,323-24. Indeed, in the 2008 review, it was the *un*certainty that EPA found in the Adams studies regarding the size and severity of the respiratory effects within the 80 to 60 ppb range that led the Administrator to revise the standard downward only to a level of 75 ppb, despite CASAC's recommendation to select an even lower standard within a range of 60 to 70 ppb. *Mississippi*, 744 F.3d at 1345, 1349-52.

Reaching even further than Industry Petitioners, State Petitioners argue that the Schelegle study does not support the Administrator's decision. State Br. 50-53. This argument fails for multiple reasons.

First, State Petitioners are focusing on a single study in the dense forest of evidence supporting the Administrator's decision. Among the evidence they ignore are clinical studies showing effects at 60 ppb and the epidemiologic evidence in its entirety. True, the Administrator singled out the Schelegle study as a particularly helpful new clinical study in this review. But in explaining her decision, she gave substantial weight to the clinical studies as a group. 80 FR 65,343/1. This approach echoes EPA's approach in the 2011 carbon monoxide NAAQS. *See Cmtys. for a Better Env't v. EPA*, 748 F.3d 333, 337 (D.C. Cir. 2014). In dismissing a challenge to that rule, the Court held that EPA had reasonably explained why it relied heavily on the findings from one particular clinical study, the "Allred study," where subsequent studies had "reinforced" those findings. *Id.* So here. The Administrator reasonably explained the significant weight she placed on the Schelegle study and on the other clinical studies. 80 FR 65,343/1-/2.

Second, State Petitioners appear to argue that EPA could not interpret the results of the Schelegle study to satisfy the American Thoracic Society (ATS) guidelines' definition of adversity. State Br. 51-52. Of course, EPA is "not bound" to the ATS guidelines. *Nat'l Envtl. Dev. Ass'n's*, 686 F.3d at 810. The guidelines "merely provide[] one reference point to help EPA and the public understand what should be considered an adverse effect" of ozone on human health. *Id.* Against that legal backdrop, State Petitioners' argument raises two distinct questions: (1) did EPA

rationally consider the guidelines in determining what health effects are adverse; and (2) did EPA rationally apply the guidelines to interpret the Schelegle study?

Yes and yes. EPA reasonably interpreted the ATS guidelines as useful information in judging what respiratory effects should be viewed as adverse. The ATS guidelines state that in distinguishing between adverse and non-adverse reversible respiratory effects, "reversible loss of lung function in combination with the presence of symptoms should be considered as adverse." 80 FR 65,309/2 n.33 (quoting ATS guidelines). Here, EPA rationally found that ATS's recommendation "is not restricted to effects of a particular magnitude nor a requirement that individual responses be correlated." *Id.* at 65,330/3.

EPA also rationally applied the guidelines to interpret the Schelegle study. *Id.* at 65,330-31. And CASAC agreed, stating that "the combination of [lung function decrements] together with the statistically significant alterations in symptoms in human subjects exposed to 72 ppb ozone meets the American Thoracic Society's definition of an adverse health effect." CASAC 2014c Letter at 5, JA____.

Third, When State Petitioners criticize allegedly "uncorrelated individual results" in the Schelegle study, State Br. 52, they apparently are relying on a public commenter's submission of an independent analysis of the individual-level data in the study. RTC 11-13, JA___-___. That analysis showed that the *magnitude* of the lung function decrements and respiratory symptoms—that is, the severity of the health effects—is not statistically correlated at 72 ppb. 80 FR 65,300/3. EPA considered this

point, but reasonably concluded that it did not alter its interpretation of the Schelegle study as showing adverse effects at 72 ppb. *Id.*; RTC 12, JA___.

Finally, State Petitioners' magnitude point is distinct from the question of whether a particular individual in the Schelegle study experienced both a lung function decrement and a respiratory symptom. On that point, the same analysis relied on by State Petitioners shows that two-thirds of the study participants experienced both lung function decrements and increased respiratory symptoms after 6.6-hour exposures to 72 ppb ozone. *Id.* at 65,300/3, 65/331 & n.90. Thus, consistent with EPA's interpretation of the ATS guidelines and CASAC's advice, EPA concluded that the majority of individuals in the Schelegle study, but not all, experienced an adverse health effect at 72 ppb average exposure—a combination of lung function decrements and respiratory symptoms. *Id.* at 65,331/2; RTC 12-13, 24-25, JA___-____, JA____-____.

b. The Administrator considered the epidemiologic evidence.

The Administrator also considered the epidemiologic evidence. 80 FR 65,343/3-44/3. While placing less weight on this evidence than on the clinical studies, she found that recent epidemiologic studies offered some evidence of adverse health effects in locations that met the 2008 standard. *Id.* at 65,344. The Administrator particularly emphasized the Mar & Koenig study, which reported a statistically significant association between ozone exposure and emergency room visits for

children and adults in Seattle, a city with air quality that would have met the 2008 standard of 75 ppb over the entire study period. *Id.* at 65,344/1, 65,335/3; RTC 59, JA____. Other multi-city studies showing associations between air quality potentially meeting the 2008 standard and morbidity and mortality further reinforced her decision. 80 FR 65,344/3.

Industry Petitioners stress the uncertainties in the epidemiologic evidence. Industry Br. 39. To be sure, those uncertainties led the Administrator that evidence less weight. 80 FR 65,343/3-44/2. Still, the epidemiologic evidence was strong enough for CASAC to conclude that it justified revision of the 2008 standard, even without considering the clinical studies. CASAC 2014c Letter at 5, JA____.

c. The Administrator considered EPA's exposure and risk assessments.

The Administrator also considered EPA's exposure and risk assessments. 80 FR 65,344-46. Following CASAC's advice, she focused on exposure and risk estimates for children. *Id.* at 65,344/3-45/1. Based on the exposure assessment, she found that the 2008 standard resulted in hundreds of thousands of children in fifteen cities across the country, including asthmatic children, experiencing multiple exposures of concern to ozone levels that she found had potential public health significance (60, 70, and 80 ppb). *Id.* at 65,345. And based on the risk assessment, she found that the 2008 standard resulted in hundreds of thousands of children, including asthmatic children, experiencing two or more instances of lung function decrements of 10% or greater

caused by ozone exposure. *Id.* at 65,346. This evidence, which Industry and State Petitioners ignore, further supported the Administrator's conclusion that the 2008 standard was inadequate.

d. The Administrator also followed CASAC's advice.

Finally, the Administrator noted CASAC's repeated and unequivocal recommendation, in this review and the 2008 review, to revise the level lower than 75 ppb. 80 FR 65,346/2. In this review, CASAC once again found that the 2008 standard "is not protective of human health." CASAC 2014c Letter at 5, JA____. CASAC therefore "unanimously recommend[ed] that the Administrator revise the current primary ozone standard to protect public health." *Id.*

The Administrator gave substantial weight to CASAC's advice. 80 FR 65,329/1. The Act allows her to do so. *See* 42 U.S.C. §§ 7607(d)(3), (6). This Court voiced that exact sentiment when EPA last revised the primary ozone NAAQS: "[S]urely [EPA] may rely on an explicit recommendation by the unanimous CASAC panel." *Mississippi*, 744 F.3d at 1345.

3. The Administrator made a rational judgment to revise the 2008 standard.

To sum up, the Administrator concluded from the available evidence—clinical studies, epidemiologic studies, and exposure and risk assessments—that people exposed to air quality that would meet the 2008 standard can experience adverse health effects caused by ozone. *See Nat'l Envtl. Dev. Ass'n's*, 686 F.3d at 811 ("It could

not then exceed EPA's authority to choose a level below that which produced adverse effects in clinical studies in order to set a standard that allows an adequate margin of safety."); *ATA III*, 283 F.3d at 370 (EPA appropriately chose to revise the NAAQS for particulate matter when health effect associations were apparent in epidemiologic studies at levels permitted by the current NAAQS).

In *Mississippi*, the Court predicted that "additional certainty about what was merely a thesis" at the time—that ozone is harmful at levels below 75 ppb—"might very well support a determination that the line marked by the term 'requisite' has shifted." 744 F.3d at 1344. That prediction has come true. The newly available evidence and CASAC's advice gave the Administrator certainty that the 2008 standard fails to adequately protect public health. Given the available scientific evidence and CASAC's advice to revise, Industry and State Petitioners "cannot seriously expect" the Court to "second-guess" her conclusion about "the inadequacy of the old [2008] standard." *ATA III*, 283 F.3d at 378-79; *see Mississippi*, 744 F.3d at 1342-45 (affirming EPA's conclusion that the 1997 ozone NAAQS standard was inadequate).

B. The Administrator set a revised primary standard that is requisite to protect public health with an adequate margin of safety.

After concluding that the 2008 primary standard was inadequate, the Administrator had to set a revised standard that, in her judgment, was sufficient, but not more than necessary, to protect public health with an adequate margin of safety. Based on the scientific evidence, CASAC's advice, and public comments, she set a

revised standard that lowered the level from 75 to 70 ppb, while retaining the other three elements of the standard.

Environmental Petitioners challenge this decision. They advance two principal arguments why the revised primary standard is not sufficiently health-protective. Environmental Br. 19-40. *First*, they argue that the form of the revised standard is not sufficiently health-protective because it allows ozone levels that on some days will exceed the 70 ppb level that the Administrator judged was requisite. *Id.* at 19-30. *Second*, they argue that ozone exposures of 70 ppb always cause adverse health effects, at least in sensitive populations like asthmatics, and they seem to believe that the evidence should have compelled the Administrator to pick a level of 60 ppb. *Id.* at 30-40.

At both turns, Environmental Petitioners are wrong. As we explain below, the Administrator's decision to retain the form of the standard was informed by her sound scientific judgment about how many people are likely to be exposed to unhealthy levels of ozone. And her decision to lower the level from 75 to 70 ppb is properly grounded in CASAC's advice and her sound judgment about what health effects are adverse.

In contrast to Environmental Petitioners' brief, Industry and State Petitioners barely mention the revised primary standard. Industry Petitioners' argument appears to boil down to a single-sentence footnote claiming that the Administrator could not rationally choose between levels of 70, 71, and 72 ppb. Industry Br. 39 n.19. That

argument is waived. *United States v. Whren*, 111 F.3d 956, 958 (D.C. Cir. 1997) (observing that a footnote is ordinarily inadequate to preserve an argument). If it is not waived, then it is easily dispatched by this Court's cases holding that the Administrator properly may choose a standard that is "just below" the range where EPA found a statistically significant association between an air pollutant and adverse health effects. *See ATA III*, 283 F.3d at 372; *Farm Bureau*, 559 F.3d at 526-27. And if State Petitioners' brief can be read to challenge the revised standard at all, their argument is just that EPA misinterpreted the Schelegle study, which is incorrect. *See* Argument Point I.A.2.a.

1. The Administrator rationally chose to retain the form of the revised standard.

Environmental Petitioners' leading argument is that the Administrator's decision to retain the same form used in the 1997 and 2008 primary standards makes the revised primary standard under-protective of public health. Environmental Br. 19-30. They contend that because the form is calculated as the three-year average of the fourth-highest daily level, the revised primary standard will allow multiple days each year with ozone levels above 70 ppb. *Id.* at 20. They also criticize the Administrator's decision to rely on EPA's exposure assessment in deciding to retain the form of the revised standard. *Id.* at 25-30. These arguments stem from a misunderstanding of the science and the law.

a. The Administrator properly considered how many people will likely experience unhealthy ozone exposures.

To decide what standard is requisite, the Administrator had to understand how many people would actually be exposed to ozone levels with potential public health implications—here, 80, 70, and 60 ppb, when combined with elevated breathing rates. As the Administrator explained, "the degree of protection" the ozone NAAQS provides depends in part "on the extent to which people experience health-relevant [ozone] exposures in locations meeting the NAAQS." 80 FR 65,363/2. This leads to two key points, one scientific and one legal.

The key scientific point is that adverse responses to ozone exposure are critically dependent on ventilation (breathing) rates. *Id.* The Administrator thus stressed that "it is important to consider activity patterns in the exposed population." *Id.* The key legal point is that Section 7409(b)(1) mandates a standard that is "requisite" to protect public health. In the Administrator's words, "[n]ot considering activity patterns, and corresponding ventilation rates, can result in a standard that provides more protection than is requisite." 80 FR 65,363/2.

Environmental Petitioners deny both points. Environmental Br. 19-26. They insist that the Administrator must set the primary standard so low that the outside air is always and everywhere free from ozone levels that could cause a health effect that could potentially be adverse, without considering whether anyone will actually breathe

that air while engaging in physical activity. *Id.* at 25-26. This argument ignores the science and the law.

On the science, human behavior patterns—where and when people sit, walk, and run—are "critical" in assessing whether ambient concentrations of ozone may pose a public health risk. 80 FR 65,356/1. Breathing air contaminated with ozone concentrations typically found outdoors has "only been shown to result in potentially adverse effects if the ventilation rates of people in the exposed populations are raised to a sufficient degree," meaning "through physical exertion." *Id.* at 65,356/1-/2, 65,312/3.

Cast in concrete scientific terms, when healthy, young adults are exposed to ozone concentrations for two hours while at rest, the *lowest* level at which a statistically significant group mean lung function decrement has been reported is 500 ppb—over *seven* times the 70 ppb level of the revised standard. *Id.* at 65,356/2 n.133; RTC 198-99, JA___-___. In other words, the science shows that being exposed to low ozone concentrations in the outdoor air is only potentially harmful if one is physically active. This is why the clinical studies require participants to engage in physical activity.

Because the Environmental Petitioners ignore the science, they advocate for a standard that would be *over*protective—more than requisite to protect public health. 80 FR 65,365/1-/2. The purpose of Section 7409(b)(1) is not, as Environmental Petitioners contend, to protect air quality in the abstract. Its purpose is to protect the

public. *Whitman*, 531 U.S. at 465-66 (interpreting "public health" in Section 7409(b)(1) to mean "the health of the public").

The cases cited by Environmental Petitioners are in agreement that this is the goal of the primary NAAQS. Environmental Br. 24 (quoting *Lead Industries* and citing *American Lung*); *see Lead Industries*, 647 F.2d at 1123 ("[T]he goal of the air quality standards must be to ensure that *the public* is protected from 'adverse health effects.'" (quoting S. Rep. No. 91-1196, at 10) (emphasis added)); *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) (same). Environmental Petitioners reach back to the '70s to quote a lonely sentence in the 1979 ozone NAAQS. Environmental Br. 25 (quoting 44 FR 8202, 8210/1 (1979)). Yet in context, the Agency's statement supports its position today. 44 FR 8210/1 (The CAA's legislative history "makes quite clear Congress's intention to protect sensitive persons . . . who *in the normal course of daily activity* are exposed to the ambient environment." (emphasis added)).

The Administrator's congressionally assigned task is to determine what standard will protect the public from potentially harmful exposures to ozone, fully taking into account the science behind such exposures. "Ignoring whether [] elevated ventilation rates are actually occurring," as Environmental Petitioners say the Administrator must, "would not provide an accurate assessment of whether the public health is at risk." 80 FR 65,356/2. Stated differently, setting a standard "without regard to behavior of the public would likely lead to a standard which is more stringent than necessary to protect the public health." *Id.*

With science and law on her side, the Administrator reasonably relied on EPA's exposure assessment. 80 FR 65,363/2-64/1. The exposure assessment estimated how often children and asthmatic children in fifteen cities across the country would experience an "exposure of concern" at ozone levels of 80, 70, and 60 ppb. *Id.* at 65,312-14 & Table 1. The exposure assessment estimated exposures of concern for a primary standard set at four potential levels (75, 70, 65, and 60 ppb). *Id.* at 65,352/1; RTC 193, JA____. The Administrator then rationally used these estimates to consider how a revised standard set at the four different levels would protect children and asthmatic children from ozone levels shown to result in health effects that are potentially adverse. *Id.* at 65,363/3.

Because the form of the standard is calculated as the three-year average of the fourth-highest daily level, a given three-year period that meets the revised standard can include multiple days with a highest daily level above 70 ppb. Seizing on this, Environmental Petitioners highlight cities where a revised standard of 70 ppb will allow multiple days with a highest daily level above 72 ppb. Environmental Br. 22-23. But EPA's exposure assessment incorporates the form of the standard and evaluates worst-case years in the fifteen cities, all of which the Administrator considered in determining the requisite standard. 80 FR 65,352/1.

b. The Administrator rationally interpreted EPA's exposure assessment.

Shifting tactics, Environmental Petitioners challenge the Administrator's interpretation of EPA's exposure assessment, Environmental Br. 26-29, but her interpretation is rational.

The Administrator correctly recognized that EPA's exposure assessment only measures how many people with an elevated ventilation rate will be *exposed* to a specific ozone level. 80 FR 65,313. In other words, the assessment does not (and cannot) predict how many of those people will experience a health effect that EPA considers adverse, or even any health effect at all. *Id.*; *id.* at 65,363/3 ("[N]ot every occurrence of an exposure of concern will result in an adverse effect."). The Administrator therefore focused on estimates of two or more exposures of concern as a health-protective approach to assessing the potential for adverse effects, emphasizing exposures of concern at and above 70 and 80 ppb. *Id.*; *id.* at 65,310, 65,331/1, 65,346; RTC 10, 13, JA____, JA____.

Based on these considerations, the Administrator concluded that a revised standard with a level of 70 ppb was estimated to eliminate two or more exposures of concern at ozone concentrations at and above 80 ppb and to virtually eliminate two or more exposures of concern at 70 ppb for all children and asthmatic children, even in the worst-case year and location evaluated. 80 FR 65,363/3. The Administrator also carefully examined exposures of concern at lower levels, even though evidence of

adverse effects at these lower levels is equivocal. A standard with a level of 70 ppb (with the same form and averaging time) "is estimated to protect the vast majority of children in urban study areas (i.e., about 96% to more than 99% of children in individual areas) from experiencing two or more exposures of concern at or above 60 ppb." *Id.* at 65,364/1; *id.* at 65,313 (Table 1) (as few as 0.5% of children and asthmatic children could experience two or more exposures of concern at 60 ppb).

Environmental Petitioners cite an estimate of 18,000 children who would experience multiple exposures of concern at or above 70 ppb during the worst year and location. Environmental Br. 26. Yet in a study area of about 19 million children, the figure they cite leaves more than 99% of those children free from such exposures. *Id.* at 26-27. Indeed, in a year and area that are not "worst case," the exposure assessment estimates that 99.9% of children will not be exposed. 80 FR 65,360/2 & n.142; *id.* at 65,313 & Table 1 (estimated range includes zero). The Administrator's conclusion that a revised standard with a level of 70 ppb will virtually eliminate this category of exposures of concern is supported by the evidence. And again, the Administrator recognized that at least some exposures of concern would not result in an adverse health effect (indeed, any health effect). *Id.* at 65,363/3. Her decision is thus distinguishable from *American Lung Association*, 134 F.3d at 392, where EPA failed to explain its determinations. *Cf.* Environmental Br. 27.

Next, Environmental Petitioners criticize purported gaps in the exposure assessment, pointing to children and adults who attend or work at summer camps.

Environmental Br. 28-29; Environmental Amici Br. 25-26. Yet they concede that EPA accounted for this specific issue by performing a sensitivity analysis on the exposure assessment, which showed the issue was likely to have only a low to moderate impact on the magnitude of the estimates. 80 FR 65,360/2. And EPA concluded that the sensitivity analysis was conservatively biased towards estimating higher exposures due to assumptions about daily activities—for instance, understating the time spent engaged in indoor camp activities and assuming that no children had summer jobs. RTC 111-13, JA____-____. Accordingly, EPA cautioned that the results of the sensitivity analysis likely applied only to a very small number of people and were not comparable to the overall results. *Id.* at 113, JA____.

EPA likewise carefully considered the issue of averting behavior, where people may change their normal behavior patterns to avoid pollution on days with poor air quality. *Cf.* Environmental Br. 24 n.66. EPA recognized that "setting a standard based on the assumption that people will adjust their activities to avoid exposures on high-pollution days would likely result in a standard that is under-protective." 80 FR 65,356/2. But the Agency concluded that the impact on the exposure assessment would be low to moderate and, after accounting for other factors that might lead to overestimates, it was unlikely that the exposure assessment would underestimate exposures of concern. RTC 108-09, JA____-____.

Environmental Petitioners cite EPA's statement in the 2008 NAAQS review that the exposure analysis there did not provide a basis for setting a revised level.

Environmental Br. 26. But EPA developed a new exposure model for this NAAQS review that provided a more robust scientific basis for making reliable estimates. 80 FR 65,311 (EPA's improved air quality modeling was endorsed by CASAC); *id.* at 65,312-13 & Table 1; ISA 4-33, JA____ (EPA analyzed daily activity journals of real people, including adults, children, asthmatics, and seniors); HREA 5-39, JA___ (EPA collected 41,474 days of detailed activity data).

Tellingly, despite their extended criticism of EPA's exposure assessment, Environmental Petitioners overlook CASAC's endorsement of EPA's approach. CASAC 2014a Letter at 1, 5-6, JA____, JA____ -____. CASAC even used EPA's exposure estimates in its recommendations on the primary standard. CASAC 2014c Letter at 8, JA____; 80 FR 65,360/2.

In the end, the exposure assessment supports the Administrator's conclusion that, by eliminating almost all multiple exposures of concern in the 60 to 80 ppb range, and almost all single exposures of concern at or above 70 and 80 ppb, a revised standard with a level of 70 ppb provides requisite protection for public health. *See Lead Industries*, 647 F.2d at 1144, 1160-61 (holding that EPA properly set the primary NAAQS to keep exposures well below the level at which the most serious effects occur and at a level designed to keep 99.5% of children below the "maximum safe individual blood lead level").

c. The Administrator properly retained the form of the primary standard in combination with a revised level.

While State and Industry Petitioners criticize the Administrator for not providing a revised standard with a form that provides more leeway for possible spikes of ozone due to natural events, Environmental Petitioners criticize the Administrator's decision to retain the form of the standard, which allows an average of three exceedances of the standard per year. Environmental Br. 29-30.

The Administrator's foremost consideration was to ensure the adequacy of the health protection provided by the combination of all four elements of the standard, including the form. 80 FR 65,352/2. This is because "[t]he degree of protection provided by any NAAQS is due to the combination of all of the elements of the standard (*i.e.*, indicator, averaging time, form, level)." *Id.* at 65,363/2. When combined with a level of 70 ppb, the Administrator concluded that the form (the three-year average of the fourth-highest daily level) was requisite. *Id.* at 65,352/1-/2. More pointedly, she concluded that using this form for the revised standard with a level of 70 ppb meant that "the large majority of days in areas that meet the revised standard will have 8-hour [ozone] concentrations *below 70 ppb*, with most days having 8-hour [ozone] concentrations *well below* this level." *Id.* at 65,363/2 (emphasis added).

Environmental Petitioners argue that the form necessarily fails to account for individual ozone days above 70 ppb. Environmental Br. 20-23; Environmental Amici at 24. That is incorrect. The Administrator chose the form in part based on EPA's

exposure assessment, which properly incorporated the form of the standard. 80 FR 65,351/3-52/1; HREA 3-15, JA____; RTC 219, JA____. Put differently, when the Administrator chose to retain the form of the revised standard, she fully accounted for days when ozone levels may exceed 70 ppb.

Furthermore, Environmental Petitioners contend that the Administrator failed to provide a health justification for her observation that the form would provide some stability when implementing the standard. Environmental Br. 29-30. Yet the Administrator viewed stability as a means to protect public health because, "to the extent areas engaged in implementing the [ozone] NAAQS frequently shift from meeting the standard to violating the standard, it is possible that ongoing implementation plans and associated control programs could be disrupted, thereby reducing public health protection." 79 FR at 75,294/3.

EPA has long recognized that areas can experience ozone spikes from unusual meteorological events. And EPA has concluded that public health would be harmed if areas shifted in and out of attainment due to such atypical events. *Id.*; PA 4-7 to 4-8, JA____-____. Providing nonattainment areas with a stable target for attainment planning thus makes it more likely that the CAA's public health goals will be met. *Id.*; *see ATA III*, 283 F.3d at 374-75 (less stable implementation programs may be less effective, and EPA therefore can consider programmatic stability in determining the form of a NAAQS).

Here, the Administrator chose a form based on the three-year average of the fourth-highest daily level to strike "an appropriate balance between public health protection and a stable target for implementing programs to improve air quality." 80 FR 65,352/2. Moreover, CASAC advised the Administrator to retain this form. CASAC 2014c Letter at 6, JA___ ("Regarding the form of the standard, the CASAC concurs that the ozone standard should be based on the fourth highest, daily maximum 8-hour average value . . . ."). And the Administrator and CASAC agreed that the form "provides health protection while allowing for atypical meteorological conditions that can lead to abnormally high ambient ozone concentrations which, in turn, provides programmatic stability." *Id.*; 80 FR 65,352/2.

2. The Administrator rationally exercised her judgment to set a revised level of 70 ppb that is no more nor less protective than necessary.

Environmental Petitioners' second principal challenge to the revised primary standard is that the Administrator's decision to lower the level from 75 to 70 ppb is an unexplained departure from CASAC's advice and from EPA's prior position regarding the adversity of certain lung function decrements. Environmental Br. 30-40. But the Administrator fully considered CASAC's advice and reached a rational decision consistent with the evidence and the Agency's prior positions.

a. The Administrator followed CASAC's advice to set a level within a range of 60 to 70 ppb.

Environmental Petitioners argue that EPA departed without adequate explanation from CASAC's scientific finding that a level of 70 ppb causes adverse health effects. Environmental Br. 31-34. Three flaws undo this argument.

First, Environmental Petitioners fail to distinguish between CASAC's scientific and policy advice. *See Mississippi*, 744 F.3d at 1354-58 (discussing the CAA's sharp distinction between CASAC's scientific and policy advice). Based on the scientific evidence, CASAC expressly stated its scientific conclusion that "there is adequate scientific evidence to recommend a range of levels for a revised primary ozone standard from 70 ppb to 60 ppb." CASAC 2014c Letter at 8, JA____.

After providing its scientific advice, CASAC shared its policy advice with EPA. *Id.* CASAC "acknowledge[d] that the choice of a level within the range recommended based on scientific evidence"—that is, 60 to 70 ppb—"is a policy judgment under the statutory mandate of the Clean Air Act." *Id.* Then CASAC noted its view that "based on the scientific evidence, at a level of 70 ppb, there is little margin of safety for the protection of public health, particularly for sensitive subpopulations." *Id.* CASAC concluded by explicitly stating "our *policy* advice is to set the level of the standard lower than 70 ppb within a range down to 60 ppb, taking into account your judgment regarding the desired margin of safety to protect public health." *Id.* (emphasis added).

Environmental Petitioners latch onto a single sentence within CASAC's discussion of policy advice. Environmental Br. 31 (quoting CASAC 2014c Letter at 8, JA___ ("At 70 ppb, there is substantial scientific certainty of a variety of adverse effects, including decrease in lung function, increase in respiratory symptoms, and increase in airway inflammation.")). But that sentence cannot mean what they want it to say, because CASAC unambiguously gave EPA its scientific advice regarding a range that included 70 ppb. Read in context, the sentence reflects CASAC's efforts to offer the Administrator policy advice. Indeed, when CASAC recommended a level below 70 ppb, it explicitly labeled the recommendation as policy advice. CASAC 2014c Letter at 8, JA___.

Second, Environmental Petitioners are wrong that the Administrator departed from CASAC's scientific advice. Environmental Br. 32-33. In revising the primary standard, the Administrator chose a level of 70 ppb, within CASAC's scientifically recommended range. Granted, the Administrator departed from CASAC's policy advice, but she explained why she did so. Moreover, "where EPA operates within the realm of uncertain science, its decisions about the appropriate NAAQS level must 'necessarily . . . rest largely on policy judgments.'" *Mississippi*, 744 F.3d at 1357 (quoting *Lead Industries*, 647 F.2d at 1147). In the realm of policy judgments, the Court defers to EPA, not to CASAC. *Id.* at 1358.

Third, Environmental Petitioners misinterpret the Administrator's statement that her "final decision is consistent with CASAC's advice, based on the scientific

evidence." 80 FR 65,362/1; Environmental Br. 32-33. That is partly because they cut off the statement midstream. The Administrator went on to note that her decision is consistent "with CASAC's focus on setting a revised standard to further limit the occurrence of the respiratory effects observed in [clinical] studies, including effects observed following exposures to 60 ppb [ozone]." 80 FR 65,362/1-/2.

The Administrator's full statement is supported by the record. The Administrator found that, when the form of the standard is combined with a level of 70 ppb, "the large majority of days in areas that meet the revised standard will have 8-hour [ozone] concentrations below 70 ppb, with most days having 8-hour [ozone] concentrations well below this level." 80 FR 65,363/2. Such a revised standard "can provide substantial protection against the broader range of [ozone] exposure concentrations . . . below 70 ppb." *Id.* In other words, the Administrator reasonably concluded that a revised standard with a level of 70 ppb and the selected form would protect against ozone exposures about which CASAC expressed concern.

b. The Administrator reasonably judged what ozone exposures could cause adverse health effects.

Environmental Petitioners also argue that the Administrator should have concluded that the clinical studies established adverse health effects at ozone levels of 60 ppb because some individuals in those studies experienced a moderate, transient lung function decrement of 10%. Environmental Br. 35-40. That argument is

incorrect because the Administrator reasonably judged whether a standard of 60 ppb was necessary to provide further protection against adverse health effects.

Although the clinical studies gave the Administrator a high degree of confidence about health effects from ozone exposures between 60 and 80 ppb, 80 FR 65,363/1, she still had to judge which health effects are adverse. *See Mississippi*, 744 F.3d 1357 n.6. She noted that "there are no universally accepted criteria by which to judge the adversity of the observed effects." *Id.* at 65,363/1; *id.* at 65,357/1. In making that judgment, she properly considered the American Thoracic Society (ATS) guidelines and CASAC's advice. 80 FR 65,357-58.

The ATS guidelines indicated that "reversible loss of lung function in combination with the presence of symptoms should be considered adverse." 80 FR 65,357/2 (quoting ATS guidelines). The Administrator noted that the Schelegle study reported this combination of effects at 72 ppb, so she concluded that they satisfied the ATS guidelines on adversity, as did CASAC. *Id.* Thus, the Administrator judged, and CASAC agreed, that ozone exposures at 72 ppb, when combined with elevated ventilation rates, caused adverse health effects. *Id.*

But the ATS guidelines and CASAC's advice became more equivocal when addressing the potential adversity of less serious health effects. For example, some clinical studies reported that transient lung function decrements (such as 10%) occurred in some individuals at lower ozone concentrations, including 60 and 63 ppb, although never in combination with respiratory symptoms. 80 FR 65,357/3. The ATS

guidelines indicated that "a small, transient loss of lung function, by itself, should not automatically be designated as adverse." *Id.* (quoting ATS guidelines). CASAC couched its advice in similarly qualified language. CASAC advised EPA that lung function decrements of 10% or greater observed in some individuals after exposure to 60 ppb ozone "*could* be adverse in individuals with lung disease," and they provided a "surrogate for adverse health outcomes for people with asthma and lung disease." CASAC 2014c Letter at 3, 7, JA____, JA____ (emphasis added).

The Administrator rationally accounted for the conditional nature of this advice. 80 FR 65,364/2. As she noted, CASAC "did not advise considering a standard that would be estimated to eliminate [ozone]-induced lung function decrements $\geq$ 10 or 15%." *Id.* (citing CASAC 2014c Letter). In the end, the Administrator placed some importance on reducing the population-level risk of lung function decrements of 10% and 15%, but she rationally placed less weight on the risk assessment (which estimated the number of children and asthmatic children who would experience lung function decrements) than on the exposure assessment (which estimated the number of children and asthmatic children who would experience one or more exposures of concern). *Id.* at 65,364; *id.* at 65,364/2 & n.150 (explaining the basis for placing limited weight on risk assessment).

Environmental Petitioners claim that the Administrator adopted a new test for adversity that departs from a test that EPA purportedly applied in the 2008 ozone NAAQS. Environmental Br. 36. In 2008, EPA did not adopt a rigid, bright-line test

for adversity of lung function decrements. Rather, EPA's general approach has been a careful balancing of the evidence, informed by guidance from CASAC and ATS.

Environmental Petitioners seize on EPA's statement in the 2008 ozone NAAQS rule that a lung function decrement of 10% or greater "should be considered adverse" for asthmatics. Environmental Br. 36 (citing 73 FR 16,436, 16,454-55). Yet just a few pages earlier, EPA noted that "[l]arge lung function decrements," which it defined as *20% or greater* would be "considered to be adverse to asthmatic individuals under the ATS definition" and "also would be cause for medical concern for some individuals." 73 FR 16,451/3. And although Environmental Petitioners contend that EPA conclusively established in the 2008 ozone NAAQS that a decrement of *10%* or greater is always adverse, they point as support to the 2010 sulfur dioxide NAAQS, where EPA stated that a different decrement of *15%* or greater "*could* result in clinical outcomes" that "would also be considered adverse effects of air pollution under ATS guidelines." EPA-HQ-OAR-2007-0352-1450 at 16, JA___ (emphasis added); RTC 17 n.12, JA___.

In any event, EPA is not bound by a judgment about adversity in a prior NAAQS review, provided that it gives a rational explanation from the available scientific evidence in the current NAAQS review. *Mississippi*, 744 F.3d at 1343-44, 1349. Here, the Administrator reasonably pointed to CASAC's equivocal advice in this review, along with the ATS guidelines' conditional definition of adversity. 80 FR 65,357-58. Thus, she provided substantial protection against exposures of concern at

60 ppb, while at the same time reasoning that if CASAC had intended for the standard to fully protect against lung function decrements of 10%, it would not have recommended a range of 60 to 70 ppb. *Id.* at 65,358/1, 65,364/2 & n.150. Her consideration of the adversity of health effects is sound.

c. The Administrator reasonably exercised her judgment to set a revised standard that is neither higher nor lower than necessary.

Deciding what is "requisite" is no simple question with an easy answer. The CAA directs the Administrator to exercise her policy judgment to set a standard that is "not lower or higher than is necessary." *Whitman*, 531 U.S. at 476. Here, her judgment is sound.

By lowering the level of the revised standard from 75 to 70 ppb, while retaining the other three elements, the Administrator established increased health protection for millions of people across the Nation, including people in at-risk groups such as children and asthmatics. The Administrator made this decision after carefully weighing the available scientific evidence, evaluating EPA's exposure and risk assessments, and considering advice from CASAC and public commenters. 80 FR 65,362-65. Although Environmental Petitioners criticize specific aspects of the Administrator's decision, they never grapple with the significant discretion that Congress conferred on her to make that decision.

This silence is noteworthy. In *Mississippi*, this Court repeated its holding from one of the very first NAAQS cases: "'That the evidence in the record may support

other conclusions, even those that are inconsistent with [EPA's], does not prevent [the Court] from concluding that [EPA's] decisions were rational . . . .'" 744 F.3d at 1348 (quoting *Lead Industries*, 647 F.2d at 1160); *ATA III*, 283 F.3d at 370. The final level set by the Administrator need not "spring from a bounty of definitive research as the clear and sole appropriate standard." *NRDC v. EPA*, 902 F.2d 962, 972 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir. 1991).

Based on her assessment of the strengths and limitations in the evidence, and CASAC's advice, the Administrator concluded that a 70 ppb level is requisite to protect public health with an adequate margin of safety. 80 FR 65,365/1. She also concluded that a level below 70 ppb would be more than requisite because she would have to place significant weight on the potential public health importance of various aspects of the clinical and epidemiologic evidence that she found not to be appropriate. *Id.* at 65,365/2. And she rationally concluded that, when compared to a level of 70 ppb, the extent to which lower levels could result in further public health improvements was notably less certain. *Id.* Her judgment should be sustained.

II. The EPA Administrator set a revised secondary standard for ozone that is neither more nor less welfare-protective than necessary.

As with the revised primary standard, EPA faces challenges to the revised secondary standard from Petitioners on both sides. Industry Petitioners claim that the revised secondary standard is too strict, while Environmental Petitioners claim that it is not strict enough. And once again, both groups are wrong.

The Administrator revised the secondary standard in three steps. In the first step (Argument Point II.A.), the Administrator rationally determined that the 2008 secondary standard was inadequate to protect public welfare. In the second step (Argument Point II.B.), the Administrator followed this Court's instructions in *Mississippi* and rationally identified the degree of public welfare protection that should be provided by the revised standard. In the third step (Argument Point II.C.), the Administrator set a revised secondary standard that provides the requisite protection. At each step, she reasonably exercised her judgment based on careful consideration of the scientific evidence, CASAC's advice, and public comments. Her judgment should be upheld.

A. The Administrator rationally concluded that the 2008 secondary standard was inadequate to protect the public welfare.

The Administrator's first step in revising the secondary standard was to decide whether the 2008 secondary standard was requisite to protect public welfare from "any known or anticipated adverse effects" of ozone, including effects on vegetation. 42 U.S.C. §§ 7409(b)(2), 7602(h). She found it was not. 80 FR 65,369-90.

Industry Petitioners devote only a few sparse paragraphs to contesting the Administrator's conclusion. Industry Br. 40-41. As in their challenge to the primary standard, they argue that the newly available evidence in this review of the secondary standard did not reflect a "fundamental change" in the scientific understanding of ozone. *Id.* at 40. As we explained in Argument Point I.A.1., this argument is legally flawed. The argument is also factually incorrect because the Administrator did have substantial new evidence and analyses that supported her decision.

All told, EPA analyzed more than *four hundred* new studies—scientific evidence that collectively strengthened EPA's understanding and confidence regarding the public welfare implications of ozone exposure. 80 FR 65,369/2. And EPA developed new analyses that, when combined with the weight of the scientific evidence, led the Administrator to rationally conclude that the 2008 secondary standard was inadequate. Three points stand out.

First, the Administrator focused on EPA's tree growth analysis as a surrogate for a broader range of ozone effects that could be adverse to public welfare. *Id.* at 65,389. That analysis, in Table 4 of the final rule, *id.* at 65,391, provided estimates of the median growth loss across eleven tree species for a range of ozone exposures. Although Industry Petitioners correctly note that the tree growth analysis relies on studies that EPA considered in the 2008 NAAQS review, Industry Br. 40, they overlook how EPA strengthened the analysis since then. In the current NAAQS review, EPA demonstrated that the tree growth analysis provided accurate estimates

of growth effects in the natural environment for seedlings and older trees. ISA §§ 9.6.3, 9.6.4., JA____-____; PA 5-15 to 5-16, JA____-____; 80 FR 65,381/2, 65,384/3. Industry Petitioners say nothing about this new analysis.

Second, the Administrator relied on a new air quality analysis of protected public lands—national parks, national forests, and wilderness areas that Congress specifically set aside to benefit public welfare. *Id.* at 65,385/1 ("Amongst the newly available information in this review is a new analysis" of air quality for public lands known as "Class I" areas.). This analysis, in Table 3 of the final rule, *id.*, showed the magnitude of ozone exposures on protected public lands with air quality that met the 2008 secondary standard. Again, Industry Petitioners overlook this analysis, even though the Administrator gave it significant weight in reaching her conclusion that the 2008 secondary standard needed to be revised. *Id.* at 65,389/2.

Third, the Administrator considered CASAC's advice, of which Industry Petitioners breathe not a word. *Id.* at 65,389/1-90/1. CASAC supported the EPA staff's conclusion that the 2008 secondary standard was inadequate and advised that 6% tree growth loss was "unacceptably high." 80 FR 65,381-82/1 (CASAC 2014c Letter at iii, 13-14, JA___, JA____-____).

In deciding that the 2008 secondary standard was inadequate, the Administrator emphasized CASAC's warning that 6% tree growth loss was unacceptably high. 80 FR 65,389/3; *see Mississippi*, 744 F.3d at 1345 (EPA may rely on CASAC's recommendations). She then combined the tree growth analysis with the

new analysis of air quality on public lands to conclude that air quality meeting the 2008 secondary standard allowed ozone exposures associated with 6% or greater tree growth loss in a number of national parks and wilderness areas. 80 FR 65,389/2. So she rationally concluded that the 2008 secondary standard was not requisite. *Id.* at 65,389-90; *see ATA III*, 283 F.3d at 378-79 (refusing to "second-guess" EPA's conclusion that the old primary standard for ozone was inadequate).

B. The Administrator reasonably exercised her judgment to identify the appropriate degree of public welfare protection.

The Administrator's second step in revising the secondary standard was to identify the appropriate degree of public welfare protection that the standard should provide. 80 FR 65,403-08. In so doing, the Administrator heeded this Court's instruction in *Mississippi* to "expressly 'determine what level of . . . protection is requisite to protect the public welfare,' and explain why this is so." 744 F.3d at 1360-61 (quoting *Farm Bureau*, 559 F.3d at 530).

Here again, the Administrator relied heavily on EPA's tree growth analysis to help her make broader judgments about the appropriate degree of protection. 80 FR 65,369/1, 65,406/1. She did so because tree growth is associated with broader impacts on public welfare, such as effects on forest ecosystems, and because the tree growth analysis is a useful quantitative tool for making judgments about public welfare protection. *Id.* Consistent with CASAC's warning, the Administrator concluded that it was appropriate to protect against tree growth loss somewhat less

than 6%. 80 FR 65,405-07. In the tree growth analysis, growth loss of 5.7% is associated with exposures of 18 parts-per-million hours (ppm-hrs), and growth loss of 5.3% is associated with exposures of 17 ppm-hrs. *Id.* at 65,407/1. Exercising her judgment, the Administrator concluded that a revised secondary standard that restricted three-year average exposures to 17 ppm-hrs or lower in nearly all instances would provide the appropriate degree of public welfare protection. *Id.* at 65,406/3-07/1.

Environmental Petitioners challenge this conclusion in two ways. *First*, they argue that, despite the Administrator's careful attention to CASAC's advice, she departed from four select pieces of that advice without adequate explanation. Environmental Br. 41-47. *Second*, they argue that the Administrator should have separately determined the appropriate degree of public welfare protection against leaf injury. *Id.* at 52-56. Both arguments are incorrect.

1. The Administrator properly addressed CASAC's advice in selecting the appropriate degree of public welfare protection.

Environmental Petitioners contend that the Administrator failed to adequately consider CASAC's advice when determining the appropriate degree of public welfare protection. Environmental Br. 41-47. They point to four specific pieces of advice from CASAC, discussed below in turn. Overall, however, their argument suffers from two principal flaws.

First, in several instances, Environmental Petitioners misinterpret CASAC's advice or mischaracterize the Administrator's response. Yet the Administrator reasonably interpreted and responded to CASAC's scientific- and policy-oriented recommendations.

Second, Environmental Petitioners' argument assumes that the Administrator must thoughtlessly conform to CASAC's advice. That premise is incorrect because the Administrator, not CASAC, has responsibility to make a judgment under Section 7409(b)(2). To give a reasoned basis for that judgment, she must rationally explain how she evaluated the evidence. *See Mississippi*, 744 F.3d at 1351. When CASAC gives advice, the Administrator must *consider* it. 42 U.S.C. § 7607(d)(3). But the Act does not require that she suspend her judgment and follow every particular of CASAC's advice in lockstep. The Act only requires that if the Administrator "departs from CASAC's recommendations," she must "explain [her] reasons for doing so." *Mississippi*, 744 F.3d at 1355.

Here, the Administrator thoroughly weighed CASAC's advice. Where she disagreed, she explained her reasons for doing so. In some places, the Administrator explained why she disagreed with CASAC's view of the scientific evidence; in others, she "accept[ed] CASAC's scientific analysis yet explain[ed] the policy considerations that led [her] to select a different [result] than that recommended by CASAC." *Id.* In all cases, the Administrator properly considered and responded to CASAC's input. The Act requires no more.

a. The Administrator followed CASAC's advice about 2% and 6% tree growth loss.

Environmental Petitioners object to the Administrator's focus on CASAC's view that annual tree growth loss of 6% was "unacceptably high," Environmental Br. 43, and they contend that she failed to rebut CASAC's view that 2% growth loss is an appropriate benchmark. *Id.* at 42-44. They misinterpret CASAC's advice and mischaracterize EPA's response.

What CASAC actually recommended is that the Administrator consider a *range* of standards that *included* those aiming for tree growth loss of 2% or below. 80 FR 65,394/3. As EPA correctly noted, CASAC never said that the revised secondary standard had to prevent 2% growth loss, nor did CASAC recommend considering only standards associated with growth loss at or below 2%. *Id.* Indeed, of the nine ozone exposure values in CASAC's recommended range, seven were associated with growth loss figures higher than 2%. *Id.*

Not only did the Administrator properly interpret CASAC's advice, but she also followed it. When assessing the appropriate degree of public welfare protection, she considered a range of ozone exposures that included those associated with 2% or lower tree growth loss. *Id.* at 65,406/2. In considering this advice, she found the scientific basis for focusing on 2% tree growth loss to be unclear, and the two pieces of evidence that CASAC cited failed to clarify its rationale. *Id.* at 65,393/3-95/1; *compare* CASAC 2014c Letter at 14, JA____ (citing Wittig study and Heck & Cowling

report) *with* 80 FR 65,394/3, 65,395 n.200 (Wittig study cited growth loss figures above 20%, not 2%, and Heck & Cowling report offered no clear rationale for 1% and 2% growth loss figures nor any identification of tree species that should meet those figures). Thus, after considering CASAC's advice about 2% growth loss, the Administrator declined to give weight to that figure as a public welfare protection objective. *Id.* at 65,406/2.

In contrast to CASAC's advice about 2% growth loss, the Administrator concluded that CASAC had plainly expressed its view that 6% tree growth loss was "unacceptably high." 80 FR 65,406/2. And CASAC treated 6% differently from 2% because its recommended range of ozone exposures were all associated with growth loss *below* 6% (but not 2%). *Id.* Thus, the Administrator appropriately placed greater weight on this recommendation by deciding to generally protect against tree growth loss of 6%. *Id.* at 65,406-07.

b. The Administrator followed CASAC's advice about the cottonwood data.

Environmental Petitioners contend that EPA's decision to remove the cottonwood data from the tree growth analysis is inconsistent with CASAC's advice that the data received "too much emphasis." Environmental Br. 43-44. Yet as they concede, *id.*, at 44 n.6, CASAC's advice referenced a chart in EPA's second draft Policy Assessment that showed all twelve tree species in the tree growth analysis, including cottonwood, and CASAC explained that the cottonwood data was "not as

strong as [data] from other experiments" that EPA used in the tree growth analysis and showed "extreme sensitivity to ozone compared to other studies." CASAC 2014c Letter at 10, JA____ (citing Figure 5-1 in the Second Draft Policy Assessment); Second Draft Policy Assessment 5-14 fig. 5-1, JA____.

EPA agreed with CASAC's scientific critique of the cottonwood data: it was based on a single study that did not control for ozone and climatic conditions, unlike the 51 studies in the tree growth analysis for the other eleven tree species. 80 FR 65,372 & n.160. Thus, EPA logically addressed these concerns by excluding cottonwood from the tree growth analysis. *Id.*

c. The Administrator considered CASAC's advice about a range of ozone exposures.

Next, Environmental Petitioners argue that the Administrator failed to adequately consider CASAC's advice to select a revised secondary standard corresponding to ozone exposures within a range of 7 to 15 ppm-hrs. Environmental Br. 41-44, 50-51. To the contrary, the Administrator did consider CASAC's recommended range when exercising her judgment to identify the proper public welfare objective. 80 FR 65,392-95, 65,406-07.

Although the Administrator considered CASAC's recommended range of ozone exposures, CASAC had relied on the old version of the tree growth analysis. *Id.* at 65,384/2. The outdated analysis included cottonwood, based on the single available study about which CASAC expressed reservations. *Id.* When EPA removed the

cottonwood data in the final Policy Assessment and proposed and final rules, the updated tree growth analysis showed that tree growth loss figures similar to those that CASAC had considered were now associated with *higher* ozone exposures. *Id.* at 65,396/2, 65,391 (Table 4); PA 6-11 (Table 6-1), JA____. Thus, the Administrator had to consider CASAC's advice in light of the updated analysis.

To do so, the Administrator placed more weight on the growth loss estimates associated with CASAC's advice than on the exposures that CASAC identified based on the outdated analysis. She noted that in the second draft Policy Assessment, growth loss estimates ranged from less than 2% (for 7 ppm-hrs) to 5.2% (for 15 ppm-hrs), and she emphasized CASAC's warning that 6% tree growth loss was "unacceptably high." 80 FR 65,396/2; *id.* at 65,406/2-07/1 & n.212 (noting that growth loss associated with 17 ppm-hrs in the updated analysis was nearly identical to growth loss associated with 15 ppm-hrs in the outdated analysis). The Administrator therefore focused on identifying ozone exposures associated with tree growth loss somewhat below 6%, including 18 ppm-hrs (associated with 5.7% growth loss) and 17 ppm-hrs (associated with 5.3% growth loss). *Id.* at 65,407/1.

d. The Administrator considered CASAC's advice to base the standard on annual ozone exposures rather than a three-year average.

Finally, Environmental Petitioners argue that the Administrator arbitrarily rejected CASAC's advice to base the standard on a single year of ozone exposures, rather than a three-year average. Environmental Br. 45-47. Environmental Petitioners

cast this as a purely scientific issue, but CASAC recognized that the Administrator could choose a three-year average as a policy matter. CASAC 2014c Letter at iii, JA____.

The Administrator's decision to select a three-year average rested on both science and policy judgments. She gave several reasons for choosing the three-year average over the annual figure favored by CASAC. 80 FR 65,404. For example, she recognized uncertainties in judging the public welfare significance of a single year of vegetation effects. *Id.* And she found that multiple years of high ozone exposures could have effects on vegetation that are of greater public welfare significance than effects from a single year of high exposures, where that year is surrounded by years with lower exposures. *Id.* She also pointed to uncertainties in using an annual measure to assess the potential for longer-term public welfare impacts because ozone effects vary year to year and are influenced not only by variations in ozone levels but also by other environmental factors, such as rainfall. *Id.* at 65,404/3. Further, she noted that use of a three-year average could address the potential for adverse public welfare effects from shorter exposure periods, such as a single year. *Id.* at 65,404/2-3; PA 6-33, JA____. The Administrator therefore rationally selected a three-year average because it gave her greater confidence in judging the adversity of public welfare impacts. *Id.*

Trying another tack, Environmental Petitioners point to CASAC's advice that if the Administrator chose a three-year average, she should pick a value so that each

year was within CASAC's recommended range of 7 to 15 ppm-hrs. Environmental Br. 46-47. Here as well, the Administrator properly considered CASAC's advice and explained where she differed. She acknowledged CASAC's recommendation that if she chose a three-year average, she should consider a lower level. 80 FR 65,404/2. Because the Administrator's principal reference point was CASAC's clear warning that 6% growth loss was too high, she gave effect to the recommendation to consider a lower level by considering exposures associated with growth loss somewhat *below* 6%. 80 FR 65,407/1. Thus, she considered 18 ppm-hrs, associated with tree growth loss of 5.7%, and 17 ppm-hrs, associated with tree growth loss of 5.3%. *Id.*

In yet another misguided attack on the Administrator's decision, Environmental Petitioners cite air quality monitoring data for eight park and wilderness areas, which they claim shows that a three-year average of 17 ppm-hrs allows single-year exposures to exceed 19 ppm-hrs. Environmental Br. 46-47. No one appears to have used this data in this manner in a public comment, and therefore Environmental Petitioners may not rely on it here. *See* 42 U.S.C. § 7607(d)(7)(B). Regardless, the argument misses the mark because the Administrator set a revised standard of 70 ppb, not 17 ppm-hrs, and Environmental Petitioners fail to show that these areas would meet the revised standard. *Cf.* EPA-HQ-OAR-2008-0699-4249 at 1-4, JA____-____ (several areas cited by Environmental Petitioners have design values above 70 ppb, based on 2008 data handling conventions). Moreover, their examples illustrate the significant variability in annual exposures, which the

Administrator found *supported* her decision to choose a three-year average. 80 FR 65404/3. For example, they highlight a single-year level of 24 ppm-hrs in Superstition Wilderness, Environmental Br. 47, but the other two years in that three-year period (2004-2006) were 10 and 12 ppm-hrs. EPA-HQ-OAR-2008-0699-4249 at 2, JA____. In sum, the Administrator reasonably judged that effects associated with multiple-year exposures were of greater significance than those from single-year exposures. 80 FR 65,404/3.

2. The Administrator reasonably used tree growth loss as a surrogate for assessing the broader array of vegetation-related effects.

Environmental Petitioners contend that the Administrator is required by Section 7409(b)(2) to identify a specific level of air quality to protect against leaf injury (technically, visible foliar injury), Environmental Br. 52-56, but the Administrator gave a reasoned explanation for her decision to rely instead on tree growth loss to assess the appropriate degree of public welfare protection.

In this NAAQS review, EPA identified a multitude of vegetation effects associated with ozone exposure. 80 FR 65,380/3 (identifying effects on "an array of ecosystem services provided by forests, including timber production, carbon storage and air pollution removal"). But the Administrator also needed to judge the adversity of such effects to public welfare. 79 FR 75,313 (noting complexity of public welfare judgments). Consistent with CASAC's advice, the Administrator recognized tree growth loss as a surrogate for a broad array of growth-related effects. 80 FR 65,369/1.

She judged it appropriate to focus on tree growth loss in revising the secondary standard to provide the requisite public welfare protection. *Id.* at 65,406/1. Although she also gave detailed consideration to two other vegetation effects, leaf injury and crop yield loss, she found too many uncertainties for those effects to provide independent bases for the standard. *Id.* at 65,407/1-08/1.

To be sure, the Administrator recognized that the scientific evidence showed a causal relationship between ozone exposure and leaf injury. *Id.* at 65,383/3. And she acknowledged that leaf injury "has the *potential* to be adverse to the public welfare." 80 FR 65,388/3. But she faced three significant challenges in judging those public welfare impacts. *Id.* at 65,370/3, 65,382/2, 65,388/3, 65,390/1; 65,407/3. *First*, she lacked criteria by which to judge the potential public welfare impacts of leaf injury and to decide what amount of leaf injury was adverse. *Id.* at 65,407/3. *Second*, she lacked evidence that would allow her to measure the relationship between leaf injury and other vegetation effects that she might find adverse. *Id. Third*, she lacked a reliable technical analysis that would allow her to predict the severity and extent of leaf injury under various air quality and environmental conditions. *Id.*

In contrast, tree growth loss was linked to a range of effects, including for individual sensitive tree species and extending to ecosystem-level effects, particularly for multi-year exposures. *Id.* at 65,406-07. Further, CASAC had provided clear advice on the amount of tree growth loss that was unacceptable. *Id.* And the tree growth analysis provided a solid technical basis for the Administrator to assess the

quantitative relationship between ozone exposures and tree growth loss when identifying the appropriate degree of public welfare protection. *Id.* Thus, the Administrator rationally focused on tree growth loss as a surrogate to assess the broader universe of adverse effects on vegetation, recognizing that this approach would provide increased protection against leaf injury. *Id.* at 65,407/3-08/1.

Her conclusion is reasonable. Section 7409(b)(2) provides that the secondary standard should be set "based on such criteria," which as the *Mississippi* court explained "simply provide the scientific basis for promulgation of air quality standards." 744 F.3d at 1346 (citation and quotations omitted). Here, the Administrator fully considered the criteria—the available scientific information—on leaf injury and reasonably explained why it did not lead her to identify a separate public welfare protection objective for leaf injury. 80 FR 65,407/3. And she disagreed that Section 7409(b)(2) required her to identify a precise, quantified level of public welfare protection for every potentially adverse public welfare impact that she considered in revising the standard. *Id.* at 65,402-03; *cf. ATA III*, 283 F.3d at 370 (EPA need not "definitively identify pollutant levels below which risks to public health are negligible"). Consistent with the judgments that she reached using tree growth loss as a surrogate for a broad array of vegetation effects, she further determined that the degree of protection she identified would provide additional protection against leaf injury. *Id.* at 65,407-08. The Court does not "look through the microscope to scrutinize EPA's use of the criteria" because "EPA's translation of the

criteria into a NAAQS decision is not frictionless." *Mississippi*, 744 F.3d at 1346. Here, the Administrator made a rational judgment about the strengths and weaknesses of the available evidence, and the Court should not "reweigh the evidence or second-guess [her] technical judgment[]." *Id.*

Seeking to undermine the scientific basis for the Administrator's conclusion, Environmental Petitioners invoke CASAC's advice that "[an ozone] level below 10 ppm-hrs is required to reduce [leaf] injury." Environmental Br. 55-56 (quoting CASAC 2014c Letter at iii, JA___). Yet CASAC characterized this as policy advice, and the Administrator properly rejected the statement as inconsistent with the scientific evidence. 80 FR 65,407/3, 65,395/2-96/1. In fact, EPA prepared a separate technical memorandum to specifically consider and address CASAC's statement. *Id.* at 65,396/1 (discussing the 2015 Smith & Murphy memorandum). Contrary to CASAC's statement, EPA's analysis showed decreases in leaf injury with decreasing ozone exposures across a range of values well above 10 ppm-hrs. *Id.* at 65,396/1, 65,407/3. Thus, the Administrator fully explained why she was not relying on CASAC's statement. Moreover, CASAC recommended to EPA a range of exposures that included values above 10 ppm-hrs, which shows that CASAC itself did not view 10 ppm-hrs as a bright-line threshold for setting the secondary standard and that CASAC did not prioritize leaf injury over other vegetation effects.

Environmental Petitioners direct the Court to *Mississippi* and *Farm Bureau*, Environmental Br. 54-55, but unlike the situation here, those cases held that EPA had

failed to identify the public welfare objective for the revised secondary standard and to explain its basis. *Mississippi*, 744 F.3d at 1360-61; *Farm Bureau*, 559 F.3d at 529-31. Here, the Administrator expressly identified the public welfare protection that, in her judgment, the revised secondary standard needed to provide and fully explained her rationale. 80 FR 65,407/1. Noting key uncertainties and limitations in the evidence base for leaf injury and crop yield loss that made them ill-suited for this determination, she reasonably focused on the extensive and reliable evidence of tree growth loss as the primary scientific basis for her decision. *Id.* at 65,406-07. At bottom, Environmental Petitioners are challenging the Administrator's evaluation of the scientific evidence about adverse vegetation effects. That is a battle they cannot win. *See Ctr. for Biological Diversity*, 749 F.3d at 1087 (concluding that "[d]ecades of decisions in this court stand in the way of [petitioners'] arguments" challenging EPA's interpretation of the science).

C. The Administrator reasonably chose a revised secondary standard that provides neither more nor less public welfare protection than necessary.

After determining the appropriate degree of public welfare protection, the Administrator proceeded to the third and final step in revising the secondary standard: choosing a combination of elements for the revised standard to provide that protection. 80 FR 65,408-10. Although Environmental Petitioners challenge the Administrator's decision on the form and the level of the revised standard, she rationally explained her decision on both elements.

1. The Administrator rationally chose to retain the form of the standard.

Environmental Petitioners assert that EPA failed to properly follow CASAC's advice to revise the standard's form (the three-year average of the fourth-highest daily level) by adopting a cumulative, seasonal exposure index (technically, the "W126 index"). Environmental Br. 48-49. Although the Administrator agreed with CASAC's advice that the exposure index provided an appropriate way to consider vegetation effects caused by ozone exposure, she rationally explained her disagreement with CASAC's recommendation that the exposure index should also be the form of the standard. 80 FR 65,398-400, 65,408.

As the Administrator explained, Section 7409 does not require that the NAAQS be revised to match an exposure metric used in the NAAQS review. 80 FR 65,408/2. In NAAQS reviews, EPA frequently uses exposure metrics to determine the likelihood and significance of impacts under different exposures to a pollutant. *Id.* at 65,399/3. In contrast, the elements of the standard are designed to control air quality. *Id.* at 65,399. While it is possible for a standard to match the exposure metric used in a NAAQS review, EPA commonly uses exposure metrics in NAAQS reviews that differ from the elements of the standards. *Id.* In fact, EPA sometimes uses multiple exposure metrics in a NAAQS review to assess risks from a single pollutant. *Id.* But EPA's use of these exposure metrics does not dictate the form of the standard.

For example, EPA used the lead concentration in young children's blood as an exposure metric for the lead NAAQS, 80 FR 65,399/2, yet no one would suggest that the level of lead in children's blood should be the form of the NAAQS. Likewise, in this NAAQS review, no one suggested that the form of the primary ozone NAAQS should be "exposures of concern." Here, the Administrator found that the W126 exposure index was an appropriate exposure metric to judge vegetation effects. *Id.* at 65,403/3. But that did not require her to revise the form of the secondary standard.

Environmental Petitioners fault the Administrator for not demonstrating that the form that she chose is *more* protective of welfare than their preferred form. Environmental Br. 51. That misstates the Administrator's obligation under Section 7409(b)(2), which is to design a standard that, as a whole, is requisite. In that standard-setting process, Section 7409(b)(2) grants the Administrator considerable discretion to decide whether a particular form is appropriate, when combined with the other elements of the standard, and to decide whether to revise the form of an existing standard. 80 FR 65,400/1, 65,408.

Here, the Administrator properly noted that her decision on the level and form of the revised secondary standard focused on the public welfare objectives that she identified. *Id.* at 65,408/1. She concluded that "in combination with a revised level, the current form and averaging time for a revised secondary standard can be expected to provide the desired level of public welfare protection." *Id.* at 65,408/2. Where, as here, the Administrator has engaged in reasoned decisionmaking and explained how

the requisite protection can be achieved by revising only the level of the standard, the Act does not require her to also revise the other elements of the standard.

2. The Administrator rationally lowered the level of the standard to 70 ppb.

After deciding to retain the form for the revised secondary standard, the Administrator properly concluded that a level of 70 ppb would provide requisite public welfare protection. 80 FR 65,409/1. Environmental Petitioners challenge this conclusion, claiming it was made for convenience rather than to protect public welfare, Environmental Br. 49-51, but they overlook the reasoned decisionmaking that led the Administrator to her decision.

In revising the level of the standard, the Administrator focused on her goal of providing protection against tree growth loss somewhat lower than 6% and used the tree growth analysis to identify ozone exposures that achieve that goal. 80 FR 65,407/1 (noting 18 ppm-hrs is associated with 5.7%, which rounds to 6%, and 17 ppm-hrs is associated with 5.3%, which rounds to 5%). She then sought to identify a standard level that would restrict ozone exposures to 17 ppm-hrs or lower in nearly all instances. *Id.* at 65,407–09. In the Wells Memos, EPA developed a complex air quality analysis to assess the relationship between three-year average exposures that the Administrator wanted to avoid and the level of the revised secondary standard that would give her protection against those exposures. *Id.* at 65,408/3-09/2.

Overall, the Wells Memos showed that a revised secondary standard with a level of 70 ppb would protect against ozone exposures of 17 ppm-hrs and higher, in virtually all instances. *Id.* For example, in the 2015 Wells Memo, data from the eleven most recent three-year periods included nearly 4,000 occurrences of air quality that met a potential revised standard of 70 ppb. *Id.* at 65,409. For all these air quality values, three-year average exposures were above 17 ppm-hrs only four times, with only one just above 19 ppm-hrs, at 19.1 ppm-hrs. *Id.* Focusing on the air quality analysis for the most recent three-year period (from 2011 to 2013), she found more than 500 occurrences of air quality that met a potential revised secondary standard of 70 ppb. *Id.* Among those air quality values, spread across all nine climatic regions in the country and 46 of the 50 states, there were no three-year average exposures above 17 ppm-hrs and less than a handful equal to 17 ppm-hrs. *Id.* Noting the isolated, rare exposures at and above 17 ppm-hrs, the Administrator explained that she did not judge the tree growth loss estimates associated with these marginally-higher exposures to indicate effects that would be adverse to the public welfare. *Id.* at 65,407/1, 65,409/1, 65,400-01. She based this judgment on her assessment of the variability in environmental factors influencing ozone effects and uncertainties associated with estimates of such effects in the natural environment. *Id.*

Environmental Petitioners contend that the air quality analysis in the Wells Memos does not show "equivalent protection" between ozone exposures of 17 ppm-hrs and the revised secondary standard. Environmental Br. 49. But the Administrator

never claimed equivalency. Instead, she judged that a revised secondary standard with a level of 70 ppb would control cumulative, seasonal exposures sufficiently to provide the requisite protection for public welfare. 80 FR 65,408-09. This is precisely what Section 7409(b)(2) instructs her to do.

Notably, Environmental Petitioners do not directly challenge the Administrator's conclusions drawn from EPA's analysis of thirteen years' worth of air quality data in the Wells Memos. Instead they challenge her decision to revise the level of the secondary standard to 70 ppb by pointing to a different set of air quality data covering several national parks and wilderness areas—the same data in the public lands air quality analysis that the Administrator relied on to conclude that the 2008 secondary standard was inadequate. Environmental Br. 49-51 (citing "Dkt-4249," JA___-___, which is the air quality dataset for Class I areas supporting Table 3 in the final rule, 80 FR 65,385-86). This point does not appear to have been raised with EPA during the notice and comment period and is therefore waived. *See* 42 U.S.C. § 7607(d)(7)(B).

In any event, Environmental Petitioners misuse the data. The air quality data values they cite are derived and validated using data handling requirements associated with the 2008 secondary standard with a level of 75 ppb (Appendix P to 40 C.F.R. Part 50), rather than the new data handling requirements in Appendix U, which EPA included in the 2015 final rule. 80 FR 65,410-12 (Appendix U); *id.* at 65,386 (Table 3 note states that design values "are derived in accordance with Appendix P to 40 CFR

Part 50."). Differences between these data handling requirements lead to differences in the calculated air quality values and related differences in identifying sites that would meet a level of 70 ppb. Thus, for purposes of considering ozone exposures associated with sites that meet the revised secondary standard of 70 ppb, the appropriate air quality data to consider come from the Wells Memos. Environmental Petitioners' failure to rely on the proper air quality data renders their analysis and conclusions unsound.

III. EPA rationally addressed concerns about implementation of the NAAQS.

EPA lowered the level of the NAAQS to 70 ppb to protect people across the Nation from health problems up to and including premature death, and to safeguard the environment. State and Industry Petitioners argue that EPA cannot provide this protection because intermittent spikes in background ozone and cost concerns will make it too difficult to attain the NAAQS, and that these concerns also render the NAAQS unconstitutional. But EPA's modeling predicts that these spikes will not prevent states from attaining the NAAQS, and, in any case, "attainability" is "not [a] relevant consideration[]" when setting the NAAQS. *API*, 665 F.2d at 1185. The Clean Air Act explicitly directs EPA to establish NAAQS "requisite" to protect "public health" and "welfare." 42 U.S.C. § 7409(b). Only after setting protective NAAQS may EPA address attainment concerns posed by background ozone and solicit advice on costs. *See, e.g., id.* 42 U.S.C. §§ 7619(b), 7409(d)(2)(C)(iv). The Supreme Court has held that the Act divides the process of setting the NAAQS from the process of implementing the NAAQS, and that this statutory framework is constitutional. *Whitman*, 531 U.S. at 470, 75-76. State and Industry Petitioners cannot undercut the protection of the NAAQS with their exaggerated implementation concerns.

A. EPA reasonably followed the statutory mandate to set a requisite NAAQS.

EPA's statutory duty in setting the NAAQS is to provide requisite protection for public health and welfare nationwide. 42 U.S.C. § 7409(b). Industry and State Petitioners argue that EPA cannot fulfill this duty because background ozone will prevent attainment. They are wrong on the facts and the law. Domestic, manmade emissions, not background ozone, drive nonattainment. In almost all areas, background ozone will never exceed 70 ppb. The remaining few areas—generally sparsely-populated, high-altitude locations in the Intermountain West—may experience rare spikes in background ozone. But because the NAAQS is based on the fourth-highest daily level, EPA does not expect that those infrequent events will prevent attainment. And if necessary, EPA can address background ozone through the specific provisions in the Clean Air Act that govern natural events and international transport. Given its statutory authority to address the attainment concerns posed by background ozone during implementation of the NAAQS, EPA need not set the NAAQS so high that the standards will never be exceeded by background ozone at any time in any part of the Nation.

Petitioners use the term "background ozone" loosely, but as relevant to this case, background ozone is any ozone not formed from U.S. manmade emissions. 80 FR 65,327/3 n.84. It includes natural and international emissions, but does not include ozone formed by manmade emissions within the United States, even when

those emissions cross state lines. Interstate emissions are regulated under the Good Neighbor Provision of the Act, which prevents upwind states from causing significant deterioration of air quality in downwind states. Thus, while interstate emissions may appear "uncontrollable" in a downwind state, these emissions are, in fact, controlled by the Act, and ozone formed by emissions in any state is not properly considered background ozone. *See* 80 FR 65,443/2; *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1591 (2014) (citing 42 U.S.C. § 7410(a)(2)(D)(i)).

The sources of background ozone most concerning to State and Industry Petitioners, natural and international emissions, are explicitly addressed by the Act, not in the provision under which EPA sets the NAAQS, but in other provisions regarding exceptional events, as well as implementation of the NAAQS. EPA has successfully used those provisions to address background ozone in the past, and it reasonably concluded that it could do so in the future.

1. Background ozone will not preclude attainment.

EPA carefully studied the influence of background ozone throughout the Nation. The Agency reviewed a vast body of scientific evidence, ran its own detailed models, and considered CASAC's advice and public comments. This evaluation of scientific data was "within [EPA's] technical expertise," and is entitled to an "extreme degree of deference." *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003). "This level of deference is especially appropriate in review of EPA's administration of

the complicated provisions of the Clean Air Act." *ATK Launch Systems, Inc. v. EPA*, 669 F.3d 330, 336 (D.C. Cir. 2012) (internal quotation marks and citations omitted).

EPA's primary technical conclusion was that manmade emissions, not background ozone, drive nonattainment. 80 FR 65,328/3. In the vast majority of the country, background ozone will never rise above 70 ppb. 80 FR 65,328/1. On days with high total ozone levels, manmade concentrations of ozone increase while background levels of ozone typically remain around the season average, between 25 ppb and 50 ppb. 80 FR 65,328/2; PA 2A-42, JA___. On days when total ozone levels exceed 70 ppb, U.S.-manmade emissions account for more than 65% of total ozone on average. 80 FR 65,328/3. These high ozone days present the greatest health risk, and this health risk is attributable to ozone formed by domestic, manmade emissions, controllable under the CAA. 80 FR 65,341/3.

To be sure, EPA also found that in a few high-altitude, rural locations in the Intermountain West, background ozone levels may rise above 70 ppb on rare occasions, but EPA does not expect that these infrequent exceedances will preclude attainment. 80 FR 65,328/1-2; RTC 342, JA____. EPA employed two scientific models to analyze background ozone in 1,294 locations throughout the country over the 214-day ozone season, for a total of 276,916 modeled location-days. PA 2A 12 & 15, JA____, JA____. These two models estimated that background ozone would exceed 70 ppb on only 2 and 22 location-days. PA 2A-25, Figs. 5c & 5d, JA____. Stratospheric intrusions and wildfires were the suspected sources of these modeled

exceedances, which were experienced in scattered locations in the Intermountain West. PA 2A-14, JA____; 80 FR 65,436/2.

EPA further predicted that these infrequent days of background ozone levels greater than 70 ppb would not prevent attainment of the NAAQS in any location. 80 FR 65,328/1; RTC 342, JA____. The form of the NAAQS is based on the fourth-highest daily level, which allows daily ozone levels in any area to exceed 70 ppb three times in one year without violating the NAAQS. 80 FR 65,351/3. CASAC endorsed EPA's selection of a form based on the fourth highest daily level, averaged across three years, specifically because it allows for "atypical meteorological conditions that can lead to abnormally high ambient ozone concentrations," like the infrequent stratospheric intrusions that can cause ozone levels to spike, while still providing requisite public health and welfare protection. 80 FR 65,352/2. Thus, EPA predicted that no locations would experience background ozone levels over 70 ppb frequently enough to preclude attainment. 80 FR 65,328/1.

Industry and State Petitioners ask this Court to second-guess EPA's technical conclusions, claiming various deficiencies in EPA's models and pointing to studies that purportedly show that background ozone concentrations will cause exceedances of the NAAQS in numerous areas of the country. But EPA's expert evaluation of "complex scientific and technical" evidence is well-supported by the record and should be upheld. *See Lead Indus.*, 647 F.2d at 1145-46. The Agency's modeling is

sound and complete, and the studies Petitioners identify actually corroborate EPA's conclusions.

State Petitioners lob many criticisms at EPA's modeling, but none hit the mark. Their claim that EPA did not consider the effect of background ozone levels on peak total ozone days, but only seasonal averages, is plainly contradicted by the record. State Br. 21. As noted above, EPA acknowledged that peak days were more relevant to the NAAQS, and concluded that on peak days when total ozone levels exceed 70 ppb, U.S.-manmade emissions are the main factor driving daily ozone levels above 70 ppb. RTC 345, JA____. EPA detailed the few exceptions, explaining that stratospheric intrusions and wildfires may cause exceedances on rare days in limited areas in the Intermountain West. 80 FR 65,328/1-2.

State Petitioners also question whether EPA's models were configured appropriately to capture days when background ozone exceeded 70 ppb. State Br. 25. Because State Petitioners did not raise these technical issues in their comments, these arguments have been waived. 42 U.S.C. § 7607(d)(7)(B). In any event, State Petitioners make the unsupported claim that EPA did not model stratospheric intrusions, even though EPA specifically identified stratospheric intrusions as a cause of modeled exceedances. 80 FR 65,300/3; PA 2A-14, JA____. EPA also modeled wildfire, lightning, and international emissions. PA 2A-7 to 2A-8, JA____-____. These models faithfully apply the definition of U.S. background ozone, which includes only ozone that would not exist without U.S.-manmade emissions, and not ozone formed by the

combination of U.S.-manmade emissions and natural emissions. PA 2A-5 n.1, JA____. Additionally, when EPA compared its model results to actual data, the Agency found that its models performed as well or better than other models and that model bias and error rates were relatively small. PA 2A-9, JA____; RTC 344-45, JA____. State Petitioners mischaracterize a graph of EPA's modeling results by discussing exceedances of 60 ppb, whereas the NAAQS is set at 70 ppb. State Br. 24 (citing Figure 5c). Tellingly, neither State nor Industry Petitioners actually specify a number of expected exceedances of 70 ppb, much less a number that is different from EPA's.

Industry Petitioners, joined by State Petitioners, do cite different scientific models that they claim cast doubt on EPA's conclusions. But EPA's choice of model cannot be rejected unless "the model bears no rational relationship" to the data. *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir. 1998). Because EPA's models incorporated extensive data on background ozone and manmade ozone and produced reliable and relevant results, they must be upheld. *Id.*

Further, most of the models Petitioners cite actually corroborate EPA's finding that in limited locations in the Intermountain West, background ozone may at most infrequently cause exceedances of 70 ppb, but will not prevent attainment of the standard itself. RTC 345-49, JA____-____; Lefohn and Oltmans, JA____ (concluding that "exceptional events in the Intermountain West" may cause infrequent spikes in background ozone levels); Zhang, JA____ (concluding that North American

background ozone would never rise above 70 ppb, and the highest daily background ozone values would be in the Intermountain West); Emery, JA____ (concluding that North American background ozone would remain below 65 ppb except in isolated regions downwind of specific, large wildfires); Lin 2012a, JA____ (concluding that North American background exceeded 70 ppb only infrequently, and highlighting the correlation between those events and stratospheric intrusions); Electric Power Research Institute, JA____ (industry comment incorporating a non-peer-reviewed model, which predicted that in the future, if international transport increases, the fourth-highest daily ozone background levels may be as high as 65 ppb in Denver); Sonoma Technologies, JA____ (industry comment estimating that background ozone levels could at times rise to a range between 47 ppb to 68 ppb).

The only cited studies that do not corroborate EPA's findings also do not undermine them. Cooper, JA____ (suggesting that internationally-transported tropospheric ozone has increased); Lin 2012b, JA____ (estimating ozone attributable to international transport from Asia); *see also* RTC 343-44, JA____-____ (noting that studies indicate that the trend in tropospheric ozone has slowed over time). Because the cited studies did not purport to estimate total background ozone levels, they provide no basis for concluding that background ozone levels are substantially higher than EPA's estimate.

Industry Petitioners cite one additional study that they claim proves background levels can rise above 70 ppb. Industry Br. 24. That study reports that

monitored ozone values in Clark County, Nevada are sometimes greater than 70 ppb. RTC 346-347, JA____-____ (discussing Langford). But as EPA explained, these monitored ozone levels cannot "be used as a proxy for background [ozone]" particularly when two million people live in the bustling county, home to Las Vegas, with many local sources of air pollution. *Id.* The authors of the study themselves acknowledge that the high monitored ozone levels have multiple causes, including locally-generated pollution, interstate pollution, and also stratospheric intrusions, wildfires and international transport from Asia.[4] *Id.*; 80 FR 65,328/1 (monitored ozone levels cannot be used as a proxy for background levels).

In sum, EPA drew logical conclusions from complex technical evidence. The stratospheric intrusions and wildfires that lift background ozone levels are uncommon and scattered, and in light of the form of the standard, those events will not prevent attainment of the NAAQS.

2. EPA can address attainment concerns posed by background ozone after setting the NAAQS.

Even assuming that background ozone would prevent attainment in certain atypical, isolated situations if left unaddressed, EPA reasonably decided that it could

[4] State Petitioners also cite EPA documents from a separate rulemaking, the Tools Fact Sheet and Workshop Slides, which are not appropriately before the Court because they postdate the administrative record. 42 U.S.C. § 7607(d)(7)(A). In any event, the scientific observations in those documents are consistent with others in the record. *Compare* the explanation of stratospheric intrusions in Tools Fact Sheet at 4 *with* PA 2-10, JA____; and *compare* the report of an increasing, but uncertain, trend in midtropospheric ozone in Workshop Slides at 21 *with* RTC 343-44, JA____-____.

address this issue through particular provisions in the Act that govern background levels of air pollution, instead of raising the NAAQS. The Exceptional Events, International Transport, and Rural Transport provisions specifically address the effects of different types of background emissions on attainment. EPA reasoned that states and areas have successfully used these targeted provisions to prevent the very same sources of background ozone at issue in this case from precluding attainment or prompting sanctions in the past, and they may do so in the future. 80 FR 65,436/3, 65,438/3, 65,444/2.

EPA pinpointed stratospheric intrusions and wildfires as the suspected sources of background ozone that may cause background ozone levels to rise above 70 ppb. 80 FR 65,436/2. These events need not preclude attainment under the Exceptional Events provision. 80 FR 65,439/2 (citing 42 U.S.C. § 7619(b)). Whether areas "attain" the NAAQS is a question that EPA answers after it issues the NAAQS. EPA receives recommendations from states regarding whether areas have attained the NAAQS, usually based on air quality monitoring data. 42 U.S.C. § 7407(d). But under the Exceptional Events provision, states can petition EPA to exclude monitoring data impacted by "exceptional events," which include "natural events" affecting air quality that are not "reasonably controllable or preventable." 42 U.S.C. § 7619(b).

EPA considers stratospheric intrusions and natural wildfires to be "natural events" covered by the Exceptional Events provision, and states have successfully petitioned EPA to exclude data from these events in the past. 80 FR 65,439/2. State

Petitioners wrongly suggest that the Exceptional Events provision is illusory because, under EPA regulations, "routine natural emissions" are not "exceptional." State Br. 35. But EPA has always considered the sources of background ozone at issue in this case (stratospheric intrusions and wildfires) to be more than "routine" fluctuations, eligible for exclusion under the Exceptional Events provision. *See* 80 FR 65439/1 n.239; Treatment of Data Influenced by Exceptional Events, 72 FR 13,560, 13,566/2-3 (Mar. 22, 2007)). Indeed, EPA has granted exceptional events petitions for stratospheric intrusions and wildfires. 80 FR 65,439/2 (EPA recently granted Wyoming's petition regarding stratospheric intrusion and California's petition regarding wildfires).

State Petitioners also assert that their Exceptional Events petitions often go unanswered. State Br. 41. Yet EPA has acted on every Exceptional Events petition that would affect a decision on an attainment or nonattainment designation following the promulgation of a revised NAAQS. 80 FR 65,436/3. The form of the standard, which is based on the fourth-highest daily level, allows ozone to exceed 70 ppb three days each year in each area without the need for any documentation. Thus, petitions to exclude data on multiple days need not always be addressed.

Though the Exceptional Events provision alone should address the two sources of background ozone that caused modeled exceedances of 70 ppb, stratospheric intrusions and wildfires, states and areas may use two other provisions in the Act to address background ozone. 80 FR 65,444/1. Under the International

Transport provision, international emissions need not force sanctions. 42 U.S.C. § 7509a. If a state demonstrates that its state implementation plan (SIP) is sufficient to attain the NAAQS "but for" international emissions, EPA must approve the SIP and cannot impose sanctions for failure to submit an adequate SIP. *Id.*; 80 FR 65,444/1. EPA has approved Section 7509a demonstrations for El Paso, Texas, and Nogales, Arizona to account for international pollution transported from Mexico, and the Agency can do the same to address the impact of international pollution on the attainment of this NAAQS. 80 FR 65,444/2. Finally, under the Rural Transport provision, certain rural areas do not need to demonstrate attainment of the NAAQS, regardless of the types of background pollution that affect them. 42 U.S.C. § 7511a(h); 80 FR 65,438/3.

Granted, no one provision of the Act operates to exclude all sources of background ozone in all areas. But collectively, these provisions address all of the sources that EPA determined might cause background levels to rise above 70 ppb, namely stratospheric intrusions and wildfires, as well as other sources, like international emissions. Because these sources of background ozone fall into the categories addressed by specific provisions in the Act, EPA reasonably concluded that it did not need to refrain from revising a NAAQS that was not requisite to protect public health, simply to address the attainment concerns posed by background ozone. 80 FR 65,328/3. Indeed, doing so would have resulted in standards that are under-protective of public health and welfare for the vast majority of the Nation, solely for

the purpose of assuring that atypical conditions in certain discrete areas never can cause violations. Such a result is both unnecessary and antithetical to the prophylactic purposes of the Act.

Industry and State Petitioners concede, as they must, that these provisions are legally available to address background ozone, and primarily argue that they are practically unworkable. Industry Br. 31 (exceptions are "theoretical[ly] availab[le]"); State Br. 41. But they ignore the fact that these provisions have worked in the past. EPA has granted Exceptional Events petitions for stratospheric intrusions and wildfires, it has approved SIPs under the International Transport provision, and it has designated Rural Transport areas. 80 FR 65,436/3, 65,444/2, 65,438/3. Because these provisions have proven workable, EPA reasonably concluded that they do work.

State Petitioners seek to distinguish the past from the present by suggesting that, while background ozone may have caused infrequent exceedances of previous NAAQS, it will cause far too many exceedances of the 2015 NAAQS. State Br. 33. EPA reasonably judged the number of exceedances at issue in this case to be "infrequent," and, regardless, the Exceptional Events provision does not limit the number of natural events that states can petition to exclude. *See* 42 U.S.C. § 7619(b)(1)(A)(iii) (human activity must be "unlikely to recur at a particular location," but natural events need not). EPA can and has granted Exceptional Events petitions for numerous natural events. *See* EPA Region 9 Letter to Hawaii, JA____ (agreeing to exclude 268 days of data influenced by volcanic emissions).

State Petitioners also claim that EPA's reliance on the three provisions discussed above is unreasonable because the future is unknowable. State Br. 42-43. But their speculative concerns about the future are no reason to overturn EPA's current decision setting the NAAQS. States need not fear that EPA will suddenly stop implementing these background pollution provisions. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (agencies are presumed to act with regularity). Indeed, EPA is revising its Exceptional Events regulations to further improve the petition process. 80 FR 65,413/2. If these Petitioners are dissatisfied with EPA's future decisions, then they may seek judicial review of those actions at the appropriate time. Idle and unsupported speculation about future events cannot, however, be used to undermine reasonable decisions made by EPA based on known facts today.

Finally, these Petitioners argue that these provisions are not "sufficient" because states and areas must affirmatively take some action to address background ozone, whereas if the NAAQS were higher, they would not. EPA acknowledged that some states and areas will have to work to meet their obligations under these NAAQS if they are significantly affected by background ozone, for example, by submitting an Exceptional Events petition. 80 FR 65,436/3. But this is a requirement imposed by Congress, not EPA. Indeed, there would have been little or no need for Congress to include the Exceptional Events provision if it had intended EPA to set the NAAQS at a level that always accommodated such events in the first place. As discussed in

more detail below, Congress did not structure the Act to allow states to automatically invoke background ozone as a reason to withdraw from the process of reducing air pollution; instead, Congress crafted a deliberate, documented process to allow some reasonable accommodation for exceptional events when they occur. In summary, EPA reasonably concluded that background ozone did not prevent the Agency from meeting its statutory obligation to set fully protective standards for the Nation because no area will be precluded from attaining the standard, and statutory provisions provide further avenues for addressing the isolated exceedances of 70 ppb caused by background ozone.

3. The Clean Air Act does not require EPA to abandon a "requisite" NAAQS to accommodate background ozone.

Industry and State Petitioners argue that despite the specific provisions that address background pollution just discussed, the Clean Air Act requires EPA to set the NAAQS above the highest background levels in any area—a least-common-denominator approach that provides manifestly inadequate public health protection. Their statutory argument collapses under the familiar standard of *Chevron v. NRDC*, 467 U.S. 837 (1984). Even assuming that background ozone may cause violations of the NAAQS, the Act does not unambiguously require EPA to set the NAAQS so high that it would never be violated by background ozone. This interpretation misconstrues the text of Section 7409(b), the principal statutory provision on setting

the NAAQS, and violates the "cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

Under Section 7409(b), EPA must set a NAAQS that is "requisite" to protect "public health" and "welfare," 42 U.S.C. § 7409(b), and a NAAQS that sacrifices the health and welfare of all people in all areas to accommodate the highest levels of background ozone cannot be "requisite." Controllable domestic, manmade emissions will subject millions of people across the Nation to harm if the NAAQS are not reduced. Congress expected EPA to protect these people by setting a NAAQS that would force down emissions. *Whitman*, 531 U.S. at 491-92 (Breyer, J. concurring). A NAAQS higher than the highest level of background ozone experienced in any area does not remedy a national problem; it fails to protect millions of Americans from the harmful effects of ozone pollution. The EPA reasonably does not interpret the Act to require such a result.

Industry and State Petitioners argue that EPA cannot provide "requisite" public health and welfare protection nationwide if background ozone will make it impossible for any single state or area to "achieve and maintain" the NAAQS. As previously discussed, this fact pattern is not present in this case because EPA does not expect background ozone to preclude attainment of the NAAQS. But even assuming otherwise, under *Chevron* step one, Petitioners must show that the Act unambiguously requires EPA to set the NAAQS above the highest level of background ozone. *Chevron*, 467 U.S. at 842-43.

More problematically, Petitioners fail to consider the statute as a whole. *See King*, 502 U.S. at 221. The Act allows states and areas several alternatives to showing that they have "achieved" the NAAQS when background ozone conflicts with attainment, as discussed in the previous section. This Court has already observed that "Congress addressed the circumstances under which attainment could be waived" through provisions such as the International Transport provision, 42 U.S.C. § 7509a. *See Coalition of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613, 624 (D.C. Cir. 2010).

As EPA began lowering the NAAQS, Congress considered and addressed the potential conflict between background ozone and the NAAQS by adding the International Transport and Rural Transport provisions in 1990 and the Exceptional Events provisions in 2005. Pub. L. No. 101-549, §§ 103, 181, 104 Stat. 2399; Pub. L. No. 109-59, § 6013(a), 119 Stat. 1144. These provisions provide EPA the means to address attainment concerns posed by background ozone when making attainment designation decisions and passing on attainment demonstrations, instead of when setting the NAAQS. Though Congress could have written an exception that prevents EPA from setting a NAAQS that ever conflicts with background ozone, Congress chose to address this issue in narrower ways. In setting the revised NAAQS here, EPA reasonably decided that it could utilize these targeted provisions when states claim that background ozone is the source of their nonattainment, instead of reducing public health and welfare protection nationwide.

Grasping for a statutory hook, State and Industry Petitioners point to three statutory phrases that mention both NAAQS and achievement or attainment, and argue that these phrases clearly require EPA to set a NAAQS under Section 7409(b) that all states can attain without resorting to any specific provision on background ozone. This argument is fatally flawed because none of the provisions cited requires the Administrator to select a NAAQS that she knows all areas will attain, and she need not ignore the statutory exceptions governing background ozone at the designation and implementation stages. *See Battery Recyclers*, 604 F.3d at 625. Thus, neither the plain language nor the structure of the Act supports Petitioners' interpretation that the highest background level sets a floor below which the NAAQS cannot fall.

Industry Petitioners mention, but place limited stock in, Section 7409(b), and for good reason. Industry Br. 26. This section requires EPA to set the NAAQS at a level "the attainment and maintenance of which" is "requisite" to protect "public health" and "welfare." 42 U.S.C. § 7409(b). But this phrase does not require states to attain the NAAQS. Section 7409(b) establishes the Administrator's obligation to set a "requisite" NAAQS that, if attained, would protect public health and welfare. This section does not establish any state obligations to attain the NAAQS. And it does not require that the Administrator consider attainability when setting the NAAQS—in fact, just the opposite. This Court has repeatedly held that "attainability" is not a "relevant consideration[]" when setting the NAAQS, specifically citing this section.

API, 665 F.2d at 1185 ("attainability" owing to "natural factors" is not relevant); *Lead Indus.*, 647 F.2d at 1148-1149; 80 FR 65,328/1.

State and Industry Petitioners attempt to dodge this Court's precedent holding that "attainability" is not relevant to setting the NAAQS by reconfiguring their argument as one of "achievement," rather than "attainment" of the NAAQS. They lean heavily on Section 7407(a), though in their briefs, both State and Industry Petitioners noticeably fail to quote the language in italics:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State *by submitting an implementation plan for such State which will specify the manner in which [the NAAQS]* will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a). State Br. 19; Industry Br. 25. This section gives states the responsibility of drafting implementation plans that include measures to "achieve[] and maintain[]" the NAAQS. The instruction it gives is unremarkable—state implementation plans (SIPS) should contain measures to implement the NAAQS. Industry Petitioners also cite another provision governing SIPs, Section 7410(a)(2)(C), which requires SIPs to include particular regulations "as necessary to assure that [NAAQS] are achieved." Industry Br. 25. This section more specifically requires that SIPs contain certain implementation measures.

Industry and State Petitioners argue that collectively, these statutory phrases require that all states "achieve" the NAAQS *and* forbid EPA from setting the NAAQS at a level that even one state or area could not achieve without excluding

background ozone. Taking this argument one step further, they assert that EPA cannot set the NAAQS at a level that would be "hard" to attain because it "approaches" background ozone levels. State Br. 20-21; Industry Br 29-30. This more extreme reading is unmoored even from their already-unreasonable statutory interpretation that the Act requires EPA to set the NAAQS at a level all states and areas can "achieve and maintain." A NAAQS that is difficult to achieve is not unachievable. Even their primary argument that EPA cannot set the NAAQS at a level lower than the highest level of background ozone on any day in any area is not supported by the text or structure of the Act. Sections 7407(a) and 7410(a)(2)(C) set requirements for SIPs, but they do not require that states or areas always be able to achieve the NAAQS without exception, or that EPA set the NAAQS accordingly.

EPA's decision to address background ozone through narrower implementation provisions without diluting the public health and welfare protection of the NAAQS is consistent with this Court's approach in *API v. Costle*. RTC 342, JA____; *see also Whitman*, 531 U.S. at 470. In *API*, the city of Houston argued in part that because "natural factors," or natural sources of pollution, would prevent it from attaining the NAAQS, EPA's decision to set a more stringent NAAQS was arbitrary and capricious. *API*, 665 F.2d at 1185-86. The Court rejected this argument because EPA need not "tailor national regulations to fit each region or locale," especially given that Congress was "aware that some regions are having difficulty" meeting the NAAQS and made allowances for this contingency in other statutory provisions,

including those that postpone deadlines for attainment. *Id.*; *see also id.* at 1190; RTC 342, JA____.

As in *API*, EPA decided not to promulgate a NAAQS that was less stringent than needed to protect public health and welfare to accommodate background ozone levels in limited, rural, high-altitude areas in the Intermountain West. Instead, EPA reasonably looked to other statutory provisions that states and areas could use to address background ozone levels without reducing public health and welfare protection nationwide.

Industry and State Petitioners struggle to distinguish their position from Houston's in *API*. Industry Br. 27; State Br. 32-33. The thrust of their argument is that while background ozone in Houston may have been a "region[al] or loc[al]" issue, background ozone here is a more widespread concern. But EPA found that background ozone may exceed 70 ppb on individual days in only a few high-altitude locations in the Intermountain West, and these exceedances were so sporadic that they would not preclude attainment of the NAAQS. RTC 342, JA____. In short, background ozone is not close to a pervasive, national issue here. 80 FR 65,328/3.

State Petitioners further parse *API* to make the semantic legal argument that the Court did not consider EPA's responsibility when background ozone makes it impossible for *states* to achieve the NAAQS, not just regions or cities. State Br. 33. But in *API*, this Court equated "regions," whose background levels cannot dictate the NAAQS, with "states." *API*, 665 F.2d at 1185-86. (noting that Congress addressed

the problems that some "regions" were having in meeting the NAAQS and describing a provision applicable to "states"). Further, primary responsibility for implementing the NAAQS has always rested with the states. *See, e.g.*, 42 U.S.C. § 7410. Congress addressed attainment concerns posed by background ozone in states, as well as smaller areas. *See* 42 U.S.C. § 7509a (addressing attainment demonstrations by states). The distinction that State Petitioners seek to make does not exist. And even if it did, *API* still supports EPA's conclusion that the Act does not unambiguously require EPA to address background ozone when setting the NAAQS, particularly when EPA can implement specific provisions on background ozone afterwards.

4. EPA did not need to address whether background ozone could ever justify a higher NAAQS.

In revising the NAAQS to provide requisite public health and welfare protection, EPA declined to raise the NAAQS to address sources of background ozone that may pose limited conflicts with a level of 70 ppb when other statutory provisions were available. 80 FR 65,328/3. Because the record indicated that background ozone posed a limited challenge to the states achieving the revised NAAQS, EPA was not faced with the question of whether raising the NAAQS to accommodate background ozone could be a *permissible* reading of the Act under *Chevron* step two. The record did not require EPA to reach this question of statutory interpretation, and EPA properly declined to do so. Likewise, the Court does not need to resolve that question in this case.

In the past, EPA has suggested that when choosing among a range of requisite values, some of which are in "proximity" to background ozone nationwide, EPA may consider background ozone when choosing a level within that range—a position this Court has acknowledged. *ATA III*, 283 F.3d at 379; 80 FR 65,327. EPA has also suggested that the NAAQS should not be lowered to levels that cannot be achieved "*throughout the country* without action affirmatively *extracting* chemicals from nature." *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1036 (D.C. Cir. 1999) (*ATA I*), *aff'd in part and rev'd in part*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (emphasis added); *see also Whitman*, S. Ct. Oral Arg. Tr. at 35 (Nov. 7, 2000). But through the operation of the statutory provisions on background pollution, particularly the Exceptional Events provision added to the Act in 2005, states and areas will not need to extract ozone from nature to fulfill their obligations under the revised NAAQS.

Industry and State Petitioners claim that EPA's current position is inconsistent with its previous positions on background ozone. Industry Br. 30; State Br. 47; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). Not so. In this review, EPA had no need to revisit its ability to raise the NAAQS to address background ozone because background ozone will not prevent attainment of a 70 ppb NAAQS, and even if it might, other statutory provisions address the sources of background ozone at issue here.

B. The Clean Air Act prohibits EPA from considering costs, or "economic impacts," in setting the NAAQS.

The Supreme Court held in *Whitman* that EPA's statutory mandate to set the NAAQS at a level requisite to protect public health and welfare "unambiguously bars cost considerations from the NAAQS-setting process," 531 U.S. at 471. Industry and State Petitioners ignore well-established law to argue that EPA must consider "adverse economic, social, and energy impacts" and other costs when revising the NAAQS. Industry Br. 31; State Br. 48. These impacts are just costs by other names. RTC 352, JA____. Many times now, this Court has rejected similar attempts to introduce cost considerations into the NAAQS through the back door. The Supreme Court has emphatically and unanimously endorsed this Court's long-held position that when setting the NAAQS, EPA cannot consider costs, no matter their guise. Indeed, had EPA considered the factors championed by Industry Petitioners, the Agency would have committed reversible error. *Whitman*, 531 U.S. at 471 n.4; RTC 353, JA____.

In *Whitman*, the Supreme Court surveyed five opinions in which this Court held that "economic considerations [may] play no part in the promulgation" of the NAAQS. *Id.* at 464 (citing *Lead Indus.*, 647 F.2d at 1148; *ATA I*, 175 F.3d at 1040-41; *Am. Lung Ass'n*, 134 F.3d at 389; *NRDC*, 902 F.2d at 973; *API*, 665 F.2d at 1185). The Supreme Court agreed that the Act forbids EPA from considering costs when setting the NAAQS. *Whitman*, 531 U.S. at 564. Though other provisions of the Act

specifically require EPA to consider costs, Section 7409(b) requires EPA to set the NAAQS at a level "requisite" to protect "public health" and "welfare" with no mention of costs. *Id.* at 465. The Supreme Court found it "implausible" that Congress silently intended EPA to consider costs in setting the NAAQS when doing so is "so full of potential for canceling the conclusions" of a health- and welfare-based analysis. *Id.* at 468-69.

The Supreme Court rejected industry's attempts to "pad health effects with cost concerns." *Id.* at 468. Industry argued that revising the NAAQS would unleash an economic downturn, which would in turn affect public health, and therefore, EPA needed to consider economic effects. The Court reasoned that Congress was "unquestionably aware" that reducing air pollution might cause some businesses to close, workers to find new jobs, and consumers to change their behavior, but affirmatively held that EPA cannot consider these impacts in setting the NAAQS. *Whitman*, 531 U.S. at 466.

Repeating history, Industry Petitioners try to shade their economic concerns with overtones of health and welfare. They argue that while *Whitman* forbade consideration of "implementation costs," the economic, social, and energy impacts of revising the NAAQS are not classic implementation costs. Industry Br. 33 n.15. This argument misstates *Whitman*'s holding, which forbids EPA from considering costs without qualification. 531 U.S. at 471. The costs that Industry Petitioners would have EPA consider, "reductions in economic growth, job loss, increased energy prices,"

Industry Br. 32, are no different than the costs that the Court held EPA was forbidden to consider in *Whitman*. *See id.* at 466 (EPA cannot consider "the economic cost of implementing a very stringent standard" which "might produce health losses sufficient to offset the health gains achieved in cleaning the air, for example by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries"). Industry Petitioners insist that they are not asking EPA to consider implementation costs, but economic and other "impacts." This distinction does not exist. The NAAQS will have no impact on the economy, society or energy unless implemented. And both the Supreme Court and this Court have held that EPA cannot consider implementation concerns, including alleged health risks from unemployment, when setting the NAAQS. *Id.*; *Lead Indus.*, 647 F.2d at 1153; *NRDC*, 902 F.2d at 973.

Industry Petitioners attempt to salvage their argument by pushing costs into a "contextual assessment of acceptable risk." Industry Br. 32. They borrow the term from Justice Breyer's concurrence in *Whitman*, but not the meaning he gave it. *See also Mississippi*, 744 F.3d at 1343 (citing *Whitman*, 531 U.S. at 494-95 (Breyer, J., concurring)). Justice Breyer agreed with the full Court that EPA must decide what level of public health and welfare protection is requisite without regard to the "economic costs of compliance." *Whitman*, 531 U.S. at 490 (Breyer, J., concurring). But he would have allowed EPA to put the health risks from air pollution in context by considering "comparative health risks," the "acceptability of small risks," and "the

severity of a pollutant's potential adverse health effects." *Id.* at 495. All of these "contextual factors" are exclusively health concerns.

State Petitioners more forthrightly argue that EPA cannot "ignore[] all cost considerations." State Br. 48. But the Supreme Court instructed EPA to do exactly that when it held that the Act "unambiguously bars cost considerations from the NAAQS-setting process." *Whitman*, 531 U.S. at 471. Like Industry Petitioners, State Petitioners attempt to cloak costs in the garb of "public health." They unearthed a public health treatise from 1970 that references the need for an adequate "standard of living" to ensure good health, and from that, they argue that EPA must consider costs when setting a health-protective NAAQS. State Br. 48-49. But the Supreme Court has already acknowledged that reducing air pollution may impose economic costs, which may in turn cause health losses, and gave the specific example of reductions in job opportunities and consumer benefits, the very makings of a "standard of living." *See* Oxford English Dictionary 2016 (standard of living ensures "material comfort"). Nonetheless, the Court held that EPA *cannot* consider these costs when setting the NAAQS. 531 U.S. at 466.

Industry Petitioners raise two final statutory points in support of their argument that EPA must consider costs when setting the NAAQS, Industry Br. 33, 36, both already rejected by the Supreme Court. *First*, Industry Petitioners cite Section 7409(d)(2)(C)(iv), which requires CASAC to advise EPA on "adverse public health, welfare, social, economic, or energy effects which may result from various strategies

for attainment and maintenance of [the NAAQS]." 42 U.S.C. § 7409(d)(2)(C)(iv). The Supreme Court has determined, contrary to Industry Petitioners' interpretation, that CASAC's advice on social, economic, and energy impacts should aid EPA and the states in implementing the NAAQS, not in setting the NAAQS. *Whitman*, 531 U.S. at 470 & n.2; *see also id.* at 490 (Breyer, J., concurring). This purpose is clear in context. The preceding subsection requires CASAC to give scientific advice to inform EPA when setting the NAAQS. Specifically, every five years, CASAC must review air quality criteria and recommend revisions to the NAAQS based on those criteria so that EPA may set a "requisite" NAAQS. 42 U.S.C. § 7409(d)(2)(B). In contrast, the subpart that Industry Petitioners cite does not require CASAC to provide this input to EPA during NAAQS review or at any specific time. *Id.* § 7409(d)(2)(C); RTC 352, JA____. Instead, CASAC's advice on economic and other impacts under Section 7409(d)(2)(C)(iv) is "pertinent only to the EPA's duty under [Section 7408] to provide the States with control strategy information."[5] *ATA I*, 175 F.3d at 1041.

Second and finally, Industry Petitioners argue that EPA must consider economic and other impacts when revising the NAAQS because Section 7409 requires NAAQS revisions to be "appropriate." Industry Br. 33 (quoting 42 U.S.C. § 7409(d)(1)). The

[5] Under Section 7409(d)(2)(C)(iv), CASAC must also advise EPA on the potential public health and welfare impacts of implementation. These public health and welfare impacts are arguably relevant to CASAC's duty to advise EPA on public health and welfare effects as part of the NAAQS-setting process. EPA sought and CASAC provided advice on these matters. CASAC Letter 2014a 10-11, JA____-____; 79 FR 75,271, 75,279, 75,285 at nn.102 & 105, 75,287 n.107; RTC 353, JA____.

Supreme Court has rejected this reading of Section 7409. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Court interpreted Section 7412 of the Act, a unique provision that requires EPA to make a threshold "appropriate and necessary" finding before regulating hazardous air pollutant emissions from power plants. 42 U.S.C. § 7412. The Court held that EPA could not decide whether regulations under Section 7412 were "appropriate and necessary" in that context without considering costs. 135 S. Ct. at 2706. But in making this determination, the Court specifically *distinguished* Section 7409(b), which more specifically requires EPA to set the NAAQS at a level "requisite to protect the public health" with an "adequate margin of safety." *Id.* at 2709 (quoting 42 U.S.C. § 7409(b)). The Supreme Court held that Section 7409(b)'s instruction to set the NAAQS at a "requisite" level "does not encompass cost; it encompasses health and safety." *Id.*; *see also Whitman*, 531 U.S. at 470.

To be sure, Section 7409(d) requires that once the NAAQS are set, they must be revised as "appropriate," but only as "appropriate in accordance with . . . subsection (b)." 42 U.S.C. § 7409(d)(1). As this Court explained in rejecting this same argument nearly two decades ago, Petitioners cannot sneak costs into a NAAQS review under Section 7409(d)'s requirement that NAAQS revisions be "appropriate" because that "argument ignores the clause immediately following 'appropriate,' which incorporates [Section 7409(b)] and thereby affirmatively precludes consideration of costs in revising NAAQS." *ATA I*, 175 F.3d at 1040. Subsection (b) does not permit

EPA to consider costs in setting the NAAQS originally, and subsection (d) does not permit EPA to consider costs in revising the NAAQS.

C. State Petitioners failed to exhaust their intelligible principle argument, which in any event is meritless.

Congress instructed EPA to set the NAAQS at a level "requisite" to protect public health and welfare, and the Supreme Court held in *Whitman* that this instruction is an "intelligible principle" that meets constitutional requirements. 531 U.S. at 474-76. State Petitioners did not raise their argument that EPA failed to give effect to that intelligible principle in their comments to EPA, and since they did not exhaust their administrative remedies, this argument is not properly before the Court. *See* 42 U.S.C. § 7607(d)(7)(B); *Lead Indus.*, 647 F.2d at 1173 (holding that under 42 U.S.C. § 7607(d)(7)(B), all challenges to the NAAQS, including constitutional challenges, must first be presented to EPA).

In any event, the argument is meritless. State Petitioners acknowledge that the Supreme Court held that the Act's delegation of authority to EPA is constitutional. State Br. 45; *see Whitman*, 531 U.S. at 475-76. While the Act does not contain a "determinate criterion" by which to set the NAAQS, the Supreme Court decided that the scope of discretion allowed EPA is permissible. *Id.* Many statutes instruct agencies to act to further the public interest, and the Clean Air Act more specifically requires EPA to provide "requisite" protection, meaning "not lower or higher than is necessary." *Id.*

State Petitioners nonetheless contend that "EPA's construction of the Act" erases that intelligible principle by failing to give effect to the term "requisite." State Br. 44. But an agency's interpretation of a statute is irrelevant to the question whether the statute lacks an intelligible principle. An agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472. Nor can agencies unlawfully delegate legislative power to themselves by misconstruing their authority under the statute.

At most, State Petitioners' argument amounts to a challenge to EPA's interpretation of the statute under *Chevron*, or to the reasonableness of EPA's decisionmaking. State Petitioners suggest three ways in which EPA failed to "conform" to the statutory mandate that the NAAQS be set at a level "requisite" to protect public health and welfare: (1) EPA set the NAAQS at an unachievable level; (2) EPA failed to explain departures from prior NAAQS; and (3) EPA failed to consider how the cost of implementing the NAAQS will affect public health. State Br. 46.

As to the first argument, we explained in Argument Point III.A. that background ozone will not preclude attainment and, in any event, statutory provisions on background ozone are available so that states and areas can meet their statutory obligations. As to the second argument, we described in Argument Point I.A. why the prior NAAQS was not "requisite" to protect public health. And as to the third

argument, we explained in Argument Point III.B. why EPA cannot consider the costs of implementation.

All three of State Petitioners' arguments suffer from the same misunderstanding of the "intelligible principle" set forth in *Whitman*. Though the Act requires EPA to set the NAAQS at a level that is "requisite"—meaning no lower or higher than necessary to protect public health and welfare, the Administrator must still exercise her judgment to make that determination. *Whitman*, 531 U.S. at 475-76; *see also Mississippi* 744 F.3d at 1348 ("unlike Goldilocks," EPA's decision need not be "just right," and even though "evidence in the record may also support other conclusions," this Court must uphold EPA's decision if it meets statutory standards). There is no "determinate criterion" that absolutely constrains EPA's discretion in setting the NAAQS. *Whitman*, 531 U.S. at 475-76. The Administrator faces a tough call, but it is her call to make.

D. State Petitioners waived any argument about EPA's decision to lengthen the ozone monitoring seasons.

At the end of their statement of the case, State Petitioners add two sentences asserting, without explanation, that EPA irrationally lengthened ozone monitoring seasons. State Br. 13-14. State Petitioners did not address this issue in their argument, and have waived any argument they might have had. *New York Rehab. Care Mgmt., LLC v. Nat'l Labor Relations Bd.*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the

court to do counsel's work." (citation omitted)). Regardless, EPA adequately explained that ozone monitoring should occur when there is a reasonable possibility that ozone concentrations will reach 70 ppb, not merely when concentrations have reached 70 ppb in the past. EPA reasonably adjudged that 60 ppb was an appropriate threshold on which to base monitoring requirements, particularly because "highly variable meteorological conditions" can shift high ozone days earlier or later in any given year than typically observed. 80 FR 65,416/2.

IV. EPA reasonably interpreted the Act's preconstruction permit provisions to allow limited grandfathering of permit applications.

In the ozone NAAQS rule, EPA amended the regulations for the CAA's Prevention of Significant Deterioration (PSD) program to allow permitting authorities (either a state or EPA) to grandfather a narrow category of permit applications from demonstrating that emissions from the proposed new source or modification will not cause or contribute to a violation of the revised ozone NAAQS. *See* 40 C.F.R. §§ 52.21(i)(12), 51.166(i)(11). Environmental Petitioners challenge the grandfathering provision as inconsistent with the Act's plain language. Environmental Br. 57-62. But contrary to their argument, this is not a *Chevron* step one situation because Congress did not directly speak to the precise question here. 467 U.S. at 842. Rather, Section 7475 of the Act is ambiguous, and EPA has implicit authority to resolve the ambiguity.

Section 7475(a)(3)(B) prohibits a "major emitting facility" from being constructed in any covered area unless the owner or operator of the facility "demonstrates," in relevant part, "that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any . . . [NAAQS] in any air quality control region." 42 U.S.C. § 7475(a)(3)(B). EPA generally interprets this provision to require a permit applicant to make this demonstration for any NAAQS in effect when that the PSD permit is issued. 80 FR 65,433/3. But nothing in the Act expressly precludes EPA, when it revises the NAAQS, from

issuing a regulation grandfathering a narrow category of pending permit applications from satisfying the demonstration requirement in Section 7475(a)(3)(B), for the revised NAAQS. And EPA has a long history of interpreting the Act to provide it discretion to issue a rule grandfathering some permit applicants from demonstrating compliance with a NAAQS that is promulgated while a permit application is pending. 40 C.F.R. § 52.21(i)(9)-(11). So the precise question is whether Section 7475(a)(3)(B)'s demonstration requirement must always apply to a NAAQS that is promulgated by EPA while a PSD permit application is pending.

Environmental Petitioners focus their *Chevron* step one argument on the language of Section 7475(a)(3)(B) alone. Environmental Br. 57-58. Yet "[i]n making the threshold determination under *Chevron*," the Court does not restrict itself to "examining a particular statutory provision in isolation" because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (citations and quotations omitted).

Looking at the broader statutory context, Section 7475(c) instructs the permitting authority that "[a]ny completed permit application" for a "major emitting facility" in any covered area "shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). Read together, Sections 7475(a)(3)(B) and 7475(c) do not clearly address how the demonstration requirements should be met for permit applications pending when the NAAQS are

revised. 80 FR 65,433/3. In particular, EPA was concerned that for a limited subset of pending permits, complying with Section 7475(a)(3)(B)'s demonstration requirement for the 2015 ozone NAAQS "could hinder compliance with the requirement under section [7475](c) to issue a permit within one year of the completeness determination." *Id.* at 65,434/1. Moreover, neither Section 7475(a)(3)(B) nor Section 7475(c) tells EPA what to do in light of the requirement in Section 7409(d)(1) to review the NAAQS every five years.

Environmental Petitioners see no friction between Sections 7475(a)(3)(B) and 7475(c), claiming that the Act gives EPA two clear alternatives when a revised ozone NAAQS becomes effective: deny all pending permit applications or find the applications no longer complete. Environmental Br. 59. Neither of their preferred interpretations is unambiguously dictated by Section 7475. In fact, their alternative interpretations reinforce why *Chevron* step one does not apply.

By leaving open the potential for conflict between Sections 7475(a)(3)(B) and 7475(c), Congress implicitly delegated authority to EPA to resolve the conflict. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). And EPA's authority is further supported by Section 7601 of the Act, which authorizes the Administrator "to prescribe such regulations as are necessary to carry out [her] functions under this chapter." 80 FR 65,434/1 (quoting 42 U.S.C. § 7601).

EPA has long held this view of its grandfathering authority. *See Sierra Club v. EPA*, 762 F.3d 971, 982 (9th Cir. 2014) (acknowledging that EPA "has long exercised

authority to grandfather certain permit applications from revised regulations"); *id.* at 983 n.8 (citing four examples of EPA's "traditional grandfathering," including three grandfathering provisions for prior NAAQS); 80 FR 65,434/2-/3 (citing three examples of EPA's exercise of authority to grandfather). When, in 1978, this Court reviewed EPA's early exercise of its grandfathering authority, it held that EPA "unquestionably had authority" to promulgate the grandfathering provision under Section 7601, but also suggested that "even without [that] explicit rulemaking authority," the Agency had gap-filling authority under the Act. *Citizens to Save Spencer County v. EPA,* 600 F.2d 844, 874 (D.C. Cir. 1979). That same authority exists here.

Turning to *Chevron* step two, 467 U.S. at 843, the grandfathering provision reflects EPA's permissible construction of Section 7475. The Agency's interpretation is supported by the context of the statutory provisions, the purposes of the PSD program and the CAA, and the legislative history of the PSD program.

First, in interpreting Section 7475, EPA followed the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (citations and quotations omitted). Here, EPA refused to read Section 7475(a)(3)(B) in isolation, as Environmental Petitioners do, and instead read the provision's demonstration requirements in the context of the permitting authority's obligation to timely issue a permit decision under Section 7475(c). 80 FR 65,434/1.

EPA's grandfathering provision strikes a reasonable balance between Section 7475(a), which is aimed at protecting the NAAQS, and Section 7475(c), which is aimed at avoiding permitting delays. The provision covers a limited category of PSD permit applications that are pending when the revised ozone NAAQS becomes effective and that satisfy one of two permitting milestones: the permitting authority has either (1) issued a formal completeness determination on or before the signature date of the final rule, or (2) published public notice of the draft permit or preliminary determination before the final rule's effective date. 80 FR 65,431/1. For permit applications that fall within this narrowly defined window, the grandfathering provision requires the applicant to demonstrate that the proposed project's emissions will not cause or contribute to a violation of the ozone NAAQS in place when the permitting milestone was met. But the applicant need not make that demonstration for the revised ozone NAAQS that became effective while the permit was pending because introducing that requirement midstream could disrupt and delay the permitting process. And the permit must still satisfy all other applicable PSD requirements, including those for ozone. *Id.* at 65,434/3.

The grandfathering provision is based on a reasonable interpretation of Section 7475(a)(3)(B) in the limited situation where a new NAAQS is established after a pending permit application passes a permitting milestone. This reading ensures that projects satisfy the Act's substantive permitting requirements that applied when the permit met the milestone while avoiding unreasonable delays in processing permit

applications. Contrary to Environmental Petitioners' claim that EPA is "waiving" Section 7475(a)(3)(B)'s requirements, Environmental Br. 62, EPA is identifying for purposes of Section 7475(a)(3)(B) which ozone NAAQS apply to certain permit applications submitted before the revised NAAQS were finalized. *See Sierra Club*, 762 F.3d at 983 (recognizing for similar EPA grandfathering regulations that "EPA grandfathered a limited set of applications, in effect, by specifying an operative date … for each new regulation, as it was formally adopted."). Put differently, the grandfathering provision does not exempt grandfathered sources from meeting Section 7475(a)(3)(B)'s demonstration requirement; rather it clarifies, incident to revision of the ozone NAAQS, which ozone standards apply to those pending permit applications. *Id.*; RTC 332, JA____.

Second, EPA's reading of Sections 7475(a) and 7475(c) harmonizes with the stated purposes of the PSD program and the CAA as a whole. One goal of the PSD program is to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Meanwhile, the CAA's broader purpose is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* § 7401(b)(1). Both purposes recognize the need to simultaneously protect air quality and maximize opportunities for economic growth. Unlike Environmental Petitioners' strict reading of Section 7475(a), which promotes

only the protection of air quality and ignores Congress's stated desire not to inhibit economic growth, EPA's interpretation of its grandfathering authority serves both.

Third, the legislative history behind the PSD Program reveals clear congressional intent that EPA have authority to ease the transition to new or revised requirements under Section 7475(a), where such measures are needed to balance economic growth and the protection of air quality. As the Court stated in *Citizens to Save Spencer County*, "both the House and Senate committees responsible for the Clean Air Act Amendments were concerned about the possibility of economic disruption from implementation of new PSD requirements and took measures to reduce such disruption." 600 F.2d at 869 & n.112 (quoting H.R. Rep. No. 95-294 at 171 (1977) (""extraordinary lengths' taken not to cause 'current construction to be halted' or to 'clamp even a temporary moratorium on planned industrial and economic development"") and S. Rep. No. 95-127 at 11, 32 (1977) ("EPA to 'minimize any disruption that might be caused in implementing the Act' and 'permit process to prevent significant deterioration should (not) become a vehicle for inaction or delay.'")); *see also* 80 FR 65,434/1 (citing S. Rep. No. 94-717 at 26 (1976) ("nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.").

Environmental Petitioners argue that by including Section 7478(b) in the Act, Congress precluded EPA from interpreting the PSD program as providing any other authority to grandfather sources. Environmental Br. 58. But the grandfathering

provided in Section 7478(b) is different in kind from the grandfathering at issue here, so it cannot be considered a specific exception that precludes any interpretation of Section 7475 that permits grandfathering. Section 7478(b) addressed the one-time transition from an earlier version of the PSD program to a different statutory and regulatory PSD regime. RTC 333, JA____. Although the provision highlights Congress's support for grandfathering to ease the transition to new or revised requirements, Section 7478(b) does not address the type of transition at issue here—the transition to a revised NAAQS in the context of the existing PSD program.

Just as in *Citizens to Save Spencer County*, EPA here "sought to pursue a legally supportable 'middle path' between inconsistent statutory provisions so as to harmonize to the maximum extent possible both the public policy concerns and conflicting directives of Congress." 600 F.2d at 859. Unlike EPA's middle path, Environmental Petitioners' reading of the PSD requirements plainly frustrates Congress's intent. Their theory, which forbids grandfathering under any circumstance, could subject applicants to potentially ongoing application revisions if EPA promulgates several new or revised NAAQS in succession. If such revisions could not be addressed within the timeframe in Section 7475(c), the permitting authority could be forced to deny the permit application. Then the applicant would need to reapply in an effort to obtain the permitting authority's approval before additional requirements become applicable to avoid going through the cycle again.

In light of the legislative history indicating Congress's intent not to delay projects or slow economic development, Congress could not have intended this result, and the Court should reject such a constrained reading of EPA's authority. The statute implicitly grants EPA the authority to resolve the conflict between Sections 7475(a) and 7475(c), and the Agency did so in a way that balances both air quality protection and economic growth, consistent with the goals of the Act. The Court should uphold the grandfathering provision because EPA's interpretation of the Act is permissible.

* * *

Finally, if the Court remands any part of EPA's rule for further consideration, the Court should decline Environmental Petitioners' request to set a 17-month deadline for EPA to act. *See Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007) ("We decline to set a two year limit on EPA's proceedings on remand as the NRDC requests; mandamus affords a remedy for undue delay."); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (declining invitation to "impose a definitive deadline by which EPA must correct [CAA rule's] flaws"). The Court can and should presume that in the event of a remand, EPA will act diligently to reach a final decision consistent with the Court's opinion.

CONCLUSION

The Court should deny all of the petitions for review and uphold EPA's 2015 ozone NAAQS rule.

Respectfully submitted,

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July 29, 2016

90-5-2-3-20627

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 32,896 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Justin D. Heminger
JUSTIN D. HEMINGER

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Justin D. Heminger
JUSTIN D. HEMINGER

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1385 (Consolidated with Nos. 15-1392, 15-1490, 15-1491, & 15-1494)

MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

STATUTORY ADDENDUM FOR RESPONDENT EPA

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JULY 29, 2016

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Part A. Air Quality and Emissions Limitations (Refs & Annos)

42 U.S.C.A. § 7401

§ 7401. Congressional findings and declaration of purpose

Currentness

(a) Findings

The Congress finds--

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are--

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

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(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 101, formerly § 1, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 392, and renumbered § 101 and amended Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(2), (3), 79 Stat. 992; Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 485; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(k), 104 Stat. 2468.)

Notes of Decisions (49)

42 U.S.C.A. § 7401, 42 USCA § 7401
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

42 U.S.C.A. § 7407

§ 7407. Air quality control regions

Effective: January 23, 2004
Currentness

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

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(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

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(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance

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with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

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(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

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(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 $PM_{2.5}$ national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 $PM_{2.5}$ national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State,

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the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 107, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678; amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 103, 91 Stat. 687; Nov. 15, 1990, Pub.L. 101-549, Title I, § 101(a), 104 Stat. 2399; Jan. 23, 2004, Pub.L. 108-199, Div. G, Title IV, § 425(a), 118 Stat. 417.)

Notes of Decisions (56)

42 U.S.C.A. § 7407, 42 USCA § 7407
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

42 U.S.C.A. § 7408

§ 7408. Air quality criteria and control techniques

Effective: November 10, 1998
Currentness

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on--

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

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(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

(d) Publication in Federal Register; availability of copies for general public

The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

(e) Transportation planning and guidelines

The Administrator shall, after consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, and with State and local officials, within nine months after November 15, 1990, and periodically thereafter as necessary to maintain a continuous transportation-air quality planning process, update the June 1978 Transportation-Air Quality Planning Guidelines and publish guidance on the development and implementation of transportation and other measures necessary to demonstrate and maintain attainment of national ambient air quality standards. Such guidelines shall include information on--

(1) methods to identify and evaluate alternative planning and control activities;

(2) methods of reviewing plans on a regular basis as conditions change or new information is presented;

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(3) identification of funds and other resources necessary to implement the plan, including interagency agreements on providing such funds and resources;

(4) methods to assure participation by the public in all phases of the planning process; and

(5) such other methods as the Administrator determines necessary to carry out a continuous planning process.

(f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health

(1) The Administrator shall publish and make available to appropriate Federal, State, and local environmental and transportation agencies not later than one year after November 15, 1990, and from time to time thereafter--

(A) information prepared, as appropriate, in consultation with the Secretary of Transportation, and after providing public notice and opportunity for comment, regarding the formulation and emission reduction potential of transportation control measures related to criteria pollutants and their precursors, including, but not limited to--

(i) programs for improved public transit;

(ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles;

(iii) employer-based transportation management plans, including incentives;

(iv) trip-reduction ordinances;

(v) traffic flow improvement programs that achieve emission reductions;

(vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service;

(vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use;

(viii) programs for the provision of all forms of high-occupancy, shared-ride services;

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(ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place;

(x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas;

(xi) programs to control extended idling of vehicles;

(xii) programs to reduce motor vehicle emissions, consistent with subchapter II of this chapter, which are caused by extreme cold start conditions;

(xiii) employer-sponsored programs to permit flexible work schedules;

(xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity;

(xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and

(xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks. [1]

(B) information on additional methods or strategies that will contribute to the reduction of mobile source related pollutants during periods in which any primary ambient air quality standard will be exceeded and during episodes for which an air pollution alert, warning, or emergency has been declared;

(C) information on other measures which may be employed to reduce the impact on public health or protect the health of sensitive or susceptible individuals or groups; and

(D) information on the extent to which any process, procedure, or method to reduce or control such air pollutant may cause an increase in the emissions or formation of any other pollutant.

(2) In publishing such information the Administrator shall also include an assessment of--

(A) the relative effectiveness of such processes, procedures, and methods;

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(B) the potential effect of such processes, procedures, and methods on transportation systems and the provision of transportation services; and

(C) the environmental, energy, and economic impact of such processes, procedures, and methods.

(g) Assessment of risks to ecosystems

The Administrator may assess the risks to ecosystems from exposure to criteria air pollutants (as identified by the Administrator in the Administrator's sole discretion).

(h) RACT/BACT/LAER clearinghouse

The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 108, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678; amended Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 104, 105, Title IV, § 401(a), 91 Stat. 689, 790; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(a) to (c), (o), 111, 104 Stat. 2465, 2466, 2469, 2470; Nov. 10, 1998, Pub.L. 105-362, Title XV, § 1501(b), 112 Stat. 3294.)

Notes of Decisions (15)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 7408, 42 USCA § 7408

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

42 U.S.C.A. § 7409

§ 7409. National primary and secondary ambient air quality standards

Currentness

(a) Promulgation

(1) The Administrator--

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

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(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 109, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1679; amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 106, 91 Stat. 691.)

Notes of Decisions (82)

42 U.S.C.A. § 7409, 42 USCA § 7409
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

42 U.S.C.A. § 7410

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

Currentness

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

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(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

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(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

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(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term “indirect source” means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

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(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

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(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph--

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

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(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

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(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

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(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The

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criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant

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transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

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(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development [1] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

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(July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680; amended June 22, 1974, Pub.L. 93-319, § 4, 88 Stat. 256; S.Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub.L. 95-95, Title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub.L. 97-23, § 3, 95 Stat. 142; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(b)-(d), 102(h), 107(c), 108(d), Title IV, § 412, 104 Stat. 2404-2408, 2422, 2464, 2466, 2634.)

Notes of Decisions (364)

Footnotes

1 So in original. Probably should be followed by a comma.

42 U.S.C.A. § 7410, 42 USCA § 7410

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

42 U.S.C.A. § 7470

§ 7470. Congressional declaration of purpose

Currentness

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air) [2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 160, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 731.)

Notes of Decisions (3)

Footnotes

1 So in original. Probably should be “anticipated”.

2 So in original. Section was enacted without an opening parenthesis.

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Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

42 U.S.C.A. § 7475

§ 7475. Preconstruction requirements

Currentness

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

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(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall

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not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable in crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to

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the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE

[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term “high terrain area” means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term “low terrain area” means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

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(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations--

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 165, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 735; amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(44)-(51), 91 Stat. 1402.)

Notes of Decisions (57)

42 U.S.C.A. § 7475, 42 USCA § 7475
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

42 U.S.C.A. § 7478

§ 7478. Period before plan approval

Currentness

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a), section 7473(b) or section 7474(a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479(2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 168, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 740; amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(52), 91 Stat. 1402.)

Notes of Decisions (1)

42 U.S.C.A. § 7478, 42 USCA § 7478
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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42 U.S.C.A. § 7509a

§ 7509a. International border areas

Currentness

(a) Implementation plans and revisions

Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if--

(1) such plan or revision meets all the requirements applicable to it under the [1] chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and

(2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.

(b) Attainment of ozone levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to an ozone nonattainment area in such State, such State would have attained the national ambient air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7511(a)(2) or (5) of this title or section 7511d of this title.

(c) Attainment of carbon monoxide levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator, with respect to a carbon monoxide nonattainment area in such State, that such State has attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section 7512(b)(2) or (9) [2] of this title.

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(d) Attainment of PM-10 levels

Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to a PM-10 nonattainment area in such State, such State would have attained the national ambient air quality standard for carbon monoxide by the applicable attainment date, but for emissions emanating from outside the United States, shall not be subject to the provisions of section 7513(b)(2) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 179B, as added Nov. 15, 1990, Pub.L. 101-549, Title VIII, § 818, 104 Stat. 2697.)

Notes of Decisions (2)

Footnotes

1 So in original. Probably should be "this".

2 So in original. Section 7512(b) of this title does not contain a par. (9).

42 U.S.C.A. § 7509a, 42 USCA § 7509a

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 2. Additional Provisions for Ozone Nonattainment Areas (Refs & Annos)

42 U.S.C.A. § 7511

§ 7511. Classifications and attainment dates

Currentness

(a) Classification and attainment dates for 1989 nonattainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value *	Primary standard attainment date **
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

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(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if--

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

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(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) of this section to the higher of--

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

(3) Voluntary reclassification

The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 7511a(g) of this title, the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term [1] "major source" and "major stationary source" shall have the same meaning as in Extreme Areas.

(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

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(D) If, after November 15, 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

(c) References to terms

(1) Any reference in this subpart to a "Marginal Area", a "Moderate Area", a "Serious Area", a "Severe Area", or an "Extreme Area" shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

(2) Any reference in this subpart to "next higher classification" or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 181, as added Nov. 15, 1990, Pub.L. 101-549, Title I, § 103, 104 Stat. 2423.)

Notes of Decisions (20)

Footnotes

* The design value is measured in parts per million (ppm).

** The primary standard attainment date is measured from November 15, 1990.

1 So in original. Probably should be "terms".

42 U.S.C.A. § 7511, 42 USCA § 7511

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

End of Document

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 2. Additional Provisions for Ozone Nonattainment Areas (Refs & Annos)

42 U.S.C.A. § 7511a

§ 7511a. Plan submissions and requirements

Currentness

(a) Marginal Areas

Each State in which all or part of a Marginal Area is located shall, with respect to the Marginal Area (or portion thereof, to the extent specified in this subsection), submit to the Administrator the State implementation plan revisions (including the plan items) described under this subsection except to the extent the State has made such submissions as of November 15, 1990.

(1) Inventory

Within 2 years after November 15, 1990, the State shall submit a comprehensive, accurate, current inventory of actual emissions from all sources, as described in section 7502(c)(3) of this title, in accordance with guidance provided by the Administrator.

(2) Corrections to the State implementation plan

Within the periods prescribed in this paragraph, the State shall submit a revision to the State implementation plan that meets the following requirements--

(A) Reasonably available control technology corrections

For any Marginal Area (or, within the Administrator's discretion, portion thereof) the State shall submit, within 6 months of the date of classification under section 7511(a) of this title, a revision that includes such provisions to correct requirements in (or add requirements to) the plan concerning reasonably available control technology as were required under section 7502(b) of this title (as in effect immediately before November 15, 1990), as interpreted in guidance issued by the Administrator under section 7408 of this title before November 15, 1990.

(B) Savings clause for vehicle inspection and maintenance

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(i) For any Marginal Area (or, within the Administrator's discretion, portion thereof), the plan for which already includes, or was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included, a specific schedule for implementation of a vehicle emission control inspection and maintenance program, the State shall submit, immediately after November 15, 1990, a revision that includes any provisions necessary to provide for a vehicle inspection and maintenance program of no less stringency than that of either the program defined in House Report Numbered 95-294, 95th Congress, 1st Session, 281-291 (1977) as interpreted in guidance of the Administrator issued pursuant to section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) or the program already included in the plan, whichever is more stringent.

(ii) Within 12 months after November 15, 1990, the Administrator shall review, revise, update, and republish in the Federal Register the guidance for the States for motor vehicle inspection and maintenance programs required by this chapter, taking into consideration the Administrator's investigations and audits of such program. The guidance shall, at a minimum, cover the frequency of inspections, the types of vehicles to be inspected (which shall include leased vehicles that are registered in the nonattainment area), vehicle maintenance by owners and operators, audits by the State, the test method and measures, including whether centralized or decentralized, inspection methods and procedures, quality of inspection, components covered, assurance that a vehicle subject to a recall notice from a manufacturer has complied with that notice, and effective implementation and enforcement, including ensuring that any retesting of a vehicle after a failure shall include proof of corrective action and providing for denial of vehicle registration in the case of tampering or misfueling. The guidance which shall be incorporated in the applicable State implementation plans by the States shall provide the States with continued reasonable flexibility to fashion effective, reasonable, and fair programs for the affected consumer. No later than 2 years after the Administrator promulgates regulations under section 7521(m)(3) of this title (relating to emission control diagnostics), the State shall submit a revision to such program to meet any requirements that the Administrator may prescribe under that section.

(C) Permit programs

Within 2 years after November 15, 1990, the State shall submit a revision that includes each of the following:

(i) Provisions to require permits, in accordance with sections 7502(c)(5) and 7503 of this title, for the construction and operation of each new or modified major stationary source (with respect to ozone) to be located in the area.

(ii) Provisions to correct requirements in (or add requirements to) the plan concerning permit programs as were required under section 7502(b)(6) of this title (as in effect immediately before November 15, 1990), as interpreted in regulations of the Administrator promulgated as of November 15, 1990.

(3) Periodic inventory

(A) General requirement

No later than the end of each 3-year period after submission of the inventory under paragraph (1) until the area is redesignated to attainment, the State shall submit a revised inventory meeting the requirements of subsection (a)(1) of this section.

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(B) Emissions statements

(i) Within 2 years after November 15, 1990, the State shall submit a revision to the State implementation plan to require that the owner or operator of each stationary source of oxides of nitrogen or volatile organic compounds provide the State with a statement, in such form as the Administrator may prescribe (or accept an equivalent alternative developed by the State), for classes or categories of sources, showing the actual emissions of oxides of nitrogen and volatile organic compounds from that source. The first such statement shall be submitted within 3 years after November 15, 1990. Subsequent statements shall be submitted at least every year thereafter. The statement shall contain a certification that the information contained in the statement is accurate to the best knowledge of the individual certifying the statement.

(ii) The State may waive the application of clause (i) to any class or category of stationary sources which emit less than 25 tons per year of volatile organic compounds or oxides of nitrogen if the State, in its submissions under subparagraphs [1] (1) or (3)(A), provides an inventory of emissions from such class or category of sources, based on the use of the emission factors established by the Administrator or other methods acceptable to the Administrator.

(4) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increased emissions of such air pollutant shall be at least 1.1 to 1.

The Administrator may, in the Administrator's discretion, require States to submit a schedule for submitting any of the revisions or other items required under this subsection. The requirements of this subsection shall apply in lieu of any requirement that the State submit a demonstration that the applicable implementation plan provides for attainment of the ozone standard by the applicable attainment date in any Marginal Area. Section 7502(c)(9) of this title (relating to contingency measures) shall not apply to Marginal Areas.

(b) Moderate Areas

Each State in which all or part of a Moderate Area is located shall, with respect to the Moderate Area, make the submissions described under subsection (a) of this section (relating to Marginal Areas), and shall also submit the revisions to the applicable implementation plan described under this subsection.

(1) Plan provisions for reasonable further progress

(A) General rule

(i) By no later than 3 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for volatile organic compound emission reductions, within 6 years after November 15, 1990, of at least 15 percent from baseline emissions, accounting for any growth in emissions after 1990. Such plan shall provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter. This subparagraph shall not apply in the case of oxides of nitrogen for those areas for

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which the Administrator determines (when the Administrator approves the plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment.

(ii) A percentage less than 15 percent may be used for purposes of clause (i) in the case of any State which demonstrates to the satisfaction of the Administrator that--

(I) new source review provisions are applicable in the nonattainment areas in the same manner and to the same extent as required under subsection (e) of this section in the case of Extreme Areas (with the exception that, in applying such provisions, the terms "major source" and "major stationary source" shall include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 5 tons per year of volatile organic compounds);

(II) reasonably available control technology is required for all existing major sources (as defined in subclause (I)); and

(III) the plan reflecting a lesser percentage than 15 percent includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To qualify for a lesser percentage under this clause, a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher category.

(B) Baseline emissions

For purposes of subparagraph (A), the term "baseline emissions" means the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the calendar year 1990, excluding emissions that would be eliminated under the regulations described in clauses (i) and (ii) of subparagraph (D).

(C) General rule for creditability of reductions

Except as provided under subparagraph (D), emissions reductions are creditable toward the 15 percent required under subparagraph (A) to the extent they have actually occurred, as of 6 years after November 15, 1990, from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under subchapter V of this chapter.

(D) Limits on creditability of reductions

Emission reductions from the following measures are not creditable toward the 15 percent reductions required under subparagraph (A):

(i) Any measure relating to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990.

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(ii) Regulations concerning Reid Vapor Pressure promulgated by the Administrator by November 15, 1990, or required to be promulgated under section 7545(h) of this title.

(iii) Measures required under subsection (a)(2)(A) of this section (concerning corrections to implementation plans prescribed under guidance by the Administrator).

(iv) Measures required under subsection (a)(2)(B) of this section to be submitted immediately after November 15, 1990 (concerning corrections to motor vehicle inspection and maintenance programs).

(2) Reasonably available control technology

The State shall submit a revision to the applicable implementation plan 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 the following:

(A) Each category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990, and the date of attainment.

(B) All VOC sources in the area covered by any CTG issued before November 15, 1990.

(C) All other major stationary sources of VOCs that are located in the area.

Each revision described in subparagraph (A) shall be submitted within the period set forth by the Administrator in issuing the relevant CTG document. The revisions with respect to sources described in subparagraphs (B) and (C) shall be submitted by 2 years after November 15, 1990, and shall provide for the implementation of the required measures as expeditiously as practicable but no later than May 31, 1995.

(3) Gasoline vapor recovery

(A) General rule

Not later than 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to require all owners or operators of gasoline dispensing systems to install and operate, by the date prescribed under subparagraph (B), a system for gasoline vapor recovery of emissions from the fueling of motor vehicles. The Administrator shall issue guidance as appropriate as to the effectiveness of such system. This subparagraph shall apply only to facilities which sell more than 10,000 gallons of gasoline per month (50,000 gallons per month in the case of an independent small business marketer of gasoline as defined in section 7625-1[2] of this title).

(B) Effective date

The date required under subparagraph (A) shall be--

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(i) 6 months after the adoption date, in the case of gasoline dispensing facilities for which construction commenced after November 15, 1990;

(ii) one year after the adoption date, in the case of gasoline dispensing facilities which dispense at least 100,000 gallons of gasoline per month, based on average monthly sales for the 2-year period before the adoption date; or

(iii) 2 years after the adoption date, in the case of all other gasoline dispensing facilities.

Any gasoline dispensing facility described under both clause (i) and clause (ii) shall meet the requirements of clause (i).

(C) Reference to terms

For purposes of this paragraph, any reference to the term "adoption date" shall be considered a reference to the date of adoption by the State of requirements for the installation and operation of a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.

(4) Motor vehicle inspection and maintenance

For all Moderate Areas, the State shall submit, immediately after November 15, 1990, a revision to the applicable implementation plan that includes provisions necessary to provide for a vehicle inspection and maintenance program as described in subsection (a)(2)(B) of this section (without regard to whether or not the area was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included a specific schedule for implementation of such a program).

(5) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase [3] emissions of such air pollutant shall be at least 1.15 to 1.

(c) Serious Areas

Except as otherwise specified in paragraph (4), each State in which all or part of a Serious Area is located shall, with respect to the Serious Area (or portion thereof, to the extent specified in this subsection), make the submissions described under subsection (b) of this section (relating to Moderate Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Serious Area, the terms "major source" and "major stationary source" include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds.

(1) Enhanced monitoring

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In order to obtain more comprehensive and representative data on ozone air pollution, not later than 18 months after November 15, 1990, the Administrator shall promulgate rules, after notice and public comment, for enhanced monitoring of ozone, oxides of nitrogen, and volatile organic compounds. The rules shall, among other things, cover the location and maintenance of monitors. Immediately following the promulgation of rules by the Administrator relating to enhanced monitoring, the State shall commence such actions as may be necessary to adopt and implement a program based on such rules, to improve monitoring for ambient concentrations of ozone, oxides of nitrogen and volatile organic compounds and to improve monitoring of emissions of oxides of nitrogen and volatile organic compounds. Each State implementation plan for the area shall contain measures to improve the ambient monitoring of such air pollutants.

(2) Attainment and reasonable further progress demonstrations

Within 4 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan that includes each of the following:

(A) Attainment demonstration

A demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date. This attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

(B) Reasonable further progress demonstration

A demonstration that the plan, as revised, will result in VOC emissions reductions from the baseline emissions described in subsection (b)(1)(B) of this section equal to the following amount averaged over each consecutive 3-year period beginning 6 years after November 15, 1990, until the attainment date:

(i) at least 3 percent of baseline emissions each year; or

(ii) an amount less than 3 percent of such baseline emissions each year, if the State demonstrates to the satisfaction of the Administrator that the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To lessen the 3 percent requirement under clause (ii), a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification. Any determination to lessen the 3 percent requirement shall be reviewed at each milestone under subsection (g) of this section and revised to reflect such new measures (if any) achieved in practice by sources in the same category in any State, allowing a reasonable time to implement such measures. The emission reductions described in this subparagraph shall be calculated in accordance with subsection (b)(1)(C) and (D) of this section (concerning creditability of reductions). The reductions creditable for the period beginning 6 years after November 15, 1990, shall include reductions that occurred before such period, computed in accordance with subsection (b)(1) of this section, that exceed the 15-percent amount of reductions required under subsection (b)(1)(A) of this section.

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(C) NO_x control

The revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of emissions of VOC's and oxides of nitrogen (calculated according to the creditability provisions of subsection (b)(1)(C) and (D) of this section), that would result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required under subparagraph (B). Within 1 year after November 15, 1990, the Administrator shall issue guidance concerning the conditions under which NO_x control may be substituted for VOC control or may be combined with VOC control in order to maximize the reduction in ozone air pollution. In accord with such guidance, a lesser percentage of VOCs may be accepted as an adequate demonstration for purposes of this subsection.

(3) Enhanced vehicle inspection and maintenance program

(A) Requirement for submission

Within 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for an enhanced program to reduce hydrocarbon emissions and NO_x emissions from in-use motor vehicles registered in each urbanized area (in the nonattainment area), as defined by the Bureau of the Census, with a 1980 population of 200,000 or more.

(B) Effective date of State programs; guidance

The State program required under subparagraph (A) shall take effect no later than 2 years from November 15, 1990, and shall comply in all respects with guidance published in the Federal Register (and from time to time revised) by the Administrator for enhanced vehicle inspection and maintenance programs. Such guidance shall include--

(i) a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling for all light-duty vehicles and all light-duty trucks subject to standards under section 7521 of this title; and

(ii) program administration features necessary to reasonably assure that adequate management resources, tools, and practices are in place to attain and maintain the performance standard.

Compliance with the performance standard under clause (i) shall be determined using a method to be established by the Administrator.

(C) State program

The State program required under subparagraph (A) shall include, at a minimum, each of the following elements--

(i) Computerized emission analyzers, including on-road testing devices.

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(ii) No waivers for vehicles and parts covered by the emission control performance warranty as provided for in section 7541(b) of this title unless a warranty remedy has been denied in writing, or for tampering-related repairs.

(iii) In view of the air quality purpose of the program, if, for any vehicle, waivers are permitted for emissions-related repairs not covered by warranty, an expenditure to qualify for the waiver of an amount of $450 or more for such repairs (adjusted annually as determined by the Administrator on the basis of the Consumer Price Index in the same manner as provided in subchapter V of this chapter).

(iv) Enforcement through denial of vehicle registration (except for any program in operation before November 15, 1990, whose enforcement mechanism is demonstrated to the Administrator to be more effective than the applicable vehicle registration program in assuring that noncomplying vehicles are not operated on public roads).

(v) Annual emission testing and necessary adjustment, repair, and maintenance, unless the State demonstrates to the satisfaction of the Administrator that a biennial inspection, in combination with other features of the program which exceed the requirements of this chapter, will result in emission reductions which equal or exceed the reductions which can be obtained through such annual inspections.

(vi) Operation of the program on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective. An electronically connected testing system, a licensing system, or other measures (or any combination thereof) may be considered, in accordance with criteria established by the Administrator, as equally effective for such purposes.

(vii) Inspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.

Each State shall biennially prepare a report to the Administrator which assesses the emission reductions achieved by the program required under this paragraph based on data collected during inspection and repair of vehicles. The methods used to assess the emission reductions shall be those established by the Administrator.

(4) Clean-fuel vehicle programs

(A) Except to the extent that substitute provisions have been approved by the Administrator under subparagraph (B), the State shall submit to the Administrator, within 42 months of November 15, 1990, a revision to the applicable implementation plan for each area described under part C of subchapter II of this chapter to include such measures as may be necessary to ensure the effectiveness of the applicable provisions of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, including all measures necessary to make the use of clean alternative fuels in clean-fuel vehicles (as defined in part C of subchapter II of this chapter) economic from the standpoint of vehicle owners. Such a revision shall also be submitted for each area that opts into the clean fuel-vehicle program as provided in part C of subchapter II of this chapter.

(B) The Administrator shall approve, as a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II of this chapter, any revision to the relevant applicable implementation plan that in the Administrator's judgment will achieve long-term reductions in ozone-producing and toxic air emissions equal to those

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achieved under part C of subchapter II of this chapter, or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute. The Administrator may approve such revision only if it consists exclusively of provisions other than those required under this chapter for the area. Any State seeking approval of such revision must submit the revision to the Administrator within 24 months of November 15, 1990. The Administrator shall approve or disapprove any such revision within 30 months of November 15, 1990. The Administrator shall publish the revision submitted by a State in the Federal Register upon receipt. Such notice shall constitute a notice of proposed rulemaking on whether or not to approve such revision and shall be deemed to comply with the requirements concerning notices of proposed rulemaking contained in sections 553 through 557 of Title 5 (related to notice and comment). Where the Administrator approves such revision for any area, the State need not submit the revision required by subparagraph (A) for the area with respect to the portions of the Federal clean-fuel vehicle program for which the Administrator has approved the revision as a substitute.

(C) If the Administrator determines, under section 7509 of this title, that the State has failed to submit any portion of the program required under subparagraph (A), then, in addition to any sanctions available under section 7509 of this title, the State may not receive credit, in any demonstration of attainment or reasonable further progress for the area, for any emission reductions from implementation of the corresponding aspects of the Federal clean-fuel vehicle requirements established in part C of subchapter II of this chapter.

(5) Transportation control

(A) [4] Beginning 6 years after November 15, 1990, and each third year thereafter, the State shall submit a demonstration as to whether current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant parameters are consistent with those used for the area's demonstration of attainment. Where such parameters and emissions levels exceed the levels projected for purposes of the area's attainment demonstration, the State shall within 18 months develop and submit a revision of the applicable implementation plan that includes a transportation control measures program consisting of measures from, but not limited to, section 7408(f) of this title that will reduce emissions to levels that are consistent with emission levels projected in such demonstration. In considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(e) of this title and with the requirements of section 7504(b) of this title and shall include implementation and funding schedules that achieve expeditious emissions reductions in accordance with implementation plan projections.

(6) De minimis rule

The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the area shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

(7) Special rule for modifications of sources emitting less than 100 tons

In the case of any major stationary source of volatile organic compounds located in the area (other than a source which emits or has the potential to emit 100 tons or more of volatile organic compounds per year), whenever any

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change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that such increase shall not be considered a modification for such purposes if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds concerned from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not make such election, such change shall be considered a modification for such purposes, but in applying section 7503(a)(2) of this title in the case of any such modification, the best available control technology (BACT), as defined in section 7479 of this title, shall be substituted for the lowest achievable emission rate (LAER). The Administrator shall establish and publish policies and procedures for implementing the provisions of this paragraph.

(8) Special rule for modifications of sources emitting 100 tons or more

In the case of any major stationary source of volatile organic compounds located in the area which emits or has the potential to emit 100 tons or more of volatile organic compounds per year, whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1, the requirements of section 7503(a)(2) of this title (concerning the lowest achievable emission rate (LAER)) shall not apply.

(9) Contingency provisions

In addition to the contingency provisions required under section 7502(c)(9) of this title, the plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.

(10) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase emissions of such air pollutant shall be at least 1.2 to 1.

Any reference to "attainment date" in subsection (b) of this section, which is incorporated by reference into this subsection, shall refer to the attainment date for serious areas.

(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms "major source" and "major stationary source" include (in addition to the sources described in section 7602 of this

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title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection [5] (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the Administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title.

Any reference to the term "attainment date" in subsection (b) or (c) of this section, which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

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Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) of this section (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. The provisions of clause (ii) of subsection (c)(2)(B) of this section (relating to reductions of less than 3 percent), the provisions of paragaphs [6] (6), (7) and (8) of subsection (c) of this section (relating to de minimus [7] rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) of this section (relating to reductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms "major source" and "major stationary source" includes [8] (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen--

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen.

For purposes of this subsection, the term "primary fuel" means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 [15 U.S.C.A. § 3361 et seq.]).

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(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that--

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions.

Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2) of this section, and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2) of this section.

Any reference to the term "attainment date" in subsection (b), (c), or (d) of this section which is incorporated by reference into this subsection, shall refer to the attainment date for Extreme Areas.

(f) NO_x requirements

(1) The plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in section 7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen. This subsection shall not apply in the case of oxides of nitrogen for those sources for which the Administrator determines (when the Administrator approves a plan or plan revision) that net air quality benefits are greater in the absence of reductions of oxides of nitrogen from the sources concerned. This subsection shall also not apply in the case of oxides of nitrogen for--

(A) nonattainment areas not within an ozone transport region under section 7511c of this title, if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

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(B) nonattainment areas within such an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not produce net ozone air quality benefits in such region.

The Administrator shall, in the Administrator's determinations, consider the study required under section 7511f of this title.

(2)(A) If the Administrator determines that excess reductions in emissions of NO_x would be achieved under paragraph (1), the Administrator may limit the application of paragraph (1) to the extent necessary to avoid achieving such excess reductions.

(B) For purposes of this paragraph, excess reductions in emissions of NO_x are emission reductions for which the Administrator determines that net air quality benefits are greater in the absence of such reductions. Alternatively, for purposes of this paragraph, excess reductions in emissions of NO_x are, for--

(i) nonattainment areas not within an ozone transport region under section 7511c of this title, emission reductions that the Administrator determines would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(ii) nonattainment areas within such ozone transport region, emission reductions that the Administrator determines would not produce net ozone air quality benefits in such region.

(3) At any time after the final report under section 7511f of this title is submitted to Congress, a person may petition the Administrator for a determination under paragraph (1) or (2) with respect to any nonattainment area or any ozone transport region under section 7511c of this title. The Administrator shall grant or deny such petition within 6 months after its filing with the Administrator.

(g) Milestones

(1) Reductions in emissions

6 years after November 15, 1990, and at intervals of every 3 years thereafter, the State shall determine whether each nonattainment area (other than an area classified as Marginal or Moderate) has achieved a reduction in emissions during the preceding intervals equivalent to the total emission reductions required to be achieved by the end of such interval pursuant to subsection (b)(1) of this section and the corresponding requirements of subsections (c)(2)(B) and (C), (d), and (e) of this section. Such reduction shall be referred to in this section as an applicable milestone.

(2) Compliance demonstration

For each nonattainment area referred to in paragraph (1), not later than 90 days after the date on which an applicable milestone occurs (not including an attainment date on which a milestone occurs in cases where the standard has been

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attained), each State in which all or part of such area is located shall submit to the Administrator a demonstration that the milestone has been met. A demonstration under this paragraph shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require, by rule. The Administrator shall determine whether or not a State's demonstration is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) Serious and Severe Areas; State election

If a State fails to submit a demonstration under paragraph (2) for any Serious or Severe Area within the required period or if the Administrator determines that the area has not met any applicable milestone, the State shall elect, within 90 days after such failure or determination--

(A) to have the area reclassified to the next higher classification,

(B) to implement specific additional measures adequate, as determined by the Administrator, to meet the next milestone as provided in the applicable contingency plan, or

(C) to adopt an economic incentive program as described in paragraph (4).

If the State makes an election under subparagraph (B), the Administrator shall, within 90 days after the election, review such plan and shall, if the Administrator finds the contingency plan inadequate, require further measures necessary to meet such milestone. Once the State makes an election, it shall be deemed accepted by the Administrator as meeting the election requirement. If the State fails to make an election required under this paragraph within the required 90-day period or within 6 months thereafter, the area shall be reclassified to the next higher classification by operation of law at the expiration of such 6-month period. Within 12 months after the date required for the State to make an election, the State shall submit a revision of the applicable implementation plan for the area that meets the requirements of this paragraph. The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(4) Economic incentive program

(A) An economic incentive program under this paragraph shall be consistent with rules published by the Administrator and sufficient, in combination with other elements of the State plan, to achieve the next milestone. The State program may include a nondiscriminatory system, consistent with applicable law regarding interstate commerce, of State established emissions fees or a system of marketable permits, or a system of State fees on sale or manufacture of products the use of which contributes to ozone formation, or any combination of the foregoing or other similar measures. The program may also include incentives and requirements to reduce vehicle emissions and vehicle miles traveled in the area, including any of the transportation control measures identified in section 7408(f) of this title.

(B) Within 2 years after November 15, 1990, the Administrator shall publish rules for the programs to be adopted pursuant to subparagraph (A). Such rules shall include model plan provisions which may be adopted for reducing emissions from permitted stationary sources, area sources, and mobile sources. The guidelines shall require that any revenues generated by the plan provisions adopted pursuant to subparagraph (A) shall be used by the State for any of the following:

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(i) Providing incentives for achieving emission reductions.

(ii) Providing assistance for the development of innovative technologies for the control of ozone air pollution and for the development of lower-polluting solvents and surface coatings. Such assistance shall not provide for the payment of more than 75 percent of either the costs of any project to develop such a technology or the costs of development of a lower-polluting solvent or surface coating.

(iii) Funding the administrative costs of State programs under this chapter. Not more than 50 percent of such revenues may be used for purposes of this clause.

(5) Extreme Areas

If a State fails to submit a demonstration under paragraph (2) for any Extreme Area within the required period, or if the Administrator determines that the area has not met any applicable milestone, the State shall, within 9 months after such failure or determination, submit a plan revision to implement an economic incentive program which meets the requirements of paragraph (4). The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(h) Rural transport areas

(1) Notwithstanding any other provision of section 7511 of this title or this section, a State containing an ozone nonattainment area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area (as defined by the United States Bureau of the Census), which area is treated by the Administrator, in the Administrator's discretion, as a rural transport area within the meaning of paragraph (2), shall be treated by operation of law as satisfying the requirements of this section if it makes the submissions required under subsection (a) of this section (relating to marginal areas).

(2) The Administrator may treat an ozone nonattainment area as a rural transport area if the Administrator finds that sources of VOC (and, where the Administrator determines relevant, NO_x) emissions within the area do not make a significant contribution to the ozone concentrations measured in the area or in other areas.

(i) Reclassified areas

Each State containing an ozone nonattainment area reclassified under section 7511(b)(2) of this title shall meet such requirements of subsections (b) through (d) of this section as may be applicable to the area as reclassified, according to the schedules prescribed in connection with such requirements, except that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions.

(j) Multi-State ozone nonattainment areas

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(1) Coordination among States

Each State in which there is located a portion of a single ozone nonattainment area which covers more than one State (hereinafter in this section referred to as a "multi-State ozone nonattainment area") shall--

(A) take all reasonable steps to coordinate, substantively and procedurally, the revisions and implementation of State implementation plans applicable to the nonattainment area concerned; and

(B) use photochemical grid modeling or any other analytical method determined by the Administrator, in his discretion, to be at least as effective.

The Administrator may not approve any revision of a State implementation plan submitted under this part for a State in which part of a multi-State ozone nonattainment area is located if the plan revision for that State fails to comply with the requirements of this subsection.

(2) Failure to demonstrate attainment

If any State in which there is located a portion of a multi-State ozone nonattainment area fails to provide a demonstration of attainment of the national ambient air quality standard for ozone in that portion within the required period, the State may petition the Administrator to make a finding that the State would have been able to make such demonstration but for the failure of one or more other States in which other portions of the area are located to commit to the implementation of all measures required under this section (relating to plan submissions and requirements for ozone nonattainment areas). If the Administrator makes such finding, the provisions of section 7509 of this title (relating to sanctions) shall not apply, by reason of the failure to make such demonstration, in the portion of the multi-State ozone nonattainment area within the State submitting such petition.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 182, as added Nov. 15, 1990, Pub.L. 101-549, Title I, § 103, 104 Stat. 2426; amended Dec. 23, 1995, Pub.L. 104-70, § 1, 109 Stat. 773.)

Notes of Decisions (23)

Footnotes

1 So in original. Probably should be "subparagraph".
2 So in original. Probably should be section "7625".
3 So in original. Probably should be "increased".
4 So in original. No subpar. (B) has been enacted.
5 So in original. Probably should be "subsections".
6 So in original. Probably should be "paragraphs".
7 So in original. Probably should be "de minimis".
8 So in original. Probably should be "include".

42 U.S.C.A. § 7511a, 42 USCA § 7511a
Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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42 U.S.C.A. § 7601

§ 7601. Administration

Currentness

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed--

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

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(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator--

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if--

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 301, formerly § 8, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992; amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, §§ 3(b)(2), 15(c)(2), 84 Stat. 1677, 1713; Aug. 7, 1977, Pub.L. 95-95, Title III, § 305(e), 91 Stat. 776; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 107(d), 108(i), 104 Stat. 2464, 2467.)

Notes of Decisions (11)

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7602

§ 7602. Definitions

Currentness

When used in this chapter--

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter.

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency.

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(5) An agency of an Indian tribe.

(c) The term "interstate air pollution control agency" means--

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

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(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.. [1]

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

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(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(q) For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, or promulgated under section 7410(c) of this title, or promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

(r) Indian tribe.--The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(s) VOC.--The term "VOC" means volatile organic compound, as defined by the Administrator.

(t) PM-10.--The term "PM-10" means particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, as measured by such method as the Administrator may determine.

(u) NAAQS and CTG.--The term "NAAQS" means national ambient air quality standard. The term "CTG" means a Control Technique Guideline published by the Administrator under section 7408 of this title.

(v) NO_x.--The term "NO_x" means oxides of nitrogen.

(w) CO.--The term "CO" means carbon monoxide.

(x) Small source.--The term "small source" means a source that emits less than 100 tons of regulated pollutants per year, or any class of persons that the Administrator determines, through regulation, generally lack technical ability or knowledge regarding control of air pollution.

(y) Federal implementation plan.--The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means

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or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

(z) Stationary source.--The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 7550 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 302, formerly § 9, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992; amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, § 15(a)(1), (c)(1), 84 Stat. 1710, 1713; Aug. 7, 1977, Pub.L. 95-95, Title II, § 218(c), Title III, § 301, 91 Stat. 761, 769; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(76), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 101(d)(4), 107(a), (b), 108(j), 109(b), Title III, § 302(e), Title VII, § 709, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

Notes of Decisions (11)

Footnotes

1 So in original.

42 U.S.C.A. § 7602, 42 USCA § 7602

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

End of Document

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7607

§ 7607. Administrative proceedings and judicial review

Currentness

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph [3], the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,, [2] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising

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regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [4] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

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(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

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(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

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(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)

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of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

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(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [5] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707; amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681-2684.)

Notes of Decisions (341)

Footnotes

1 So in original. Probably should be “this”.

2 So in original.

3 So in original. Probably should be “subsection,”.

4 So in original. The word “to” probably should not appear.

5 So in original. Probably should be “sections”.

42 U.S.C.A. § 7607, 42 USCA § 7607

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7619

§ 7619. Air quality monitoring

Effective: August 10, 2005
Currentness

(a) In general

After notice and opportunity for public hearing, the Administrator shall promulgate regulations establishing an air quality monitoring system throughout the United States which--

(1) utilizes uniform air quality monitoring criteria and methodology and measures such air quality according to a uniform air quality index,

(2) provides for air quality monitoring stations in major urban areas and other appropriate areas throughout the United States to provide monitoring such as will supplement (but not duplicate) air quality monitoring carried out by the States required under any applicable implementation plan,

(3) provides for daily analysis and reporting of air quality based upon such uniform air quality index, and

(4) provides for recordkeeping with respect to such monitoring data and for periodic analysis and reporting to the general public by the Administrator with respect to air quality based upon such data.

The operation of such air quality monitoring system may be carried out by the Administrator or by such other departments, agencies, or entities of the Federal Government (including the National Weather Service) as the President may deem appropriate. Any air quality monitoring system required under any applicable implementation plan under section 7410 of this title shall, as soon as practicable following promulgation of regulations under this section, utilize the standard criteria and methodology, and measure air quality according to the standard index, established under such regulations.

(b) Air quality monitoring data influenced by exceptional events

(1) Definition of exceptional event

In this section:

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(A) In general

The term "exceptional event" means an event that--

(i) affects air quality;

(ii) is not reasonably controllable or preventable;

(iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and

(iv) is determined by the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event.

(B) Exclusions

In this subsection, the term "exceptional event" does not include--

(i) stagnation of air masses or meteorological inversions;

(ii) a meteorological event involving high temperatures or lack of precipitation; or

(iii) air pollution relating to source noncompliance.

(2) Regulations

(A) Proposed regulations

Not later than March 1, 2006, after consultation with Federal land managers and State air pollution control agencies, the Administrator shall publish in the Federal Register proposed regulations governing the review and handling of air quality monitoring data influenced by exceptional events.

(B) Final regulations

Not later than 1 year after the date on which the Administrator publishes proposed regulations under subparagraph (A), and after providing an opportunity for interested persons to make oral presentations of views, data, and arguments regarding the proposed regulations, the Administrator shall promulgate final regulations governing the review and handling or [1] air quality monitoring data influenced by an exceptional event that are consistent with paragraph (3).

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(3) Principles and requirements

(A) Principles

In promulgating regulations under this section, the Administrator shall follow--

(i) the principle that protection of public health is the highest priority;

(ii) the principle that timely information should be provided to the public in any case in which the air quality is unhealthy;

(iii) the principle that all ambient air quality data should be included in a timely manner,[2] an appropriate Federal air quality database that is accessible to the public;

(iv) the principle that each State must take necessary measures to safeguard public health regardless of the source of the air pollution; and

(v) the principle that air quality data should be carefully screened to ensure that events not likely to recur are represented accurately in all monitoring data and analyses.

(B) Requirements

Regulations promulgated under this section shall, at a minimum, provide that--

(i) the occurrence of an exceptional event must be demonstrated by reliable, accurate data that is promptly produced and provided by Federal, State, or local government agencies;

(ii) a clear causal relationship must exist between the measured exceedances of a national ambient air quality standard and the exceptional event to demonstrate that the exceptional event caused a specific air pollution concentration at a particular air quality monitoring location;

(iii) there is a public process for determining whether an event is exceptional; and

(iv) there are criteria and procedures for the Governor of a State to petition the Administrator to exclude air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator with respect to exceedances or violations of the national ambient air quality standards.

(4) Interim provision

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Until the effective date of a regulation promulgated under paragraph (2), the following guidance issued by the Administrator shall continue to apply:

(A) Guidance on the identification and use of air quality data affected by exceptional events (July 1986).

(B) Areas affected by PM-10 natural events, May 30, 1996.

(C) Appendices I, K, and N to part 50 of title 40, Code of Federal Regulations.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 319, as added Aug. 7, 1977, Pub.L. 95-95, Title III, § 309, 91 Stat. 781; amended Aug. 10, 2005, Pub.L. 109-59, Title VI, § 6013(a), 119 Stat. 1882.)

Notes of Decisions (1)

Footnotes

1 So in original. Probably should be "of".

2 So in original. Probably should be followed by "in".

42 U.S.C.A. § 7619, 42 USCA § 7619

Current through P.L. 114-186. Also includes P.L. 114-188, 114-189, and 114-191 to 114-194.

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Public Law 101-549
101st Congress

An Act

To amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes.

Nov. 15, 1990
[S. 1630]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air pollution control.

TITLE I—PROVISIONS FOR ATTAINMENT AND MAINTENANCE OF NATIONAL AMBIENT AIR QUALITY STANDARDS

SEC. 101. GENERAL PLANNING REQUIREMENTS.

Inter-governmental relations.

(a) AREA DESIGNATIONS.—Section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)) is amended to read as follows:

"(d) DESIGNATIONS.—

"(1) DESIGNATIONS GENERALLY.—

"(A) SUBMISSION BY GOVERNORS OF INITIAL DESIGNATIONS FOLLOWING PROMULGATION OF NEW OR REVISED STANDARDS.—By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

"(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

"(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

"(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not

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"(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 110(k)(1)(A), or

"(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.".

SEC. 103. ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS.

Part D of title I of the Clean Air Act is amended by adding the following new subpart at the end thereof:

"Subpart 2—Additional Provisions for Ozone Nonattainment Areas

"SEC. 181. CLASSIFICATIONS AND ATTAINMENT DATES. 42 USC 7511.

"(a) CLASSIFICATION AND ATTAINMENT DATES FOR 1989 NONATTAINMENT AREAS.—(1) Each area designated nonattainment for ozone pursuant to section 107(d) shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

"TABLE 1

Area class	Design value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after enactment
Moderate	0.138 up to 0.160	6 years after enactment
Serious	0.160 up to 0.180	9 years after enactment
Severe	0.180 up to 0.280	15 years after enactment
Extreme	0.280 and above	20 years after enactment

*The design value is measured in parts per million (ppm).
**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

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"(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

"(3) At the time of publication of the notice under section 107(d)(4) (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) (relating to lack of notice and comment and judicial review) shall apply to such classification.

"(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

"(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the 'Extension Year') the date specified in table 1 of paragraph (1) of this subsection if—

"(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

"(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

"(b) NEW DESIGNATIONS AND RECLASSIFICATIONS.—

"(1) NEW DESIGNATIONS TO NONATTAINMENT.—Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4), and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3), shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

"(2) RECLASSIFICATION UPON FAILURE TO ATTAIN.—(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area,

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any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) to the higher of—

"(i) the next higher classification for the area, or

"(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

"(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

Federal Register, publication.

"(3) VOLUNTARY RECLASSIFICATION.—The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

Intergovernmental relations.

Federal Register, publication.

"(4) FAILURE OF SEVERE AREAS TO ATTAIN STANDARD.—(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 185 shall apply within the area, the percent reduction requirements of section 182(c)(2)(B) and (C) (relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

"(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 182(g), the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term 'major source' and 'major stationary source' shall have the same meaning as in Extreme Areas.

"(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

"(D) If, after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

"(c) REFERENCES TO TERMS.—(1) Any reference in this subpart to a 'Marginal Area', a 'Moderate Area', a 'Serious Area', a 'Severe Area', or an 'Extreme Area' shall be considered a reference to a

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Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

"(2) Any reference in this subpart to 'next higher classification' or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

Intergovernmental relations.
42 USC 7511a.

"SEC. 182. PLAN SUBMISSIONS AND REQUIREMENTS.

"(a) MARGINAL AREAS.—Each State in which all or part of a Marginal Area is located shall, with respect to the Marginal Area (or portion thereof, to the extent specified in this subsection), submit to the Administrator the State implementation plan revisions (including the plan items) described under this subsection except to the extent the State has made such submissions as of the date of the enactment of the Clean Air Act Amendments of 1990.

"(1) INVENTORY.—Within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990, the State shall submit a comprehensive, accurate, current inventory of actual emissions from all sources, as described in section 172(c)(3), in accordance with guidance provided by the Administrator.

"(2) CORRECTIONS TO THE STATE IMPLEMENTATION PLAN.—Within the periods prescribed in this paragraph, the State shall submit a revision to the State implementation plan that meets the following requirements—

"(A) REASONABLY AVAILABLE CONTROL TECHNOLOGY CORRECTIONS.—For any Marginal Area (or, within the Administrator's discretion, portion thereof) the State shall submit, within 6 months of the date of classification under section 181(a), a revision that includes such provisions to correct requirements in (or add requirements to) the plan concerning reasonably available control technology as were required under section 172(b) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990), as interpreted in guidance issued by the Administrator under section 108 before the date of the enactment of the Clean Air Act Amendments of 1990.

"(B) SAVINGS CLAUSE FOR VEHICLE INSPECTION AND MAINTENANCE.—(i) For any Marginal Area (or, within the Administrator's discretion, portion thereof), the plan for which already includes, or was required by section 172(b)(11)(B) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) to have included, a specific schedule for implementation of a vehicle emission control inspection and maintenance program, the State shall submit, immediately after the date of the enactment of the Clean Air Act Amendments of 1990, a revision that includes any provisions necessary to provide for a vehicle inspection and maintenance program of no less stringency than that of either the program defined in House Report Numbered 95-294, 95th Congress, 1st Session, 281-291 (1977) as interpreted in guidance of the Administrator issued pursuant to section 172(b)(11)(B) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990) or the program already included in the plan, whichever is more stringent.

Federal Register, publication.

"(ii) Within 12 months after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator shall review, revise, update, and republish in the Federal

(Page 244 of Total)

Public Law 109–59
109th Congress

An Act

Aug. 10, 2005
[H.R. 3]

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. Intergovernmental relations. 23 USC 101 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" or "SAFETEA–LU".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

"(B) TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS.—The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update,"; and

(B) in the third sentence, by striking "A suit" and inserting the following:

"(C) CIVIL ACTION TO COMPEL PROMULGATION.—A civil action"; and

(4) by striking subparagraph (E) (as redesignated by paragraph (1)) and inserting the following:

Deadline.

"(E) INCLUSION OF CRITERIA AND PROCEDURES IN SIP.—Not later than 2 years after the date of enactment of the SAFETEA–LU the procedures under subparagraph (A) shall include a requirement that each State include in the State implementation plan criteria and procedures for consultation required by subparagraph (D)(i), and enforcement and enforceability (pursuant to sections 93.125(c) and 93.122(a)(4)(ii) of title 40, Code of Federal Regulations) in accordance with the Administrator's criteria and procedures for consultation, enforcement and enforceability.".

Deadline. 42 USC 7506 note.

(g) REGULATIONS.—Not later than 2 years after the date of enactment of this Act, the Administrator of the Environmental Protection Agency shall promulgate revised regulations to implement the changes made by this section.

SEC. 6012. FEDERAL REFERENCE METHOD.

(a) IN GENERAL.—Section 6102(e) of the Transportation Equity Act for the 21st Century (42 U.S.C. 7407 note; 112 Stat. 464–465) is amended to read as follows:

Deadline.

"(e) FIELD STUDY.—Not later than 2 years after the date of enactment of the SAFETEA–LU, the Administrator shall—

"(1) conduct a field study of the ability of the $PM_{2.5}$ Federal Reference Method to differentiate those particles that are larger than 2.5 micrometers in diameter;

"(2) develop a Federal reference method to measure directly particles that are larger than 2.5 micrometers in diameter without reliance on subtracting from coarse particle measurements those particles that are equal to or smaller than 2.5 micrometers in diameter;

"(3) develop a method of measuring the composition of coarse particles; and

Reports.

"(4) submit a report on the study and responsibilities of the Administrator under paragraphs (1) through (3) to—

"(A) the Committee on Energy and Commerce of the House of Representatives; and

"(B) the Committee on Environment and Public Works of the Senate.".

SEC. 6013. AIR QUALITY MONITORING DATA INFLUENCED BY EXCEPTIONAL EVENTS.

(a) IN GENERAL.—Section 319 of the Clean Air Act (42 U.S.C. 7619) is amended—

(1) by striking the section heading and all that follows through "after notice and opportunity for public hearing" and inserting the following:

"SEC. 319. AIR QUALITY MONITORING.

"(a) IN GENERAL.—After notice and opportunity for public hearing"; and Notice.

(2) by adding at the end the following:

"(b) AIR QUALITY MONITORING DATA INFLUENCED BY EXCEPTIONAL EVENTS.—

"(1) DEFINITION OF EXCEPTIONAL EVENT.—In this section:

"(A) IN GENERAL.—The term 'exceptional event' means an event that—

"(i) affects air quality;

"(ii) is not reasonably controllable or preventable;

"(iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and

"(iv) is determined by the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event.

"(B) EXCLUSIONS.—In this subsection, the term 'exceptional event' does not include—

"(i) stagnation of air masses or meteorological inversions;

"(ii) a meteorological event involving high temperatures or lack of precipitation; or

"(iii) air pollution relating to source noncompliance.

"(2) REGULATIONS.— Deadlines.

"(A) PROPOSED REGULATIONS.—Not later than March 1, 2006, after consultation with Federal land managers and State air pollution control agencies, the Administrator shall publish in the Federal Register proposed regulations governing the review and handling of air quality monitoring data influenced by exceptional events. Federal Register, publication.

"(B) FINAL REGULATIONS.—Not later than 1 year after the date on which the Administrator publishes proposed regulations under subparagraph (A), and after providing an opportunity for interested persons to make oral presentations of views, data, and arguments regarding the proposed regulations, the Administrator shall promulgate final regulations governing the review and handling or air quality monitoring data influenced by an exceptional event that are consistent with paragraph (3).

"(3) PRINCIPLES AND REQUIREMENTS.—

"(A) PRINCIPLES.—In promulgating regulations under this section, the Administrator shall follow—

"(i) the principle that protection of public health is the highest priority;

"(ii) the principle that timely information should be provided to the public in any case in which the air quality is unhealthy;

"(iii) the principle that all ambient air quality data should be included in a timely manner, an appropriate Federal air quality database that is accessible to the public;

"(iv) the principle that each State must take necessary measures to safeguard public health regardless of the source of the air pollution; and

"(v) the principle that air quality data should be carefully screened to ensure that events not likely to

recur are represented accurately in all monitoring data and analyses.

"(B) REQUIREMENTS.—Regulations promulgated under this section shall, at a minimum, provide that—

"(i) the occurrence of an exceptional event must be demonstrated by reliable, accurate data that is promptly produced and provided by Federal, State, or local government agencies;

"(ii) a clear causal relationship must exist between the measured exceedances of a national ambient air quality standard and the exceptional event to demonstrate that the exceptional event caused a specific air pollution concentration at a particular air quality monitoring location;

"(iii) there is a public process for determining whether an event is exceptional; and

"(iv) there are criteria and procedures for the Governor of a State to petition the Administrator to exclude air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator with respect to exceedances or violations of the national ambient air quality standards.

Applicability.

"(4) INTERIM PROVISION.—Until the effective date of a regulation promulgated under paragraph (2), the following guidance issued by the Administrator shall continue to apply:

"(A) Guidance on the identification and use of air quality data affected by exceptional events (July 1986).

"(B) Areas affected by PM–10 natural events, May 30, 1996.

"(C) Appendices I, K, and N to part 50 of title 40, Code of Federal Regulations.".

SEC. 6014. FEDERAL PROCUREMENT OF RECYCLED COOLANT.

Deadline.

(a) IN GENERAL.—Not later than 90 days after the date of enactment of this Act, the President shall conduct a review of Federal procurement policy of recycled coolant.

President.

(b) ELEMENTS.—In conducting the review under subsection (a), the President shall consider recycled coolant produced from processes that—

(1) are energy efficient;

(2) generate no hazardous waste (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903));

(3) produce no emissions of air pollutants;

(4) present lower health and safety risks to employees at a plant or facility; and

(5) recover at least 97 percent of the glycols from used antifreeze feedstock.

42 USC 16091a.

SEC. 6015. CLEAN SCHOOL BUS PROGRAM.

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) ALTERNATIVE FUEL.—The term "alternative fuel" means—

(A) liquefied natural gas, compressed natural gas, liquefied petroleum gas, hydrogen, or propane;

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Invalid Utility Air Regulatory Group v. E.P.A., U.S., June 23, 2014
KeyCite Yellow Flag - Negative Treatment Proposed Regulation

40 C.F.R. § 52.21

§ 52.21 Prevention of significant deterioration of air quality.

Effective: December 28, 2015
Currentness

(a)(1) Plan disapproval. The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD and FFF of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD and FFF of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) Applicability procedures.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

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(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this paragraph or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed redesignation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) Stack heights.

(1) The degree of emission limitation required for control of any air pollutant under this section shall not be affected in any manner by—

(i) So much of the stack height of any source as exceeds good engineering practice, or

(ii) Any other dispersion technique.

(2) Paragraph (h)(1) of this section shall not apply with respect to stack heights in existence before December 31, 1970, or to dispersion techniques implemented before then.

(i) Exemptions.

(1) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if;

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(1) as in effect before March 1, 1978, and the owner or operator:

(a) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

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(6) The requirements for best available control technology in paragraph (j) of this section and the requirements for air quality analyses in paragraph (m)(1) of this section, shall not apply to a particular stationary source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submitted an application for a permit under those regulations before August 7, 1980, and the Administrator subsequently determines that the application as submitted before that date was complete. Instead, the requirements at 40 CFR 52.21(j) and (n) as in effect on June 19, 1978 apply to any such source or modification.

(7)(i) The requirements for air quality monitoring in paragraphs (m)(1)(ii) through (iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1)(ii) through (iv) of this section, and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

(ii) The requirements for air quality monitoring in paragraphs (m)(1)(iii) through (iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1)(ii) through (iv).

(8)(i) At the discretion of the Administrator, the requirements for air quality monitoring of PM_{10} in paragraphs (m)(1)(i)–(iv) of this section may not apply to a particular source or modification when the owner or operator of the source or modification submits an application for a permit under this section on or before June 1, 1988 and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements for monitoring particulate matter in paragraphs (m)(1)(i)–(iv).

(ii) The requirements for air quality monitoring of PM_{10} in paragraphs (m)(1) (ii) and (iv) and (m)(3) of this section shall apply to a particular source or modification if the owner or operator of the source or modification submits an application for a permit under this section after June 1, 1988 and no later than December 1, 1988. The data shall have been gathered over at least the period from February 1, 1988 to the date the application becomes otherwise complete in accordance with the provisions set forth under paragraph (m)(1)(viii) of this section, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1)(iii) requires shall have been gathered over a shorter period.

(9) The requirements of paragraph (k)(1)(ii) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for nitrogen oxides if the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increase took effect as part of the applicable implementation plan and the Administrator subsequently determined that the application as submitted before that date was complete.

(10) The requirements in paragraph (k)(1)(ii) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for PM–10 if (i) the owner or operator of the source or modification

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submitted an application for a permit under this section before the provisions embodying the maximum allowable increases for PM–10 took effect in an implementation plan to which this section applies, and (ii) the Administrator subsequently determined that the application as submitted before that date was otherwise complete. Instead, the requirements in paragraph (k)(1)(ii) shall apply with respect to the maximum allowable increases for TSP as in effect on the date the application was submitted.

(11) The requirements of paragraph (k)(1) of this section shall not apply to a stationary source or modification with respect to the national ambient air quality standards for $PM_{2.5}$ in effect on March 18, 2013 if:

(i) The Administrator has determined a permit application subject to this section to be complete on or before December 14, 2012. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for $PM_{2.5}$ in effect at the time the Administrator determined the permit application to be complete; or

(ii) The Administrator has first published before March 18, 2013 a public notice that a draft permit subject to this section has been prepared. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for $PM_{2.5}$ in effect on the date the Administrator first published a public notice that a draft permit has been prepared.

(12) The requirements of paragraph (k)(1) of this section shall not apply to a permit application for a stationary source or modification with respect to the revised national ambient air quality standards for ozone published on October 26, 2015 if:

(i) The Administrator has determined the permit application subject to this section to be complete on or before October 1, 2015. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for ozone in effect at the time the Administrator determined the permit application to be complete; or

(ii) The Administrator has first published before December 28, 2015 a public notice of a preliminary determination or draft permit for the permit application subject to this section. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for ozone in effect on the date the Administrator first published a public notice of a preliminary determination or draft permit.

(j) Control Technology Review.

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

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Unconstitutional or Preempted Prior Version Held Invalid Utility Air Regulatory Group v. E.P.A., U.S., June 23, 2014
KeyCite Yellow Flag - Negative Treatment Proposed Regulation

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 51. Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Refs & Annos)
Subpart I. Review of New Sources and Modifications (Refs & Annos)

40 C.F.R. § 51.166

§ 51.166 Prevention of significant deterioration of air quality.

Effective: December 28, 2015
Currentness

(a)(1) Plan requirements. In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

(6) Amendments.

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(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided*, That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g)(2), (3)(iii), and (3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed area designation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) Stack heights. The plan shall provide, as a minimum, that the degree of emission limitation required for control of any air pollutant under the plan shall not be affected in any manner by—

(1) So much of a stack height, not in existence before December 31, 1970, as exceeds good engineering practice, or

(2) Any other dispersion technique not implemented before then.

(i) Exemptions.

(1) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a particular major stationary source or major modification if:

(i) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any of the following categories:

(a) Coal cleaning plants (with thermal dryers);

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paragraph (k)(1)(ii) shall apply with respect to the maximum allowable increases for TSP as in effect on the date the application was submitted.

(10) The plan may provide that the requirements of paragraph (k)(1) of this section shall not apply to a stationary source or modification with respect to the national ambient air quality standards for $PM_{2.5}$ in effect on March 18, 2013 if:

(i) The reviewing authority has determined a permit application subject to this section to be complete on or before December 14, 2012. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for $PM_{2.5}$ in effect at the time the reviewing authority determined the permit application to be complete; or

(ii) The reviewing authority has first published before March 18, 2013 a public notice of a preliminary determination for the permit application subject to this section. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for $PM_{2.5}$ in effect at the time of first publication of a public notice on the preliminary determination.

(11) The plan may provide that the requirements of paragraph (k)(1) of this section shall not apply to a permit application for a stationary source or modification with respect to the revised national ambient air quality standards for ozone published on October 26, 2015 if:

(i) The reviewing authority has determined the permit application subject to this section to be complete on or before October 1, 2015. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for ozone in effect at the time the reviewing authority determined the permit application to be complete; or

(ii) The reviewing authority has first published before December 28, 2015 a public notice of a preliminary determination or draft permit for the permit application subject to this section. Instead, the requirements in paragraph (k)(1) of this section shall apply with respect to the national ambient air quality standards for ozone in effect at the time of first publication of a public notice of the preliminary determination or draft permit.

(j) Control technology review. The plan shall provide that:

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emission standards and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each a regulated NSR pollutant that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each a regulated NSR pollutant for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions

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Calendar No. 1214

91ST CONGRESS
2d Session

SENATE

REPORT
No. 91-1196

NATIONAL AIR QUALITY STANDARDS ACT OF 1970

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE

TOGETHER WITH

INDIVIDUAL VIEWS

TO ACCOMPANY

S. 4358

SEPTEMBER 17, 1970.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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Calendar No. 1214

91ST CONGRESS 2d Session } SENATE { REPORT No. 91-1196

NATIONAL AIR QUALITY STANDARDS ACT OF 1970

SEPTEMBER 17, 1970.—Ordered to be printed

Mr. BYRD of West Virginia (for Mr. MUSKIE, from the Committee on Public Works, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. 4358]

The Committee on Public Works, to which the bill (S. 4358), to amend the Clean Air Act as amended, was referred having considered the same, reports favorably thereon without amendment. An original bill (S. 4358) is reported in lieu of S. 3229, S. 3466, and S. 3546 which were considered by the Committee.

GENERAL STATEMENT

The committee bill would restructure the methods available to attack a critical and growing national problem of air pollution.

The legislation reported by the committee is the result of deep concern for protection of the health of the American people. Air pollution is not only an aesthetic nuisance. The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants (oxides of sulfur, particulates, carbon monoxide, hydrocarbons and oxidants). These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

The new information that carbon monoxide concentrations at levels damaging to public health occur in Chicago more than 22 percent of the time, and that other cities have similar problems with carbon monoxide and other pollutants, intensified the committee's concern to authorize a massive attack on air pollution. This bill is designed to provide the basis for such an attack.

such areas ought to be subdivided to effectively implement air quality standards.

SECTION 109. AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

This proposed legislation would require acceleration of the issuance of air quality criteria and information on control techniques as an integral part of the system for adoption of ambient air quality standards and implementation plans.

Pollution agents which would be subject to the provisions of this section would be those which are emitted from widely distributed air pollution sources and generally present in the ambient air in all areas of the Nation.

Air quality criteria for five pollution agents have already been issued (sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants). Other contaminants of broad national impact include fluorides, nitrogen oxides, polynuclear organic matter, lead, and odors. Others may be added to this group as knowledge increases. The bill would require that air quality criteria for these and other pollutants be issued within 13 months from enactment. If the Secretary subsequently should find that there are other pollution agents for which the ambient air quality standards procedure is appropriate, he could list those agents in the Federal Register, and repeat the criteria process.

Reports on control techniques, as under existing law, would be issued simultaneously with the publication of criteria. The Committee recognizes that the States will continue to need this information to develop meaningful programs for implementation of ambient air quality standards on a regional basis.

The Committee believes that criteria and control technology documents should be periodically reviewed and re-issued to ensure currency. In addition, control techniques information should be periodically modified to reflect information developed under sections 104 and 113.

The Secretary would also be required to issue information on control techniques for air pollution agents for which emission standards are to be established under Section 114 and Section 115 and for which new source standards of performance are to be established under Section 113. It is expected that the Secretary would provide documentation, as appropriate, on the control techniques, methods, processes, or systems available for the purpose of complying with such emission standards or standards of performance.

The Committee does not intend that the recommended control techniques documents should lock in existing technology. As was pointed out by Dr. Aaron Teller, "the inhibition of innovation is the most dangerous consequence of this language. Air pollution control requires a new and unique technology."

The Committee intends that the information provided pursuant to this section should serve as guidance to States, not as limitations on control technology innovation.

SECTION 110. NATIONAL AIR QUALITY STANDARDS AND GOALS

This section would provide for publication and promulgation of national ambient air quality standards at a level which will protect the health of persons. In setting such air quality standards the Secretary

should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified.

Following the publication of any proposed national ambient air quality standard, the Secretary would provide up to 90 days for the receipt and evaluation of comments. Since the issuance of air quality criteria would precede the promulgation of such national standards, and since expert advisory committees would continue to be consulted in the preparation of air quality criteria, 90 days is considered sufficient time for the presentation and evaluation of additional information and opinions that may have a bearing on the national ambient air quality standards.

Although the option of adopting ambient air quality standards more stringent than the national health minimum for any air quality control region is preserved for the States, the Secretary would be required to set a national minimum standard of air quality which will protect the health of persons regardless of where such persons reside. This mechanism is recommended by the committee to expedite the establishment and implementation of ambient air quality standards.

In requiring that national ambient air quality standards be established at a level necessary to protect the health of persons, the Committee recognizes that such standards will not necessarily provide for the quality of air required to protect those individuals who are otherwise dependent on a controlled internal environment such as patients in intensive care units or newborn infants in nurseries. However, the Committee emphasizes that included among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment. In establishing an ambient standard necessary to protect the health of these persons, reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group.

Ambient air quality is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air. An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent or class of such agents (related to a period of time) which will protect the health of any group of the population.

For purposes of this description, a statistically related sample is the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air.

Within 30 days after enactment the Secretary would be required to publish proposed national air quality standards for those pollutants covered by existing air quality criteria (sulfur oxides, particulate matter, carbon monoxide, hydrocarbons, and photochemical oxidants). Since these criteria have been available for some time, it is realistic to expect that proposed national standards for these five pollution agents would be published within the 30-day period. Proposed national air quality standards for pollutants for which criteria would be issued

subsequent to enactment would be published simultaneously with the issuance of such criteria. These pollutants would include nitrogen oxides, lead, polynuclear organics, odors, and fluorides.

National air quality standards are authorized because the Committee has recognized that protection of health is a national priority, but the Committee also recognizes that man's natural and man-made environment must be preserved and protected. Therefore, the bill provides for the setting of national ambient air quality goals at levels necessary to protect public health and welfare from any known or anticipated adverse effects of air pollution—includ ng effects on soils, water, vegetation, man-made materials, animals, wildlife, visibility climate, and economic values. To implement this provision the sections of existing law relating to the issuance of air quality criteria have been modified to require that air quality criteria documents include, to the extent practicable, information on any known or anticipated adverse effects of air pollution, including such effects on all the environmental and economic values listed above. Those criteria which have been issued as well as those planned for January of 1971 must be revised to include this information. Until such revisions are made, the Secretary should publish interim guidelines to assist the States in developing plans for the implementation of goals.

The Committee is aware that there are many gaps in the available scientific knowledge of the welfare and other environmental effects of air pollution agents. As indicated in the discussion of section 107, the Committee expects that the Department will intensify research on environmental and other economic effects of air pollution. A great deal of basic research will be needed to determine the long-term air quality goals which are required to protect the public health and welfare from any potential effects of air pollution. In the meantime, the Secretary will be expected to establish such national goals on the basis of the best information available to him.

The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels are already relatively low, the attainment and maintenance of these goals should not require an extended time period. In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.

SECTION 111. IMPLEMENTATION PLANS

The establishment alone of ambient air quality standards has little effect on air quality. Standards are only the reference point for the analysis of the factors contributing to air pollution and the imposition

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94TH CONGRESS
2d Session

SENATE

REPORT
No. 94-717

CLEAN AIR AMENDMENTS OF 1976

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE

TOGETHER WITH

MINORITY AND INDIVIDUAL VIEWS

TO ACCOMPANY

S. 3219

MARCH 29, 1976.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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Calendar No. 685

94TH CONGRESS 2d Session | SENATE | REPORT No. 94-717

CLEAN AIR AMENDMENTS OF 1976

MARCH 29, 1976—Ordered to be printed

Mr. MUSKIE, from the Committee on Public Works, submitted the following

REPORT

together with

MINORITY AND INDIVIDUAL VIEW

To accompany S. 3219]

The Committee on Public Works, reports an original bill (S. 3219), to amend the Clean Air Act, as amended, and recommends that the bill do pass.

GENERAL STATEMENT

Since enactment of the 1970 Clean Air Amendments, the Subcommittee on Environmental Pollution has held fifty-six days of hearings to review the implications of that Act. This legislation addresses many of the issues raised during those hearings, in court proceedings, by administrative rule-making, and by legislative proposals from the President and various Members of the Senate.

The Committee discussed these initiatives and issues within a framework provided by three fundamental concerns:

The need to augment the responsibility, authority, and effectiveness of State and local air pollution control programs.

The need to accentuate technological innovation in the control of air pollutants.

The need to be certain that the present primary and secondary ambient air quality standards, control requirements, and deadlines are adequate to protect public health and welfare.

This framework was the focus for evaluating many conflicting and dissenting viewpoints. It is essential that the actions of the Committee and that the provisions of this legislation be viewed in the context of these principles. And it is essential that these needs be fulfilled.

Much confusion has occurred regarding the "buffer zones" that supposedly encircle these Class I areas. The Committee has eliminated any buffer zones by setting the Class I increment as a flexible test. The Class I increment is a test for determining where the burden of proof lies and is an index of changes in air quality. It is not the final determinant for approval or disapproval of the permit application.

Most sources will only have to model for the Class II numbers and provide data to demonstrate that it will not exceed the increment governing the Class II area. The exception occurs when there is reason to believe a source may damage the air quality associated values of a Class I area. The State, on receipt of any application for a permit, is required to publish a notice of the application and to inform the EPA. EPA would then give notice to Federal Land Managers and to the supervisors of any Class I Federal lands in the areas that might be affected.

The Federal Land Manager or the supervisor of a Class I area, or the Administrator of EPA, or a Governor of an adjacent State with a Class I area, is authorized to notify the State that the proposed source poses a potential adverse impact on the quality of the air within the Class I area. A statement identifying the potential impacts of the proposed facility would be filed. The bill charges the Federal Land Manager and the supervisor with a positive role to protect air quality values associated with the land areas under the jurisdiction of the Federal Land Manager. This means that such officials must seriously consider whether a proposed facility might adversely affect the lands for which they are responsible. If either of them believes there is any risk of such adverse effect, that official should notify the State and initiate the Class I analysis. This affirmative responsibility to protect the air quality of Federal lands may involve court challenges for inappropriate permits and facilities constructed without permits, as well as participation in the permit consideration administrative process.

When no such notice is forthcoming from a Federal lands official, the Administrator, or a Governor, the applicant would adhere to the regular requirement s for the Class II areas, with best available control technology.

When notice is filed, the applicant must demonstrate whether or not the Class I increments would be exceeded in the Class I areas. If they are met, but the Federal Land Manager, not the supervisor, nevertheless can demonstrate to the satisfaction of the State that the emissions would still have an unacceptable adverse effect on the air quality-related values of the Class I Federal lands, then the State must refuse to issue a permit.

If, on the other hand, the permit applicant demonstrates, to the satisfaction of the Federal Land Manager, that there would be no unacceptable, adverse impact on the air quality related values of the Class I Federal lands, notwithstanding the fact that the Class I increments would be exceeded, the State may issue the permit.

Each case of suspected Class I intrusion must be analyzed on an individual basis, with the decision on whether or not a permit is issued resting with the State. The Federal Land Manager holds a

powerful tool. He is required to protect Federal lands from deterioration of an established value, even when Class I numbers are not exceeded. And whenever they are, he must be satisfied by the applicant that Federal lands will not be damaged, and certify to that effect before the State may issue a permit.

No land use plan is required under the requirements to prevent significant deterioration. States will comply by amending their existing Clean Air Act Implementation Plan. If a State fails to adopt such an amendment, no major emitting facility can be constructed in the areas of the State identified as cleaner than any existing standards. The Federal Government's role under the provision to prevent significant deterioration is far less extensive than under provisions required to achieve the primary and secondary standards under the Clean Air Act.

The Committee intends a sharply restricted role for the Environmental Protection Agency in regard to implementing the policy to prevent significant deterioration. EPA is limited to (1) approving the new source review process established by the State; (2) seeking injunctive relief or other measures that would be necessary to prevent the issuing of a permit for a new source if it does not comply with the requirements of the subsection; (3) resolving interstate disputes; and (4) notifying a State when it believes adverse impact may occur in a Class I area. Once the State submits an adequate amendment to its plan, the Environmental Protection Agency role is restricted to assuring compliance with the law.

While the general scope of the Federal Government's activities in preventing significant deterioration has been carefully limited, the Federal Land Manager should assume an aggressive role in protecting the air quality values of land areas under his jurisdiction. This will trigger analyses of air quality impact of proposed development where there is reason to believe an adverse impact might occur. The Federal Land Manager is expected to request such analysis under the notification steps provided in the bill when there is reason for concern. In the case of doubt, the land manager should err on the side of protecting the air quality-related values for future generations.

As used in paragraph (5) (B) and (C), the term "air quality related values" of Federal lands designated as Class I includes the fundamental purposes for which such lands have been established and preserved by the Congress and the responsible Federal agency. For example, under the 1916 Organic Act to establish the National Park Service (16 U.S.C. § 1), the purpose of such national park lands "is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Much of the controversy concerning this bill has grown from studies of the effects of the policy to prevent significant deterioration. The Environmental Protection Agency and the Federal Energy Administration jointly analyzed alternative approaches to preventing significant deterioration in a two-volume study in October 1975, "An Analysis of the Impact on the Electric Utility Industry of Alternative Approaches to Significant Deterioration." Four supplements to that study have since been published.

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95TH CONGRESS
1st Session

SENATE

REPORT
No. 95-127

CLEAN AIR AMENDMENTS OF 1977

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL VIEWS

TO ACCOMPANY

S. 252

MAY 10 (legislative day, MAY 9), 1977.—Ordered to be printed

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95TH CONGRESS 1st Session } SENATE { REPORT No. 95-127

CLEAN AIR AMENDMENTS OF 1977

MAY 10 (legislative day, MAY 9), 1977.—Ordered to be printed

Mr. MUSKIE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 252]

The Committee on Environment and Public Works, to which was referred the bill (S. 252) a bill to amend the Clean Air Act, as amended, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PREFACE

The committee has reported a bill which in most respects is similar to the legislation which the Senate passed on August 5, 1976. It includes eight new provisions; significant modifications of five provisions; and minor modifications of others. But, with the exception of the issue which is referred to as "nonattainment", the bill is very similar to last year's Senate-passed bill.

This year the committee held 4 days of hearings and heard 50 witnesses. There are 3,023 pages of printed testimony and 10 sessions were held to mark up this bill. This means that, over the past 3 years, this legislation has been subject, cumulatively, to 18 days of hearings, and 58 days of mark-up sessions, and has been commented on by 138 witnesses, in 9,470 pages of testimony.

The committee has made clarifications in provisions where deemed appropriate. But in the interest of consistency and in the interest of presenting the Senate legislation, the major features of which would be familiar, the committee tried to stay within the bounds of last year's bill.

The committee has agreed that the report on the legislation should also be similar to last year's report, except in those instances in which

General Statement

Since enactment of the 1970 Clean Air Amendments, the Subcommittee on Environmental Pollution has held 60 days of hearings to review the implications of that act. This legislation addresses many of the issues raised during those hearings, in court proceedings, by administrative rulemaking, and by legislative proposals from various Members of the Senate.

The committee discussed these initiatives and issues within a framework provided by three fundamental concerns;

The need to augment the responsibility, authority, and effectiveness of State and local air pollution control programs.

The need to accentuate technological innovation in the control of air pollutants.

The need to be certain that the present primary and secondary ambient air quality standards, control requirements, and deadlines are adequate to protect public health and welfare.

This framework was the focus for evaluating many conflicting and dissenting viewpoints. It is essential that the actions of the committee and that the provisions of this legislation be viewed in the context of these principles. And it is essential that these needs be fulfilled.

The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national resources within States, and provide guidance on the technical and the economic implications of various national policies.

The problem of air pollution exists at the State and local level. That is where the public understands the problem. That is where the resources must be directed. The Federal Government has a responsibility to provide support for those regulatory activities, but it need not have an actual presence in all regulatory activities.

Public problems must be solved at the level of government most capable of dealing with them. It is for this reason that the committee adopted amendments which keep the pressure on the auto industry to clean up auto emissions at the earliest practicable date. Vehicle emissions are a national problem. The solution lies with national standards.

Proper implementation of the amendments in this bill will significantly enhance the Federal-State relationship and will provide the States and localities with the flexibility they need, while at the same time providing a mechanism to assure that national policy is implemented.

The Federal role must be one of support rather than control. The Federal Government does not have and will not have the resources required to do an effective job of running the air pollution control programs of the States. And yet the Federal Government can and must provide the technical information and enforcement assistance that States and localities need. Fulfilling this latter role effectively will

protect and enhance air quality more than fulfilling the former role inadequately.

This act gives the States and communities new tools and more time which can be used effectively to achieve the objectives of the act. The resources and time must not be dissipated.

The bill is precise in its guidance for implementation of its provisions and thereby minimizes the need for additional Federal regulations. The bill sets forth a specific method by which clean air areas should be protected, the basic measure against which deterioration is to be determined, and the programs that States should have in place to prevent significant deterioration. This guidance is intended to supersede broad, unnecessary and perhaps conflicting regulations.

The Environmental Protection Agency must minimize any disruption that might be caused in implementing the act. It should not "rediscover the basis for the regulations, while modifying those regulations. A similar problem occurred after the enactment of the 1972 Federal Water Pollution Control Act. In that instance, the Agency frequently stopped programs completely while new regulations were drafted, revised, and promulgated. The effect of such a hiatus can be very detrimental to a program. The Agency must avoid any such pattern in complying with the 1977 air amendments.

In addition to the question of new emissions in areas exceeding national air quality standards (discussed in the preface) the legislation addresses four issues that are basic to the structure and integrity of the Clean Air Act: the prevention of significant deterioration, compliance deadlines, auto emissions standards, and transportation controls.

Prevention of significant deterioration.—The first major policy question involves the protection against significant deterioration of air that is already clean.

The 1967 Air Quality legislation required improvements in the quality of dirty air and protection of clean air against future deterioration. The 1970 act did not alter this policy. As a result of administrative and judicial decisions, the Environmental Protection Agency created a regulatory structure to protect air quality in clean air areas.

Presented with arguments ranging from a do-nothing approach to repeal, the committee determined that the implications of that policy and procedures are too vast to be left to the administrative or judicial process. Congress has a responsibility to delineate a policy for protecting clean air as it had a responsibility in the previous act to spell out the policy to restore clean air.

This legislation defines "significant deterioration" in all clean air areas as a specified amount of additional pollution. Specified Federal lands having unique air quality related values are further protected. This definition is intended to prevent any major decline in air quality currently existing in clean air areas and will provide a margin of safety for the future. This will be made easier by a mandatory use of the best available control technology as set forth in the bill.

This policy will be implemented by the States. Judgments will be made on a case-by-case basis, taking into account local factors. But in no case will deterioration be permitted to a level that would exceed any national ambient air quality standard.

The chief tool to be used in implementing the no significant deterioration requirements is the permit that must be issued by the State for any major emitting facility to be located in any clean-air area, including Federal lands. The permit must include an emission limitation based on best available technology. It must insure that total emissions from the facility are such that the increments will never be exceeded. The application for a permit must include careful analyses of climate and meteorology, the soils, the vegetation, the visibility, and other environmental factors at the proposed site and in the area that might be affected by the emissions.

In studying the permit application, the State must examine the growth associated with any proposed facility in terms of other industries that might be attracted to the area and associated with the facility, and its effect on support services, and the residential, commercial, and transportation needs accompanying the facility.

Inherent in any review-and-permit process is the opportunity for delay. The committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. Nothing could be more detrimental to the intent of this section and the integrity of this act than to have the process encumbered by bureaucratic delay.

Major emitting facilities which commence construction after June 1, 1975, are required to receive a permit under this provision.

The amendments provide a definition of when a major emitting facility can be said to have "commenced construction." This definition was adopted to allow a determination as to whether any particular facility is subject to the review and other requirements of the provisions for the prevention of significant deterioration. The date at which construction is said to have commenced is the time at which the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State or local laws and has committed itself to a program of construction. The test of commitment is whether physical on-site construction has begun or whether the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss. The committee does not expect that this test will necessarily be met by penalty clauses in contracts. Rather, the committee intends a factual determination as to whether a source has so committed itself, financially and otherwise, to the use of a particular site for a particular facility that relocation is not an option and delay or substantial modification would be severely disruptive.

This definition represents a change from the policy which the Environmental Protection Agency followed during 1975. The definition of "commenced construction" used at that time excluded from coverage under the regulations those sources which had entered into binding obligations before June 1, 1975, whether or not construction had actually begun or whether there would be any substantial loss if the contract was canceled or modified. Some sources, in fact, received assurances from the Environmental Protection Agency that their

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1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 95-294

CLEAN AIR ACT AMENDMENTS OF 1977

REPORT

BY THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

[To accompany H.R. 6161]

together with

ADDITIONAL, SEPARATE, AND SUPPLEMENTAL VIEWS

And Including Cost Estimate of the Congressional Budget Office

MAY 12, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
88-734 O WASHINGTON : 1977

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CLEAN AIR ACT AMENDMENTS OF 1977

MAY 12, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

together with

ADDITIONAL, SEPARATE, AND SUPPLEMENTAL VIEWS

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 6161]

The Committee on Interstate and Foreign Commerce (to whom was referred the bill (H.R. 6161) to amend the Clean Air Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

STATEMENT OF PURPOSES AND SUMMARY OF LEGISLATION

Because the Committee Proposal portion of this report incorporates a detailed section-by-section analysis of the provisions of H.R. 6161, the following Statement of Purposes and section-by-section summary has been prepared to provide a concise explanation of the proposed legislation.

STATEMENT OF PURPOSES

In the view of the Committee on Interstate and Foreign Commerce, this bill (H.R. 6161) is needed for several main purposes:

(1) to extend authorizations of appropriations for nonresearch activities under the Clean Air Act;

(2) to provide a greater role and greater assistance for State and local governments in the administration of the Clean Air Act;

Safeguards against moratorium on growth

The committee went to extraordinary lengths to assure that this legislation and the time needed to develop and implement regulations would not cause current construction to be halted or clamp even a temporary moratorium on planned industrial and economic development.

First, the committee proposal designates 97 percent of all lands in the United States as class II. States can immediately begin the process of issuing permits to new sources for construction and operation in these class II areas. This means that even without a redesignation to class III by the States, very substantial heavy industrial development will be allowed in most of the United States. According to FEA-EPA studies, the committee's class II increments would allow for the construction and operation of giant coal-fired powerplants up to two and one-half times the size of the largest existing plants. The class II increments allow the location of such facilities as little as 1 mile apart, depending on factors such as weather patterns, terrain features, degree of pollution control, et cetera.

Second, the committee restricted initial class I designation to only 2–3 percent of total United States land area. Of these Federal areas, only existing national parks and national wilderness areas over 25,000 acres and national monuments, national recreation areas and national primitive areas over 100,000 acres must remain class I. All other Federal class I areas are free to be moved to class II by the States.

Third, the committee bill requires only major sources of air pollution to obtain State preconstruction permits to assure allowable increments and ceilings will not be exceeded and that the emission limits specified in the permits can and will be met. The committee defined "major sources of pollution" so as to limit this permit requirement to only those sources emitting more than 100 tons per year, or 200,000 pounds. States would not be required to apply the permit process to smaller new sources, although the State plan would still be required to contain such measures as are necessary to prevent significant deterioration.

Fourth, preconstruction, onsite air quality monitoring may be for less than a year if the basic necessary information can be provided in less time, or it may be waived entirely if the necessary data is already available. In any case, such onsite monitoring normally occurs in the site selection process for new major sources of pollution and, therefore, this monitoring requirement is not expected to cause any delay in construction.

Fifth, as discussed above, to prevent disruption of present or planned sources, the committee has authorized extensive "grandfathering" of both existing and planned sources.

Neither construction nor operation of any of these existing or proposed sources need be affected by the provisions of the committee proposal. Planned economic and industrial growth, therefore, will be safeguarded.

Sixth, the committee has included additional safeguards in the section regarding economic development. These include:

(1) A prohibition on the Administrator requiring any rollback from existing pollution levels to meet the provisions of this section;

(2) As discussed above, at the discretion of the Governor, in-

creases in certain pollutants need not be counted (temporarily or permanently, as the case may be) against the allowable limit;

(3) A prohibition on EPA requiring any automatic or uniform buffer zones to protect class I or any other areas from increases in pollution;

(4) A requirement that a State approve or deny within 180 days of final submission any completed application for a permit submitted by a proposed source; and

(5) No temporary lapse of ongoing programs during the time necessary to propose and promulgate new regulations under this section; existing regulations (as amended by this section) will remain in effect until such new regulations are in effect.

Some concern has been expressed that the State reclassification of Federal areas from discretionary class I to class II, or of any area from class II to class III, may take so long that it would prevent further growth in large parts of the country. The committee believes these concerns are based on a serious misunderstanding of the committee's proposal.

First, it must be re-emphasized that 97 percent of the country is initially designated class II. Class II increments generally allow for substantial industrial growth and development, even without a redesignation to class III.

Second, the discretionary class I status applies to a mere 1.2 percent of the land area of the United States. Even if all the States were to refuse to redesignate any of these areas as class II, this 1.2 percent remaining in class I would not, according to FEA–EPA data, significantly affect the construction of even the largest industrial sources of pollution in the rest of the United States.

Third, all provisions "grandfathering" sources or exempting certain types of emissions from the increment apply equally to all Federal areas as they do to non-Federal areas.

Fourth, the States have sole discretion over reclassification of Federal areas.

Finally, the committee does not foresee undue relays in any possible reclassification (either to class II or class III). While a State has good reason to move quickly to reclassify an area, the committee expects that that State will move to reclassify by expeditiously complying with the procedural and other requirements of this section. In the meantime, the variety of "grandfather" provisions included by the committee will assure no moratorium on development.

Therefore, since the discretionary class I areas make up a mere 1 percent of the United States, and since all "grandfathers" and exemptions provided in section 108 apply to these areas as well, it can be concluded that these areas will not cause a temporary moratorium on economic growth while the States decide their ultimate designation.

Further study

The committee believes that the issue of prevention of significant deterioration perhaps is unique in that it is one of the most carefully and completely studied issues to come before Congress in many years.

The subcommittee and the committee have discussed the issue on several different occasions over the past 3 years. For instance, the issue of whether to prevent significant deterioration and how to do