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' REPLY BRIEF

Steven M. Odendahl
AIR LAW FOR ALL, LTD.
3550 Everett Dr.
Boulder, CO 80305
(720) 979-3936
steve.odendahl@airlaw4all.com

Robert Ukeiley
CENTER FOR BIOLOGICAL DIVERSITY
1536 Wynkoop St., Ste. 421
Denver, CO 80202
(720) 496-8568
rukeiley@biologicaldiversity.org

Counsel for Petitioners

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 ten percent or more ownership interest or stock in the Center for Biological Diversity or the Center for Environmental Health.

Date: December 11, 2020

/s/ Steven M. Odendahl

Steven M. Odendahl

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

Clean Air Act

FEDERAL REGISTER

ADDITIONAL STATUTORY PROVISIONS

Statutory provisions not previously provided in the briefing are provided in a supplemental addendum to this brief.

ARGUMENT

I. INTRODUCTION

Imperial County, California suffers from ozone pollution. Brief of *Amicus Curiae* Comité Civico del Valle, Inc. 14-17. Respondent Environmental Protection Agency ("EPA") emphasizes its technical judgment that Mexico, which abuts the County, is to blame. Respondents' Answering Brief ("Answering Brief") 3-4, 18-19, 49-53. However, the issues raised by Petitioners Center for Biological Diversity and Center for Environmental Health ("Conservation Groups") are EPA's erroneous interpretations of the Clean Air Act ("Act"), Petitioners' Corrected Opening Brief ("Opening Brief"), 16-30, 50-51; EPA's failure to give adequate notice under the Administrative Procedure Act and follow the procedures of the Clean Air Act, *id.* at 31-49; and EPA's consequent failures to consider important aspects of the problem, *id.* at 51-53. EPA's technical judgment is irrelevant to these failures.

Imperial County is designated nonattainment and classified as "Moderate" for the 2008 ozone standards. Opening Brief 11. As a result, the County's ozone plan was required (among other things) to demonstrate that the area would attain

the standards by the attainment date, July 20, 2018. *Id.* at 11-12. EPA proposed, under section 179B(a) of the Act, to waive this requirement based on a demonstration by the State that the plan "would be adequate to *attain and maintain*" the standards "by" the specified attainment date "but for emissions emanating from outside the United States." Excerpts of Record ("E.R.") 21, 26-30; 42 U.S.C. § 7509a(a)(2) (emphasis added). EPA's proposal notice extensively detailed how EPA thought the plan met the requirement to demonstrate the plan would attain the standards (but for international emissions). E.R. 26-30. But other than a bare recital of the language of the statutory provision, EPA's notice was silent about how EPA interpreted the parallel maintenance requirement in section 179B(a) and how the state's plan met it. Opening Brief 13.

In contrast, in its final notice EPA gave interpretations of the maintenance requirement and identified the information EPA found relevant to approving the plan as meeting that requirement. E.R. 4-5. This notice failure is severe. The government must treat the public fairly when making decisions, especially those that can result in serious health impacts and even premature death, E.R. 20, 88. It is fundamentally unfair to expect the public to guess what EPA's interpretation will be and what information EPA will use to apply it.

EPA fared no better with the substance of its final action. Although Congress designated EPA as the agency to authoritatively interpret the Act, EPA

declined to do so. Instead, EPA posited two interpretations. The first is contrary to the plain meaning of the term "maintenance" and nullifies the maintenance requirement. It therefore fails at both steps of the *Chevron* analysis.

EPA's implementation of its second interpretation fails at the second step, because it leaves EPA unable to address future increases in domestic emissions of pollutants. While EPA may think this unlikely to happen in Imperial County, the Act applies across the entire United States. The result is a potential for significant problems, not only with ozone pollution, but also with the five other pollutants addressed by section 179B(a), in every state that seeks a waiver under that section.

II. EPA'S FIRST INTERPRETATION IS CONTRARY TO THE ACT

EPA's first interpretation reads "by" as "up to" for the maintenance requirement in section 179B(a). E.R. 4. In other words, the state must show that the plan will attain the standards "by" the attainment date and maintain them "up to" the attainment date, but for international emissions. This interpretation fails at both steps of *Chevron*.

A. "Maintain" Means an Ongoing Obligation

The Conservation Groups explained that the relevant plain meaning of "maintain" is "to keep in a state of repair, efficiency, or validity." Opening Brief 18-19. EPA, relying on *MacClarence v. U.S. EPA*, 596 F.3d 1123, 1130-31 (9th Cir. 2010), argues that the plain meaning "does not eliminate all doubt from the

meaning of the term." Answering Brief 39-40. True enough, but the plain meaning eliminates any doubt about EPA's first interpretation. Expiring the maintenance requirement at the very same date the plan is expected to show attainment (but for international emissions) is contrary to this plain meaning. It does not "keep" air quality in the "state of validity" that the attainment requirement achieves. EPA in response never explains how to square its first interpretation with this plain meaning. *See* Answering Brief 39-42.

As EPA states, in *MacClarence* the plain meaning of "demonstrate" did "not resolve important questions," such as the "type of evidence" and "burden of proof" in a demonstration. *Id.* at 39-40. But the plain meaning of "demonstrate" indicates there must be some evidence, no matter what type and amount. Here, although the plain meaning of the term "maintain" does not resolve what a plan must specifically do to maintain the standards (but for international emissions), it does show there must be something that operates on an ongoing basis.

EPA errs along similar lines when it argues that the Conservation Groups' explanation of the various ways in which an ongoing maintenance obligation can be implemented necessarily shows the provision is ambiguous with respect to the issue of EPA's first interpretation. *Id.* at 40-41. That is not how *Chevron* works. "First, always, is the question whether Congress has directly spoken to the *precise question at issue*." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*

("Chevron"), 467 U.S. 837, 842 (1984) (emphasis added). The precise question at issue here is whether the maintenance requirement expires at the attainment date. Congress has directly spoken to this issue: the maintenance requirement does not expire. Opening Brief 17-29. Given that an ongoing maintenance obligation is compelled, then how to implement that obligation is a separate *Chevron* analysis. *Id.* at 50-51 (showing EPA's implementation of its second interpretation is impermissible).

B. EPA Fails to Give Meaning to Maintenance

EPA argues its first interpretation springs to life when a state chooses to show the plan will attain the standards (but for international emissions) before the attainment date. Answering Brief 42-43. In that case, EPA theorizes, the maintenance provision creates an additional obligation for the state to demonstrate maintenance for the remaining interim period "up to" the attainment date.

But EPA admits here that Imperial County, by showing attainment (but for international emissions) by the attainment date, and not earlier, did not need to demonstrate maintenance at all. *Id.* at 43 n.7. This is precisely the problem. EPA's theory only applies in a hypothetical world where states choose, at their discretion, to do additional "busy work" by developing two separate demonstrations, one for attainment prior to the attainment date and one for maintenance for the remaining interim period up to the attainment date, instead of

just one for attainment at the attainment date. This effectively writes the maintenance provision out of the Act. because there is no requirement to do this unnecessary busy work. Thus, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), is on point. Opening Brief 20-21. While EPA there claimed it had given meaning to a maintenance requirement by using it as a basis to justify additional control measures, functionally EPA's approach did not create any additional obligations for upwind states and therefore failed to give independent significance to the maintenance requirement. *North Carolina*, 531 F.3d at 909-910. Similarly, EPA's interpretation here does not create any maintenance obligations for states.

Amicus Imperial County Air Pollution Control District ("District") offers the example of a "wrestling coach who instructs her star wrestler to 'attain and maintain lightweight status by the end-of-year meet.'" Brief of *Amicus Curiae* Imperial County Air Pollution Control District ("District Amicus Brief") 6. Far from helping EPA, this highlights what is wrong. Collegiate wrestlers commonly did not attain their weight class until just before the weigh-in at a meet. Artioli et al., *The need of a weight management control program in judo: a proposal based on the successful case of wrestling*, 7 J. INT. SOC'Y SPORTS NUTRITION 1, 1 (2010), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876998/. Similarly, states would not bother with EPA's illusory maintenance requirement. Rather, a state would instead, as California did, simply show attainment (but for

international emissions) right at the attainment date, thus depriving the maintenance requirement of any meaning.

Importantly, a wrestling meet is a one-time affair, while breathing air is not. A star wrestler's weight might not matter after a meet, but the Act's purpose of protecting public health demands ongoing maintenance of clean air. At *Chevron* step one, the words of a statute are read "in their context and with a view to their place in the overall statutory scheme." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue ("Altera")*, 926 F.3d 1061, 1075 (9th Cir. 2019) (citation and quotation omitted). Events such as cloudy, wet weather or economic recession may provide temporary relief from ozone pollution. However, the Act's context, a comprehensive program to improve air quality and protect public health, indicates an ongoing maintenance obligation.

C. EPA's Arguments About "By" Cut Against EPA

EPA argues that the term "by" in section 179B(a), must apply to both attainment and maintenance, Answering Brief 36-37, and Imperial County argues it must apply equally, Imperial Amicus Brief 5-6. This refutes EPA's own interpretation. EPA rewrites the term "by" to mean "up to" with respect to the maintenance requirement. E.R. 4. "Up to" is nonsensical when applied to the attainment requirement. The relevant meaning of "attain" is to "reach a goal." Opening Brief 18. No one would say "reach this goal up to the end of the day"

instead of "reach this goal by the end of the day."

The Conservation Groups provided a relevant definition of "by," "no later than." *Id.* EPA offers no definition of "by" meaning "up to"; instead, EPA evades the problem by calling "by" a "clear temporal limitation." Answering Brief 35. EPA rewrites "by" as "up to" to resolve the conflict under its first interpretation between "by" and the ongoing meaning of "maintain" so that its first interpretation, "maintain the standards (but for international emissions) up to the attainment date," can make some sense.

This conflict can be resolved without rewriting the term "by." Opening Brief 26-27. The maintenance requirement should be read to mean that the state must show the plan will have all necessary provisions for ongoing maintenance (but for international emissions) in place "by" the attainment date. This preserves the natural meaning of "by," "no later than," as applied to both the maintenance requirement and the attainment requirement.

EPA describes this as "strained," Answering Brief 38, but it is perfectly understandable. It addresses, for example, the possibility that the plan provisions are adequate to attain the standards (but for international emissions) by the attainment date, but those provisions explicitly expire at or after the attainment date. EPA also objects that applying "by" to the plan provisions is difficult to square with the attainment requirement, which EPA describes as being "about

whether areas attain by the attainment date." Answering Brief 38. That misstates the attainment requirement in section 179B(a): it is about whether the state can establish that the *plan* is adequate to attain the standards (but for international emissions) by the attainment date. 42 U.S.C. § 7509a(a)(2). Thus, the focus on plan provisions in the Conservation Groups' reading is consistent with the attainment requirement.

D. EPA's *Post Hoc* Reliance on Section 179B(b) Fails

EPA argues Congress would have placed an ongoing maintenance obligation in section 179B(b) had Congress intended such an obligation. Answering Brief 37. This argument is a *post hoc* invention of EPA's counsel. *See* E.R. 4-5 (devoting two paragraphs to discussion of the Act without mention of section 179B(b)). As such, it deserves no deference. *Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1099 (9th Cir. 2007). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. ("State Farm")*, 463 U.S. 29, 50 (1983). In any event, EPA's arguments are without merit.

EPA's analysis of sections 179B(a) and 179B(b) is faulty. Section 179B(a) relieves the state from plan requirements to demonstrate attainment and maintenance by the attainment date, after meeting alternate plan requirements for attainment and maintenance by the attainment date but for international emissions.

42 U.S.C. § 7509a(a). Section 179B(b) relieves the state from other plan requirements that would result from failure to attain by the attainment date and reclassification. *Id.* § 7509a(b). The plan requirements that are waived in section 179B(a) and the corresponding obligations to receive a waiver do not expire at the attainment date. Here, for example, EPA proposed its action on the state's plan on November 1, 2019, E.R. 19, and finalized it on February 27, 2020, E.R. 1, both well after the July 20, 2018 attainment date. Thus, EPA's statement that section 179B(a) ceases to operate after the attainment date, Answering Brief 37, is refuted by EPA's own action. EPA's statement that section 179B(a) concerns provisions that are prospective "to" the attainment date, *id.* at 11, assumes the validity of EPA's first interpretation and thus offers no support.

It was logical for Congress to put the alternative "but for" maintenance obligation in the same section where the waiver for maintenance requirements is specified. EPA's theory requires the entire portion of section 179B(a) regarding maintenance to be stripped from section 179B(a) and placed in section 179B(b), for no good reason.

EPA's theory also requires additional rewriting of the Act. The provisions in sections 179B(b), (c), and (d) regarding reclassification only address the three pollutants—ozone, carbon monoxide, and particulate matter—that have classification schemes for areas in violation of the standards for those pollutants.

See 42 U.S.C. § 7509a(b), (c), (d); *id.* §§ 7511, 7512, 7513 (classifications for ozone, carbon monoxide, and particulate matter). There are three more pollutants—sulfur oxides, nitrogen dioxide, and lead—that do not have classification schemes. *See id.* §§ 7514, 7514a (provisions for sulfur oxides, nitrogen dioxide, and lead). Section 179B(a) applies across all six pollutants, making it the obvious place to put the maintenance obligation without adding unnecessarily repetitive language and additional subsections.

EPA's *post hoc* views on how Congress should draft statutes deserve no deference and cannot be the basis to uphold EPA's decision. They also shed no light on how to read the Act as actually written.

E. The Legislative History Does Not Support EPA

EPA quotes legislative history stating border areas should not "shoulder more of a regulatory and economic burden" that might "put people … out of business." Answering Brief 46. Presumably then EPA's requirements to demonstrate attainment (but for international emissions) do not impose burdens that "put people out of business." Maintaining equivalent protections in an ongoing way should therefore also not "put people out of business," and EPA identifies nothing in the record to suggest otherwise. If economic conditions change in some relevant way, Imperial County could submit a plan revising its ongoing maintenance obligations. *See* 42 U.S.C. § 7410(k) (providing for plan

revisions).

EPA also claims the legislative history indicates EPA should have additional leeway in interpreting section 179B. Answering Brief 46-47. This ignores the context of the 1990 Amendments, which greatly reduced EPA's discretion due to years of failure under the previous approach. Opening Brief 9-10.

F. EPA's Interpretation Does Not Warrant Additional Deference

EPA claims that the Conservation Groups "disregard EPA's role" in interpreting the Act. Answering Brief 34. Not so. The Conservation Groups freely admit that the *Chevron* framework applies. Opening Brief 17.

But that does not satisfy EPA. EPA argues that drafting errors in *other* subsections of section 179B show that Congress did not draft section 179B(a) "with precision," suggesting that the Court should give EPA additional deference in interpreting section 179B. Answering Brief 44. This is not only *post hoc*, E.R. 4-5, but is also a novel theory for which EPA offers no support. For example, section 126(b) of the Act contains a scrivener's error. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040-44 (D.C. Cir. 2001). This does not give EPA additional deference in interpreting section 126(b), much less the remainder of section 126. *See, e.g.*, *Maryland v. EPA*, 958 F.3d 1185, 1196-97 (D.C. Cir. 2020) (applying standard *Chevron* analysis to section 126(b)).

EPA also implies the statutory language is too confusing to be resolved at

Chevron step one. Answering Brief 38 (dismissing "Petitioners' attempt to reconcile Section 179B(a)'s conflicting terms"). "[T]he Act is far from a *chef d'oeuvre* of legislative draftsmanship. But we, and EPA, must do our best." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (rejecting EPA's *Chevron* argument that its interpretation was compelled). By advancing an interpretation that effectively writes the maintenance requirement out of the Act, EPA instead does its worst. The Court should reject EPA's first interpretation.

III. EPA'S IMPLEMENTATION OF ITS SECOND INTERPRETATION IS IMPERMISSIBLE

The Act is a comprehensive program for air quality. Opening Brief 22-23; Answering Brief 5. The commenters identified a potential hole in this comprehensive program regarding maintenance of the standards. E.R. 100-102. In response, EPA cited its authority to call for a plan revision under section 110(k)(5) of the Act as a means to address future maintenance issues. E.R. 5. But under EPA's first interpretation, and under EPA's implementation of its second interpretation, section 110(k)(5) cannot actually do anything to fill this hole. Opening Brief 23-26, 50-51. EPA gives no good answer.

A. EPA Skips Past *Chevron* Step Two

By only requiring a one-time technical demonstration and not substantive provisions implementing an ongoing obligation, EPA's second approach leaves EPA without any way to address future increases in domestic emissions. Opening

Brief 50-51. As a result, EPA's second approach is impermissibly unmoored from a key purpose of the Act, maintenance of air quality. *Id.*

In response, EPA miscasts the Conservation Groups' *Chevron* step two arguments under the *State Farm* arbitrary and capricious standard. *See, e.g.*, Answering Brief 49 ("Petitioners' remaining arguments … fall under the APA's arbitrary and capricious standard."). EPA notes that the Conservation Groups state EPA's second interpretation was permissible, but EPA then incorrectly concludes that the only remaining issue is whether EPA's action was arbitrary and capricious. Answering Brief 48. The issue raised, though, was whether EPA's implementation of that interpretation (which could be described as additional interpretation) was permissible. Opening Brief 51-52, 51 n.14. Recently, as the Conservation Groups noted, this Court explained the distinction between the two standards. *Altera*, 926 F.3d at 1075; Opening Brief 29-30; *see also* Answering Brief 48 (incorrectly stating that the Conservation Groups equate *Chevron* step two with the arbitrary and capricious standard).

This distinction matters. EPA asks the Court to defer under *State Farm* to EPA's opinion that a call for plan revision is unlikely to be needed in Imperial County. Answering Brief 52-53; *see also id.* at 54 (describing the flaw as "theoretical"). That is not relevant to *Chevron*: the Act applies throughout the United States, not just in Imperial County. At *Chevron* step two, "[a]n agency's

interpretation of statutory authority is examined in light of the statute's text, structure and purpose. The interpretation fails if it is unmoored from the purposes and concerns of the underlying statutory regime." *Altera*, 926 F.3d at 1076 (citations and quotations omitted).

EPA nowhere argues that maintenance of the standards is not an important purpose and concern of the Act. EPA also nowhere argues that, even if section 110(k)(5) is ineffectual, then EPA's approach is somehow still permissible. EPA only disputes the scope of its authority under section 110(k)(5) and how it is invoked. Answering Brief 53-55. If those arguments fail, and they do, then EPA's second approach is impermissible.

B. EPA Lacks the Authority It Claims

Citing *Montana Sulphur & Chemical Co. v. U.S. EPA*, 666 F.3d 1174 (9th Cir. 2012), EPA offers that its authority under section 110(k)(5) is "broad," Answering Brief 53-54, but it is only as broad as the three instances Congress specified in the Act, Opening Brief 24-25. *Montana Sulphur* offers no support for EPA's nebulous view. The court did not hold that section 110(k)(5) gave a *carte blanche* grant of authority; instead, it examined the evidence for EPA's finding that the plan was substantially inadequate to attain and maintain the sulfur dioxide standards. *Montana Sulphur*, 666 F.3d at 1184-85. While the challenge was framed as to EPA's authority, *id.* at 1184, the court concluded EPA's finding was

not arbitrary or capricious, *id.* at 1185.

EPA then notes that it can call for a plan revision if a plan is substantially inadequate to attain the standards (or, although EPA does not mention it, maintain the standards), Answering Brief 53-54, but that is the predicament: EPA here has approved a plan that neither attains nor maintains the standards. If EPA can turn around and apply its call for revision authority to this plan on the basis that it does not attain or maintain the standards, then section 179B(a) is undercut. Opening Brief 24-25. EPA offers no response to this point other than finding it strange that the Conservation Groups question the breadth of EPA's authority. Answering Brief 54. There is nothing strange, though, about showing that EPA's ineffectual approach cannot fix problems should they arise.

EPA also offers that it could call for a plan revision if EPA's interpretation of section 179B(a) or another provision of the Act changes in the future. *Id*. Possibly, but that is tantamount to an admission that EPA's current interpretation—which is at issue in this litigation—does not address the problem. *Cf. Sierra Club v. EPA*, 356 F.3d 296, 298 (D.C. Cir. 2004) (EPA cannot approve plans that "promise to do tomorrow what the Act requires today"). In a similar vein, EPA offers no satisfactory response to the point that a discretionary authority such as section 110(k)(5) cannot adequately substitute for a present, mandatory, and ongoing obligation. Opening Brief 23-24. EPA's authority to require reports,

Answering Brief 53, does not help, because it also is discretionary.

EPA again misses the mark in responding that air quality monitors are sufficient to alert it to an issue. Answering Brief 53. The key question is whether domestic emissions and international emission will change in such a way that international emissions are no longer the "but for" cause of violations of the ozone standards in Imperial County. Opening Brief 23-24. Furthermore, climate change may create hotter and dryer conditions in Imperial County, in which case domestic emissions by themselves may cause violations. Air quality monitors detect local pollution levels; they do not identify the point of origin. 57 Fed. Reg. 7,687, 7,687 (Mar. 4, 1992) (enumerating information collected by ozone monitors). Without an appropriate way to inform EPA about the problem, EPA would not have grounds to invoke its discretionary authorities, which in any event cannot substitute for a mandatory obligation.

IV. EPA'S *POST HOC* RATIONALES DO NOT SAVE ITS ACTION

In response to the arguments that EPA's approval under its second interpretation was arbitrary and capricious, EPA relies on red herrings and *post hoc* rationales. For example, EPA first labors at length to defend the record for its approval of the state's demonstration of attainment (but for international emissions). Answering Brief 50-52. That is a red herring: the demonstration of attainment is not at issue here.

In an effort to make it relevant, EPA cites *Rybachek v. U.S. EPA ("Rybachek")*, 904 F.2d 1276, 1284 (9th Cir. 1990), for the unremarkable proposition that review is based on the "whole record." Answering Brief 50. But under the arbitrary and capricious standard, EPA must "examine the relevant data and *articulate* a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Altera*, 926 F.3d at 1081-82 (emphasis added) (citation and quotation omitted). EPA did not articulate in its final action how emissions data through 2017 and other information in the attainment demonstration would support EPA's determination that the plan would similarly maintain the standards through 2030, the endpoint of EPA's analysis. E.R. 4-5. Instead, EPA relied solely on projected emissions data to 2030 that was not part of EPA's proposed action, including its proposed approval of the attainment demonstration. *Id.* at 4, 106-108 (technical support document). So, any reliance in EPA's brief on the information in the attainment demonstration to bolster its determination that the plan would adequately maintain the standards is a *post hoc* rationale, which cannot be accepted and only "underscore[s] the absence of an adequate explanation in the administrative record itself," *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) (citation and quotation omitted).

In response to the argument that EPA failed to explain why it did not use

photochemical modeling to demonstrate maintenance (but for international emissions), EPA first states it did rely on photochemical modeling that demonstrated attainment. Answering Brief 56. That is a continuation of EPA's first red herring. Then EPA states that there was no requirement to use photochemical modeling. *Id.* That is also a red herring; it does not explain why EPA did not do so. EPA points to other photochemical modeling that extended out to 2023. *Id.* That is a *post hoc* rationale: EPA did not rely on that modeling for its determination, which instead used 2030 as the relevant timeframe. E.R. 4.

EPA also failed to look at projected emissions from Mexico and thus was unable to draw a rational connection between the facts found and the decision made. Opening Brief 52-53. EPA first notes, "Information regarding sources inside Mexico is limited and difficult to obtain." Answering Brief 59. This *post hoc* rationale was not present in EPA's analysis or technical support document, which merely examined domestic emissions. E.R. 4, 106-108. EPA then notes an update to the inventory of emissions from Mexico, Answering Brief 59, but that was discussed in EPA's proposed evaluation of the attainment demonstration for section 179B(b) and is therefore another *post hoc* rationale. Supplemental E.R. 47-48, 48 n.7. EPA then states that domestic emissions are the "primary focus" of section 179B(a), which is a *post hoc* interpretation of that section. *See* E.R. 4-5. The legal inability for the State and County to control sources in Mexico is a red

herring; it is not relevant to a technical analysis. And the relative magnitude of emissions from those sources is a *post hoc* rationale; EPA's justification for its final action did not discuss relative magnitude. E.R. 4-5, 106-108.

EPA's arguments are not only wrong, they are misdirected. It is foundational that agency action is arbitrary and capricious if the agency fails to consider an important aspect of the problem. *State Farm*, 463 U.S. at 43. EPA seeks to modify this standard. For example, EPA argues the Conservation Groups did not show photochemical modeling would achieve a different result. Answering Brief 56. In other words, EPA asks the Conservation Groups to not only show that EPA failed to consider an important aspect of the problem, but also to show that if EPA had considered that aspect, its final decision would have changed. But it is the agency's job, not the Conservation Groups, to examine the important aspects of the problem and then decide how they affect the final decision.

V. EPA'S NOTICE WAS INADEQUATE

EPA's action on the attainment demonstration shows that EPA is capable of compiling a strong record and rationale, Answering Brief 50-52, when EPA articulates its interpretation of the Act and describes the relevant information in its proposal, E.R. 26-30 (detailing EPA's review), and does so well in advance so that states know what is expected in their submittals*, id*. at 21 (citing 1992 and 1994 guidance regarding section 179B). However, in its proposal and earlier guidance,

EPA did not articulate any interpretation of the maintenance requirement and did not identify the relevant information for the requirement. Opening Brief 13. This was inadequate notice; it is not surprising that as a result EPA's action is also inadequate on the merits. "[N]otice improves the quality of agency rulemaking by ensuring that agency regulations will be tested by exposure to diverse public comment." *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citation and quotation omitted). It is "an essential component of fairness to affected parties." *Id.* And notice "enhances the quality of judicial review" "by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule." *Id.* EPA's *post hoc* interpretations and rationales, *see, e.g., supra* p. 9, can be traced directly to EPA's inadequate notice here.

Section 179B(a)(2) requires EPA to make two distinct findings: (1) whether the plan would attain the standards but for international emissions; and (2) whether the plan would maintain the standards but for international emissions. The Conservation Groups do not challenge the first finding. But for the second, all EPA said in its proposal was a bare recital of the statutory language. The statutory language did not tell the public, including the Conservation Groups, what the test is for the second element. And the statutory language by itself does not make any sort of finding that the test is met. To make that second finding, EPA must apply

the test to the plan and the relevant information, which EPA only did in its final notice.

A. EPA Failed to Give Notice for Its Second Interpretation

EPA's bare recital of the statutory language, Answering Brief 23-24, was insufficient notice. EPA did not propose any interpretation of the maintenance requirement. Opening Brief 13. Thus, there was no notice that EPA intended to interpret this requirement in its final action.

In an attempt to downplay its notice failure, EPA describes it as merely failing to give a "more specific" interpretation of the maintenance requirement. Answering Brief 26. However, there was no initial specificity that could be made "more specific." EPA also miscasts the Conservation Groups' arguments as wanting EPA to define the terms "maintain" and "maintenance." *Id.* at 24. Not so. *See, e.g.*, Opening Brief 34 ("Here, the notice for the proposal entirely failed to discuss the maintenance *requirement*, let alone propose any sort of substantive implementation.") (emphasis added). While it may not be necessary for EPA to define every term in the maintenance requirement, Answering Brief 25, EPA does have to give the requirement some meaning, as EPA itself admits, *id.* at 42-43 (arguing EPA's first interpretation gives meaning to the requirement). And, most importantly, in order to approve a waiver under section 179B(a), that meaning has to be applied to the plan through an analysis of whether it meets EPA's test for the

maintenance requirement.

EPA's discussion of definitions in *Hercules, Inc. v. U.S. EPA*, 938 F.2d 276 (D.C. Cir. 1991), is thus beside the point. In relevant part, in *Hercules* EPA proposed to rely on a definition of a statutory term EPA thought was provided in other regulations, but in the end declined to provide any definition while still recognizing the term was important. *Id.* at 279-280. By proposing to define the term, EPA gave sufficient notice that the term was at issue. *Id.* at 283. That is not the case here. EPA did not propose to either define the term or even recognize its importance by imbuing it with meaning.

Another way to reach the same result in *Hercules* is to observe: "One logical outgrowth of a proposal is surely … to refrain from taking the proposed step." *New York v. U.S. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (citation and quotation omitted). Thus, EPA's decision to not define the statutory term was a logical outgrowth of EPA's proposal to do so.

This principle could be even more tersely stated: nothing is a logical outgrowth of something. On the other hand, "Something is not a logical outgrowth of nothing." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). EPA's second interpretation in its final action gave substance to the maintenance requirement, but EPA's proposal gave none. In short, EPA made something out of nothing. Opening Brief 34-36.

EPA attempts to distinguish *Kooritzky* on the basis that the agency there in its proposal "did not announce that it would be making a fundamental change in the way it had interpreted existing law" and "did not give the 'merest hint' that the rule was reconsidering existing practice." Answering Brief 27 (quoting *Kooritzky*, 17 F.3d at 1513). Even assuming that is relevant, it is precisely what happened here. Since its 1992 guidance and up through its proposal, EPA has given no meaning to the maintenance requirement when interpreting section 179B(a). E.R. 21 (citing guidance memoranda from 1992 and 1994 as well as the preamble from a 2008 rule). But in its final notice EPA did. *Kooritzky* is squarely on point.

Hercules is instructive in one way. The court rejected a notice challenge to EPA's failure in its final action to address a related issue. *Hercules*, 938 F.2d at 283. "EPA's failure to address the issue in the proposed rule should have placed [the petitioners] on notice that the final rule also might fail to do so." *Id.* In short, nothing is a logical outgrowth of nothing. EPA's bare recital of the statutory language here would have been adequate notice if EPA had not finalized any interpretation whatsoever for the maintenance requirement. Based on EPA's notice, the commenters assumed EPA intended to entirely erase the maintenance requirement from the Act and rebutted that proposal. E.R. 102-104.

EPA briefly notes, as the Conservation Groups did, that a court might find it strange that a petitioner who was also a commenter would complain of a notice

violation if the commenter's suggestion were adopted. Opening Brief 40 (citing *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985)), Answering Brief 26 (same). But the Conservation Groups distinguished this situation. Opening Brief 40-41. EPA does not dispute this. *See* Answering Brief 26. Instead, EPA raises the fear that "the rulemaking process could go on forever." *Id.* That is easily avoided. All EPA must do is, in its proposal notice, give a reasonable interpretation of the maintenance requirement and identify the information it relies on for its proposed decision. EPA is fully capable of doing that, as its separate action on the attainment demonstration shows.

B. EPA Failed to Give Notice for the Information EPA Relied on to Approve the Plan

EPA attempts to distinguish *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996). Answering Brief 29-31. *Ober* provides the governing standard: "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*, 84 F.3d at 313.

EPA states: "the additional information EPA considered in this matter confirmed and expanded on the existing data discussed in EPA's proposed rule." Answering Brief 30. But EPA never specifically identifies what existing data in the proposed rule was confirmed in the final rule. EPA cannot, because EPA, in its

proposal, considered no data at all regarding the maintenance requirement. Opening Brief 13.

In the final rule, after the public comment period had closed, EPA relied on projections of emissions through 2030, in part from a plan submitted for another pollutant, PM10, and in part from a state database, to approve the plan with respect to the maintenance requirement. E.R. 4. The submitted attainment demonstration, in contrast, only projected emissions out to 2017. And the evidence in the plan is equivocal with respect to whether emissions from Mexico will continue to grow. Opening Brief 12 (noting recent program to reduce emissions in Mexicali). The District forthrightly states that the relevant information was not in the plan EPA acted on here, but in other state plans and databases. District Amicus Brief 10-12.

EPA also claims the information was not critical for EPA's decision. Answering Brief 30. However, both EPA's final notice in its response to comments and technical support document relied entirely on that information, and not on pre-existing information from EPA's proposal. E.R. 4, 106-108.

EPA also attempts to distinguish *Ober* by claiming that EPA developed its analysis to respond to comments. Answering Brief 30. That is true in terms of selecting the relevant timeframe, but the information originated from the state, just as in *Ober*. In the final notice for the action at issue in *Ober*, EPA analyzed the state's information and used it to respond to comments, just as it did here. *See* 60

Fed. Reg. 18,010, 18,017-18 (Apr. 10, 1995) (cited in *Ober*, 84 F.3d at 315). Thus, *Rybachek*, 904 F.2d at 1286, which predates *Ober*, does not create a hard-and-fast rule that it is acceptable for an agency to use new information so long as it is used to respond to comments. Such a rule would be absurd. When agencies fail to receive comments, they typically do not look for new information to support their proposed decision. It is only when they receive comments that call into question the proposed decision that agencies look to new information.

In order to show prejudice from EPA's procedural failure, the Conservation Groups, having finally been told the first time in the final rule what information EPA considered relevant, identified potential comments that could have disputed the information. Opening Brief 43-44. EPA does not address whether these are sufficient to show prejudice. Instead, EPA takes them on their merits. Answering Brief 57-59. Briefing is not the place to argue that in the first instance; notice-and-comment rulemaking is. The potential comments are enough to show that EPA's errors were not harmless, as the comments bear on "the substance of the decision reached," *California Wilderness Coal. v. U.S. Dept. of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011).

For example, one potential comment was that the state underestimates nitrogen oxide emissions from agricultural soils, a significant source in the Imperial Valley. Opening Brief 44. EPA argues that this issue is waived because

the commenters did not raise a similar comment regarding the emissions data for the attainment demonstration. Answering Brief 59. However, EPA did not identify the relevant information for the maintenance requirement, so there was no way for the commenters to know what to challenge. And waiver does not apply in any case. The commenters were not required to comment on data for one requirement, attainment, in order to preserve an issue regarding data from a different time period for a separate and independent requirement, maintenance.

Although EPA disputes this example's significance, Answering Brief 59, it is not a trivial issue. Accounting for nitrogen oxide emissions from cropland soil could increase inventories of nitrogen oxide emissions in areas in California by 20 to 51 percent. Almaraz et al., "*Agriculture is a major source of NOx pollution in California,*" SCIENCE ADVANCES (Jan. 31, 2018), *available at* https://advances.sciencemag.org/content/4/1/eaao3477.

Finally, the notice violation here is more severe than in *Ober*. In *Ober* the proposal made clear what information was relevant: analyses of reasonably available control measures. Opening Brief 45. Here, EPA did not even identify in its proposal what information was relevant to the maintenance requirement. And, as *Ober* states, supplemental information may be used to address "alleged deficiencies in the pre-existing data." *Ober*, 84 F.3d at 313. Because EPA did not identify the nature of the relevant information in its proposal, it was not

supplementing but rather starting from scratch in the final rule. Thus, it was impossible for commenters to identify "alleged deficiencies."

In its final action, EPA decided to rely on projected emissions data. E.R. 4. But that is not the only way in which EPA might determine that a plan is adequate to maintain the standards (but for international emissions). For example, photochemical modeling could be used instead, as it was for the demonstration of attainment. Opening Brief 51-52; *see also* E.R. 4 n.10. Or, as the commenters speculated, the state might be able to identify existing plan provisions that would be adequate to maintain the standards. E.R. 104-105. The District identifies numerous provisions in and outside of its ozone plan that the District thinks should be considered for that purpose. District Amicus Brief 13-17. However, those provisions were not assessed for maintenance purposes by EPA, E.R. 4-5, for the simple reason that the District could not have known from EPA's proposal that the District might have to submit a separate demonstration that its plan provisions were adequate to maintain the standards (but for international emissions).

This shows EPA's notice failure regarding its interpretation of the maintenance requirement is intertwined with its notice failure regarding the information relevant to that requirement. Although the Court could find inadequate notice on either ground, the combined effect of the two falls even farther short of the requirements for reasonable notice.

EPA's brief is replete with references to its technical judgment and calls for deference to it. Answering Brief 3-4, 18-19, 20, 49, 50-52, 60. But that deference comes with a corresponding responsibility for EPA to tell the public, before the public submits comments, how EPA is going to apply its technical judgment, including what data EPA will use. EPA failed to do so here, and so its repeated calls for deference to its technical judgment fall flat.

CONCLUSION

For the foregoing reasons, the Court should vacate EPA's action with respect to the maintenance requirement and remand it to the agency.

Date: December 11, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

Steven M. Odendahl
AIR LAW FOR ALL, LTD.
3550 Everett Dr.
Boulder, CO 80305
(720) 979-3936
steve.odendahl@airlaw4all.com

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 Cir. R. 32-1(b), because this brief contains 6,881 words, excluding the parts of the brief exempted by Cir. R. 32-1(c) and Fed. R. App. P. 32(f).

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: December 11, 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 December 11, 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: December 11, 2020

Respectfully submitted,

/s/ Steven M. Odendahl

Steven M. Odendahl

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

ADDENDUM

TABLE OF CONTENTS

(e) Exemptions for certain small areas

For areas with a total population under 200,000 which fail to attain the standard by the applicable attainment date, no sanction under this section or under any other provision of this chapter shall apply if the area can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone or ozone precursors transported from other areas. The prohibition applies only in cases in which the area has met all requirements and implemented all measures applicable to the area under this chapter.

(July 14, 1955, ch. 360, title I, § 185, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2450.)

§ 7511e. Transitional areas

If an area designated as an ozone nonattainment area as of November 15, 1990, has not violated the national primary ambient air quality standard for ozone for the 36-month period commencing on January 1, 1987, and ending on December 31, 1989, the Administrator shall suspend the application of the requirements of this subpart to such area until December 31, 1991. By June 30, 1992, the Administrator shall determine by order, based on the area's design value as of the attainment date, whether the area attained such standard by December 31, 1991. If the Administrator determines that the area attained the standard, the Administrator shall require, as part of the order, the State to submit a maintenance plan for the area within 12 months of such determination. If the Administrator determines that the area failed to attain the standard, the Administrator shall, by June 30, 1992, designate the area as nonattainment under section 7407(d)(4) of this title.

(July 14, 1955, ch. 360, title I, § 185A, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2451.)

§ 7511f. NO_x and VOC study

The Administrator, in conjunction with the National Academy of Sciences, shall conduct a study on the role of ozone precursors in tropospheric ozone formation and control. The study shall examine the roles of NO_x and VOC emission reductions, the extent to which NO_x reductions may contribute (or be counterproductive) to achievement of attainment in different nonattainment areas, the sensitivity of ozone to the control of NO_x, the availability and extent of controls for NO_x, the role of biogenic VOC emissions, and the basic information required for air quality models. The study shall be completed and a proposed report made public for 30 days comment within 1 year of November 15, 1990, and a final report shall be submitted to Congress within 15 months after November 15, 1990. The Administrator shall utilize all available information and studies, as well as develop additional information, in conducting the study required by this section.

(July 14, 1955, ch. 360, title I, § 185B, as added Pub. L. 101–549, title I, § 103, Nov. 15, 1990, 104 Stat. 2452.)

SUBPART 3—ADDITIONAL PROVISIONS FOR CARBON MONOXIDE NONATTAINMENT AREAS

§ 7512. Classification and attainment dates

(a) Classification by operation of law and attainment dates for nonattainment areas

(1) Each area designated nonattainment for carbon monoxide 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 Moderate Area or a Serious 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 carbon monoxide shall be as expeditiously as practicable but not later than the date provided in table 1:

TABLE 3[1]

Area classification	Design value	Primary standard attainment date
Moderate	9.1–16.4 ppm	December 31, 1995
Serious	16.5 and above ...	December 31, 2000

(2) At the time of publication of the notice required under section 7407 of this title (designating carbon monoxide nonattainment areas), the Administrator shall publish a notice announcing the classification of each such carbon monoxide nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(3) 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 November 15, 1990, by the procedure required under paragraph (2), adjust the classification of the area. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for carbon monoxide in the area, the level of pollution transport between the area and the other affected areas, and the mix of sources and air pollutants in the area. The Administrator may make the same adjustment for purposes of paragraphs (2), (3), (6), and (7) of section 7512a(a) of this title.

(4) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter in this subpart referred to as the ''Extension Year'') the date specified in table 1 of subsection (a) 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 one exceedance of the national ambient air quality standard level for carbon monoxide has occurred in the area in the year preceding the Extension Year.

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

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 carbon monoxide under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for carbon monoxide 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 subsections (a)(1) and (a)(4). 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)(2), 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.

(2) Reclassification of Moderate Areas upon failure to attain

(A) General rule

Within 6 months following the applicable attainment date for a carbon monoxide nonattainment area, the Administrator shall determine, based on the area's design value as of the attainment date, whether the area has attained the standard by that date. Any Moderate 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)(1) as a Serious Area.

(B) Publication of notice

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).

(c) References to terms

Any reference in this subpart to a ''Moderate Area'' or a ''Serious Area'' shall be considered a reference to a Moderate Area or a Serious Area, respectively, as classified under this section.

(July 14, 1955, ch. 360, title I, §186, as added Pub. L. 101–549, title I, §104, Nov. 15, 1990, 104 Stat. 2452.)

§ 7512a. Plan submissions and requirements

(a) Moderate Areas

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

(1) Inventory

No later than 2 years from 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)(A) Vehicle miles traveled

No later than 2 years after November 15, 1990, for areas with a design value above 12.7 ppm at the time of classification, the plan revision shall contain a forecast of vehicle miles traveled in the nonattainment area concerned for each year before the year in which the plan projects the national ambient air quality standard for carbon monoxide to be attained in the area. The forecast shall be based on guidance which shall be published by the Administrator, in consultation with the Secretary of Transportation, within 6 months after November 15, 1990. The plan revision shall provide for annual updates of the forecasts to be submitted to the Administrator together with annual reports regarding the extent to which such forecasts proved to be accurate. Such annual reports shall contain estimates of actual vehicle miles traveled in each year for which a forecast was required.

(B) Special rule for Denver

Within 2 years after November 15, 1990, in the case of Denver, the State shall submit a revision that includes the transportation control measures as required in section 7511a(d)(1)(A) of this title except that such revision shall be for the purpose of reducing CO emissions rather than volatile organic compound emissions. If the State fails to include any such measure, the implementation plan shall contain an explanation of why such measure was not adopted and what emissions reduction measure was adopted to provide a comparable reduction in emissions, or reasons why such reduction is not necessary to attain the national primary ambient air quality standard for carbon monoxide.

(3) Contingency provisions

No later than 2 years after November 15, 1990, for areas with a design value above 12.7 ppm at the time of classification, the plan revision shall provide for the implementation of specific measures to be undertaken if any estimate of vehicle miles traveled in the area which is submitted in an annual report under paragraph (2) exceeds the number predicted in the most recent prior forecast or if the area fails to attain the national primary ambient air quality standard for carbon monoxide by the primary standard attainment date. Such measures shall be included in the plan revision as contingency measures to take effect without further action by the State or the Administrator if the prior forecast has been exceeded by an updated forecast or if the national standard is not attained by such deadline.

implementation by State of test-only I/M240 enhanced vehicle inspection and maintenance program as means of compliance with this section, with further provisions relating to plan disapproval and emissions reduction credits, see section 348 of Pub. L. 104–59, set out as a note under section 7511a of this title.

SUBPART 4—ADDITIONAL PROVISIONS FOR PARTICULATE MATTER NONATTAINMENT AREAS

§ 7513. Classifications and attainment dates

(a) Initial classifications

Every area designated nonattainment for PM–10 pursuant to section 7407(d) of this title shall be classified at the time of such designation, by operation of law, as a moderate PM–10 nonattainment area (also referred to in this subpart as a ''Moderate Area'') at the time of such designation. At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each PM–10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious

(1) Reclassification before attainment date

The Administrator may reclassify as a Serious PM–10 nonattainment area (identified in this subpart also as a ''Serious Area'') any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM–10 by the attainment date (as prescribed in subsection (c)) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM–10 under section 7407(d)(4) of this title, the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain

Within 6 months following the applicable attainment date for a PM–10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date—

(A) the area shall be reclassified by operation of law as a Serious Area; and

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

(c) Attainment dates

Except as provided under subsection (d), the attainment dates for PM–10 nonattainment areas shall be as follows:

(1) Moderate Areas

For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM–10 under section 7407(d)(4) of this title, the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas

For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM–10 under section 7407(d)(4) of this title, the date shall not extend beyond December 31, 2001.

(d) Extension of attainment date for Moderate Areas

Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the ''Extension Year'') the date specified in paragraph[1] (c)(1) if—

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

(2) no more than one exceedance of the 24-hour national ambient air quality standard level for PM–10 has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of PM–10 in the area for such year is less than or equal to the standard level.

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

(e) Extension of attainment date for Serious Areas

Upon application by any State, the Administrator may extend the attainment date for a Serious Area beyond the date specified under subsection (c), if attainment by the date established under subsection (c) would be impracticable, the State has complied with all requirements and commitments pertaining to that area in the implementation plan, and the State demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area. At the time of such application, the State must submit a revision to the implementation plan that includes a demonstration of attainment by the most expeditious alternative date practicable. In determining whether to grant an extension, and the appropriate length of time for any such extension, the Administrator may consider the nature and extent of nonattainment, the types and numbers of sources or other emitting activities in the area (including the influence of uncontrollable natural sources and transboundary emissions from foreign countries), the population exposed to

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

concentrations in excess of the standard, the presence and concentration of potentially toxic substances in the mix of particulate emissions in the area, and the technological and economic feasibility of various control measures. The Administrator may not approve an extension until the State submits an attainment demonstration for the area. The Administrator may grant at most one such extension for an area, of no more than 5 years.

(f) Waivers for certain areas

The Administrator may, on a case-by-case basis, waive any requirement applicable to any Serious Area under this subpart where the Administrator determines that anthropogenic sources of PM–10 do not contribute significantly to the violation of the PM–10 standard in the area. The Administrator may also waive a specific date for attainment of the standard where the Administrator determines that non-anthropogenic sources of PM–10 contribute significantly to the violation of the PM–10 standard in the area.

(July 14, 1955, ch. 360, title I, §188, as added Pub. L. 101–549, title I, §105(a), Nov. 15, 1990, 104 Stat. 2458.)

§ 7513a. Plan provisions and schedules for plan submissions

(a) Moderate Areas

(1) Plan provisions

Each State in which all or part of a Moderate Area is located shall submit, according to the applicable schedule under paragraph (2), an implementation plan that includes each of the following:

(A) For the purpose of meeting the requirements of section 7502(c)(5) of this title, a permit program providing that permits meeting the requirements of section 7503 of this title are required for the construction and operation of new and modified major stationary sources of PM–10.

(B) Either (i) a demonstration (including air quality modeling) that the plan will provide for attainment by the applicable attainment date; or (ii) a demonstration that attainment by such date is impracticable.

(C) Provisions to assure that reasonably available control measures for the control of PM–10 shall be implemented no later than December 10, 1993, or 4 years after designation in the case of an area classified as moderate after November 15, 1990.

(2) Schedule for plan submissions

A State shall submit the plan required under subparagraph (1) no later than the following:

(A) Within 1 year of November 15, 1990, for areas designated nonattainment under section 7407(d)(4) of this title, except that the provision required under subparagraph (1)(A) shall be submitted no later than June 30, 1992.

(B) 18 months after the designation as nonattainment, for those areas designated nonattainment after the designations prescribed under section 7407(d)(4) of this title.

(b) Serious Areas

(1) Plan provisions

In addition to the provisions submitted to meet the requirements of paragraph[1] (a)(1) (relating to Moderate Areas), each State in which all or part of a Serious Area is located shall submit an implementation plan for such area that includes each of the following:

(A) A demonstration (including air quality modeling)—

(i) that the plan provides for attainment of the PM–10 national ambient air quality standard by the applicable attainment date, or

(ii) for any area for which the State is seeking, pursuant to section 7513(e) of this title, an extension of the attainment date beyond the date set forth in section 7513(c) of this title, that attainment by that date would be impracticable, and that the plan provides for attainment by the most expeditious alternative date practicable.

(B) Provisions to assure that the best available control measures for the control of PM–10 shall be implemented no later than 4 years after the date the area is classified (or reclassified) as a Serious Area.

(2) Schedule for plan submissions

A State shall submit the demonstration required for an area under paragraph (1)(A) no later than 4 years after reclassification of the area to Serious, except that for areas reclassified under section 7513(b)(2) of this title, the State shall submit the attainment demonstration within 18 months after reclassification to Serious. A State shall submit the provisions described under paragraph (1)(B) no later than 18 months after reclassification of the area as a Serious Area.

(3) Major sources

For any Serious Area, the terms ''major source'' and ''major stationary source'' include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM–10.

(c) Milestones

(1) Plan revisions demonstrating attainment submitted to the Administrator for approval under this subpart shall contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate reasonable further progress, as defined in section 7501(1) of this title, toward attainment by the applicable date.

(2) Not later than 90 days after the date on which a milestone applicable to the area occurs, each State in which all or part of such area is located shall submit to the Administrator a demonstration that all measures in the plan approved under this section have been implemented and that the milestone has been met. A demonstration under this subsection shall be submitted in such form and manner, and shall contain such information and analysis, as the

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

Administrator shall require. The Administrator shall determine whether or not a State's demonstration under this subsection is adequate within 90 days after the Administrator's receipt of a demonstration which contains the information and analysis required by the Administrator.

(3) If a State fails to submit a demonstration under paragraph (2) with respect to a milestone within the required period or if the Administrator determines that the area has not met any applicable milestone, the Administrator shall require the State, within 9 months after such failure or determination to submit a plan revision that assures that the State will achieve the next milestone (or attain the national ambient air quality standard for PM–10, if there is no next milestone) by the applicable date.

(d) Failure to attain

In the case of a Serious PM–10 nonattainment area in which the PM–10 standard is not attained by the applicable attainment date, the State in which such area is located shall, after notice and opportunity for public comment, submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM–10 air quality standard and, from the date of such submission until attainment, for an annual reduction in PM–10 or PM–10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for such area.

(e) PM–10 precursors

The control requirements applicable under plans in effect under this part for major stationary sources of PM–10 shall also apply to major stationary sources of PM–10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM–10 levels which exceed the standard in the area. The Administrator shall issue guidelines regarding the application of the preceding sentence.

(July 14, 1955, ch. 360, title I, §189, as added Pub. L. 101–549, title I, §105(a), Nov. 15, 1990, 104 Stat. 2460.)

§ 7513b. Issuance of RACM and BACM guidance

The Administrator shall issue, in the same manner and according to the same procedure as guidance is issued under section 7408(c) of this title, technical guidance on reasonably available control measures and best available control measures for urban fugitive dust, and emissions from residential wood combustion (including curtailments and exemptions from such curtailments) and prescribed silvicultural and agricultural burning, no later than 18 months following November 15, 1990. The Administrator shall also examine other categories of sources contributing to nonattainment of the PM–10 standard, and determine whether additional guidance on reasonably available control measures and best available control measures is needed, and issue any such guidance no later than 3 years after November 15, 1990. In issuing guidelines and making determinations under this section, the Administrator (in consultation with the State) shall take into account emission reductions achieved, or expected to be achieved, under subchapter IV–A and other provisions of this chapter.

(July 14, 1955, ch. 360, title I, §190, as added Pub. L. 101–549, title I, §105(a), Nov. 15, 1990, 104 Stat. 2462.)

SUBPART 5—ADDITIONAL PROVISIONS FOR AREAS DESIGNATED NONATTAINMENT FOR SULFUR OXIDES, NITROGEN DIOXIDE, OR LEAD

§ 7514. Plan submission deadlines

(a) Submission

Any State containing an area designated or redesignated under section 7407(d) of this title as nonattainment with respect to the national primary ambient air quality standards for sulfur oxides, nitrogen dioxide, or lead subsequent to November 15, 1990, shall submit to the Administrator, within 18 months of the designation, an applicable implementation plan meeting the requirements of this part.

(b) States lacking fully approved State implementation plans

Any State containing an area designated nonattainment with respect to national primary ambient air quality standards for sulfur oxides or nitrogen dioxide under section 7407(d)(1)(C)(i) of this title, but lacking a fully approved implementation plan complying with the requirements of this chapter (including this part) as in effect immediately before November 15, 1990, shall submit to the Administrator, within 18 months of November 15, 1990, an implementation plan meeting the requirements of subpart 1 (except as otherwise prescribed by section 7514a of this title).

(July 14, 1955, ch. 360, title I, §191, as added Pub. L. 101–549, title I, §106, Nov. 15, 1990, 104 Stat. 2463.)

§ 7514a. Attainment dates

(a) Plans under section 7514(a)

Implementation plans required under section 7514(a) of this title shall provide for attainment of the relevant primary standard as expeditiously as practicable but no later than 5 years from the date of the nonattainment designation.

(b) Plans under section 7514(b)

Implementation plans required under section 7514(b) of this title shall provide for attainment of the relevant primary national ambient air quality standard within 5 years after November 15, 1990.

(c) Inadequate plans

Implementation plans for nonattainment areas for sulfur oxides or nitrogen dioxide with plans that were approved by the Administrator before November 15, 1990, but, subsequent to such approval, were found by the Administrator to be substantially inadequate, shall provide for attainment of the relevant primary standard within 5 years from the date of such finding.

(July 14, 1955, ch. 360, title I, §192, as added Pub. L. 101–549, title I, §106, Nov. 15, 1990, 104 Stat. 2463.)

SUBPART 6—SAVINGS PROVISIONS

§ 7515. General savings clause

Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990, shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

(July 14, 1955, ch. 360, title I, §193, as added Pub. L. 101–549, title I, §108(*l*), Nov. 15, 1990, 104 Stat. 2469.)

SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

PART A—MOTOR VEHICLE EMISSION AND FUEL STANDARDS

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) IN GENERAL.—(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) REVISED STANDARDS FOR HEAVY DUTY TRUCKS.—(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO_x) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) LEAD TIME AND STABILITY.—Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) REBUILDING PRACTICES.—The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) MOTORCYCLES.—For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1)[1] of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in

[1] See References in Text note below.