Case No. 20-71196

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY and CENTER FOR ENVIRONMENTAL HEALTH,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator,
Respondents.

On Petition for Review of Final Agency Action

RESPONDENTS' ANSWERING BRIEF

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GLOSSARY

Act	Clean Air Act
APA	Administrative Procedure Act
CAA	Clean Air Act
CARB	California Air Resources Board
CEPAM	California Emissions Projections Analysis Model
CSAPR	Cross-State Air Pollution Rule
EPA	United States Environmental Protection Agency
E.R.	Petitioners' Excerpts of Record
NAAQS	National Ambient Air Quality Standard
NO_x	Nitrogen oxides
PM_{10}	Particulate matter that is 10 micrometers or smaller in diameter
PPB	Parts per billion
ROG	Reactive organic gases
S.E.R.	Respondents' Supplemental Excerpts of Record
SIP	State Implementation Plan
VOCs	Volatile organic compounds

INTRODUCTION

Imperial County is a sparsely populated area in southeastern California with large areas of open desert. The Mexicali, Mexico metropolitan area is located directly across the international border. Mexicali is a major industrial and transportation hub with a population approaching nearly one million — five times greater than Imperial County. Pollution sources in Mexico are not subject to the same rigorous regulation system that applies in the United States under the Clean Air Act ("CAA"). As a result, Mexicali has a serious ozone pollution problem. Because Imperial County shares the same airshed, emissions of ozone precursors from sources inside Mexico impact Imperial County too.

To combat ozone pollution, Imperial County and California have implemented measures to reduce emissions of ozone precursors from domestic sources. Long-term trends show that levels of ozone in ambient air in Imperial County are declining and will continue to decline due to those regulatory efforts. Nevertheless, Imperial County did not meet the 2008 ozone national ambient air quality standard ("NAAQS") by its applicable attainment date of July 20, 2018. Prevailing winds blow substantial amounts of ozone and ozone precursors from Mexico into southern California. Without the impacts from Mexican sources, Imperial County's air quality would be much better — in fact, the County's ambient air quality would measure well below EPA's 2008 ozone standard.

Imperial County's proximity to Mexico poses a challenge for regulators. The State and Imperial County have jurisdiction over domestic sources of ozone precursors, but the CAA provides no extraterritorial authority to regulate sources in Mexico, a short distance away. As a result, Imperial County has few effective options to reduce emissions of ozone precursors coming from Mexico.

In the CAA's 1990 amendments, Congress addressed the unfairness that would result if areas within the United States were held responsible for air pollution originating in foreign nations beyond their control. Congress was particularly concerned about communities along the southern border, such as Imperial County, subject to a large influx of international transport. Accordingly, Congress passed a new section codified at 42 U.S.C. § 7509a ("Section 179B"), titled "International border areas," to provide flexibility to account for cross-border pollution within the CAA's framework.

The first subsection — Section 179B(a) — looks prospectively to the attainment date and authorizes EPA to approve state nonattainment plan submissions that demonstrate attainment in an area but for the impacts of cross-border pollution. The second subsection — Section 179B(b) — operates after the attainment date and contemplates a retrospective analysis into why an area did not meet the NAAQS by an applicable attainment date. If a state can demonstrate that it would have attained the ozone NAAQS but for emissions of ozone precursors

emanating from outside the United States, Section 179B(b) exempts the area from being reclassified, which would entail more stringent regulatory requirements.

Here, EPA provided adequate notice of rulemaking and thoroughly explained its reasonable application of Section 179B(a) and Section 179B(b) to California's ozone submissions for Imperial County. Petitioners identify no error in EPA's technical judgments, but nevertheless contend that EPA misinterpreted Section 179B(a) and acted arbitrarily and capriciously in approving California's nonattainment plan submissions for Imperial County. There is no merit to Petitioners' procedural or substantive challenges to EPA's well-supported rule.

EPA explained that Section 179B(a)'s language is ambiguous and offered two potential readings of the terms "maintain" and "maintenance" in that provision. Petitioners' brief concedes that EPA's second interpretation of Section 179B(a), which provides for some form of ongoing maintenance, is permissible. Thus, the Court need not reach Petitioners' lengthy statutory construction arguments regarding the first potential reading to uphold EPA's rule under the second interpretation.

Under either interpretation of Section 179B(a), EPA concluded that California's revisions for Imperial County were sufficient because they complied with all applicable CAA requirements, other than demonstrating attainment of the 2008 ozone NAAQS due to emissions from Mexico. EPA's decision rests on a

strong foundation here. First, there is no dispute that emissions from Mexico substantially impact Imperial County. Nor is there any question that emissions of ozone precursors from domestic sources have been decreasing in Imperial County since at least 2008. Based on the available data, domestic emissions of ozone precursors in Imperial County are likely to continue to decrease in the future. Thus, EPA reasonably concluded that California's nonattainment plan submissions complied with Section 179B(a) under either of EPA's readings of terms "maintain" or "maintenance." Petitioners offer no legitimate reason to second-guess EPA's technical judgments in approving California's revisions for Imperial County under Section 179B(a). The petition for review therefore should be denied.

STATEMENT OF JURISDICTION

On February 27, 2020, EPA issued a final rule titled "Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, California," 85 Fed. Reg. 11,817 (Feb. 27, 2020); Petitioners' Excerpts of Record 1 ("E.R.") 0001. EPA promulgated the rule under the CAA, 42 U.S.C. §§ 7401-7671q. EPA agrees that the petition was timely and this Court has subject matter jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

1. Whether EPA provided adequate notice of its proposed decision to approve California's revisions to Imperial County's implementation plan, and was

entitled to respond to Petitioners' comments with additional information to further explain the basis for its final rule.

2. Whether the terms "maintenance" and "maintain" in Section 179B(a) are sufficiently ambiguous to be susceptible to more than one possible statutory interpretation.

3. Whether EPA's alternative interpretations of Section 179B(a) are permissible, and therefore entitled to deference from this Court.

4. Whether EPA acted arbitrarily or capriciously when it determined, based on an extensive showing in the record, that Imperial County's nonattainment plan submission satisfied Section 179B(a).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are provided in the addendum following this brief and Petitioners' Corrected Opening Brief ("Opening Brief"), ECF 14.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Ozone regulation in the NAAQS Program

The CAA establishes a comprehensive program for controlling and improving the Nation's air quality through cooperative state and federal regulation. One of the Act's foundational tools is the NAAQS program, under which EPA promulgates standards for the maximum ambient concentrations of certain

pollutants, designed to protect public health and welfare. 42 U.S.C. § 7409. For each pollutant regulated under the program, EPA generally designates geographic areas in every state as either in attainment (if air quality meets the NAAQS) or nonattainment (if air quality does not meet the NAAQS or contributes to nonattainment in a nearby area). *Id.* § 7407(d).

Once EPA promulgates a new or revised NAAQS, states have primary responsibility for formulating pollution control strategies and ensuring that they meet the NAAQS. *Id.* § 7407(a). All states must have a State Implementation Plan ("SIP") for the implementation, maintenance, and enforcement of the NAAQS. A SIP must include, among other provisions, enforceable emissions limitations and other measures necessary to attain and maintain the NAAQS within its borders. *Id.* § 7410(a)(1), (a)(2). States with designated nonattainment areas must include additional, more stringent requirements in their SIPs for those areas. Some of those additional requirements apply to nonattainment areas for all NAAQS; others are specific to ozone nonattainment areas. *See id.* §§ 7502, 7511a.

When a state makes a SIP submission, EPA must evaluate it and either approve, disapprove, or conditionally approve the submission within specified statutory timelines. *Id.* § 7410(k). If EPA disapproves it, or the state fails to submit a complete SIP submission within the required time, then EPA must

promulgate a federal implementation plan unless the state corrects the deficiency. *Id.* § 7410(c)(1).

In California, the California Air Resources Board ("CARB") is responsible for making SIP submissions to EPA and has broad authority to establish emission standards and other requirements for mobile sources. Local and regional air pollution control districts generally are responsible for regulating stationary sources and developing air quality plans for their districts. The Imperial County Air Pollution Control District develops CAA nonattainment plans for Imperial County.[1] Imperial County submits the plans to CARB for adoption, and then CARB submits them to EPA as proposed revisions to California's SIP.

EPA has regulated ozone under the NAAQS program since the late 1970s. *See* 84 Fed. Reg. 58,641, 58,642 (Nov. 1, 2019); Respondents' Supplemental Excerpts of Record ("S.E.R.") at 29. Ozone is generally not emitted directly from sources. It is formed in the atmosphere through chemical reactions between precursor pollutants — namely, nitrogen oxides ("NO_x") and volatile organic compounds ("VOCs").[2] *See* 80 Fed. Reg. 65,292, 65,299-65,300 (Oct. 26, 2015).

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[1] This brief uses the term "Imperial County" to describe either the County or the Air Pollution Control District. The geographic boundaries for the County's nonattainment area for the 2008 ozone standard are set forth in 40 C.F.R. § 81.305.

[2] California uses the term reactive organic gases ("ROG") to refer to VOCs.

This case concerns EPA's 2008 ozone NAAQS, which set a standard of 75 parts per billion ("ppb"). *See* 40 C.F.R. § 50.15; 73 Fed. Reg. 16,436 (Mar. 27, 2008).[3]

Congress established additional requirements specific to ozone nonattainment areas. 42 U.S.C. §§ 7511-7511f. Upon designation, EPA classifies each ozone nonattainment area as Marginal, Moderate, Serious, Severe, or Extreme based on the severity of its ozone problem. *See* 42 U.S.C. § 7511(a)(1); 40 C.F.R. § 51.1103. An area's classification determines the stringency and suite of control requirements that apply to the area, as well as the date by which it must meet the relevant NAAQS, known as the "attainment date." *See* 42 U.S.C. § 7511.

Within six months after the applicable attainment date, EPA must determine whether the area attained the NAAQS. *Id.* § 7511(b)(2)(A). If EPA determines that the area did not attain, then it is reclassified by operation of law to the next higher classification (e.g., from Marginal to Moderate). *Id.* This reclassification results in a later attainment date and requires the state to make SIP revisions implementing increasingly stringent controls. *See id.* § 7511(a). A determination that an area classified as Moderate or above has failed to timely attain also triggers the contingency measures in the state's prior nonattainment plan. *Id.* § 7502(c)(9).

[3] In 2015, EPA promulgated a new ozone NAAQS. The rule under review concerns only the 2008 ozone NAAQS.

If the state attains the NAAQS by the applicable deadline, then EPA issues a determination of attainment; however, the area retains its nonattainment designation. To qualify for a redesignation to attainment, a state must meet specific statutory requirements. *See id.* § 7407(d)(3). Thus, even after EPA makes an attainment determination, the state remains subject to applicable nonattainment plan requirements until EPA formally redesignates the area. *Id.* § 7505a(c).

2. SIP requirements for nonattainment areas

The CAA enumerates specific SIP requirements that states must address in nonattainment area plans. *Id.* § 7502; *see also id.* § 7511a (ozone nonattainment plans). In addition to providing for attainment of the NAAQS, a state's nonattainment plan must include, among other things, implementation of reasonably available control measures; provisions requiring reasonable further progress toward achieving attainment; a comprehensive inventory of actual emissions; and a program requiring permits for construction and operation of new or modified major stationary sources.[4] *Id.* §§ 7502(c), 7511a. Additional requirements apply based on the area's nonattainment classification. *Id.* § 7511a.

[4] Ozone nonattainment areas classified as Marginal have a more limited set of SIP requirements than those listed here. *Id.* § 7511a(a).

3. Section 179B: accounting for cross-border pollution

As noted in the Introduction, Congress created Section 179B as an exception to the Act's typical requirements for nonattainment plans because Congress understood that there were parts of the country, including communities along our southern border, where monitored air quality may exceed the NAAQS due in part to the transport of pollutants from a foreign nation. Section 179B contains two subsections relevant here. The first subsection — titled "Implementation plans and revisions" — authorizes EPA to approve state nonattainment plans that meet all CAA requirements, except for the requirement to demonstrate attainment and maintenance of the NAAQS, due to emissions emanating from outside of the United States. Section 179B(a) provides:

> (a) Implementation plans and revisions. Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if—
>
> > (1) such plan or revision meets all the requirements applicable to it under the chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and
> >
> > (2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.

42 U.S.C. § 7509a(a). Section 179B(a) governs EPA's evaluation of SIP submissions that are prospective, or looking forward to the applicable attainment date, to determine whether the plan or revision "would be adequate" for attainment without the additional emissions from outside the United States.

The second subsection of Section 179B is titled "Attainment of ozone levels." When Section 179B(b) applies, the attainment date has passed and the issue is whether the state failed to attain by that date due to international transport. *See* S.E.R.59. Section 179B(b) states:

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

42 U.S.C. § 7509a(b). In other words, Section 179B(b) gives states the option of preparing a *retrospective* analysis to persuade EPA that foreign pollution was the "but for" cause of its failure to attain the relevant ozone NAAQS by the applicable attainment deadline. If a state makes the requisite showing, Section 179B(b) provides relief from reclassification to a higher level of nonattainment and the more stringent requirements that would result. *Id.* § 7511(b)(2).

In that regard, it is important to note that Section 179B(b)'s last clause contains an error. It incorrectly refers to "section 7511(a)(2)" instead of "section

7511(b)(2)." The latter subsection addresses EPA's duty to reclassify an ozone nonattainment area after the attainment date. Petitioners agree with EPA that Section 179B(b) contains this erroneous cross-reference. *See* Opening Brief 11.

B. Factual background

1. Imperial County's ozone designation status

As noted above, EPA established a new ozone standard in March 2008. *See* 73 Fed. Reg. 16,435 (March 27, 2008). In 2012, EPA designated Imperial County as a nonattainment area for the 2008 Ozone NAAQS, and classified it "Marginal." *See* 77 Fed. Reg. 30,088, 30,099 (May 21, 2012). Thus, Imperial County's initial attainment date became July 20, 2015.

Imperial County did not meet the NAAQS by the July 2015 attainment date and was reclassified as "Moderate." *See* 81 Fed. Reg. 26,697, 26,699-700 (May 4, 2016). After this reclassification, Imperial County was required to prepare a new SIP submission meeting Moderate area requirements and to attain the 2008 ozone NAAQS no later than July 20, 2018. *Id.* at 26,698, 26,704. California did not invoke Section 179B(b) in 2015 to show that emissions of ozone precursors from Mexico caused it to exceed the 2008 ozone NAAQS at that time.

2. California's submissions

Although California was under a January 2017 deadline to submit a nonattainment plan for the Imperial County area, a number of events unrelated to

the issues at hand delayed CARB's submission. California ultimately provided three submissions ("California Submissions") to EPA relevant to Imperial County's status as a nonattainment area for the 2008 ozone NAAQS that became the subject of the single EPA rulemaking at issue here.

Pursuant to 179B(a), California submitted for EPA's review the "Imperial County 2017 State Implementation Plan for the 2008 8-Hour Ozone Standard" and the "2018 SIP Updates to the California State Implementation Plan," which contained analyses relevant to several ozone nonattainment areas, including Imperial County. S.E.R.94-103, 122-174. With modeling, back tracing analysis, emissions inventories and a detailed technical analysis, California demonstrated that — in accordance with Section 179B(a) — Imperial County had put in place the measures necessary to attain and maintain the 2008 ozone NAAQS but for the impacts of pollution from Mexico. *Id.*

Pursuant to Section 179B(b), California also submitted for EPA's review the "Imperial Ozone Retrospective Demonstration" in July 2018. The Retrospective Demonstration presents CARB's technical analysis showing that Imperial County would have attained the 2008 ozone NAAQS by July 20, 2018, but for emissions emanating from Mexico. S.E.R.104-18.

Given the timing of the California Submissions and because both relevant subsections of Section 179B share the "but for" standard for assessing impacts of

emissions emanating from outside the United States, there is some overlap in the analysis of three submissions covered by EPA's rule.

3. EPA's rulemaking

In November 2019, EPA issued a notice of proposed rulemaking announcing that it planned to approve the California Submissions in accordance with Section 179B. *See* 84 Fed Reg. 58,641 (Nov. 1, 2019); S.E.R.28-53. EPA's proposed rule thoroughly describes the background for the action and the relevant statutory provisions, including Section 179B(a). *See*, *e.g.*, *id.* at 58,643 (quoting Section 179B(a)'s language and explaining its applicability in a section titled "Requirements for International Border Areas").

EPA provided a section-by-section summary of each significant aspect of the California Submissions and supported that with a section describing EPA's analysis and the basis for proposing to approve the revisions under Section 179B(a). *Id.* at 58,644-64 (discussing, among other things, emissions inventories, reasonable available control measures, reasonable further progress provisions, and the demonstration of attainment for the 2008 ozone NAAQS but for international emissions). EPA also placed its technical analysis in the docket. *See id.* at 58,645 n.29, 58,654; S.E.R.54-93. EPA clearly summed up its conclusion with respect to Section 179B(a) in the "Proposed Actions" section:

> Given our proposal that the Imperial Ozone Plan meets all requirements for the Imperial County Moderate ozone nonattainment

> area, other than the requirement to demonstrate attainment, and our evaluation of the State's lines of evidence that together support the conclusion that Imperial County would attain the 2008 ozone NAAQS by the July 20, 2018 attainment date but for emissions emanating from Mexico, the EPA proposes to approve the Imperial Ozone Plan's section 179B attainment demonstration as meeting the requirements of CAA sections 172(c)(1), 182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.

84 Fed. Reg. at 58,644-64. Similarly, EPA stated that it was proposing to approve California's Retrospective Demonstration under Section 179B(b). *Id.; see also id.* at 58,660-65. As EPA explained, California showed that the two monitoring sites in Imperial County with the worst ambient air quality — El Centro and Calexico — had design values only 1 to 2 ppb above the 75 ppb standard, and would have been *well below* the NAAQS (approximately 64 to 65 ppb) without emissions from Mexico. *See id.* at 58,661 (discussing Table 8).

During the public comment period, EPA received two comment letters on the proposed rule. *See* 85 Fed. Reg. at 11,819. One was an anonymous e-mail raising an irrelevant issue about safety sensors. *Id.* Petitioner Center for Biological Diversity submitted the only other comment letter. *Id.*

On February 27, 2020, EPA published its final rule approving California's Submissions relating to Imperial County. *Id.* at 11,817; 1 E.R.0001. In the final rule, EPA explained that there was no reason to depart from the extensive analysis described in the proposed rule and therefore EPA approved California's

Submissions. *Id.* at 11,819 (incorporating the "more detailed discussion of the rationale for approval" from the initial rule).

EPA also provided a lengthy summary and response to Petitioners' comments. *Id.* at 11,819-22. As an initial matter, EPA noted that the statute "provides little guidance" regarding the meaning of "maintenance" in Section 179B(a). *Id.* at 11,820. EPA explained that two interpretations of Section 179B(a)'s terms were possible. Regarding the timing of the "maintenance" requirement, EPA stated that "one possible interpretation of the statutory language is that the state's demonstration must show that the plan revision is adequate to attain and 'maintain' the NAAQS 'by,' that is, up to the attainment date." *Id.* EPA noted that another "possible interpretation" of Section 179B(a) is that the state must demonstrate that the plan revision is "adequate to maintain the NAAQS beyond the attainment date." *Id.* In other words, EPA determined that Section 179B(a)'s ambiguous terms supported two potential readings: one that would require maintenance only up to the attainment date and a second that would require maintenance after the attainment date. *Id.* Under either potential reading of Section 179B(a), however, EPA concluded that California's plan for Imperial County would be adequate to attain and maintain the 2008 ozone standard but for emissions from Mexico. *Id.*

As EPA discussed, ambient ozone levels in Imperial County have been decreasing since at least 2008 and were projected to continue decreasing. Because Petitioners questioned what might happen if the situation changed, EPA looked at additional public data, analyzed projections and emissions inventories further into the future, and concluded that the weight of evidence supported the conclusion that domestic emissions of ozone precursors in Imperial County would continue decreasing through at least 2030 (twelve years beyond the attainment date). With no realistic prospect of domestic emissions in Imperial County increasing to a level that would approach the NAAQS, EPA finalized its determination that California's Submissions complied with Section 179B(a). EPA also finalized its proposed finding under Section 179B(b) that Imperial County would have met the 2008 ozone NAAQS by the applicable deadline but for emissions from Mexico. *Id.*

SUMMARY OF ARGUMENT

EPA provided adequate notice of its proposed decision to approve Imperial County's SIP revisions under Section 179B(a). The proposed rule recited the statutory language and contained a detailed discussion explaining why EPA proposed to find that California's Submissions satisfied Section 179B(a). EPA's notice was effective: Petitioners submitted comments on the proposed rule asking EPA to elaborate on its interpretation of Section 179B(a). EPA responded to

Petitioners' comments in the final rule, which reached the same conclusions as the proposed rule and was a logical outgrowth of the Agency's rulemaking.

EPA acted reasonably in approving under Section 179B(a) California's Submissions. Here, the precise meaning of the terms "maintain" and "maintenance" in Section 179B(a) are ambiguous. Accordingly, Congress implicitly delegated to EPA the task of interpreting the statute in a permissible manner, and EPA did so in the rule under review. Indeed, Petitioners concede that one of EPA's readings — the second interpretation of Section 179B(a) — is permissible, offering the Court a relatively straightforward path to reject the challenges here. Under the guise of attacking EPA's first interpretation, Petitioners nevertheless attempt to circumvent *Chevron* standards and to impose their own policy preferences on EPA. The Court should reject Petitioners' arguments and defer to EPA's permissible construction of Section 179B(a).

Petitioners fail to show that EPA's decision was arbitrary, capricious, or otherwise unlawful. Given the highly deferential standard of review, Petitioners cannot establish that EPA overlooked any relevant facts or that its approval lacked a rational basis. The administrative record demonstrated a clear causal relationship between pollution from Mexico and Imperial County's nonattainment of the 2008 ozone NAAQS. Similarly, the administrative record supports EPA's conclusion that emissions of ozone precursors from domestic sources in Imperial County will

continue to decrease into the future. Excluding Mexico's impact, EPA concluded that Imperial County's ambient air quality would have been and will remain far below the 2008 NAAQS level. Petitioners offer no legitimate reason to second-guess EPA's assessment of the technical evidence in the record or its policy judgments. In sum, the Court should deny the petition for review.

STANDARD OF REVIEW

The deferential standard of review for agency actions set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), applies here. The Court must uphold the agency action unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Rybachek v. EPA*, 904 F.2d 1276, 1284 (9th Cir. 1990). This standard is "highly deferential, presuming the agency action to be valid" and requires "affirming the agency action" when a reasonable basis for it exists. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (citation omitted). A reviewing court may not "substitute its judgment for that of the agency." *Id.* (citation omitted); *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

Agency action is arbitrary or capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Generally, an agency's decision will be upheld as long as there is a rational connection between the facts found and the conclusions made. *Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 530 (9th Cir. 2016).

Where a challenge involves a factual dispute or judgment that implicates EPA's technical expertise, courts typically defer to the Agency. *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1074 (9th Cir. 2014); *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination … a reviewing court must generally be at its most deferential."). Even when an agency explains its decision with less than ideal clarity, a reviewing court will not disturb the decision on that account if the agency's path may reasonably be discerned. *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 497 (2004).

When an agency interprets a statute it administers, this Court follows the two-step analytical framework set forth in *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Alaska Wilderness League v. EPA*, 727 F.3d 934, 938 (9th Cir. 2013). At step one, if Congress has "directly spoken to the precise question at issue," then the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *Barnhart v. Walton*, 535 U.S. 212, 217 (2002). But "if the statute is silent or ambiguous with respect to the specific

issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *Resisting Environmental Destruction on Indigenous Lands ("REDOIL") v. EPA*, 716 F.3d 1155, 1161-63 (9th Cir. 2013). The Court does not need to find the agency's interpretation is the sole permissible one, or that it is the interpretation the court would have reached, but only that the agency's interpretation is rational. *See McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999).

Moreover, this Court may deny the petition under either of EPA's alternative interpretations of Section 179B(a), or both. *See MacClarence v. EPA*, 596 F.3d 1123, 1129 (9th Cir. 2010); *U.S. v. Simpson*, 430 F.3d 1177, 1185 (D.C. Cir. 2005); *Vista Hill Foundation, Inc. v. Heckler*, 767 F.2d 556, 559 (9th Cir. 1985).

ARGUMENT

I. EPA Provided Adequate Notice of Its Action.

Petitioners advance two related APA challenges regarding EPA's notice during the rulemaking. *See* Opening Brief 31-48. They argue that: (1) the APA required EPA to define Section 179B(a)'s "maintenance" terms when it issued the proposed rule; and (2) the APA barred EPA from citing additional information in the final rule when responding to Petitioners' comments urging EPA to explain

how it was applying those terms in Section 179B(a).[5] Petitioners mischaracterize the APA's notice provisions and disregard the significance of their own comments calling for, and thereby prompting, EPA's further explanation in the final rule. EPA fully satisfied the APA's notice provisions here.

A. EPA's proposed rulemaking notice was adequate.

The APA requires that an agency publish a notice that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). As the APA's text makes clear, agencies are not required to include every jot and tittle in a proposed rulemaking notice. *See Rybachek*, 904 F.2d at 1287 (holding that EPA need not "publish in advance every precise proposal which it may ultimately adopt as a rule."). Rather, the APA allows an agency to describe generally the substance of a proposed action or the issues under consideration. *See Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (noting that the APA's goal is to fairly apprise interested persons of the subjects or issues before the agency).

Moreover, as Petitioners concede, this Court has recognized that the APA does not preclude an agency from promulgating a final rule that differs "even

[5] Petitioners illogically assert the APA notice arguments only against EPA's second interpretation of Section 179B(a), while urging the Court to review the first interpretation on the merits. Opening Brief 31 n.6. Notwithstanding this inconsistency, the APA arguments fail as to either interpretation.

substantially" from its proposed rule. Opening Brief 33 (citation omitted). "Informed changes and distinctions are the very raison d'etre of the notice-and-comment period." *Rybachek*, 904 F.2d at 1288; *see also Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (the APA does not require EPA to "adopt a final rule that is identical to the proposed rule").

EPA's proposed rule provided ample notice. EPA disclosed what it was proposing to do: approve California's Submissions in accordance with Section 179B(a). *See, e.g., id.* at 58,641 ("The EPA proposes to approve the portions of the Imperial Ozone Plan that address the requirements for . . . a demonstration of attainment . . . but for emissions emanating from outside of the United States"); *id.* at 58,665 (proposing to approve the "demonstration as meeting the requirements of CAA sections 172(c)(1), 182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.").

In the face of EPA's discussion of Section 179B(a), Petitioners assert that EPA "entirely ignore[d]" the statutory language. Opening Brief 33. EPA's proposed rule, however, specifically recited Section 179B(a)'s language several times and explained why EPA believed that the revisions complied with Section 179B(a). *See, e.g., id.* at 58,643 (quoting the statutory language, including "maintenance"); *id.* at 58,651 (repeating Section 179B(a)'s text and applying it to the State's Submissions); *id.* at 58,660 (agreeing that the "section 179B(a)

demonstration" met applicable requirements); *id.* at 58,665 (summarizing EPA's proposed conclusion regarding Section 179B(a)).

In sum, EPA included Section 179B(a)'s full text in the proposed rule and provided a thorough review of the California Submissions, including technical analysis showing that Mexican emissions substantially impacted Imperial County's air quality. Based on an objective review, the proposed rule notified the public that Section 179B(a) was at issue in the rulemaking. EPA's notice disclosed the terms and substance of the proposed rule and it clearly invited comments regarding Section 179B(a)'s application to the Imperial County revisions under review. *See Rybachek*, 904 F.2d at 1287 (holding that the APA's notice provisions did not require EPA's proposed rule to disclose the actual wording of the "best management practices" to be incorporated in permits).

Petitioners incorrectly assert that EPA was obligated to *specifically construe* the terms "maintain" and "maintenance" in the proposed rule. *See* Opening Brief 31-34. This argument reflects a misunderstanding of APA notice provisions. The APA contains no requirement that an agency engage in a detailed statutory construction of every phrase or term in a statutory provision governing the subject matter when the rulemaking notice amply discloses that the provision is at issue.

The D.C. Circuit's decision in *Hercules Inc. v. EPA*, 938 F.2d 276, 283 (D.C. Cir. 1991), is instructive. In *Hercules*, EPA initiated a rulemaking in light of

new statutory requirements applicable to the transfer of properties containing hazardous substances. In the proposed rule, EPA did not define what would constitute a contract to transfer real property or address whether leases would qualify, preferring to make case-by-case determinations. *Id.* at 278-80.

Petitioners in *Hercules* argued that providing no definition of the term "transfer" was a failure of notice. *Id.* at 280. However, the D.C. Circuit held that the APA *did not require* EPA to provide a specific definition of that term in the proposed rule. *Id.* Because the proposal notice covered the general subject matter, interested parties had the opportunity, and thus the obligation, to submit comments requesting a more specific definition of the statutory term if desired. *Id*. at 281. The court also held that EPA's decision to not define the statutory term in the final rule was reasonable. *Id.* *Hercules* therefore undercuts Petitioners' procedural and substantive APA challenges to EPA's rule here.

Agencies often start with broadly worded rulemaking proposals. If a commenter requests more specificity on an issue, this does not signify there was a problem with the notice. *See Hercules*, 938 F.2d at 283 ("several commenters in fact pointed out to the agency" that EPA had provided "no definition" of the statutory term); *Rybachek*, 904 F.2d at 1286 (noting that petitioners had the right to comment on EPA's proposed regulation, but not to "comment in a never-ending way" on EPA's response to their comments); *see also generally Hodge v. Dalton*,

107 F.3d 705, 711 (9th Cir. 1997) (noting that the agency initially "did not propose language specifying" whether certain parties were covered by the rule, but then clarified the issue in response to a comment).

Petitioners do not identify a single APA case that has adopted their view. Indeed, one decision Petitioners cite (Opening Brief 40) squarely rejected a similar argument as "strange." *See AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (dismissing the notion that a party that had presented comments recommending changes to a regulation could later "complain that it had inadequate notice" of the possibility of such a change). EPA followed the normal notice-and-comment rulemaking process by responding to Petitioners' concern that the Agency should address the meaning of the terms "maintain" and "maintenance" in the final rule. Another round of public comment was not required in these circumstances — otherwise, the rulemaking process could "go on forever." *See, e.g.*, *Arizona ex rel. Darwin*, 852 F.3d at 1159.

Because they incorrectly assume that the proposed rule should have contained a more specific statutory interpretation, Petitioners' reliance on the catchphrase "something cannot come from nothing" from *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), is misplaced. *See* Opening Brief 35-36. In fact, they misread that decision's rationale and the relevant context.

The problem in *Kooritzky*, an immigration law case, was that the agency did not announce that it would be making a fundamental change in the way it had interpreted existing law, which greatly affected employers who were trying to obtain agency permission to hire alien workers. *Id.* at 1511-12. Indeed, the agency stated in the proposed rule that *no change* would be made and did not give the "merest hint" that the rule was reconsidering existing practice. *Id.* In the final rule, however, the agency completely reversed course and abolished its existing practice without giving employers or the general public any notice or opportunity to comment on this fundamental change. *Id.* at 1513.

Kooritzky is distinguishable. There was no surprise reversal in the final rule here. Nor is it accurate for Petitioners to assert that EPA's proposed rule contained "nothing" to give notice of EPA's position. As explained above, EPA published a proposed rule that provided ample notice of the administrative action EPA intended to take — namely, to approve the State's revisions in accordance with Section 179B(a). *See supra* pp. 22-24. Although the final rule provided more specific interpretations for the first time in response to Petitioners' comments, EPA — consistent with its proposal — reached the same conclusion regarding Section 179B(a) under either of the two interpretations. Accordingly, the Court should affirm that EPA followed the APA's notice procedures in this rulemaking.

See Rybachek, 904 F.2d at 1287 (holding that EPA need not "publish in advance every precise proposal which it may ultimately adopt as a rule").

B. EPA may examine issues raised in public comments without violating APA notice provisions.

Agencies often receive new information during a rulemaking or are prompted by comments on a proposed rule to conduct additional analyses that the agency discloses when the final rule is promulgated. In such circumstances, this Court has repeatedly held that no APA violation has occurred. Indeed, the APA encourages agencies to consider such information, without thereby necessitating a new comment period. *See, e.g.*, *Kern County*, 450 F.3d at 1076 (citing *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 645-46 (1st Cir. 1979)); *Rybachek*, 904 F.2d at 1286 ("Nothing prohibits [EPA] from adding supporting documentation for a final rule in response to public comments.").

Petitioners nevertheless assert that EPA violated the APA by considering additional data — developed and analyzed by EPA staff in response to comments on the proposed rule — regarding future ozone levels in Imperial County. Opening Brief 42-48 (relying on *Ober v. EPA*, 84 F.3d 304, 314-15 (9th Cir. 1996)). Petitioners again miss the mark. *See, e.g.*, *Air Transport Ass'n of America v. CAB*, 732 F.2d 219, 223-24 (D.C. Cir. 1984) (holding that reliance on staff reports prepared in response to comments did not violate the APA); *BASF*, 598

F.2d at 645-46 (stating that agencies often will collect new data to give regulations a better foundation, and this does not trigger a "new comment period").

The APA analysis is straightforward. Petitioners' comments discussed one "reasonable possible interpretation" of Section 179B(a), which involved analyzing whether domestic emissions would increase so much that foreign pollution was no longer the but for cause of nonattainment. 2 E.R.0103. In response, EPA considered Petitioners' suggestion and explained in the final rule that available emissions inventories and data showed that Imperial County's domestic ozone emissions would continue to decrease through 2030. *See* 85 Fed. Reg. at 11,820 (citing C. Bohnenkamp, Ozone Precursor Emission Inventory Trends for Imperial County, California, S.E.R.1-27). In other words, EPA concluded that its technical analysis remained valid when extended further into the future and that domestic emissions of ozone precursors in Imperial County would continue to result in ambient ozone levels well below the NAAQS (without the influence of emissions from Mexico). It was fully appropriate for EPA to rely on its own technical memorandum to explain why Petitioners' speculation about domestic ozone emissions was unfounded. *See Kern County*, 450 F.3d at 1076.

Petitioners' primary case — *Ober* — does not say otherwise. In general, *Ober* recognizes that an agency may use supplementary data not disclosed with the initial rulemaking notice that "expands on or confirms information" in the

proposed rule. The precise problem before the Court in *Ober* differs from the instant matter: in *Ober*, it was the state — not EPA — that provided the additional information after the comment period that no one else was able to evaluate before the final rule issued. On that basis, *Ober* distinguished *Rybachek*, noting that there was no APA violation in *Rybachek* because the "added materials" were "the *EPA's own responses* to comments received during the public comment period." *Id.* at 314 (emphasis added). Thus, there is a clear distinction between the facts presented in *Ober* and situations, like this one, in which EPA conducts its own, additional analysis based on comments received on a proposed rule.

In *Kern County*, for example, the Court limited *Ober* to its facts and held that the agency did not violate the APA in considering — on its own initiative — three additional studies germane to its proposed endangered species listing that were not made available to the public during the comment period. *See* 450 F.3d at 1076 (reiterating that "the public is not entitled to review and comment on every piece of information utilized during rule making.").

As in *Kern County*, the additional information EPA considered in this matter confirmed and expanded on the existing data discussed in EPA's proposed rule and did not introduce a new premise or lead to a different decision regarding Section 179B(a). Therefore, the new information cannot be deemed so "vital" as to require EPA to conduct another round of comment. *Id.* at 1079-80; *see also Chemical*

Manufacturers Ass'n v. EPA, 870 F.2d 177, 202 (5th Cir. 1989) (holding that EPA's use of an expanded database for a final rule was "logical and reasonable" based on industry comments questioning the data presented in the initial rule), *clarified on reh'g on other issues*, 885 F.2d 253 (5th Cir. 1989).

C. EPA complied with all CAA procedures.

Petitioners further assert that Section 179B(a) imposes a procedural obligation on EPA to ignore any emission data or other relevant information, unless it was provided by the State. *See* Opening Brief 48-49 n.11 (admitting, however, that relying on this information was not an APA violation). If EPA, for example, has expertise, information, or data that the Agency believes is germane, Petitioners contend that *Section 179B(a)* forecloses EPA from considering that material when reviewing SIP revisions under the statute. For good reason, Petitioners do not cite a single case holding that such a procedural requirement exists in Section 179B(a) — there is none.

Nothing in the CAA, including Section 179B(a), suggests that EPA's authority should be constrained to consider *only* information that a state provides with a Section 179B(a) submission. In analogous circumstances, this Court rejected the notion that EPA's authority is limited to rubber stamping state implementation plans and revisions. *See Arizona ex rel. Darwin*, 815 F.3d at 531-32 (confirming that EPA plays more than a "ministerial role" in reviewing SIP

revisions). There is no good reason to impose a procedural rule prohibiting EPA from considering updated emissions data as part of its technical review under Section 179B(a), particularly when EPA rationally considers and explains the relevance of the information in response to public comments.

Finally, it is clear that EPA did not "willy-nilly grab state documents" and "approve them as plans, or as part of a plan," without submission by the State, as Petitioners contend. *See* Opening Brief 49. The only submissions EPA considered and approved were made by the State. EPA did not purport to incorporate the County's PM_{10} demonstration into the California Submissions or make its approval contingent on anything in it. The former document merely included relevant data regarding PM_{10} precursors (NO_x and VOCs) that are also ozone precursors, which EPA found useful in evaluating the California Submissions. In sum, the Court should reject Petitioners' attempt to invalidate the rule based on a non-existent CAA procedural obligation.

II. Section 179B(a) Is Ambiguous.

In accordance with *Chevron* standards, EPA correctly concluded that Section 179B(a) is ambiguous based on the statutory language and the specific context in which that language occurs. *See REDOIL*, 716 F.3d at 1161-63 (finding a CAA provision ambiguous and deferring to EPA's reading); *Alaska Wilderness*, 727 F.3d at 938 (same). EPA determined that Section 179B(a) was amenable to

two potential readings: one that would require maintenance only up to the attainment date and a second that contemplated some type of maintenance showing by a state after the attainment date. *See supra* p. 16. Petitioners direct their statutory arguments mostly against EPA's first interpretation of Section 179B(a), conceding that EPA's second interpretation is permissible. Opening Brief 51. Accordingly, while the Court should defer to both EPA interpretations, the second interpretation provides the most direct path to denying the petition for review. If the Court chooses to reach them, Petitioners' challenges to EPA's first interpretation fare no better and should be rejected as well.

At the first *Chevron* step, the Court must determine whether Congress has "*directly* spoken to the precise question" at issue. *Chevron*, 467 U.S. at 842-43 (emphasis added); *see Barnhart*, 535 U.S. at 218 (the focus at *Chevron* step 1 is whether the statute "unambiguously forbids" the agency's interpretation); *City of Arlington, Texas v. FCC*, 569 U.S. 290, 296 (2013) (statutory ambiguities are resolved by the administering agency, not the courts). As explained below, there is no single, unequivocal way to read "maintain" and "maintenance" in Section 179B(a). The ambiguities in Section 179B(a) require that Petitioners' policy-laden arguments be reviewed under the more deferential standards applicable to *Chevron* step 2 and general APA challenges. *See Village of Barrington, Illinois v. Surface Transportation Board*, 636 F.3d 650, 661 (D.C. Cir. 2011) ("But to prevail under

Chevron step one, the railroad must do more than offer a reasonable or, even the best, interpretation; it must show that the statute *unambiguously* forecloses" the agency's interpretation); *see infra* pp. 46-60.

A. Petitioners disregard EPA's role in the CAA.

In response to Petitioners' comments on the proposed rule, EPA elaborated on its interpretation of Section 179B(a) in the final rule. EPA began by noting that "the statute provides little guidance" regarding the meaning of the terms "maintenance" and "maintain" in Section 179B(a)(1) and (2). 85 Fed. Reg. at 11,820. This simple observation remains correct. The CAA provides no generally applicable definition of "maintenance" or "maintain" and neither does Section 179B(a) specifically. Because Congress did not speak directly to the issues at hand with unequivocal text, it implicitly delegated to EPA the responsibility for resolving the ambiguity in the terms maintenance and maintain for purposes of Section 179B(a). *See generally National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (noting that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"); *McLean*, 173 F.3d at 1181.

B. Petitioners ignore key statutory terms.

Despite citing the need to adhere to Section 179B(a)'s plain meaning and to give effect to all the statute's terms, Opening Brief 20-22, Petitioners' *Chevron* step 1 arguments stray from these well-established rules of statutory construction.

First, Petitioners' *Chevron* step 1 argument overlooks a critical point: the terms "maintenance" and "maintain" are followed with the phrase "by the attainment date" in both Section 179B(a)(1) and (2). Courts interpret "by" to connote a clear temporal limitation. *See, e.g.*, *Doucot v. IDS Scheer, Inc.*, 734 F.Supp.2d 172, 188 (D. Mass. 2010); *Bracey v. Helene Curtis, Inc.*, 780 F. Supp. 568, 570 n.2 (D. Kan. 1992). Thus, consistent with the plain language, EPA correctly concluded in the final rule that Section 179B(a) arguably could be read to mean that a state must show that a plan revision is adequate to attain and maintain the NAAQS "by" — that is, "up to" — the attainment date. 85 Fed. Reg. at 11,820. Congress did not say in Section 179B(a) that a state must show that it will maintain the ozone NAAQS "after" or "through" or "beyond" the attainment date. Rather, Congress chose the term "by the attainment date" and presumably intended the ordinary meaning of this term, arguably imposing a temporal limit on "maintain" and "maintenance" in this context. At a minimum, Congress' inclusion of the phrase "by the attainment date" creates ambiguity as to whether Congress

intended the terms "maintain" or "maintenance" to mean an obligation that would continue past the attainment date in the context of Section 179B(a).

Petitioners unsuccessfully attempt to eliminate the ambiguity associated with the use of the term "by the attainment date" in Section 179B(a). Petitioners suggest "by" applies *only* to "attainment" and they ask the Court to rewrite the language to cut "maintenance" free from any temporal limitation. *See* Opening Brief 21. But this argument cannot prevail at *Chevron* step 1 for several reasons.

As an initial matter, courts do not construe statutes by viewing individual words in isolation, but rather by reading the relevant statutory provision as a whole. *See generally Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066 (9th Cir. 1998); *Sierra Club v. EPA*, 99 F.3d 1551, 1555-56 (10th Cir. 1996) (rejecting the petitioner's "circuitous" plain language argument and upholding EPA's conclusion that a CAA provision was ambiguous when read in context). Reading the words Congress used in Section 179B(a) together, it is impossible to conclude that there is only one, unambiguous reading of the term "maintenance" that dictates when this particular concept applies. *See Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1187 (9th Cir. 2012) ("We must review the provision as a whole and, where possible, effectuate every word.").

Second, *Chevron* does not permit a court to rearrange the statutory text and adopt a sequencing of words that Congress did not choose. In Section 179B(a), the

phrase "by the attainment date" modifies both "maintenance" and "attainment." Petitioners' various arguments only serve to highlight the doubt about what Congress intended by the combination of words and phrases in Section 179B(a). Such ambiguity obligates the Court to analyze EPA's rule under the highly deferential *Chevron* step 2 framework, not at step 1. *See Chevron*, 467 U.S. at 843 (if the statute is "silent or ambiguous" on the issue, the court must defer to the agency's interpretation so long as it is a permissible construction); *MacClarence*, 596 F.3d at 1129-30 (holding that Congress left the meaning of the provision open for EPA to supply a reasonable interpretation).

Third, the absence of the terms "maintain" or "maintenance" in Section 179B(b) — which, unlike Section 179B(a), operates *after* the attainment date — suggests that any "maintenance" obligation applies only before the attainment date in this context. *See supra* pp. 10-11 (discussing the two subsections' respective language). If Congress had clearly intended for a state to be subject to some type of "maintenance" even though the area remains in nonattainment after the attainment date due to international emissions, one might expect to find some reference to such an obligation in Section 179B(b). Given the structure and purposes of the two subsections, the fact that Section 179B(b) makes no mention of "maintenance" undercuts Petitioners' main premise and indicates that there is not just one way to read Section 179B(a).

Petitioners also offer another alternative reading purporting to "resolve the tension" in Section 179B(a)'s language. Even if this were a proper exercise at *Chevron* step 1, their arguments would fail. *See* Opening Brief 26-27. Petitioners suggest the statutory terms "can be read" to mean that measures necessary for maintenance must be in place "by" the attainment date. *Id.* But this is a strained reading given the terms and relevant context, not one that EPA was required to adopt. In arguing that "by the attainment date" is tied only to when control measures need to be in place, Petitioners ignore Section 179B's key inquiry. The crux of the provision is attainment of the NAAQS by the attainment date, one of the CAA's central goals. To say that this provision is not about whether areas would attain by the attainment date, but instead whether plan provisions would be in place by the attainment date, is not a reasonable reading. In any event, weighing the relative merits of EPA's interpretation against Petitioners' attempt to reconcile Section 179B(a)'s conflicting terms is not proper at *Chevron* step 1. It suffices to say that there is not only one construction compelled by Section 179B(a)'s text. *See REDOIL*, 716 F.3d at 1161-63; *Village of Barrington*, 636 F.3d at 661.

Furthermore, Section 179B(a)'s "notwithstanding" clause makes clear that Congress intended to create an exception for areas affected by international emissions from the CAA's normal regulatory scheme. Section 179B(a) vests EPA with authority to approve a state's implementation plan, "[n]otwithstanding any

other provision of law," when the requirements in the Section are satisfied. Given this explicit carve out, Petitioners cannot credibly argue that the Agency is compelled to interpret the terms "maintenance" and "maintain" as they appear in other provisions, such as Section 175A, 42 U.S.C. § 7505a.

C. Petitioners interpret "maintenance" in the abstract, not as written in Section 179B(a).

Petitioners do not dispute that the CAA contains no definitions of the applicable statutory terms and phrases. In the absence of statutory definitions, Petitioners rely heavily on a dictionary to define the terms "maintenance" and "maintain" in Section 179B(a). *See* Opening Brief 17-20. If pointing to a dictionary alone could eliminate ambiguities in a complex statutory scheme, then few cases would progress beyond *Chevron* step 1. *See, e.g., Center for Biological Diversity v. Zinke*, 900 F.3d 1053, 1064-65 (9th Cir. 2018) (finding dictionaries alone insufficient to define the term "range" in the Endangered Species Act).

The Court's decision in *MacClarence* illustrates why inserting a dictionary definition is not dispositive at *Chevron* step 1 here. 596 F.3d at 1130-31. When construing the term "demonstrate" in Title V of the CAA, 42 U.S.C. § 7661d(b)(2), the Court held that petitioner's dictionary definition of "demonstrate" did not supplant EPA's authority to give contextual meaning to an ambiguous term. As the Court explained, the dictionary did not resolve important questions regarding the meaning of "demonstrate" in the particular CAA section at issue, such as the

type of evidence a petitioner may present and the burden of proof guiding EPA's evaluation. *Id.* The Court therefore concluded that the term "demonstrate" was ambiguous, deferred to EPA's reasonable construction, and rejected the petition for judicial review. *Id.* at 1130-33. Like *MacClarence*, a straightforward application of *Chevron* step 1 standards compels the same conclusion regarding the ambiguity of "maintenance" and "maintain" in Section 179B(a).

To say that "maintain" generally means "to keep in a state of repair" or to "preserve from failure" does not eliminate all doubt from the meaning of the term, as used in Section 179B(a). At best, Petitioners offer an abstract concept, suggesting that "maintenance" involves some type of "ongoing" activity. Opening Brief 18-19. Extrapolating from this generality, Petitioners assert that the normal sequence of "attainment" and "maintenance" suggests that some type of "maintenance" must *always* follow attainment. But they do not account for the fact that Imperial County is not in attainment for the 2008 ozone NAAQS now. Even after stringing these general concepts together, Petitioners themselves do not arrive at a single interpretation of Section 179B(a) that can be applied to achieve clear results. Rather, as their brief later concedes, there are "multiple ways" to implement their view of "maintenance." Opening Brief 37-38; *see Village of Barrington*, 636 F.3d at 664 (if provisions may be read in any number of reasonable ways, they can "hardly be described as unambiguous."). Petitioners'

abstract statutory theories, at best, represent one of several potential options to address Section 179B(a)'s ambiguity, and thus fall short at *Chevron* step 1. *See Putnam Family Partnership v. City of Yucaipa, Cal.*, 673 F.3d 920, 929 (9th Cir. 2012) (considering what an ambiguous statutory phrase meant in context, not what it "could mean in the abstract").

By looking "elsewhere" in the Act for meaning, Petitioners highlight Section 179B(a)'s ambiguity. For example, Petitioners note (Opening Brief 19-20) that a state must prepare a "maintenance plan" if the area attains the NAAQS *and* the state seeks to be redesignated as an attainment area. *See* 42 U.S.C. § 7407(d)(3)(E)(i), (iv) (redesignation); § 7505a(a) (maintenance plan). But the CAA does not require a state to seek redesignation even if it attains the NAAQS. Here, Imperial County has not made and currently cannot make such a request with respect to the 2008 ozone NAAQS.[6] Section 175A plainly does not apply to the specific situation under review.

Ironically, Petitioners cite *North Carolina v. EPA*, 531 F.3d 896, 908-11 (D.C. Cir. 2008), for the proposition that all the policy reasons in the world cannot justify reading a substantive provision out of a statute. Opening Brief 21. First, as

[6] By contrast, Imperial County did submit a maintenance plan and request redesignation to attainment for the 24-hour 1987 NAAQS for PM_{10}, which EPA recently approved. *See* 85 Fed. Reg. 58,286 (Sept. 18, 2020).

explained below, EPA is not reading any terms out of Section 179B. It is Petitioners who rely heavily on policy for their proposed interpretation at *Chevron* step 1, ignoring the ambiguous language and statutory context that require review under *Chevron* step 2. Moreover, *North Carolina* did not involve Section 179B(a) or international emissions at all. The text of the statutory provision at issue — 42 U.S.C. § 7410(a)(2)(D)(i)(I) — bears no resemblance to Section 179B(a). In short, *North Carolina* has no applicability here.

If Congress had intended to create a specific type of "maintenance" obligation in the context of international emissions, it could have written Section 179B(a) to incorporate something comparable to Section 175A's explicit "maintenance plan" provisions. *See id.* § 7505a(a). But, again, Section 179B(a) does not do so. Even Petitioners accept that Section 175A's "maintenance plan" requirements do not apply in this context. *See* Opening Brief 37-39 (arguing that there are "multiple ways" to implement an ongoing maintenance requirement). If there are indeed "multiple ways" to implement Section 179B(a) — as Petitioners suggest — then by definition Congress did not provide clear, unequivocal language defining precisely what "maintain" and "maintenance" mean in this context.

D. "Maintenance" is not meaningless under EPA's approach.

Petitioners argue, as a *Chevron* step 1 matter, that unless "maintenance" is construed as an "ongoing" obligation, EPA must necessarily be reading the term

"out" of the statute. Petitioners are mistaken. Both of EPA's interpretations of Section 179B(a) imbue the terms "maintain" and "maintenance" with meaning.

EPA's first interpretation reads the terms in accordance with Section 179B(a)'s structure and the temporal connotations associated with the phrase "by the attainment date." Under this interpretation, if a state's demonstration of attainment but for international emissions shows attainment in advance of the attainment date, the state must additionally demonstrate that it will maintain the NAAQS up to the applicable date. For example, if a state's demonstration shows attainment but for international emissions by 2021, but the statutory attainment date is 2023, the state must additionally demonstrate that it will continue to maintain the standard but for international emissions through 2023.[7]

EPA's second interpretation would construe the terms "maintain" and "maintenance" as extending past the attainment date, in line with Petitioners' preferred reading. Petitioners dispute only whether EPA had sufficient evidence to approve the California Submissions given such an interpretation. As explained in Section IV below, EPA found that that emissions of ozone precursors would continue declining into the future, and reasonably concluded that Imperial

[7] In the instant case, California did not need to make separate demonstrations of attainment and maintenance because the Submissions demonstrated attainment by the statutory deadline but for international emissions.

County's ambient air quality, excluding Mexican emissions, will remain far below the 2008 ozone NAAQS level.

E. Congress's use of ambiguous terms is not a surprise, given the drafting errors in Section 179B.

Petitioners' theory that Congress had a unifying vision that imparts unequivocal meaning to Section 179B is dubious given the errors written into the statute. For instance, as noted above, Section 179B(b) contains an incorrect reference to the applicable reclassification provision for ozone. *See supra* p. 11. Similarly, Section 179B(c) contains a mistaken reference to a provision in the CAA that does not exist. *See* 57 Fed. Reg. at 13,569 n.42; 2 E.R.0039. And as its title makes clear, Section 179B(d) applies to PM_{10}, but that subsection's one sentence of text mistakenly refers to "carbon monoxide." *Id.* While these drafting errors do not directly bear on the meaning of "maintenance" in Section 179B(a), they tell us that Congress did not draft Section 179B with precision. This is understandable, given the magnitude of the 1990 Amendments and the fact that Section 179B(a) remains a relatively obscure provision. *See Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. New York Dep't of Environmental Conservation*, 17 F.3d 521, 524 (2d Cir. 1994) (describing the 1990 amendments).

F. The legislative history does not eliminate the ambiguity.

Citing *Altera Corp. & Subsidiaries v. Commissioner of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019), Petitioners invite the Court to consult the

legislative history of the 1990 Amendments to divine Section 179B(a)'s meaning. *See* Opening Brief 27-28. There are several problems with Petitioners' approach.

First, as this Court recently recognized when interpreting the CAA, a petitioner cannot resort to the legislative history to "avoid" ambiguity in the text. *REDOIL*, 716 F.3d at 1162-63. If Section 179B(a)'s language were as clear as Petitioners posit, reference to the legislative history for the 1990 Amendments would be "both unnecessary and inappropriate to illuminate unambiguous text." *Id.* *Altera* does not hold otherwise. There, the Court concluded that the statutory language at issue was *ambiguous* at *Chevron* step 1 and proceeded to consider legislative history at *Chevron* step 2. *See* 926 F.3d at 1076-78.

Second, and equally importantly, Petitioners concede that Section 179B(a)'s "legislative history does not explicitly endorse one interpretation or another." Opening Brief 27. EPA agrees with that point. There are no better clues in the legislative history regarding what Congress intended the terms "maintain" or maintenance" in Section 179B(a) to mean than in the statute itself. For example, there is no evidence in the legislative history that suggests the phrase "by the attainment date" does not serve as a temporal limit on the preceding terms in the same sentence. In short, the legislative history does not eliminate the ambiguities that EPA correctly identified in Section 179B(a)'s text. *See Espejo v. INS*, 311

F.3d 976, 979 (9th Cir. 2002) (proceeding to *Chevron* step 2 because the statute was silent on the issue and legislative history was ambiguous at best).

To the extent that the Court wishes to consider the scant legislative history that exists for Section 179B(a) as part of its *Chevron* step 2 analysis, *see infra* pp. 47-49, EPA disagrees with Petitioners. EPA has long recognized that Section 179B "evinces a general congressional intent not to penalize areas" when emissions from a foreign country are the "but for" cause of nonattainment. *See* 57 Fed. Reg. at 13,569 n.42; 2 E.R.0039; *see also* 59 Fed. Reg. at 42,001 (Congress did not want states with areas affected by foreign pollution to "shoulder more of a regulatory and economic burden" than states that were not similarly affected); 2 E.R.0044. This view accords with Congressional statements about the need to provide states with relief in this context. *See* 101 Cong. Rec. S1630, (statement of Sen. Gramm), 1990 WL 1222325 (CAANINE) (stating that it "obviously is not our intention to put people in El Paso out of business . . . because people across the border are making no effort" to control air pollution).

In addition, the legislative history shows that Congress wanted to vest EPA with discretion to work with states on the international pollution problem. Senator Gramm expressly stated that Section 179B would "give EPA the flexibility to address that problem." *Id.* Thus, if anything, Congress wanted to give EPA leeway to decide how best to address regulatory issues to protect public health

through the NAAQS and take into consideration the impacts of international pollution when evaluating state submissions involving Section 179B.

III. EPA's Interpretations Are Permissible.

Because Congress did not unambiguously forbid EPA's alternative interpretations of Section 179B(a), *Barnhart*, 535 U.S at 218, the Court is bound to apply the highly deferential *Chevron* step 2 standard. *Brand X*, 545 U.S. at 981. As long as the agency's view reflects a reasonable reading of the statute, the *Chevron* step 2 inquiry is satisfied. *Id.* (a court cannot reject an agency's reading because the court does not believe it is "the best" statutory interpretation); *Village of Barrington*, 636 F.3d at 660 (asking only whether the agency explained how its permissible interpretation is rationally related to the goals of the statute). At *Chevron* step 2, courts do not choose from among the permissible choices EPA could have made or weigh the pros and cons of different policies. *See Central Arizona Water Conservation District v. EPA*, 990 F.2d 1531, 1543 (9th Cir. 1993) ("This court is not to substitute Petitioners' judgment, or its own, for that of EPA, as long as the agency's interpretation is reasonable."); *McLean*, 173 F.3d at 1181 (noting the limited circumstances for reversing an agency at *Chevron* step 2). Petitioners cannot carry their heavy burden under this deferential standard.

Here, Petitioners again focus on the first interpretation of Section 179B(a), but the Court can easily affirm EPA's second potential interpretation under

Chevron step 2 standards. In fact, Petitioners expressly concede that EPA's second interpretation is "permissible" because this option contemplates that a SIP revision would provide for "maintenance" in some form "beyond" the attainment date. *See* Opening Brief 51 (stating that EPA's "interpretation" is permissible, but questioning the particular "implementation" of it here). Consequently, the only issue for the Court with respect to EPA's second interpretation is whether EPA's application and ultimate approval of the 2008 ozone plan relating to Imperial County was arbitrary and capricious. *See REDOIL*, 716 F.3d at 1161-63.

With regard to EPA's first interpretation, as noted above, EPA explained that the term "maintenance" in Section 179B(a) could be construed in conjunction with the phrase "by the attainment date" to create a temporal limitation, i.e., an acceptable revision could provide for maintenance of the NAAQS "up to" the attainment date. Other than repeating their *Chevron* step 1 arguments, Petitioners make only a superficial attempt to argue that EPA's first interpretation is deficient under *Chevron* step 2. *See* Opening Brief 29-30 (agreeing that a statutory interpretation is "permissible" if it satisfies the arbitrary and capricious standard). Thus, if the Court agrees that Section 179B(a) is ambiguous, Petitioners offer no valid reason to override the first interpretation at *Chevron* step 2. *See generally Central Arizona Water*, 990 F.2d at 1543. EPA's first interpretation is rational based on Section 179B(a)'s text, the structure of its two subsections relating to

ozone, and the clear Congressional goal to provide relief to border areas that are impacted by foreign pollution. *See supra* pp. 33-46. As EPA thoroughly explained, Imperial County has regulated domestic sources effectively and would be well below the 2008 ozone NAAQS but for emissions emanating from Mexico. Accordingly, EPA provided cogent reasons for the policy choices it made and articulated how those comport with the CAA's goals in the proposed and final rule.

EPA provided rational reasons for approving the Imperial County plan under either interpretation based on the administrative record. *See infra* pp. 49-60; *Pharmaceutical Research & Manufacturers of America v. FTC*, 790 F.3d 198, 209-10 (D.C. Cir. 2015) (noting that *Chevron* step two often overlaps with or is the same as arbitrary and capricious review under the APA).

IV. EPA's Approval Under Section 179B(a) Was Reasonable.

Petitioners' remaining arguments, though advanced under different banners, fail under the APA's highly deferential arbitrary and capricious standard. *See State Farm*, 463 U.S. at 43 (courts must affirm an agency conclusion unless it is so "implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *Ukeiley v. EPA*, 896 F.3d 1158, 1164-65 (10th Cir. 2018) (rejecting an APA challenge to EPA's approval of a state's maintenance plan because EPA "relied on technical judgments grounded in data"); *WildEarth*

Guardians v. Jewell, 738 F.3d 298, 309 (D.C. Cir. 2013) (emphasizing that APA review does not entail "flyspecking" an agency decision).

Although Petitioners focus on the "maintenance" issue, the Court is bound to evaluate the reasonableness of EPA's rule based on the record as whole. *See Rybachek*, 904 F.2d at 1284. Viewed under the APA's deferential standards, the record plainly shows that EPA's approval of California's 179B(a) demonstration of attainment of the 2008 ozone NAAQS but for emissions from Mexico is supported by sound technical judgments. *See Arizona ex rel. Darwin*, 815 F.3d at 530-31 (deferring to EPA's informed expertise and discretion). Even Petitioners admit that "the state's demonstration of attainment (but for international emissions) was technically strong" and they do not challenge it here. Opening Brief 4.

In the proposed rule, EPA cited ample supporting data and explained that California's submissions — with modeling and other analyses — satisfied Section 179B(a) and (b) because Imperial County would have attained the 2008 ozone NAAQS by the July 20, 2018 deadline but for emissions from Mexico. S.E.R.38-52. As an initial matter, EPA's reasoned analysis cited Imperial County's proximity to Mexicali, the shared topography and meteorological conditions, and the fact that Mexicali has a much larger population and emissions inventory than Imperial County. *See* 84 Fed. Reg. at 58,651-53, 63-65.

As EPA elaborated in the proposed rule, California's demonstration included photochemical modeling, back trajectory analysis, and emissions inventory comparisons, which showed a steady decline in ozone pollution levels in Imperial County as a result of domestic source regulation. *Id.* at 58,652-55. In addition, EPA considered modeling results from EPA's Cross-State Air Pollution Rule Update ("CSAPR") and found that this information further confirmed the long-term trend of declining domestic ozone levels in Imperial County. *Id.* at 58,654. One CSAPR modeling run, for example, showed that domestic emissions in Imperial County (without the influence of Mexico) would remain far below the NAAQS for at least five years beyond the attainment date, i.e., through 2023. *Id.* at 58,654, 58,661 n.186; S.E.R. 79, 83, 113-14, 119-21. In short, EPA reasonably concluded that the various "lines of evidence" presented in the State's submissions fully supported the Agency's approval under Section 179B(a). *Id.* at 58,655.

Moreover, the rulemaking record reveals that Mexico's impact on Imperial County's ability to meet the 2008 ozone NAAQS was not a close question. Table 8 of the proposed rule, along with other evidence discussed above, leaves no room to question EPA's finding that efforts by California and Imperial County to regulate domestic sources are adequate to attain and maintain the 2008 ozone NAAQS (but for Mexico). Once Mexican emissions were excluded, the highest design value for any monitoring site in Imperial County (Calexico) dropped by

16.5% to 64.3 ppb, approximately 10 ppb below the 2008 ozone NAAQS. *Id.* at 58,661. This unequivocally demonstrates that emissions of ozone precursors from Mexico substantially impact Imperial County's ambient air quality.

In sum, EPA assessed the data and noted that multiple analyses yielded consistent results, providing a strong foundation for approving the California Submissions under Section 179B(a). *See* 85 Fed. Reg. at 11,819 (incorporating the proposed rule's analyses into the explanation for the final rule). EPA considered the relevant information, articulated a rational connection between the facts and the choice it made, and engaged in a thorough technical analysis that even Petitioners concede was sound. This clearly shows that a rational basis for EPA's rule exists.

If the Court agrees that EPA's second interpretation is reasonable (which Petitioners concede), it should reject Petitioners' attempts to dispute EPA's judgments on the theory that ozone pollution from domestic sources in Imperial County *might* increase in the future. Opening Brief 4 (arguing that "past success is no guarantee of future success"). As elaborated below, these arguments are wrong on multiple levels. Petitioners ignore EPA's response to their comments in the final rule and disregard the deference that is owed to EPA based on its expertise in this area. *See WildEarth Guardians*, 759 F.3d at 1074; *Rybachek*, 904 F.2d at 1284. At bottom, Petitioners' unsupported speculation about the future cannot supplant the extensive record evidence showing that EPA reasonably concluded

that domestic emissions of ozone and ozone precursors in Imperial County will result in ozone levels substantially below the 75 ppb standard for the foreseeable future. *See*, *e.g.*, *Ukeiley*, 896 F.3d at 1165 (rejecting an arbitrary and capricious argument where ample data supported EPA's technical analysis).

First, Petitioners erroneously assert that EPA's approval was arbitrary because the Agency would not be able to respond in the unlikely event that domestic ozone pollution greatly increases in the future. *See* Opening Brief 23-25, 50 (arguing that EPA's rule left a "gap" or "hole" in the Act's regulatory scheme). As an initial matter, Petitioners claim that there is "no mechanism" to alert EPA if this did become a problem. Opening Brief 24. But that is clearly incorrect because California will continue to collect and report ozone monitoring data to EPA under the 2008 ozone NAAQS, *see, e.g.*, 40 C.F.R. §§ 58.10-12, 14-16, and the more restrictive 2015 NAAQS. Thus, EPA will have the means to determine if the ozone situation in Imperial County drastically changes. *See also* 42 U.S.C. § 7410(p) (authorizing EPA to request reports from states).

As noted in the final rule, EPA also retains broad authority under 42 U.S.C. § 7410(k)(5) to call for plan revisions "[w]henever" EPA finds a plan to be substantially inadequate. *See* 85 Fed. Reg. at 11,821. If, for example, subsequent to EPA's approval of a nonattainment plan, air quality monitoring data shows that the measures in the plan did not prevent NAAQS violations, it would be within

EPA's authority under the first prong of § 7410(k)(5) to find that the plan was then substantially inadequate to "attain" the relevant NAAQS. *See generally Association of Irritated Residents v. EPA*, 686 F.3d 668, 675-78 (9th Cir. 2012) (noting that EPA may consider revising an attainment plan even after approval).

Similarly, under the third prong of § 7410(k)(5), EPA could find that a 179B plan no longer "compl[ies] with" the requirements of Section 179B itself. There is no temporal limitation on EPA's discretion to call for a SIP revision if circumstances change. Nor would EPA need to make specific findings to invoke its authority under § 7410(k)(5) if EPA determined that its interpretation of Section 179B(a), or some other applicable CAA provision, must change in the future. *See U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167-68 (10th Cir. 2012). Whereas courts have interpreted EPA's SIP call authority broadly to further the Act's goals, *see Montana Sulphur*, 666 F.3d at 1181-84, Petitioners strangely ask for the opposite result here without citing a single case that has adopted their unreasonably narrow view of § 7410(k)(5). In short, the theoretical "gap" Petitioners posit ignores EPA's lawful authority and the data showing that domestic ozone pollution levels in Imperial County will not significantly increase into the future.

If EPA is presented with different facts and circumstances — for instance, if modeling for another area or pollutant showed that air quality from domestic emissions was much closer to the NAAQS than is the case with Imperial County's

ozone levels — nothing in the final rule here ties EPA's hands from taking appropriate action. EPA has long favored a flexible approach to implementing Section 179B(a) and adopted that policy again in this rule. *See* 84 Fed. Reg. at 58,643. Accordingly, EPA rationally decided to continue working with states on a "case-by-case basis" to determine the most appropriate "information and analytical methods" to fit each area's unique situation. *Id.* (internal quotations omitted).

Petitioners' efforts to quibble with EPA's finding that the California Submissions comply with Section 179B(a) are foreclosed by the administrative record. Even Petitioners' comments on the proposed rule suggested that one "reasonable" way for EPA to assure "maintenance" under Section 179B(a) would be to conduct an analysis of the area's emissions some time into the future. *See supra* p. 48. EPA conducted such an analysis in response to those comments, and as explained in the final rule, EPA concluded that domestic emissions of ozone precursors (NO_x and VOCs) will decline through 2030. *See* 85 Fed. Reg. at 11,819-20 (discussing EPA's staff memorandum by C. Bohnenkamp). Because Section 179B(a) does not mandate any particular "maintenance" analysis and Petitioners do not dispute that emissions of ozone precursors from domestic sources in Imperial County are likely to decrease in the future, their remaining challenges to EPA's conclusions require little discussion under the highly

deferential standard of review. *See Kern County*, 450 F.3d at 1076 (a reviewing court cannot substitute its judgment for that of the agency).

First, Petitioners fault EPA for not explaining why it did not use "photochemical modeling" (Opening Brief 52) to evaluate the SIP submissions, but they ignore what EPA said in the rule, which is sufficient to establish the Agency's rational basis. California used its own photochemical modeling, as well as EPA's photochemical modeling in support of CSAPR, to evaluate attainment by the attainment date but for international impacts, and as noted above, the CSAPR modeling did look five years beyond the attainment date. Furthermore, as Petitioners acknowledge, California was not required to prepare a maintenance plan under 42 U.S.C. § 7505a because California did not seek redesignation to attainment per § 7407(d). The bottom line is that there is no requirement to use photochemical modeling in the manner Petitioners' suggest; what is needed for a state to meet Section 179B(a)'s standards is a matter within EPA's expertise and discretion. In that regard, EPA reasonably relied on a host of different analyses, including the CSAPR photochemical modeling, demonstrating that levels of ozone resulting from emissions of ozone precursors from domestic sources in Imperial County will remain below the standard for many years into the future. Petitioners provide no evidence to the contrary, nor do they assert that other modeling would show a different result.

Second, Petitioners argue that EPA did not explain why it looked at emissions and inventory data reported in Imperial County's recent PM_{10} redesignation request and maintenance plan. Opening Brief 52. However, they immediately acknowledge the obvious: both PM_{10} and ozone are "formed from nitrogen oxides and volatile organic compounds." *Id.* Moreover, the data regarding ozone precursors that EPA discussed came from the California Emissions Projections Analysis Model ("CEPAM") emissions database. *See* 85 Fed. Reg. at 11,820. This is the same database that California relied on for the photochemical modeling to demonstrate attainment with the 2008 ozone NAAQS but for emissions from Mexico. *See, e.g.*, S.E.R.3, 37, 148. Given that Petitioners argued in their comments on the proposed rule that EPA should look at emission levels further into the future, there was nothing unreasonable about EPA examining the available precursor data in the CEPAM database out to 2030 and discussing the Agency's technical analysis of it in the final rule.

Third, Petitioners question whether EPA conducted an "independent" review of the CEPAM data. Opening Brief 44. Petitioners raised no objection during the public comment period to California's use of CEPAM data in the Submissions or to EPA's discussion of CEPAM emissions data in the proposed rule, thereby waiving this argument under both the CAA and APA. *See Arizona ex rel. Darwin*

v. EPA, 852 F.3d 1148, 1160 (9th Cir. 2017); *Buckingham v. Secretary of U.S. Dep't of Agriculture*, 603 F.3d 1073, 1081 (9th Cir. 2010).

In any event, the record clearly shows that EPA acted reasonably in considering CEPAM data in the final rule as part of its analysis. EPA's technical staff reviewed the data and explained that both annual and seasonal inventories were consistent in confirming that emissions of ozone precursors in Imperial County would decrease long into the future. S.E.R.1-27 (Bohnenkamp memo). Similarly, EPA noted that ozone precursors in upwind areas, including the South Coast air basin, also will decrease through 2031. *Id.* The adequacy of EPA's "review" of the CEPAM information is apparent from the explanation in the final rule and the record itself. In addition, EPA has since approved Imperial County's redesignation request and maintenance plan for $PM_{10,}$ which relied in part on the same CEPAM data. *See supra* p. 41 n.6. In sum, the CEPAM data added to overall reasonableness of EPA's finding that the Imperial County's attainment plan would be adequate to maintain the 2008 ozone NAAQS but for international emissions. *See generally Kern County*, 450 F.3d at 1076 (holding that EPA did not err in relying on additional studies that supported its determination).

Fourth, Petitioners assert that they "would have" challenged the "accuracy" of emissions data for Imperial County because California allegedly "undercounts" nitrogen oxide emissions in agricultural areas. Opening Brief 44. EPA's proposed

rule provided extensive discussion and analysis of California's emission inventories for NO_x (and VOCs). *See* 84 Fed. Reg. 58,645-47 (emissions inventories for the base year of 2012); *id.* at 58,655-57 (emissions inventories for the "reasonable further progress" milestone year of 2017). Yet, Petitioners failed to raise the alleged "undercounting" problem before the Agency. Therefore, Petitioners waived the issue and cannot present it for the first time here. *See supra* pp. 57-58 (citing waiver cases). In any event, EPA's analyses indicated that domestic emission levels in Imperial County are far below the 2008 ozone NAAQS. *See supra* pp. 15-17, 49-52. Because Petitioners do not attempt to quantify the alleged undercounting, it would be sheer speculation to assume that this alleged issue would alter the analysis even if they had timely raised the point.

Finally, Petitioners question why EPA did not discuss Mexican emission inventories in the final rule. Opening Brief 52-53. Information regarding sources inside Mexico is limited and difficult to obtain, 2 E.R.0078, but EPA did cite a recent update that showed a large increase in Mexico's emissions inventory. *See* 84 Fed. Reg. at 58,661 n.186. While this suggests emissions within Mexico may increase in the future, the primary focus under Section 179B(a) is domestic emissions (i.e., the State's demonstration that domestic emissions are sufficiently controlled such that the area would have attained by the attainment date, but for emissions emanating from outside of the United States). The record clearly

showed that a large amount of ozone results from sources in Mexico, and emissions in Mexico are likely to remain a problem. But neither California nor Imperial County can control emission sources in Mexico. Thus, it was eminently reasonable for EPA to cite CEPAM's domestic inventories in the final rule, explaining that emissions from domestic sources will decrease for at least the next decade, as part of its justification for approving the revisions under Section 179B(a). *See Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (stating that courts must be "most deferential when reviewing scientific judgments and technical analyses within the agency's expertise").

V. The Amicus Brief Identifies No Error By EPA.

Although amicus curiae Comité Civico Del Valle, Inc. ("Comité") advocates for reducing ozone pollution on "both sides" of the border, it acknowledges that Imperial County cannot unilaterally regulate emissions sources in Mexico. ECF 15 at 3, 24-25. Indeed, Comité largely confirms the reasonableness of EPA's overall analysis. *Id.* at 7 (noting that Mexicali has five times the population and its industry and freight transportation networks "greatly impact" Imperial County's environment); *id.* at 16-17 (discussing Mexicali's *maquiladoras* and heavy-duty truck traffic). In sum, the amicus brief buttresses the rational conclusions reached by government agencies at the local, the state, and the national level, and does not

detract from the solid foundation for EPA's approval of Imperial County's revisions under either interpretation of Section 179B(a).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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This brief contains 13,749 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Date October 21, 2020

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I hereby certify that on October 21, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Michael C. Augustini
MICHAEL C. AUGUSTINI

ADDENDUM

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5 U.S.C.A. § 553

§ 553. Rule making

Currentness

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

Notes of Decisions (1480)

5 U.S.C.A. § 553, 5 USCA § 553
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End of Document

KeyCite Yellow Flag - Negative Treatment
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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (4781)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 116-163.

End of Document

United States Code Annotated
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42 U.S.C.A. § 7407

§ 7407. Air quality control regions

Effective: January 23, 2004

Currentness

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

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

(b) Designated regions

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

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

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

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

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

(d) Designations

(1) Designations generally

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

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

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

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

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

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

(B) Promulgation by EPA of designations

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

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the

designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

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

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

(C) Designations by operation of law

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

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

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

(2) Publication of designations and redesignations

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

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

(3) Redesignation

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

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

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase “60 days” shall be substituted for the phrase “120 days” in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

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

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

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

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

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

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

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

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

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

(A) Ozone and carbon monoxide

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

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

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

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

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a

Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

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

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

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

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

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

(5) Designations for lead

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

(6) Designations

(A) Submission

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

(B) Promulgation

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

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

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

(e) Redesignation of air quality control regions

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

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located

within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

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

CREDIT(S)

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

Notes of Decisions (59)

42 U.S.C.A. § 7407, 42 USCA § 7407
Current through P.L. 116-140.

End of Document

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

42 U.S.C.A. § 7409

§ 7409. National primary and secondary ambient air quality standards

Currentness

(a) Promulgation

(1) The Administrator--

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

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

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

(b) Protection of public health and welfare

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

Notes of Decisions (89)

42 U.S.C.A. § 7409, 42 USCA § 7409
Current through P.L. 116-163.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

42 U.S.C.A. § 7410

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

Currentness

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

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

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

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

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

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

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

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

(D) contain adequate provisions--

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

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

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

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

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

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

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

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

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

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

(H) provide for revision of such plan--

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

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

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

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

(K) provide for--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Extension of period for submission of plans

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

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

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

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

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

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

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

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

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

(D) For purposes of this paragraph--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) meets the requirements of this section, and

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

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

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

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

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

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

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

(i) Modification of requirements prohibited

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

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

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

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

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

to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

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

(2) Deadline for action

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

(3) Full and partial approval and disapproval

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

(4) Conditional approval

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

(5) Calls for plan revisions

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

(6) Corrections

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

(l) Plan revisions

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

(m) Sanctions

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

(n) Savings clauses

(1) Existing plan provisions

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

(2) Attainment dates

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

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

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

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

(3) Retention of construction moratorium in certain areas

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

(o) Indian tribes

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

(p) Reports

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

CREDIT(S)

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

Notes of Decisions (378)

Footnotes

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

42 U.S.C.A. § 7410, 42 USCA § 7410
Current through P.L. 116-163.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

42 U.S.C.A. § 7505a

§ 7505a. Maintenance plans

Currentness

(a) Plan revision

Each State which submits a request under section 7407(d) of this title for redesignation of a nonattainment area for any air pollutant as an area which has attained the national primary ambient air quality standard for that air pollutant shall also submit a revision of the applicable State implementation plan to provide for the maintenance of the national primary ambient air quality standard for such air pollutant in the area concerned for at least 10 years after the redesignation. The plan shall contain such additional measures, if any, as may be necessary to ensure such maintenance.

(b) Subsequent plan revisions

8 years after redesignation of any area as an attainment area under section 7407(d) of this title, the State shall submit to the Administrator an additional revision of the applicable State implementation plan for maintaining the national primary ambient air quality standard for 10 years after the expiration of the 10-year period referred to in subsection (a).

(c) Nonattainment requirements applicable pending plan approval

Until such plan revision is approved and an area is redesignated as attainment for any area designated as a nonattainment area, the requirements of this part shall continue in force and effect with respect to such area.

(d) Contingency provisions

Each plan revision submitted under this section shall contain such contingency provisions as the Administrator deems necessary to assure that the State will promptly correct any violation of the standard which occurs after the redesignation of the area as an attainment area. Such provisions shall include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before redesignation of the area as an attainment area. The failure of any area redesignated as an attainment area to maintain the national ambient air quality standard concerned shall not result in a requirement that the State revise its State implementation plan unless the Administrator, in the Administrator's discretion, requires the State to submit a revised State implementation plan.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 175A, as added Pub.L. 101-549, Title I, § 102(e), Nov. 15, 1990, 104 Stat. 2418.)

Notes of Decisions (4)

42 U.S.C.A. § 7505a, 42 USCA § 7505a
Current through P.L. 116-163.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

42 U.S.C.A. § 7509a

§ 7509a. International border areas

Currentness

(a) Implementation plans and revisions

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

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

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

(b) Attainment of ozone levels

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

(c) Attainment of carbon monoxide levels

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

(d) Attainment of PM-10 levels

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

CREDIT(S)

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

Notes of Decisions (2)

Footnotes

1 So in original. Probably should be “this”.
2 So in original. Section 7512(b) of this title does not contain a par. (9).

42 U.S.C.A. § 7509a, 42 USCA § 7509a
Current through P.L. 116-163.

End of Document

42 U.S.C.A. § 7511

§ 7511. Classifications and attainment dates

Currentness

(a) Classification and attainment dates for 1989 nonattainment areas

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

TABLE 1

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

Extreme	0.280 and above	20 years after November 15, 1990

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

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

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

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

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

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

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

(b) New designations and reclassifications

(1) New designations to nonattainment

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

(2) Reclassification upon failure to attain

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

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

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

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

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

(3) Voluntary reclassification

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

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the

area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

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

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

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

(c) References to terms

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

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

CREDIT(S)

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

Notes of Decisions (23)

Footnotes

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

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

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

42 U.S.C.A. § 7511, 42 USCA § 7511
Current through P.L. 116-140.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7607

§ 7607. Administrative proceedings and judicial review

Currentness

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) [1] or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [2] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [3] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph [4], the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,, [3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) [1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before

August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [5] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed

such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged

procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [6] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 307, as added Pub.L. 91-604, § 12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub.L. 92-157, Title III, § 302(a), Nov. 18, 1971, 85 Stat. 464; Pub.L. 93-319, § 6(c), June 22, 1974, 88 Stat. 259; Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f) to (h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub.L. 95-190, § 14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681-2684.)

Notes of Decisions (364)

Footnotes

1 Repealed. See References in Text notes set out under this section.
2 So in original. Probably should be “this”.
3 So in original.
4 So in original. Probably should be “subsection,”.
5 So in original. The word “to” probably should not appear.
6 So in original. Probably should be “sections”.

42 U.S.C.A. § 7607, 42 USCA § 7607
Current through P.L. 116-163.

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