Oral Argument Not Yet Scheduled

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

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

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
80 FED. REG. 65,292 (OCT. 26, 2015)

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GLOSSARY

AB	Answering Brief of Respondents
Agency	United States Environmental Protection Agency
CAA	Clean Air Act
CB	Brief of the California Amici
EB	Brief of the Environmentalist Intervenors
EPA	United States Environmental Protection Agency
FR	Federal Register
NAAQS	National Ambient Air Quality Standard
OB	Opening Brief of the State Petitioners
ppb	Parts Per Billion
SIP	State Implementation Plan

INTRODUCTION

The Clean Air Act tasks EPA with promulgating a national ambient air quality standard (NAAQS) for ozone that is "requisite" to protect "public health." 42 U.S.C. § 7409(b). It likewise charges States with the "responsibility" to ensure that the standards are "achieved and maintained," through SIPs, *id.* §§ 7407(a), 7410. These complementary obligations have historically coexisted. Now, however, by failing to adequately consider sources of ozone that States cannot control, EPA has created a false conflict between the Agency's obligation to adopt a health-protective standard and States' obligation to achieve that standard. More than a poor reading of the statute, the clash EPA has created between what States can "achieve" and what is "requisite" for the "public health" invites a cascade of resulting harms, including a constitutional infirmity in the Clean Air Act itself. This Court should insist that the Agency reasonably address the problem of uncontrollable ozone and thereby reconcile the respective obligations of EPA and the States under Sections 7407(a) and 7409(b).

SUMMARY OF THE ARGUMENT

I. EPA arbitrarily restricts its consideration of uncontrollable ozone. First, it limits its consideration of background ozone to days on which such ozone ***alone*** leads to an exceedance of the NAAQS. *E.g.*, AB 31, 33. Even then, its modeling either uses average (rather than peak) data for background ozone or underestimates the peak effects on peak ozone days. Second, the Agency understates the problem of uncontrollable ozone by wrongly assuming a State can control ozone transported from another State. *E.g.*, AB 29-30. But "[a]ir pollution is . . . heedless of state boundaries," *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014), a fact that EPA acknowledges as to international boundaries but not, arbitrarily, as to interstate boundaries. Neither these ground rules nor EPA's inapposite invocation of alternate relief measures require agency expertise or technical judgment, but together they lead to a rule that understates the effect of uncontrollable ozone on States' ability to ensure the NAAQS is achieved.

II. EPA also misreads the Clean Air Act. The Agency recognizes that achievability is relevant but confines that relevance to

the selection of a standard from within a range, *e.g.*, AB 119, as if the choice of range was not part of choosing the standard. The statutory text supports no such distinction, and because this Court (and, before now, EPA) concluded that achievability is relevant, the Agency has no justification for limiting its own power as it now claims it must do. Additionally, the Constitution's insistence on an intelligible principle to accompany delegations of legislative authority demands that EPA consider whether the standard it has set is so close to uncontrollable background levels as to be unachievable. EPA's effort to manufacture a conflict among the provisions of the Clean Air Act is baseless, and even the cloak of *Chevron* will not protect it.

III. Finally, the Agency enjoys considerable latitude in making technical determinations, but it must still explain its decisions and connect them to supporting evidence. That it has not done. For all its talk of a "forest of evidence," AB 47, EPA's conclusions rest overwhelmingly on a single study riddled with limitations, 80 FR 65,330, and unreliable under the Agency's own precedent, *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013).

ARGUMENT

I. EPA Did Not Adequately Address the Fundamental Issue of Uncontrollable Background Ozone.

In their opening brief, the States explained that EPA failed to address adequately a "relevant and significant aspect of a problem," *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009): whether the peak effects of uncontrollable sources on peak ozone days will preclude States from carrying out their duty to ensure that ozone "standards will be achieved and maintained" at the new level of 70ppb, 42 U.S.C. § 7407(a); *see* OB 20-27. EPA's brief fails to defend its treatment of this critical issue.

A. EPA Did Not Adequately Address the Peak Effects of Uncontrollable Ozone on Peak Ozone Days.

EPA's brief fails to marshal a convincing defense for its inadequate treatment of the issue of uncontrollable ozone.

First, EPA's primary defense is that its analysis was sufficient because this issue is—in the Agency's judgment—only relevant if uncontrollable ozone, ***standing alone***, exceeds the new 70ppb standard. In the section of its answering brief entitled "Background ozone will not preclude attainment," EPA claims repeatedly that uncontrollable ozone is rarely "above," "over," "exceed[ing]" or "greater than" 70ppb, using

this argument as its sole response to many of the States' points. AB 99-104. EPA even refers to studies showing uncontrollable ozone of 65ppb and 68ppb as ***support*** for a 70ppb standard. *Id.* 103-05.

EPA's argument on this score turns entirely on the false assumption that States can "achieve[] and maintain[]," 42 U.S.C. § 7407(a), a 70ppb ozone level where peak uncontrollable ozone levels on peak days approach, but do not exceed, 70ppb. But if uncontrollable ozone is "near" 70ppb, OB 23, the only way a State could comply would be to require its citizens to revert to a world that has no industry or automobiles—or even agriculture. *See* Policy Assessment 2-12, 2-27 (JA__).[1] As EPA admits, "zero manmade emissions" is an "unrealizable" scenario. *Id.* at 2A-7 (JA__). Or as Justice Breyer put it, Congress did not require "a standard demanding the return of the Stone Age." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 496 (2001) (Breyer, J., concurring). Having conceded that some level of anthropogenic emissions are unavoidable, the Agency was duty-bound to consider the peak effects of uncontrollable ozone on peak ozone days,

[1] 79 FR 75,243 (Policy Assessment "describ[ed] in detail" EPA's "approach to informing decisions on the primary [ozone] standard").

including where such peak-peak uncontrollable ozone leads to levels close to, but not exceeding, 70ppb. Because EPA has concededly failed to engage in that analysis, the Rule must be vacated as unlawful for this reason alone.

Second, having (incorrectly) framed the issue as only being concerned with situations where uncontrollable ozone single-handedly exceeds 70ppb, EPA fails to adequately address even this issue. Much of EPA's analysis focuses on "seasonal mean" uncontrollable ozone, which is meaningless because, as the States explained, attainment depends on the fourth-highest daily reading. OB 26-27; *see also* Policy Assessment 2A-14–20 (JA__).

Where EPA's modeling addresses high-ozone days, it inadequately considers the peak effects of uncontrollable ozone on those days. Policy Assessment 2A-21–28 (JA__). In a reprisal of the seasonal-mean folly, EPA discusses the role of background ozone on high-ozone days in terms of "averages over the entire U.S." 80 FR 65,328. But the peak effects of uncontrollable ozone, even on peak days, do not occur in the same way everywhere. One way they differ is through natural events that cause uncontrollable ozone to spike—stratospheric intrusions, wildfires,

lightning, and unique meteorological conditions. *See* OB 24-25. In this litigation, EPA claims that its modeling ***did*** account for such events. AB 100-01 (citing Policy Assessment 2A-14 (JA__)). The administrative record tells a different story. The "Summary" section of EPA's study explains that the modeling used to forecast exceedance "was not expressly developed to capture these types of events . . . (wildfires, stratospheric intrusions)." Policy Assessment 2A-42 (JA__); *see also id.* 2A-8 (JA__) (wildfire emissions based on monthly averages). Even the page cited by EPA explains that its discussion of wildfires and stratospheric intrusions (*i.e.*, peak effects on peak days) was discussing the real world, ***not*** the model. Policy Assessment 2A-14 (JA__).[2]

While EPA may have evaluated ***some*** uncontrollable ozone on peak ozone days, it did not evaluate ***peak*** uncontrollable ozone on peak days. In other words, EPA evaluated only one peak of the peak-peak

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[2] EPA claims that the States did not raise this objection to EPA's modeling in their comments, AB 102, but "[i]t is sufficient that an issue was raised by any commenter; the party petitioning for judicial review need not have done so itself." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 n.12 (D.C. Cir. 2004). Here, that condition is satisfied. *See*, *e.g.*, Alliance of Automobile Manufacturers Comment at 15-16, 25 (JA__).

problem, *see* OB 20-27, and thereby underestimated the achievability problem that it has created with its new ozone standard.

This error also compounds the previously-discussed mistake of assuming that uncontrollable ozone alone must cause an exceedance before it becomes a problem. While the Agency claims that its modeling shows only "2 and 22 location-days" with uncontrollable ozone over 70ppb, AB 100, the States included the same chart that EPA cites (from Policy Assessment 2A-25) to show that even EPA's own modeling ***still*** shows a significant number of days where uncontrollable ozone would be near (at least 60ppb) or above the new standard on days when overall modeled ozone (horizontal axis) exceeded that threshold. OB 24 & n.1.

Third, EPA minimizes the amount of uncontrollable ozone by excluding ozone transported between States while recognizing that internationally transported ozone is uncontrollable. AB 98-99; *see also id.* 29-30 (citing OB 7-8). This distinction is arbitrary. Both types of ozone are uncontrollable by the State into which the pollutant is transported. The Supreme Court recently agreed: "downwind States to which the pollution travels are unable to achieve clean air because of

the influx of out-of-state pollution ***they lack authority to control***." *Homer City*, 134 S. Ct. at 1592 (emphasis added). Instead of ignoring uncontrollable interstate ozone, EPA should have applied what it calls the "generic" definition of background ozone: "the portion of [ozone] in ambient air that comes from sources outside the jurisdiction of an area and can include natural sources as well as transported [ozone] of anthropogenic origin." 80 FR 65,327 n.84. This definition captures the reality States face. Whether transient pollution crosses an international border or an interstate one, States "lack the authority to control" it. *Homer City*, 134 S. Ct. at 1592.

The Agency responds that because the Act's "Good Neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), requires upwind States to regulate emissions whose transport would complicate attainment in downwind States, these emissions are not part of the background problem. AB 99; *accord* CB 19. The Good Neighbor provision, however, only threatens punishment for "bad neighbors;" it provides no relief for their downwind victims. For example, it is cold comfort for Coconino County, Arizona, that California might—eventually—be forced to reduce the emissions contributing 7.7ppb to that area's design value,

leaving a scant 2.92ppb for human activity. ADEQ Comments at 7 (JA__). Moreover, using the Good Neighbor provision as justification for treating ozone produced in other States as non-background ozone makes no sense when the Agency treats international ozone differently—*i.e.*, as a component of uncontrollable background—despite a ***more*** robust statutory provision for international pollution that actually has the potential to provide some relief. 42 U.S.C. § 7509a; *but see* Part I.B *infra*.

Additionally, the Good Neighbor provision allocates pollution-reduction responsibilities based on cost. *Homer City*, 134 S. Ct. at 1606-07 (Good Neighbor provision addresses only contributions that can be cost-effectively eliminated). Under this provision, EPA would tolerate, for example, California emissions where the cost of reduction is too high. Yet, when that same pollution blows into neighboring States, EPA refuses to treat it as background ozone, arguing that doing so would violate *Whitman*'s ban on considering "cost" in setting a NAAQS standard. *Whitman*, 531 U.S. at 466.

EPA's arbitrary treatment of out-of-state ozone infects each and every calculation of background ozone and thus necessitates vacatur.

Finally, as a last resort, EPA appeals to "technical expertise," suggesting that the States are asking this Court to "second-guess EPA's technical conclusions" and "complex technical evidence." AB 99, 101, 105. But the States have identified simple yet critical flaws in EPA's analysis that require no "technical expertise" to understand: to address the "achiev[ability]" of a standard based on the fourth-highest annual ozone measurement, EPA needed to study ***all*** background ozone ***on the fourth-highest ozone days***. This necessitates consideration of the peak-peak issue and "generic" background. EPA cannot appeal to technical expertise to shield a flawed analysis. *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir 2010).

B. The Act Does Not Countenance EPA's Reliance on Alternate Relief Mechanisms.

In addition to understating the obstacle of uncontrollable ozone for State attainment, the Agency overstates the potential for alternate relief mechanisms to mitigate the problem. *E.g.*, 80 FR 65,436; AB 105, 113, 116. These mechanisms are not designed to, and do not, compensate for an unachievable standard.

The States identified several ways in which EPA's reliance on relief measures (rural and international transport and exceptional events) was unreasonable and inconsistent with the Act. OB 35-44.

EPA says almost nothing about rural transport. The statutory restrictions on this provision—specifically the exclusion of areas that border a metropolitan statistical area (MSA), 42 U.S.C. § 7511a(h)—render it inapplicable to large swaths of the country. OB 38-39 (citing the example of Salt Lake City); *see also* Westar Comments 16 (JA__). In western States, where the issue of background ozone in rural areas is particularly acute and the counties abutting MSAs are particularly large, the CAA's rural transport provision promises little or no relief. In practice, EPA has never approved a rural transport area under the 8-hour ozone NAAQS. 80 FR 65,438 & n.235.

More importantly, neither of the provisions related to transported ozone—rural or international—averts nonattainment. 42 U.S.C. §§ 7509a(b) (exempting international transport areas from just three nonattainment provisions), 7511a(h)(1) (treating rural transport areas as "marginal" nonattainment). Instead, they merely lighten certain punitive restrictions that a nonattainment area faces. EPA knows that

these provisions do not halt the harsh and immediate consequences of a nonattainment designation, *see*, *e.g.*, 79 FR 75,384, which include onerous regulatory requirements that can permanently inhibit economic development. *See*, *e.g.*, 42 U.S.C. § 7407(d)(3)(E) (requiring permanent emission reductions before re-designation as attainment). Yet its massive brief makes no attempt to respond to this issue.[3] The Agency likewise fails to respond to the uncontested fact that pollution generated overseas contributes more ozone to America's air with each passing year. *See* OB 10 (citing Cooper 344-48 (JA__) (estimating that ozone from Asia is increasing by .63ppb/year)). By failing to address the growing prevalence of international ozone and the international transport provision's inability to avert nonattainment, EPA fails to grapple with a "significant aspect of [the] problem." *Am. Farm Bureau*, 559 F.3d at 520.

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[3] Missing an irony, California points out that it is "home to the only two areas of the country designated 'extreme' non-attainment for ozone," yet has never lost highway funds. CB n.10. It is no remedy to an arbitrary rule that EPA may choose not to impose penalties. More importantly, California overlooks the permitting and regulatory burdens that accompany nonattainment status. *See*, *e.g.*, 42 U.S.C. § 7511a(a). For States that are not already the poster children of nonattainment, these concerns are far from "overstated." CB n.10.

The same is true of the exceptional events rule, which expressly excludes "background." 40 C.F.R. § 50.14(c)(3)(iv)(C). Also disqualified are "stagnation of air masses," "meteorological" events, and "event[s] caused by human activity" that are capable of recurring. 42 U.S.C. § 7619(b)(1). So, too, biogenic sources and lightning. 80 FR 65,439 n.239. What remains are wildfires and stratospheric intrusions. AB 107. This narrow applicability undermines EPA's repeated appeals to the exceptional events provision. OB 35-37. EPA responds with the non sequitur that wildfires and stratospheric intrusions are, indeed, exceptional. AB 107 (misstating OB 35). True enough, but not responsive to the point that the exceptional events provision provides no succor for States facing exceedances due to routine events that are equally beyond their control.

Not only is the exceptional events provision inadequate (by design) to address the full range of uncontrollable background ozone, but using it for that purpose is impractical. An exceptional event petition requires thousands of hours to prepare and offers little chance of success. OB 41. The rule also applies only to discrete occurrences, *see* 40 C.F.R. §§ 50.14(a)(1), (c)(3)(iv)(B-C), making it inefficient and

ineffective to address general recurring background ozone. EPA has no response, except to misrepresent the States' argument as complaining that their "petitions often go unanswered." AB 107. Nowhere does the opening brief make that claim.

Both EPA and the California *Amici* trumpet the fact that EPA has previously granted a few exceptional events petitions and approved a couple of international transport SIPs. AB 107, 109; CB 17-19. But the point is that EPA rarely furnishes the requested relief. OB 41-42 (describing EPA's past use of each measure, including Wyoming's 25 petitions with one success). Outside of this litigation, EPA has acknowledged the low chances and unclear criteria for relief, including in its proposal to revise the exceptional events policy. 80 FR 72,840; *see also* 79 FR 75,384 ("few" nonattainment areas ever obtain relief).

Finally, EPA is silent on its subtle attempt to shift the burden to States by relegating States to enforcement-stage relief rather than addressing the uncontrollable background issue as a part of the NAAQS rulemaking. While the Agency, in promulgating a NAAQS rule, has the burden to "explain and expose every step of its reasoning," *Mississippi*, 744 F.3d at 1349, and address every "significant aspect" of its decision,

Am. Farm Bureau, 559 F.3d at 520, that burden shifts to States under the relief provisions. The States must show, for example, that international pollution is the "but for" cause of their nonattainment under 42 U.S.C. § 7509a(a), and prove a "clear causal relationship" under the exceptional events rule, 40 C.F.R. § 50.14(c)(3)(iv)(B). Justifying the adoption of a NAAQS through reference to procedures with the opposite legal burdens sidesteps the scrutiny that Congress assumed would apply to newly revised standards under the CAA.

II. EPA Misreads the Act to Limit Its Ability to Consider Uncontrollable Ozone.

EPA's reading of the Act creates a false conflict between States' "responsibility" to ensure that NAAQS are "achieved and maintained," 42 U.S.C § 7407(a), and the Agency's own duty to set a standard "requisite" to protect "public health," *id.* § 7409(b)(1). AB 111-16. Along the way, it undoes the Supreme Court's solution to the nondelegation problem this Court recognized in a previous ozone NAAQS rulemaking.[4]

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[4] Again, EPA attempts to argue waiver, AB 126, but again the issue was before the Agency. *See supra* n.2; UARG Comment 4-5 (JA__); Gray Comment 16-17 (JA__).

Whitman, 531 U.S. at 475-76 (reversing *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

A. The Act Requires EPA to Consider the Issue of Uncontrollable Ozone in Setting the Ozone Range.

The States highlighted a critical ***legal*** error requiring vacatur: EPA "adopt[ed] a non-textual limitation on its own authority." OB 28-32 (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2706-07 (2015)). Specifically, EPA concluded that addressing uncontrollable ozone was irrelevant in selecting a range of potential NAAQS levels, but was relevant in selecting the level within that range. OB 28-29. The States explained that this atextual limitation is inconsistent with the CAA's plain terms, its "design and structure . . . as a whole," *id.* 29, principles of federalism and administrative law, *id.* 29-30, and this Court's precedent, *id.* 30-33.

Perhaps realizing this weakness, EPA's brief takes the position that the Agency did not "reach th[e] question" of whether uncontrollable ozone must be considered and at what stage of the analysis. AB 118-19. This is contrary to what EPA said in the rulemaking, where it expressed a clear position that is binding in litigation. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). At that time, EPA explained

that it did "not consider[] proximity to background [ozone] concentrations" when "identifying the range of policy options." Policy Assessment 1-27 (JA__); *accord* 80 FR 65,328. Then, in its very first response to comments raising the uncontrollable ozone issue, EPA said that it "may consider proximity to background concentrations . . . ***only*** in the context of [selecting a standard from] within the range of reasonable values [determined by] the Administrator." 80 FR 65,328 (improperly adding the word "only" to a passage from *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 379 (D.C. Cir. 2002) (*ATA III*); emphasis added). Thus, if this Court concludes that EPA's legal conclusion is faulty, the Rule must be vacated. *Chenery*, 318 U.S. at 88.

EPA responds that Section 7409(b) forbids it from considering achievability and therefore bars consideration of background ozone when selecting the range of potential standards. AB 114-18 (citing *American Petroleum Institute v. Costle*, 665 F.2d at 1186 (D.C. Cir. 1981)). But the Agency makes too much of *American Petroleum*. That decision rejected Houston's claim that EPA's standard was arbitrary and capricious because uncontrollable emissions exceeded "***half*** EPA's presently promulgated [120ppb] ozone standard," a very different

circumstance than presented by the facts of the present case. City of Houston Opening Brief 8-10, (JA__).

In rejecting Houston's argument, *American Petroleum* did not foreclose consideration of uncontrollable ozone, and this Court subsequently recognized in *ATA III* that EPA could consider proximity to background in setting a NAAQS. 283 F.3d at 379. *ATA III* also concerns a NAAQS far lower than 120ppb, such that background ozone actually presented a challenge to achievability. Thus, contrary to Environmentalist Intervenors' argument, EB 22, this Court's decision in *ATA III* did not conflict with *American Petroleum*.

Additionally, EPA's reading of *American Petroleum* cannot be reconciled with the Agency's position that it can consider uncontrollable ozone within a range, but not in selecting that range. If *American Petroleum* is read to mean that uncontrollable ozone is not a "relevant consideration," then this factor would not be relevant at any point. *See* OB 30-31.

Rather than harmonizing its obligation to set a standard "requisite to protect the public health" with the States' obligation to achieve that standard, EPA retreats to the unavailing shelter of

Chevron. AB 111, 118. The Supreme Court has consistently held that "[s]tatutory construction is a holistic endeavor," in which a single provision "cannot be read in isolation." *Smith v. United States*, 508 U.S. 223, 233 (1993) (quotation and internal modification omitted). EPA's interpretation of the Act violates this principle by uprooting Section 7409(b) from its context, which includes an explicit expectation that States can "achieve[] and maintain[]" the standard. 42 U.S.C. § 7407(a).[5]

EPA's interpretation also conflicts with the canon that "[o]bviously, Congress did not intend to require the impossible." *Motor Vehicle Mfrs. Ass'n v. Ruckelshaus*, 719 F.2d 1159, 1168 (D.C. Cir. 1983); OB 29-30. "Ambiguity," after all, "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *accord Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014). In the context of the CAA, any reading of Section 7409(b)

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[5] The Agency's atomized reading of the Act is likewise apparent in its argument that Section 7409(b) "does not establish any state obligations to attain the NAAQS." AB 114. Only with the extreme tunnel vision EPA brings to this rulemaking could that assertion make sense, as numerous provisions impose obligations by reference. *E.g.*, 42 U.S.C. §§ 7407(a), 7410 (SIPs for "implementation, maintenance, and enforcement" of standard in "section 7409 of this title").

that excludes (at the time of selecting a range) consideration of what is possible for States to achieve is so flawed that it cannot create an ambiguity in the statute.

EPA's flawed reading of the CAA—with its arbitrary allowance for consideration of achievability "only" when selecting a standard from within a range—is not entitled to deference. *Chevron v. NRDC*, 467 U.S. 837, 843 (1984).

* * *

Finally and more generally, EPA argues that it did not have to set an ozone standard above "the highest level of background ozone on *any* day in *any* area," or "so high that it would never be violated," AB 111-16.[6] To be absolutely clear, the States have never endorsed this straw man. Rather, what the States have argued is that EPA must consider whether peak effects of uncontrollable ozone will cause insuperable problems for the States and then address these problems, supporting that analysis with adequate reasoning and evidence. *See supra* Part I. It is EPA's failure to carry out this duty—by never considering the peak

[6] This is an odd concern if the Agency truly believes that uncontrollable ozone will not "prevent attainment of the NAAQS at any location." AB 100-01.

impact of uncontrollable ozone on peak days, *supra* Part I.A, and by improperly limiting its consideration of this crucial issue—that renders the Rule unlawful.

B. The Constitution Requires EPA to Consider the Issue of Uncontrollable Ozone in Setting the Ozone Range.

Congress has charged EPA with regulating a compound "that inflict[s] a continuum of adverse health effects at any airborne concentration greater than zero." *Whitman*, 531 U.S. at 475; *accord* 62 FR 38,863 ("[I]t is not possible to select a level below which absolutely no effects are likely to occur."). Absent some limiting principle, a concern for health alone would require the Agency to set a NAAQS of zero. Yet, time and again, this Court and the Supreme Court have eschewed that outcome, explaining that "requisite" contains an intelligible limiting principle. *Id.* at 476. So, too, has the Agency. In earlier cases, EPA recognized that achievability generally and uncontrollable background ozone in particular constitute part of that principle. In 1997, for example, the Agency rejected some commenters' requests for a standard of 70ppb, explaining that it would be too close to "peak background levels." 62 FR 38,868. This Court likewise approved consideration of "proximity to peak background ozone" as a basis for

rejecting a lower NAAQS. *ATA III*, 283 F.3d at 379; *see also* OB 30-31. The latter is particularly important because it followed remand in *Whitman* and gave effect to the Supreme Court's insistence that the CAA could be read to contain an intelligible principle.

In the current rulemaking, EPA's approach to uncontrollable background ozone—which has only increased since 1997 when 70ppb was too close—abolishes the Supreme Court's intelligible principle. Confronted with this problem, the Agency doubles down, asserting that "the Act does not unambiguously require EPA to address background ozone." AB 118. While *Chevron* sometimes protects an agency's interpretation of ambiguous statutory language, it does not swallow the constitutional requirement that any delegation of lawmaking power must contain an intelligible principle. As explained, the principles applicable to this "non-threshold" pollutant include achievability and consideration of ozone that the regulated entities (States) cannot control.

EPA's refusal to recognize the States' obligations under Sections 7407(a) and 7410 upends the CAA and resurrects nondelegation defects that *Whitman* and *ATA III* avoided.

III. The Agency's Technical Conclusions Lack Support in the Evidence on which They Purport to Rely.

EPA claims that it relied on a "forest of evidence" when finding the 75ppb NAAQS insufficiently restrictive. AB 47. Specifically, EPA claims that it gave "substantial weight to the clinical studies as a group." *Id.* (citing 80 FR 65,343). But EPA's "group" of studies that show adverse effects below 80ppb (meaning both statistically significant decrease in FEV_1 and statistically significant symptoms) admittedly consists of a single study. 80 FR 65,305 ("***one*** recent study did report increased symptoms following exposure to 72 ppb O_3" (emphasis added; citing Schelegle (JA__)); *id.* at 65,317-18 ("***a*** recent controlled human exposure study" (emphasis added)). Indeed, the final rule cites the Schelegle study over 30 times.[7] The next-most-cited studies are Kim and Adams, but they do not support lowering the standard and instead serve primarily to reject a NAAQS of 60ppb. *See*, *e.g.*, 80 FR 65,303 n.21 ("Adams (2006) did not find effects on FEV_1 at 60ppb to be statistically significant."); 80 FR 65,334 (Kim shows pulmonary

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[7] Likewise, the rule refers 70 times to the concentration 72ppb. That level, with its decisive impact on the NAAQS, comes from the Schelegle study alone.

inflammation ***alone*** as low as 60ppb, which does not constitute an adverse effect). In fact, even EPA admits that Schelegle is unique: "Other studies at levels below 72ppb did not find this combination of statistically significant effects." AB 16. If EPA ever gazed upon a "forest" of evidence, it has missed that forest for a single tree.

And the tree is far from capable of supporting this rule. OB 50-53. For example, Petitioners pointed out that the Adams studies' six of 30 study participants with lung-function decrements was insufficient in 2008, yet now the only evidence of such decrements at 72ppb is based on six of 31 participants. OB 52 n.5 (citing *Mississippi*). The Agency is practically silent in response to this point, repeating only its former "*un*certainty" over the studies cited in the 2008 review, AB 46, without "provid[ing] a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quotation omitted). Likewise, the Agency continues to hide Schelegle's failure to show that the same individuals experienced both lung function decrements of 10% and respiratory symptoms, as required for finding an adverse health effect. AB 47-49.

While the Agency enjoys significant deference in technical matters, it must nevertheless "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Encino*, 136 S. Ct. at 2125. Silence and false correlations are not a "satisfactory explanation." Despite lip service to a plethora of evidence—a claim possible in every rulemaking—the Agency's actual reasoning shows excessive reliance on a single study with conceded defects. *E.g.*, 80 FR 65,330.

CONCLUSION

This Court should vacate the Rule and remand to the Agency.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because this brief contains 4,902 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The total number of words contained in this brief and the Industry Petitioners' Reply Brief is fewer than 9,500, per this Court's Order of March 9, 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 on September 14, 2016. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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