ORAL ARGUMENT NOT YET SCHEDULED

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

WILDEARTH GUARDIANS, MEDICAL ADVOCATES FOR HEALTHY AIR, CENTER FOR BIOLOGICAL DIVERSITY, PHYSICIANS FOR SOCIAL RESPONSIBILITY – LOS ANGELES, CITIZENS FOR CLEAN AIR (A PROJECT OF ALASKA COMMUNITY ACTION ON TOXICS), and SIERRA CLUB,	)	
Petitioners,	)	No. 14-1145
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

On Petition for Review of Final Action
of the U.S. Environmental Protection Agency

OPENING BRIEF OF PETITIONERS

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Dated: January 16, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Petitioners in Case No. 14-1145 WildEarth Guardians, Medical Advocates for Healthy Air, Center for Biological Diversity, Physicians for Social Responsibility – Los Angeles, Citizens for Clean Air (a project of Alaska Community Action on Toxics), and Sierra Club ("Petitioners") submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors and *Amici*

(i) Petitioners: WildEarth Guardians, Medical Advocates for Healthy Air, Center for Biological Diversity, Physicians for Social Responsibility – Los Angeles, Citizens for Clean Air (a project of Alaska Community Action on Toxics), and Sierra Club.

(ii) Respondent: U.S. Environmental Protection Agency.

(iii) Intervenors: South Coast Air Quality Management District, and San Joaquin Valley Unified Air Pollution Control District.

(iv) *Amici Curiae*: None.

(B) Circuit Rule 26.1 Disclosure for Petitioners

WildEarth Guardians. WildEarth Guardians has no parent companies, and no publicly held company has a 10% or greater ownership interest in the organization.

WildEarth Guardians, a corporation organized and existing under the laws of the State of New Mexico, is a nonprofit organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West.

Medical Advocates for Healthy Air. Medical Advocates for Healthy Air has no parent companies, and no publicly held company has a 10% or greater ownership interest in Medical Advocates for Healthy Air.

Medical Advocates for Healthy Air is a California nonprofit organization consisting of medical professionals living in the San Joaquin Valley who regularly treat patients suffering from respiratory ailments caused or greatly exacerbated by the unhealthy levels of air pollution in the area. Its mission is to advocate for the expeditious attainment of state and federal health-based air quality standards in the San Joaquin Valley.

Center for Biological Diversity. The Center for Biological Diversity has no parent companies, and no publicly held company has a 10% or greater ownership interest in the organization.

The Center for Biological Diversity ("Center"), a corporation organized and existing under the laws of the State of California, is a national nonprofit conservation organization that has offices across the United States, including in Alaska and California. The Center has more than 775,000 members and supporters dedicated to the preservation, protection, and restoration of biodiversity and

ecosystems throughout the world. The Center works to insure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitat these species need to survive. The Center has also worked to achieve full implementation of the Clean Air Act to protect ecosystems and the environment.

Physicians for Social Responsibility – Los Angeles. Physicians for Social Responsibility – Los Angeles has no parent companies, and no publicly held company has a 10% or greater ownership interest in the organization.

Physicians for Social Responsibility – Los Angeles, a corporation organized and existing under the laws of the State of California, is a California nonprofit organization dedicated to advocating for policies and practices that improve public health, eliminate environmental threats, and address health inequalities.

Citizens for Clean Air (a project of Alaska Community Action on Toxics). Alaska Community Action on Toxics has no parent companies, and no publicly held company has a 10% or greater ownership interest in the organization.

Citizens for Clean Air is a coalition of local community members and citizens groups in Fairbanks, Alaska who are committed to cleaning up the air while keeping everyone warm in the winter. Citizens for Clean Air is a project of Alaska Community Action on Toxics, a non-profit environmental health research and advocacy organization organized and existing under the laws of the State of

Alaska, whose mission is to assure justice by advocating for environmental and community health.

Sierra Club. Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization of approximately 625,000 members, roughly 147,000 of whom live in California. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

(C) Rulings Under Review

Petitioners challenge a final rule promulgated by EPA entitled "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," 79 Fed. Reg. 31566 (June 2, 2014).

(D) Related Cases: None.

DATED: January 16, 2015

Respectfully submitted,

/s/ Paul Cort

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GLOSSARY

Act	The federal Clean Air Act, 42 U.S.C. §§ 7410 *et seq*.
Classification Rule	"Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," 79 Fed. Reg. 31566 (June 2, 2014)
EPA	United States Environmental Protection Agency
$\mu g/m^3$	Micrograms per cubic meter. A measure of concentration in the air.
µm	Micrometers
NAAQS	National Ambient Air Quality Standard
Nonattainment area	An area designated by EPA as failing to meet a national ambient air quality standard.
PM_{10}	Particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers. Also referred to as coarse or thoracic coarse particulate matter.
$PM_{2.5}$	Particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers. Also referred to as fine particulate matter.
SIP	State Implementation Plan. A plan prepared by states, and submitted to EPA for approval, that identifies the actions and programs to be undertaken by the state and its subdivisions to implement their responsibilities under the Clean Air Act.
Subpart 1	Subpart 1 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7501-7509a
Subpart 4	Subpart 4 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7513-7513b

JURISDICTIONAL STATEMENT

(A) Agency. Respondent U.S. Environmental Protection Agency ("EPA") is charged with federal implementation of the Clean Air Act. EPA's cited authority for the challenged rule is 42 U.S.C. §§ 7407, 7410, 7502, 7513, 7513a, and 7601.

(B) Court of Appeals. This court has jurisdiction to review final actions taken by EPA under the Clean Air Act. 42 U.S.C. § 7607(b)(1).

(C) Timeliness. The petition for review herein was timely filed on July 31, 2014, within sixty days of publication of the final rulemaking challenged herein. *See* 42 U.S.C. § 7607(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF ISSUES

(1) Whether the new implementation schedule for $PM_{2.5}$ nonattainment areas announced in EPA's Classification Rule conflicts with the framework and deadlines provided in subpart 4 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7513-7513b ("Subpart 4").

(2) Whether EPA has statutory authority to adopt a schedule that conflicts with the implementation framework and deadlines in Subpart 4.

(3) Whether claimed unfairness and judicial presumptions against retroactivity can support EPA's decision to adopt a schedule that conflicts with the implementation framework and deadlines in Subpart 4.

NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE AGENCY

Petitioners in this case challenge EPA's final rule entitled "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," 79 Fed. Reg. 31566 (June 2, 2014) [JA___] ("Classification Rule"). The final rule, promulgated under the Clean Air Act, classifies $PM_{2.5}$-polluted areas and establishes a deadline for states with those areas to prepare and submit plans that comply with the requirements of Clean Air Act title I, part D, subpart 4, 42 U.S.C. §§ 7513-7513b. *See* 79 Fed. Reg. at 31566 [JA___].

Petitioners filed a petition for review of the final rule on July 31, 2014. (Doc. # 1505916). On September 22, 2014, the Court granted the unopposed motions to intervene filed on behalf of the South Coast Air Quality Management District and San Joaquin Valley Unified Air Pollution Control District. *See* Clerk's Order, No. 14-1145 (filed Sept. 22, 2014) (Doc. # 1513420). On November 24, 2014, the Court granted EPA's unopposed motion to establish the briefing

schedule in this matter. *See* Clerk's Order, No. 14-1145 (filed Nov. 24, 2014) (Doc. # 1523999).

STATEMENT OF FACTS

I. Particulate Matter Pollution and EPA's National Ambient Air Quality Standards.

Since the 1948 tragedy in Donora, Pennsylvania and the 1952 killer London fog event, we have known that inhalable airborne particles, the main ingredient of smoke, haze, and airborne dust, are harmful to human health. "Fine particulate matter" pollution, consisting of particles 2.5 micrometers in diameter and smaller ("$PM_{2.5}$"), is produced chiefly by combustion processes and by atmospheric reactions of gaseous pollutants such as nitrogen oxides, sulfur oxides, ammonia, and volatile organic compounds. 71 Fed. Reg. 61144, 61146 (Oct. 17, 2006). Sources of $PM_{2.5}$ include "mobile sources, power generation, combustion sources at industrial facilities, and residential fuel burning." *Id*.

Fine particulate matter can penetrate deep into a person's lungs and may even enter a person's bloodstream. *See* EPA Website, "Particulate matter: Basic Information," http://www.epa.gov/pm/basic.html (visited Jan. 12, 2015). According to EPA, "[e]pidemiological studies have shown statistically significant correlations between elevated $PM_{2.5}$ levels and premature mortality . . . [,] aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and

restricted activity days), [and] changes in lung function and increased respiratory symptoms." 72 Fed. Reg. 20586, 20586-87 (Apr. 25, 2007). Even "[s]hort-term exposure (from less than 1 day up to several days) to $PM_{2.5}$ is likely causally associated with mortality from cardiopulmonary diseases, increased hospitalization and emergency department visits for cardiopulmonary diseases, increased respiratory symptoms, decreased lung function, and changes in physiological indicators for cardiovascular health." 72 Fed. Reg. 54112, 54128 (Sept. 21, 2007). EPA also has identified a number of adverse welfare impacts associated with elevated fine particulate levels, including adverse impacts on visibility. *See* 71 Fed. Reg. 2620, 2675 and 2681 (Jan. 17, 2006).

The Clean Air Act requires EPA to promulgate national ambient air quality standards (also called "NAAQS") for harmful air pollutants, 42 U.S.C. § 7409, and directs the states to devise plans for bringing areas that violate those standards ("nonattainment areas") into compliance with the standards. *Id*. § 7410; *see also NRDC v. EPA*, 706 F.3d 428, 429-30 (D.C. Cir. 2013) (describing relevant Clean Air Act requirements). Section 7409(d)(1) further directs EPA to review (and revise as appropriate) national ambient air quality standards every five years. 42 U.S.C. § 7409(d)(1).

One of the first pollutants for which EPA adopted national standards was particulate matter, s*ee* 36 Fed. Reg. 8186 (April 30, 1971), but it was not until

1997 that EPA established the first separate standards for fine particulate matter. 62 Fed. Reg. 38652 (July 18, 1997). EPA's original particulate matter standards established limits for particles up to 45 or 50 micrometers in diameter. *See* 52 Fed. Reg. 24634, 24635 (July 1, 1987).

In 1987, EPA concluded that particles larger than 10 micrometers were largely filtered and removed in the nose and throat and did not pose the same health concerns as smaller particles that are able to penetrate deeper into the respiratory tract, where they pose "markedly greater" risks. 52 Fed. Reg. at 24639. EPA therefore decided to revise the standards for particulate matter to include only "particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers" ("PM_{10}"). *Id.* at 24634.

In the 1987 rulemaking, EPA recognized that within PM_{10}, "[p]articles in ambient air usually occur in two overlapping size distributions, fine (diameter less than 2.5 µm) and coarse (diameter larger than 2.5 µm)" and that "[t]he two fractions tend to have different origins and composition." 52 Fed. Reg. at 24639 n.2; *see also id.* at 24639 (describing different health risks associated with different particle sizes). EPA considered setting a separate standard for $PM_{2.5}$ in 1987, but instead decided to adopt "a 10 µm indicator that included all of the fine and a portion of the coarse fraction." *Id.* at 24649.

In 1997, EPA again reviewed the national standards for particulate matter and, concurring with the recommendations of its staff and scientific advisors, decided "to control particles of health concern (i.e., PM_{10}) through separate standards for fine and coarse particles." 62 Fed. Reg. at 38667. EPA noted that since it adopted the 1987 standards, significant new community epidemiological studies had been conducted that provided "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM . . . even at concentrations below current U.S. PM standards." 61 Fed. Reg. 65638, 65641 (Dec. 13, 1996). EPA concluded that setting separate standards for $PM_{2.5}$ would more effectively and efficiently target those components of PM linked to the remaining mortality and morbidity impacts that continued to be found at levels below the 1987 standards. 62 Fed. Reg. at 38667. EPA "revis[ed]" the particulate matter standards by adding new separate standards for $PM_{2.5}$. 62 Fed. Reg. at 38679.

This court ultimately upheld the 1997 $PM_{2.5}$ standards in *American Trucking Associations, Inc. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002). Implementation of the 1997 $PM_{2.5}$ standards, however, was significantly delayed, and several areas continue to violate the 18-year old standard. *See* 78 Fed. Reg. 69809 (Nov. 21, 2013) [JA___] (listing Libby, MT, San Joaquin Valley, CA, and the Los Angeles-

South Coast Air Basin, CA, as areas still designated nonattainment under the 1997 standards).

In the meantime, EPA, under court-ordered deadlines, revised the $PM_{2.5}$ standards in 2006 and again in 2013. *See* 71 Fed. Reg. at 61144; 78 Fed. Reg. 3086 (Jan. 15, 2013); *see also Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (remanding 2006 $PM_{2.5}$ standards); *Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921 (D.C. Cir. 2014) (upholding 2013 $PM_{2.5}$ standards). The rulemaking at issue in this case relates to the classification of nonattainment areas, and the deadlines for submitting plans to meet the 1997 and 2006 $PM_{2.5}$ standards. *See* 79 Fed. Reg. at 31566 [JA___].

II. Implementation Requirements for the $PM_{2.5}$ Standards.

The above discussion on the history of EPA's national standards for particulate matter pollution is relevant to understanding not only the health protections at stake, but also the history of delay in implementing the $PM_{2.5}$ standards and the context for the challenged rulemaking. Following promulgation of the separate $PM_{2.5}$ standards in 1997, EPA maintained that implementation of these standards should be governed by the less prescriptive provisions of 42 U.S.C. §§ 7501-7509a ("Subpart 1") rather than the specific, more prescriptive provisions added by Congress in the 1990 Clean Air Act Amendments to govern particulate matter nonattainment areas, 42 U.S.C. §§ 7513-7513b ("Subpart 4"). *See NRDC*,

706 F.3d at 431. EPA claimed that Subpart 4 was intended to govern implementation of the PM_{10} standards only, and that the later-adopted $PM_{2.5}$ standards were not PM_{10} standards. *See id.* at 434-35. This Court, however, recognized that by definition $PM_{2.5}$ *is* PM_{10}. *Id.* at 436 (citing 42 U.S.C. § 7602(t)). As a result, the Court rejected EPA's approach as violating the plain language of the Clean Air Act holding that "under *Chevron* step 1, EPA must implement all standards applicable to PM_{10}—including its $PM_{2.5}$ standards—pursuant to Subpart 4." *Id.*

Relevant to this case, Subpart 4 specifies how nonattainment areas will be classified, when areas must submit plans, when areas must attain the standards, and the consequences of failing to attain. Section 7513(a) provides that: "Every area designated nonattainment for PM-10 pursuant to section 7407(d) shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart as a "Moderate Area") at the time of such designation." 42 U.S.C. § 7513(a). Implementation plans complying with the requirements of Subpart 4 for moderate areas must be submitted to EPA "18 months after the designation as nonattainment." 42 U.S.C. § 7513a(a)(2)(B).

The deadline for moderate areas to attain the national standards is "as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment . . . ." *Id.* § 7513(c)(1). Areas that

cannot attain by the moderate area deadline are to be reclassified as "serious" nonattainment areas. *Id*. § 7513(b). Serious areas are provided more time to attain the national standards but must adopt new implementation plans containing more stringent control measures. *See id*. §§ 7513(c)(2) and 7513a(b). The attainment deadline for serious nonattainment areas is again "as expeditiously as practicable," but "no later than the end of the tenth calendar year beginning after the area's designation as nonattainment." *Id*. § 7513(c)(2).

For the 1997 $PM_{2.5}$ standards, EPA's nonattainment designation and classification rulemaking became effective April 5, 2005. *See* 70 Fed. Reg. 944 (Jan. 5, 2005). Applying section 7513, the moderate area attainment deadline for these areas would have been December 31, 2011, and the serious area deadline is December 31, 2015. The designation for the 2006 $PM_{2.5}$ standard became effective December 14, 2009. *See* 74 Fed. Reg. 58688 (Nov. 13, 2009). The moderate area attainment deadline for the 2006 standard is thus December 31, 2015, and the serious area deadline is December 31, 2019.[1]

In addition to spelling out these deadlines, the Act also specifies the consequences of missing these deadlines. First, section 7509(a) provides that if

[1] EPA designated one additional 2006 $PM_{2.5}$ nonattainment area – West Central Pinal, Arizona – effective March 7, 2011. *See* 79 Fed. Reg. at 31569 n.5 [JA___]. The moderate area attainment deadline for this area is December 31, 2017. For simplicity, the remainder of the brief will not call out this separate area and deadlines, but the arguments herein are similarly relevant.

EPA "finds that a State has failed, for an area designated nonattainment under section 7407(d) of this title, to submit a plan . . . , unless such deficiency has been corrected within 18 months after the finding, . . . one of the sanctions referred to in subsection (b) of this section shall apply . . . until the [EPA] determines that the State has come into compliance . . . ." 42 U.S.C. § 7509(a). The sanctions provided in 7509(b) include more stringent permitting requirements for new sources and the loss of certain federal highway funds. *Id*. § 7509(b); *see also* 40 C.F.R. § 52.31 (EPA regulations governing application of sanctions).

Subpart 4 specifically addresses the failure to attain by the specified attainment deadlines. Section 7513(b)(2) states:

> Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable date –
>
> > (A) the area shall be reclassified by operation of law as a Serious Area; and
> >
> > (B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

42 U.S.C. § 7513(b)(2). Section 7513a(b)(2) requires states with areas reclassified as serious nonattainment areas to submit revised implementation plans complying with section 7513a(b)(1) within 18 months of being reclassified. *Id*. § 7513a(b)(2).

III. EPA's Classification Rule.

On June 2, 2014, EPA finalized the Classification Rule purporting to respond to the *NRDC* court's decision regarding implementation of the $PM_{2.5}$ standards. 79 Fed. Reg. at 31567 [JA___]. The final rule classified all nonattainment areas under both the 1997 and 2006 $PM_{2.5}$ standards as "moderate" nonattainment areas and established a new deadline for states to submit plans complying with the moderate area implementation plan requirements of Subpart 4. *Id*. at 31568 [JA___]. EPA explained that "[u]nder the unique circumstances presented here, the EPA relies on its authority under [42 U.S.C. § 7601] to establish a reasonable, and expeditious, deadline of December 31, 2014, by which states must submit [implementation plans] consistent with the subpart 4 requirements." *Id*.

STANDARD OF REVIEW

The Act's judicial review provision provides for reversal of EPA actions found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). In determining whether EPA's actions comport with statutory requirements, this court applies the two-step analysis of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under step one of *Chevron*, the court must "give[] effect" to congressional intent discerned using "traditional tools of statutory construction." *Id*. at 843 n.9. Agency actions that conflict with

plain statutory requirements must be rejected. When "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. Where Congress has failed to make its intent clear, step two of *Chevron* provides for judicial deference to reasonable agency interpretations of the statute. *Id*. at 845.

SUMMARY OF ARGUMENT

EPA's Classification Rule resets the deadlines and statutory consequences plainly provided by the statute. EPA points to no ambiguity in these statutory requirements and no authority specifically allowing EPA to reset these deadlines. Instead EPA relies on general Clean Air Act rulemaking authority provided in 42 U.S.C. § 7601. This Court, however, has repeatedly rejected EPA's use of this general rulemaking authority to rewrite specific statutory provisions of the Act. EPA additionally offers broad assertions of fairness and judicial presumptions against retroactive rulemaking to support its action. These non-statutory claims cannot provide the Agency authority is does not have, and are based on a flawed analysis of the "pre-decisional" effect of this Court's decision in *NRDC* finding that implementation of the $PM_{2.5}$ standards must be governed by subpart 4.

STANDING

Petitioners are all nonprofit organizations dedicated to the protection of public health and the environment. *See* Decl. of Yolanda Andersen ¶ 4;[2] Decl. of Julie Pokrandt ¶ 4; Decl. of Pamela Miller ¶ 3; Decl. of Kevin Hamilton ¶ 2; Decl. of Linda (Lou) Sue Brown ¶ 2; Decl. of Martha Dina Arguello ¶ 4; Decl. of Kevin Mueller ¶ 3.

As outlined above, $PM_{2.5}$ is associated with a variety of severe adverse health effects including premature death from heart and lung disease, aggravation of asthma and other respiratory ailments, decreased lung function, development of chronic respiratory disease, increased cardiac-related risk, and increased hospital and emergency room visits for respiratory and cardiac conditions. *See* 71 Fed. Reg. at 61154-55; 71 Fed. Reg. at 2627-36. EPA estimates that $PM_{2.5}$ pollution is responsible for thousands of premature deaths annually. 71 Fed. Reg. at 61154-55. In addition to health impacts, particulate matter pollution is the main cause of visibility impairment in the nation's cities and national parks, thereby adversely impacting public welfare in a substantial way. *See* 71 Fed. Reg. at 2675-77.

Petitioners have members who live, work, or recreate in areas that fail to comply with the 1997 and 2006 national standards for $PM_{2.5}$ pollution. *See, e.g.*, Andersen Decl. ¶ 7-9 (reporting numbers of Sierra Club members in key $PM_{2.5}$

[2] All supporting declarations are included in the Addendum to this brief.

nonattainment areas); Pokrandt Decl. ¶ 9 (same for Center for Biological Diversity); Arguello Decl. ¶ 6. Petitioners' members are suffering from the health and other impacts that $PM_{2.5}$ pollution is having in their areas. *See, e.g.*, Decl. of Paula Calzada ¶¶ 4-7 (describing how $PM_{2.5}$ pollution in Rialto, California has affected her health and the health of her son and has limited their activities); Decl. of Patrice Lee ¶¶ 4-6 (describing the health and financial hardships she suffers as a result of $PM_{2.5}$ pollution in Fairbanks, Alaska); Mueller Decl. ¶¶ 5-6 (describing how high $PM_{2.5}$ pollution days in Salt Lake City, Utah has limited his outdoor activities); Decl. of Tom Frantz ¶¶ 7 (describing the breathing problems he experiences during period of high $PM_{2.5}$ pollution in the San Joaquin Valley in California); Decl. of Tom Hothem ¶¶ 3-6 (describing the health and aesthetic impacts that he suffers as a result of $PM_{2.5}$ pollution in Merced, California); Hamilton Decl. ¶¶ 12-23 (describing the health impacts he and his family suffer in Fresno, California, and the resulting financial impacts those cause); Decl. of Felix Aguilar ¶ 6-7 (describing health impacts suffered in Los Angeles air basin); Decl. of Ileene Anderson ¶¶ 8-13 (describing how $PM_{2.5}$ pollution impacts the outdoor environments she enjoys in the San Joaquin Valley and Los Angeles air basins); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975) (finding membership organizations have standing where "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action").

Petitioners' members believe EPA's Classification Rule has deprived them of the health and welfare protections guaranteed by the Act by delaying the deadlines and mandatory duties established by Congress to protect the public from harmful levels of particulate matter pollution. *See, e.g.*, Calzada Decl. ¶ 8; Frantz Decl. ¶¶ 8-9; Hothem Decl. ¶ 8; Lee Decl. ¶ 8-9; Hamilton Decl. ¶ 25; Brown Decl. ¶ 10; Mueller Decl. ¶ 10-11; Aguilar Decl. ¶ 9-10. In addition, several Petitioners have actively tried to enforce the statutory deadlines and mandatory duties related to the implementation of the $PM_{2.5}$ standards only to have EPA use the Classification Rule as a shield to prevent enforcement. *See, e.g.*, EPA Motion to Dismiss at 2, *Citizens for Clean Air v. McCarthy*, No. 2:14-cv-00610-MJP (W.D. Wash. filed Sept. 19, 2014). Vacating the Classification Rule would redress these injuries by "reinstating" the deadlines and mandatory duties provided in the Act, and preventing EPA from resetting these deadlines as a shield against enforcement of these deadlines and mandatory duties.

ARGUMENT

I. EPA'S CLASSIFICATION RULE CREATES A NEW IMPLEMENTATION SCHEME THAT CONFLICTS WITH THE REQUIREMENTS OF SUBPART 4.

A. EPA's New Deadline For Submitting Nonattainment Plans Conflicts With The Plain Language Of The Clean Air Act.

Implementation plans complying with the requirements of Subpart 4 for moderate areas must be submitted to EPA "18 months after the designation as

nonattainment . . . .” 42 U.S.C. § 7513a(a)(2)(B). Thus, areas designated nonattainment on April 5, 2005 under the 1997 $PM_{2.5}$ standards should have submitted their moderate area plans by October 5, 2006. For areas designated nonattainment on December 14, 2009 under the 2006 $PM_{2.5}$ standard, the deadline for submitting the moderate area plans was June 14, 2011. There is no ambiguity in these statutory deadlines (and EPA does not even try to invent any). The plan submittal deadlines are tied to the date the areas were designated nonattainment under section 7407(d) and there is no question as to when those designations occurred. EPA's final rule resetting the plan submittal deadlines to December 31, 2014 is in direct conflict with the plain statutory language.

By resetting these deadlines, EPA is also resetting all of the deadlines for sanctions and other consequences for failing to submit plans by the applicable deadlines. *See, e.g.*, 42 U.S.C. § 7509(a). EPA has no such authority.

B. EPA Erroneously Required Areas Still Violating the 1997 $PM_{2.5}$ Standards to Comply Only With Moderate Area Requirements Instead of the More Protective Serious Area Requirements.

The attainment date for moderate nonattainment areas was “the end of the sixth calendar year after the area's designation as nonattainment.” 42 U.S.C. § 7513(c)(1). The attainment deadline for areas designated in April 2005 as nonattainment under the 1997 $PM_{2.5}$ standards was thus December 31, 2011. Pursuant to section 7513(b)(2), EPA should have made a determination as to

whether these areas had attained the standard by June 30, 2012. Those areas that EPA finds failed to attain the 1997 $PM_{2.5}$ standards by December 31, 2011 should have been reclassified by operation of law as "serious" nonattainment areas. *Id.* § 7513(b)(2)(A). Serious area plans for these areas should have been submitted by no later than December 31, 2014 – 18 months after reclassification of the area as a serious area. *Id.* § 7513a(b)(2).

EPA's rulemaking acknowledges that Libby, MT, San Joaquin Valley, CA and the Los Angeles-South Coast Air Basin, CA failed to attain the 1997 $PM_{2.5}$ standards by the December 31, 2011 deadline and continue to violate the standards. *See* 78 Fed. Reg. at 69809 [JA___] (explaining that EPA has not determined that the air in these areas is clean and that these areas have not requested to be "redesignated" as attaining the standards). EPA's decision to ignore these continuing violations and pretend that Subpart 4 only requires moderate area plans and controls for these areas is irreconcilable with the requirements of the Act. *See* 79 Fed. Reg. at 31568 [JA___] ("Because these areas are classified as Moderate, and not Serious, the affected states are required at this time to submit plans for these areas that satisfy [section 7513a(a)] and not section [7513a(b)]."). The Act required EPA to make a finding that these areas had failed to attain, which would have reclassified these areas by operation of law and triggered the obligation for these areas to submit implementation plans meeting the more stringent

requirements of section 7513a(b)(1). EPA's circular argument that serious area plans are not required because EPA has chosen to classify these areas as moderate nonattainment areas – notwithstanding the fact that these areas long ago missed the moderate area attainment deadline – is inconsistent with the plain statutory scheme outlined in Subpart 4.

II. EPA LACKS STAUTORY AUTHORITY TO RESET THE IMPLEMENTATION SCHEME OF SUBPART 4.

EPA does not point to any specific authority that allows the Agency to change the framework or deadlines specified in Subpart 4. Nor does EPA claim that Congress left gaps in the statutory language for EPA to fill. EPA nonetheless claims that Congress provided the Agency general rulemaking authority in 42 U.S.C. § 7601 to establish new "reasonable, and expeditious, deadlines . . . ." 79 Fed. Reg. at 31568 [JA___].

Section 7601(a)(1) authorizes EPA to "prescribe such regulations as are necessary to carry out [its] functions under [the Act]." This Court, however, has "consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point." *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014); *see also Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir.1995) ("the general grant of rulemaking power to EPA cannot trump specific portions of the CAA"); *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir.1992) (rejecting EPA's use of general rulemaking authority to add to a

statutorily specified list); *Sierra Club v. EPA*, 719 F.2d 436, 453 (D.C.Cir.1983) (same). As the Court has explained, "Th[e]se precedents establish a simple and sensible rule: EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill." *NRDC*, 749 F.3d at 1064.

EPA can point to no gap in the statutory language itself. The "problems" that EPA references as justifying EPA actions (*e.g.*, unfairness and concerns about retroactivity, discussed *infra*) are not the product of gaps in the statutory language but of EPA's prior illegal actions. The language itself admits no ambiguity in terms of when implementation plans are due, when standards must be attained, and when more stringent requirements must be met. Section 7601 does not delegate open-ended authority to rewrite plain statutory requirements – even where EPA's past actions have made a hash of them.

Facing otherwise plain statutory mandates and having no statutory authority to alter those mandates, EPA's legal analysis (and the Court's) should end here. EPA must follow the requirements and deadlines of Subpart 4, and the Classification Rule is inconsistent with those requirements. But EPA argues that fairness and judicial presumptions against retroactivity support EPA's decision to revise the implementation scheme clearly outlined by Congress. EPA's non-statutory arguments lack merit.

III. EPA'S ARGUMENTS FOR NOT IMPLEMENTING SUBPART 4 AS WRITTEN LACK MERIT.

A. Implementing Subpart 4 as Written Does Not Create Unfair Hardships on States.

EPA argues that its decision to rewrite the statute is justified because to follow it as written would be unfair to states that had relied on EPA's prior illegal implementation rules. *See, e.g.*, 79 Fed. Reg. at 31569 [JA___] (claiming that requiring compliance with Subpart 4 deadlines "would effectively penalize states that followed EPA's guidance and regulations").

Before turning to the specifics of the statute, it is important to note that such "fairness" arguments are entirely beside the point where the Agency lacks authority to make such judgment calls. An agency may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). Moreover, EPA's fairness claim is truly nothing more than an empty assertion. EPA never specifies how, in fact, states will be "penalized" at all, let alone in a way that creates an obvious unfairness. Nor does EPA explain why its concern for being "fair" to states, justifies waiving the health protections guaranteed by the statute's scheme of deadlines and consequences. Indeed, the *Environmental Protection* Agency offers no argument for why its rewriting of the statutory framework supports its directives to protect the

environment. *See* 42 U.S.C. § 7401(b)(1) (purpose of the Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare").

EPA's fairness arguments ring hollow in any event because the statute provides a detailed set of provisions that give EPA and states ample time to cure the failures that have occurred. Instead of changing the statutory deadline for moderate area plans, EPA was required to make a finding that the nonattainment areas had failed to submit required plans (referred to as a "finding of failure to submit"). *See* 42 U.S.C. § 7509(a); *see also id.* § 7410(k)(1)(B) (requiring assessment of whether a "complete" plan has been submitted "no later than 6 months after the date, if any, by which a State is required to submit the plan or revision"). Such a finding puts states on a "clock" to prepare and submit compliant plans within 18 months or become subject to more stringent new source permitting requirements. *Id.* § 7509(b)(2); 40 C.F.R. § 52.31(d)(1). If a state fails to submit a compliant plan within two years, the state will face restrictions on certain federal highway funds, and EPA is obligated to adopt a federal implementation plan complying with the requirements of Subpart 4, which will stay in effect until replaced by a compliant state implementation plan. 42 U.S.C. §§ 7509(b)(1) and 7410(c)(1); 40 C.F.R. § 52.31(d)(1). Through these provisions, the statute creates strong incentives for states to take action without immediately "punishing" them

for noncompliance. EPA's claim that "[a]n EPA finding of failure to submit a [state implementation plan] under subpart 4 . . . would not give the states the opportunity to prepare or submit an appropriate [plan] before being found in default of that obligation" is simply misleading. *See* 79 Fed. Reg. at 31569. States will have the same 18-month opportunity to prepare compliant plans that they would have had under section 7513a(a)(2)(B). The only difference is that there are now consequences for failing to meet those deadlines. *See NRDC v. EPA*, 22 F.3d 1125, 1131 (D.C. Cir. 1994) (describing Clean Air Act's "statutory teeth" for enforcing planning deadlines).

B. Implementing Subpart 4 as Written is not Inappropriate Retroactive Application of the Law.

EPA's most developed legal argument claims that requiring states to comply with the deadlines and planning requirements plainly provided in Subpart 4 would represent improper retroactive application of those statutory provisions and the court's decision in *NRDC*. *See, e.g.*, 79 Fed. Reg. at 31568 [JA___] (explaining "it is the EPA's position that the *NRDC* decision does not apply retroactively"). EPA's legal analysis is flawed.

As the Supreme Court stated in *Reynoldsville Casket Co. v. Hyde*, when a court "decides a case and applies the (new) legal rule of that case to the parties before it, then . . . it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those

cases involve predecision events." 514 U.S. 749, 752 (1995). What EPA refers to as "retroactive" application is, in fact, necessary for a statutory construction decision like *NRDC* because "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added); *see also id.* at 313 n.12 ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted.").

Thus, EPA's "retroactive" label is misleading—the statutory obligations at issue here have always been in place and effective since they were adopted, and are not waiting to spring into force once EPA chooses to start following the law. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281 (D.C. Cir. 1995) ("Because the decision of an Article III court, however, announces the law 'as though it were finding it – discerning what the law is, rather than decreeing what it is . . . changed to, or what it will tomorrow be,' . . . all parties charged with applying that decision, whether agency or court, state or federal, must treat it as if it had always been the law." (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring). The failure to apply the holding in *NRDC* will

serve to perpetuate EPA's error well into the future across many jurisdictions – a result the case law plainly seeks to avoid. *See, e.g.*, *NRDC*, 706 F.3d at 436 (holding that "EPA *must* implement . . . its $PM_{2.5}$ standards . . . pursuant to Subpart 4") (emphasis added).

EPA relies heavily on a district court decision in Colorado that declined to enforce deadlines in Subpart 4 that had passed during the time that EPA claimed Subpart 4 did not apply to the $PM_{2.5}$ standards. *See* 79 Fed. Reg. at 31569 [JA___] (citing *WildEarth Guardians v. McCarthy*, No. 13-cv-1275-WJM-KMT, 2014 WL 943136 (D. Colo. Mar. 11, 2014)). In that case, EPA persuaded the district court to adopt the Agency's view that because this Court remanded but did not vacate the $PM_{2.5}$ implementation rules before it in *NRDC*, it should be inferred that "the *NRDC* court intended its decision to be prospective in effect, rather than retroactive." *WildEarth*, 2014 WL 943136 at *4. The district court also expressed concern that "retroactive" application of *NRDC* "would unfairly burden the States" who "were entitled to rely on the Implementing Rule promulgated by the EPA in scheduling the pace with which they would proceed in developing their $PM_{2.5}$ SIPs." *Id.* (citation omitted).

The *WildEarth* decision is not binding on this Court and defies controlling precedent on the retroactive application of judicial decisions as noted above. The determining factor in a judicial retroactivity analysis is whether the previous

decision "applie[d] the (new) legal rule of that case to the parties before it"—if so, other courts must apply the same legal rule to pre-decision events. *Hyde*, 514 U.S. at 752. The *WildEarth* decision misapplied this test when, as "the primary basis" for its decision, it viewed *NRDC*'s remedy of remand as evidence that the decision should only apply prospectively. 2014 WL 943136 at *4. The remand itself is proof that the legal rule of the case was applied to the parties, as "any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court." *James B. Beam Distilling Co.*, 501 U.S. at 539. Further, although the *WildEarth* decision expressed concern that states might be unfairly burdened by their reliance on EPA's earlier, pre-*NRDC* view of the law, *see* 2014 WL 943136 at *4, the Supreme Court has held that even where parties "may have reasonably relied upon" previous law, "this type of justification—often present when prior law is overruled—is . . . insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it)." *Hyde*, 514 U.S. at 753-54.

EPA's reliance on *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004), and *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002), is even more misplaced. Both cases reject requests to apply EPA *rulemaking* retroactively. *See Sierra Club v. Whitman*, 285 F.3d at 68 (rejecting request to make rule effective before the date

of promulgation); *Sierra Club v. EPA*, 356 F.3d at 310-11 (citing *Sierra Club v. Whitman* to reject request to make requirements triggered by reclassification due before reclassification occurred). Here there is no issue of making a rule retroactive. The deadlines here are statutory and do not depend on the effectiveness of EPA's Classification Rule. Indeed no Classification Rule is required at all. Petitioners seek vacature to eliminate the legal shield EPA's rule has created against enforcement of the statute. Petitioners are not asking EPA to set deadlines retroactively because EPA has no authority to set any deadlines at all.

Moreover the effect of these deadlines is not "retroactive" in that the consequences of missing them do not apply retroactively. These deadlines have been missed and EPA is under a mandatory duty to enforce them. Nothing in Petitioners' arguments requires "back-dating" Agency actions or would otherwise violate the Administrative Procedures Act's prohibition on retroactive rulemaking. *Cf. Sierra Club v. Whitman*, 285 F.3d at 68.

CONCLUSION AND RELIEF REQUESTED

In sum, the D.C. Circuit's holding in *NRDC* that "under *Chevron* step 1, EPA must implement all standards applicable to PM_{10}—including its $PM_{2.5}$ standards—pursuant to Subpart 4," 706 F.3d at 436, means that the requirements of Subpart 4 necessarily govern disposition of this lawsuit. EPA has no discretion to rewrite the deadlines in Subpart 4. Petitioners, therefore, respectfully request that

the Court vacate the Classification Rule and order EPA to comply with the requirements of Subpart 4 as written.

DATED: January 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing brief is within the applicable word limit provided under Fed. R. App. Procedure Rule 28.1(e)(2) and this Court's orders, in that it contains 6,078 words according to counsel's word processing system.

DATED: January 16, 2015

/s/ Paul Cort
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 16, 2015, I electronically filed **OPENING BRIEF OF PETITIONERS** 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 16, 2015

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