ORAL ARGUMENT NOT YET SCHEDULED

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

No. 04-1200 (and consolidated cases)

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Final Action of the
United States Environmental Protection Agency

FINAL OPENING BRIEF OF ENVIRONMENTAL PETITIONERS AND SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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DATED: May 4, 2006 (refiled with Joint Appendix citations June 23, 2006).

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

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*	)	
Petitioners,	)	
v.	)	No. 04-1200 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES OF ENVIRONMENTAL PETITIONERS AND SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Petitioners American Lung Association, Conservation Law Foundation, Environmental Defense, Louisiana Environmental Action Network, Natural Resources Defense Council, Sierra Club, South Coast Air Quality Management District, and Southern Alliance for Clean Energy ("Environmental Petitioners") submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and *Amicus Curiae* Who Appeared in the District Court

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors and *amici* who appeared below is inapplicable because D.C. Circuit No. 04-1200 (and consolidated cases) are not appeals from the ruling of a district court.

(ii) Parties to These Cases

Petitioners are South Coast Air Quality Management District (Nos. 04-1200 and 05-1386); State of Ohio (No. 04-1201); Louisiana Environmental Action Network (No. 04-1206); The Chamber of Greater Baton Rouge, The West Baton Rouge Chamber of Commerce, The Iberville Parish Chamber of Commerce, The Louisiana Oil Marketers and Convenience Store Assn, Couhig Southern Environmental Services of Baton Rouge, Inc, Lovie Robinson Hammett (No. 04-1208); American Lung Assn, Environmental Defense, Natural Resources Defense Council, Sierra Club (Nos. 04-1210, 04-1376, 04-1379, 05-1281, 05-1282, 05-1376); Conservation Law Foundation, Southern Alliance for Clean Energy (Nos. 04-1212 and 05-1385); National Petrochemical and Refiners Assn (No. 04-1216); Commonwealth of Massachusetts, State of Connecticut, State of New York, District of Columbia (Nos. 04-1377 and 05-1359); Commonwealth of Pennsylvania, State of Delaware, State of Maine (No. 04-1377); and the Commonwealth of Pennsylvania, Department of Environmental Protection (No. 05-1359).

Respondents are United States Environmental Protection Agency and Stephen L. Johnson, Administrator, United States Environmental Protection Agency.

Intervenors for respondents are State of Georgia, National Environmental Development Assn, National Petrochemical & Refiners Assn, American Chemistry Council, American Forest and Paper Assn., Inc, American Petroleum Institute, National Assn of Manufacturers, Utility Air Regulatory Group, Renewable Fuels Assn, American Lung Assn, Environmental Defense, Natural Resources Defense Council, and Sierra Club.

(iii) *Amici Curiae* in These Cases

Amici are The Chamber of Greater Baton Rouge, The West Baton Rouge Chamber of Commerce, The Iberville Parish Chamber of Commerce, The Louisiana Oil Marketers and

Convenience Store Assn, Couhig Southern Environmental Services of Baton Rouge, Inc, and Lovie Robinson Hammett.

(iv) Circuit Rule 26.1 Disclosures for Environmental Petitioners

American Lung Association. American Lung Assn has no parent companies, and no publicly held company has a 10% or greater ownership interest in American Lung Assn.

American Lung Assn, a nonprofit corporation organized and existing under the laws of the State of Maine, is a national organization dedicated to the conquest of lung disease and the promotion of lung health.

Conservation Law Foundation. Conservation Law Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in Conservation Law Foundation.

Conservation Law Foundation, a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts, works to solve the environmental problems that threaten the people, natural resources, and communities of New England, on behalf of its members who live throughout the New England region.

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

Environmental Defense, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

Louisiana Environmental Action Network. Louisiana Environmental Action Network ("LEAN") has no parent companies, and no publicly held company has a 10% or greater ownership interest in LEAN.

LEAN, an organization existing under the laws of Louisiana, is a non-profit, public interest, grassroots environmental organization.

Natural Resources Defense Council. Natural Resources Defense Council ("NRDC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in NRDC.

NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

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 dedicated to the protection and enjoyment of the environment.

Southern Alliance for Clean Energy. Southern Alliance for Clean Energy has no parent companies, and no publicly held company has a 10% or greater ownership interest in Southern Alliance for Clean Energy.

Southern Alliance for Clean Energy, a nonprofit corporation organized and existing under the laws of the State of Tennessee, is a regional organization working in eight southeastern states on energy issues, and dedicated to finding positive solutions to the negative impacts of power

production by working for clean air policies and promoting the use of renewable energy and implementation of energy efficiency practices.

(B) Rulings Under Review

Petitioners seek review of the final actions (including promulgation of regulations) taken by respondents United States Environmental Protection Agency and Michael O. Leavitt, Administrator, United States Environmental Protection Agency, at 69 Fed. Reg. 23951 (April 30, 2004), 69 Fed. Reg. 23858 (April 30, 2004), 70 Fed. Reg. 30592 (May 26, 2005), and 70 Fed. Reg. 39413 (July 8, 2005).

(C) Related Cases

The instant case, No. 04-1200 (and consolidated cases), is a challenge to EPA's "Phase 1" rule, promulgated April 30, 2004, and certain related actions, all regarding implementation of national clean air standards for ozone. In case No. 06-1045, some of the petitioners in No. 04-1200 also challenge EPA's "Phase 2" ozone implementation rule promulgated November 29, 2005, and certain other EPA actions. The two cases involve different rules, although the Phase 1 and Phase 2 ozone rules share the same EPA docket number. No briefing schedule or argument date have yet been set in No. 06-1045.

In *Environmental Defense v. EPA*, No. 04-1291 (D.C. Cir.), oral argument held December 1, 2005, three of the environmental petitioners in the instant case are challenging an EPA rule relating to air quality conformity on some of the same grounds as those raised in part I.F. of the following brief in the instant case.

DATED: October 17, 2005 (refiled with Joint Appendix citations June 23, 2006).

Respectfully submitted,

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GLOSSARY

CAA	Clean Air Act
CI	Certified Index
EPA	United States Environmental Protection Agency
JA	joint appendix
LAER	lowest achievable emission rate
MPOs	metropolitan planning organizations
MVEBs	motor vehicle emission budgets
NAAQS	national ambient air quality standard
NSR	new source review
NOx	oxides of nitrogen
ppm	parts per million
PSD	prevention of significant deterioration
RFP	reasonable further progress
ROP	rate of progress
RTC	Response to Comments
SIP	State Implementation Plan
SCAQMD	South Coast Air Quality Management District
Subpart 1	Subpart 1 of Part D of Clean Air Act’s Title I
Subpart 2	Subpart 2 of Part D of Clean Air Act's Title I
tpy	tons per year
VOC	volatile organic compound

JURISDICTIONAL STATEMENT

(A) Agency. Respondent U.S. Environmental Protection Agency ("EPA") has jurisdiction to issue regulations implementing the Clean Air Act ("CAA" or "the Act"). CAA §§301(a)(1), 172(e), 176(c), 42 U.S.C. §§7601(a)(1), 7502(e), 7506(c).

(B) Court of Appeals. This Court has jurisdiction to review the final EPA actions (including promulgation of national regulations) challenged in this proceeding. CAA §307(b)(1), 42 U.S.C. §7607(b)(1)

(C) Timeliness. Each petition addressed herein was timely filed within sixty days of the publication of the challenged final action in the *Federal Register* of 69 Fed. Reg. 23951 (Apr. 30, 2004)(petitions filed June 25 and June 29, 2004); 69 Fed. Reg. 23858 (Apr. 30, 2004) (petition filed June 29, 2004); 70 Fed. Reg. 30592 (May 26, 2005)(petition filed July 21, 2005); 70 Fed. Reg. 39413 (July 8, 2005)(petition filed July 21, 2005), and 70 Fed. Reg. 44470 (Aug. 3, 2005)(petitions filed Sept. 27, 2005 and Oct. 3, 2005).

(D) Standing. Petitioners herein are the South Coast Air Quality Management District ("SCAQMD"), and American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Conservation Law Foundation, Southern Alliance for Clean Energy, and Louisiana Environmental Action Network ("Environmental Petitioners"). The rules at issue govern implementation of health standards for smog in more than 450 counties throughout the United States, including the area governed by SCAQMD and many communities where Environmental Petitioners' members live. *See* 69 Fed. Reg. 23876-951; Attached declarations.

SCAQMD is the regional air pollution control agency responsible pursuant to the CAA and California law for developing and implementing plans to attain clean air health standards –

including health standards for ozone - in the South Coast Air Basin ("Basin"). CAA §107, 42 U.S.C. §7407; Cal. Health & Safety Code §40410 et seq. The Basin encompasses the nondesert portions of Los Angeles, San Bernardino and Riverside Counties and Orange County. Cal. Health & Safety Code §40410. With a population of over 16 million people, the Basin is the single most heavily impacted area in the country by unhealthful levels of ozone pollution. It was classified in 1990 as an "extreme" nonattainment area for 1-hour ozone – the most severe classification possible under the Act – and has been classified as "severe-17" for the 8-hour ozone standard, the most polluted classification of any area in the nation. 40 C.F.R. §81.305; 69 Fed. Reg. 23882[JA25]. EPA's rules directly impact SCAQMD's CAA obligations for attainment planning and implementation, erode protections for the health of the Basin's residents, reduce progress by agencies, including EPA to control emissions, and diminish incentives to develop needed control technologies.

Environmental Petitioners are organizations whose purposes include the protection and improvement of air quality and public health. *See* membership declarations. They have standing to bring this challenge on behalf of their many members, who breathe air where they live and work that fails to meet minimum federal health protection standards for ozone pollution. Attached declarations; 40 C.F.R. Part 81 Subpart C. Exposure to such polluted air increases the risk of asthma attacks, lung damage, irreversible reduction in lung function, lower quality of life, and other injury to these members' health and welfare.[1] The challenged rules weaken and delay requirements for limiting and reducing such ozone air pollution, thereby prolonging and exacerbating adverse health and welfare threats to Environmental Petitioners' members from

[1] 68 Fed. Reg. 32802, 32804 (June 2, 2003)[JA205](describing adverse effects of ozone); 62 Fed. Reg. 38856, 38875 (July 18, 1997)[JA201] (describing ozone-related "damage … to vegetation and natural resources")

ozone pollution. Further support for Petitioners' standing appears in the materials cited in this brief and in the appended declarations.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum to this brief.

STATEMENT OF ISSUES

Whether EPA acted unlawfully or arbitrarily in:

1. Allowing communities to weaken or eliminate antipollution measures that Congress expressly mandated to limit and reduce unhealthful ozone levels, including: a) limitations and control requirements that Congress established for new and modified major sources of pollution; b) pollution controls that Congress mandated to assure timely progress toward and attainment of clean air standards; c) contingency measures that Congress required to compensate for any shortfalls in required pollution reductions; d) emission fees that Congress mandated to create financial incentives to reduce pollution in areas that fail to achieve health protection standards by statutory deadlines; and e) limits on motor vehicle emissions previously included by states in their federally approved clean air plans to assure timely progress toward and attainment of ozone health standards;

2. Providing that the 1-hour ozone national ambient air quality standard ("NAAQS") will no longer apply to an area one year after the effective date of the designation of that area for the 8-hour ozone standard, contrary to EPA's pre-existing rule that kept the 1-hour standard in place until attained.

3. Exempting most 8-hour ozone nonattainment areas from specific requirements that Congress mandated to protect residents of areas that violate ozone standards (Subpart 2 of Part D of the Clean Air Act's Title I), and instead providing residents of those areas with only the more

limited protections that Congress created for nonattainment areas in general (Subpart 1 of Part D).

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

Petitioners challenge final EPA actions governing implementation of national air quality standards for ozone pursuant to the Clean Air Act. The challenged actions were published at 69 Fed. Reg. 23951 (Apr. 30, 2004); 69 Fed. Reg. 23858 (Apr. 30, 2004); 70 Fed. Reg. 30592 (May 26, 2005); 70 Fed. Reg. 39413 (July 8, 2005); and 70 Fed. Reg. 44470 (Aug. 3, 2005).

STATEMENT OF FACTS

A. The Statute

Congress enacted the Clean Air Act Amendments of 1970 as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). The Act requires EPA to promulgate national ambient air quality standards for harmful air pollutants, CAA §109, 42 U.S.C. §7409, and directs the states to devise "state implementation plans" ("SIPs") for bringing polluted areas into compliance with the standards. *Id.* CAA §110, 42 U.S.C. §7410. One of the first pollutants for which EPA adopted NAAQS was ozone, a principal component of urban smog, and a severe lung irritant even to healthy adults. *See* 66 Fed. Reg. 5002, 5012/3 (January 18, 2001). Ozone is formed in the atmosphere when volatile organic compounds ("VOCs") and nitrogen oxides ("NOx") are emitted into the air in the presence of sunlight. H.R. Rep. No. 101-490, pt.1 at 202 (1990) ("House Report")[JA726].

The 1970 Act gave states considerable discretion in choosing the manner in which they would attain the standards for ozone and other pollutants. After repeated failure of state cleanup efforts, however, Congress amended the Act in 1977 and 1990 to mandate increasingly

prescriptive requirements for "nonattainment" areas – that is, communities identified by EPA as having air pollution levels exceeding the standards – and to specify requirements for changing an area's attainment status to assure continued public health protection. The 1990 Amendments specified most of these requirements in Part D of title I, CAA §§171-193, 42 U.S.C. §§7501-7515. Subpart 1 of Part D contains general nonattainment requirements, while Subpart 2 mandates stronger and more prescriptive requirements specifically for ozone nonattainment areas.

Among other things, Subpart 2 classifies ozone nonattainment areas as "marginal," "moderate," "serious," "severe," or "extreme" based on the severity and persistence of the area's ozone problem. These classifications and the ozone levels that determine them are set forth in Table 1 of CAA §181(a)(1), 42 U.S.C. §7511(a)(1)("Table 1"). Subpart 2 further directs states to submit SIP revisions demonstrating attainment of the ozone standard in theses areas "as expeditiously as practicable," but no later than deadlines specified in Table 1. *Id.* Congress required these plan revisions to include a number of specific pollution control measures detailed in Subpart 2 plus any additional measures necessary to ensure attainment by the Table 1 deadlines. Among other things, these plan revisions must include "New Source Review" ("NSR") permit programs governing construction and modification of major factories and power plants ("sources"). CAA §§172(c)(5), 173, 42 U.S.C. §§7502(c)(5), 7503. NSR programs must require such sources to install state-of-the-art emission controls and compensate for emission increases with greater offsetting reductions. *Id.* §173. Areas with higher ozone classifications must extend NSR requirements to a wider range of new factories and facility modifications. CAA §§182(c), (d), (e), 302(j), 42 U.S.C. §§7503, 7511a(c), (d), (e), 7602(j). Likewise, Congress required more offsetting pollution reductions for each ton of new pollution in areas with higher classifications: CAA §§182(a)(4), (b)(5), (c)(10), (d)(2), (e)(1).

Where an area fails to meet its attainment deadline, Subpart 2 directs that it be reclassified ("bumped up") to a higher classification "by operation of law." §181(b)(2). Table 1 provides areas with higher classifications more time to attain the standard, but these higher classifications carry with them more safeguards to reduce pollution. *Id.* §§181(a)(1), 182. For example, Congress allowed "moderate" areas six years (until 1996) to attain the standard, and required state plans for such areas to include (among other things) auto emissions testing programs, emission limits for major existing factories, and a "rate of progress" ("ROP" or "RFP") plan adequate to ensure a minimum 15% cut in ozone forming emissions. *Id.* §182(b). By comparison, Congress allowed "serious" areas until 1999 to attain, but state plans for those areas must contain an "enhanced" (i.e., more stringent) auto emission testing program, and must assure a minimum 24% emission cut. *Id.* §182(c). Table 1 provides attainment deadlines for "severe" and "extreme" areas of 2005 and 2010 respectively, and plans for those areas must include increasingly more protective provisions, including emissions fees for certain large industries that fail to reduce their emissions by 20% if the area fails to timely attain. *Id.* §182(d),(e). Congress also mandated that all SIPs contain "contingency" measures that will kick in automatically if the plan fails to produce timely emission reductions or attainment. *Id.* §§172(c)(9), 182(c)(9).

Because motor vehicle emissions contribute significantly to the nation's air pollution problems, the Act further requires that transportation projects "conform" with SIPs, thus ensuring these projects do not cause new or worsen existing air quality violations or delay timely attainment. §176(c). Among other things, this "conformity" provision requires that predicted emissions from transportation projects be consistent with estimates of motor vehicle emissions in the state's plan to attain clean air standards. *Id.* §176(c)(2)(A). To implement this requirement, EPA adopted regulations in 1993 providing for each nonattainment area SIP to contain a "motor vehicle emission

budget" limiting total allowable motor vehicle emissions in the nonattainment area. 40 C.F.R. §93.101, .118; 58 Fed. Reg. 62188 (November, 24, 1993).

B. The Ozone NAAQS and EPA's Implementation Rule

When Congress adopted Subpart 2 in 1990, the ozone NAAQS limited ozone levels to 0.12 parts per million (ppm) averaged over a 1-hour period ("1-hour NAAQS"). Congress established initial classifications of ozone nonattainment areas in Table 1 of Subpart 2 based on the degree to which an area exceeded this 1-hour NAAQS. §181(a)(1), Table 1 (classifying for example any area with 1-hour ozone readings in the range of 0.121 to 0.138 ppm as "marginal," 0.138 to 0.160 as "moderate," and so on). The Act directed states to submit plan revisions at various times between 1990 and 1995 providing for attainment by the applicable Table 1 deadlines and implementing the other Subpart 2 requirements. §182(a)-(e).[2] As noted above, the Act further bumped up each area that missed an attainment deadline to the next highest classification.

In 1997, EPA found based on an extensive scientific review that increased protection to public health was needed beyond the 1-hour ozone NAAQS. 62 Fed. Reg. 38856[JA197]. Accordingly, EPA promulgated an additional ozone NAAQS of 0.08 ppm averaged over an 8-hour period ("8-hour" standard or NAAQS). *Id.* At the same time, the agency adopted a rule providing that in addition to the 8-hour standard, the 1-hour standard would continue to apply in a given nonattainment area until it was attained in that area. *Id.* 38873[JA199]. EPA further announced that it would implement the new 8-hour standard solely under the general nonattainment provisions of Subpart 1, rather than under Subpart 2's more protective ozone-specific requirements. *Id.*

[2] An exception was the SIP revision to require emission fees in "severe" and "extreme" areas, which was not due until 2000. §182(d)(3).

In *Whitman v. American Trucking Assns.*, 531 U.S. 457, 481-86 (2001), the Supreme Court unanimously rejected EPA's policy for implementing the 8-hour standard solely under Subpart 1. The Court found that Congress intended Subpart 2 to govern implementation of ozone standards "far into the future" and that EPA could not render Subpart 2 "abruptly obsolete" or "construe the statute in a way that completely nullifies" the explicit Subpart 2 mandates. *Id.* 485. The Court found a few limited gaps in the Act as to implementation of a new ozone standard, but held these did not justify rendering Subpart 2 "utterly nugatory." *Id.* 484.

After further remand proceedings, EPA on April 30, 2004 designated areas throughout the nation as "attainment" or "nonattainment" for the 8-hour standard, with the designations to take effect on June 15, 2004. 69 Fed. Reg. 23858[JA1]. Also on April 30, 2004, EPA promulgated an ozone implementation rule. 69 Fed. Reg. 23951[JA94]. Among other things, these rules directed that the 1-hour standard would be revoked in an area one year after the effective date of the 8-hour designation for that area. *Id.* 23996[JA139]. Because the 8-hour designations for almost all areas of the nation were effective June 15, 2004, this meant that EPA effectively abolished the 1-hour standard in those areas after June 15, 2005. Notwithstanding the Supreme Court's decision in *Whitman*, the EPA rules also provided that EPA would regulate more than half of the 8-hour nonattainment areas – essentially any that did not violate the 1-hour standard at the time of 8-hour designation - solely under Subpart 1 rather than under Subpart 2. *Id.* 23954[JA97].

The rules provided for regulation under Subpart 2 of those areas that violated the 1-hour standard at the time of 8-hour designation. *Id.* EPA classified these areas using a modified version of Subpart 2's Table 1, with the ozone thresholds for the various classifications adjusted proportionately to reflect ranges of 8-hour exceedances. *Id.* 23997-98[JA140-41]. For example, EPA classified areas with 8-hour ozone levels ranging from .085 up to (but not including) .092 ppm

as "marginal,"[3] .092 to .107 "moderate," .107 to .120 "serious," and so on. *Id.* Outside attainment deadlines for these areas were set at the same number of years Congress had initially allowed for attainment in Table 1, except measured from the effective date of EPA's 8-hour designations (June 15, 2004) rather than the enactment date of the 1990 Amendments. *Id.* Thus, outside attainment deadlines for classified 8-hour nonattainment areas ranged from 2007 to 2024. The Subpart 2 SIP submittal and implementation deadlines were similarly modified to start as of the date of 8-hour designation. See 68 Fed. Reg. 32802, 32817 (June 2, 2003)[JA218].

As a result of EPA's classification approach, almost all pre-existing 1-hour nonattainment areas were given lower 8-hour classifications than their 1-hour classifications. For example, the South Coast Basin - which was "extreme" nonattainment for 1-hour ozone – was classified "severe" for the 8-hour standard. 40 C.F.R. §81.305. Cities like Chicago, Houston, New York, Philadelphia, Baltimore, Washington DC, Baton Rouge, and Atlanta that were "severe" for the 1-hour standard were given "moderate" (or, in the case of Baton Rouge and Atlanta, "marginal") 8-hour classifications. *Id.* §§81.309, .311, .314, .319, .321, .333, .339, .344. EPA's approach also provided those areas with more time to adopt control measures and obtain mandated emission reductions than Congress originally allowed under Subpart 2. *See, e.g.* EPA, Response to Comments Document, April 15, 2004 ("RTC"), Certified Index (CI) document #715, at 119[JA608]. Combined with EPA's suspension of the 1-hour standard, this scheme's effect was to relax anti-pollution requirements for 1-hour nonattainment areas, even those that continued to violate both the 1-hour and 8-hour standards.

[3] Although the 8-hour NAAQS is set at .08 ppm, EPA allows rounding down of ozone levels monitored at concentrations as high as .084 ppm. Accordingly, EPA does not treat ozone levels as exceeding the NAAQS unless they are at or above .085 ppm.

EPA realized that its 8-hour classification scheme and suspension of the one-hour standard would, without more, create the paradoxical situation of allowing 1-hour nonattainment areas to actually weaken ozone control measures at a time when the agency was implementing a more protective ozone standard. Rather than retaining the 1-hour standard, however, EPA attempted to partially mitigate the damage by adopting rules requiring 1-hour nonattainment areas to adhere to some (but not all) of the Congressionally mandated deadlines and requirements for their pre-existing 1-hour classifications. Among other things, these "antibacksliding" rules required 1-hour nonattainment areas to continue to implement measures such as auto emissions testing and enhanced emissions monitoring on the schedules required under their 1-hour classifications. 69 Fed. Reg. 23997-24000[JA140-43]. However, EPA waived continued compliance with several key requirements, including: a) new source review requirements; b) controls required to assure timely progress toward and timely attainment of the 1-hour standard; c) emission fees levied against industries that fail to cut emissions by 20% in severe and extreme 1-hour nonattainment areas that do not timely attain; and d) contingency measures to correct failures to achieve timely progress or attainment. *Id.* 23971-86[JA114-29]; 70 Fed. Reg. 30592[JA149]. EPA further declared that upon suspension of the 1-hour standard, motor vehicle emission limits previously adopted in ozone SIPs would become unenforceable, as would any requirement to ensure that transportation projects meet conformity requirements for the 1-hour standard. 69 Fed. Reg. 23986-87[JA129-30].

The effect of these exclusions is to allow a significant weakening of statutorily mandated ozone control requirements in pre-existing nonattainment areas that have never attained any federal ozone protection standard – whether 1-hour or 8-hour. EPA's relaxation of NSR requirements allows many large factories and power plants to substantially increase their emissions without installing state-of-the-art pollution controls or obtaining emissions offsets that would have been

required under the 1-hour standard. Likewise, EPA's rules let states drop pollution control measures already adopted to achieve emission reductions mandated by Subpart 2 for 1-hour nonattainment areas, without making up the lost reductions. EPA's rules further allow states to drop requirements for emission fees that Congress mandated to create a financial incentive for large factories to reduce emissions by at least 20% in "severe" and "extreme" 1-hour nonattainment areas that fail to timely attain the 1-hour standard. Furthermore, EPA's rules nullify SIP limits on motor vehicle emissions, allowing such emissions to increase and pollution to worsen.

For reasons further set forth below, Petitioners contend that EPA's relaxation of statutory pollution control requirements while implementing a more protective air quality standard was unlawful, arbitrary and capricious.

SUMMARY OF ARGUMENT

This is an appeal of EPA's attempt to withdraw and delay statutory safeguards for people who live in areas that have yet to achieve minimum federal standards for healthful air. More specifically, the Environmental/SCAQMD Petitioners challenge EPA's theory that when it establishes new national health protection standards for ozone pollution it somehow acquires authority to reverse Congress' explicit schedules and mandates for EPA and the states to clean up unhealthful air. EPA cannot reconcile its assertion of authority to waive statutory deadlines and protections with the unambiguous statutory language of the ozone provisions of the 1990 Amendments to the Clean Air Act (known as "Subpart 2").

In Subpart 2, Congress mandated specific statutory safeguards to protect millions of Americans from unhealthful ozone levels. In particular, Congress set forth a table, specifying the precise classifications (i.*e*., "marginal," "moderate," "serious," "severe," or "extreme") assigned by law to areas with ozone levels falling into specific ranges. CAA §181(a) Table 1. In

that same table, Congress specified an attainment deadline for each classification ranging from 1993 to 2010. *Id.* Further, Congress mandated that if an area missed its deadline, the Act would bump it up into a higher (*i.e.*, more protective) classification "by operation of law." *Id.* §181(b)(2). *Id*; *see generally Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (rejecting EPA's attempt to extend attainment deadlines without reclassifying area).

Congress mandated enhanced statutory safeguards for residents of areas with "higher" classifications, since those classifications reflect a longer history of violations (or higher initial ozone levels). These statutory safeguards include, among other things:

- Broadening the definition of "major" sources to include facilities that emit 50, 25, or 10 tons per year (tpy) among those new and modified sources that must install state-of-the art controls, §182(c), (d), (e);
- Reducing the significance threshold (from 40 to 25 tons per year) for emission increases that trigger the obligation to install state-of-the-art controls, *id*. §182(c)(6)-(8), (d);
- Adjusting the ratio (1.5 to 1) that governs the amount of pollution reductions which new or modified major sources must obtain to more than offset each significant increase, *id.* §182(a)(4), (b)(5), (c)(10), (d)(2), (e)(1);
- Requiring state plan revisions to show that nonattainment areas will meet "rate of progress" milestones and their attainment deadlines, *id*. §182(b)(1), (c)(2)(B), (d), (e);
- Requiring state contingency plans to kick in automatically to reduce pollution in the face of missed deadlines, *id*. §§172(c)(9), 182(c)(9); and
- Creating financial incentives, *i.e.*, fees, for sources that fail to achieve 20 percent reductions in most areas that do not meet standards for healthful air by November 2005. *Id*. §182.

Now, fifteen years after enactment of these statutory safeguards, EPA seeks to strip their protections from residents of areas that have never attained any ozone health standard and before Congress' remedial scheme has even run its course. EPA's action must be overturned because it flouts unambiguous statutory language setting deadlines, classifications, and control

requirements for areas that have yet to attain the 1-hour ozone standard. EPA's action also violates Congress' "anti-backsliding" provisions, which – as construed by EPA itself - forbid relaxation of antipollution requirements when EPA strengthens clean air health standards.

The agency's position is all the more untenable given EPA's finding that the 1-hour standard was generally not strict enough and, therefore, people who breathe air that fails to meet that standard are at particular risk. Yet EPA has waived protection for people who have already breathed unhealthful air for a longer period than Congress intended to allow. Thus, EPA has not only departed from unambiguous statutory language (requiring vacatur under step one of the *Chevron* analysis), EPA has also frustrated Congress' purpose in 1990 of providing statutory safeguards to people who, more than a decade later, continue to breathe air that violates the minimum health protection standard for ozone. *Chevron, USA v. NRDC*, 467 U.S. 837 (1984).

Before EPA decided to abrogate the Act's protections for residents of areas that violate the ozone standard, EPA had adopted an approach that maintained those protections by preserving the 1-hour ozone standard (and all protections associated with that standard) in areas that had yet to attain the standard. With the regulations at issue, however, EPA has shifted course and purported to "revoke" the 1-hour standard, without rationally justifying its radical change of position. EPA claims this revocation gives the agency implicit authority to waive statutory deadlines and protections. But whatever authority EPA may have to adopt rules to implement a new standard, it may not exercise it in ways that abrogate other provisions of the statute. Because EPA's decision to revoke the 1-hour ozone standard is part and parcel of a scheme that is inconsistent with statutory protections, that revocation is contrary to law. EPA's administrative revocation of the standard further flies in the face of *Whitman's* finding that Congress "codified" the 1-hour standard in the Act, and violates the Act's express prohibitions

on redesignating dirty-air areas as "clean." EPA also acted arbitrarily and capriciously in failing to consider important health protections provided by the 1-hour standard that the 8-hour standard does not provide, protections that millions of Americans will lose upon the 1-hour standard's revocation.

STANDARD OF REVIEW

The Act's judicial review provision provides *inter alia* for reversal of EPA action found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAA §307(d)(9)(A). Under step one of *Chevron*, the Court must "give[] effect" to congressional intent discerned using "traditional tools of statutory construction." *Chevron, U.S.A.*, 467 U.S. at 843 n.9. 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.* 842-43. An agency receives "no deference" on this issue. *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). Where Congress has failed to make its intent clear, step two of *Chevron* provides for judicial deference to reasonable agency interpretations of the statute. 467 U.S. at 845; *see also Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). Unless otherwise expressly indicated, references in this brief to "unlawful" agency action address both violation of congressional intent under *Chevron* step one and unreasonable agency interpretation under step two. Agency action is arbitrary and capricious if *inter alia* the agency has not "identified and explained the reasoned basis for its decision," *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996), or if it has reached a conclusion that is unsupported by substantial evidence. *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

ARGUMENT

I. EPA'S RELAXATION OF STATUTORY PROTECTIONS MANDATED BY CONGRESS WAS UNLAWFUL AND ARBITRARY[4]

A. EPA Lacks Discretion to Withdraw Statutory Protections or Waive Statutory Deadlines

In striking down EPA's prior attempt to shunt aside Subpart 2 provisions, *Whitman* ruled that "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." 531 U.S. at 485. Nonetheless, EPA has purported to weaken Congress' requirements for control of pollution from new and modified stationary sources, controls and contingency measures to assure progress and timely attainment in those areas, and financial incentives to reduce pollution in areas that are still in violation by November 15, 2005 (15 years after Congress' 1990 Amendments).

As EPA concedes, Congress in 1990 designated and classified nonattainment areas "as a matter of law." 69 Fed. Reg. at 23972/2[JA115]. The classifications were dictated in the Act itself, as were the controls required for each classification. §§181(a), 182. Likewise, Subpart 2 directed bump up of nonattainment areas to higher classifications "as a matter of law" where those areas failed to timely attain the 1-hour standard, and expressly directed that such areas meet the requirements for their new, higher classification. §§181(b)(2)(a), 182(i). As EPA also concedes, Congress further "provided that areas could not remove from the SIP controls mandated by subpart 2 even after the area attains the NAAQS and is redesignated to attainment." 69 Fed. Reg. 23972/2[JA115](emphasis added), citing CAA §175A(d), 42 U.S.C. §7505a(d).

[4] For reasons set forth in Part II below, Petitioners contend that EPA's revocation of the 1-hour standard – which was the agency's pretext for relaxing the Act's specific control requirements – was unlawful, arbitrary and capricious. Should the Court agree with Petitioners on that point, the Court need not reach the arguments in Part I of this brief.

EPA is completely without authority to relax or remove such statutory mandates by administrative fiat. See *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997)("[T]his court has consistently struck down administrative narrowing of clear statutory mandates,"). Indeed, EPA's action conflicts directly with the Supreme Court's holding in *Whitman* that the agency could not render Subpart 2 "abruptly obsolete." 531 U.S. at 485. EPA conceded as much in the preamble to the ozone implementation rule, stating: "We believe if we allowed areas to remove …mandated controls from their SIPs it would render those provisions prematurely obsolete, contrary to Congressional intent." 69 Fed. Reg. 23972[JA115](emphasis added).

EPA's waiver of existing control requirements for nonattainment areas also conflicts with §172(e) of the Act, which requires that upon relaxation of a NAAQS, EPA must "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." CAA §172(e). EPA itself reads this provision as showing congressional intent to also bar backsliding where EPA strengthens a NAAQS.[5] 69 Fed. Reg. 23972/2[JA115] ("We believe that, if Congress intended areas to remain subject to the same level of control where a NAQQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent"). Indeed, to conclude otherwise would produce the absurd result of requiring stronger anti-pollution measures where EPA relaxes a NAAQS than when it strengthens one. Because EPA's ozone implementation rule allows relaxation of "controls applicable to areas designated nonattainment" before the 8-hour standard took effect, the rule flouts both the language and intent of §172(e).

[5] Of course, if EPA is allowed to suspend or revoke the 1-hour standard, it has in effect "relaxed" that standard by eliminating it entirely: in which case §172(e) is directly applicable.

The following discussion addresses specific requirements of the Act that EPA illegally abrogated in its ozone implementation rule and refutes EPA's attempts to justify waiver or relaxation of these requirements.

B. EPA Lacks Authority to Abrogate Statutory Protections From Pollution Emitted by New and Modified Sources.

EPA's rule purports to roll back Congress' requirements to control pollution from new and modified stationary sources in nonattainment areas, including areas that persist in violating the ozone health protection standard past statutory deadlines.

All nonattainment SIPs must include "New Source Review" permit programs governing construction and modification of major factories and power plants. CAA §§110(a)(2)(C), 172(c)(5), 173. Among other things, NSR programs must require such sources to: a) achieve the "lowest achievable emission rate" ("LAER") for ozone-forming pollutants; and b) obtain emission reductions from other sources in the area sufficient to more than offset increased emissions from the new or modified major source ("offsets"). §173.

1. Congress set its requirements in law.

In the 1990 Clean Air Act Amendments, Congress mandated a measured enhancement of the new source review program's public health protections depending on: (a) each nonattainment area's air quality shortly after the 1990 Amendments' enactment, and (b) the number of years after enactment during which residents of the area were forced to breathe air that failed to meet at least the minimum health protection standard for ozone that was before Congress when it passed the 1990 Amendments. More specifically, Congress required that EPA classify each area according to "design value[s]" (based on air-quality monitoring results) that Congress listed in CAA §181(a)(1). To limit the amount of time that U.S. residents would have to breathe air that violates minimum standards, Congress mandated that the Act would bump up

each area into a more protective classification, "by operation of law" if that area failed to meet attainment deadlines. §181(b)(2).

Congress set initial classifications as "marginal," "moderate," "serious," "severe," or "extreme." *Id.* §181(a)(1). The Act then provides for statutory "reclassification" according to the following deadlines: After November 15, 1993, "marginal" areas that failed to attain would become "moderate" nonattainment areas. If those areas failed to attain by 1996, they (as well as areas initially designated as "moderate") would become "serious." Essentially all areas that failed to meet minimum health protection standards by November 15, 1999, would become at least "severe," all "by operation of law." §181(a)(1), (b)(2). Thus, today, even an area that falls within the air quality range for Congress' initial designation of "marginal" should be classified as at least "severe"—because its residents have been breathing unhealthful air for more than 9 years following enactment of the 1990 Amendments.

To protect people who continue to breathe unhealthy air so long after expiration of statutory deadlines, Congress enhanced the new source review program with each bump up in classification. For example, Congress broadened the definition of "major source," which determines, among other things, whether new and modified facilities must install state-of-the-art pollution controls and obtain emission reductions to more than offset increases.[6] For "marginal" and "moderate" areas, Congress did not change the general definition of major source, *i.e.*, 100 tons per year. §302(j). For "serious" areas, however, the Act moved the definition down to "50 tons per year." §182(c). For "severe" areas, the statutory definition is "25 tons per year," *id.*

[6] *See* House Report 234[JA739]("areas with more severe pollution problems are required to regulate increasingly smaller stationary facilities as 'major sources.'"; because the Act's preexisting 100-ton major-source threshold exempted over 90% of the inventory of ozone-forming volatile organic compounds, it is "essential" to regulate smaller sources).

§182(d), and for extreme areas "10 tons per year." §182(e). Thus, essentially all U.S. residents who are still breathing air with unhealthful levels of ozone after November 15, 1999, are entitled to know that new and modified sources that emit 25 or more tons per year will be carefully reviewed and tightly controlled.

Congress also modified the "significance" thresholds by which EPA has historically limited new source review protections. *See* 40 C.F.R. §51.165(a)(1)(x) (establishing a significance threshold of "40 tpy"). Specifically, for "serious" and "severe" areas, Congress barred EPA from considering increases of more than "25 tons" per year to be insignificant. §182(c)(6), (d). Again, this means that all Americans who continued to breathe unhealthful levels of ozone after 1996 and 1999 are entitled to expanded new source review protections.

Beyond broadening the applicability of new source review protections, Congress enhanced the strength of those protections. For example, the new source review program seeks to improve air quality in nonattainment areas by, *inter alia*, requiring new and modified sources to more than offset their emission increases with reductions. This is accomplished in part by an offset ratio. The Act assigned offset ratios by operation of law in 1990 based on areas' air quality, and also required areas that remained in nonattainment to be bumped up into progressively higher offset ratios thereafter. In particular, areas failing to attain by 1999 must apply a ratio of at least "1.3 to 1," and thus must find 1.3 tons in reductions for each 1 ton increase. §182(d)(2). As the drafters explained, "the graduated control requirements [include] increasing offset ratios that require a greater level of pollution reductions from other sources in the nonattainment area to offset increases in pollution from new sources or modifications." House Report 234[JA739]. Congress fashioned the offset program "to allow economic growth

and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced." *Id.*

To provide an example: The Act required that EPA designate the Houston area as "severe" under §181(a)(1). 40 C.F.R. §81.344. Thus, the Act's express terms define major sources in the Houston area as those emitting 25 tons or more, §182(d), specify that increases of 25 tons per year or more are significant, §182(d) (incorporating §182(c)(6)), and require new and modified major sources to offset emissions by at least 1.3 to 1. §182(d)(2).

2. EPA's rule conflicts with the law.

EPA's rule, however, abrogates these statutory requirements. EPA seeks to undermine congressional mandates by reclassifying areas under the 8-hour standard, discarding the initial classification and reclassification provisions of §181 along with the corresponding new source review requirements, and permitting 8-hour nonattainment areas to only meet weaker requirements under their 8-hour classifications. *See* 69 Fed. Reg. 23985/3[JA128] ("at the time that the 1-hour NAAQS is revoked, a state is no longer required to retain a nonattainment NSR program in its SIP based on the requirements that applied by virtue of the area's previous classification under the 1-hour standard.").

For areas that were nonattainment under the 1-hour ozone standard, EPA determined that "[a]ny lower major stationary source threshold and higher offset ratio that applied by virtue of the area's previous 1-hour classification would no longer apply." *Id*. 23985/3[JA128]. *See also id*. 24000/1[JA143](to be codified at 40 C.F.R. §51.905(e)(4)(i))("implementation plan provisions satisfying sections 172(c)(5) and 173 of the CAA (including provisions satisfying section 182) based on the area's previous 1-hour ozone NAAQS classification are no longer required elements of an approvable implementation plan"). Instead, EPA would require

implementation plans for 8-hour nonattainment areas to "include an NSR program based on the area's designation and classification under the 8-hour standard." 69 Fed. Reg. 23985/3[JA128].

The rule flouts Congress' explicit provisions requiring progressively stricter new source review where areas have failed to attain the ozone standard by congressionally set deadlines. Instead of complying with Congress' time-sensitive new source review scheme, EPA unilaterally determined that some areas, despite never having complied with the ozone standard, are free to weaken new source review programs that were congressionally mandated upon the area's failure to achieve the ozone standard by Congress' deadline. To return to the example of the Houston area, classified as severe before EPA's rule: EPA has now classified Houston as moderate nonattainment under the 8-hour standard. 40 C.F.R. §81.344. The area is therefore now allowed to relax new source review requirements: a major source is one emitting 100 tons or more (instead of 25 tons per year); §302(j),[7] increases of 40 tons (instead of 25 tons) or more are significant, 40 C.F.R. §51.165(a)(1)(x), and offsets need only be 1.15 to 1 (instead of 1.3 to 1). §182(b)(5). New sources emitting up to 99 tons per year can start operation without installing state-of-the-art technology and offsetting their emissions, and existing nonmajor sources can likewise evade those safeguards if they increase emissions by fewer than 100 tons[8]—contrary to Congress' express mandate. *See* §182(d) (setting a 25 ton-per-year major-source threshold, and incorporating §182(c)(6)'s 25-ton *de minimis* cap). EPA's rule thus unlawfully allows relaxation

[7] Because the moderate-area provisions in §182(b) contain no major-source tonnage threshold, the Act's general threshold in §302(j) applies.

[8] A modification at a nonmajor source triggers NSR only if it would increase emissions by an amount exceeding the major source threshold, 40 C.F.R. §51.165(a)(1)(iv)(A)(2)—which, under EPA's rule, is 100 tons for the Houston area.

of congressionally mandated new source review requirements in areas like Houston that have never complied with any ozone health protection standard.

In the proposed rule's preamble, EPA stated: “We interpret the mandated obligations in subpart 2 for purposes of an area’s 1-hour ozone classification to remain applicable to such areas by virtue of the area’s classification ‘as a matter of law’ in 1990." 68 Fed. Reg. 32820/3[JA221](emphasis added). Thus, the agency proposed that “the major source applicability cut-offs and offset ratios continue to apply to the extent the area has a higher classification for the 1-hour standard than for the 8-hour standard." *Id.* 32821/3[JA222]. As the agency emphasized: “We see no rationale under the CAA—given the Congressional intent for areas ‘classified by operation of law’—why the existing NSR requirements [for new and modified sources] should not remain ‘applicable requirements’ for the portion of the 8-hour nonattainment area that was classified higher for the 1-hour standard." *Id.* (emphasis added). Yet in the final rule, EPA unlawfully abrogated Subpart 2 new source review requirements.

3. Congress’ law does not produce an absurd result.

EPA indicated that “we will entertain requests for waivers of applicable requirements—such as [S]ubpart 2 mandatory measures—only in cases where implementation of such measures would cause an 'absurd result.'" RTC 99[JA588]. But EPA has not even attempted to show that Congress’ new source review safeguards are absurd. Indeed, it is EPA's abrogation of these requirements that produces an absurd result. The requirements for new and modified sources at issue here already apply by operation of law in areas that have been out of compliance with ozone health standards for many years. That law reflects a considered congressional judgment that these protective requirements are important for the areas at issue. *See* note 6, *supra* (citing House Report). In the fifteen years since that enactment, EPA has concluded, based on extensive

peer-reviewed science, that ozone concentrations harm health at lower concentrations than previously documented; in response to that science, the agency has promulgated a more protective NAAQS; and most recently, the agency has concluded that the areas at issue violate that NAAQS. It is absurd for EPA to suggest that these circumstances warrant relaxation of previously applicable NSR safeguards.

4. Other Clean Air Act Provisions Confirm that EPA's Weakening of Preexisting NSR Requirements Is Unlawful and Arbitrary.

In addition to Subpart 2 itself, other Clean Air Act provisions confirm that EPA has acted unlawfully and arbitrarily by weakening preexisting NSR requirements.

Section 110(l). The 1990 Amendments added §110(l), which prohibits EPA from approving revisions of state implementation plans "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress…, or any other applicable requirement of this chapter." EPA's rule announces a blanket, nationwide finding that §110(l) allows removal of the stronger preexisting provisions from state implementation plans. 69 Fed. Reg. 23985/3[JA128]. This finding violates §110(l). For reasons stated in Part I.B.1, *supra*, the stronger, preexisting NSR requirements fit squarely within §110(l)'s reference to "applicable requirement[s]." Accordingly, as a matter of law EPA cannot issue a §110(l) finding authorizing removal of those requirements from state implementation plans. *See*, *e.g.*, RTC 102[JA591] (where "Congress has mandated that a State adopt a specific measure," the State "has no flexibility to revise the SIP to remove that measure regardless of the effect on attainment and maintenance of the NAAQS"). *Accord*, *id.* 111[JA600].

In addition to this statutory violation, EPA's nationwide finding is arbitrary and capricious because it lacks a reasoned explanation and is unsupported by substantial evidence. *See, e.g., Transactive Corp.*, 91 F.3d at 236; *Data Processing*, 745 F.2d at 683-84. EPA argues

that, even though the rule abrogates preexisting new source review requirements, "8-hour NSR will still be required and thus no emissions increases will result." 70 Fed. Reg. 39421/3[JA170]. This assertion is simply false. While EPA argues that the weakened provisions for new and modified sources will still require sources to obtain offsetting reductions to compensate for their emissions, *id.* at 39421/2[JA170], those offset requirements, as explained above, only apply to major sources. By raising the tonnage thresholds, EPA's rule exempts from offset requirements many sources that would be major under the preexisting statutory requirements, thus allowing significant emissions increases both from construction of new sources and modification of existing sources. By resting its rule on a fundamentally erroneous rationale, EPA has acted arbitrarily.[9]

EPA further justifies its action by arguing that "States are not relying on major NSR to generate emissions reductions" in their attainment modeling. 70 Fed. Reg. 39420[JA169](emphasis added). Assuming *arguendo* that is so, new source review still performs an important role in preventing pollution increases. EPA does not and could not deny that such increases can interfere with "attainment and reasonable further progress." *See* §110(l).

Finally, EPA argues that any potential for emissions growth is adequately addressed by "[t]he growth projection methods used in preparing" the attainment demonstrations in state implementation plans. 70 Fed. Reg. 39420/3[JA169]. But EPA itself elsewhere concedes that

[9] EPA argues that problems created by weakening major-source NSR can be addressed via so-called "minor NSR," 70 Fed. Reg. 39421/2[JA170]—*i.e.*, by programs under the residual mandate that States regulate source construction and modification "as necessary to assure that national ambient air quality standards are achieved." *See* §110(a)(2)(C). But where sources are governed by express statutory requirements for major sources, EPA lacks authority to substitute weaker minor-source requirements. Moreover, EPA has offered no analysis or evidence documenting that minor-source NSR programs—which vary widely from state to state—will in all cases prevent interference with attainment, reasonable further progress, and other CAA requirements.

Congress created the Subpart 2 new source review requirements because it recognized that "some States were not accurately predicting the growth within their attainment demonstrations." *Id.* 39418/3[JA167]. EPA arbitrarily uses these unreliable growth predictors to justify scrapping the very measures Congress created to address that unreliability.

Worse, the agency does so on a nationwide, *a priori* basis. This approach flies in the face of Subpart 2, which "shift[ed] the emphasis from managing growth using growth allowances to using the case-by-case offset approach." *Id.* 39418 n.4[JA167]. Likewise, §110(l) focuses on whether attainment and reasonable further progress are jeopardized by "the revision"—not by all revisions nationwide, including as-yet nonexistent ones.

As one court held in overturning an EPA decision under §110(l): "if a court is to uphold the EPA's decision, the EPA's analysis must rationally connect its approval of particular plan revisions before it to its assessment of an area's prospects for meeting current attainment requirements." *Hall v. EPA*, 273 F.3d 1146, 1161 (9th Cir. 2001) (brackets and internal quotations omitted). Indeed, EPA itself previously indicated that it "interprets section 110(l) by applying it to each SIP revision, in light of the circumstances presented by each case," and "has not issued general guidance on section 110(l), because it views each type of SIP revision as presenting unique issues that should be addressed on a case-by-case basis." 61 Fed. Reg. 16051-52 (April 11, 1996). Here, EPA has arbitrarily abandoned its prior approach without record support documenting that any area—much less all one-hour nonattainment areas in the Nation—can safely dispense with the "extra buffer for growth"[10] provided by textually applicable Subpart 2 NSR requirements.

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[10] *See* 70 Fed. Reg. 39418/3[JA167].

§172(e). The unlawfulness of EPA's approach is further confirmed by the antibacksliding requirement of §172(e). Applicable directly when EPA "relaxes" a standard, §172(e) requires EPA to promulgate requirements which "shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." EPA concluded that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." 69 Fed. Reg. 23972/2[JA115]. However, EPA claims now that it may weaken new source review provisions, arguing that those provisions—which require controls on sources of pollution—somehow fail to qualify as "controls" within the meaning of §172(e). 70 Fed. Reg. 39417/1[JA166]

To the contrary, requirements that new and modified sources install state-of-the-art pollution controls, and offset their emissions, qualify as "controls" in at least three ways. First, EPA itself concedes that Congress, by requiring sources to meet the "lowest achievable emission rate," §§173(a)(2), 171(3), requires them "to apply control technologies." 70 Fed. Reg. 39419/1[JA168](emphasis added). Second, the Act requires sources to offset emissions by arranging for reductions from other sources, §173(a)(1)(A), (c)—thus controlling emissions at those sources. And third, each source must demonstrate, through analysis *inter alia* of "environmental control techniques," that its benefits outweigh its costs. §173(a)(5).

In short, each of these requirements to control pollution from new and modified sources is plainly a "control"—i.e., "[a] restraining device, measure, or limit; a curb." American Heritage Dictionary (2000). *See Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1176 (D.C. Cir. 2003) (statutory terms are presumed to have their ordinary meaning). Indeed, the Act itself

repeatedly uses the word "control" in referring to new source review requirements, *see* §§173(d), 108(h), 182(c)(7), and so did the authors of the 1990 Amendments. House Report 234[JA739].

Indeed, so implausible is EPA's contrary argument that the agency itself is unable to stay on script, repeatedly using "control" in discussing new source review. *See* 70 Fed. Reg. 39418/3[JA167]("Congress included major NSR in its 'graduated control program' in subpart 2"), 39419/1[JA168]("control technologies"); 69 Fed. Reg. 23986/1[JA129]("measures to control growth").

EPA argues that "Congress created the major NSR program as a measure to mitigate emissions growth rather than a measure to generate emissions reductions." 70 Fed. Reg. 39420/1[JA169](emphasis added). However, there is no textual basis for arguing that "measures to control growth" (*see* 69 Fed. Reg. 23986/1[JA129])(emphasis added) are not "controls" under §172(e). Moreover, EPA arbitrarily applied its emission-reduction test selectively, invoking it to discard preexisting NSR requirements (which produce at least some emissions reductions[11]), while retaining preexisting requirements as to monitoring[12] (which produce none). *Transactive Corp.*, 91 F.3d at 237 (agency acts arbitrarily by "offer[ing] insufficient reasons for treating similar situations differently"). Worse, EPA offered no response to comments pointing out this discrepancy. Earthjustice Comments 5/4/05, Dkt OAR-2003-0079 at 5-6 [JA683-84]. *See, e.g., Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (agency must "respond[] to those comments that are relevant and significant").

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[11] As explained in part I.B above, the Subpart 2 NSR requirements produce reductions by *inter alia* requiring offset ratios greater than 1:1. *See also* House Report 234[JA739](Subpart 2 offset ratios "require a greater level of pollution reductions from other sources in the nonattainment area," thus "assuring that emissions are actually reduced")(emphasis added).

[12] *See* 40 C.F.R. §51.900(f)(9)[JA743](applicable requirements include "[e]nhanced (ambient) monitoring").

EPA unpersuasively attempts to support its narrow reading of "controls" by citing *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004), *cited in* 70 Fed. Reg. 39419/3[JA168]. First, that case involved areas that had already attained the applicable health protection standard. Because the Act requires such areas to be governed by its "prevention of significant deterioration" ("PSD") provisions, the court found it "would make little sense" to require such areas to adopt nonattainment new source review requirements, and that such a reading would create a "potential statutory conflict." 370 F.3d at 536. By contrast, the areas at issue here remain in nonattainment status, based on recent NAAQS violations. Second, *Greenbaum* noted that the purpose of §175A's contingency measures is to "promptly" correct NAAQS violations, *see* §175A(d), and that NSR "would have no immediate effect on emissions." 370 F.3d at 538. By contrast, §172(e) is not limited to measures whose impact is immediate. Third, *Greenbaum* did not address the statutory language in §§173(d), 108(h), 182(c)(7), cited above, that uses the word "control" in referencing NSR.[13]

EPA also argues that, even if NSR requirements are "controls," §172(e) allows EPA to pick and choose which controls to include. 70 Fed. Reg. 39419/2[JA168]. To the contrary, §172(e) broadly encompasses "the controls" previously applicable (emphasis added), not some subset thereof.

Finally, EPA argues: "To the extent that a nonattainment area is currently designated with a lower classification under the more stringent 8-hour standard, it is because that area now has cleaner air than when it was designated under the 1-hour standard." 70 Fed. Reg. 39419/1[JA168]. To the contrary, lower 8-hour classifications may simply reflect the shift from

[13] Although the decision is distinguishable for all the reasons set forth above, Petitioners do not concede that *Greenbaum* was correctly decided.

a shorter averaging time to a longer one (*i.e.*, from one hour to eight hours). In any event, under the textually applicable Subpart 2 requirements, NSR requirements cannot be weakened until the standard has actually been attained, and indeed Congress mandated that essentially all Americans breathing air not in compliance by 1999 would be entitled to the enhanced protections prescribed for "severe" or greater areas. Attainment has not yet occurred in any of the areas at issue here, all of which still violate the 8-hour standard, which EPA insists is the standard relevant to gauging ozone's impacts on public health. *See, e.g.*, RTC 90[JA579]. Moreover, EPA does not believe its own argument about current air quality: while citing alleged air quality changes as grounds for weakening Subpart 2 NSR requirements, EPA has retained other Subpart 2 requirements notwithstanding such changes. 69 Fed. Reg. 23997[JA140](to be codified at 40 C.F.R. §51.900(f)).

C. EPA Cannot Lawfully Waive Statutory Requirements for Controls Needed to Achieve "Rate of Progress" Milestones and Timely Attainment

Subpart 2 of the Act required moderate and above 1-hour nonattainment areas to submit "rate of progress" ("progress" or "ROP") plans with controls adequate to ensure minimum percentage reductions in ozone forming emissions by set deadlines.[14] "Moderate" area progress plans had to ensure a 15% cut in emissions by 1996, and plans for "serious" and above areas had to ensure additional cuts of at least 3% per year averaged over each 3-year period after 1996 until the attainment date. §§182(b)(1), (c)(2)(B), (d) & (e). All of these areas also had to include in their plans any additional controls needed to demonstrate attainment by the applicable attainment date ("attainment demonstration" plans). *Id.* §§182(b)(1), (c)(2)(A), (d)&(e). The Act required "moderate" areas to submit progress and attainment demonstration plan revisions by November 15,

[14] These plans are sometimes also referred to by EPA as "reasonable further progress" or "RFP" plans.

1993, and "serious" and above areas to submit such SIPs by November 15, 1994. *Id.* §§182(b)(1)(A),(c)(2),(d) & (e).

In the rulemaking at issue, EPA correctly took the position that the requirements for 1-hour progress and attainment demonstration plans must remain in force even after suspension of the 1-hour standard. 69 Fed. Reg. 23974-76[JA117-19]. Thus, EPA's rule required states that had failed to timely submit such plans to correct that failure. Paradoxically, however, EPA at the same time also permitted states to remove control measures from the required plans even if such removal would mean failure to achieve emission reductions needed to meet 1-hour progress or attainment deadlines. EPA's rule allows states to relax such controls (which EPA misnames "discretionary" measures) as long as the state makes a showing under CAA §110(l) that the relaxation will not interfere with progress or attainment requirements for the 8-hour standard. *Id.* EPA concedes such an approach allows states to delay controls and emission reductions that otherwise would have been required under the 1-hour standard. See RTC 119[JA608]. That is because ROP and attainment deadlines for the 8-hour standard are generally years later than the analogous deadlines for the 1-hour standard.

EPA's decision to let states relax controls needed to effectuate 1-hour ROP and attainment plans is directly at odds with the Act for all the reasons set forth in part I.A above. Congress set the mandates for 1-hour progess and attainment plans, as well as the deadlines for achieving emission reductions and 1-hour attainment "as a matter of law." 69 Fed. Reg. 23972[JA115]. EPA has no authority to relax these requirements. Moreover, as explained in part I.A., EPA's rule violates §172(e) by allowing states to relax or eliminate controls required to meet 1-hour progress and attainment deadlines.

EPA's rationale for continuing the obligation for states to submit 1-hour ROP and attainment plans even after suspension of the 1-hour standard highlights the inconsistency of letting states drop controls needed to effectuate those plans. The agency correctly recognized that "Congress intended areas to continue to have control measures no less stringent than those that applied for the 1-hour NAAQS." 69 Fed. Reg. 23975/2[JA118]. EPA explained that "[b]ecause the ROP obligation results in control obligations…, areas should remain obligated to adopt outstanding ROP obligations to ensure that the ROP milestones are met." *Id.* EPA concluded that "in light of the need to ensure there is no delay in achieving emissions reductions to protect public health," states should remain obligated to submit and implement attainment demonstration implementation plans for the 1-hour standard. *Id.* 23976[JA119]. Without such continuing obligation, state plans "would provide emission reductions on a more protracted time schedule than areas that had met their 1-hour standard planning obligations, thereby deferring the benefits of either the 1-hour or the 8-hour standard." RTC 119[JA608].

EPA does not and cannot explain why the same reasons do not compel continuation of the control measures in mandated progress and attainment plans. EPA cannot justify letting states relax controls required to meet progress and attainment deadlines that applied for the 1-hour standard after recognizing Congress' intent that "areas …continue to have control measures no less stringent than those that applied for the 1-hour NAAQS." 69 Fed. Reg. 23975[JA118]. If states must adhere to rate of progress planning requirements "to ensure that the ROP milestones are met," they surely must also retain control measures needed to meet those milestones. As with the requirements to adopt plans, retention of controls required by such plans is essential to prevent delaying until 2008 or later emission reductions that – under the 1-hour standard – were due by 2005.

EPA offers no plausible basis for allowing relaxation of 1-hour progress and attainment controls. At one point the agency asserted that the 1-hour standard was not necessary to protect public health, and that relaxation of controls should therefore be permissible if there was no interference with requirements related to the 8-hour standard. RTC 102[JA591]. This assertion simply ignores EPA's own construction of the Act as barring relaxation of Subpart 2's progress requirements regardless of whether there is interference with 8-hour requirements. As construed by EPA itself, the Act requires continuation of the progress required under the 1-hour standard, not merely non-interference with the 8-hour standard.

EPA also suggested that relaxation of controls in ROP and attainment plans should be permissible because the Act gives States discretion to determine the mix of those controls. RTC 111[JA600]. The fact that states can choose the mix of controls, however, does not mean they have carte blanche to relax the overall stringency of controls. Here, EPA's rule does not merely let states substitute one equally stringent control (or set of controls) for another, but rather allows total elimination of controls without requiring that the lost emission reductions be achieved in some other way. Subpart 2, which requires controls sufficient to achieve specified 1-hour progress targets, and §172(e), which requires that the stringency of controls required under the 1-hour standard be maintained, bar such an approach.

For all the foregoing reasons, EPA's rule allowing relaxation of controls needed for timely progress and attainment violated the Act, and was also arbitrary and capricious because it was wholly inconsistent with the agency's decision to bar relaxation of requirements for submission of the 1-hour ROP and attainment plans themselves. *Air Transport Ass'n of Am.v. DOT*, 119 F.3d 38, 43 (D.C. Cir. 1997)(agency action arbitrary and capricious where based on internally inconsistent rationale).

D. EPA Lacks Authority to Waive Statutory Requirements for Contingency Measures to Kick in Automatically to Protect the Public in the Face of Missed Deadlines

Sections 172(c)(9) and 182(c)(9) of the Act require state implementation plans to include contingency measures to be triggered automatically by any failure to timely meet rate of progress milestones or attain ozone standards. Congress knew that actual emission reductions would sometimes fall short of SIP predictions in some nonattainment areas, and therefore required contingency measures as a way of ensuring that required reductions would in fact be achieved. House Report 224 (contingency measures must "be adequate to compensate for any emission reduction shortfall")[JA731]. Here, however, EPA adopted a rule abrogating the statutory mandates for contingency measures in 1-hour nonattainment areas. The rule allows states to submit 1-hour ROP and attainment SIPs without contingency measures, and lets states drop previously adopted contingency measures from such SIPs. 40 C.F.R. §51.905(e)(2)(iii).

Waiver of the requirement for contingency measures creates a substantial risk of dirtier air than would otherwise be allowed. For example, SIPs for extreme and certain severe 1-hour nonattainment areas had to provide for emission cuts of at least 9% between 2005 and 2007, and had to include contingency measures to correct any failure to achieve that target. Under the EPA rule challenged herein, however, such areas can fail to achieve <u>any</u> of the required reductions and will have no obligation to do anything to correct that failure. Thus, thanks to EPA's rule, residents of these areas face the risk of breathing air that is more polluted than would have been allowed under the pre-existing "less stringent" standard.

This rule is unlawful, arbitrary, and capricious for all the same reasons discussed in Part I.A. above. It illegally abrogates Subpart 2's contingency measure requirements (which were imposed on 1-hour areas "as a matter of law") and renders those requirements "prematurely obsolete" contrary to *Whitman*. It further violates the antibacksliding provisions of §172(e) by

relaxing explicit control requirements for pre-existing 1-hour nonattainment areas.[15] The portion of the rule allowing states to delete contingency measures already in their SIPs is also flatly contrary to CAA §110(l), which prohibits EPA approval of SIP revisions that interfere with applicable requirements concerning attainment and reasonable further progress. Contingency measures are plainly requirements concerning attainment and reasonable further progress because their whole purpose is to correct failures to achieve timely attainment and RFP.

The rule is also wholly inconsistent with EPA's decision to require states to satisfy outstanding obligations to submit ROP and 1-hour attainment demonstrations (or substitutes therefor). Contingency measures are integral parts of attainment and ROP plans. Indeed, this Court has ruled that EPA cannot lawfully approve attainment and ROP plans without contingency measures. *Sierra Club*, 294 F.3d at 164. Thus, if states must satisfy 1-hour ROP and attainment demonstration obligations (and Environmental/SCAQMD Petitioners agree with EPA that they must), then states must also satisfy the contingency measure requirements that are integrally connected to those obligations.

Moreover, EPA's reasons for requiring states to fulfill 1-hour progress and attainment demonstration obligations apply equally to contingency measures. EPA reasoned that "both attainment demonstrations and ROP plans result in the adoption of control obligations." 69 Fed. Reg. 23975[JA118]. EPA also noted that if it determined these requirements did not apply,

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[15] EPA incorrectly asserts that the antibacksliding provisions of §172(e) are confined to measures "triggered" before a change in the NAAQS. In reality, the relevant text of §172(e) requires EPA antibacksliding rules to "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." Thus, if an area was designated 1-hour nonattainment prior to designations for the new NAAQS, EPA's antibacksliding rules must require the area to maintain the stringency of the control regime applicable to 1-hour nonattainment areas: The rules are not limited to merely protecting the stringency of individual controls whose implementation deadlines happened to fall before the NAAQS change.

"areas currently designated nonattainment for the 1-hour NAAQS that have not met these obligations might be subject to less stringent controls than would have otherwise applied." *Id.* With respect to rate of progress, EPA concluded that 1-hour nonattainment areas "should remain obligated to adopt outstanding ROP obligations to ensure that the ROP milestones are met." *Id.* (emphasis added). Likewise, EPA decided to retain a requirement for 1-hour attainment plans (or substitute therefor) "in light of the need to ensure there is no delay in achieving emissions reductions to protect public health."[JA119]. All of these rationales apply with equal force to the Act's requirements for SIP contingency provisions. Such SIPs result in the adoption of control obligations. Moreover, 1-hour nonattainment areas that have not met their obligation to adopt contingency measures might well be subject to less stringent controls than would otherwise have applied. Contingency measures are necessary "to ensure that the ROP milestones are met" (indeed, the Act requires them specifically for this purpose). And contingency measures are needed "to ensure there is no delay in achieving emissions reductions to protect public health."

EPA does not and cannot identify any authority in the statute for waiving contingency measures expressly mandated by the Act for 1-hour ozone areas. The agency suggests that the contingency measure requirement can somehow be deemed to vanish upon suspension of the 1-hour standard, but, as discussed above, these measures are among those mandated by Subpart 2 as a matter of law. EPA also wrongly asserts that the triggering of contingency measures is keyed to a finding of failure to timely attain the 1-hour standard (implying that such a finding somehow cannot be made after suspension of the standard). In reality, ROP contingency measures are triggered by failure to achieve specified emission cuts, and in any event a state can certainly determine whether the level of the 1-hour standard has been exceeded by the 1-hour attainment deadline, as such a determination is based on objective, discernable facts that will

occur irrespective of whether the standard has been suspended.[16] Indeed, EPA itself takes the position that states must still submit overdue 1-hour attainment demonstrations (or a substitute) after revocation of the 1-hour standard, thus conceding that the standard still has a post-revocation role in driving emission reductions.

EPA also acted illegally and arbitrarily in finding that repeal of untriggered contingency measures in 1-hour SIPs will never violate CAA §110(l) because such repeal will never interfere with any applicable requirement of the Act concerning attainment and RFP. EPA based this finding on the legally flawed premise that 1-hour attainment and RFP requirements cease to become "applicable" upon suspension of the 1-hour standards – a premise fully refuted above. Because states remain obligated by the Act to achieve the emission reductions mandated for 1-hour nonattainment areas, EPA cannot make a blanket finding that removal of contingency measures to ensure achievement of those reductions will always comply with §110(l). EPA cannot consistent with §110(l) approve the removal of SIP contingency measures without a case-specific finding that such removal will not interfere with assurance of timely 1-hour RFP and attainment – e.g., by finding that the state has adopted substitute contingency measures that will provide equivalent emission reductions if and when needed.

E. EPA Cannot Lawfully Abrogate or Postpone Clean Air Act §185's Economic Incentives to Reduce Pollution.

1. EPA Seeks to Eliminate Statutory Financial Incentives

In Clean Air Act §185, Congress created a powerful financial incentive to protect

[16] Contrary to EPA assertions (70 Fed Reg. 30599/2[JA156]), the triggering of contingency measures is not tied to an EPA finding that an area has failed to achieve timely progress or attainment. The Act merely requires that contingency measures be "undertaken if the area fails to make reasonable further progress, or to attain . . .by the [applicable] attainment date." §172(c)(9). Indeed, such measures are "to take effect without further action by the State or the [EPA] Administrator." *Id. Accord* §182(c)(9).

residents of areas with a history of poor air quality so protracted that they still violate the health protection standard for ozone pollution 15 to 20 years after promulgation of the 1990 Amendments. Specifically, Congress provided that in each area that continues to violate the ozone health protection standard after 2005 (for "severe" areas) or 2010 (for "extreme" areas),[17] operators of "major sources" must choose between reducing their emissions by 20% or paying a fee for each ton they emit in excess of 80% of their "baseline" emissions. CAA §185, 42 U.S.C. §7511d.[18] But despite Congress' clear mandate, EPA has purported to abrogate or postpone the effectiveness of §185, even for areas that have never complied with any federal health protection standard for ozone, such as the five-parish Baton Rouge area in Louisiana. *See* 70 Fed. Reg. 30594[JA151]("the requirement to implement the fees does not exist as of the effective date of designation for the 8-hour NAAQS").

2. EPA's Approach Conflicts with the Plain Language of CAA §§181(b)(4) and 185(a).

Under the Act, implementation of §185's financial incentives to reduce pollution in "severe" and "extreme" areas that do not meet the ozone health protection standards on time (i.e., by 2005 or 2010 respectively) is mandatory. Section 181(b)(4) commands: "If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date… the fee provisions under section [185 of the Act] shall apply." 42 U.S.C. §181(b)(4) (emphasis added). The Act unambiguously sets the "applicable attainment date" in Table 1 of §181(a), and adjusts missed attainment dates "by operation of law" (up to November 15, 2005) in areas that persist in failing to achieve the standard. §181(b)(2). In addition, to

[17] For a few "severe" areas, the trigger date is 2007 rather than 2005. §181(a)(2).

[18] The Act defines "baseline" for these purposes at §185(b)(2).

implement the §185 fee provisions, Congress imposed a "December 31, 2000" deadline for states with "severe" and "extreme" nonattainment areas to "submit a plan revision which includes the provisions required under [§185]." §182(d)(3).

As explained in Part I.A. above, EPA cannot abrogate the §185 fee requirement absent express Congressional authorization. Not only did Congress not explicitly provide EPA such authority, but Congress specifically mandated application of §185 fees to areas that failed to comply with the ozone standard by November 15, 2005 or (for "extreme" areas) 2010, even though it was well aware when it adopted the fee requirement (in 1990) that EPA was contemplating revising the 1-hour standard. *See Whitman*, 531 U.S. at 485 (Congress knew in 1990 that revision of the ozone standard "could happen any time, since the technical staff papers had already been completed in late 1989.").

Because EPA cannot identify congressional permission for postponing application of the fee provisions, its rule unlawfully conflicts with the Act's plain language in §§181(a), 182(b)(4), and 185. Indeed, EPA's complete disregard for the remedial deadlines that Congress set to address the most persistent pollution problems is exactly what the *Whitman* Court prohibited: EPA action that goes "over the edge of reasonable interpretation" by rendering "textually explicit" provisions of Subpart 2 "utterly inoperative." *See* 531 U.S. at 485.

EPA tries to justify its abrogation of §185's financial incentives by characterizing the provisions as "programs keyed to a finding of failure to attain the old [1-hour] standard" that become inapplicable "after that standard no longer applies." 70 Fed. Reg. 30594[JA151]. But §§181(a), 182(b)(4), and 185 are in fact keyed to the length of time that people are forced to breathe air that violates minimum health protection standards, measured from the date Congress enacted the 1990 Amendments. Congress nowhere authorized EPA to eliminate statutory

provisions by revising the ozone standard; just as Congress did not grant EPA *carte blanche* to extend applicable attainment dates in areas that have never met an ozone health protection standard. *See Sierra Club,* 294 F.3d at 161 (rejecting EPA attempt to extend CAA deadlines without specific statutory authorization).

3. EPA's Action Conflicts with the Act's Anti-Backsliding Provisions.

EPA's abrogation of the §185 fee requirement also violates §172(e)'s mandate to "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before" the 8-hour standard took effect. §172(e). The §185 fee requirement is unquestionably a control applicable to areas that were designated nonattainment for ozone prior to designation of areas for the 8-hour standard. Congress added the fee requirement to the Act in 1990 and applied it by operation of law to all areas classified as "severe" or "extreme." §§181(b)(2), (b)(4), 185. The Act further mandated that states submit implementation plan revisions incorporating fee provisions by December 31, 2000. §182(d)(3). Thus, the §185 fee requirement was not only applicable to areas that were designated ozone nonattainment prior the 8-hour designations, but Congress also directed that the requirement be incorporated into state implementation plans long before the 8-hour designations.[19] EPA's rule, however, would let states remove fee provisions that are already incorporated into their state implementation plan. 70 Fed. Reg. 30604 (codified at 40 C.F.R. §51.905(e)(2)(ii)) ("the State may remove from the SIP …the provisions for complying with the section 185 fee provision…"). EPA's promulgation

[19] EPA asserts that the requirement "to impose" §185 fees cannot exist any earlier than 2006, but this claim is both irrelevant and false. 70 Fed. Reg. 30594[JA151]. First, §172(e) precludes backsliding from controls "applicable" to "areas designated nonattainment before" the revision – it is not limited to controls that had to be "imposed" before the revision. *See* note 15 *supra*. In any event, the requirement to impose fees can be triggered prior to 2006, where monitoring data shows that an area has so many pre-attainment deadline exceedances that it cannot meet the test for timely attainment of the 1-hour standard.

therefore violates antibacksliding protections of §172(e).

4. EPA and States have the Means to Determine Compliance.

EPA wrongly argues that the fee provisions cannot be triggered for 1-hour nonattainment areas because "there is no basis for determining whether an area has met the 1-hour NAAQS once the 1-hour NAAQS has been revoked." 70 Fed. Reg. 30593[JA150]. In reality, EPA and states are fully capable of continuing to determine whether an area has attained the 1-hour standard by the attainment dates that Congress specified in the Act. The determination is a simple matter of comparing monitored air quality with the standard for the relevant time period. Indeed, EPA agrees that the 1-hour standard will continue to have legal effect even after its revocation. Among other things, the agency is requiring 1-hour nonattainment areas lacking approved 1-hour attainment demonstrations to submit such demonstrations, unless they choose one or two other options provided by the final rule. 69 Fed. Reg. 23998[JA141](codified at 40 C.F.R. §51.905(a)(1)(ii)(A)).

F. EPA Lacks Authority to Abrogate Existing Limits on Motor Vehicle Emissions in Approved State Implementation Plans

1. The Act requires conformity of transportation plans with motor vehicle emission limits in state implementation plans

In amending the Clean Air Act in 1990, Congress found that motor vehicle emissions were a major cause of unhealthful ozone levels, and that growth in such emissions threatened to thwart efforts to attain ozone standards. S. Rep. No. 228, 101st Cong, 1st Sess. 13, 85-86 (1989); 136 Cong. Rec. S16971 col.1 (October 27, 1990). To address this problem, Congress added language to the Act requiring metropolitan planning organizations ("MPOs") to ensure that emissions expected from planned road and other transportation projects "conform" to (i.e., do not exceed) estimates of motor vehicle emissions in the state's SIP. CAA §176(c)(2)(A)

(prohibiting MPOs from adopting transportation plans and programs "until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan…"); *Environmental Defense Fund v. EPA*, 167 F.3d 641, 643-44 (D.C. Cir. 1999)(CAA requires that transportation plans be "consistent with achieving the allowable emission targets for each pollutant assigned to mobile sources in the SIP").

EPA implemented the above-referenced conformity mandate by requiring ozone SIPs to include "motor vehicle emission budgets" ("MVEBs") and requiring MPOs to ensure that transportation plans and projects would not generate motor vehicle emissions in excess of those budgets. 40 C.F.R. §93.101(defining MVEB). The MVEB "establishes a cap on emissions which cannot be exceeded by predicted highway and transit vehicle emissions." 58 Fed. Reg. 62194/1. Pursuant to these requirements, states included MVEBs in their 1-hour ROP and attainment demonstration SIPs, and MPOs have determined conformity by reference to those budgets. *See, e.g.*, 70 Fed. Reg. 25688, 25715-17 (May 13, 2005)(MVEBs for Washington D.C. area); CI-215 at 53-57[JA366-70]. In its ozone implementation rule, however, EPA directed that upon revocation of the 1-hour standard, the MVEBs in existing ozone SIPs would no longer be enforceable, and MPOs would no longer be required to ensure conformity with those budgets. 69 Fed. Reg. 23985-87[JA128-30]. The rule mandated abrogation of these SIP MVEBs regardless of the impact on air quality, regardless of whether the state wanted to revoke the MVEB, without requiring a SIP revision, and without opportunity for public notice and hearing at the state level as required by the Act for SIP revisions. EPA modified the effect of this rollback somewhat in a subsequent rule prescribing conformity requirements under §176(c)(4)(A) for the 8-hour

standard ("8-hour conformity rule"). 69 Fed. Reg. 40004 (July 1, 2004)[JA277]. That rule provides for presumptive reliance on the pre-existing MVEBs as an interim measure (i.e., until adoption of 8-hour MVEBs), but further expressly allows an MPO to set aside the those MVEBs – again without a SIP revision -- wherever the MPO decides such abrogation is "appropriate," a term left undefined by the rule. 40 C.F.R. §93.109(e)(2)(v). Thus, the rule unlawfully transfers from the State to the regional transportation planning organization authority to dispense with the budget established in the SIP without providing any criteria for determining when a budget is no longer "appropriate." [20]

2. EPA has no authority to abrogate the motor vehicle emission limits in approved state implementation plans

EPA acted contrary to law in nullifying by national fiat the MVEBs in all previously approved ozone SIPs. The penumbral sentence of §176(c)(2) as well as the language of §176(c)(2)(A) expressly require that conformity be based on the "applicable implementation plan," which the Act defines as "the implementation plan, or most recent revision thereof, which has been approved [by EPA]…" §302(q). An MVEB in an EPA-approved SIP is plainly part of the applicable implementation plan and therefore governs conformity determinations under §176(c). 40 C.F.R. §93.101 ("Motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan … allocated to highway and transit vehicle use and emissions"). Moreover, both the Supreme

[20] In a separate proceeding before this Court, three of the Petitioners herein (Environmental Defense, Sierra Club, and NRDC) are challenging the 8-hour conformity rule on some of the same grounds alleged herein – namely, that EPA has no authority to authorize abrogation of 1-hour MVEBs without SIP revisions that meet all applicable requirements of the Act. *Environmental Defense v. EPA*, No. 04-1291 (D.C. Cir.), Oral Argument set 12/1/05. Accordingly, resolution of that case may obviate the need for the Court to address the issue in this case.

Court and this Court have made clear that revision of a SIP requires EPA review and approval of the specific revision being proposed. *Train v. NRDC*, 421 U.S. 60, 92-94 (1975); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 812-13 (D.C. Cir. 1975). The Supreme Court has further stated that a state's "approved SIP is the applicable implementation plan," and remains so even "during the time a SIP revision is pending." *General Motors Corp v. U.S.*, 496 U.S. 530, 539-42 (1990).

Thus, EPA cannot nullify approved SIP limits on motor vehicle emissions by national fiat. Rather, removal or modification of MVEBs from a SIP requires a SIP revision – a formal process that involves first proposal of the revision by the state, an opportunity for public comment on the proposal, and then review and approval or disapproval of the revision by EPA. §110(a)(2),(k), (l). Furthermore, §110(l) of the Act forbids EPA from approving a SIP revision without determining that the revision will not interfere with any applicable requirement of the Act (including attainment and RFP), a determination that, as discussed in part I.B above, requires a case-specific inquiry for each revision being proposed. Indeed, the requirement for an EPA finding that the specific SIP revision before it will assure attainment of standards is central to the Act's remedial scheme. *Train*, 421 U.S. at 93-94. EPA's blanket nullification of each and every SIP MVEB nationwide illegally circumvents all of the foregoing procedural and substantive prerequisites to SIP revision. EPA cannot possibly determine whether removal of an MVEB from a SIP will interfere with timely attainment without examining the specific SIP at issue to determine the effect of such budget removal on the attainment prospects of the affected area. See 40 C.F.R. §93.118(e)(4)(iv) (requiring finding that motor vehicle budgets must show attainment when considered together with emissions from all other sources).

EPA's action also violated the Act's antibacksliding restrictions for all the reasons discussed in part I.A above. The MVEBs in ozone SIPs are integral parts of the control programs required by the Act for progress toward, and attainment of the ozone NAAQS. By nullifying those budgets in the transition to the 8-hour standard, EPA illegally relaxed the ozone control regime applicable as a matter of law, and flouted Congress' intent that – as EPA itself puts it – 1-hour areas "continue to implement requirements that applied in the area for the 1-hour NAAQS." 69 Fed. Reg. 23973/1[JA116]. Abrogation of existing MVEBs is also flatly inconsistent with EPA's rationale for requiring continued submission and approval of 1-hour ROP and attainment plans – namely, to assure that there is no relaxation or delay in rates of progress toward clean air required under the 1-hour standard. 69 Fed. Reg. 23975/2, 23976/2[JA118, 119]. The setting aside of MVEBs in approved SIPs will allow motor vehicle emissions to greatly exceed caps found necessary by both the states and EPA to ensure the adequacy of 1-hour ROP and attainment plans – plans that EPA agrees the states must maintain. EPA acted arbitrarily and capriciously in adopting such an inconsistent and irrational approach. *Air Transport Ass'n*, 119 F.3d at 43.

EPA sought to justify its action by claiming that upon suspension of the 1-hour standard, reliance on MVEBs in approved SIPs would be somehow forbidden by CAA §176(c)(5). 69 Fed. Reg. 23987[JA130]; RTC 152[JA641]. But that provision merely provides that conformity is mandated only for "a nonattainment area and each pollutant for which the area is designated as a nonattainment area" and for "an area that was designated as a nonattainment area but that was later redesignated … as an attainment area and that is required to develop a maintenance plan ["maintenance" area]…" All of the areas at issue here have been designated either nonattainment or maintenance for the pollutant ozone, and therefore meet the criteria in

§176(c)(5) for coverage by the Act's conformity requirements. Even if §176(c)(5) could be read as requiring conformity only as to the 8-hour ozone standard (as EPA seems to think), nothing in the statute authorizes EPA to unilaterally abrogate motor vehicle emission caps that states have previously chosen to include in their ozone SIPs.[21] EPA itself takes the position that, even after suspension of the 1-hour standard, states cannot without formal SIP revision change other SIP requirements originally adopted to comply with requirements tied specifically to the 1-hour NAAQS (e.g., 1-hour ROP and attainment plans). *See, e.g.,* 69 Fed. Reg. 23974[JA117]. There is no lawful or rational basis for treating MVEBs - which are integral parts of the control strategies in such SIPs - any differently.

II. EPA'S REVOCATION OF THE 1-HOUR STANDARD, INCLUDING THE ELIMINATION OF DESIGNATIONS AND CLASSIFICATIONS FOR THAT STANDARD, WAS UNLAWFUL AND ARBITRARY

A. EPA's Decision to Revoke the 1-Hour Standard in Full Was Contrary to the Express Language and Purposes of the Act.

EPA's final rule states that "the 1-hour NAAQS set forth in paragraph (a) of this section will no longer apply to an area one year after the effective date of the designation of that area for the 8-hour ozone NAAQS pursuant to section 107 of the Clean Air Act." 69 Fed. Reg. 23996[JA139]. EPA acknowledges that its revocation of the 1-hour NAAQS is the means by which it seeks to allow states to drop or delay SIP programs and controls previously required under the 1-hour ozone standard. *See, e.g.,* 69 Fed. Reg. 23971/2[JA114](stating "with revocation of the 1-hour NAAQS,

[21] EPA also tried to support its action with the false and irrelevant assertion that after suspension of the 1-hour standard the Act "will no longer waive sovereign immunity to allow States to require the U.S. Department of Transportation [DOT] to perform conformity determinations." 69 Fed. Reg. 23987/2[JA130]. For reasons discussed above, suspension of the 1-hour standard does not abrogate MVEBs in approved SIPs, and in any event, compliance with MVEBs is in the first instance an obligation of *MPOs,* which are local planning organizations. Further, the continued legal validity of 1-hour MVEBs (or indeed any requirement of federal law) does not hinge on whether someone can sue the federal government to enforce them.

conformity will no longer apply for that NAAQS as a matter of law."). Indeed, although EPA has retained some of the 1-hour requirements of Subpart 2 in areas formerly designated nonattainment for the 1-hour standard, it has failed to retain other key requirements, as discussed in Part I above. EPA's revocation, therefore, is part and parcel of a plan to waive statutory control requirements in many areas of the country, including areas such as the South Coast Basin and the Baton Rouge area that have yet to attain either the 1-hour or the 8-hour standards.

This result is contrary to the Act's express terms. As the Supreme Court held in *Whitman*, Congress in 1990 "codified" the 1-hour ozone standard in Subpart 2, and set out a detailed plan "reaching far into the future" for implementing that standard. 531 U.S. at 483 (1-hour standard "codified by Table 1"), 485. The Court noted that "[s]ome of the elements required to be included in SIPs under Subpart 2 were not to take effect until many years after the passage of the Act", and held that this scheme "was not enacted to be abandoned the next time the EPA reviewed the ozone standard…" *Id.* 485. Yet EPA's revocation rule does abandon that scheme before it has even run its course. As EPA acknowledges, many areas still violate the 1-hour standard and still have not adopted all of the plans and controls required by Subpart 2 to attain that standard. 69 Fed. Reg. 23976[JA119]. Indeed, some of the Subpart 2 deadlines for implementing the 1-hour standard have yet to even expire. For example, the 1-hour attainment deadline for SCAQMD is 2010: for New York and Houston the deadline is 2007. By revoking the 1-hour standard before it has been attained – and indeed before all attainment deadlines have even expired – EPA has sought to pull the rug out from under Congress' carefully crafted Subpart 2 scheme.

B. EPA's Decision to Revoke the 1-Hour Standard in Full Was Arbitrary and Capricious.

EPA's main rationale for prematurely revoking the 1-hour standard seems to be that the focus should now be on implementing the 8-hour standard. *See* 69 Fed. Reg. 23970-71[JA113-

14]. [22] Yet EPA has not found a conflict between the two standards. See RTC 92[JA581]. To the contrary, the Agency concedes that controls to reduce the 1-hour concentrations are generally also helpful in reducing 8-hour levels. RTC 89, 132[JA578, 621]. EPA also agrees that Congress intended that "controls not be weakened where the NAAQS is made more stringent." 69 Fed. Reg. 23972/2[JA115]. Further, in promulgating the 8-hour standard in 1997, EPA specifically provided that the 1-hour standard would continue to apply as a matter of law for so long as an area is not attaining that standard. 62 Fed. Reg. 38856, 38894/3[JA202]. EPA adopted this approach "for purposes of achieving attainment of the current 1-hour standard" and "to ensure a smooth transition to the implementation of the new 8-hour standard." *Id.* 38873[JA199]. There is no rational explanation for now asserting a wholly contrary position. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 57 (1983)("an agency changing its course must supply a reasoned analysis").

EPA's revocation action was also arbitrary and capricious because the agency failed to consider the health benefits of retaining the 1-hour standard. SCAQMD and other commenters submitted substantial evidence that in some communities the 1-hour standard provides important health protection not provided by the 8-hour standard – most notably from high short term ozone levels. *See, e.g*. OAR-2003-0079-0441; OAR-2003-0079-0101 at 42[JA335]. EPA itself has found that the 8-hour standard alone "could allow for high 1-hour exposures of concern." 62 Fed. Reg. 38856, 38863[JA198]. By revoking the 1-hour standard before that standard has even been

[22] EPA also justifies revocation as a way of "simplify[ing]" implementation and conserving state resources. RTC 83[JA572]. Far from simplifying things, however, EPA's approach makes things considerably more complicated because it adds several layers of antibacksliding and other transition rules that, under the agency's view, would not be needed if the 1-hour standard was retained. And there is no evidence in the record that EPA's approach will be any less resource intensive for the states, except where EPA is illegally waiving pollution control requirements all together.

attained, EPA has therefore exposed millions of Americans to increased health risks. Because the agency failed to consider this additional health risk or explain why such risk should be allowed, its action was arbitrary and capricious. *American Lung Ass'n v. EPA*, 134 F.3d 388, 391-92 (D.C. Cir. 1998)(EPA failure to explain why short term peaks in air pollution were not of concern renders action arbitrary and capricious.).

C. Eliminating the Nonattainment Designations and Classifications for the 1-Hour Standard Without Following the Requirements Set out in Section 107(d) of the Clean Air Act Was Unlawful

In revoking the 1-hour standard, EPA also revoked the associated designations and classifications for 1-hour nonattainment areas. 69 Fed. Reg. 23969/3[JA112].[23] In so doing, EPA unlawfully circumvented the express requirements of CAA §107(d), which provides that an area's nonattainment designation for a pollutant "shall remain in effect until the area … is redesignated" pursuant to §§107(d)(3) or (4). §107(d)(1)(B)(iv)(emphasis added). For a pre-existing 1-hour ozone nonattainment area, the only redesignation provided for in §107(d)(3) or (4) is from "nonattainment" to "attainment." There is no authority to redesignate from "nonattainment" to "standard no longer applicable." Moreover, redesignation of a 1-hour nonattainment area to attainment is only allowed if the area has actually attained the 1-hour standard and has met all pollution control obligations applicable to 1-hour nonattainment areas (including those under Subpart 2). §§107(d)(1)(B)(iv), (d)(3)(E).

[23] EPA is retaining in the Code of Federal Regulations information on 1-hour ozone designation and classification status as of the effective date of designation for the 8-hour standard. 70 Fed. Reg. 44471[JA177]. However, EPA is doing this only because the prior 1-hour designations and classifications are relevant for purposes of the agency's antibacksliding rules – not because it considers the 1-hour designations and classifications to remain in effect. *Id.* .

Here, EPA's blanket revocation of 1-hour nonattainment designations violated §107's mandate that each area's nonattainment designation "shall remain in effect" until that area…is redesignated "pursuant to paragraph [d](3) or [d](4)" of §107. §107(d)(1)(B)(iv)(emphasis added). While EPA designated areas for the 8-hour standard, effective June 15, 2004, such designations were made pursuant to paragraph (d)(1) of §107 -- not paragraphs (d)(3) or (d)(4). 69 Fed. Reg. 23860[JA3]. As noted above, §107(d)(3)(E) lists the requirements that must be met before an area can be redesignated from nonattainment to attainment, and EPA made no finding that those requirements were met by any of the 1-hour nonattainment areas for which it revoked the 1-hour nonattainment designation. To the contrary, EPA has found that many of those areas continue to violate the 1-hour standard, a fact that by itself would disqualify such areas from redesignation under §107(d)(3)(E). *See* 69 Fed. Reg. 23858 [JA1](finding that more than half of 8-hour nonattainment areas violate 1-hour standard).

Congress provided no exemption in the case of revised NAAQS from its general proscriptions against changing nonattainment designations unless the requirements of CAA §107(d)(3) and (d)(4) are met. And "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *American Methyl Corp. v. EPA,* 749 F.2d 826, 836 (D.C. Cir 1984), *citing National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974). EPA's decision to create its own new regulatory pathway rather than following the path clearly set forth in the Clean Air Act, by revoking the 1-hour standard and eliminating nonattainment designations in effect for that standard without following the requirements of §107(d), is therefore contrary to law. For the same reasons, EPA's revocation rule is unlawful because it terminates the classifications of 1-hour nonattainment areas. The 1990 Amendment assigned those classifications "by operation of law," both initially

in 1990 and thereafter by mandatory bump up of areas that failed to meet attainment deadlines. CAA §§181(a)(1), (b)(2)(A). Congress gave EPA no authority to change the classifications mandated by operation of law (except for adjustment of borderline cases within 90 days of initial classification). §181(a)(4).

As a result of EPA's action, residents of 1-hour nonattainment areas are being deprived of specific safeguards that Congress wrote into the Act to assure implementation of antipollution measures and attainment of standards. Through §107(d)(3)(E), Congress directed that no nonattainment area would be allowed to take an off ramp from the Act's remedial scheme for nonattainment areas until the area showed that it had adopted all of the Act's antipollution requirements (including those in Subpart 2), that it had actually attained the standard, and that attainment was due to permanent pollution reductions. Through the classification provisions, Congress directed that 1-hour nonattainment areas would be subject to increasingly protective clean air requirements until they met the standard. EPA's action here flouts all of these requirements by letting numerous 1-hour nonattainment areas evade the Act's express remedial scheme without ever having attained any ozone standard and without ever having adopted all of the antipollution measures mandated for such areas.

III. EPA'S DECISION TO REGULATE MOST 8-HOUR NONATTAINMENT AREAS UNDER SUBPART ONE RATHER THAN SUBPART TWO WAS ILLEGAL, ARBITRARY AND CAPRICIOUS

EPA acted illegally and arbitrarily in directing that most 8-hour ozone nonattainment areas be regulated only under the general nonattainment provisions of Subpart 1, and exempting those areas from the more specific and protective provisions of Subpart 2.[24] In *Whitman*, the

[24] This issue is addressed in greater depth in the brief of the State/Commonwealth petitioners, whose arguments we join.

Supreme Court expressly rejected a 1997 EPA policy that exempted all 8-hour nonattainment areas from regulation under Subpart 2. The Court held that the Act "unquestionably" provided for classification and regulation of 8-hour nonattainment areas under Subpart 2 and that Congress intended Subpart 2 to govern ozone implementation "far into the future." 531 U.S. 482, 484-85. Yet on remand EPA flouted these holdings by exempting from Subpart 2 more than half of all 8-hour nonattainment areas - namely, those that did not also violate the 1-hour standard as of the date of 8-hour designation.

EPA's approach conflicts sharply with the Act's express terms and with the holding in *Whitman*. CAA §181(a)(1) directs that "[e]ach area designated nonattainment for ozone pursuant to section [107(d)] . . . shall be classified, at the time of such designation, under table 1" – the backbone of Subpart 2 that sets out classifications and attainment deadlines. 42 U.S.C. §181(a)(1)(emphasis added); 531 U.S. at 482. Because EPA designated all 8-hour nonattainment areas pursuant to §107(d), 69 Fed. Reg. 23860[JA3], §181(a)(1) requires that all of those areas be classified under Subpart 2. Further, *Whitman* held that the "principal" distinction between Subpart 1 and Subpart 2 was that the latter "eliminate[d] regulatory discretion that the former allowed." 531 U.S. at 484. As an example of such limiting of discretion, the Court noted that "[w]hile Subpart 1 permits the EPA to establish classifications for nonattainment areas, Subpart 2 classifies areas as a matter of law based on a table." *Id.* (emphasis added).

EPA attempted to justify its action by grossly misreading the Supreme Court's reference to a "gap" in the Act with respect to how Subpart 2 should be applied to a new ozone standard. The Court found that "to the extent the new [8-hour] ozone standard is stricter than the old one …the classification system of Subpart 2 contains a gap, because it fails to classify areas whose ozone levels are greater than the new standard (and thus nonattainment) but less than the

approximation of the old standard codified by Table 1" in Subpart 2. *Id.* 483. Thus, the "gap" cited by the Court arises because the Table 1 classifications (which are based on 1-hour concentrations) do not fully accommodate the "stricter" 8-hour standard. It is wholly inapposite for EPA to use Table 1's failure to adequately reflect a stricter standard as an excuse for adopting a weaker regulatory approach than mandated under Subpart 2. The solution to the gap was to translate the Table 1 ozone values to reflect ranges of 8-hour concentrations above the 8-hour standard, a step that EPA in fact took. The readjusted Table 1 specifically provides for classification of 8-hour nonattainment areas at all ozone levels exceeding the 8-hour standard, including levels that are less than the approximation of the old 1-hour standard codified in the original Table 1. 69 Fed. Reg. 23863[JA6]. Having thus addressed the gap, there was simply no justification for EPA to then take the extreme and unlawful step of exempting most 8-hour nonattainment areas from Subpart 2.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Petitioners respectfully request that the Court vacate the EPA actions challenged herein to the extent that they:

1. Allow relaxation of NSR requirements applicable to 1-hour nonattainment areas under their 1-hour classifications;

2. Allow relaxation of controls included in 1-hour rate of progress and attainment plans;

3. Waive requirements for adoption and implementation of contingency measures to remedy failure to timely meet 1-hour rate of progress milestones or attain the 1-hour standard;

4. Waive requirements for adoption and implementation of the economic incentives for emission reductions required by CAA§185 in areas that fail to timely attain the 1-hour standard;

5. Abrogate motor vehicle emission budgets in approved state implementation plans and bar determination of conformity with respect to the 1-hour standard;

6. Provide for revocation of the 1-hour standard one year after the effective date of 8-hour designations;

7. Provide for regulation of 8-hour nonattainment areas solely under Subpart 1, rather than classifying and regulating such areas under Subpart 2.

Petitioners further ask the Court to remand this matter to EPA with instructions to publish, within 6 months of the Court's order, rules that fully correct the deficiencies identified above. A deadline for EPA action on remand is warranted to avoid delay in compliance with the statutory deadlines for submittal of 8-hour ozone SIPs (which are due June 15, 2007), and to prevent unlawful relaxation of the Act's pollution control mandates.

DATED this 17th day of October, 2005 (refiled with Joint Appendix citations June 23, 2006).

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Final Opening Brief of Environmental Petitioners and South Coast Air Quality Management District** contains 16,191 words, as counted by counsel's word processing system and is therefore within the applicable word limitation set in the Court's Order of August 26, 2005.

DATED: October 17, 2005 (refiled with Joint Appendix citations June 23, 2006).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Final Opening Brief of Environmental Petitioners and South Coast Air Quality Management District** has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 23rd day of June 2006, upon the following:

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