No. 20-71196

IN THE 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, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents.

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

PETITIONERS' CORRECTED OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Center for Biological Diversity and the Center for Environmental Health have no parent corporations.

There are no publicly held corporations that own 10 percent or more ownership interest or stock in the Center for Biological Diversity or the Center for Environmental Health.

Date: August 20, 2020

/s/ Steven M. Odendahl

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INTRODUCTION

Under the Clean Air Act ("Act"), the United States Environmental Protection Agency ("EPA") sets standards for air pollutants "the attainment and *maintenance* of which ... are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added). While improving unhealthy air is critical for public health, maintaining healthy air is at least as important.

Petitioners Center for Biological Diversity and Center for Environmental Health (collectively "Conservation Groups") challenge EPA's approval of an ozone plan for Imperial County, California. In its approval, EPA focused on attainment of ozone standards but gave short shrift to maintenance of those same standards. As a result, ozone levels in the County—where juvenile and adult asthmatics are a significant percentage of the population, E.R. 55–56 tbl. 1-1[1]—will not be maintained to the extent required by the Act.

Specifically, section 179B(a) of the Act, "International border areas," allows EPA to waive requirements to demonstrate "attainment and *maintenance*" of national standards if a state can "establish" that its plan "would be adequate to attain and *maintain*" the standards "by" a specified date "but for emissions emanating from outside of the United States." 42 U.S.C. § 7509a(a) (emphasis

[1] This brief uses the abbreviation "E.R." for Petitioner's Excerpts of Record. The page number cited is the Bates number at the bottom of the document's page.

added). EPA proposed to apply this waiver to the ozone plan here, but EPA's proposed rule and technical support document failed to interpret the explicit requirement in section 179B(a) to demonstrate the plan would be adequate to maintain the standards (but for international emissions) and failed to explain how the plan met it. *See generally* E.R. 21, 26–30 (proposal notice); 34–36 (technical support document).

Commenters, including Petitioner Center for Biological Diversity, argued that EPA must give some meaning to the statutory maintenance language. E.R. 99-104. After the public comment period was over, in the final rule EPA posited two interpretations of the language. E.R. 4. But EPA specifically adopted neither. *Id.* One interpretation would require a demonstration of maintenance (but for international emissions) only up to the same date as for the demonstration of attainment. *Id.* The other would recognize an obligation to demonstrate ongoing maintenance (but for international emissions) after the attainment date. *Id.* According to EPA, under either interpretation the state's plan could be approved. *Id.*

EPA's first interpretation is contrary to the Act. The plain meaning of "maintain" is an ongoing activity that preserves a status, while the plain meaning of "attain" is achievement of a goal, an end point. Just as a sick person must attain good health before she maintains good health, an area with unhealthy air must

attain healthy air before the area maintains it. Because maintenance necessarily follows attainment, EPA's first interpretation writes the maintenance requirement out of the Act. This leaves EPA without any tools to address the possibility that future reductions in emissions from Mexico and/or future increases in domestic emissions may make domestic emissions the "but for" cause of Imperial County's pollution violating the ozone standards.

EPA's implementation of the second, "ongoing maintenance" interpretation failed to meet the notice requirements of the Administrative Procedure Act ("APA"). While EPA's proposal gave no substance to the maintenance requirement, EPA's final action did. "Something is not a logical outgrowth of nothing." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

EPA's implementation of its second interpretation is also flawed and should have been subject to comment. Because EPA's proposal did not give substance to the maintenance requirement, it also did not identify the information EPA ultimately relied on to approve the plan under the second interpretation, a second violation of the notice requirements of the APA. Had EPA provided the information and identified its significance for public comment, the Conservation Groups would have disputed its accuracy, completeness, and relevance.

And in the end, EPA's implementation of the second interpretation is largely toothless: it merely requires projections of emissions over the next decade. Like

the first interpretation, this leaves EPA without tools to address future ozone problems in the County should those projections fail. While the state's demonstration of attainment (but for international emissions) was technically strong and is not challenged here, past success is no guarantee of future performance. EPA's first interpretation does nothing to address future performance, and EPA's second interpretation does too little. EPA's approval of the plan with respect to the maintenance requirements of section 179B(a) should be vacated and remanded.

JURISDICTIONAL STATEMENT

Agency's Jurisdiction

The EPA has jurisdiction under the Act to review state implementation plans such as the ozone plan here. 42 U.S.C. § 7410(k)(3).

Court's Jurisdiction

This Court has jurisdiction under the Act to review EPA's final action on plans submitted by states within this Court's geographical boundaries. *Id.* § 7607(b)(1) (petitions for review of "locally and regionally applicable" actions, including "approving … any implementation plan" must be filed in the "appropriate circuit"). This petition for review challenges EPA's final approval of a plan submitted by the State of California for Imperial County, California, which is within this Court's geographical boundaries.

The Act requires filing of Petitions for Review within sixty days from the date of publication in the Federal Register. *Id.* EPA's final action approving the plan was published in the Federal Register on February 27, 2020. E.R. 1–6. The Conservation Groups timely filed this petition on April 27, 2020. E.R. 17–18.

Standing

To establish standing, the Conservation Groups must prove (1) they have suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision. *Alliance for the Wild Rockies v. U.S. Dep't of Agric.,* 772 F.3d 592, 598 (9th Cir. 2014). Standing for one party suffices for all. *Bd. of Nat. Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993). Further, one declarant can establish standing without inquiry into other declarants. *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1153 n.3 (9th Cir. 2015) (no inquiry into a second declarant's basis for standing for a group, where one declarant sufficed). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 1154 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Svcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

Petitioner Center for Biological Diversity has standing because it has members who regularly visit Imperial County and will continue to do so on a regular basis. *See* Declaration of Ileene Anderson and Declaration of Brendan Cummings, Appendix A. Ileene Anderson is a member of the Center for Biological Diversity. Declaration of Ileene Anderson, ¶ 1. She visits several natural areas in Imperial County to hike, go for nature walks, botanize, and bird; she has visited the County as recently as May and will continue to do so on a regular basis. *Id.* ¶ 2. She is 61 years old, needs to exercise, and prefers to do so outdoors, but she is concerned that air pollution will hurt her lungs. *Id.* ¶ 3. EPA has identified older adults, children, people with preexisting respiratory conditions, and people who work or exercise outside as those particularly sensitive to injury from ozone. E.R. 88. Ms. Anderson falls into two of these categories, showing her concerns about being exposed to unhealthy levels of ozone pollution in Imperial County are reasonable.

Should the Conservation Groups prevail here, EPA will have to reexamine whether the Imperial County ozone plan is adequate to maintain the ozone standards (but for emissions from Mexico). If it is not adequate, the State and the County may have to impose additional requirements to limit emissions in Imperial County of the air pollutants that form ozone. This would redress Ms. Anderson's injury regarding exposure to ozone pollution in Imperial County. Protection of

Ms. Anderson from ozone pollution is germane to the purposes of the Center for Biological Diversity, *see* Declaration of Brendan Cummings ¶ 2, but this petition is based on the administrative record and does not require her individual participation. The declaration of Brendan Cummings confirms that the Center for Biological Diversity has standing as he is likewise injured. *See generally* Declaration of Brendan Cummings.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

I. Whether EPA's first interpretation, that section 179B(a) of the Act requires a demonstration that a state's plan will maintain the ozone standards (but for international emissions) only up to the same date the section requires for attainment of the ozone standards (but for international emissions), is contrary to the Act; or was impermissible and arbitrary and capricious; and

II. Whether EPA's alternative interpretation—first announced in its final action—that the maintenance language in section 179B(a) creates an ongoing obligation after the attainment date, was issued without proper notice in violation of the APA; was issued without observance of

procedures required by the Act; or was impermissible or arbitrary and capricious.

STATEMENT OF THE CASE

Procedural History

The State of California submitted the ozone plan at issue on November 4, 2017. E.R. 21. In a notice published in the Federal Register on November 1, 2019, EPA proposed to approve the relevant portions of the plan under section 179B(a). E.R. 26–30. Commenters, including Petitioner Center for Biological Diversity, submitted timely comments on December 2, 2019. E.R. 97–105. In a second notice published in the Federal Register on February 27, 2020, EPA responded to the comments and finalized its proposed approval of the relevant portions of the plan. E.R. 3–6. The Conservation Groups timely filed this petition for review on April 27, 2020. E.R. 17–18.

Ozone Pollution

Two air pollutants, volatile organic compounds and nitrogen oxides, react in sunlight to form ozone pollution. E.R. 19. Breathing ozone pollution "can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases." E.R. 20. And it can cause premature mortality. E.R. 87. Ozone pollution also directly harms trees, native vegetation, and crops; and thereby indirectly harms soils, water, and wildlife. E.R. 89.

Under the Act, EPA promulgates and revises national ambient air quality standards ("standards") for air pollutants such as ozone, primary standards that are requisite to protect public health and secondary standards that are requisite to protect public welfare. E.R. 85 (citing 42 U.S.C. § 7409(b)(1), (b)(2)). In 2008, EPA strengthened the standards for ozone from 80 parts per billion to 75 parts per billion. E.R. 84. EPA did so in part due to information showing heightened impacts from ozone pollution on children, who are more exposed to outdoor ozone pollution than the general population. E.R. 86–87.

Statutory Scheme

Under the Act's general scheme, after EPA sets national standards, EPA "designates" areas that do not meet the standards as "nonattainment areas." *Comm. for a Better Arvin v. U.S. EPA ("Arvin")*, 786 F.3d 1169, 1173–74 (9th Cir. 2014). States with nonattainment areas then submit plans to EPA to normally reduce pollution so that the areas achieve the standards, which EPA reviews for approval. *Id.* at 1174.

In 1990, faced with years of failures by states and EPA to bring ozone areas into attainment under this general scheme, Congress stepped in. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886 (D.C. Cir. 2006). "The old ends-driven approach that had proven unsuccessful for [pollutants including ozone] was redesignated Subpart 1 (of Part D of Title I)." *Id.* at 887. Congress placed ozone-

specific provisions in Subpart 2. *Id.* "No longer willing to rely upon EPA's exercise of discretion, Congress adopted a graduated classification scheme that prescribed mandatory controls" to be included in state plans. *Id.* New ozone nonattainment areas are initially classified as Marginal, Moderate, Serious, Severe, or Extreme according to the severity of ozone pollution. *Id.* (citing 42 U.S.C. § 7511(a) tbl.1).

If an ozone nonattainment area fails to attain the standards by a specified "attainment date," EPA must reclassify the area to a higher classification, creating new obligations for the state to improve air quality. 42 U.S.C. § 7511(b)(2)(A). For example, for a Moderate area that is reclassified to Serious, the state must submit a new plan with (among other things) specific requirements for reductions in emissions of volatile organic compounds and for enhancements in monitoring. *Id.* § 7511a(c)(1), (c)(2)(B).

On the other hand, if EPA determines the area attained the standards, the area becomes eligible for "redesignation" to attainment if (among other things) EPA approves the state's "maintenance plan" for the area. *Id.* § 7407(d)(3)(E)(i), (iv). Maintenance plans consist of a plan revision to "provide for the maintenance" of the primary standard for at least ten years after redesignation, including "additional measures, if any, as may be necessary." *Id.* § 7505a(a). They must also include "contingency provisions" to "promptly correct any violation of the

standard." *Id.* § 7505a(d).

Section 179B, "International border areas," of the Act creates exceptions to the reclassification process. For example, if a state "establishes" to EPA's "satisfaction" that an ozone nonattainment area "would have attained" the ozone standards "by the applicable attainment date, but for emissions emanating from outside the United States," the area will not be reclassified to a higher classification. *Id.* § 7509a(b); *see also* E.R. 21 n.14 (explaining the references in section 179B(b)).

Section 179B also creates an exception to plan requirements. If a state "establishes" to EPA's "satisfaction" that the state's plan "would be adequate to attain and maintain" standards "by" the specified attainment date, "but for emissions emanating from outside the United States," the plan is not subject to requirements that it "demonstrate attainment and maintenance" of the standards by the specified attainment date. 42 U.S.C. § 7509a(a).

The Imperial County Ozone Plan

Four years after revising the ozone standards in 2008, EPA designated Imperial County as a nonattainment area for the revised standards and classified it as Marginal. E.R. 20. After another four years, EPA determined that the area failed to attain the standards by the attainment date of July 20, 2015 and reclassified it as Moderate. *Id*. This triggered an obligation for California to

demonstrate that the Imperial County area would attain the 2008 standards by the new attainment date of July 20, 2018. E.R. 26.

Instead, California submitted a demonstration under section 179B. E.R. 27. In its demonstration, California relied on several types of analyses to show that Imperial County would have attained the standards by the attainment date, but for emissions from Mexico. *Id.* First, the state used "photochemical air quality modeling" to predict ozone levels at the attainment date. *Id.* According to EPA, "photochemical modeling is the most technically credible method of estimating future year ozone concentrations." E.R. 48. Among the inputs to the modeling are data about air pollution emissions in a "base year," in this case 2012, and projected emissions for a "future year," in this case 2017. E.R. 23–24. This data included not only emissions within Imperial County and from the rest of the State but also emissions from Mexico. E.R. 60. The state's modeling showed that, at the most impacted location in Imperial County, 2017 ozone levels would be 79 parts per billion, above the 2008 ozone standard, with emissions from Mexico included, but 68 parts per billion, below the standard, without. E.R. 62–63 tbl. 8-2. The plan noted some uncertainty in its estimates of emissions from Mexico. E.R. 78. It also noted that Mexico had undertaken a program to reduce emissions in Mexicali, but did not quantify the reductions. E.R. 73.

The state's analyses also examined overall trends in emissions and ozone levels, E.R. 64–65; additional measures that according to the state "were put into place in order to ensure attainment is maintained long term," E.R. 69; back trajectories of air flow on days with high ozone levels, E.R. 29; and a relative comparison of the emissions data from Imperial County and from Mexico, *id*. Finally, in a separate portion of the state's submittal designed to address section 179B(b), the State reviewed photochemical modeling performed by EPA to determine the impacts of interstate emissions across the United States. E.R. 94-95. This modeling showed similar results to the State's modeling for 2017 and an increased contribution from Mexico's emissions in 2023. E.R. 95 tbl. 3.

EPA proposed to approve California's demonstrations under both subsections 179B(a) and 179B(b). E.R. 30. While EPA repeated the language of subsection 179B(a), including the language regarding "maintenance," EPA did not explain how it interpreted that language. E.R. 21. Nor did the notices EPA cited as providing "general guidance on section 179B." E.R. 21; E.R. 37–40; E.R. 41–45. Correspondingly, EPA also did not explain in its notice or its technical support document how the state's plan met the requirements of subsection 179B(a) regarding maintenance. E.R. 26–30 (proposal notice); E.R. 34–36 (technical support document). In particular, EPA did not evaluate whether the plan would maintain the standards, but for emissions from Mexico, after the attainment date.

E.R. 30. Elsewhere, EPA reviewed the emissions data from 2012 and projected emissions data for 2017 "for consistency with [Clean Air Act] requirements and the EPA's guidance" and found them appropriate. E.R. 23–25.

Commenters, including Petitioner Center for Biological Diversity, noted EPA's omission. E.R. 99. In response, EPA declined to adopt a particular interpretation of the maintenance requirement. E.R. 4. Instead, EPA stated that, "regarding the timing of the maintenance requirement," there were two possible readings. *Id.* One would require a demonstration that the plan was adequate to maintain the standards (but for international emissions) up to the attainment date; the other would require a demonstration that the plan was adequate to maintain the standards beyond the attainment date. *Id.*

EPA stated that under either interpretation, "available emissions information from California indicates that its plan is adequate to maintain the [ozone standards] but for emissions emanating from Mexico, as the State's emissions are projected to decline into the future." *Id.* Specifically, EPA relied on emissions data from a "maintenance plan" for a different pollutant, coarse particulate matter, and from a state emissions database for the period 2016–2030. E.R. 4–5. Unlike the emissions data EPA reviewed elsewhere, EPA did not state whether it had reviewed this emissions data for consistency with the Act and EPA's guidance. *Id.*; E.R. 106–108 (memorandum for final action). And, unlike the state's

demonstration of attainment, this data did not include any projections for emissions from Mexico. E.R. 4–5. EPA also did not rely on or review the additional measures the state cited as ensuring maintenance "over the long term," nor did EPA rely on projections from its own modeling. *Id.*

EPA accordingly approved the Imperial County ozone plan with respect to section 179B(a). E.R. 5. EPA also approved the state's request under section 179B(b) for a waiver from reclassification. *Id.*

SUMMARY OF THE ARGUMENT

EPA posited two interpretations of the maintenance requirement in section 179B(a). The first would require the state to demonstrate its plan was adequate to maintain the standards (but for international emissions) "up to" the attainment date. But Congress spoke clearly: the plain meanings of "attain" and "maintain" show that maintenance is an ongoing obligation that follows after attainment. EPA's first interpretation would nullify the maintenance requirement and create a hole in the Act's comprehensive scheme for air quality. The legislative history indicates that a state getting a waiver should be on an equal footing with states that do not, further evidence for an ongoing obligation. And even if the Act were ambiguous with respect to this issue, EPA's interpretation is impermissible because it is contrary to the Act's concerns with maintaining the standards, and is arbitrary and capricious because EPA's interpretation was a clear error of judgment.

EPA's approval of the state's plan under its second interpretation, which would require the state to demonstrate the plan would maintain the standards (but for international emissions) after the attainment date, was not a "logical outgrowth" of EPA's proposal. EPA's proposal said nothing about an ongoing maintenance requirement or how it should be elaborated and applied to the plan. Nor did the proposal say anything about the information EPA ultimately relied on to approve the plan, another violation of the APA's notice requirements. EPA also violated the Act's procedures by unilaterally taking state data that had not been submitted for the ozone plan in order to approve that plan. And EPA's elaboration of an ongoing maintenance requirement is impermissible, because it leaves EPA without any tools to address future ozone problems, and arbitrary and capricious because EPA failed to explain various inconsistencies.

ARGUMENT

I. EPA'S FIRST INTERPRETATION OF THE MAINTENANCE REQUIREMENT IS CONTRARY TO THE ACT

EPA stated that one "possible interpretation" of the section 179B(a)'s maintenance requirement "is that the state's demonstration must show that the plan revision is adequate to attain and 'maintain' the [standards] 'by,' that is, up to, the attainment date." E.R. 4. This interpretation is contrary to the Act.

A. Standard of Review

EPA's action on a submitted plan is reviewed under the standards of the APA: the court "consider[s] whether the EPA's decision was arbitrary, capricious, an abuse of discretion, or contrary to law." *Arvin*, 786 F.3d at 1174–75 (citing *Sierra Club v. EPA*, 671 F.3d 955, 961 (9th Cir. 2012)). In particular, EPA's interpretation of the Act is reviewed under the *Chevron* framework:

> [A]t the first step [the court] determine[s] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. 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.

Arvin, 786 F.3d at 1175 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. ("Chevron")*, 467 U.S. 837, 842-43 (1984)) (internal quotations omitted).

B. Under the Plain Meaning of the Terms, Maintenance Follows Attainment

At the first step of the *Chevron* analysis, a court uses "traditional tools of statutory construction" to determine if the intent of Congress is clear. *Chevron*, 467 U.S. at 843 n.9. The court "look[s] first to the plain meaning" of the statutory text. *Lagandaon v. Ashcroft*, 383 F.3d 983, 987 (9th Cir. 2004). To help determine the plain meaning, a court may review dictionary definitions. *Id.* at 988 n.5.

EPA's first interpretation of section 179B(a), 42 U.S.C. § 7509a(a), that the state must show the plan will maintain the standards (but for international emissions) "up to" the attainment date, is contrary to the plain meaning of the terms "attain" and "maintain." When used together regarding a status, such as air quality, under their plain meaning maintenance must follow attainment.

The relevant plain meaning of attain is "reach, gain, achieve, accomplish," as in "attain his goals." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY ("WEBSTER'S THIRD") 140 (unabridged ed. 1993, 2020 printing).[2] In the typical instance, "attain" is used in the Act to mean to "achieve" the standards, the "goals." *E.g.* 42 U.S.C. § 7511(b)(2)(A) (requiring EPA to determine if ozone nonattainment areas have "attained the standard by" the attainment date). Thus, attainment of the standards has an endpoint: the attainment date. This corresponds to the relevant plain meaning of "by" as used here: "not later than (a specified time)." WEBSTER'S THIRD at 307.

On the other hand, the relevant definition of "maintain" indicates an ongoing activity: "to keep in a state of repair, efficiency, or validity: preserve from failure

[2] Commenters did not provide these definitions in their comments, as EPA did not include its first interpretation in its proposed rule. Rather, EPA announced this interpretation for the first time in its final rule, after the public comment period had ended. An issue has been exhausted if the agency has "sufficient notice … to afford it the opportunity to rectify" the issue. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). The issue raised by Commenters was EPA's failure to give meaning to the maintenance requirement. E.R. 99–104. EPA's first interpretation failed to do so.

or decline." *Id.* at 1362. When used together, the natural sequence is to first attain a state and then maintain it. For example, if one is in poor health, one must first attain good health before one can maintain good health. It would make no sense to say: "I was ill, but I maintained good health up to the same date I attained good health."

As used elsewhere in the Act for nonattainment areas, this natural sequence is obeyed: maintenance follows attainment. If a nonattainment area attains the standards, then it becomes eligible for redesignation if, among other things, EPA approves the state's "maintenance plan" for the area. 42 U.S.C. § 7407 (d)(3)(E)(i), (iv). The maintenance plan must "provide for the maintenance of" the relevant standards "in the area concerned for at least 10 years *after* the redesignation." *Id.* § 7505a(a) (emphasis added). And subsequently the state must submit another plan revision "for maintaining" the relevant standards for an additional 10 years. *Id.* § 7505a(b). In other words, under Congress' scheme for nonattainment areas maintenance follows attainment, in accordance with the plain meaning of the terms and their natural sequence when used together.

EPA in its final rule here acknowledged this natural sequence: "In the EPA's guidance regarding redesignations, the EPA suggests that *maintenance* of the [standards] for areas *that have already attained the standards* may be demonstrated by …". E.R. 4 n.10. But EPA's first interpretation has the maintenance obligation

running only "up to" the attainment date, the date set for the attainment obligation. This violates the plain meaning and the natural sequence of the terms "attainment" and "maintenance."

C. EPA's First Interpretation Fails to Give Effect to the Maintenance Language

Another rule of statutory construction is to "give effect to all of the statute's provisions." *Defenders of Wildlife v. Norton ("Defenders")*, 258 F.3d 1136, 1142 (9th Cir. 2001) (citation and quotation omitted). Because maintenance necessarily follows attainment, and states must show attainment by the attainment date, a requirement to show maintenance "up to" the attainment date is necessarily no requirement at all. In other words, EPA's first interpretation fails to give effect to the maintenance language, and thus does not address the issue raised by Commenters.

This is not the first time EPA has tried to nullify a maintenance requirement by subsuming it under an attainment requirement. *See North Carolina v. EPA ("North Carolina")*, 531 F.3d 896, 908–911 (D.C. Cir. 2008) (cited by Commenters, E.R. 100 n.12). *North Carolina* addressed EPA's interpretation of section 110(a)(2)(D)(i)(I) of the Act, which requires plans to "contain adequate provisions" addressing emissions of air pollutants "in amounts which will *contribute significantly to nonattainment* in, or *interfere with maintenance* by any

other State with respect to" national standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added).

In 2006, EPA promulgated a rule to address this provision for Eastern states with respect to ozone and fine particulate matter standards. *North Carolina*, 531 F.3d at 903. North Carolina challenged the rule on the basis that a county in the state, while currently attaining the standards, was at risk of falling back into nonattainment due to EPA's failure to give independent meaning to the "interfere with maintenance" requirement. *Id.* at 908–909.

The court agreed that EPA failed to give meaning to the statutory language. *Id.* at 910. "Under EPA's reading of the statute, a state can never 'interfere with maintenance' unless EPA determines that at one point it 'contribute[d] significantly to nonattainment.'" *Id.* While EPA gave policy reasons for its interpretation, "[a]ll the policy reasons in the world cannot justify reading a substantive provision out of a statute." *Id.* (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)).

Here, EPA's first interpretation fails to give any independent meaning to the maintenance requirement, reading it out of the statute. And, unlike in *North Carolina*, EPA did not even give any policy reasons for doing so. *See* E.R. 4.

A detail must be addressed. The *North Carolina* court noted that the nonattainment and maintenance requirements were joined by the disjunctive "or,"

and "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *North Carolina,* 531 F.3d at 910 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Here, the terms "attainment" and "maintenance" (or "attain" and "maintain") are connected by the conjunctive "and."

However, section 110(a)(2)(D)(i)(I) creates two prohibitions, while section 179B(a) creates two requirements. If one prohibits a child from "watching TV *or* playing video games," then it is understood that the child can do neither. If one requires a child to "take out the trash *and* make the bed," then it is understood the child must do both. In other words, "and" plays the same role in the context of section 179B(a) as "or" does in section 110(a)(2)(D)(i)(I). So the principle applied by the *North Carolina* court also applies here: EPA must give meaning to the maintenance requirement. EPA's first interpretation failed to do so.

D. The Structure of the Act Shows the Maintenance Obligation Must Be Ongoing

At step one of the *Chevron* analysis, "[a] court must []interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted). That is especially true here, as "[t]he Clean Air Act establishes a *comprehensive* program for controlling and improving air

quality." *Helping Hand Tools v. U.S. EPA*, 848 F.3d 1185, 1190 (9th Cir. 2016) (emphasis added).

As Commenters explained to EPA, once an area such as Imperial County has avoided reclassification under section 179B(b), the state may never have any additional obligations for the area unless EPA gives some meaning to the maintenance requirement. E.R. 100–102. This is because international emissions cannot be taken into account in determining whether an area qualifies for redesignation from nonattainment to attainment, and redesignation in turn requires the state to submit a maintenance plan under section 175A. *Id.* Thus, an area such as Imperial County could indefinitely continue to violate the ozone standards—indeed, the situation could worsen—without any obligation for the state to address the issue.

In response to Commenters identifying this structural hole in the Act's "comprehensive scheme," EPA noted its authority under Clean Air Act section 110(k)(5) "to call for plan revisions to address substantially inadequate implementation plans." E.R. 5 (discussing 42 U.S.C. § 7410(k)(5)). This authority fails to fill the structural hole for two reasons. First, EPA's authority under section 110(k)(5) is discretionary: it is not triggered until EPA makes a determination that the plan is "substantially inadequate." *See* 42 U.S.C. § 7410(k)(5). Replacing a present, mandatory duty for a plan to have ongoing provisions to maintain the

standards (but for international emissions) after the attainment date with EPA's potential, future use of discretionary authority does not eliminate the structural hole; at most it makes it slightly smaller. *Cf. Sierra Club v. EPA*, 356 F.3d 296, 298 (D.C. Cir. 2004) (EPA cannot "promise to do tomorrow what the Act requires today."). Furthermore, EPA did not identify any mechanism to alert EPA to an issue with increased emissions in Imperial County and/or decreased emissions in Mexico. Thus, EPA's claim that it might use its authority to call for a plan revision lacks plausibility.

Second, EPA did not, and cannot, explain how section 110(k)(5) could even apply under EPA's first interpretation. Section 110(k)(5) gives EPA authority to call for a plan revision when EPA finds that the plan is substantially inadequate in one of three ways:

- "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," i.e the Act.

42 U.S.C. § 7410(k)(5). Because a plan that qualifies for a waiver under section 179B(a) does not have to maintain the standards—instead it must maintain the standards but for international emissions—EPA cannot turn around and call for a plan revision on the basis that the plan is substantially inadequate to maintain the

standards. Otherwise, EPA could circumvent a section 179B(a) waiver through its authority to call for plan revisions. The second instance, inadequate mitigation of interstate transport of air pollutants, also does not apply here.

Finally, under EPA's first interpretation, after the attainment date there is simply no applicable requirement under the Act: the maintenance requirement has expired. In other words, EPA cannot find the plan substantially inadequate under the third prong, "to otherwise comply with any requirement of [the Act]," as after the attainment date there is no longer any requirement regarding maintenance.

On the other hand, if section 179B(a) is interpreted to create an ongoing maintenance requirement, then EPA has a statutory hook to call for a plan revision if the state's plan for ongoing maintenance goes awry. Under the third prong of section 110(k)(5), "to otherwise comply with any requirement" of the Act, EPA can find that the plan is substantially inadequate to comply with section 179B(a)'s requirements for ongoing maintenance of the standards (but for international emissions). Thus, EPA's own reference to its authority under section 110(k)(5) shows, if anything, that the structure of the Act favors an ongoing maintenance interpretation.

EPA's first interpretation thus leaves EPA without any tools to address future ozone problems in Imperial County caused by Imperial County emissions. While the State has shown it has done what it reasonably can today, tomorrow

could be a different story. The hole in the Act created by EPA's first interpretation confirms Congress' clear statement: maintenance obligations must follow after attainment.

E. To Give Effect to the Maintenance Language, It Must Be Read to Create an Ongoing Obligation

"When interpreting a statute, [a court] must follow a 'natural reading . . ., which would give effect to all of [the statute's] provisions.'" *Defenders*, 258 F.3d at 1142 (quoting *United Food and Commercial Workers Union Local 571 v. Brown Group, Inc.*, 517 U.S. 544, 549 (1996)).[3] EPA's first interpretation does not give effect to the maintenance requirement; instead it reads it out of the statute.

Commenters provided a reading of section 179B(a) that, unlike EPA's, does give effect to the maintenance requirement. E.R. 103. The language requiring the state to demonstrate that its plan would maintain the standards "by" the attainment date (but for international emissions) can be read to mean that the state must demonstrate that the necessary plan provisions for maintaining the standards will be in place "by" the attainment date. *Id.* This interpretation resolves the tension between the word "maintain," with its connotation of an ongoing activity, and the phrase "by the attainment date," with its connotation of an endpoint. Necessarily,

[3] *Defenders* did not explicitly state it was applying the *Chevron* framework. *See generally id.* at 1140–41. However, at step one of the *Chevron* analysis, the court uses "traditional tools of statutory construction" such as this to determine if the intent of Congress is clear. *See Chevron*, 467 U.S. at 843 n.9.

if read this way, the state's provisions that are put in place "by" the attainment date would maintain the standards (but for international emissions) on an ongoing basis after the attainment date; otherwise this reading would have no point.

Not only does this reading give effect to the maintenance requirement, it is in accordance with the natural sequence of the terms "attain" and "maintain." By requiring the plan to maintain the standards (but for international emissions) on an ongoing basis after the attainment date, it also fills the structural hole in the Act's comprehensive scheme. And it gives EPA authority to call for a plan revision should the plan not suffice to maintain the standards but for international emissions. EPA's first interpretation fails in each respect and is therefore barred at *Chevron* step 1.

F. The Legislative History Supports an Ongoing Maintenance Obligation

At *Chevron* step one, a court may also look to the legislative history. *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019), *cert. denied*, 2020 WL 3405861 (June 22, 2020). While the legislative history here does not explicitly endorse one interpretation or another, it tends to contradict EPA's first interpretation.[4] Section 179B was created by the 1990 Clean

[4] While Commenters did recount some of the legislative history, E.R. 100, they did not do so to rebut EPA's first interpretation, as that was not proposed. *See supra* 18 n.2.

Air Act Amendments. E.R. 100. It originated as a floor amendment from Senator Gramm of Texas to S. 1630, the Senate bill that became the basis for the Amendments. *Id.* Senator Gramm stated that it would be "unfair" to hold cities such as El Paso, Texas "accountable for pollution that is generated in a foreign country that they have no control over." 4 LEGISLATIVE HISTORY OF THE 1990 CLEAN AIR ACT AMENDMENTS, TOGETHER WITH A SECTION-BY-SECTION INDEX 5741 (Environment and Natural Resources Policy Division, Congressional Research Service, Nov. 1993). The Senator explained:

> So what this amendment does is says that in assessing whether or not the State implementation plan has been met, and when assessing the levels of ozone, carbon monoxide and particulates, pollution that is being generated across the border has to be taken into account so that our cities and regions will be judged based on what they do.

Id. If anything, this implies that the Imperial County plan should be judged on the basis of what it does to maintain the standards, international emissions aside. EPA's first interpretation instead requires nothing of Imperial County.

Nor is it unfair to expect Imperial County to take substantive steps to maintain the standards (but for international emissions), for there is no "threshold concentration below which" ozone is "known to be harmless." *Am. Trucking Ass'ns, Inc. v. EPA*, 283 F.3d. 355, 360 (D.C. Cir. 2002). In addition, as explained above, non-border areas that attain the standards have maintenance obligations if they seek redesignation to attainment. Requiring Imperial County to address

maintenance just puts it on an equal footing with non-border areas.

G. EPA's First Interpretation Is Impermissible and Arbitrary and Capricious

Even if the Act were ambiguous—and it is not—with respect to this issue, EPA's first interpretation would fail at step two of the *Chevron* analysis. At step two, the court considers whether the interpretation is permissible. *Altera*, 926 F.3d at 1074. "A permissible construction is one that is not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 844). The interpretation "is examined in light of the statute's text, structure and purpose"; it "fails if it is unmoored from the purposes and concerns of the underlying statutory regime." *Id.* at 1076 (citations and quotations omitted).

Here, a key purpose of the Act is maintenance of the national standards. As Commenters pointed out, the 1990 Clean Air Act Amendments, which added section 179B, also added section 175A for maintenance plans. E.R. 102 n.35. In fact, the title of the Amendments was "An Act to amend the Clean Air Act to provide for attainment and *maintenance* of health protective national ambient air quality standards, and for other purposes." *Id.* (quoting 104 Stat. 239) (emphasis added). Furthermore, EPA sets the standards so that "the attainment and *maintenance* of [them] ... are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added). And failure to maintain the standards not only

harms public health, but also wastes the economic costs expended to attain the standards. EPA's first interpretation, by prematurely expiring any maintenance obligation at the attainment date, is unmoored from the purposes and concerns of the Act and manifestly contrary to it. This is not permissible.

EPA's first interpretation is also arbitrary and capricious. A rule can be challenged under both the *Chevron* framework, which evaluates the conclusion of an agency's decision-making process, as well as under the *State Farm* standard, which evaluates whether that process itself was flawed. *Altera*, 926 F.3d at 1075. Under that second standard, the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For its first interpretation, EPA identified no typical factors such as air quality or economic growth. E.R. 4. The only factor EPA could be said to have considered, by way of responding to Commenters, is whether the statute had a hole that needed to be addressed. E.R. 5. EPA thought not, based on its authority to call for a plan revision. *Id.* But that authority does not apply under EPA's first interpretation. *See supra* 23–25. This is a clear error of judgment and therefore arbitrary and capricious.

II. EPA'S APPROVAL OF THE PLAN UNDER AN ONGOING MAINTENANCE INTERPRETATION VIOLATED THE APA, VIOLATED THE PROCEDURES IN THE ACT, IS IMPERMISSIBLE, AND IS ARBITRARY AND CAPRICIOUS

EPA's approval of a submitted plan is a rulemaking subject to the APA. *Ober v. U.S. EPA ("Ober")*, 84 F.3d 304, 312 (9th Cir. 1996).[5] Under the APA's procedures, an agency must publish a notice of proposed rulemaking in the Federal Register, including "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). "[T]he 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." *Id.* § 553(c). EPA violated these procedures by failing to propose its second, ongoing maintenance interpretation and failing to identify the information it ultimately relied on to approve the plan.[6] The result of EPA's faulty process was a faulty action: EPA's implementation of the second

[5] The procedures in section 307(d) of the Act do not apply here, including the heightened standard for judicial review of procedural errors in section 307(d)(8). *Compare id.* (reviewing EPA's approval of a *state* plan) *with Arizona ex rel. Darwin v. U.S. EPA*, 852 F.3d 1148, 1157 (9th Cir. 2017) (reviewing EPA's promulgation of a *federal* plan); *see also* 42 U.S.C. § 7607(d)(1)(B) (requiring EPA's promulgation of federal plans to follow the procedures in section 307(d) but not requiring EPA's action on state plans to do so).

[6] For the same reasons, EPA violated the APA by issuing its first interpretation and approving the plan under it. Given the strong arguments that the first interpretation violates the Act, the Conservation Groups suggest the Court directly address their merits.

interpretation was impermissible and arbitrary and capricious.

A. EPA Violated the APA by Failing to Give Notice of Its Second, Ongoing Maintenance Interpretation

Under EPA's ongoing maintenance interpretation, "the statute requires the state to demonstrate that the plan revision is adequate to maintain the [standards] beyond the attainment date." E.R. 4. EPA then proffered "one way to do so": "an analysis of the area's emissions some time into the future." *Id.* Stating that it was not necessary to decide between the first and second interpretations "in this action," EPA concluded that its notice was adequate.[7] *Id.*

There are a multitude of potential implementations of the second, ongoing maintenance, interpretation. EPA admitted as much when it chose "one way to do so." EPA's failure to propose one implementation, or even several, and invite comment violated the notice requirements of the APA.[8] EPA's ongoing maintenance interpretation is not a logical outgrowth of EPA's proposal, which said nothing about that interpretation.

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[7] EPA's conclusion is accorded no deference by the court. *Natural Res. Def. Council v. U.S. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

[8] Under the APA, the issue of notice failure is not required to have been raised in comments. *Cf. CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1078–79 (D.C. Cir. 2009). This again distinguishes APA procedures for EPA action on state plans from EPA actions under section 307(d) of the Act. *See supra* 31 n.5; *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015) (holding that under the procedures in section 307(d) notice objections such as "logical outgrowth" are barred if not raised during the comment period). In any case, Commenters alerted EPA to its notice failure. E.R. 100, 103.

1. The second interpretation was not a logical outgrowth of the proposal

While it may be unfamiliar to see an agency entirely ignore statutory language in a proposed rulemaking but then in the final rule give that language substantive import, a familiar way to analyze the situation is through the "logical outgrowth" doctrine. Under that doctrine, a "final regulation that varies from the proposal, even substantially, will be valid as long as it is in character with the original proposal and a logical outgrowth of the notice and comments." *Envtl. Def. Ctr., Inc. v. EPA ("Envtl. Def. Ctr.")*, 344 F.3d 832, 851 (9th Cir. 2003) (quoting *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997)). "The test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* (citing *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994)).

In relevant part, petitioners in *Envtl. Def. Ctr.* challenged an "alternative permit" option in an EPA rule as failing the logical outgrowth test because, although the proposal discussed several alternatives, this option was not among them. *Envtl. Def. Ctr.*, 344 F.3d at 851. EPA had previously issued a "Phase I" rule under the Clean Water Act addressing large sources of stormwater discharges, including "large and medium sized municipal storm sewer systems." *Id.* at 841–42.

In a "Phase II" rule, EPA gave small municipal systems a choice: comply with six "Minimum Measures," either under a general permit or an individual permit; or through the "alternative permit option" apply for an individual permit under the permitting program for large and medium-sized systems in the Phase I rule. *Id.* at 845. Under the alternative option, "permit seekers, in their application for a permit to discharge, [would] propose management programs that address substantive concerns similar to those addressed by the Minimum Measures." *Id.* at 847.

Petitioners argued that the alternative permit option was not a logical outgrowth because the option was not presented in the proposed rule. *Id.* at 851. EPA responded that the proposal "included a supplementary alternative permitting system based on concepts similar to those in the Minimum Measures." *Id.* The court sided with EPA, for two reasons. First, the proposed rule had "suggested an individualized permitting option to be developed in response to comments during the notice and comment period," and second, the "[a]lternative option contain[ed] no elements that were not part of the original rule, even if they are configured differently in the final rule." *Id.*

Here, the notice for the proposal entirely failed to discuss the maintenance requirement, let alone propose any sort of substantive implementation. Thus, EPA's second interpretation was not even "suggested" in the proposal, and its second interpretation was not simply a different configuration of the proposal.

This falls far short of the notice that was upheld in *Envtl. Def. Ctr.*

Instead, EPA's notice failure here fits squarely with the Department of Labor's in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) Under laws administered by the Department and the Immigration and Naturalization Service, would-be employers of alien workers must first apply to the state employment service agency for certification of the potential employee, including a determination by the state agency that no U.S. worker is available for the position. *Id.* at 1511. The date of filing the application establishes priority for immigrant visas. *Id.* The Department evaluates the application and determines whether the statutory criteria are met; if so the Department issues the certification, which is valid indefinitely. *Id.*

After the 1990 Immigration Act, the Service proposed "new immigrant classifications and requirements established in the 1990 legislation." *Id.* at 1512. The Service also proposed to change the priority date to the date a "petition for classification of the alien is filed with the Service" *Id.* The Department shortly thereafter proposed to "implement changes wrought by the 1990 Act and [to] make other technical modifications of its regulations." *Id.* The proposal also stated that the Department "would not alter its existing rule that labor certifications were valid indefinitely" and would work with the Service to avoid retroactive application of the priority date change. *Id.*

In an interim final rule, the Department added a significant provision to its regulations: the employer could no longer substitute another alien for the one named on the application, even when the named alien "became unable or unwilling to accept the job." *Id.* As a result, the employer would have to start over and the replacement employee "would go to the end of the line for immigrant visas." *Id.* Although the interim final rule also reopened the comment period, the Department never issued a new rule responding to the comments. *Id.*

In reviewing the addition of the substitution provision to the interim final rule, the D.C. Circuit found that it "did not even come close to complying with the notice requirements" of the APA. *Id.* at 1513.

> The notice of proposed rulemaking contains nothing, not the merest hint, to suggest that the Department might tighten its existing practice of allowing substitution. Substitution is neither discussed nor mentioned. The subject is not touched upon in any of the rules proposed. Anyone reading those proposals would have assumed that [the relevant provision] would not be affected.

Id. In short, "[s]omething is not a logical outgrowth of nothing." *Id.*

The same is true here. With respect to the maintenance requirement, the proposal notice contained nothing. EPA's second, ongoing maintenance interpretation gave substance and contours to the maintenance requirements; it's "something." The second interpretation is not a logical outgrowth of the proposal and therefore EPA's reliance on it here violates the notice requirements of the APA.

2. There are a multitude of ways to implement an ongoing maintenance requirement

EPA stated that "available emissions information from California indicates that its plan is adequate to maintain the NAAQS but for emissions emanating from Mexico, as the State's emissions are projected to decline into the future." E.R. 4. EPA references a guidance memorandum for maintenance plans under section 175A of the Act, which states that maintenance of the standards may be demonstrated either by showing that future emissions will not increase or by using modeling. *Id.* n.10.

This immediately shows EPA has made a choice in implementing its second interpretation, a choice unannounced in the proposal notice: electing use of projected emissions data instead of photochemical modeling. The state used photochemical modeling (as well as projected emissions data) to demonstrate attainment; why should EPA not also use photochemical modeling to demonstrate maintenance?

EPA's analogy to section 175A maintenance plans shows EPA made other choices that should be subject to notice and comment. The demonstration of maintenance in section 175A takes place in the context of a plan that also contains contingency provisions as EPA "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." 42 U.S.C. § 7505a(d). Thus, EPA might be able to accept a less rigorous demonstration of maintenance in reliance on these contingency provisions as a "backstop."

In the absence of such contingency provisions, as here, EPA could hold the state to a higher standard than it does for section 175A demonstrations of maintenance. Or EPA could deem the plan inadequate to demonstrate maintenance, regardless of the strength of the technical demonstration, if it lacks some type of appropriate contingency provisions.

Furthermore, EPA's guidance for section 175A maintenance plans recommends states commit to monitoring air quality to verify the standards are being maintained and to tracking progress of emission reductions to verify the assumptions in the maintenance demonstration remain valid. E.R. 122–23. EPA could have required similar commitments here. These commitments could address the possibility that emissions from Mexico will in the future decline sufficiently, or domestic emissions will increase sufficiently, so that the "but for" cause of the failure to maintain the standards shifts to domestic emissions. And, under section 175A, states must submit a second maintenance plan to demonstrate maintenance after the end of the initial 10-year period, 42 U.S.C. § 7505a(b); EPA could have required the state here to commit to a similar update.

Finally, EPA could choose to mix and match some of these options, as

appropriate for border areas, or EPA could take some other approach entirely. Whatever EPA's choice, the APA requires EPA to provide it in a proposal notice and allow for comment on it. This "new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency" to take one of the approaches discussed above. *Envt'l Def. Ctr.*, 344 F.3d at 851.

3. EPA cannot bootstrap notice from the comments

Commenters focused on EPA's failure in its proposal notice to give any meaning to the maintenance requirement, effectively writing it out of the statute. E.R. 99–104. Commenters noted that EPA could only claim Congress could not have meant what it said if EPA could show that either as a matter of historical fact or as a matter of logic and statutory structure, Congress could not have meant to impose a maintenance requirement. E.R. 102 (citing *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

With respect to logic and statutory structure, Commenters pointed out that the phrase could be given a plausible explanation: "the plan should have all provisions for maintenance in place 'by the applicable attainment date.'" E.R. 103. Commenters suggested that the plan could be required to show that the root cause for failure to attain would not shift from international emissions to in-state emissions and posited that this might be done through an emissions analysis or

through modeling as for maintenance plans under section 175A. *Id.* However, Commenters noted that it was "EPA's duty in the first instance to propose an interpretation, not for commenters to guess at what it might be." *Id.*

EPA cannot claim that, by adopting a similar approach to that suggested in comments, but with a critical distinction, EPA's notice was adequate. "As a general rule, an agency must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment." *AFL-CIO v. Donovan ("AFL-CIO")*, 757 F.2d 330, 340 (D.C. Cir. 1985) (quoting *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

The *AFL-CIO* court did note that there could be an exception where the commenter and petitioner (or plaintiff in that case) were the same party. *AFL-CIO*, 757 F.2d at 339-40.[9] The court found it "passing strange" that a petitioner could recommend changes and then "complain that it had inadequate notice of the possibility the regulation might be changed." *Id.* at 340.

Here, though, Commenters were not recommending a change to an interpretation of the maintenance requirement. Instead, they were noting that the statute must be reasonably interpreted to give independent meaning to the maintenance requirement, to rebut EPA's failure to do so. There was no existing or proposed interpretation of the maintenance requirement to be changed, just a

[9] Petitioner Center for Biological Diversity was also a commenter. E.R. 97.

blank slate upon which any number of interpretations could be writ.

And EPA in fact did not adopt Commenters' approach. EPA looked only at emissions in the state, and not from Mexico, and concluded an ongoing maintenance requirement was met. But analyzing only in-state emissions does not support the conclusion Commenters proposed: that the root cause of a failure to maintain the standards will not shift from international border emissions to in-state emissions. This outcome cannot have been reasonably anticipated by Commenters.

Furthermore, Commenters did not suggest a particular time period for the analysis. Had EPA proposed the 10-year period it used, Commenters could have noted that, under section 175A(b), states must submit a second revision that demonstrates the standards will be maintained for the second ten-year period, and EPA should require the same here.

B. EPA Violated the APA by Failing to Give Notice of the Information EPA Relied On to Approve the Plan

EPA's failure to propose its ongoing maintenance interpretation goes hand-in-hand with EPA's second violation of the APA. In order to approve the plan, EPA relied on projections of emissions over the next decade. E.R. 4–5. Necessarily, since EPA gave no notice of the ongoing maintenance interpretation, EPA also gave no notice of the information it would rely on to approve the plan

under that interpretation.[10] Specifically, EPA relied on emission inventories prepared by the state, not for the purpose of an ozone plan for a nonattainment area, but for a maintenance plan for another pollutant, coarse particulate matter ("PM10"); and other emissions data from the state that was not submitted with the ozone plan. *Id.* This information was neither in the docket for the proposed rule nor referenced in the proposed rule. *See generally* E.R. 8–15, E.R. 26–30.

"An agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown." *Ober v. U.S. EPA*, 84 F.3d 304, 313 (9th Cir. 1996) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402 (9th Cir. 1995)). The information here does not expand on or confirm information in the proposed rulemaking to address alleged deficiencies in that information, as there was no information whatsoever in the proposed rulemaking regarding the adequacy of the state's plan for an ongoing maintenance requirement. Instead, the information relied on by EPA addressed a requirement that EPA did not even acknowledge existed in its proposal notice, and it was placed in the docket by EPA after the comment period closed. E.R. 16 (additional documents for final

[10] For the same reasons as EPA's "logical outgrowth" error, this issue was not required to be raised in comments. *See supra* 32 n.8.

rulemaking).

In *Ober*, the information addressed the plan's compliance with a requirement for "reasonably available control measures" for PM10: "For each of the available control measures, the state must either implement the measure or provide a reasoned justification for rejecting it." *Ober,* 84 F.3d at 313. In comments, the petitioners identified several potential control measures. *Id.* EPA requested, and the state provided, additional analyses to justify rejecting petitioners' suggested control measures. *Id.*

In finding a notice violation, the court reasoned that the analyses "addressed the submitted Implementation Plan's failure to comply with an essential provision of the Clean Air Act." *Id.* at 314. They were "relied on" by EPA and "critical to" EPA's approval of the state's plan. *Id.* In addition, petitioners had called into question the accuracy of the analyses, increasing the importance of making them available for public comment. *Id.*

Here, the emissions data was critical to EPA's approval of the plan with respect to maintenance requirements. Under EPA's second interpretation, maintenance requirements are an independent part of section 179B(a). EPA was not able to justify its approval without resorting to the data.

Had the Conservation Groups and others had the opportunity to comment on the emissions data, they would have pointed out that this rulemaking addresses

ozone and that some of the emissions data EPA used was from a plan for a different pollutant, PM10. While ozone and PM10 both result from nitrogen oxides and volatile organic compounds, PM10 also forms in other ways.

The Conservation Groups could have also disputed the accuracy of of the data, just as the *Ober* petitioners did. For example, emissions of nitrogen oxides cause ozone pollution. E.R. 19. The Conservation Groups would have commented that emission inventories for California consistently undercounts these emissions from agricultural soils. This is significant for the Imperial Valley, with its large agricultural industry. E.R. 57–58.

Furthermore, the record does not show that EPA conducted any independent review of the emissions data it relied on. EPA did review other emissions data for consistency with the Act and EPA's guidance, E.R. 23–25, but neither EPA's final rule nor its supporting memorandum indicate that this data was similarly reviewed. E.R. 4–5; 106–108.

Petitioners would also have commented that the emissions data was incomplete, as it did not include any projections about emissions from Mexico, unlike the emissions data California used to show attainment. All of this should be subject to notice and comment.

In that last respect, the notice violation here is again worse than in *Ober*, where at least the state provided the additional information to address the correct

context: reasonably available control measures for the PM10 plan at issue. The violation here is worse in another respect, as well: in *Ober*, EPA had an established interpretation of the statutory phrase "reasonably available control measures." *Ober*, 84 F.3d at 313 (citing 57 Fed. Reg. 13,498 13,540–41 (Apr. 16, 1992)). This gave the *Ober* Petitioners better opportunity to meaningfully comment: they knew to identify potential available control measures. Here, in the absence of any established EPA interpretation of the maintenance requirement, Commenters could not even attempt to identify the nature of the missing information, whether it be emissions data, photochemical modeling, or existing provisions in the plan that might address maintenance of the ozone standards.

EPA's notice violation does differ from *Ober* in another respect: there, the information was not available to Petitioners until EPA published its final rule. *Ober*, 84 F.3d at 313. Here, at least some of the information EPA ultimately relied on, although not identified as relevant by EPA in the proposal, was publicly available during the comment period. E.R. 4 (referring to an online database). And the rest was likely publicly available. *Id.* (referring to the State's PM10 maintenance plan). However, public availability of the information does not by itself cure the notice failure. *See Chamber of Commerce of U.S. v. S.E.C. ("Chamber of Commerce")*, 443 F.3d 890, 901 (D.C. Cir. 2006). Instead, the circumstances must be examined to determine whether public availability "merit[s]

an exception to the comment requirement of [APA] section 553(c)." *Id.*

In *Chamber of Commerce*, as here, and as in *Ober*, the publicly available information, regarding costs of compliance with rule amendments, was critical to the SEC's decision. *Id.* at 901–904. The SEC's proposal notice expressly requested comments on these costs, which the SEC expected to be minimal, so that the SEC could comply with a statutory requirement to consider the economic consequences of proposed regulations. *Id.* at 901. In its final action, the SEC relied on privately produced bulletins, including a nonpublic survey that was summarized in one of the bulletins, which the SEC argued were publicly available. *Id.* at 901–902. The court, though, found the notice inadequate:

> The [SEC]'s bare request for information on costs and its expectation that these costs would be "minimal" did not place interested parties on notice that, in the absence of receiving reliable cost data during the comment period, the [SEC] would base its cost estimates on an extra-record summary of extra-record survey data that, although characterized as "a widely used survey," was not the sort, apparently, relied upon by the [SEC] during the normal course of its official business.

Id. at 904–905. The court distinguished the surveys from "reliable sources of information that should be treated as the inevitable background source of information on the mutual fund industry." *Id.* at 906. The public availability of the bulletins also did not diminish the Chamber's claims of prejudice, because the proposal notice did not indicate that the SEC would rely on them. *Id.* at 907.

While the emissions data EPA relied on here in one sense is the normal sort of data EPA ordinarily relies on when acting on state plans, in a more critical way it is not. EPA does not ordinarily unilaterally take emissions data from a different state plan, submitted for other pollutants, or from a state database, to approve a plan. As in *Chamber of Commerce*, the Conservation Groups had no notice that EPA would vary from ordinary practice in such a way and were therefore prejudiced.

Nor does general use of state-developed emissions data make it so reliable that it need not be subject to public comment. While EPA has issued guidance for the development of this data, EPA still reviews the data when submitted as part of a plan for consistency with the guidance and the Act and provides for public comment on it. *E.g.* E.R. 24 ("We have reviewed the 2012 base year inventory developed for the Imperial Ozone Plan and the inventory methodologies used by CARB and the District for consistency with CAA requirements and the EPA's guidance."). EPA's guidance might be considered reliable and widely-used, but the particular emissions data here is not widely-used; it is only used for the particular areas the data comes from and needs to be verified.

It was not even possible to identify the type of data EPA would rely on, because EPA did not in its proposal explain how a state could demonstrate its plan would maintain the standards (but for international emissions). Commenters noted

three possible ways—emissions data, modeling, or existing plan provisions—but there may be others. E.R. 103–104.

The combination of EPA's two notice failures—one for its implementation and one for the data it used—exacerbates the problem. It is not tenable for commenters to in advance rebut every possible implementation and, for every possible implementation, rebut every potential source of data EPA may rely on, when a proposal provides no clue how to do so.

C. EPA Failed to Follow the Procedures in Section 179B(a) and for Plans Generally

EPA's unilateral use of state emissions data from another plan and a database not only violated the APA, it also violated the procedures in the Act.[11] For a state to obtain a Section 179B(a) waiver, the state itself must "establish" to EPA's "satisfaction" that the waiver is warranted. 42 U.S.C. § 7509a(a)(2). EPA skipped over this lead role of the state. Nothing in the record shows that the state submitted the data EPA used to "establish" that the waiver here should be granted. This violates the plain language of section 179B(a).

The correct procedure is in accordance with the general scheme for implementation plans: "The state proposes, the EPA disposes." *Virginia v. EPA*,

[11] While this is not a violation of APA procedures, it is agency action "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). For the same general reasons given above, *supra* 32 n.8, this issue was not required to be raised in comments.

108 F.3d 1397, 1408 (D.C. Cir. 1997) (quotation omitted); *see also Arvin*, 786 F.3d at 1174 (explaining the process for state plans). In other words, the state had to submit a plan (either as a component of this ozone plan or separately) with supporting data to address the ongoing maintenance requirement.

This is necessary for two reasons. First, the cooperative federalism structure of the Act gives states sole authority to decide what should be submitted to EPA. *See Virginia*, 108 F.3d at 1407–10. EPA cannot willy-nilly grab state documents and approve them as plans, or as part of a plan, without formal submission by the state. *See* 40 C.F.R. Pt. 51, App'x V, § 2.1(a) (requiring complete plan submissions to include a "formal signed, stamped, and dated letter of submittal from the Governor or [Governor's] designee, requesting EPA approval of the plan or revision thereof").

Second, the Act requires state plans to go through notice and comment during the state process. 42 U.S.C. § 7410(a)(2), (l). Had the state developed a plan to address the ongoing maintenance requirement, including the supporting data, that plan would have been subject to public comment during the state process. EPA's procedure here not only violated the public's opportunity to comment on EPA's action under the APA, but also violated the public's opportunity to comment on a state plan during the state process.

D. EPA's Implementation Impermissibly Fails to Address the Structural Hole and Is Arbitrary and Capricious

As with its first interpretation, EPA failed to explain how its authority to call for a plan revision under section 110(k)(5) of the Act would actually apply under EPA's implementation of its second interpretation.[12] *See supra* 23–25. Recall that EPA has this authority in three instances, but the only one potentially applicable here is the instance in which the plan is substantially inadequate "to comply with other requirements" of the Act. *Id.* (quoting 42 U.S.C. § 7410(k)(5)).

Under EPA's implementation of its second interpretation, the only "other requirement" is to produce projected emissions data that purports to show the standards will be maintained (but for international emissions) over the next decade. If those projections fail and air quality deteriorates, or even if they succeed but air quality deteriorates after the next decade, the only thing EPA can require under its authority to call for a plan revision would be to require the state to redo the projections. But redoing the projections to make them reflect reality would serve no rational purpose without some corresponding change in the State's plan to reduce emissions correspondingly. Under EPA's implementation of its second interpretation EPA has no hook under section 110(k)(5) to require that.

[12] Commenters raised the issue of a structural hole in the Act. E.R. 100–102. EPA's implementation of its second interpretation fails to address the issue. *See supra* 18 n.2.

On the other hand, if EPA under its second interpretation had required provisions that reduce emissions if the plan goes awry, such as the contingency provisions in a maintenance plan under section 175A, those provisions might be adequate to address the problem. If they turned out to be "substantially inadequate" to do so, then EPA would have its necessary hook to call for a plan revision that would actually reduce emissions.

EPA's ongoing maintenance interpretation is not only permissible, it is compelled. However, EPA's implementation of it is neither. For the same reasons that EPA's first interpretation is impermissible, EPA's implementation of its second interpretation is also impermissible.[13] Specifically, the implementation is "unmoored from the purposes and concerns" of the Act, *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1076 (9th Cir. 2019), *cert. denied*, 2020 WL 3405861 (June 22, 2020), because, by leaving EPA without an effective tool to address future ozone problems, it is ineffectual in ensuring maintenance of the standards.

And EPA's implementation of its second interpretation is arbitrary and capricious.[14] The only factor EPA discussed to support it was an analogy to the

[13] While this brief has described it as "implementation" to avoid confusion, it could also be described as an interpretation of "establish": how should a state "establish" that its plan will maintain the standards (but for international emissions).

[14] If EPA can bootstrap notice of its implementation from the comments, then EPA's faulty implementation is fair game, as it fails to rationally address the issue then raised by commenters: how to "establish" that a plan will maintain the standards (but for international emissions).

demonstrations used in maintenance plans under section 175A. E.R. 4. But sometimes photochemical modeling is used to demonstrate maintenance in those plans. E.R. 120–122. And Commenters noted that modeling could be used. E.R. 103. EPA failed to explain why it should not be used here. E.R. 4. This failure is notable, as the state relied primarily on photochemical modeling to demonstrate attainment. E.R. 27. *See Altera*, 926 F.3d at 1080 (agency "must articulate a satisfactory explanation for its action").

EPA also failed to explain why data from the State's maintenance plan for another pollutant, PM10, should be used. While both PM10 and ozone are formed from nitrogen oxides and volatile organic compounds, PM10 is formed in other ways. The emissions data for a PM10 plan may not be suitable for ozone.

EPA's analogy to section 175A maintenance plans, suggested by Commenters, E.R. 103, raises a further issue. The demonstration of maintenance there takes place in the context of a plan that also contains contingency provisions to promptly correct violations of the standards. Thus, EPA might accept a less "technically credible" method such as projected emissions data in reliance on the contingency provisions as a backstop. EPA did not explain why here, in the absence of such provisions, it was acceptable to rely on it.

EPA also did not explain why, when section 179B(a) requires the state to establish that the plan would maintain the standards, but for international

emissions, EPA did not examine projected emissions data from Mexico. By itself, without something more, EPA's review of in-state emissions data does not create a rational connection "between the facts found and the choice made." *Altera*, 926 F.3d at 1080.

CONCLUSION

For the forgoing reasons, EPA's approval of the ozone plan with respect to the maintenance requirements in section 179B(a) of the Act should be vacated and remanded.

Date: August 20, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

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STATEMENT OF RELATED CASES

Petitioners do not know of any related cases in this Court.

Date: August 20, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

Steven M. Odendahl

Attorney for Petitioners Center for Biological Diversity and Center for Environmental Health

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,312 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: August 20, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

Steven M. Odendahl

Attorney for Petitioners Center for Biological Diversity and Center for Environmental Health

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: August 20, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

Steven M. Odendahl

Attorney for Petitioners Center for Biological Diversity and Center for Environmental Health

APPENDIX

Standing Declarations

Declaration of Ileene Anderson

Declaration of Brendan Cummings

No. 20-71196

IN THE 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, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents.

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

DECLARATION OF ILEENE ANDERSON

1. I have been a continuous member of the Center for Biological Diversity since 1999. I live in Los Angeles County, California with my family. I work in the City of Los Angeles, California.
2. I enjoy spending time outdoors participating in various activities. That includes hiking, going for nature walks, botanizing and birding. I like to visit places like the Salton Sea shore, the Algodones Dunes, Anza-Borrego Desert State Park, San Felipe Marsh, Milpitas Wash, the Cargo Muchacho Mountains, the Yuha desert, the Colorado River and

other areas in Imperial County, California. I will continue to visit Imperial County on a regular basis and most recently visited in May of this year to watch birds during migration around the Salton Sea .

3. I am 61 years old, and while I do not currently suffer from any health conditions that affect my breathing, I worry that as I grow older, the air pollution will take a toll on my lungs. To stay healthy and active in California, I need to exercise, and I prefer to do so outdoors.

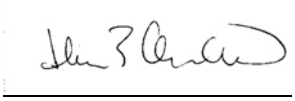
4. I care deeply about levels of air pollution in the areas where I work, play, and live. I pay attention to the news about air quality so that I can determine whether or not it is a good air day to spend time outside. When levels become dangerously elevated, I curtail my outdoor activities.

5. I understand that the Environmental Protection Agency, or EPA, has the power to regulate air pollution. I also understand that the EPA requires States to submit implementation plans for controlling pollution under the Clean Air Act. I know that EPA has approved a plan for ozone pollution in Imperial County. I consider myself harmed by air pollution in Imperial County. I am concerned that EPA did not require the plan to meet the Clean Air Act's requirements to maintain ozone standards.

6. I know that the Center for Biological Diversity has filed a lawsuit against the EPA for its approval of the Imperial County ozone plan. If the Center prevails in this case, the state will need to submit and EPA will need to review a plan to maintain ozone standards in Imperial County. Once such a plan is approved, I will be less concerned about air pollution in California because there will be a plan to address increases in ozone pollution in Imperial County.

I declare under the penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Dated: August 7, 2020



Ileene Anderson

No. 20-71196

IN THE 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, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents.

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

DECLARATION OF BRENDAN CUMMINGS

1. I am a member of the Center for Biological Diversity. I am also on staff at the Center and currently serve as Conservation Director for the organization. The Center's members and staff, including myself, rely on the Center to represent our interests in the preservation of imperiled species and habitats, clean air and water and a healthy climate. I have been a member of the Center for over 25 years and have been on staff for over 20 years.

2. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and water, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the natural environment are closely linked, the Center is working to protect natural resources like air to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for the people that interact with, depend on, and cherish these natural resources. The Environmental Health Program is focused on protecting biodiversity and human health from toxic substances like ozone. This case falls squarely within the ambit of the Center's mission carried out on behalf of its members.
3. I am personally and professionally concerned about the impacts of environmental pollutants on human health and the environment. My work requires me to be familiar with studies regarding the harms ozone and other, related air pollutants cause. I have worked on efforts to reduce or mitigate air pollution impacts on endangered species and ecosystems, both across the nation and in Imperial County specifically.
4. In both my personal and professional capacity, I regularly go to Imperial County and engage in outdoor activities including hiking, backpacking, looking for rare plants and other imperiled species, birdwatching and environmental monitoring. I have been making such trips since 1987 and will continue to do as long as I am physically able.
5. Since at least 2000, I've worked on efforts to protect the rare species of Imperial County, including the federally threatened Peirson's milk-vetch, the state-protected Algodones Dunes sunflower and Wiggins' croton, the flat-tailed horned lizard and numerous others. A primary focus of these efforts has been on the management of the Algodones Dunes

(otherwise known as the Imperial Sand Dunes), the largest active sand dune field in the United States and recognized as a National Natural Landmark.

6. As part of my work related to improving management of the Algodones Dunes, I have visited the Dunes and surrounding areas several dozen times, and I plan to continue these visits. These visits have ranged from official meetings and tours with BLM representatives at the Dunes themselves or the agency's El Centro office, participating in citizen monitoring of off-road vehicle (ORV) compliance (or non-compliance) with measures designed to protect the species and air quality of the area, going on monitoring overflights, and recreational hiking and camping trips to the area. My most recent such visit was in April of last year when I met with ORV advocacy groups at the Dunes to discuss potential management plan revisions. I expect a similar meeting will be scheduled next year. While most such trips are for the explicit purpose of visiting the Dunes themselves, I also regularly visit the Dunes when passing through the region. The Algodones Dunes are bisected by Interstate 8 in the south and SR78 in the north. In a non-pandemic year, my work typically takes me to the Center's headquarters in Tucson, Arizona at least twice a year and I almost always take a route through Imperial County and the Algodones Dunes on my drive to or from Tucson. In May of last year I did such a trip, driving up the east side of the Dunes to SR78 and then westward, getting out on foot at multiple places along the way to birdwatch, botanize and otherwise look for wildlife and enjoy the scenery. I did a similar trip in November. My plans for a trip this spring were derailed by the Covid-19 outbreak, but I will almost certainly do such a trip again this winter or spring if and when conditions improve and make such a trip safe and socially responsible.

7. In addition to the Algodones Dunes, my work regularly takes me to other areas of Imperial County. I am involved in efforts to prevent or at least minimize the environmental impacts of border security infrastructure and have visited various areas where such construction has been planned or is already in place. New construction is underway in San Diego and Imperial County and I will visit these sites with my colleagues when it is safe to do so. I have also worked on issues related to the Salton Sea, BLM's Yuha Area of Critical Environmental Concern, areas set aside to protect the flat-tailed horned lizard, mines, pipelines and the siting of large-scale renewable energy projects. Each of these issues has brought me to Imperial County and will continue to do so for the foreseeable future.

8. While protecting the California Desert is an important part of my work life, it is also central to my personal life. I live in Joshua Tree in the California desert and my primary recreational activity is exploring various areas in the California Desert as a hiker, backpacker, wildlife-watcher, and sightseer. Such trips often take me to various parts of Imperial County, which are close enough I can visit on daytrips as well as the occasional overnight camping trip. These trips have taken me to the Imperial Wildlife Refuge and the Sonny Bono Salton Sea National Wildlife Refuge along the Salton Sea as well as the Cibola National Wildlife Refuge and Picacho State Recreation Area along the Colorado River. I have also explored many of the backroads on BLM lands throughout Imperial County. In addition to the natural areas of Imperial County, I also am interested in historic or cultural sites in the area, ranging from ancient geoglyphs and trails on BLM lands, the remains of World War II training sites, to places like Slab City and Salvation

Mountain. I have visited these places multiple times in the past, most recently on a short road trip in December 2019, and will certainly continue to do so in the future.

9. While I love the wildlife, desert plants and scenery of the undeveloped portions of Imperial County, one of the biggest impediments to my enjoyment of the area is the often-abysmal air quality in the region. The Algodones Dunes become almost intolerable on busy weekends when the dust and exhaust pollution from all the ORV use can obscure the views from miles away and make breathing difficult near the Dunes themselves. Even absent the spike in pollution stemming from the Algodones Dunes, air quality in the area is frequently very poor.

10. From EPA and other resources, I am aware that ozone harms people's health, particularly their breathing. I am also aware of studies that tie elevated ozone levels to harmful effects on plant and animal life. I am further aware that oxides of nitrogen are a precursor to ozone and that nitrogen deposition is harmful to the ecosystems I enjoy seeing, for nitrogen deposition "fertilizes" desert soils and makes it easier for invasive plants to encroach. This is a significant issue in Joshua Tree where I live, as invasive plants now cover much of my property, as well as the National Park, not just crowding out native plants but also greatly increasing the threat of fire. My understanding is that such impacts are happening in Imperial County as well, and I have seen first-hand how invasive Sahara mustard and other species are encroaching on the western margins of the Algodones Dunes.

11. In areas of known bad air quality, I often curb my level of hiking and exertion. On the worst air quality days, I will simply cancel planned hiking excursions or limit myself to vehicle-based travel where I have the benefit of filtered air. Imperial County is one of the

most beautiful areas I know, but because of concerns about air pollution there, I often either chose to go elsewhere or limit my time outside when passing through. I am aware that the area violates federal limits on ozone pollution levels. Sometimes the air quality is visibly bad, and I will stay in my vehicle because I am concerned about the effects of the dirty air on my health. Improved air quality would allow me to better enjoy the environment and know the species and ecosystems I enjoy seeing and have worked to protect would be better off.

12. I am aware that EPA approved an ozone plan for Imperial County. I further am aware that the Center is involved in a lawsuit against EPA regarding maintenance of the ozone standards in Imperial County. I support the Center's effort because I know that success will mean we are a step closer to reducing the air pollution that harms me and my interests in enjoying my outdoor activities in Imperial County.

I declare under the penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Dated: August 12, 2020.

Brendan Cummings

ADDENDUM

TABLE OF CONTENTS

out below] shall take effect 180 days after the date of its enactment [Sept. 13, 1976].

''(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment [Sept. 13, 1976].''

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–409, §1, Sept. 13, 1976, 90 Stat. 1241, provided: ''That this Act [enacting this section, amending sections 551, 552, 556, and 557 of this title, section 10 of Pub. L. 92–463, set out in the Appendix to this title, and section 410 of Title 39, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, §2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(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.

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

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, §4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

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.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

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

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

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.

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

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

ble of recommending plans for implementation of national primary and secondary ambient air quality standards, for provisions authorizing Federal grants for the purpose of expediting the establishment of air quality standards and provisions requiring the designated State agency to be capable of recommending standards of air quality and plans for implementation thereof, respectively, and struck out subsec. (b) which authorized establishment of air quality planning commissions.

§ 7407. Air quality control regions

(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)[1] of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5)[1] of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

(July 14, 1955, ch. 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.)

REFERENCES IN TEXT

Section 7413 of this title, referred to in subsec. (e)(3), was amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsec. (d) of section 7413 no longer relates to final compliance orders.

CODIFICATION

Section was formerly classified to section 1857c–2 of this title.

PRIOR PROVISIONS

A prior section 107 of act July 14, 1955, as added Nov. 21, 1967, Pub. L. 90–148, § 2, 81 Stat. 490, related to air quality control regions and was classified to section 1857c–2 of this title, prior to repeal by Pub. L. 91–604.

Another prior section 107 of act July 14, 1955, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 399, was renumbered section 111 by Pub. L. 90–148 and is classified to section 7411 of this title.

[1] See References in Text note below.

AMENDMENTS

2004—Subsec. (d)(6), (7). Pub. L. 108–199 added pars. (6) and (7).

1990—Subsec. (d). Pub. L. 101–549 amended subsec. (d) generally, substituting present provisions for provisions which required States to submit lists of regions not in compliance on Aug. 7, 1977, with certain air quality standards to be submitted to the Administrator, and which authorized States to revise and resubmit such lists from time to time.

1977—Subsecs. (d), (e). Pub. L. 95–95 added subsecs. (d) and (e).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

OZONE AND PARTICULATE MATTER STANDARDS

Pub. L. 108–199, div. G, title IV, § 425(b), Jan. 23, 2004, 118 Stat. 417, provided that: ''Except as provided in paragraphs (6) and (7) of section 107(d) of the Clean Air Act [subsec. (d)(6), (7) of this section] (as added by subsection (a)), section 6101, subsections (a) and (b) of section 6102, and section 6103 of the Transportation Equity Act for the 21st Century [Pub. L. 105–178] (42 U.S.C. 7407 note; 112 Stat. 463), as in effect on the day before the date of enactment of this Act [Jan. 23, 2004], shall remain in effect.''

Pub. L. 105–178, title VI, June 9, 1998, 112 Stat. 463, as amended by Pub. L. 109–59, title VI, § 6012(a), Aug. 10, 2005, 119 Stat. 1882, provided that:

''SEC. 6101. FINDINGS AND PURPOSE.

''(a) The Congress finds that—

''(1) there is a lack of air quality monitoring data for fine particle levels, measured as $PM_{2.5}$, in the United States and the States should receive full funding for the monitoring efforts;

''(2) such data would provide a basis for designating areas as attainment or nonattainment for any $PM_{2.5}$ national ambient air quality standards pursuant to the standards promulgated in July 1997;

''(3) the President of the United States directed the Administrator of the Environmental Protection Agency (referred to in this title as the 'Administrator') in a memorandum dated July 16, 1997, to complete the next periodic review of the particulate matter national ambient air quality standards by July 2002 in order to determine 'whether to revise or maintain the standards';

''(4) the Administrator has stated that 3 years of air quality monitoring data for fine particle levels, measured as $PM_{2.5}$ and performed in accordance with any applicable Federal reference methods, is appropriate for designating areas as attainment or nonattainment pursuant to the July 1997 promulgated standards; and

''(5) the Administrator has acknowledged that in drawing boundaries for attainment and nonattainment areas for the July 1997 ozone national air quality standards, Governors would benefit from considering implementation guidance from EPA on drawing area boundaries.

''(b) The purposes of this title are—

''(1) to ensure that 3 years of air quality monitoring data regarding fine particle levels are gathered for use in the determination of area attainment or nonattainment designations respecting any $PM_{2.5}$ national ambient air quality standards;

''(2) to ensure that the Governors have adequate time to consider implementation guidance from EPA on drawing area boundaries prior to submitting area designations respecting the July 1997 ozone national ambient air quality standards;

''(3) to ensure that the schedule for implementation of the July 1997 revisions of the ambient air quality standards for particulate matter and the schedule for

Subsec. (f)(1). Pub. L. 101–549, § 108(b), in introductory provisions, substituted present provisions for provisions relating to Federal agencies, States, and air pollution control agencies within either 6 months or one year after Aug. 7, 1977.

Subsec. (f)(1)(A). Pub. L. 101–549, § 108(b), substituted present provisions for provisions relating to information prepared in cooperation with Secretary of Transportation, regarding processes, procedures, and methods to reduce certain pollutants.

Subsec. (f)(3), (4). Pub. L. 101–549, § 111, added pars. (3) and (4).

Subsec. (g). Pub. L. 101–549, § 108(*o*), added subsec. (g).

Subsec. (h). Pub. L. 101–549, § 108(c), added subsec. (h).

1977—Subsec. (a)(1)(A). Pub. L. 95–95, § 401(a), substituted ''emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare'' for ''which in his judgment has an adverse effect on public health or welfare''.

Subsec. (b)(1). Pub. L. 95–95, § 104(a), substituted ''cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology'' for ''technology and costs of emission control''.

Subsec. (c). Pub. L. 95–95, § 104(b), inserted provision directing the Administrator, not later than six months after Aug. 7, 1977, to revise and reissue criteria relating to concentrations of NO_2 over such period (not more than three hours) as he deems appropriate, with the criteria to include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

Subsecs. (e), (f). Pub. L. 95–95, § 105, added subsecs. (e) and (f).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7409. National primary and secondary ambient air quality standards

(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.

(July 14, 1955, ch. 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.)

CODIFICATION

Section was formerly classified to section 1857c–4 of this title.

PRIOR PROVISIONS

A prior section 109 of act July 14, 1955, was renumbered section 116 by Pub. L. 91–604 and is classified to section 7416 of this title.

AMENDMENTS

1977—Subsec. (c). Pub. L. 95–95, §106(b), added subsec. (c).

Subsec. (d). Pub. L. 95–95, §106(a), added subsec. (d).

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95–95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95–95, set out as a note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95–95 [this chapter], see section 406(b) of Pub. L. 95–95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

ROLE OF SECONDARY STANDARDS

Pub. L. 101–549, title VIII, §817, Nov. 15, 1990, 104 Stat. 2697, provided that:

''(a) REPORT.—The Administrator shall request the National Academy of Sciences to prepare a report to the Congress on the role of national secondary ambient air quality standards in protecting welfare and the environment. The report shall:

''(1) include information on the effects on welfare and the environment which are caused by ambient concentrations of pollutants listed pursuant to section 108 [42 U.S.C. 7408] and other pollutants which may be listed;

''(2) estimate welfare and environmental costs incurred as a result of such effects;

''(3) examine the role of secondary standards and the State implementation planning process in preventing such effects;

''(4) determine ambient concentrations of each such pollutant which would be adequate to protect welfare and the environment from such effects;

''(5) estimate the costs and other impacts of meeting secondary standards; and

''(6) consider other means consistent with the goals and objectives of the Clean Air Act [42 U.S.C. 7401 et seq.] which may be more effective than secondary standards in preventing or mitigating such effects.

''(b) SUBMISSION TO CONGRESS; COMMENTS; AUTHORIZATION.—(1) The report shall be transmitted to the Congress not later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990].

''(2) At least 90 days before issuing a report the Administrator shall provide an opportunity for public comment on the proposed report. The Administrator shall include in the final report a summary of the comments received on the proposed report.

''(3) There are authorized to be appropriated such sums as are necessary to carry out this section.''

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

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

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c), 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)[1] 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)[1] 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)[1] 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

[1] See References in Text note below.

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[1] of this title, as in effect before August 7, 1977, or section 7413(d)[1] 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[1] of this title as in effect before August 7, 1977, or under section 7413(d)[1] 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)[1] 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[2] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

(July 14, 1955, ch. 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; Pub. L. 95–95, title I, §§107, 108, Aug. 7, 1977, 91 Stat. 691, 693; Pub. L. 95–190, §14(a)(1)–(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)–(d), 102(h), 107(c), 108(d), title IV, §412, Nov. 15, 1990, 104 Stat. 2404–2408, 2422, 2464, 2466, 2634.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a)(3)(B), is Pub. L. 93–319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§791 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

Section 7413 of this title, referred to in subsecs. (a)(3)(C), (6), (f)(5), (g)(3), and (i), was amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, subsecs. (d) and (e) of section 7413 no longer relates to final compliance orders and steel industry compliance extension, respectively.

Section 1857c–10 of this title, as in effect before August 7, 1977, referred to in subsecs. (f)(5) and (g)(3), was in the original ''section 119, as in effect before the date of the enactment of this paragraph'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, §3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of subsecs. (f)(5) and (g)(3) of this section by Pub. L. 95–95, §107, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to section 7413(d)(5) of this title. Section 7413 of this title was subsequently amended generally by Pub. L. 101–549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, see note above. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

CODIFICATION

Section was formerly classified to section 1857c–5 of this title.

[2] So in original. Probably should be followed by a comma.

§ 7504. Planning procedures

(a) In general

For any ozone, carbon monoxide, or PM–10 nonattainment area, the State containing such area and elected officials of affected local governments shall, before the date required for submittal of the inventory described under sections 7511a(a)(1) and 7512a(a)(1) of this title, jointly review and update as necessary the planning procedures adopted pursuant to this subsection as in effect immediately before November 15, 1990, or develop new planning procedures pursuant to this subsection, as appropriate. In preparing such procedures the State and local elected officials shall determine which elements of a revised implementation plan will be developed, adopted, and implemented (through means including enforcement) by the State and which by local governments or regional agencies, or any combination of local governments, regional agencies, or the State. The implementation plan required by this part shall be prepared by an organization certified by the State, in consultation with elected officials of local governments and in accordance with the determination under the second sentence of this subsection. Such organization shall include elected officials of local governments in the affected area, and representatives of the State air quality planning agency, the State transportation planning agency, the metropolitan planning organization designated to conduct the continuing, cooperative and comprehensive transportation planning process for the area under section 134 of title 23, the organization responsible for the air quality maintenance planning process under regulations implementing this chapter, and any other organization with responsibilities for developing, submitting, or implementing the plan required by this part. Such organization may be one that carried out these functions before November 15, 1990.

(b) Coordination

The preparation of implementation plan provisions and subsequent plan revisions under the continuing transportation-air quality planning process described in section 7408(e) of this title shall be coordinated with the continuing, cooperative and comprehensive transportation planning process required under section 134 of title 23, and such planning processes shall take into account the requirements of this part.

(c) Joint planning

In the case of a nonattainment area that is included within more than one State, the affected States may jointly, through interstate compact or otherwise, undertake and implement all or part of the planning procedures described in this section.

(July 14, 1955, ch. 360, title I, § 174, as added Pub. L. 95–95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 748; amended Pub. L. 101–549, title I, § 102(d), Nov. 15, 1990, 104 Stat. 2417.)

AMENDMENTS

1990—Pub. L. 101–549 amended section generally, substituting present provisions for provisions which related to: in subsec. (a), preparation of implementation plan by designated organization; and in subsec. (b), coordination of plan preparation.

§ 7505. Environmental Protection Agency grants

(a) Plan revision development costs

The Administrator shall make grants to any organization of local elected officials with transportation or air quality maintenance planning responsibilities recognized by the State under section 7504(a) of this title for payment of the reasonable costs of developing a plan revision under this part.

(b) Uses of grant funds

The amount granted to any organization under subsection (a) shall be 100 percent of any additional costs of developing a plan revision under this part for the first two fiscal years following receipt of the grant under this paragraph, and shall supplement any funds available under Federal law to such organization for transportation or air quality maintenance planning. Grants under this section shall not be used for construction.

(July 14, 1955, ch. 360, title I, § 175, as added Pub. L. 95–95, title I, § 129(b), Aug. 7, 1977, 91 Stat. 749.)

§ 7505a. Maintenance plans

(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.

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

§ 7506. Limitations on certain Federal assistance

(a), (b) Repealed. Pub. L. 101–549, title I, § 110(4), Nov. 15, 1990, 104 Stat. 2470

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

(2) Any transportation plan or program developed pursuant to title 23 or chapter 53 of title 49 shall implement the transportation provisions of any applicable implementation plan approved under this chapter applicable to all or part of the area covered by such transportation plan or program. No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter. In particular—

(A) no transportation plan or transportation improvement program may be adopted by a metropolitan planning organization designated under title 23 or chapter 53 of title 49, or be found to be in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan, and that the plan or program will conform to the requirements of paragraph (1)(B);

(B) no metropolitan planning organization or other recipient of funds under title 23 or chapter 53 of title 49 shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan;

(C) a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under title 23 or chapter 53 of title 49, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements—

(i) such a project comes from a conforming plan and program;

(ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and

(iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.

(D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan only if it is demonstrated that the projected emissions from such project, when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area, do not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan.

(E) The appropriate metropolitan planning organization shall redetermine conformity of existing transportation plans and programs not later than 2 years after the date on which the Administrator—

(i) finds a motor vehicle emissions budget to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004);

(ii) approves an implementation plan that establishes a motor vehicle emissions budget if that budget has not yet been determined to be adequate in accordance with clause (i); or

(iii) promulgates an implementation plan that establishes or revises a motor vehicle emissions budget.

(iv) highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;

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

(vi) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;

(vii) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and

(viii) such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.

In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

(2) Offsets

In applying the emissions offset requirements of section 7503 of this title to new or modified sources or emissions units for which a permit is required under this part, the ratio of emission reductions to increased emissions shall be at least 2 to 1.

(c) Notice of failure to attain

(1) As expeditiously as practicable after the applicable attainment date for any nonattainment area, but not later than 6 months after such date, the Administrator shall determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date.

(2) Upon making the determination under paragraph (1), the Administrator shall publish a notice in the Federal Register containing such determination and identifying each area that the Administrator has determined to have failed to attain. The Administrator may revise or supplement such determination at any time based on more complete information or analysis concerning the area's air quality as of the attainment date.

(d) Consequences for failure to attain

(1) Within 1 year after the Administrator publishes the notice under subsection (c)(2) (relating to notice of failure to attain), each State containing a nonattainment area shall submit a revision to the applicable implementation plan meeting the requirements of paragraph (2) of this subsection.

(2) The revision required under paragraph (1) shall meet the requirements of section 7410 of this title and section 7502 of this title. In addition, the revision shall include such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.

(3) The attainment date applicable to the revision required under paragraph (1) shall be the same as provided in the provisions of section 7502(a)(2) of this title, except that in applying such provisions the phrase ''from the date of the notice under section 7509(c)(2) of this title'' shall be substituted for the phrase ''from the date such area was designated nonattainment under section 7407(d) of this title'' and for the phrase ''from the date of designation as nonattainment''.

(July 14, 1955, ch. 360, title I, §179, as added Pub. L. 101–549, title I, §102(g), Nov. 15, 1990, 104 Stat. 2420.)

§ 7509a. International border areas

(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.

[1] So in original. Probably should be ''this''.

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

(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.

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

ESTABLISHMENT OF PROGRAM TO MONITOR AND IMPROVE AIR QUALITY IN REGIONS ALONG BORDER BETWEEN UNITED STATES AND MEXICO

Pub. L. 101–549, title VIII, § 815, Nov. 15, 1990, 104 Stat. 2693, provided that:

''(a) IN GENERAL.—The Administrator of the Environmental Protection Agency (hereinafter referred to as the 'Administrator') is authorized, in cooperation with the Department of State and the affected States, to negotiate with representatives of Mexico to authorize a program to monitor and improve air quality in regions along the border between the United States and Mexico. The program established under this section shall not extend beyond July 1, 1995.

''(b) MONITORING AND REMEDIATION.—

''(1) MONITORING.—The monitoring component of the program conducted under this section shall identify and determine sources of pollutants for which national ambient air quality standards (hereinafter referred to as 'NAAQS') and other air quality goals have been established in regions along the border between the United States and Mexico. Any such monitoring component of the program shall include, but not be limited to, the collection of meteorological data, the measurement of air quality, the compilation of an emissions inventory, and shall be sufficient to the extent necessary to successfully support the use of a state-of-the-art mathematical air modeling analysis. Any such monitoring component of the program shall collect and produce data projecting the level of emission reductions necessary in both Mexico and the United States to bring about attainment of both primary and secondary NAAQS, and other air quality goals, in regions along the border in the United States. Any such monitoring component of the program shall include to the extent possible, data from monitoring programs undertaken by other parties.

''(2) REMEDIATION.—The Administrator is authorized to negotiate with appropriate representatives of Mexico to develop joint remediation measures to reduce the level of airborne pollutants to achieve and maintain primary and secondary NAAQS, and other air quality goals, in regions along the border between the United States and Mexico. Such joint remediation measures may include, but not be limited to measures included in the Environmental Protection Agency's Control Techniques and Control Technology documents. Any such remediation program shall also identify those control measures implementation of which in Mexico would be expedited by the use of material and financial assistance of the United States.

''(c) ANNUAL REPORTS.—The Administrator shall, each year the program authorized in this section is in operation, report to Congress on the progress of the program in bringing nonattainment areas along the border of the United States into attainment with primary and secondary NAAQS. The report issued by the Administrator under this paragraph shall include recommendations on funding mechanisms to assist in implementation of monitoring and remediation efforts.

''(d) FUNDING AND PERSONNEL.—The Administrator may, where appropriate, make available, subject to the appropriations, such funds, personnel, and equipment as may be necessary to implement the provisions of this section. In those cases where direct financial assistance of the United States is provided to implement monitoring and remediation programs in Mexico, the Administrator shall develop grant agreements with appropriate representatives of Mexico to assure the accuracy and completeness of monitoring data and the performance of remediation measures which are financed by the United States. With respect to any control measures within Mexico funded by the United States, the Administrator shall, to the maximum extent practicable, utilize resources of Mexico where such utilization would reduce costs to the United States. Such funding agreements shall include authorization for the Administrator to—

''(1) review and agree to plans for monitoring and remediation;

''(2) inspect premises, equipment and records to insure compliance with the agreements established under and the purposes set forth in this section; and

''(3) where necessary, develop grant agreements with affected States to carry out the provisions of this section.''

SUBPART 2—ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS

§ 7511. Classifications and attainment dates

(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

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

**The primary standard attainment date is measured from 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 non-

attainment 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 ambi-

[1] So in original. Probably should be ''terms''.

ent 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.

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

EXEMPTIONS FOR STRIPPER WELLS

Pub. L. 101–549, title VIII, § 819, Nov. 15, 1990, 104 Stat. 2698, provided that: ''Notwithstanding any other provision of law, the amendments to the Clean Air Act made by section 103 of the Clean Air Act Amendments of 1990 [enacting this section and sections 7511a to 7511f of this title] (relating to additional provisions for ozone nonattainment areas), by section 104 of such amendments [enacting sections 7512 and 7512a of this title] (relating to additional provisions for carbon monoxide nonattainment areas), by section 105 of such amendments [enacting sections 7513 to 7513b of this title and amending section 7476 of this title] (relating to additional provisions for PM–10 nonattainment areas), and by section 106 of such amendments [enacting sections 7514 and 7514a of this title] (relating to additional provisions for areas designated as nonattainment for sulfur oxides, nitrogen dioxide, and lead) shall not apply with respect to the production of and equipment used in the exploration, production, development, storage or processing of—

''(1) oil from a stripper well property, within the meaning of the June 1979 energy regulations (within the meaning of section 4996(b)(7) of the Internal Revenue Code of 1986 [26 U.S.C. 4996(b)(7)], as in effect before the repeal of such section); and

''(2) stripper well natural gas, as defined in section 108(b) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3318(b)).[,]

except to the extent that provisions of such amendments cover areas designated as Serious pursuant to part D of title I of the Clean Air Act [this part] and having a population of 350,000 or more, or areas designated as Severe or Extreme pursuant to such part D.''

§ 7511a. Plan submissions and requirements

(a) Marginal Areas

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

(1) Inventory

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

(2) Corrections to the State implementation plan

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

(A) Reasonably available control technology corrections

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

(B) Savings clause for vehicle inspection and maintenance

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

(ii) Within 12 months after November 15, 1990, the Administrator shall review, revise, update, and republish in the Federal Register the guidance for the States for motor vehicle inspection and maintenance programs required by this chapter, taking into consideration the Administrator's investigations and audits of such program. The guidance shall, at a minimum, cover the frequency of inspections, the types of vehicles to be inspected (which shall include leased vehicles that are registered in the nonattainment area), vehicle maintenance by owners and operators, audits by the State, the test method and measures, including whether centralized or decentralized, inspection methods and procedures, quality of inspection, components covered, assurance that a vehicle subject to a recall notice from a manufacturer has complied with that notice, and effective implementation and enforcement, including ensuring that any re-

testing of a vehicle after a failure shall include proof of corrective action and providing for denial of vehicle registration in the case of tampering or misfueling. The guidance which shall be incorporated in the applicable State implementation plans by the States shall provide the States with continued reasonable flexibility to fashion effective, reasonable, and fair programs for the affected consumer. No later than 2 years after the Administrator promulgates regulations under section 7521(m)(3) of this title (relating to emission control diagnostics), the State shall submit a revision to such program to meet any requirements that the Administrator may prescribe under that section.

(C) Permit programs

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

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

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

(3) Periodic inventory

(A) General requirement

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

(B) Emissions statements

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

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

(4) General offset requirement

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

The Administrator may, in the Administrator's discretion, require States to submit a schedule for submitting any of the revisions or other items required under this subsection. The requirements of this subsection shall apply in lieu of any requirement that the State submit a demonstration that the applicable implementation plan provides for attainment of the ozone standard by the applicable attainment date in any Marginal Area. Section 7502(c)(9) of this title (relating to contingency measures) shall not apply to Marginal Areas.

(b) Moderate Areas

Each State in which all or part of a Moderate Area is located shall, with respect to the Moderate Area, make the submissions described under subsection (a) of this section (relating to Marginal Areas), and shall also submit the revisions to the applicable implementation plan described under this subsection.

(1) Plan provisions for reasonable further progress

(A) General rule

(i) By no later than 3 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for volatile organic compound emission reductions, within 6 years after November 15, 1990, of at least 15 percent from baseline emissions, accounting for any growth in emissions after 1990. Such plan shall provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter. This subparagraph shall not apply in the case of oxides of nitrogen for those areas for which the Administrator determines (when the Administrator approves the plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment.

(ii) A percentage less than 15 percent may be used for purposes of clause (i) in the case of any State which demonstrates to the satisfaction of the Administrator that—

(I) new source review provisions are applicable in the nonattainment areas in the same manner and to the same extent as required under subsection (e) in the case of Extreme Areas (with the exception that, in applying such provisions, the terms ''major source'' and ''major stationary

[1] So in original. Probably should be ''subparagraph''.

source'' shall include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 5 tons per year of volatile organic compounds);

(II) reasonably available control technology is required for all existing major sources (as defined in subclause (I)); and

(III) the plan reflecting a lesser percentage than 15 percent includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To qualify for a lesser percentage under this clause, a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher category.

(B) Baseline emissions

For purposes of subparagraph (A), the term ''baseline emissions'' means the total amount of actual VOC or NO_x emissions from all anthropogenic sources in the area during the calendar year 1990, excluding emissions that would be eliminated under the regulations described in clauses (i) and (ii) of subparagraph (D).

(C) General rule for creditability of reductions

Except as provided under subparagraph (D), emissions reductions are creditable toward the 15 percent required under subparagraph (A) to the extent they have actually occurred, as of 6 years after November 15, 1990, from the implementation of measures required under the applicable implementation plan, rules promulgated by the Administrator, or a permit under subchapter V.

(D) Limits on creditability of reductions

Emission reductions from the following measures are not creditable toward the 15 percent reductions required under subparagraph (A):

(i) Any measure relating to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990.

(ii) Regulations concerning Reid Vapor Pressure promulgated by the Administrator by November 15, 1990, or required to be promulgated under section 7545(h) of this title.

(iii) Measures required under subsection (a)(2)(A) (concerning corrections to implementation plans prescribed under guidance by the Administrator).

(iv) Measures required under subsection (a)(2)(B) to be submitted immediately after November 15, 1990 (concerning corrections to motor vehicle inspection and maintenance programs).

(2) Reasonably available control technology

The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology under section 7502(c)(1) of this title with respect to each of the following:

(A) Each category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990, and the date of attainment.

(B) All VOC sources in the area covered by any CTG issued before November 15, 1990.

(C) All other major stationary sources of VOCs that are located in the area.

Each revision described in subparagraph (A) shall be submitted within the period set forth by the Administrator in issuing the relevant CTG document. The revisions with respect to sources described in subparagraphs (B) and (C) shall be submitted by 2 years after November 15, 1990, and shall provide for the implementation of the required measures as expeditiously as practicable but no later than May 31, 1995.

(3) Gasoline vapor recovery

(A) General rule

Not later than 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to require all owners or operators of gasoline dispensing systems to install and operate, by the date prescribed under subparagraph (B), a system for gasoline vapor recovery of emissions from the fueling of motor vehicles. The Administrator shall issue guidance as appropriate as to the effectiveness of such system. This subparagraph shall apply only to facilities which sell more than 10,000 gallons of gasoline per month (50,000 gallons per month in the case of an independent small business marketer of gasoline as defined in section 7625–1[2] of this title).

(B) Effective date

The date required under subparagraph (A) shall be—

(i) 6 months after the adoption date, in the case of gasoline dispensing facilities for which construction commenced after November 15, 1990;

(ii) one year after the adoption date, in the case of gasoline dispensing facilities which dispense at least 100,000 gallons of gasoline per month, based on average monthly sales for the 2-year period before the adoption date; or

(iii) 2 years after the adoption date, in the case of all other gasoline dispensing facilities.

Any gasoline dispensing facility described under both clause (i) and clause (ii) shall meet the requirements of clause (i).

(C) Reference to terms

For purposes of this paragraph, any reference to the term ''adoption date'' shall be considered a reference to the date of adoption by the State of requirements for the installation and operation of a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.

[2] So in original. Probably should be section ''7625''.

(4) Motor vehicle inspection and maintenance

For all Moderate Areas, the State shall submit, immediately after November 15, 1990, a revision to the applicable implementation plan that includes provisions necessary to provide for a vehicle inspection and maintenance program as described in subsection (a)(2)(B) (without regard to whether or not the area was required by section 7502(b)(11)(B) of this title (as in effect immediately before November 15, 1990) to have included a specific schedule for implementation of such a program).

(5) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase[3] emissions of such air pollutant shall be at least 1.15 to 1.

(c) Serious Areas

Except as otherwise specified in paragraph (4), each State in which all or part of a Serious Area is located shall, with respect to the Serious Area (or portion thereof, to the extent specified in this subsection), make the submissions described under subsection (b) (relating to Moderate Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Serious Area, the terms ''major source'' and ''major stationary source'' include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds.

(1) Enhanced monitoring

In order to obtain more comprehensive and representative data on ozone air pollution, not later than 18 months after November 15, 1990, the Administrator shall promulgate rules, after notice and public comment, for enhanced monitoring of ozone, oxides of nitrogen, and volatile organic compounds. The rules shall, among other things, cover the location and maintenance of monitors. Immediately following the promulgation of rules by the Administrator relating to enhanced monitoring, the State shall commence such actions as may be necessary to adopt and implement a program based on such rules, to improve monitoring for ambient concentrations of ozone, oxides of nitrogen and volatile organic compounds and to improve monitoring of emissions of oxides of nitrogen and volatile organic compounds. Each State implementation plan for the area shall contain measures to improve the ambient monitoring of such air pollutants.

(2) Attainment and reasonable further progress demonstrations

Within 4 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan that includes each of the following:

(A) Attainment demonstration

A demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date. This attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.

(B) Reasonable further progress demonstration

A demonstration that the plan, as revised, will result in VOC emissions reductions from the baseline emissions described in subsection (b)(1)(B) equal to the following amount averaged over each consecutive 3-year period beginning 6 years after November 15, 1990, until the attainment date:

(i) at least 3 percent of baseline emissions each year; or

(ii) an amount less than 3 percent of such baseline emissions each year, if the State demonstrates to the satisfaction of the Administrator that the plan reflecting such lesser amount includes all measures that can feasibly be implemented in the area, in light of technological achievability.

To lessen the 3 percent requirement under clause (ii), a State must demonstrate to the satisfaction of the Administrator that the plan for the area includes the measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification. Any determination to lessen the 3 percent requirement shall be reviewed at each milestone under subsection (g) and revised to reflect such new measures (if any) achieved in practice by sources in the same category in any State, allowing a reasonable time to implement such measures. The emission reductions described in this subparagraph shall be calculated in accordance with subsection (b)(1)(C) and (D) (concerning creditability of reductions). The reductions creditable for the period beginning 6 years after November 15, 1990, shall include reductions that occurred before such period, computed in accordance with subsection (b)(1), that exceed the 15-percent amount of reductions required under subsection (b)(1)(A).

(C) NO_x control

The revision may contain, in lieu of the demonstration required under subparagraph (B), a demonstration to the satisfaction of the Administrator that the applicable implementation plan, as revised, provides for reductions of emissions of VOC's and oxides of nitrogen (calculated according to the creditability provisions of subsection (b)(1)(C) and (D)), that would result in a reduction in ozone concentrations at least equivalent to that which would result from the amount of VOC emission reductions required under subparagraph (B). Within 1 year after November 15, 1990, the Administrator shall issue guidance concerning the conditions under which NO_x control may be substituted for VOC control or may be combined with VOC control in order to maximize the reduction in ozone air pollution. In accord with such guidance,

[3] So in original. Probably should be ''increased''.

a lesser percentage of VOCs may be accepted as an adequate demonstration for purposes of this subsection.

(3) Enhanced vehicle inspection and maintenance program

(A) Requirement for submission

Within 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to provide for an enhanced program to reduce hydrocarbon emissions and NO_x emissions from in-use motor vehicles registered in each urbanized area (in the nonattainment area), as defined by the Bureau of the Census, with a 1980 population of 200,000 or more.

(B) Effective date of State programs; guidance

The State program required under subparagraph (A) shall take effect no later than 2 years from November 15, 1990, and shall comply in all respects with guidance published in the Federal Register (and from time to time revised) by the Administrator for enhanced vehicle inspection and maintenance programs. Such guidance shall include—

(i) a performance standard achievable by a program combining emission testing, including on-road emission testing, with inspection to detect tampering with emission control devices and misfueling for all light-duty vehicles and all light-duty trucks subject to standards under section 7521 of this title; and

(ii) program administration features necessary to reasonably assure that adequate management resources, tools, and practices are in place to attain and maintain the performance standard.

Compliance with the performance standard under clause (i) shall be determined using a method to be established by the Administrator.

(C) State program

The State program required under subparagraph (A) shall include, at a minimum, each of the following elements—

(i) Computerized emission analyzers, including on-road testing devices.

(ii) No waivers for vehicles and parts covered by the emission control performance warranty as provided for in section 7541(b) of this title unless a warranty remedy has been denied in writing, or for tampering-related repairs.

(iii) In view of the air quality purpose of the program, if, for any vehicle, waivers are permitted for emissions-related repairs not covered by warranty, an expenditure to qualify for the waiver of an amount of $450 or more for such repairs (adjusted annually as determined by the Administrator on the basis of the Consumer Price Index in the same manner as provided in subchapter V).

(iv) Enforcement through denial of vehicle registration (except for any program in operation before November 15, 1990, whose enforcement mechanism is demonstrated to the Administrator to be more effective than the applicable vehicle registration program in assuring that noncomplying vehicles are not operated on public roads).

(v) Annual emission testing and necessary adjustment, repair, and maintenance, unless the State demonstrates to the satisfaction of the Administrator that a biennial inspection, in combination with other features of the program which exceed the requirements of this chapter, will result in emission reductions which equal or exceed the reductions which can be obtained through such annual inspections.

(vi) Operation of the program on a centralized basis, unless the State demonstrates to the satisfaction of the Administrator that a decentralized program will be equally effective. An electronically connected testing system, a licensing system, or other measures (or any combination thereof) may be considered, in accordance with criteria established by the Administrator, as equally effective for such purposes.

(vii) Inspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems.

Each State shall biennially prepare a report to the Administrator which assesses the emission reductions achieved by the program required under this paragraph based on data collected during inspection and repair of vehicles. The methods used to assess the emission reductions shall be those established by the Administrator.

(4) Clean-fuel vehicle programs

(A) Except to the extent that substitute provisions have been approved by the Administrator under subparagraph (B), the State shall submit to the Administrator, within 42 months of November 15, 1990, a revision to the applicable implementation plan for each area described under part C of subchapter II to include such measures as may be necessary to ensure the effectiveness of the applicable provisions of the clean-fuel vehicle program prescribed under part C of subchapter II, including all measures necessary to make the use of clean alternative fuels in clean-fuel vehicles (as defined in part C of subchapter II) economic from the standpoint of vehicle owners. Such a revision shall also be submitted for each area that opts into the clean fuel-vehicle program as provided in part C of subchapter II.

(B) The Administrator shall approve, as a substitute for all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II, any revision to the relevant applicable implementation plan that in the Administrator's judgment will achieve long-term reductions in ozone-producing and toxic air emissions equal to those achieved under part C of subchapter II, or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute. The Administrator may approve such

revision only if it consists exclusively of provisions other than those required under this chapter for the area. Any State seeking approval of such revision must submit the revision to the Administrator within 24 months of November 15, 1990. The Administrator shall approve or disapprove any such revision within 30 months of November 15, 1990. The Administrator shall publish the revision submitted by a State in the Federal Register upon receipt. Such notice shall constitute a notice of proposed rulemaking on whether or not to approve such revision and shall be deemed to comply with the requirements concerning notices of proposed rulemaking contained in sections 553 through 557 of title 5 (related to notice and comment). Where the Administrator approves such revision for any area, the State need not submit the revision required by subparagraph (A) for the area with respect to the portions of the Federal clean-fuel vehicle program for which the Administrator has approved the revision as a substitute.

(C) If the Administrator determines, under section 7509 of this title, that the State has failed to submit any portion of the program required under subparagraph (A), then, in addition to any sanctions available under section 7509 of this title, the State may not receive credit, in any demonstration of attainment or reasonable further progress for the area, for any emission reductions from implementation of the corresponding aspects of the Federal clean-fuel vehicle requirements established in part C of subchapter II.

(5) Transportation control

(A)[4] Beginning 6 years after November 15, 1990, and each third year thereafter, the State shall submit a demonstration as to whether current aggregate vehicle mileage, aggregate vehicle emissions, congestion levels, and other relevant parameters are consistent with those used for the area's demonstration of attainment. Where such parameters and emissions levels exceed the levels projected for purposes of the area's attainment demonstration, the State shall within 18 months develop and submit a revision of the applicable implementation plan that includes a transportation control measures program consisting of measures from, but not limited to, section 7408(f) of this title that will reduce emissions to levels that are consistent with emission levels projected in such demonstration. In considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(e) of this title and with the requirements of section 7504(b) of this title and shall include implementation and funding schedules that achieve expeditious emissions reductions in accordance with implementation plan projections.

[4] So in original. No subpar. (B) has been enacted.

(6) De minimis rule

The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the area shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

(7) Special rule for modifications of sources emitting less than 100 tons

In the case of any major stationary source of volatile organic compounds located in the area (other than a source which emits or has the potential to emit 100 tons or more of volatile organic compounds per year), whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that such increase shall not be considered a modification for such purposes if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds concerned from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not make such election, such change shall be considered a modification for such purposes, but in applying section 7503(a)(2) of this title in the case of any such modification, the best available control technology (BACT), as defined in section 7479 of this title, shall be substituted for the lowest achievable emission rate (LAER). The Administrator shall establish and publish policies and procedures for implementing the provisions of this paragraph.

(8) Special rule for modifications of sources emitting 100 tons or more

In the case of any major stationary source of volatile organic compounds located in the area which emits or has the potential to emit 100 tons or more of volatile organic compounds per year, whenever any change (as described in section 7411(a)(4) of this title) at that source results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source, such increase shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of volatile organic compounds from other operations, units, or

activities within the source at an internal offset ratio of at least 1.3 to 1, the requirements of section 7503(a)(2) of this title (concerning the lowest achievable emission rate (LAER)) shall not apply.

(9) Contingency provisions

In addition to the contingency provisions required under section 7502(c)(9) of this title, the plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.

(10) General offset requirement

For purposes of satisfying the emission offset requirements of this part, the ratio of total emission reductions of volatile organic compounds to total increase emissions of such air pollutant shall be at least 1.2 to 1.

Any reference to ''attainment date'' in subsection (b), which is incorporated by reference into this subsection, shall refer to the attainment date for serious areas.

(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms ''major source'' and ''major stationary source'' include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection[5] (b)(2)(B) and (c)(2)(B) (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city, business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the Administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title.

Any reference to the term ''attainment date'' in subsection (b) or (c), which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. The provisions of clause (ii) of subsection (c)(2)(B) (relating to reductions of less than 3 percent), the provisions of paragaphs[6] (6), (7) and (8) of subsection (c) (relating to de minimus[7] rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) (relating to re-

[5] So in original. Probably should be ''subsections''.

[6] So in original. Probably should be ''paragraphs''.

[7] So in original. Probably should be ''de minimis''.

ductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms ''major source'' and ''major stationary source'' includes[8] (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen—

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen.

For purposes of this subsection, the term ''primary fuel'' means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 [15 U.S.C. 3361 et seq.]).

(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that—

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions.

Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2), and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2).

Any reference to the term ''attainment date'' in subsection (b), (c), or (d) which is incorporated by reference into this subsection, shall refer to the attainment date for Extreme Areas.

(f) NO_x requirements

(1) The plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in section 7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen. This subsection shall not apply in the case of oxides of nitrogen for those sources for which the Administrator determines (when the Administrator approves a plan or plan revision) that net air quality benefits are greater in the absence of reductions of oxides of nitrogen from the sources concerned.

[8] So in original. Probably should be ''include''.

This subsection shall also not apply in the case of oxides of nitrogen for—

(A) nonattainment areas not within an ozone transport region under section 7511c of this title, if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(B) nonattainment areas within such an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of oxides of nitrogen would not produce net ozone air quality benefits in such region.

The Administrator shall, in the Administrator's determinations, consider the study required under section 7511f of this title.

(2)(A) If the Administrator determines that excess reductions in emissions of NO_x would be achieved under paragraph (1), the Administrator may limit the application of paragraph (1) to the extent necessary to avoid achieving such excess reductions.

(B) For purposes of this paragraph, excess reductions in emissions of NO_x are emission reductions for which the Administrator determines that net air quality benefits are greater in the absence of such reductions. Alternatively, for purposes of this paragraph, excess reductions in emissions of NO_x are, for—

(i) nonattainment areas not within an ozone transport region under section 7511c of this title, emission reductions that the Administrator determines would not contribute to attainment of the national ambient air quality standard for ozone in the area, or

(ii) nonattainment areas within such ozone transport region, emission reductions that the Administrator determines would not produce net ozone air quality benefits in such region.

(3) At any time after the final report under section 7511f of this title is submitted to Congress, a person may petition the Administrator for a determination under paragraph (1) or (2) with respect to any nonattainment area or any ozone transport region under section 7511c of this title. The Administrator shall grant or deny such petition within 6 months after its filing with the Administrator.

(g) Milestones

(1) Reductions in emissions

6 years after November 15, 1990, and at intervals of every 3 years thereafter, the State shall determine whether each nonattainment area (other than an area classified as Marginal or Moderate) has achieved a reduction in emissions during the preceding intervals equivalent to the total emission reductions required to be achieved by the end of such interval pursuant to subsection (b)(1) and the corresponding requirements of subsections (c)(2)(B) and (C), (d), and (e). Such reduction shall be referred to in this section as an applicable milestone.

(2) Compliance demonstration

For each nonattainment area referred to in paragraph (1), not later than 90 days after the date on which an applicable milestone occurs (not including an attainment date on which a milestone occurs in cases where the standard has been attained), each State in which all or part of such area is located shall submit to the Administrator a demonstration that the milestone has been met. A demonstration under this paragraph shall be submitted in such form and manner, and shall contain such information and analysis, as the Administrator shall require, by rule. The Administrator shall determine whether or not a State's demonstration is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) Serious and Severe Areas; State election

If a State fails to submit a demonstration under paragraph (2) for any Serious or Severe Area within the required period or if the Administrator determines that the area has not met any applicable milestone, the State shall elect, within 90 days after such failure or determination—

(A) to have the area reclassified to the next higher classification,

(B) to implement specific additional measures adequate, as determined by the Administrator, to meet the next milestone as provided in the applicable contingency plan, or

(C) to adopt an economic incentive program as described in paragraph (4).

If the State makes an election under subparagraph (B), the Administrator shall, within 90 days after the election, review such plan and shall, if the Administrator finds the contingency plan inadequate, require further measures necessary to meet such milestone. Once the State makes an election, it shall be deemed accepted by the Administrator as meeting the election requirement. If the State fails to make an election required under this paragraph within the required 90-day period or within 6 months thereafter, the area shall be reclassified to the next higher classification by operation of law at the expiration of such 6-month period. Within 12 months after the date required for the State to make an election, the State shall submit a revision of the applicable implementation plan for the area that meets the requirements of this paragraph. The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(4) Economic incentive program

(A) An economic incentive program under this paragraph shall be consistent with rules published by the Administrator and sufficient, in combination with other elements of the State plan, to achieve the next milestone. The State program may include a nondiscriminatory system, consistent with applicable law regarding interstate commerce, of State established emissions fees or a system of marketable permits, or a system of State fees on sale or manufacture of products the use of which contributes to ozone formation, or any combination of the foregoing or other similar meas-

ures. The program may also include incentives and requirements to reduce vehicle emissions and vehicle miles traveled in the area, including any of the transportation control measures identified in section 7408(f) of this title.

(B) Within 2 years after November 15, 1990, the Administrator shall publish rules for the programs to be adopted pursuant to subparagraph (A). Such rules shall include model plan provisions which may be adopted for reducing emissions from permitted stationary sources, area sources, and mobile sources. The guidelines shall require that any revenues generated by the plan provisions adopted pursuant to subparagraph (A) shall be used by the State for any of the following:

(i) Providing incentives for achieving emission reductions.

(ii) Providing assistance for the development of innovative technologies for the control of ozone air pollution and for the development of lower-polluting solvents and surface coatings. Such assistance shall not provide for the payment of more than 75 percent of either the costs of any project to develop such a technology or the costs of development of a lower-polluting solvent or surface coating.

(iii) Funding the administrative costs of State programs under this chapter. Not more than 50 percent of such revenues may be used for purposes of this clause.

(5) Extreme Areas

If a State fails to submit a demonstration under paragraph (2) for any Extreme Area within the required period, or if the Administrator determines that the area has not met any applicable milestone, the State shall, within 9 months after such failure or determination, submit a plan revision to implement an economic incentive program which meets the requirements of paragraph (4). The Administrator shall review such plan revision and approve or disapprove the revision within 9 months after the date of its submission.

(h) Rural transport areas

(1) Notwithstanding any other provision of section 7511 of this title or this section, a State containing an ozone nonattainment area that does not include, and is not adjacent to, any part of a Metropolitan Statistical Area or, where one exists, a Consolidated Metropolitan Statistical Area (as defined by the United States Bureau of the Census), which area is treated by the Administrator, in the Administrator's discretion, as a rural transport area within the meaning of paragraph (2), shall be treated by operation of law as satisfying the requirements of this section if it makes the submissions required under subsection (a) of this section (relating to marginal areas).

(2) The Administrator may treat an ozone nonattainment area as a rural transport area if the Administrator finds that sources of VOC (and, where the Administrator determines relevant, NO_x) emissions within the area do not make a significant contribution to the ozone concentrations measured in the area or in other areas.

(i) Reclassified areas

Each State containing an ozone nonattainment area reclassified under section 7511(b)(2) of this title shall meet such requirements of subsections (b) through (d) of this section as may be applicable to the area as reclassified, according to the schedules prescribed in connection with such requirements, except that the Administrator may adjust any applicable deadlines (other than attainment dates) to the extent such adjustment is necessary or appropriate to assure consistency among the required submissions.

(j) Multi-State ozone nonattainment areas

(1) Coordination among States

Each State in which there is located a portion of a single ozone nonattainment area which covers more than one State (hereinafter in this section referred to as a ''multi-State ozone nonattainment area'') shall—

(A) take all reasonable steps to coordinate, substantively and procedurally, the revisions and implementation of State implementation plans applicable to the nonattainment area concerned; and

(B) use photochemical grid modeling or any other analytical method determined by the Administrator, in his discretion, to be at least as effective.

The Administrator may not approve any revision of a State implementation plan submitted under this part for a State in which part of a multi-State ozone nonattainment area is located if the plan revision for that State fails to comply with the requirements of this subsection.

(2) Failure to demonstrate attainment

If any State in which there is located a portion of a multi-State ozone nonattainment area fails to provide a demonstration of attainment of the national ambient air quality standard for ozone in that portion within the required period, the State may petition the Administrator to make a finding that the State would have been able to make such demonstration but for the failure of one or more other States in which other portions of the area are located to commit to the implementation of all measures required under this section (relating to plan submissions and requirements for ozone nonattainment areas). If the Administrator makes such finding, the provisions of section 7509 of this title (relating to sanctions) shall not apply, by reason of the failure to make such demonstration, in the portion of the multi-State ozone nonattainment area within the State submitting such petition.

(July 14, 1955, ch. 360, title I, §182, as added Pub. L. 101–549, title I, §103, Nov. 15, 1990, 104 Stat. 2426; amended Pub. L. 104–70, §1, Dec. 23, 1995, 109 Stat. 773.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (e)(3), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended. Title III of the Act is classified generally to subchapter III (§3361 et seq.) of chapter 60 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of Title 15 and Tables.

AMENDMENTS

1995—Subsec. (d)(1)(B). Pub. L. 104–70 amended subpar. (B) generally. Prior to amendment, subpar. (B) read as

to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions*. The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability*. This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity*. Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded*. Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

§ 7607. Administrative proceedings and judicial review

(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 six-

[1] See References in Text note below.

[2] So in original. Probably should be ''this''.

[3] So in original.

[4] So in original. Probably should be ''subsection,''.

tieth 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 (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.

[5] So in original. The word ''to'' probably should not appear.

(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.

[6] So in original. Probably should be ''sections''.

(July 14, 1955, ch. 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)–(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.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101–549, title II, § 230(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101–549, title II, § 230(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c–10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original ''section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)'', meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93–319, § 3, 88 Stat. 248, (which was classified to section 1857c–10 of this title) as in effect prior to the enactment of Pub. L. 95–95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95–95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93–319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93–319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101–549, title VII, § 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95–95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I, referred to in subsec. (d)(1)(J), was in the original ''subtitle C of title I'', and was translated as reading ''part C of title I'' to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), ''subchapter II of chapter 5 of title 5'' was substituted for ''the Administrative Procedures Act'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h–5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91–604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly § 14, as added Dec. 17, 1963, Pub. L. 88–206, § 1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89–272, renumbered section 310 by Pub. L. 90–148, and renumbered section 317 by Pub. L. 91–604, and is set out as a Short Title note under section 7401 of this title.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101–549, § 703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out ''or section 7521(b)(5)'' after ''section 7410(f)''.

VI. POLICY WHERE ATTAINMENT DATES HAVE NOT PASSED

In some cases, the dates for attainment of primary standards specified in the SIP under section 110 have not yet passed due to a delay in the promulgation of a plan under this section of the Act. In addition the Act provides more flexibility with respect to the dates for attainment of secondary NAAQS than for primary standards. Rather than setting specific deadlines, section 110 requires secondary NAAQS to be achieved within a ''reasonable time''. Therefore, in some cases, the date for attainment of secondary standards specified in the SIP under section 110 may also not yet have passed. In such cases, a new source locating in an area designated in 40 CFR 81.300 *et seq.* as nonattainment (or, where section III of this Ruling is applicable, a new source that would cause or contribute to a NAAQS violation) may be exempt from the Conditions of section IV.A if the conditions in paragraphs VI.A through C are met.

A. The new source meets the applicable SIP emission limitations.

B. The new source will not interfere with the attainment date specified in the SIP under section 110 of the Act.

C. The Administrator has determined that conditions A and B of this section are satisfied and such determination is published in the FEDERAL REGISTER.

VII. [RESERVED]

[44 FR 3282, Jan. 16, 1979]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting appendix S to part 51, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

EFFECTIVE DATE NOTE: At 76 FR 17554, Mar. 30, 2011, part 51, appendix S, paragraph II.A.5 (vii) is stayed indefinitely.

APPENDIXES T–U TO PART 51 [RESERVED]

APPENDIX V TO PART 51—CRITERIA FOR DETERMINING THE COMPLETENESS OF PLAN SUBMISSIONS

1.0. PURPOSE

This appendix V sets forth the minimum criteria for determining whether a State implementation plan submitted for consideration by EPA is an official submission for purposes of review under §51.103.

1.1 The EPA shall return to the submitting official any plan or revision thereof which fails to meet the criteria set forth in this appendix V, and request corrective action, identifying the component(s) absent or insufficient to perform a review of the submitted plan.

1.2 The EPA shall inform the submitting official whether or not a plan submission meets the requirements of this appendix V within 60 days of EPA's receipt of the submittal, but no later than 6 months after the date by which the State was required to submit the plan or revision. If a completeness determination is not made by 6 months from receipt of a submittal, the submittal shall be deemed complete by operation of law on the date 6 months from receipt. A determination of completeness under this paragraph means that the submission is an official submission for purposes of §51.103.

2.0. CRITERIA

The following shall be included in plan submissions for review by EPA:

2.1. Administrative Materials

(a) A formal signed, stamped, and dated letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof (hereafter ''the plan''). If electing to submit a paper submission with a copy in electronic version, the submittal letter must verify that the electronic copy provided is an exact duplicate of the paper submission.

(b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter ''document'') in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made (such as redline/strikethrough) to the existing approved plan, where applicable. The submission shall include a copy of the official State regulation/document, signed, stamped, and dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of any regulation/document contained in the submission shall, whenever possible, be indicated in the regulation/document itself; otherwise the State should include a letter signed, stamped, and dated by the appropriate State official indicating the effective date. If the regulation/document provided by the State for approval and incorporation by reference into the plan is a copy of an existing publication, the State submission should, whenever possible, include a copy of the publication cover page and table of contents.

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

(f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice.

(g) Certification that public hearing(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable and consistent with the public hearing requirements in 40 CFR 51.102.

(h) Compilation of public comments and the State's response thereto.

2.2. Technical Support

(a) Identification of all regulated pollutants affected by the plan.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected areas(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented. For all requests to redesignate an area to attainment for a national primary ambient air quality standard, under section 107 of the Act, a revision must be submitted to provide for the maintenance of the national primary ambient air quality standards for at least 10 years as required by section 175A of the Act.

(e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

(f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

(i) Special economic and technological justifications required by any applicable EPA policies, or an explanation of why such justifications are not necessary.

2.3. Exceptions

2.3.1. The EPA, for the purposes of expediting the review of the plan, has adopted a procedure referred to as ''parallel processing.'' Parallel processing allows a State to submit the plan prior to actual adoption by the State and provides an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances, the plan submitted will not be able to meet all of the requirements of paragraph 2.1 (all requirements of paragraph 2.2 will apply). As a result, the following exceptions apply to plans submitted explicitly for parallel processing:

(a) The letter required by paragraph 2.1(a) shall request that EPA propose approval of the proposed plan by parallel processing.

(b) In lieu of paragraph 2.1(b) the State shall submit a schedule for final adoption or issuance of the plan.

(c) In lieu of paragraph 2.1(d) the plan shall include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable.

(d) The requirements of paragraphs 2.1(e)–2.1(h) shall not apply to plans submitted for parallel processing.

2.3.2. The exceptions granted in paragraph 2.3.1 shall apply only to EPA's determination of proposed action and all requirements of paragraph 2.1 shall be met prior to publication of EPA's final determination of plan approvability.

3.0. GUIDELINES

The EPA requests that the State adhere to the following voluntary guidelines when making plan submissions.

3.1 All Submissions

(a) The State should identify any copyrighted material in its submission, as EPA does not place such material on the web when creating the E-Docket for loading into the Federal Document Management System (FDMS).

(b) The State is advised not to include any material considered Confidential Business Information (CBI) in their SIP submissions. In rare instances where such information is necessary to justify the control requirements and emissions limitations established in the plan, the State should confer with its Regional Offices prior to submission and must clearly identify such material as CBI in the submission itself. EPA does not place such material in any paper or web-based docket. However, where any such material is considered emissions data within the meaning of Section 114 of the CAA, it cannot be withheld as CBI and must be made publicly available.

3.2 Paper Plan Submissions

(a) The EPA requires that the submission option of submitting one paper plan must be accompanied by an electronic duplicate of the entire paper submission, preferably as a word searchable portable document format (PDF), at the same time the paper copy is submitted. The electronic duplicate should be made available through email, from a File Transfer Protocol (FTP) site, from the State Web site, on a Universal Serial Bus (USB) flash drive, on a compact disk, or using another format agreed upon by the State and Regional Office.

(b) If a state prefers the submission option of submitting three paper copies and has no means of making an electronic copy available to EPA, EPA requests that the state confer with its EPA Regional Office regarding additional guidelines for submitting the plan to EPA.

[55 FR 5830, Feb. 16, 1990, as amended at 56 FR 42219, Aug. 26, 1991; 56 FR 57288, Nov. 8, 1991; 72 FR 38793, July 16, 2007; 80 FR 7340, Feb. 10, 2015]

APPENDIX W TO PART 51—GUIDELINE ON AIR QUALITY MODELS

PREFACE

a. Industry and control agencies have long expressed a need for consistency in the application of air quality models for regulatory purposes. In the 1977 Clean Air Act (CAA), Congress mandated such consistency and encouraged the standardization of model applications. The *Guideline on Air Quality Models* (hereafter, *Guideline*) was first published in April 1978 to satisfy these requirements by specifying models and providing guidance for their use. The *Guideline* provides a common basis for estimating the air quality concentrations of criteria pollutants used in assessing control strategies and developing emissions limits.

b. The continuing development of new air quality models in response to regulatory requirements and the expanded requirements for models to cover even more complex problems have emphasized the need for periodic review and update of guidance on these techniques. Historically, three primary activities have provided direct input to revisions of the *Guideline*. The first is a series of periodic EPA workshops and modeling conferences conducted for the purpose of ensuring consistency and providing clarification in the application of models. The second activity was the solicitation and review of new models from the technical and user community. In the March 27, 1980, FEDERAL REGISTER, a procedure was outlined for the submittal to the EPA of privately developed models. After extensive evaluation and scientific review, these models, as well as those made available by the EPA, have been considered for recognition in the *Guideline*. The third activity is the extensive on-going research efforts by the EPA and others in air quality and meteorological modeling.

c. Based primarily on these three activities, new sections and topics have been included as needed. The EPA does not make changes to the guidance on a predetermined schedule, but rather on an as-needed basis. The EPA believes that revisions of the *Guideline* should be timely and responsive to user needs and should involve public participation to the greatest possible extent. All future changes to the guidance will be proposed and finalized in the FEDERAL REGISTER. Information on the current status of modeling guidance can always be obtained from the EPA's Regional Offices.

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