

Before the United States Environmental Protection Agency

Proposal to Implement the 8-Hour Ozone National Ambient Air Quality Standard,
68 Fed. Reg. 32,802 (June 2, 2003), EPA Docket No. OAR 2003-0079.

COMMENTS OF:

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American Lung Association, Clean Air Task Force, Conservation Law Foundation, Environmental Defense, Natural Resources Defense Council, Southern Alliance for Clean Energy, Southern Environmental Law Center, and United States Public Interest Research Group submit these comments on "Proposed Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard; Proposed Rule," 68 Fed. Reg. 32802 (June 2, 2003).

INTRODUCTION

With the promulgation of the 1997 8-hour ozone standard, we saw the promise of improved public health for millions of Americans. Unfortunately, with this implementation proposal, EPA seemingly has made the choice to reject the carefully crafted framework provided by Congress for ozone in the 1990 Clean Air Act, in favor of a complicated array of mixed-and-matched requirements, all in the name of “flexibility”. At the same time the science is telling us that ozone is more dangerous than even previously acknowledged, EPA seems willing to squander the statutory authority to ensure that the needed reductions occur on a timely basis.

By its preference for a hybrid classification scheme, under which some areas are regulated under subpart 2 and others under subpart 1, and by its stated intention to summarily revoke the 1-hour NAAQS for ozone, the agency makes clear that its goal is not attainment of the ozone standard “as expeditiously as practicable,” but rather is “flexibility at any cost,” a rationale certainly not found within the Act. The agency’s proposal promotes backsliding, jettisons carefully crafted statutory pollution control requirements, exacerbates existing ozone transport problems, offers opportunities to game the classification and attainment demonstration processes through modeling analyses, and would result in serious weakening of the momentum towards attainment generated by the control programs already in place to combat ozone smog.

The Clean Air Act's language, structure and legislative history, not to mention the nation's public health, require the Agency to finalize an implementation plan for the 8-hour ozone standard that preserves the more rigorous deadlines and implementation measures included in subpart 2 of Title I.

I. BACKGROUND

A. Statutory and Scientific Context for Ozone's Effects on Human Health.

Protection of public health through attainment of health-based NAAQS is at the heart of the Clean Air Act. That public health mandate -- and the health effects science relevant to compliance with that mandate -- are key elements of the context for EPA's implementation rule. Guided by them, EPA must expeditiously promulgate an implementation rule that is equal to the crucial task of protecting our children, the elderly and other vulnerable populations from the adverse health effects of ozone.

1. The Act's mandate to protect public health with an adequate margin of safety.

The Act's public health mandate is embodied in the requirement that NAAQS "protect public health" with "an adequate margin of safety." CAA § 109(b)(1). This mandate requires protection against known adverse health effects -- including in sensitive individuals. As the drafters of the 1970 Amendments made clear, the millions of Americans subject to respiratory ailments are entitled to the protection of the NAAQS: "included among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed

to the ambient environment." S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970). The drafters went on to explain that "[a]mbient air quality is sufficient to protect the health of such persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air." *Id.* A statistically related sample "is the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air." *Id.*

In short, as EPA itself has long since recognized, Congress "specified that the air quality standards must also protect individuals who are particularly sensitive to the effects of pollution," and "required that the standards be set at a level at which there is 'an absence of adverse effect' on these sensitive individuals." *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980) (stating EPA's position). The D.C. Circuit "agree[d]" with EPA's rejection of a contrary interpretation advanced by industry, and stated approvingly that "[t]he Senate Report explains that the Administrator is to set standards which ensure that there is 'an absence of adverse effects.'" *Id. Accord, American Lung Association v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998) ("NAAQS must be set at a level at which there is an absence of adverse effect on sensitive individuals") (citation, brackets and internal quotations omitted).

Moreover, by mandating protection of public health with an "adequate margin of safety," CAA § 109(b)(1), Congress directed that NAAQS "be preventive in nature," *Ethyl Corp. v. EPA*, 541 F.2d 1, 15 (D.C. Cir. 1976), and that they "protect against incompletely understood dangers to public health ..., in addition to well-known risks." *Hercules Inc. v. EPA*, 598 F.2d 91, 104 (D.C. Cir. 1978) (construing similar phrase in Federal Water Pollution Control Act), *quoted in Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1165 (D.C. Cir. 1987) (construing similar phrase in § 112 of Clean Air Act).

Thus, in an interpretation addressed *inter alia* to the "margin of safety" requirement of CAA § 109(b)(1), 541 F.2d at 15, *Ethyl* rejected industry's argument that EPA was required to document "proof of actual harm" as a prerequisite to regulation, instead upholding EPA's conclusion that the Act contemplates regulation where there is "a significant risk of harm." *Id.* at 12-13 (emphasis added). Noting the newness of many human alterations of the environment, the Court found:

Sometimes, of course, relatively certain proof of danger or harm from such modifications can be readily found. But, more commonly, 'reasonable medical concerns' and theory long precede certainty. Yet the statutes — and common sense — demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Id. at 25. *Accord, Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 655-56 (1980) (plurality) (agency need not support finding of significant risk "with anything approaching scientific certainty," but rather must have "some leeway where its findings must be made on the frontiers of scientific knowledge," and "is free to use conservative assumptions in interpreting the data," "risking error on the side of overprotection rather than underprotection").

The 1977 Amendments confirmed and adopted the precautionary interpretation enunciated in *Ethyl*, enacting special provisions (Pub. L. No. 95-95, § 401, 91 Stat. 790-91 (August 7, 1977)) designed to "apply this interpretation to all other sections of the act relating to public health protection." H.R. Rep. No. 294, 95th Cong., 1st Sess. 49 (1977) (emphasis added) ("1977 House Report"). *Accord, id.* at 50 n.3. *See also id.* at 51 (amendments are designed inter

alia to "emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm)").¹

Elsewhere in the 1977 legislative history, the drafters rejected the argument "that unless conclusive proof of actual harm can be found based on the past occurrence of adverse effects, then the [national ambient air quality] standards should remain unchanged," finding that this approach "ignores the commonsense reality that 'an ounce of prevention is worth a pound of cure.'" 1977 House Report at 127 (emphasis added).

2. Health effects evidence.

The health effects evidence documents an array of adverse effects from exposure to ozone at levels commonly experienced by tens of millions of Americans in communities across the nation. These effects include adverse effects not only at levels violating the 1979 one-hour standard, but at levels meeting that standard as well. Indeed, that evidence even documents effects at the level of the 1997 eight-hour standard.

Below we briefly discuss this evidence, which is addressed in greater detail in EPA's own documents -- including its criteria document, staff paper, and preambles. Initially, we note that these effects are not simply a matter of abstract science, but are real impacts on the health of real people. Especially at risk are senior citizens, children and others who are active outdoors -- particularly those who suffer from asthma and other lung diseases. 62 Fed. Reg. 38859 (July 18, 1997). A disease whose prevalence has grown dramatically, asthma now afflicts close to 20.3

¹ Section 109 itself was not among the provisions amended, because it had already been found to be precautionary. *Ethyl*, 541 F.2d at 15. By adopting the precautionary *Ethyl* interpretation as the uniform basis for standard-setting under the Act -- including under CAA § 108, which governs the listing of pollutants for regulation under CAA § 109 -- Congress confirmed its approval of that interpretation.

million Americans, and kills nearly 4,500 Americans each year. *See American Lung Association, Trends in Asthma Morbidity and Mortality*, March 2003, at 3, 8.

As a medical expert told Congress two decades ago, "no physician or lay person who has witnessed the distress of an asthmatic attack could fail to recognize it as an adverse health effect." *Clean Air Act Oversight -- Part 3*, Senate Hearing 97-H12 (June 9, 1981), at 233 (Dr. Homer Boushey, assistant professor of medicine, University of California). Indeed, during the rulemaking proceeding that led to the 1997 ozone NAAQS, EPA heard vivid testimony from those who suffer such attacks:

When I was four years old, I was playing outside on a really hot day and I started wheezing and my lungs started tightening up. So I came in and told my mom.

We went to the doctor the next day and the doctor said I had asthma. The worst thing about having an asthma attack is that it almost feels like you are going to die because your lungs close up and it is really hard to breathe.

The last two summers have been really bad for me. On days when the ozone is bad, I can't even go outside to play.

EPA Docket A-95-58, Document #IV-F-84a at 168-69 (ten-year-old Bethany Myles of Chicago, testifying on January 14, 1997).

When there are ozone warnings, I can't be out of the air-conditioning. If I do go outside, I have an asthma attack. An asthma attack feels like I am suffocating. No one should have to feel this way.

EPA Docket A-95-58, Document #IV-F-84a at 39 (ten-year-old Jeff Damitz of Chicago, testifying on January 14, 1997).

EPA also heard from other citizens, who likewise suffer adverse health effects from ozone levels that are all too common around the nation:

We had at least 26 days this summer of "unhealthful" ground level ozone under the ME [Maine] standard of .08 ppm. That's a big part of our summer, a very big part. This ground level ozone is a real problem, a serious problem.

It's not just a statistical problem, either, because some standard was exceeded. I can feel it personally. I have exercised vigorously outside on "unhealthful" days and become physically sick — a funny nauseous feeling with a headache.

EPA Docket A-95-58, Document #IV-F-102 at 1 (Charles M. Sexton of South Portland, ME, testifying on January 14, 1997).

These direct testimonials of ozone's impact put a human face on the compelling scientific evidence -- including the large number of studies considered in the 1997 rulemaking, as well those that have been published subsequently.

a. Evidence documenting the inadequacy of the 1979 NAAQS, and EPA's multi-year delay in revising the NAAQS to reflect that evidence.

The initial predecessor to the current ozone NAAQS was promulgated in 1971 at 0.08 ppm, averaged over one hour. 36 Fed. Reg. 8187 (April 30, 1971). *See American Petroleum Institute v. Costle*, 665 F.2d 1176, 1182 (D.C. Cir. 1981) (though the 1971 standard was nominally addressed to photochemical oxidants, compliance was gauged by measuring only ozone). In 1979, EPA relaxed this standard to 0.12 ppm, one hour average. 44 Fed. Reg. 8220 (February 8, 1979).

Subsequently, a growing body of peer-reviewed scientific evidence emerged, documenting the inadequacy of the 1979 standard to protect public health with an adequate margin of safety. However, despite the Act's express mandate to review and (as appropriate) revise NAAQS at intervals of no greater than five years, CAA § 109(d)(1), EPA failed to consider the new evidence, or to revise the NAAQS to reflect it. 58 Fed. Reg. 13013 (March 9, 1993) (EPA "missed both the 1985 and 1990 deadlines for completion of [ozone NAAQS] review cycles under section 109(d)"). Even after being sued by American Lung Association and

ordered to complete a review of the NAAQS,² EPA issued a final decision that still refused to consider the new evidence -- and declined to revise the NAAQS. 58 Fed. Reg. 13008, 13013-14, 13016 (March 9, 1993). When that decision was challenged in the D.C. Circuit, EPA sought and received a voluntary remand to consider the new science. Order of June 27, 1994 in *American Lung Association v. Browner*, D.C. Cir. No. 93-1305.

b. 1997 ozone NAAQS, and the science upon which it was based.

Finally, many years after the new evidence started to emerge, EPA completed a NAAQS review considering that evidence. That review produced the 1997 eight-hour NAAQS, at 0.08 ppm, addressed in EPA's present implementation proposal.

The evidence on which EPA based the 1997 ozone NAAQS encompassed "up to 1,000 new studies" that the agency had not considered in the prior NAAQS review. 57 Fed. Reg. 35546 (August 10, 1992). Among these were numerous peer-reviewed published studies, including human clinical studies and human epidemiological studies.

(i) Human clinical studies.

EPA's 1997 NAAQS decision concluded:

Based on a significant body of information available since the last review, there is now clear evidence from human clinical studies that O₃ effects of concern are associated with the 6- to 8-hour exposures tested. ... This includes evidence of the following statistically significant responses at 6- to 8-hour exposures to the lowest concentration evaluated, 0.08 ppm O₃, at moderate exertion: lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation.

62 Fed. Reg. 38863-64 (emphasis added). After considering the results of the clinical studies, and EPA staff's criteria for defining which health effects should be considered adverse (which in

² *American Lung Association v. Reilly*, E.D.N.Y. No. 91-CV-4114 JRB.

turn were based on criteria of the American Thoracic Society³), EPA concluded that "responses of some sensitive individuals [to 0.08 ppm] are sufficiently severe and extended in duration to be considered adverse." 62 Fed. Reg. 38864 (emphasis added).

As EPA told the D.C. Circuit, the agency considered effects

such as increased airway responsiveness, acute inflammation, and increased susceptibility to respiratory infection, to be more serious under the [American Thoracic Society] guidelines because for some people they could result in episodic illness, permanent respiratory injury, or progressive respiratory dysfunction, although others may experience only transient and reversible responses. For example, increased airway responsiveness could aggravate asthma and lead to more persistent alterations in airway responsiveness, repeated inflammatory responses could lead to irreversible lung tissue damage, and repeated respiratory infections in children can lead to development of more significant lung impairment in later life.

EPA Brief in *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 (November 16, 2001), at 17-18 (emphasis added).

The human clinical data represents a strong and persuasive basis for linking adverse human health effects to ozone concentrations allowed by the 1979 NAAQS. *See, e.g.*, 62 Fed. Reg. 38872 ("the bulk of the human health effects evidence supporting a decision on an appropriate O₃ standard is based on controlled human exposure studies that relate known O₃ exposures directly to responses in individuals") (emphasis added). Moreover, those adverse effects occur not just in people engaged in heavy exertion (as was the case in the study that was the key basis for the 1979 standard, 62 Fed. Reg. 38859), but also under moderate exertion. This is of concern because "[m]oderate exertion levels are more frequently experienced by individuals than heavy exertion levels." *Id.*

(ii) Human epidemiological studies.

³ American Thoracic Society, Guidelines as to What Constitutes an Adverse Respiratory Health Effect, *Am.Rev. Respir. Dis.* 131:666-668 (1985).

EPA emphasized that "field ... and epidemiological studies" confirmed the results of the clinical studies: "effects were seen not only from controlled exposures to 0.08 ppm, but also in ambient environments in which 8-hour average O₃ concentrations ranged from above to below the 0.08 ppm level." *Id.* at 38865. For example, "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O₃ exposures, including O₃ concentrations below the level of the current standard." *Id.* 38864 (emphasis added). As the agency noted, these studies "provide strong evidence that ambient exposures to O₃ can cause significant exacerbations of preexisting respiratory disease in the general public at concentrations below 0.12 ppm O₃." Air Quality Criteria for Ozone and Related Photochemical Oxidants (EPA July 1996), at 7-171 (emphasis added). EPA concluded that "increased hospital admissions and emergency room visits ... are clearly adverse to individuals." 62 Fed. Reg. 38864. Moreover, record evidence indicated that for each ozone-induced hospital admission, there are thousands of other ozone-induced health effects including asthma attacks, acute respiratory symptoms, and respiratory-related restrictions of activity. *Id.* at 38868.

To reduce the incidence of such effects, EPA promulgated the 1997 NAAQS at 0.08 parts per million (eight-hour), rejecting the notion that the standard should be set at the status-quo level of 0.09 ppm. *See* 61 Fed. Reg. 65725 (the eight-hour standard most comparable in protectiveness to the one-hour 0.12 ppm NAAQS was an eight-hour 0.09 ppm standard). The new standard will offer additional protection to more than 120 million Americans who live in areas where the standard is being violated. *See* EPA, National Air Quality and Emissions Trends Report, 1999 (March 2001), at 39.

Indeed, EPA's 1997 rulemaking decision emphasized additional adverse health effects that will be prevented by the new ozone NAAQS:

Based on EPA's updated analyses of estimated moderate or large decreases in lung function and moderate to severe pain on deep inspiration in outdoor children in nine urban areas, a standard set at 0.09 ppm would allow approximately 40 percent to 65 percent more outdoor children to experience such effects than would a 0.08 ppm standard, and approximately 70 percent to 120 percent more occurrences of such effects in outdoor children per year. ... [T]he differences in these percentages between the two standard levels represent tens of thousands more children, and hundreds of thousands more occurrences of adverse effects in these children, in these nine urban areas alone, for a 0.09 ppm standard as compared to a 0.08 ppm standard.

62 Fed. Reg. 38867-68 (citation omitted).

Similarly, EPA found significant differences between 0.08 and 0.09 for overall exposures of concern, which EPA judged "to be an important indicator of the public health impacts of those O₃-related effects for which information is too limited to develop quantitative estimates of risk:"

Based on EPA's exposure analyses in the nine urban areas, a standard set at 0.09 ppm would allow more than three times as many children to experience 8-hour average exposures of concern as would a 0.08 ppm standard, with the number of outdoor children likely to experience such exposures increasing from approximately 100,000 to more than 300,000 in the nine urban areas alone, representing an increase from approximately 3 percent to approximately 11 percent of the outdoor children likely to experience such exposures.

Id. at 38868.

In short, EPA properly concluded that neither relying on the prior NAAQS, nor promulgating a revised NAAQS of comparable stringency, would suffice to protect public health. Instead, stronger NAAQS were necessary. That conclusion was upheld by the U.S. Court of Appeals for the D.C. Circuit:

[N]ot only is the record replete with references to studies demonstrating the inadequacies of the old one-hour standard, but EPA discussed at length the advantages of a longer averaging time, including reduced risk of prolonged exposures to unhealthy ozone levels and increased uniformity of protection across different urban areas.

American Trucking Assns. v. USEPA, 283 F.3d 355, 378-79 (D.C. Cir. 2002) (citations omitted).

c. Recent science confirming health effects of ozone.

EPA's 1997 decision to set stronger ozone NAAQS has been further confirmed by recent science documenting that the adverse health effects of ozone, especially the impacts on children, are more serious than previously understood. One study associated ozone exposure with decreased lung function in girls with asthma. Peters, J.M.; Avol, E., Gauderman, W.J.; Linn, W.S.; Navidi, W.; London, S.J.; Margolis, H.; Rappaport, E.; Vora, H.; Gong, H.; Thomas, D.C., "A Study of Twelve Southern California Communities with Differing Levels and Types of Air Pollution," *Am. J. Respir. Crit. Care. Med.* 159:768-75 (1999). Another study found that children with asthma who had a low birthweight or a premature birth are especially susceptible to the effects of summer ozone. Mortimer, K.M.; Tager, I.B.; Dockery, D.W.; Neas, L.M.; Redline, S., "The Effect of Ozone on Inner-City Children with Asthma," *Am. J. Respir. Crit. Care Med.* 162: 1838-45 (2000).

Likewise, a body of research has consistently linked elevated ozone levels and asthma attacks and other respiratory distress. Studies show that respiratory-related emergency room visits rise significantly on high-ozone days. This ozone-emergency room link was demonstrated in Montreal, where scientists reviewed hospital records for the years 1989 through 1990 and found an 18.7 to 21.8 percent rise in respiratory-related emergency room visits among senior citizens on days when ozone reached, but never exceeded the U.S. one-hour standard of 0.12 ppm. Delfino, R.J.; Murphy-Moulton, A.M.; Becklake, M.R., "Emergency Room Visits for Respiratory Illnesses among the Elderly in Montreal: Association with Low Level Ozone Exposure," *Environmental Research*, 76(2):67-77 (1998). Similarly, several studies have associated school absences with elevated ozone concentrations due to asthma and other

respiratory ailments. Gilliland, F.D.; Berhane, K.; Rappaport, E.B.; Thomas, D.C.; Avol, E.; Gauderman, W.J.; London, S.J.; Margolis, H.G.; McConnell, R.; Islam, K.T.; Peters, J.M., "The Effects of Ambient Air Pollution on School Absenteeism Due to Respiratory Illnesses," *Epidemiology*, 12:43-54 (2001); Chen, L.; Jennison, B.L.; Yang, W.; Omaye, S.T., "Elementary School Absenteeism and Air Pollution," *Inhalation Toxicology*, 12:997-1016 (2000).

Most recently, research has indicated that ozone may not only trigger asthma episodes in people already diagnosed with the condition, but actually could be linked to the development of the condition in children. McConnell, R.; Berhane, K.; Gilliland, F.; London, S.J.; Islam, T.; Gauderman, W.J.; Avol, E.; Margolis, H.G.; Peters, J.M. "Asthma in exercising children exposed to ozone: a cohort study," *Lancet*, 359:386-91 (2002). In this study, 3535 children with no previous diagnosis of asthma from 12 Southern California communities of varying air quality were followed for up to five years. The results of the study demonstrated that playing multiple team sports in a high ozone environment is associated with development of physician-diagnosed asthma. Exercise-induced asthma was deemed an unlikely single source because the onset of asthma was associated with exercise only in polluted communities.

Moreover, another study compellingly demonstrates the benefits to children with asthma of lowering ozone-forming contaminants. A study of the effect of the citywide alternative transportation strategy implemented by Atlanta, Georgia during the 1996 Summer Olympics found that as a result of lowered ozone concentrations pediatric asthma acute care events dropped substantially, including fewer urgent care and emergency department visits, and hospitalizations. Friedman, M.S.; Powell, K.E.; Hutwagner, L.; Graham, L.M.; Teague, W.G., "Impact of Changes in Transportation and Commuting Behaviors During the 1996 Summer

Olympic Games in Atlanta on Air Quality and Childhood Asthma,” *Journal of the American Medical Assn.*, 285:897-905 (2001).

New evidence of the adverse health effects of elevated ozone are growing not just for children, but also for the elderly and other groups. Indeed, a recent study has linked elevated ozone concentrations to the risk of acute stroke mortality in the elderly and in women. Hong, Y.-C.; Lee, J.-T.; Kim, H.; Ha, E.-H.; Schwartz, J.; Christiani, D.C., “Effects of Air Pollutants on Acute Stroke Mortality,” *Environmental Health Perspectives*, 110:187-91 (2002).

Even the fetus may be at risk. A study of more than 9,000 babies born in Southern California during the early 1990s has linked birth defects to elevated ozone exposure during a critical period in pregnancy. Ritz, B.; Yu, F.; Fruin, S.; Chapa, G.; Shaw, G.M. and Harris, J.A. “Ambient Air Pollution and Risk of Birth Defects in Southern California,” *Am. J. Epidemiol.* 2002; 155; 17-25.

In short, both the scientific studies considered by EPA in the 1997 rulemaking and those coming to light since then point to the same conclusion: EPA must expeditiously and effectively implement the new 8-hour ozone NAAQS to protect our children, the elderly and other vulnerable populations from the adverse health effects of elevated ozone concentrations. Taking meaningful action now is a public health imperative.

B. The Clean Air Act’s Evolution Illustrates Increasing Congressional Emphasis on Accountability and Specificity, Particularly With Respect to Ozone.

The evolution of the Clean Air Act shows an increasing emphasis on accountability and specificity. In three successive major overhauls, Congress enacted increasingly prescriptive federal requirements in order to protect public health through attainment of health-based air

quality standards by statutorily specified deadlines -- or earlier if practicable -- and through reduction or elimination of the number and severity of NAAQS violations in the meantime.

1. 1970 Amendments.

The congressional mandate for promulgation and implementation of NAAQS dates back over three decades to the 1970 Clean Air Act Amendments, which "gave the Clean Air Act the basic structure it retains today." *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1123 n.1 (D.C. Cir. 1995) (citation omitted). "[A] drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), the 1970 amendments "carrie[d] the promise that ambient air in all parts of the country shall have no adverse effects upon any American's health." 116 Cong. Rec. 42381 (December 18, 1970).⁴

The 1970 Amendments were prompted by Congress' disappointment with the 1967 Amendments, under which "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (emphasis added). The response of the States to this approach was "disappointing," and "[e]ven by 1970," they "had made little progress." *Train*, 421 U.S. at 64.

⁴ See also 116 Cong. Rec. 32901 (September 21, 1970) (remarks of Senator Muskie) ("This bill states that all Americans in all parts of the Nation should have clean air to breathe, air that will have no adverse effects on their health."); *id.* at 33114 (September 22, 1970) (remarks of Senator Nelson) ("This bill before us is a firm congressional statement that all Americans in all parts of the Nation should have clean air to breathe, air which does not attack their health."); *id.* at 33116 (remarks of Senator Cooper) ("The committee modified the President's proposal somewhat so that the national ambient air quality standard for any pollution agent represents the level of air quality necessary to protect the health of persons."); *id.* at 42392 (December 18, 1970) (remarks of Senator Randolph) ("we have to insure the protection of the health of the citizens of this Nation, and we have to protect against environmental insults -- for when the health of the Nation is endangered, so is our welfare, and so is our economic prosperity"); *id.* at 42523 (remarks of Congressman Vanik) ("Human health and comfort has been placed in the priority in which it belongs -- first place.").

Thus, "Congress reacted by taking a stick to the States" in the form of the 1970 Amendments, which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Id.* While retaining primary responsibility for assuring air quality within their boundaries, "the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." *Id.* at 64-65 (emphasis added).

Rejecting a House bill that would have "requir[ed] only that health-related standards be met 'within a reasonable time,'" the Conferees adopted the Senate approach which set an outside deadline for attainment. *Union Electric*, 427 U.S. at 258-59. In particular, EPA was required to promulgate NAAQS within four months of enactment; states were to submit implementation plans within nine months of that promulgation; EPA was to act on each state plan within four months of the submission deadline; and (in the event of state delinquency) EPA was to promulgate a federal implementation plan within six months of the state submission deadline. The plans were to provide for attainment of health-based NAAQS "as expeditiously as practicable," but (with certain exceptions) "in no case later than three years" from the date of plan approval. Pub. L. 91-604, 84 Stat. 1679-82 (Dec. 31, 1970). As Senator Muskie explained:

With up to four months for the final promulgation of national standards, up to nine months for the States to develop their plans and up to four months for the Administrator to either approve a State plan or decide to substitute his own authority in promulgating a plan, approval of plans for pollutants is no more than 17 months away. Within four and one-half years, the level of air quality in American cities, as to these major pollutants, should be adequate to avoid adverse effects on public health.

116 Cong. Rec. 42384 (Dec. 18, 1970) (emphasis added). The mandate for achievement of health-based NAAQS by statutorily specified deadlines is the "heart" of the Act. *Train*, 421 U.S. at 66.

2. 1977 Amendments.

The attainment deadlines under the 1970 Amendments expired in 1975 (or 1977 in some cases). H.R. Rep. No. 294, 95th Cong., 1st Sess. 207 (1977). Many areas failed to attain the 1971 photochemical oxidants NAAQS by those deadlines. 43 Fed. Reg. 8962-63 (March 3, 1978).

Reacting to this failure, Congress enacted a major overhaul of the Act in 1977. The 1977 Amendments continued to require attainment "as expeditiously as practicable," while extending outer attainment deadlines to 1982, with a possible further extension to 1987. Pub. L. No. 95-95, § 129(b), 91 Stat. 746-47 (Aug. 7, 1977) (enacting CAA §§ 172(a) and (b)). In exchange, however, the Amendments also included more specific requirements, to foster timely cleanup. In particular, Congress directed that areas violating the NAAQS be designated as "nonattainment" areas, *id.* at § 103, 91 Stat. 687-88 (enacting CAA § 107(d)), and that the SIPs for those areas not only ensure attainment of the NAAQS by the new extended deadlines, *id.* at § 129(b), 91 Stat. 746-47 (enacting CAA §§ 172(a) and (b)), but also *inter alia* "require, in the interim, reasonable further progress." *Id.* at § 129(b), 91 Stat. 747 (enacting CAA § 172(b)(3)). "Reasonable further progress," in turn, was defined as

annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable standard by the date required in section 172(a).

Id. at § 129(b), 91 Stat. 746 (enacting CAA § 171(1))(emphasis added). Likewise, the 1977 amendments instituted a requirement that new and modified stationary sources in nonattainment areas undergo a preconstruction permitting process, and -- as a condition of qualifying for a permit -- that the applicant comply with the lowest achievable emission rate, and obtain

reductions from other sources sufficient to offset the applicant's emissions. *Id.* at § 129(b), 91 Stat. 747-48 (enacting CAA §§ 172(b)(6) and 173).

3. 1990 Amendments.

Unfortunately, even though the photochemical oxidant standard was substantially weakened in 1979, *see* page 7, *supra*, numerous areas still failed to attain the standard by the 1982 or even 1987 deadlines. In 1990, Congress enacted a third major overhaul of the Act's provisions for attainment of health-based NAAQS. Like the 1977 Amendments, the 1990 legislation extended outer attainment deadlines, while retaining the mandate to attain "as expeditiously as practicable." CAA §§ 181(a)(1), 172(a)(2)(A).⁵

The amendments also expressly recognize that implementation plans are intended not only to "achiev[e] expeditious attainment" of NAAQS, but also to "eliminat[e] or reduc[e] the severity and number of violations" of those NAAQS. CAA § 176(c)(1)(A). Thus, measures that will reduce NAAQS violations must be implemented, even if they will not accelerate attainment.

In exchange for substantial extensions of the 1977 Amendments' deadlines, the 1990 Amendments included requirements more detailed and prescriptive than those in the 1977 legislation. Importantly, the most detailed set of requirements were the "Subpart 2" requirements addressing ozone. CAA §§ 181-185B. In Subpart 2, Congress provided for a series of graduated outer attainment deadlines, keyed to classifications reflecting the seriousness of each area's ozone problem. Each classification was associated with specific measures that must be implemented in specified timeframes -- and the measures were cumulative, meaning that more

⁵ *See, e.g.*, H.R. Rep. 490, 101st Cong., 2d Sess. 2229 (1990) (Subpart 2 attainment dates "are outside limits intended to provide a reasonable target for a large class of nonattainment areas. In the case of each individual nonattainment area, the bill continues the responsibility to attain as expeditiously as practicable. The objective is to achieve the standard as early as possible with effective and enforceable measures and without gaming by the States, industry, and others.") (emphasis added); S. Rep. 228, 101st Cong., 1st Sess. 37 (1989) (the CAA § 181 attainment dates are "final deadlines;" "The generic requirement in section 172(a) for attainment as expeditiously as practicable, of course, applies to attainment of the ozone standard. For example, if a severe area can attain the standard in less than fifteen years, it must do so.") (emphasis added).

polluted classifications are required to implement the measures for all less polluted categories, as well as those for their own classification.

Subpart 2 (like the generic nonattainment provisions of Subpart 1) continues the requirement for progress in the years before attainment -- but quantifies the obligation by specifying percentage reductions that must be achieved. CAA §§ 182(b)(1), (c)(2). Likewise, Subpart 2 (again, like Subpart 1) continues the applicability of the preconstruction review permit requirement, but strengthens that requirement by both lowering the tonnage threshold defining a "major" source, and increasing the ratio of pollution offsets that an applicant must obtain in order to qualify for a permit. CAA §§ 182(a) to (e). Beyond those requirements, Subpart 2 contains numerous additional measures that must be implemented in ozone attainment areas by specified dates -- addressing matters such as vehicle inspection, refueling vapor recovery, reasonably available control technology, reformulated gasoline, clean-fuel vehicles, and vehicle miles traveled. *Id.*

C. The Supreme Court's *Whitman* Decision

Simultaneous with the 1997 rulemaking on the setting of the ozone NAAQS itself, EPA adopted an implementation policy purporting to jettison Subpart 2 in favor of Subpart 1. 62 Fed. Reg. 38873 (July 18, 1997). An accompanying Presidential implementation plan directed EPA to follow a "flexible" implementation approach, 62 Fed. Reg. 38425 (July 18, 1997), involving abandonment of Subpart 2's prescriptive programs in favor of vaguer and more generic approaches drawn from Subpart 1. *Id.* at 38424-27. EPA's approach was based *inter alia* on the agency's prediction that, "based on the EPA's review of the latest modeling, a regional approach,

coupled with the implementation of other already existing State and Federal Clean Air Act requirements, will allow the vast majority of areas that currently meet the 1-hour standard but would not otherwise meet the new 8-hour standard to achieve healthful air quality without additional local controls." *Id.* at 38425 (emphasis added).

The Supreme Court unanimously struck down EPA's implementation approach in *Whitman v. American Trucking Assns.*, 531 U.S. 457, 481-86 (2001). While the Court noted "gaps" in Subpart 2 that render the Act "ambiguous concerning the manner in which Subpart 1 and Subpart 2 interact with regard to revised ozone standards," *id.* at 484, the Court emphasized that EPA's resolution of that ambiguity must be "reasonable." *Id.* EPA's interpretation failed that test, and thus was "unlawful." *Id.* at 481-86.

In particular, EPA's interpretation "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." *Id.* at 481. "EPA's interpretation making Subpart 2 abruptly obsolete" was "astonishing" -- indeed, "[a]n interpretation of Subpart 2 so at odds with its structure and manifest purpose cannot be sustained." *Id.* at 485-86.

The Court emphasized that, "[w]hatever effect may be accorded the gaps in Subpart 2 as implying some limited applicability of Subpart 1, they cannot be thought to render Subpart 2's carefully designed restrictions on EPA discretion utterly nugatory once a new standard has been promulgated." *Id.* at 484 (emphasis added). *Accord, id.* at 485 ("Subpart 2 was obviously written to govern implementation for some time").

"The principal distinction between Subpart 1 and Subpart 2 is that the latter eliminates regulatory discretion that the former allowed." *Id.* at 484 (emphasis added). For example:

- "While Subpart 1 permits the EPA to establish classifications for nonattainment areas, Subpart 2 classifies areas as a matter of law based on a table. Compare § 7502(a)(1) with § 7511(a)(1) (Table 1)." *Id.*

- "Whereas the EPA has discretion under Subpart 1 to extend attainment dates for as long as 12 years, under Subpart 2 it may grant no more than 2 years' extension. Compare §§ 7502(a)(2)(A) and (C) with § 7511(a)(5)." *Id.*

- "Whereas Subpart 1 gives the EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law. Compare § 7502(c) and (d) with § 7511a." *Id.*

"Yet according to the EPA, Subpart 2 was simply Congress's 'approach to the implementation of the [old] 1-hour' standard, and so there was no reason that 'the new standard could not simultaneously be implemented under ... subpart 1.' 62 Fed. Reg. 38856, 38885 (1997); *see also id.* at 38873 ('the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour ozone standards')." *Id.* at 484-85. This was not a lawful reading: "To use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation. The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* at 485 (emphasis added).

D. Implications for EPA's implementation rule.

The foregoing authorities have key implications for EPA's implementation rule. In particular, because the gaps in Subpart 2 are "few" and the applicability of Subpart 1 to a revised ozone NAAQS is "limited," *Whitman*, 531 U.S. at 485, 484, the agency's implementation rule must be based primarily on Subpart 2, and any divergence must be cogently justified based on the statutory language and purposes, respecting Subpart 2's "carefully designed restrictions on EPA discretion." *See id.* at 484. While EPA might prefer to have discretion "to shape

nonattainment programs," the agency must respect -- and implement -- Congress's decision in Subpart 2 to "prescribe[] large parts of them by law." *Id.*

EPA cannot shunt these statutorily prescribed programs aside in quest of a "flexible" approach, or in anticipation of future emission reductions from preexisting programs. That is precisely the approach taken by EPA's 1997 implementation policy, which the Supreme Court unanimously held to be unlawful.

These conclusions are reinforced by considering other authorities discussed above. For example, the core, emphatic mandate underlying the Clean Air Act is to protect the public from adverse health effects with an adequate margin of safety -- a precautionary approach that involves erring on the side of prevention, not pollution.

The health effects evidence, as interpreted by EPA itself in the 1997 NAAQS proceeding, and as buttressed by subsequent science, compellingly shows that tens of millions of Americans are exposed to ozone at unhealthy levels. The resulting impacts -- felt most intensively by senior citizens, people with asthma and other lung diseases, children, and all those susceptible individuals who are active outdoors -- include asthma attacks, hospitalizations, chest pain and other symptoms, and reductions in lung function, as well as an array of well-documented impacts on the respiratory system with troubling implications for long-term lung health. Under the Act's precautionary approach, EPA must take action to avoid these effects, not let them drag on for years in quest of "flexibility."

Indeed, an urgent rather than laggard approach to NAAQS implementation has underlain each of the three major iterations of the Act since 1970. In each, Congress has included deadlines for specified actions designed to produce attainment. The original 1975 deadline for NAAQS attainment is now twenty-eight years -- nearly three decades -- behind us, and the Act's

solemn promise of healthy air remains unrealized for tens of millions of Americans. An entire generation of Americans has come into the world and grown to adulthood after that deadline, breathing unhealthy air that should have been cleaned up before they were born. In light of the Supreme Court's admonition that the Act is a "drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution," *Union Electric Co. v. EPA*, 427 U.S. at 256, remedies crafted at this late date must emphasize urgency, not flexibility. This is all the more true given the compelling evidence, in the 1997 rulemaking record and subsequently, that ozone harms human health at lower levels than previously documented -- indeed, even at the level of the 1997 standard itself.

Congress's reactions to prior delays further corroborate the need for urgent, aggressive action. When the approaches prescribed by the 1967, 1970 and 1977 Amendments failed to produce clean air, Congress did not resort to a more "flexible" approach, nor did it allow EPA and the states to forego implementing aggressive anti-pollution measures while they awaited future reductions from pre-existing programs. To the contrary, in each instance Congress reacted to past failures by increasing specificity and prescriptiveness -- and Subpart 2 is the preeminent example of that approach. In adopting the opposite approach, EPA's proposal swims upstream against all three major iterations of the Act in the last three decades.

Finally, the Act expressly requires NAAQS implementation to focus not just on meeting the outer attainment deadlines, but also on attaining "as expeditiously as practicable," CAA § 181(a)(1), and on "eliminating or reducing the severity and number of violations" in the period before attainment. CAA § 176(c)(1)(A). Thus, for example, even if a given area predicts that preexisting programs would bring it into attainment by its outer statutory deadline without need for additional local controls, the area must still apply such controls where they are practicable

and would produce attainment before the outer deadlines, or where they would eliminate or reduce the number or severity of violations during that pre-deadline period. Here too, EPA's shunting aside of additional control measures in favor of a "flexible" approach contravenes the Act.

The record on which EPA based the 1997 8-hour standard's averaging and concentration levels describes the likelihood that the 1997 standard, *once it is attained*, will prove beneficial to public health. *See* 62 Fed. Reg. at 38861-63. These observations and conclusions were based on the quantitative risk assessments completed to support the promulgation of the new standard. *Id.* at 38862/1. But the simple fact of promulgating a new standard, by itself, does not guarantee improved public health results. Only diligent implementation of the new standard, through application of various control measures and techniques, will yield attainment "as expeditiously as practicable," as the Clean Air Act requires. EPA's analysis led it to conclude in 1997 that "the 8-hour standard more appropriately directs control programs to reduce the risk of exposures of most concern." *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Ozone* at 7 (July 1997). But the theory that 8-hour programs and measures will reduce risks is not enough -- it necessarily follows that until those 8-hour control programs are approved and implemented, they will not provide any reduction in the risk of exposure.

Furthermore, EPA also recognized in 1997 that "[t]he fact that current control programs [under the 1-hour standard] are resulting in progress toward improving air quality suggests that it is important to ensure that such progress is maintained during any transition to a revised standard." *Id.* at 6. EPA also recognized that even at the future point when 8-hour measures are in place and enforceable in an area, there are areas of the country that will continue to experience

peak events signifying violation of the 1-hour standard. 62 Fed Reg. at 38863/2. It appears this will be the case in several metropolitan areas, including Houston, Texas and Portland, Oregon.

EPA notes that the fundamental premise underlying the development of this proposal was the need “to find flexibility within the statute, as interpreted by the Supreme Court.” 68 Fed. Reg. at 32811/1. The Agency has sought to find ways *around* the Congressionally-mandated approaches to the ozone problem, set out in Subpart 2, despite having been told by the Supreme Court that it must not construe the statute in a way that nullifies “textually applicable provisions meant to limit its discretion.” *Whitman*, 531 U.S. at 485. Stated simply, the Agency admits that its proposal is based on finding the least prescriptive approaches possible. But that perspective is contrary to the framework established in the CAA, as well as the directive from the Supreme Court on remand. In 1990, Congress was explicitly and expressly moving away from the “flexible” approaches characteristic of subpart 1 (the pre-1990 Act), and towards more prescriptive approaches for ozone, precisely because ozone nonattainment was an intractable problem that could not be solved through the mechanisms previously available in the Act.

EPA indicates that it is limited here to a “narrow reading” of the Act in developing an implementation scheme for ozone. 68 Fed Reg at 32811/3. However, the proposal improperly reflects a very different approach, under which EPA asserts broad discretion over almost every aspect of implementation. The Agency’s discretion is far more limited. The analyses set out below address each of the elements of the proposal: classification, transition, the appropriate use of modeling techniques, the method for taking interstate transport into consideration, and the measures and programs required for all ozone nonattainment areas.

II. EPA's Preferred Classification Scheme is Contrary to Law.

EPA states that with respect to classifying ozone areas, it prefers what it calls “Option 2” – which would include ozone nonattainment areas in the classification scheme set out in CAA subpart 2 only to the extent that they are also in nonattainment of the existing 1-hour standard, or have been classified as nonattainment for the 1-hour standard at any time since 1990. 68 Fed. Reg. at 32812-13. The Agency's preferred approach for the remaining nonattainment areas would be to regulate them under subpart 1, without classifications,⁶ with the exception of an “overwhelming transport classification” to be created by importing the requirements of section 182(h) from subpart 2 of the Act.

EPA seeks comment also on another option for classifying 8-hour ozone nonattainment areas, under which all ozone nonattainment areas would be classified and regulated under subpart 2 of the Act. The Agency rejects this “Option 1,” however, despite recognizing that it is far simpler as well as easier to communicate, on the grounds that Option 2 provides States and Tribes more “flexibility.” 68 Fed. Reg. at 32812.

Of the two classification options presented, only Option 1 finds support in the language, structure and history of the Clean Air Act. Option 2, on the other hand, contravenes the purpose and requirements of the Act. Furthermore, EPA advances an interpolation of Table 1 based on a flawed analysis of Congress's intent in crafting the initial subpart 2 Table 1.

A. EPA's Preference For Classifying Some, But Not All Ozone Nonattainment Areas Under Table 1 of Subpart 2 Is Contrary to Law.

⁶ EPA recognizes it does have authority to develop subpart 1 area classifications, pursuant to section 172(a)(1)(A)), but chooses not to exercise it. 68 Fed. Reg. 32813/3.

EPA asserts that its authority to avoid the prescriptive approaches of subpart 2 for some ozone nonattainment areas is derived from the fact that subpart 2, particularly Table 1 of subpart 2, was crafted explicitly referencing the 1-hour ozone standard existing in 1990. EPA asserts that it has discretion to avoid subpart 2 when implementing the 8-hour standard because there is a “gap” between the ozone design values explicitly listed in Table 1 of section 181(a) of the Act and the design values characteristic of 8-hour nonattainment. 68 Fed. Reg. at 32,813/1-2. But while the *Whitman* Court indeed did find a “gap” in the explicit terms of Table 2, the Court did not give EPA free rein to ignore subpart 2 completely for 8-hour nonattainment areas with design values below those listed explicitly in Table 1. Instead, the Court directed EPA to: “develop a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS,” and forbade the Agency from “constru[ing] the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman*, 531 U.S. 485-486.

As between the two choices EPA proposes, EPA must adopt Option 1 – which would require all nonattainment areas for the pollutant ozone to be classified and regulated under subpart 2 of the Act – because Congress expressly limited the Agency’s authority to classify ozone areas when it crafted subpart 2. In short, Congress precluded to kind of “flexibility” EPA seeks here. Subpart 2 of the Act was crafted, as even EPA recognizes here, because of the failure of subpart 1 to yield ozone attainment, even some 20 years after the original enactment of the statute. 68 Fed. Reg. 32815/2.

EPA’s exercise of discretion to create additional flexibility is not permitted under the “narrow reading” of the statute that the Agency elsewhere states it favors. *See* Fed. Reg. at 32 81811/3 (EPA states it is limited to a “narrow reading” of the statute in developing an

implementation scheme for ozone). Congress explicitly stated in the 1990 amendments that the classifications and measures of subpart 2 must apply to the pollutant ozone. By the explicit terms of section 181(a)(1) of the Act, “each area designated nonattainment for ozone pursuant to section [107(d)] *shall* be classified, at the time of such designation, under Table 1.” 42 U.S.C. § 7511(a)(1) (emphasis added). These are the kinds of subpart 2 elements limiting the Agency’s discretion, and which the Supreme Court told EPA it must not ignore. *Whitman*, 531 U.S. 485-486. To state the obvious, the title of subpart 2, “Additional Provisions for Ozone Nonattainment Areas” does not read “Additional Provisions for Areas in Nonattainment Of the One Hour Ozone Standard Since 1990.”

Furthermore, the “gap” found by the Court is simply a “gap” in Table 1, which the Court directed the Agency to correct. Any discretion EPA has with respect to classification, as a result of the Court’s *Whitman* decision, is thereby limited: the Agency may find an interpolation of Table 1 that accommodates the 8-hour ozone standard, but the Agency’s discretion does not extend to choosing to regulate some ozone nonattainment areas outside the structure of subpart 2.

What is EPA’s basis for seeking authority beyond that granted by Congress? EPA states that “using our discretion to regulate gap areas under subpart 1 is one way . . . to avoid requiring unnecessary new controls in areas projected to meet the standard in the near term.” 68 Fed. Reg. at 32814/3. There are two fundamental problems with this formulation: first, as noted above, the discretion EPA asserts is not grounded in any authority granted by the statute: the statute states that all ozone nonattainment areas must be classified and regulated under subpart 2. Second, it is based on the assumption that EPA is authorized to avoid what Congress clearly mandated, namely subpart 2’s programs and measures as strategies for the attainment of the ozone standard.

EPA further bases its decision to choose the complicated and exotic Option 2 over the “simpler” Option 1, on the assertion that “regional modeling by EPA indicates that the majority of potential 8-hour nonattainment areas that fall into the gap will attain the 8-hour standard by 2007” *Id.* at 32814/c.3 (not citing any source for this ‘regional modeling’ analysis). Even if EPA were authorized to avoid the clearly stated requirements of the Clean Air Act on this basis,⁷ EPA is relying here on modeling which is at least 3 years old, and so does not reflect current or even recent monitored air quality data. *See id.* at 32805 n. 2 (EPA apparently is relying on year 2000 modeling analyses for ozone projections to 2007 from the Technical Support Document for the Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirement: Air Quality Modeling Analyses, EPA420-R-00-028. December 2000, <http://www.epa.gov/otaq/regs/hd2007/firm/r00028.pdf>). This modeling not only does not reflect 2001 or 2002 ozone season data, it also fails to reflect changes to the underlying rules it uses as inputs.⁸

Accordingly, Option 1 must be selected as the framework for implementation of the ozone NAAQS. To avoid backsliding, furthermore, an area that is designated nonattainment for the 1-hour standard must retain its 1-hour classification level after designation for the 8-hour standard. For example, if an area is classified serious for the 1-hour standard, the Act does not allow EPA to rescind that classification.

B. EPA’s Linear Interpolation of Table 1 for the 8-Hour Standard Fails to Effectuate Congressional Intent

⁷ In fact, EPA may not use modeling analysis in this way. *See Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (rejecting agency attempt to provide extra-statutory extensions on the basis of regional modeling); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (same).

⁸ For example, the model uses the NOx SIP Call but does not reflect the fact that the SIP Call budgets and requirements have been amended several times since 2000.

The approach the Agency has adopted in interpolating Table 1 to accommodate the 8-hour standard is also flawed because it fails to accurately replicate the distribution of classifications originally adopted by Congress. Instead, the interpolated Table 1 is far more skewed towards the more lenient classifications than was the case with the Table 1 crafted by Congress in 1990.

House Report 101-490 includes a discussion of Table 1 of Subpart 2. The Report states that the attainment dates included in Table 1 are “outside limits intended to provide a reasonable target for a large class of nonattainment areas. In the case of each individual nonattainment area, the bill continues the responsibility to attain as expeditiously as practicable. The objective is to achieve the standard as early as possible with effective and enforceable measures and without gaming by the States, industry, and others.” H.R. Rep. 101-490, reprinted in 1990 CAA Leg. Hist. 3021 at 3253. The Report goes on to specify which areas would be captured in each classification on the Table, as a result of then-existing air quality data. One extreme area, 8 severe areas, 18 serious areas, 32 moderate areas, and 41 marginal areas are listed. As finally promulgated by EPA, actual 1990 classifications broke down as follows: one extreme area, 12 severe areas (5 severe-17 and 7 severe-15), 13 serious areas, 30 moderate areas, and 43 marginal areas. <http://www.epa.gov/oar/oaqps/greenbk/onsum2.html>. By contrast with what Congress enacted in Table 1, the supporting information provided by EPA for this proposal gives the distribution of hypothetical areas by classification for Option 1 (all nonattainment areas governed and classified by subpart 2) as: zero extreme areas, 1 severe-17 area, 1 severe-15 area, 6 serious areas, 53 moderate areas, and 61 marginal areas.⁹ Plainly, even under Option 1, EPA’s proposed new interpolation of Table 1 would drastically depart from the original distribution of

⁹ Background Information Document: “Hypothetical Nonattainment Areas for “”Purposes of Understanding the EPA Proposed Rule for Implementing the 8-Hour Ozone National Ambient Air Quality Standard, Illustrative Analysis Based on 1998-2000 Data,” Docket No. A2001-31, record No. I-E-23, at 4-15 (April 2003).

classifications established in 1990, even before considering the effects of the proposed incentive feature. Under EPA's preferred Option 2, the distribution of areas by classification, before consideration of the incentive feature, is given as: zero extreme areas, 1 severe-17 area, 1 severe-15 area, 6 serious areas, 26 moderate areas, and 12 marginal areas, with a whopping 76 areas (over 60% of total nonattainment areas for ozone) not classified under Subpart 2's Table 1 at all, but regulated pursuant to subpart 1. EPA arrives at this distribution by crafting a classification Option through its simple linear interpolation and then figuring out how many areas fall into each classification as a result. The outcome of EPA's interpolation method bears no relationship to the Congress' intended distribution of ozone nonattainment areas by classification. Given the explicit provisions guarding against backsliding included in other sections of the Act,¹⁰ it is unreasonable to believe that Congress could have intended to allow a less protective distribution of classifications 13 years after it created Table 1.

To avoid these flaws in the rule, EPA must modify its classification proposal at the very least by developing a classification table based on Table 1 that more accurately reflects the distribution of ozone classifications created by the original Table 1 enacted in 1990. Furthermore, where an area is currently in nonattainment of the 1-hour standard, EPA must maintain the existing 1-hr classifications in place. *See* Part III, *infra*.

C. EPA'S Proposed "Incentive Feature" Is Contrary to the Clean Air Act

The "incentive feature" element of EPA's proposed classification scheme is not authorized by the Clean Air Act, and indeed is directly contrary to its express terms and

¹⁰ *See, e.g.*, section 193 ("No control requirement in effect or required to be adopted . . . 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.").

Congressional intent in crafting them. Under EPA’s proposal, if a nonattainment area regulated under subpart 2 is able to demonstrate through “modeling acceptable to EPA” that it can reach attainment within the time allotted for attainment under the lower classification, the area can receive a lower classification than would be otherwise be justified on the basis of its monitored air quality (and thus its calculated design values).¹¹

This aspect of the proposal subverts the plain language of the Clean Air Act. In section 181(a)(4), Congress directly addressed the limited circumstances in which the Administrator is authorized to classify an ozone nonattainment area lower than its design value would otherwise require. That section authorizes the Administrator to classify an area below the classification that Table 1 otherwise would require only when that area’s design value is within 5% of the lower classification’s design value.¹² Nothing in the language of section 181(a)(4) allows the Administrator to use modeled demonstrations of early attainment to justify a classification “bump down,” as EPA proposes. Furthermore, a well-accepted principle of statutory construction maintains that “when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Here, the statute is explicit about when and how the Administrator is authorized to grant “bump downs” in classification. Such specificity negates the possibility of any other option.

EPA cites no other authority in the Act as justifying the “incentive feature,” and indeed, there is nothing within any of the Clean Air Act’s provisions that remotely justifies this bump-down procedure. As the EPA admits, “the CAA was not originally structured to allow lower

¹¹ 68 Fed. Reg. at 32815-16.

¹² CAA § 181(a)(4).

classifications based on an area being projected to attain earlier.”¹³ In fact, Congress’s intent when it created subpart 2 was to respond to the consistent failure to attain the standard, which it recognized had its basis in part in the ability of states to game the process under subpart 1. Section 181(b) is focused exclusively on how to handle new ozone nonattainment areas, and existing ozone nonattainment areas that fail to attain the ozone standard within the deadline set out in Table 1 for the classification. The Table 1 deadlines furthermore are described in the legislative history as providing “outside limits” – nonattainment areas are still required to attain the standard as “expeditiously as practicable.” H.R. Rept. 101-490, reprinted in 1990 CAA Leg. Hist. 3021, 3253. *Accord*, S. Rep. 228, 101st Cong., 1st Sess. 37 (1989). No negative consequence follows under the Act as it is written if an area attains early – just redesignation to attainment pursuant to section 107(d).

Ignoring these points, the Agency attempts to justify the bump-down proposal by citing to a “congressional intent” to tie classifications to the amount of time in which the area is anticipated to attain.¹⁴ But Congress plainly did not embrace the concept of “bump down.” The only change in classification authorized by subpart 2 (aside from that allowed by §181(a)(4) initial classifications) is a bump *up*.

EPA also seeks to find support, in the Supreme Court’s *Whitman* decision, for the notion that it has expanded discretion -- beyond the process set out in section 181(a)(4) -- to adjust ozone nonattainment area classifications. But far from being a source of support for the idea of expanded Agency discretion, the Court’s opinion in fact reaffirms that Congress intended subpart 2 specifically to limit EPA discretion with respect to ozone. In *Whitman*, the Court stated: “While Subpart 1 permits the EPA to establish classifications for nonattainment areas, Subpart 2

¹³ 68 Fed. Reg. at 32816

¹⁴ *Id.*

classifies areas as a matter of law based on a table.”¹⁵

Even if there was some ambiguity that would allow EPA discretion to bump down classifications of nonattainment areas, EPA’s proposal is plainly unreasonable because it allows areas to avoid more stringent controls based on ill-defined “modeling” (or weight of the evidence/relative reduction methods) of future attainment. No provision of the Act allows EPA to bump down an area based on modeling: To the contrary, the Act requires reclassification to be based on measured design values – not modeling. CAA §181(b)(2)(A). EPA also proposes to allow these bump-downs based on regional-scale modeling. This is a method EPA itself admits “is not considered sufficient for an approvable attainment demonstration.”¹⁶

Indeed, the history of the CAA is replete with examples in which modeling strategies have been illegally used to attempt to avoid the requirements of the Act. Congress recognized this when it amended the Act in 1990:

States had the responsibility to use the best data and analytical methods available in preparing emissions inventories and conducting modeling, and EPA had the responsibility for providing guidance of what constituted the best methods and carefully scrutinizing State submissions to assure that assumptions and analyses were consistent with the guidance.

In a January 1988 report the General Accounting Office (GAO) found in the three areas it studied-Houston, Los Angeles, and Charlotte, North Carolina-that assumptions used in models and inaccuracies in data exacerbated the uncertainties normally associated with models. This led to understating inventories of emissions and therefore the amount of emissions reductions needed to bring the areas into attainment. Both the States involved and EPA bear responsibility for these miscalculations.¹⁷

Thus, even if the Act were ambiguous on the point, which it is not, bump-downs do not represent a reasonable exercise of EPA's interpretational authority. The bump-down mechanism proposed by EPA contravenes Congressional intent to replace vague, modeling-based assessments of the

¹⁵ 531 U.S. at 484.

¹⁶ 68 Fed. Reg. at 32815.

¹⁷ Sen. Rpt.101-128 (Dec. 20, 1989), 1990 U.S.C.C.A.N. 3385, 3397.

future with the explicit requirements of Table 1 and section 181(a)(4) of the Act.¹⁸

D. EPA's Preferred Classification Scheme and the Incentive Feature Will Produce Results Contrary to the Language and Purpose of the Act.

EPA's preferred classification option will result in relaxed controls, increased ozone precursor emissions from existing sources, and additional ozone as a result of the growth that accompanies sprawl. The following list provides examples some of the consequences of EPA's preferred classification scheme that are plainly at odds with the language and structure of the Clean Air Act.¹⁹

1. Creation of Areas with "Split Classifications."

The EPA's preferred approach creates the prospect of ozone nonattainment areas with split classifications. That is, some parts of the nonattainment area would be subject to subpart 1 while other parts would be subject to subpart 2. As a result, where areas in an outside ring of a metropolitan area are regulated under subpart 1, but city core areas are subject to subpart 2 requirements, new industry would have an incentive to locate outside the central city to take advantage of the lower NSR offsets. This in turn will promote growth in the vicinity of the new industry, yielding further increases in air pollution emissions that accompany such sprawl.

2. Major Sources Can Avoid Paying Emissions Fees.

Another consequence of EPA's proposal that contradicts the plain language of the CAA

¹⁸ We do not object to the use of modeling where such use is consistent with the Act and EPA rules. Indeed, the Act mandates the use of photochemical grid modeling for certain ozone attainment demonstrations. But the Act plainly does not authorize the use of modeling to authorize a bump down. Moreover, where reliance on modeling is appropriate, EPA must still ensure that such modeling reliably simulates real world conditions, and meets all requirements of EPA rules. A vague provision for "modeling", without any requirements to assure reliability and compliance with EPA rules, is therefore grossly deficient.

¹⁹ These consequences might not occur in certain areas due to other requirements of the Act or unique circumstances. Also some of these consequences will not occur in 1-hour nonattainment areas to the extent that EPA continues to implement and enforce subpart 2 with respect to the 1-hour standard in such areas, as advocated in Part III *infra*.

is that it allows major sources of air pollution in areas that have the worst ozone problems to avoid paying emissions fees. Major sources in extreme and severe nonattainment areas that fail to come into attainment by their attainment dates are currently required to pay fees under sections 7511d (a) and 7511 (b)(4)(A). These fees were a key component of the 1990 Amendments. In crafting those amendments, Congress explicitly stated that a lack of resources impeded areas from attaining the ozone standard:

Lack of resources at the Federal, State and local level has severely hampered implementation of the Act's requirements. During the decade of the 1980's, while the demands on EPA grew, appropriated funds for the air pollution program, as for other EPA programs, decreased both in nominal and real terms. States, which are required by the Act to impose permit fees to cover the costs of administering and enforcing permit programs, in many instances have not complied. Lack of resources led to preparation of inadequate and incomplete inventories, use of less costly-and less accurate-models, less frequent review and updating of inventories and other data on which control strategies are based, inadequate enforcement programs, and, at the Federal level, woefully inadequate oversight of, and technical assistance to, the States.²⁰

Under EPA's preferred incentive feature, 68 Fed. Reg. at 32815, major sources in areas bumped down to serious will be able to avoid having to pay emission fees. This is so, even though 7511d (e) already provides a flexibility mechanism exempting sources in certain areas where nonattainment is due to ozone transported from other areas. Therefore, allowing areas to avoid the major source emissions fees undermines both the language and the purpose of the CAA.

3. Stationary Sources Will be Able to Avoid New Source Review (NSR) And Reasonably Achievable Control Technologies (RACT), Rigorous Offsets, and Clean Fuels Requirements.

EPA's proposal includes an option whereby RACT would be waived for areas covered only by subpart 1, provided the area can show that RACT is not needed for timely attainment and would not advance the attainment date. 68 Fed. Reg. 32810. This aspect of the proposal is flatly

²⁰ Sen. Rpt.101-128 (Dec. 20, 1989), 1990 U.S.C.C.A.N. 3385, 3398.

contrary to section 172(c)(1) of the Act, which explicitly mandates RACT “at a minimum” in all nonattainment areas.

Also, the EPA’s incentive feature plainly contravenes the Clean Air Act, which requires areas in higher classifications to implement NSR and RACT on more sources, and requires these sources to offset emissions increases. Under EPA’s proposal fewer sources will have to implement NSR and RACT requirements in areas that are bumped down to lower classifications because the emissions thresholds that define what constitutes a “major source” are higher in lower classifications. CAA § 182, 42 U.S.C. § 7411a. As major source thresholds increase for lower classifications, the number of sources that exceed the emissions threshold – and the number of sources that must implement NSR and RACT requirements – decrease.

Not only will there be fewer major sources in areas that are bumped down, facilities in lower-classified areas that do qualify as major sources are subject to less rigorous offset requirements. For example, areas that are bumped down from extreme to severe will not have to ensure that major sources secure offsets of 1.5:1 as required under § 7511a (e)(1). Contrary to this statutory dictate, these bumped down areas will only have to secure offsets of 1.3:1.

Moreover, pursuant to EPA’s incentive feature, areas that are bumped down from extreme to severe will not have to require large sources of nitrogen oxides to utilize clean fuels or advanced control technologies. This outcome is directly contrary to the requirements for large sources in extreme areas under section 7511a(e)(3).

4. Mobile Sources of Ozone Will Have Relaxed Controls.

EPA’s proposed incentive feature not only relaxes ozone controls applicable to major stationary sources, but also undercuts those aimed at reducing ozone precursor emissions from mobile sources. For example, areas that are bumped down from severe to serious will no longer

need to sell less polluting reformulated gas as required by section 211(k)(5). Likewise, areas that are bumped down from serious to moderate can avoid implementing clean fuel vehicle programs as required under section 182(c)(4). Furthermore, areas that are bumped down from moderate to marginal classification need not require gasoline stations to install and operate systems for recovering gasoline vapor emissions, as required by section 182(b)(3)(A).

The above list is not intended to be exhaustive. The point is that lower classifications generally have less protective pollution control requirements than higher classifications, and that bump downs will therefore lead to less protective SIPs than would otherwise be required.

III. EPA May Not Revoke the 1-Hour Ozone Standard In Whole Or In Part, Nor May it Waive Compliance with Requirements of the Act Tied to the 1-Hour Standard.

EPA proposes to revoke the 1-hour standard, either in whole or in part, within one year after designation of 8-hour areas. We strongly oppose any attempt to revoke the 1-hour standard, either in whole or in part. Revocation would be flatly contrary to the Act and its purposes, for several reasons.

First, total or partial revocation of the 1-hour standard as proposed by EPA would illegally circumvent the Act's express provisions for redesignating nonattainment areas to attainment. Once an area is designated under the Act, that designation must remain in effect until the area is redesignated. CAA §§ 107(d)(1)(B)(4), 175A. An ozone nonattainment area cannot be redesignated to attainment unless and until all the prerequisites of section 107(d)(3)(E)

are met. Those requirements include not only actual compliance with the 1-hour standard, but also full approval of the applicable SIP, a demonstration that air quality improvement is due to permanent and enforceable emission reductions, full approval of a maintenance plan complying with section 175A, and full compliance with all requirements applicable to the area under section 110 and Part D. EPA cannot by-pass these explicit statutory prerequisites, either by “revoking” the 1-hour standard or declaring it no longer “applicable” to the area.

Revocation of the 1-hour standard is also contrary to subpart 2 of Part D, wherein Congress expressly mandated both planning and control requirements to assure progress toward, and timely attainment of, the ozone standard in place in 1990: namely the 1-hour standard. EPA correctly notes in this proposal that “Congress intended each area that was classified for the 1-hour ozone NAAQS under subpart 2 to adopt the specified control obligations in subpart 2 for the area’s 1-hour classification.” 68 Fed. Reg. 32820/3. The agency also correctly interprets “the mandated obligations in subpart 2 for purposes of an area’s 1-hour ozone classification to remain applicable to such areas by virtue of the area’s classification ‘as a matter of law.’” *Id.* We also agree with EPA that in allowing for revision of the NAAQS, “Congress did not open the door for States to remove SIP-approved measures or to avoid control obligations with which they have not yet complied.” *Id.* at 32819. But we disagree with EPA that it can take these sound legal positions, and yet at the same time assert that it has authority to do away with the very standard that formed the initial underpinning for these obligations. If Congress intended to codify the subpart 2 requirements “by operation of law” for 1-hour ozone nonattainment areas – and we agree with EPA that it did – then Congress also necessarily intended to preserve the 1-hour standard on which those obligations were premised.

As the Supreme Court held in *Whitman*, 531 U.S. at 485, Subpart 2 “was obviously written to govern implementation for some time. . . . A plan reaching so far into the future was not enacted to be abandoned the next time the EPA reviewed the ozone standard. . . .” Thus, the Supreme Court found that Congress had “codified” the one-hour standard. *Id.* 483. Retention of the 1-hour NAAQS is also fully consistent with EPA’s approach with respect to other pollutants. For example, EPA has adopted both short term and longer term NAAQS for PM-10, PM2.5, SO2, and carbon monoxide. Where there are two NAAQS in place for the same pollutant, requirements applicable to both must be met. *Ober v. EPA*, 84 F.3d 304, 308-11 (9th Cir. 1996)

There is furthermore no basis in the Act for EPA’s attempt to distinguish subpart 2’s planning obligations (such as the requirements for rate of progress plans and attainment demonstrations) from subpart 2’s requirements for adoption of specific control measures. Both types of obligations are explicitly mandated for 1-hour ozone nonattainment areas. Indeed, several of the specific control requirements of subpart 2 are explicitly tied to subpart 2’s requirements for attainment and rate-of-progress demonstrations. *E.g.*, CAA §§182(d)(1)(A) (transportation control measures linked to attainment and progress demonstrations); 182(e)(5) (new technologies flexibility dependent on existence of attainment demonstration); 182(f)(1)(A) (requirements for NO_x controls dependent on whether additional NO_x reductions would contribute to attainment). Thus, EPA cannot lawfully waive compliance with subpart 2’s planning requirements in areas that continue to be designated nonattainment for the 1-hour standard. All of the subpart 2 requirements, both for planning and specific control measures, must be continued by operation of law.

A. Revocation of the 1-Hour Standard is Contrary to the Anti-Backsliding Requirements of the Act.

Anti-backsliding must be a key principle of the transition rule. A prohibition on backsliding is inherent in the above-referenced requirements of subpart 2, and in section 110(l) of the Act.²¹ The language of section 172(e) means that Congress intended to bar the relaxation of implementation requirements -- not only where EPA *relaxes* a NAAQS, but also where (as here) EPA has *strengthened* the NAAQS. *Id.* at 32819/2 & n.23. Revocation of the 1-hour standard, however, is wholly inconsistent with the antibacksliding principle embodied in section 172(e) and more generally in section 193 of the Act.²² In a number of nonattainment areas, enforcement of planning and control requirements for progress toward, and timely attainment of, the 1-hour standard will require actual emission reductions and air quality improvements over the next two to four years – before 8 hour SIPs are even due. Any weakening or delay of such requirements would plainly constitute backsliding.

EPA correctly asserts that states cannot be allowed to modify or remove any control measure required by the Act for a 1-hour nonattainment area except to the extent that the state could modify or remove that measure for purposes of the 1-hour standard. In any case the state must also show compliance with section 110(l) – that any plan revision may not interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment, or any other requirement of the Act. However, EPA wrongly suggests that the section 110(l) demonstration in such cases can be confined to determining whether the revision

²¹ Section 110(l) states, in part, that “[t]he Administrator shall not approve a revision of a [SIP] if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [CAA § 171(1)]), or any other applicable requirement of this chapter.” 42 U.S.C. § 7410(l).

²² Section 172(e) states that when the Administrator relaxes a NAAQS, she must promulgate regulations that “are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.” 42 U.S.C. § 7502(e). Section 193, the General Savings Clause, states in part that “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.” 42 U.S.C. § 7517.

would interfere with attainment or progress toward attainment of *only* the 8-hour standard. As noted above, timely attainment and progress toward attainment of the 1-hour standard remain applicable requirements of the Act, even after promulgation of the 8-hour standard. Thus, SIP revisions cannot be approved unless they assure compliance with the 1-hour, as well as 8-hour, progress and attainment requirements. Such an approach is dictated not only by the language of subpart 2 and section 110(l), but also by the purposes of the 8-hour NAAQS revision and of the Act. The 8-hour standard was intended to provide greater, not less, public health protection from ozone. Yet an interpretation that reads the 1-hour standard out of section 110(l) would allow for a *slowing* of ozone reductions, and in some cases even a *worsening* of interim ozone levels.

For example, suppose an area is classified as “severe” for the 1-hour standard (with a 2005 attainment deadline) and “moderate” for the 8-hour standard (with a 2010 attainment deadline).²³ Under EPA’s proposal, this area could relax “discretionary” control requirements²⁴ that are indisputably needed to assure timely attainment of (or progress toward attaining) the 1-hour standard by 2005, as long as the relaxation would not jeopardize required rates of progress or timely attainment of the 8-hour standard. This could well allow violations of the 1-hour standard to occur beyond the 2005 deadline contemplated by Congress, exposing residents of the area to unhealthy air and delaying pollution reductions that would otherwise have occurred. Such an untenable result is completely contrary to the Act’s language and public health purposes,

²³ A distinctly likely scenario. See Background Information Document: Hypothetical Nonattainment Areas For Purposes of Understanding the EPA Proposed Rule for Implementing the 8-Hour National Ambient Air Quality Standard, EPA Docket A2001-31, No. I-E-23 at 4-17 (Table 1) (Listing areas’ 1-hour and projected 8-hour classifications under EPA’s proposed options, using 1998-2000 data). Table 1 includes at least 5 such areas.

²⁴ The term “discretionary” is a misnomer used by EPA to describe control measures that are needed to achieve timely progress or attainment, but that are not specifically identified in subpart 2. These measures are no more “discretionary” than the specific measures identified in subpart 2. Rather, they are mandated by subpart 2’s provisions requiring SIPs to contain enforceable measures sufficient to achieve timely progress and attainment.

and to EPA's stated intent of strengthening public health protection through adoption of the 8-hour standard.²⁵

B. The Clean Air Act Does Not Authorize EPA to Relax 1-Hour Planning Obligations.

EPA seeks comment on the idea of relaxing unmet planning obligations with respect to the one-hour standard. 68 Fed. Reg. 32822. For all the reasons discussed above, EPA has no authority to relax 1-hour planning obligations, such as requirements for rate of progress and attainment demonstration SIPs. The proposal correctly notes that 1-hour nonattainment areas remain subject to subpart 2 requirements by operation of law. Rate of progress and attainment demonstrations for 1-hour nonattainment areas are just as explicitly mandated by subpart 2, as are "control" measures such as NSR and RACT that EPA agrees must be continued in 1-hour nonattainment areas. In addition, as even EPA recognizes, *see id.* at 32822/2, relaxation of unmet planning obligations would create major inequities between areas that have complied with the 1-hour planning obligations and those that have not.

There is no merit whatsoever to EPA's claim that compliance with unmet 1-hour planning obligations would somehow "divert resources" from planning to meet the 8-hour standard. *Id.* at 32822/1. The emissions inventories, modeling, and control strategies necessary for 1-hour demonstrations are transferrable in virtually all material respects to planning for the 8-hour standard. Indeed, to the extent that states have not yet completed their 1-hour planning obligations, there is no reason whatsoever that they could not plan for both standards

²⁵ We also question how a state can make a legally sufficient section 110(l) demonstration with respect to the 8-hour standard prior to EPA's full approval of the 8-hour SIP for the area in question. Until EPA has determined (through the SIP approval process) that the state's ROP and attainment demonstrations for the 8-hour standard are technically and legally sufficient, the agency can hardly conclude that pre-existing measures can be discontinued without interfering with timely progress and attainment with respect to the 8-hour standard.

simultaneously. As noted above, states have long been required to simultaneously plan for attainment of both short and long term NAAQS for the same pollutant (e.g., PM10, SO2, CO). There is no evidence that such a requirement imposes undue burdens on the states. Furthermore, states that have still failed to meet their 1-hour planning obligations are hardly in a position to complain about cost, particularly when many other states *did* meet those planning obligations and will now be required to plan for the 8-hour standard as well.

California's San Joaquin Valley offers a specific example of how EPA's proposal would reward delinquent air planning agencies at the expense of public health. Despite a May 2002 deadline, the San Joaquin Valley Unified Air Pollution Control District ("Valley Air District") has failed to submit an approvable ozone attainment plan to EPA. Currently in "severe" ozone nonattainment²⁶ for the 1-hour standard, the Valley finally will incur offset sanctions in March 2004 and highway sanctions in September 2004 unless it submits a complete attainment plan in January of 2004. And unless EPA approves the Valley's plan by September of 2004, EPA is scheduled to promulgate an ozone FIP at that time. Unable or unwilling to produce an approvable ozone attainment plan, the Valley Air District has voluntarily proposed to downgrade itself to "extreme" for the 1-hour standard by December of 2003, in order to stave off the sanctions and FIP. Under the 1-hour standard, such voluntary reclassification would extend the ozone attainment deadline from 2005 to 2010 and require much more protective pollution controls in the interim. Under EPA's proposal, however, the Valley would likely be classified as "serious" for the 8-hour standard, with an extended attainment deadline of 2013. Meanwhile, the Valley's residents will be forced to breathe the most ozone-polluted air in the country,²⁷ while its

²⁶ EPA downgraded the Valley from "serious" to "severe" in June 2000 following the Valley's failure to attain by the November 15, 1999 deadline.

²⁷ Four of the top seven most ozone-polluted metropolitan areas in the nation are located in the San Joaquin Valley: Fresno, Bakersfield, Visalia-Tulare-Porterville and Merced. American Lung Association, *State of the Air 2003*.

children suffer from asthma at a rate nearly three times the national average.²⁸ It is imperative that areas like the Valley with outstanding 1-hour planning obligations not be permitted to delay emissions reductions that would be required for full and timely compliance with the 1-hour standard.

1. Neither of EPA's Alternative Approaches Has Merit.

The proposal asks for comment on two alternatives to requiring compliance with unmet 1-hour planning obligations, but neither of these alternatives comports with the Act. One alternative would involve requiring submission of an ROP SIP for the 8-hour standard, while the other would involve requiring "early" submittal of an 8-hour attainment demonstration. The Act does not give EPA authority to substitute these kinds of plans for 1-hour ROP and attainment demonstrations, which are explicitly mandated by subpart 2. Moreover, both alternatives would result in backsliding, as they almost certainly would delay the emission reductions and ozone improvement that would otherwise be required by full compliance with the 1-hour SIP planning mandates. In most areas, unmet 1-hour planning obligations must provide for sufficient emission reductions to achieve ROP *now*, and through 2005 (or in some cases 2007), and to assure actual attainment of the 1-hour standard by 2005 or 2007. Plans that merely provide for progress years later toward the 8-hour standard are no substitute for plans to reduce emissions today, and to assure attainment of the 1-hour standard in the near term.

EPA also has no authority to waive the attainment demonstration and ROP plans mandated by subpart 2 on the pretext that an area has "clean data." *Id.* at 32823/1. The Act unambiguously requires these plans for any area designated nonattainment for the pollutant ozone, and gives EPA no power whatsoever to waive such plan requirements. Although subpart

²⁸ See California Health Interview Survey Fact Sheet, *Asthma Symptom Prevalence in California in 2001*, available at www.chis.ucla.edu

2 contains some narrowly crafted exceptions (*e.g.*, CAA § 182(b)(1)(A)(ii)), there are no exceptions based on “clean data.” In the past, EPA has cited a Tenth Circuit decision, *Sierra Club v. EPA*, 99 F.3d 1551 (10th Cir. 1996), as supporting the “clean data” policy. Although we contend that case was wrongly decided to begin with, it has in any event been superseded by the Supreme Court’s decision in *Whitman*. There, the Court held that Subpart 2 “eliminates regulatory discretion” previously allowed to EPA under Subpart 1, and noted that Subpart 2 “prescribes large parts” of nonattainment programs “by law” – citing all of section 182 as an example. *Id.*, 531 U.S. at 484. The requirements for ROP and attainment demonstrations are among those Subpart 2 nonattainment programs that Congress “prescribed by law”, thereby eliminating EPA’s discretion to accept something less. *See also Sierra Club v. EPA*, 293 F.3d 155 (D.C. Cir. 2002) (holding that EPA is without authority to infer exceptions to attainment deadlines and to explicit Subpart 2 requirements for ROP plans).

C. EPA’s Proposal To Waive 1-Hour Findings of Failure to Attain and 1-Hour Classification Bump Ups Violates the Clean Air Act.

EPA proposes that after total or partial revocation of the 1-hour standard in an area, the Agency would not make findings of failure to attain the 1-hour standard or reclassify areas that failed to timely attain the 1-hour standard. 68 Fed. Reg. 32824/2. This proposal conflicts with the express terms of the Act, which mandates that EPA make a finding of nonattainment within 6-months following the applicable attainment date, and further mandates reclassification “by operation of law” for areas that EPA finds have not timely attained. CAA § 181(b)(2), 42 U.S.C. § 7511(b)(2). Moreover, the Act’s reclassification requirements are part and parcel of the specific control obligations mandated by Subpart 2 – obligations that EPA itself concedes must

remain in effect regardless of whether of 1-hour standard is “revoked.” EPA’s proposal would also produce grossly inequitable results. For example, where EPA failed to timely reclassify an area prior to revocation of the 1-hour standard, that area effectively would receive a grandfathered exemption from the stronger subpart 2 control requirements that would continue to apply in areas that were reclassified on time.

The proposal tries to justify a waiver of bump ups on that ground that states should focus resources on attainment of the 8-hour standard, and that “it would be counterproductive to establish new obligations for States with respect to the 1-hour standard after they have begun planning for the 8-hour standard.” 68 Fed. Reg. at 32824/2. There is absolutely no support, however, for the notion that bump ups would divert resources from 8-hour planning, or that the stronger control requirements for a higher 1-hour classification would somehow be “counterproductive” with respect to the 8-hour standard. As EPA itself has repeatedly stated, controls to achieve the 1-hour standard invariably contribute to attainment of the 8-hour standard as well.

D. EPA Cannot Relax 1-Hour Obligations in Areas That Meet the 8-Hour Standard But Remain In 1-Hour Non-Attainment.

For all the reasons set forth above, EPA has no authority to relax requirements for 1-hour nonattainment areas that are designated attainment for the 8-hour standard. We find it particularly astonishing that EPA would propose to *reward* areas that have failed to perform their 1-hour planning obligations, by waiving those obligations *entirely* if the area is designated attainment for the 8-hour standard. Nor does EPA have authority to waive the Act’s requirements for nonattainment new source review (NSR) in such areas. As EPA correctly

notes, “Congress intended each area that was classified for the 1-hour ozone NAAQS under subpart 2 to adopt the specified control obligations in subpart 2 for the area’s 1-hour classification.” 68 Fed. Reg. at 32820/3. Those obligations “remain applicable to such areas by virtue of the area’s classification ‘as a matter of law’ in 1990.” *Id.* Nonattainment NSR is unquestionably a control obligation specified in subpart 2. *E.g.*, CAA §§ 182(a)(2)(C), (b)(5), (c), (d), (e). Thus, 1-hour nonattainment areas must adopt and implement nonattainment NSR programs whether or not they are designated attainment for the 8-hour standard.

E. EPA Cannot Eliminate By Rule the Act’s 1-Hour Maintenance Planning Requirements.

EPA has no authority to waive the requirement for a section 175A maintenance plan for 1-hour nonattainment areas that are meeting the 8-hour standard. As indicated above, once an area has been designated nonattainment for the 1-hour standard, it cannot be redesignated to attainment unless and until it has submitted, and received EPA approval of, a maintenance plan meeting the requirements of section 175A. Such a plan must include contingency measures, including a requirement that the State will implement all measures contained in the pre-redesignation SIP. A maintenance plan meeting only the requirements of section 110 will not suffice.

For the same reasons, EPA cannot authorize states to simply drop subpart 2 measures when the area is meeting either standard. The Act allows states to move mandated controls to a maintenance contingency plan, but only after the area has been redesignated to attainment pursuant to section 107(d)(3)(E). *See* CAA § 175A(d).

EPA also has no authority to approve the removal from maintenance SIPs of requirements to implement contingency measures upon a violation of the 1-hour standard. Section 175A of the Act explicitly requires that maintenance plans must contain contingency provisions “to assure that the State will promptly correct any violation of the standard” that occurs after redesignation. *Id.* The “standard” being referred to is the one the maintenance plan was specifically designed to protect – namely the 1-hour standard. States must adopt a maintenance plan (or amend their existing maintenance plan) to assure continued compliance with the 8-hour standard.

Removal of 1-hour violations as a trigger for maintenance contingency measures would also violate the anti-backsliding principle. For example, if a 1-hour maintenance area recorded a 1-hour violation in, say, 2004, the area would have to implement contingency measures to reduce emissions so as to promptly correct the violation. Under EPA’s proposal, however, the same area would not have to take any action to address a post-revocation 1-hour violation -- no matter how severe. Rather, the area could simply do nothing to remedy the violation, and indeed could even allow ozone levels to worsen. Such a result would conflict sharply with the anti-backsliding requirements discussed above.

IV. Comments On Specific Aspects of EPA’s Proposal Related To Clean Air Act Tools For Ozone NAAQS Attainment: Transportation Conformity, New Source Review, Interstate Ozone Transport, and Other Attainment Demonstration Requirements

A. EPA’s Proposed Implementation Framework Would Seriously Weaken Transportation Conformity

Transportation remains the source of a third to half of the health threatening air pollutants in most ozone nonattainment areas. Yet EPA's proposed implementation plan for the 8-hour ozone standard, if adopted, would substantially weaken clean air protections by sharply curtailing transportation conformity, a key implementation tool under the Clean Air Act that has been successful over the past decade in achieving significant progress towards meeting clean air standards.

EPA's proposed 8-hour ozone rule would sharply slow momentum to implement health protective emission reduction strategies in areas with unhealthful air quality. It would curtail the effectiveness of transportation conformity in areas with inadequate air quality, including both existing 1-hour and new ozone non-attainment areas. It would do this by:

- Abandoning in April 2005 the requirement that non-attainment areas keep their transportation emissions within the pollution limits established to attain the 1-hour ozone health standard, regardless of whether the area had met that standard. Instead conformity would likely be demonstrated using a seriously flawed "build/no-build" test that allows traffic and pollution growth even when increased emissions will exacerbate adverse health effects. 68 Fed. Reg. at 32809 (1 hour ozone designations are proposed to be revoked one year after 8 hour designation are final).
- Eliminating the requirement that areas which recently had health-threatening air pollution levels must continue to monitor the effects of transportation plans on air pollution and public health through limiting motor vehicle emissions to levels needed to maintain compliance with public health standards. *Id.* at 32809 and 32842 (1-hour conformity revoked for maintenance areas).
- Providing huge loopholes for 8-hour ozone non-attainment areas to be exempted from controlling motor vehicle emissions and new source review for large industrial sources on the basis of weak and flawed analysis claiming to attain public health standards, without adequate plans to ensure timely attainment, or on the basis of other seriously flawed incentive programs. *Id.* at 32849 (Clean Air Development Communities proposal) and 32815 (proposed incentive feature).

Together, these changes would cause great harm to those who suffer from health problems related to poor air quality by allowing motor vehicle emissions to increase prior to the

submission of a new attainment SIP for the 8-hour NAAQS that includes motor vehicle emissions budgets adequate to provide for attainment, delaying by years more the day when air quality would meet even the existing 1-hour NAAQS while waiting for the 8-hour NAAQS to be fully implemented.

EPA's proposal includes these conformity rollbacks despite the fact that Congress passed the 1990 Clean Air Act Amendments, including transportation conformity provisions, precisely so that transportation plans would no longer routinely undermine progress towards healthful air quality, as they had repeatedly since the 1970 Clean Air Act. Transportation conformity ensures that transportation plans and programs do not delay timely attainment of the National Ambient Air Quality Standards (NAAQS).

Transportation conformity has been very effective at motivating actions to curb pollution and protect health. Conformity has spurred support for cleaner vehicles, fuels, and maintenance, and strategies to curb traffic and pollution growth with better travel choices. It has gotten transportation and air quality agencies finally talking to each other. As we discuss below, disabling conformity and dismantling effective emission reduction strategies, as EPA's proposal would do, is likely to undermine this progress in places like Washington, DC, where conformity is working to produce progress towards attainment.

EPA's 8-hour implementation strategy proposes to render ineffective for many years the transportation conformity programs in the nation's most seriously polluted areas like New York, Washington, Atlanta, Baltimore, Chicago, Sacramento, California's Central Valley, Los Angeles and Houston, making it certain that these areas will once again fail to achieve healthful air quality by the deadlines established by the Clean Air Act for the 1-hour standard, and potentially exacerbating the magnitude of future emissions reductions needed to attain the 8-hour NAAQS.

It also proposes to remove the public health protections that transportation conformity affords for areas that are in maintenance of the 1-hour standard and attainment of the 8-hour standard, such as Portland, Oregon, which according to regional planning officials there, nonetheless has to work hard year-by-year to stay within its 1-hour maintenance motor vehicle emission budget which is designed to protect public health from threatened future violations of the NAAQS. If EPA revokes the 1-hour standard and the obligation to conform motor vehicle emissions to the emissions budgets contained in the current Portland SIP, Portland's emissions are likely to rise, and support for emission reducing initiatives will be lost, including millions of dollars of federal Congestion Mitigation Air Quality funds that are critical to maintenance plan implementation.

1. Transportation Conformity Must Be Retained: It Produces Emission Reductions Through Disclosure and Accountability.

Transportation conformity is like a periodic health checkup for a patient ill with respiratory disease or cancer. It is designed to make sure the patient – in this case a metropolitan area with unhealthy air quality – does not make transportation decisions that will exacerbate the health problem but that instead contribute to timely improvement of air quality. Like a health checkup, conformity checks on whether the prescribed air quality treatment plan is being followed, including appropriate medications, proper diet, and avoidance of unhealthy behaviors, and it provides for timely monitoring and evaluation of vital systems to see if any change in the treatment plan is needed.

Conformity ensures that transportation spending and planning decisions are accountable to public health, air quality and the environment. In the past decade, the science linking emissions from the transportation sector to public health has confirmed, time and again, the powerful link between health and the environment, and shown that how transportation funds are

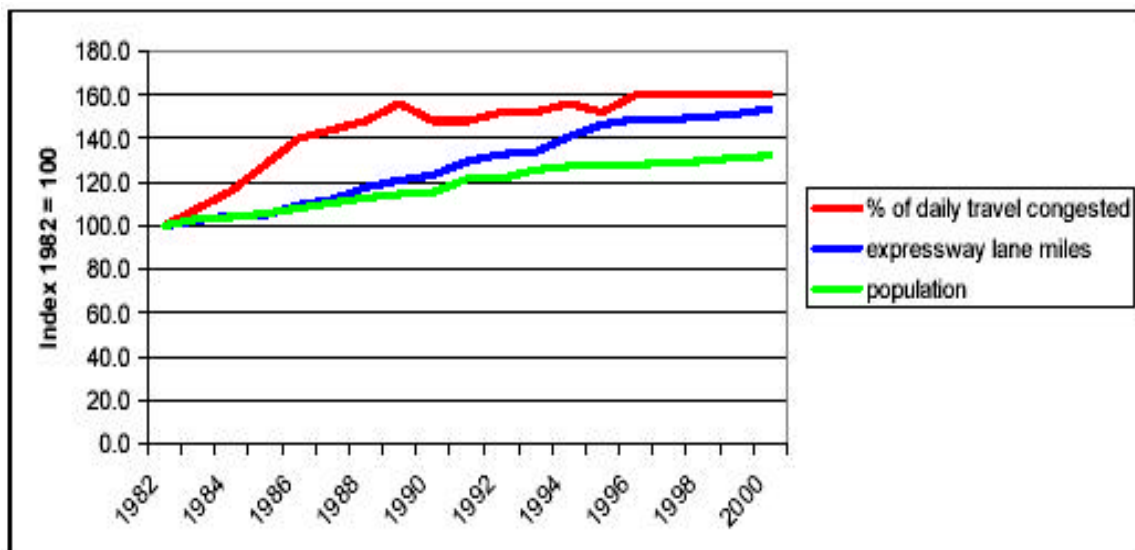
spent has a strong influence on land use, the number of vehicle miles driven, and resulting air pollution emissions. If conformity is weakened, billions of dollars will be spent on transportation without accountability for public health impacts.

2. EPA's Proposal Will Yield Air Quality Rollbacks: A Look At Metro Washington, D.C.'s Success Under the Existing Requirements, But Likely Problems Under the EPA Proposal.

To understand the effects of these proposed rules, it is helpful to look at an example of how conformity and clean air laws have worked in a typical metropolitan area and how EPA's proposal would change things. The Washington, DC metropolitan area has faced serious air pollution problems - due in large measure to emissions from motor vehicles - since before adoption of 1970 Clean Air Act. Like many other areas, the DC metro area's air quality control plans have repeatedly failed to achieve healthful air quality, missing deadline after deadline. The 1990 CAA Amendments classified the DC region as a "serious" ozone non-attainment area and gave it until 1999 to attain the 1-hour ozone standard. But the region's officials delayed taking steps needed to clean up the air. As the chart below illustrates, from 1982-2000, investments in lane miles of freeway capacity outpaced population growth, prompting sprawl and even greater traffic growth, and offsetting many of the pollution reductions that came from cleaner fuels and vehicles.

In the early and mid 1990s, in the absence of a motor vehicle emission budget (MVEB) setting pollution limits as part of a State Implementation Plan (SIP) for air quality, the region relied on the largely ineffective transitional "build/no-build" conformity test. To pass that test, the area's officials simply demonstrated that by adding changes to the region's transportation plan, pollution would be some tiny fraction less than continuing with the adopted transportation plan, all the while ignoring – due to EPA's acquiescence to deeply flawed and discredited

computer traffic models - induced sprawl and traffic impacts of transportation projects such as outer beltways. In short, the build/no-build test failed to offset the effects of traffic growth on pollution levels, the very thing that conformity is intended to address.



Texas Transportation Institute *Urban Mobility Study* data for the Washington D.C. region

A State Implementation Plan (SIP) demonstrating how the region would attain the 1-hour standard by 1999 was required from the region's governments by 1994 -- but was not submitted until 2000, after litigation by Environmental Defense, the Natural Resources Defense Council and others compelled EPA and regional authorities to comply with the clear requirements of the CAA. Interim SIPs were submitted in the mid and late 1990s to demonstrate only "Reasonable

Further Progress” (RFP) toward attainment – defined by the CAA as a 3 percent annual reduction in ozone precursors – and these resulted in some added emission controls.

Thus, it is only in the past two and a half years – nearly a decade later than originally contemplated in the CAA - that the DC region has established a motor vehicle emission budget as part of a plan to attain the 1-hour ozone standard. This emissions budget is the critical pollution limit used to ensure that the transportation plan and program will achieve the limit on motor vehicle emissions that the States determined to be necessary to attain the air quality standard. With this limit on motor vehicle emissions in place, conformity is a very simple and elegant test: does the transportation system keep pollution emissions within the limits that are designed to protect public health?

With emissions budgets in place, in July 2001, Washington-area officials sought to update the region’s transportation plan more than a year before its conformity finding was due to expire, so they could include several new regionally-significant highway projects. The area’s Metropolitan Planning Organization (MPO), in a routine update of modeling assumptions, found mobile source emissions exceeding the SIP emission limits by about 8 tons per day of nitrogen oxides (NOx) when the growing use of sport utility vehicles (SUVs) and light trucks was accounted for, as these vehicles produce significantly more pollution per mile driven than standard cars. This finding was an early warning that additional emission reduction strategies needed to be adopted before new road projects could be added to the transportation plan. Officials formed a task force to consider reopening the SIP to allow for more motor vehicle pollution by finding offsets from other emission sources or fixing the conformity problem by adopting added emission reduction measures. Over the course of a year, area officials

deliberated, and eventually settled on three major types of actions which each contributed significantly to address the conformity problem within the transportation planning process:

- The MPO refined their models to **better account for emissions and for emission reducing measures** already being implemented by the District of Columbia and other jurisdictions, but not previously credited by planners.
- The state of Maryland advanced a \$42 million package of **new transportation emission reduction strategies**, including buying clean buses, improving pedestrian and bicycle access to transit, and supporting transit oriented development and telework.
- The state of Virginia **cut back its proposed short-term road program** for 2005 by 100 lane miles of new road capacity (representing about 0.5% of 2005 modeled road capacity), which the MPO estimated would result in a 1% reduction in regional mobile source NO_x, a 0.1% decrease in VOC, a 0.6% reduction in daily VMT, and a 1.3% increase in daily transit trips.²⁹ And Virginia taxpayers saved \$800 million.

This is a conformity success story.³⁰ But if the region's 1-hour ozone non-attainment designation had been revoked, and along with it the motor vehicle emission budget, the replacement build/no-build test would have been completely blind to the increased emissions from rising use of SUVs and light trucks. This is because build/no-build is not aimed at achieving specific levels of emissions that have been identified as necessary to achieve a prescribed air quality outcome. It looks only at whether emissions will be less with a plan than with no plan at all. If emissions without a plan would increase by 4% annually, a plan that reduced the emissions increase to 3.999% would be found to conform. The result would have been fewer emission reduction measures and more pollution. Awareness of the emission benefits of reduced road expansion would have gone unnoted. The MPO would have devoted less time

²⁹ Kirby, Ronald. F., "Emissions Estimates Associated with the 2002 CLRP And FY2003-08 TIP, and Potential Transportation Emissions Reductions Measures (TERMs), memorandum of June 28, 2002 to Transportation Planning Board, Washington, DC, Attachment 1, "New 2005 Emissions Calculations Reflecting Changes In the Six-Year Plan and Certain Posted Speed Limits in Virginia".

³⁰ This is not to say that the Washington region is in full compliance with the Act, either with regard to SIP or conformity requirements. The Region still has a long way to fully comply with the Act's requirements with respect to ozone.

and resources to considering strategies to reduce emissions and traffic growth. The result would have been dirtier air, more sick kids, more premature deaths from respiratory problems, and more damage to the health of the Chesapeake Bay and other ecosystems caused by excess air pollution from motor vehicles.

Specifically, EPA's proposal would allow the outer beltways around Washington, D.C. and other major metropolitan areas to be approved in the absence of a motor vehicle emission budget, even if the region had failed to attain the 1-hour ozone standard, and even though these road projects would contribute to increased vehicle emissions above the current motor vehicle emissions budgets adopted as part of the metro-area SIP, and result in substantial degradation of air quality. These emissions increases increase emissions that will contribute to new or more severe violations of both the 1-hr and 8-hour NAAQS, and also make it much more unlikely that the region will attain the 8-hour ozone standard by the deadline.

3. The Act Requires That EPA Retain Conformity's Effectiveness.

The Act requires that EPA keep in place adopted emission budgets for motor vehicles and control strategies for all sources that have been adopted by states to implement the 1-hour ozone standard. When a new set of more protective motor vehicle emission budgets and control strategies are fully in force to implement the 8-hour NAAQS, the current motor vehicle emissions budget used for conformity purposes may be superseded. Moreover, to achieve the full measure of protection from the adverse effects of both 1-hour and 8-hour exposures, both NAAQS must be applied. Otherwise, there is a serious likelihood of backsliding towards dirtier air in America's most polluted and most populated metropolitan areas, with lengthy delay in attainment of healthful air quality.

a. 1-Hour NAAQS May Not Be Revoked.

Part D, subpart 2 of the Act requires states that have been designated nonattainment for the 1-hour NAAQS to adopt and implement plans to attain and maintain the 1-hour NAAQS. As the Supreme Court observed in *Whitman v. American Trucking Assns*, 531 U.S. at 483, Congress “codified” the old standard by enacting Table 1 in section 181. From this and other provisions of Subpart 2, the Court concluded that “Subpart 2 [] eliminates regulatory discretion that [Subpart 1] allowed.” Included within the discretion withdrawn by Subpart 2 is the option of revoking the 1-hour NAAQS. The Act in Subpart 2 expressly requires that the States adopt and submit plan revisions that “shall provide for such specific annual reductions in emissions...as necessary to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter,” CAA §182(b)(1)(A), and “a demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date. CAA § 182(c)(2)(A). Indeed, this was the Supreme Court’s understanding of EPA’s view during the NAAQS rulemaking, *i.e.*, that Subpart 2 was simply Congress’s ‘approach to the implementation of the [old] 1-hour standard.’” *Whitman*, 531 U.S. at 483. The Court concluded that the congressional scheme for implementing the 1-hour standard “reaching so far into the future was not enacted to be abandoned the next time the EPA reviewed the ozone standard—which Congress knew could happen at any time.” *Id.* at 485. “The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Id.* Because the detailed regulatory scheme in Subpart 2 was enacted to require implementation of the 1-hour NAAQS, that standard must continue to be implemented.

b. Conformity To Current SIPs Is Still Required Even if 1-Hour NAAQS Is Revoked.

Even if Congress had not codified the 1-hour NAAQS by enacting Table 1 and required its implementation by enacting the subsequent provisions of Subpart 2, EPA may not lawfully revoke conformity requirements currently in effect with regard to requiring compliance with the motor vehicle emissions budgets contained in current SIPs.

Section 176(c)(5) states that conformity applies to—

(A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and

(B) an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 7505a of this title with respect to the specific pollutant for which the area was designated nonattainment.

Any area currently designated nonattainment for ozone retains that designation until the area has been redesignated by the Administrator as an attainment area pursuant to section 107(d)(3)(E).

Even assuming *arguendo* the 1-hour NAAQS could be revoked, any area currently designated nonattainment for the pollutant ozone will retain that designation for ozone until it has been redesignated as in attainment with the ozone NAAQS in effect at the time of redesignation.

Areas currently designated nonattainment for ozone will therefore remain subject to the conformity provisions of the Act as either nonattainment or redesignated attainment areas. There can be no lawful hiatus when conformity does not apply.

The Act prohibits federal approval, funding or support for “any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.” CAA § 176(c)(1). More specifically relating to transportation plans, programs and projects, the Act prohibits any federal agency from approving, accepting or funding “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.” CAA §176 (c)(2).

Thus transportation conformity must be determined with the SIP as approved or promulgated by EPA.

The single most important aspect of conformity is the demonstration that the emissions expected from implementation of the transportation plan “are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan.” CAA § 176 (c)(2)(A). As long as the applicable implementation plan contains estimates of emissions from motor vehicles and includes transportation control measures (as defined in 40 CFR § 93.101) or other control measures to achieve necessary reductions in motor vehicle emissions, conformity with those estimates and necessary reductions must be demonstrated. The Act offers EPA no option to waive this requirement when a new NAAQS is promulgated, or an existing NAAQS is revised or revoked. Conformity is a SIP-based process and continues to apply as long as a SIP is required for the pollutant. Therefore, even if the 1-hour NAAQS is revoked, conformity with the ozone SIP will continue to be required as long as a SIP is required for ozone. We do not understand EPA’s proposed implementation policy as allowing states to revoke their ozone SIPs, or approved control measures in their ozone SIPs -- and any such approach would violate the Act's anti-backsliding provisions.

Administratively, EPA has created by rule the motor vehicle emissions budget (MVEB, as defined in 40 CFR § 93.101) as the mechanism for implementing the statutory requirement for consistency between the transportation plan, program and projects and the SIP. The MVEB is generally identified as a specific element of the SIP that is approved, or found to be adequate for transportation conformity purposes, by EPA. Once approved, it is a part of the applicable

implementation plan which establishes the benchmark for determining the conformity of transportation plans, programs and projects.

EPA may not by fiat remove the MVEBs from a SIP or render them nugatory for transportation conformity purposes. EPA may not unilaterally revise a state's SIP or suspend a State's SIP. When EPA finds a deficiency in a State SIP, EPA is authorized only to "require the State to revise the plan as necessary to correct inadequacies." CAA § 110(k)(5). But such authority is limited to cases where "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." *Id.*

In order to require States to revoke the MVEBs in their SIPs, EPA would have to find that the current MVEBs are not adequate to attain or maintain, and "require the State to revise the plan as necessary to correct such inadequacy." EPA's proposed implementation policy does not propose any such findings, nor does EPA propose any corrections that would be necessary to replace an inadequate MVEB with one that is adequate to implement the 8-hour NAAQS. In any event, if EPA were to follow this procedure to replace the current MVEBs, the existing inadequate MVEB would remain as part of the SIP until replaced with an adequate MVEB. Nothing in the Act authorizes EPA to suspend the use of the currently approved MVEBs in the SIP.

Nor may EPA lawfully allow the States to discontinue implementation of the MVEBs in their current SIPs. If a State fails to implement "any requirement of an approved plan," including the requirements adopted as part of each State's approved conformity SIP, EPA's

obligation is to impose sanctions pursuant to section 179(a)(4). The Act does not authorize the Administrator to encourage the states to discontinue implementation of approved plan requirements.

c. States May Not Revise SIPs to Remove MVEBs Without Making Statutory Showing Required by § 110(l).

States are free to revise their SIPs at any time, but any revision that would involve revoking or revising the MVEBs in the ozone SIP would require compliance with the showing required by Section 110(l), *i.e.*, that the revision would not “interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this chapter.” This test would require any State that proposed to revoke or revise the MVEB in its SIP to show that such revision will not interfere with attainment of the NAAQS for ozone in effect at the time the proposed revision is submitted, will not interfere with reasonable further progress toward attainment of such NAAQS, and would not interfere with determining the conformity of transportation plans, programs and projects to the estimates of motor vehicle emissions and necessary emissions reductions required by the applicable implementation plan as well as the statutory criteria for determining conformity in sections 176(c)(1)(A) and (B).

To ensure that the tests imposed by section 110(l) are applied consistently, and to give advance notice to the States and the breathing public of the criteria to be applied, commenters request that EPA develop guidance governing how this provision will be applied to States that attempt to revoke or revise MVEBs or control measures during the period prior to approval of a full attainment demonstration for the 8-hour NAAQS that includes a MVEB adequate to provide for attainment. At a minimum, such guidance must make clear that the benchmark for applying the statutory tests governing EPA’s approval of SIP revisions requires a showing that emissions

will not be allowed to increase during the interim period, and that any requirement for reasonable further progress prior to approval of a full attainment demonstration will be satisfied. The guidance must also make clear that the statutory criteria for conformity continue to apply, and that an emissions analysis showing compliance with a MVEB pursuant to 40 CFR § 93.118 must be used for any area where the SIP contains motor vehicle emissions estimates and/or control measures that have been adopted to achieve “necessary emissions reductions” for any purpose under the Act.

d. Policies Proposed by EPA May Not Trump Statutory Conformity Requirements.

EPA asserts that revocation of the 1-hour NAAQS, and/or MVEBs for conformity purposes, is necessary to avoid the diversion of agency resources away from planning to meet the 8-hour standard. 68 Fed. Reg. at 32822/1. But neither the revocation of the 1-hour standard nor MVEBs is justified on this basis with respect to transportation and emissions modeling. Evaluating conformity under either standard requires establishment of base year inventories, future forecasts, and simulation modeling tools to translate demographic data, transportation system characteristics, spatial and meteorological data, vehicle data, and other information into forecasts of travel, traffic, emissions, and emissions. Establishment and maintenance of this information and evaluation systems requires resources, but once in place, the level of effort in both time and money to produce analyses to different regional boundaries (*e.g.*, for a 1-hour non-attainment area vs. an 8-hour non-attainment area) is relatively small.³¹ This is *particularly* true in comparison with the \$40-60 billion a year in health costs faced by Americans as a result of

³¹ A common situation would be that the 1-hour non-attainment area is contained within a larger 8-hour non-attainment area. In this case, conformity would be demonstrated to the 1-hour budget for the 1-hour area, while the larger area subject to the 8-hour NAAQS should be subject to a transition test in the absence of an emission budget that has been found adequate as part of an attainment demonstration.

motor vehicle air pollution (Table 9, *Addendum to the 1997 Federal Highway Cost Allocation Study Final Report*, U.S. Dep't of Transportation, Federal Highway Administration, May 2000).

With a 1% set aside of federal Surface Transportation Program funds for Metropolitan Planning Organizations and a 3% set aside of Surface Transportation Program and other federal funds for state planning and research, there are ample resources available to pay for regional and state analysis of conformity to both the 1-hour and 8-hour standards, ensuring attainment and continued maintenance of any NAAQS that has ever been violated in a region.

e. Conformity Determinations In Areas Without Approved MVEBs.

Conformity of transportation plans and programs in newly designated nonattainment areas lacking an adequate and approved motor vehicle emission budgets should be demonstrated if that plan or program is demonstrated to achieve no net increase in motor vehicle emissions in the non-attainment area in the period between designation as nonattainment and approval of a motor vehicle emission budget as adequate to attain the NAAQS.

This transitional test would be far preferable to the “build/no-build” test that was applied by EPA in the early and mid 1990s, for the period prior to the establishment of motor vehicle emission budgets in SIPs. As designed by Congress in the 1990 Clean Air Act, conformity is intended to focus on comparing forecast motor vehicle emissions in a transportation plan and program with an adopted motor vehicle emission budget (MVEB) established in a SIP designed to enable a region to attain the National Ambient Air Quality Standards (NAAQS) by deadlines established by law. Where such MVEBs exist, they must be used as the fundamental yard-stick to measure conformity of transportation plans and programs with air quality plans. Where they do not exist, the build/no-build test is not a legally permissible substitute.

The deficiencies in the “build/no-build” transition rule, amply demonstrated by numerous decisions applying it, include the length of the transition to conformity against adopted SIP MVEBs, and the build/no-build test's disregard of overall emissions growth in an area. The build/no-build rule, first issued by EPA and DOT in 1991, compares emissions in a base-case no-build future scenario vs. emissions in a build scenario, adding or subtracting the applicable transportation projects changes proposed in any given TIP or RTP amendment. This test does not satisfy the statutory conformity tests because it allows emissions increases without regard to whether those increases may cause the statutory conformity tests to be violated. When motor vehicle emissions are allowed to increase in an area, they may “cause or contribute to any new violation of any standard,” or “increase the frequency or severity of any existing violation of any standard,” or “delay timely attainment of any standard or any required interim emission reductions” in violation of section 176 (c)(1)(B). Therefore, the build/no-build test may not be applied as the sole test for conformity during an interim period in areas without identified MVEBs.

Previously EPA paired the build/no-build test with an emissions baseline test that ensured that emissions were not allowed to increase during an interim period. This approach prevents backsliding until MVEBs can be adopted to implement ROP schedules prior to adoption and submittal of complete control strategies that provide for attainment. The baseline must be set at emissions levels that occurred at the time of designation to ensure that emission improvements from earlier baseline periods are not available for backsliding, and to not impose a burden on transportation agencies to reduce emissions increases that may have occurred prior to the year of designation.

However, even the baseline emissions test would not be acceptable if it continued to apply during the period after annual reductions are required to meet ROP reductions. EPA must clearly tie the duration of the baseline emissions test to the period before SIP revisions are required to achieve ROP, and that ROP requirements shall include the submission of MVEBs consistent with each ROP milestone period.

f. Motor Vehicle Emissions Analyses and Emissions Inventories Require Use of the Most Reliable, State-of-the-Art Modeling Tools.

Emissions analyses for conformity and for SIP development purposes have assumed no induced land use change or shift in the time-of-day of traffic caused by transportation system changes. Numerous peer-reviewed studies have demonstrated that induced traffic effects are profound and the addition of 10% more lane miles of roadways can be expected to induce an additional 3 to 11% vehicle miles traveled in a region in a few years time. If induced traffic is unaccounted for, the emissions analysis is invalid, and will underestimate motor vehicle emissions growth associated with major highway system expansions, working against the CAA statutory mandate that SIPs must achieve the emissions reductions needed for attainment, and transportation plans and programs must contribute to timely attainment of the NAAQS.

It is vital that areas expected to be designated as new non-attainment areas now begin to take steps to develop reliable emissions inventories and to meet conformity analysis requirements. The TEA-21 federal transportation law provides flexible funding to states and regions in the Surface Transportation Program and other funding categories that can be used for planning and data collection. Such funds must be used now to establish sound, up-to-date, local inventories of jobs, housing, highways, transit resources, and travel behavior, to develop locally-applicable transportation planning models that meet best practice standards for appraising travel behavior and induced traffic, to code information on planned transportation investments and

forecast job and housing growth expectations, and other information. Outside consultants should be retained to help cultivate local expertise to sustain these analysis systems, which have many cost-effective applications beyond conformity analysis in supporting sound capital program planning, traffic and transit operations planning, transportation equity analysis, growth management, cost-allocation evaluation, and other activities. The cost of establishing such planning and analysis systems is but a tiny fraction of the annual capital facilities investment costs of most states and regions, but can have a payoff far in excess of these costs by assuring more sound decision-making, investment planning, and identification of lower-cost and more optimal strategies for meeting local and national mobility, environmental, economic development, and equity goals. Establishing these planning and analysis tools in a metropolitan area can be accomplished in less than a year, but does require agency commitment and ongoing support.

g. Promised Modeling Guidance Must Be Issued to Ensure that Motor Vehicle Emissions Estimates Used In SIP Development Are Reliable.

EPA and DOT should promptly issue long-promised additional model guidance and regulations to assure that non-attainment areas properly account for induce land use and traffic effects in conformity analysis and SIP transportation modeling. There are no valid reasons why any newly designated non-attainment area cannot establish the requisite transportation and emissions analysis systems well in advance of the expiration of the one-year grace period following designation. Until adopted SIP MVEBs are available to provide a basis for conformity, a no net increase in emissions test would be preferable to the build/no-build test for evaluating conformity in non-attainment areas.

EPA furthermore should take steps in the 8-hour ozone implementation framework to ensure better analysis tools and assumptions are used by the agency and by the FHWA to support

preparation of SIPs and conformity. Traffic and emission forecasts often rely on unsupportable assumptions that go unquestioned in the interagency review process. FHWA and EPA have failed to enforce key Clean Air Act and TEA-21 planning requirements that transportation plans and programs must be fiscally constrained and show the sources of funding that can be relied upon to implement and operate them. They have also failed to enforce regulatory requirements that the effects of congestion and new transportation capacity on travel time and cost appropriately be “fed-back” through the travel behavior analysis process and reflected in emission and traffic estimates.

Many Metropolitan Planning Organizations (MPOs) continue to rely on unrealistic and questionable financial and technical forecasts as they determine the quality and performance of regional transportation systems in future years, including the level and price of transit services, the characteristics of motor vehicles being driven, and the amount of traffic and emissions. Poor accounting often leads to underestimation of motor vehicle emissions, making it more likely that State Implementation Plan (SIP) air pollution control strategies will again fail to deliver on the promise of healthful air for all Americans, more than 32 years after the first Clean Air Act.

The failure to reflect “induced” traffic often leads to underestimation of emissions. EPA and FHWA must assure that MPO traffic models used for conformity and project impact analysis appropriately reflect scientifically established relationships between travel time, travel cost, and traveler behavior, as reflected in numerous induced traffic studies. If MPO models do not reflect these relationships adequately, immediate corrective action must be required to assure honest accounting for traffic and emissions growth, with a timely investment in developing best practice analysis methods, regionally and nationally. These empirical relationships are well reviewed in a paper by two former EPA scientists. Their survey of the literature found that in general for every

10 percent increase in road lane miles, it is typical to find a 3 to 11 percent increase in vehicle miles traveled, with 8 percent being a typical median value. As this paper notes,

Regional transportation planning agencies (or the states) generally maintain a system of models to forecast and evaluate the impact of transportation projects and plans. These models are usually deficient in accurately forecasting emissions (Transportation Research Board 1995) partially because they do not adequately account for both short and long run induced travel effects. This can be partially corrected by building feedback mechanisms into the models to at least account for some of the short run impacts (Johnson and Ceerla, 1996 a). Air quality regulations already require this step for conformity analysis, though actual practice has generally not kept up with the regulatory requirement.

Some EPA regions are working with metropolitan planning organizations to improve the state of the practice in the modeling of transportation impacts, in particular the impacts of transportation on land development. Various modeling packages (none of which are ideal) are available to provide estimates of land development changes induced by transportation and accessibility changes. Improved modeling of these impacts would provide decision-makers with far better information on the short-run and long-run emission impact of alternative transportation plans and are critical for development of State Implementation Plans that will actually help bring a region into attainment of the NAAQS. Project selection criteria would also be vastly improved.³²

Notable improvements to models used for transportation and air quality planning are being made in many regions, including Portland, Oregon and Sacramento, California. And other states also are making progress.³³

EPA has issued guidance that encourages submission of attainment SIPs that sound science indicates are unlikely to provide for the attainment of the National Ambient Air Quality Standards (NAAQS) as they are required to do. EPA OAQPS, *Policy Guidance of the Use of Mobile6 for SIP Development and Transportation Conformity* (January 18, 2002)

³² Robert Noland and Lewison Lem, "A review of induced travel and changes in transportation and environmental policy in the US and the UK," *Transportation Research Part D*, Vol. 7, 2002.

³³ The Ohio Department of Transportation for example has launched a \$6 million program to develop an integrated transportation and land use model. This work follows the example of Oregon, which has pioneered a similar state-wide model and which is sharing it with its metro area planning agencies. And the Columbus Mid-Ohio Regional Planning Commission is developing an activity-based travel micro-simulation model which offers the promise of bringing that area's analysis tools up to best practice standards. These kinds of tools are vital to making performance-based planning a reality rather than an ill-supported pipe-dream.

(www.epa.gov/otaq/models/mobile6/m6policy.pdf) (allowing the use of a proportional rollback assumption). Moreover, EPA has been finding such SIPs adequate and granting them full approval. Conformity to the emission budgets in these SIPs is unlikely to result in attainment by the statutory deadlines.

In January 2002, EPA released a new Mobile 6 emission factor model that metropolitan areas and states must use this year or next year to update their SIPs. In nearly all metropolitan areas, this improved model is showing that mobile source emissions of NO_x and VOC are significantly higher than previously estimated for years prior to 2007. Thus, emissions will be higher than previously thought in the attainment deadline years that have been established for serious and severe 1-hour ozone nonattainment areas. These substantial excess emissions in the attainment year are likely to cause the attainment SIPs to fail unless these emissions are offset by added emission reductions. Yet EPA is relying on proportional rollback assumptions to accept these SIPs, rather than pressing for full emission reductions for the attainment year. This is compounded by EPA's proposed 8-hour implementation framework, which proposes to revoke the 1-hour standard in 2005 and to eliminate further bump-ups, reasonable further progress requirements, adoption of added emission reduction strategies, section 185 penalty fees, or other consequences for failure to attain, just as it becomes apparent that many areas will fail to demonstrate attainment in 2005.

Before accepting new Mobile 6 SIPs as adequate for purposes of conformity, or as new attainment demonstrations, EPA must require states to either offset these increased emissions or to use a regional airshed model to evaluate whether their SIP strategies will be adequate to demonstrate attainment by the statutory deadlines. EPA has offered states guidance that would allow them to use scientifically unsupported "rollback" methods in lieu of new modeled

demonstrations of attainment with the latest emission inventories and forecasts. EPA must require areas to consider by how much emissions will increase in each SIP milestone and attainment year using Mobile 6, compared to the emissions estimated using the older Mobile 5 model, and ask the states to evaluate with regional airshed models the effect these increased emissions will have on forecast ozone levels in various attainment years.

Transportation agencies must be required to promptly upgrade their computer models to effectively consider air quality, induced traffic, and fully-up-to-date planning factors. EPA and DOT must establish best-practice planning model standards and to require timely action by MPOs and other agencies to meet these standards for conformity and SIP planning. A recent report (U.S. General Accounting Office, *Environmental Protection: Federal Incentives Could Help Promote Land Use That Protects Air and Water Quality*, Washington, DC, October 2001, GAO-02-12, page 95) notes that, “DOT and EPA efforts to improve travel-demand-forecasting models may help MPOs and communities determine the effects of transportation improvements on congestion and air quality. However...these efforts currently do not call for integrating land use or environmental components into the travel demand model...Without such integrated models, communities cannot consider the likely effects that their transportation decisions will have on land use, future growth and development, and air quality.” U.S. GAO-02-12, at page 95.

In regions where transportation models used for conformity and air quality planning have not been upgraded to integrate land use and environmental components, including full sensitivity to induced traffic and growth effects of transportation investments, urban design, and pricing policies, less frequent conformity analysis is likely to impair timely upgrading of analyses.

B. The Approaches to the New Source Review Program Reflected in EPA's Proposal Are Contrary to Law.

1. EPA's Proposed "Transitional NSR Program" Is Arbitrary, Capricious, and Otherwise Not in Accordance With Law.

a. Allowing the "Transitional NSR Program" to Apply in Areas Designated Nonattainment Under the Eight-Hour Ozone Standard Would Violate Subpart 2 of Part D.

Paragraph (b)(1) of section 181, which is within subpart 2 of part D of the Act, states that

[a]ny 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 redesignation, be classified by operation of law in accordance with table 1 under subsection (a)(3) of this section.

42 U.S.C. § 7511(b)(1). As soon as the automatic classification takes place,

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) of this section³⁴

Id. In other words, an area that is designated attainment for ozone under the one-hour standard and later designated nonattainment for ozone under the eight-hour standard receives its nonattainment classification (moderate, serious, severe, *etc.*) by operation of law and immediately becomes subject to all of the requirements (in section 110, subpart 1, and subpart 2) that apply to that classification.

Under EPA's proposed scheme, an area that is designated attainment for ozone under the one-hour standard and later designated nonattainment for ozone under the eight-hour standard does not become subject to any of the preconstruction permitting requirements that apply to

³⁴ Paragraph (b)(1) ends, ". . . except that an 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." 42 U.S.C. § 7511(b)(1).

ozone nonattainment areas for as long as six months after the redesignation. 68 Fed. Reg. at 32846-48.³⁵ This scheme is “not in accordance with law” in that it violates the Act’s express mandate that all of the requirements applicable to ozone nonattainment areas apply immediately upon nonattainment redesignation. 42 U.S.C. § 7607(d)(9)(A). “The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman v. American Trucking Assns*, 531 U.S. at 485. *See also Sierra Club v. Whitman*, 129 F.3d 137, 138 (D.C. Cir. 1997) (vacating twelve-month grace period from Clean Air Act conformity requirements on grounds that Act set forth those requirements unequivocally and says nothing of grace periods).³⁶

b. Allowing an Area Designated Nonattainment Under the Eight-Hour Standard to Ignore Control Requirements in Effect Due to the Area's Preexisting Nonattainment Status Under the One-Hour Standard Would Violate Section 193 and Section 110(l).

Section 193 of the Act states, in part, that

[n]o control requirement in effect, or required to be adopted by a[] . . . 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.

42 U.S.C. § 7515. So if certain control requirements applied in an area before November 15, 1990 by virtue of the area’s nonattainment status under the one-hour ozone standard, then those requirements may not be relaxed during any subsequent period in which the area is in nonattainment under an ozone standard.

³⁵ “A state may continue implementing transitional NSR under appendix S, section VI for six months following submission of its attainment plan, or until its attainment plan is approved, whichever is earlier.” 68 Fed. Reg. at 32848/1.

³⁶ EPA seeks authority for its proposal in 40 C.F.R. § 52.24(k) and Appendix S to 40 C.F.R. § 51; however, those regulations were promulgated before enactment of – and therefore were superseded by – section 181(b)(1).

Under EPA's proposal, if an area had been subject to the nonattainment preconstruction permitting requirements as a nonattainment area under the one-hour ozone standard before November 15, 1990, and if the area subsequently attained the one-hour standard, then, upon the area's designation as nonattainment under the eight-hour standard, the preconstruction permitting requirements in effect prior to November 15, 1990 would be relaxed. The relaxation would occur in one of two ways. In states where the control requirements for nonattainment areas explicitly referenced a list of areas, and where the list did not include certain of the areas later designated nonattainment under the eight-hour standard, the relaxation in the latter areas would be automatic. 68 Fed. Reg. at 32845/1-46/1. In states where the control requirements for nonattainment areas were not expressly limited to specifically identified areas, the authorities could still effect the relaxation by revising their SIPs to make clear that the nonattainment requirements did not apply to areas designated nonattainment under only the eight-hour ozone standard.³⁷

EPA's scheme to allow relaxation under the first scenario is not in accordance with section 193 in that it allows the control requirements in effect before November 15, 1990 to be relaxed automatically upon nonattainment designation under the eight-hour standard. The agency's plan to allow relaxation under the second scenario is not in accordance with section 193 in that it invites states to relax the control requirements through a SIP revision.³⁸

³⁷ "States with already applicable part D NSR programs may choose to amend their SIPs to allow them to take advantage of the transitional option described in this section, provided they meet the transitional program eligibility criteria." 68 Fed. Reg. at 32844 n. 67.

³⁸ EPA again seeks authority for its proposal in 40 C.F.R. § 52.24(k) and Appendix S to 40 C.F.R. § 51. But again, those regulations were promulgated before enactment of – and therefore were superseded by – section 193. Moreover, the rules EPA cites were intended to bridge a regulatory gap that existed in some states. They were not intended as an alternative to the statute for states in which no regulatory gap existed. EPA's proposal to pervert the rules to serve this second, unjustified purpose thus not only violates section 193, but is also arbitrary and capricious. *See* 42 U.S.C. § 7607(d)(9)(A).

The plan to allow relaxation under the second scenario also violates section 110(l) of the Act. That provision declares, in part:

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.

Id. at § 7410(l). The nonattainment preconstruction permitting requirements “concern[] attainment and reasonable further progress.” *See, e.g.*, 42 U.S.C. § 7503(a)(1)(A) (requiring offsets as a nonattainment preconstruction permitting requirement in order to ensure “reasonable further progress (as defined in section 7501 of this title)”). It follows that if a SIP is already written such that nonattainment preconstruction permitting requirements will apply in an area as soon as it is designated nonattainment under the eight-hour standard, then any revision that thwarts the automatic effectiveness of those requirements “interfere[s] with any applicable requirement concerning attainment and reasonable further progress.” 42 U.S.C. § 7401(l). EPA’s announcement that states “with already applicable part D NSR programs may choose to amend their SIPs to allow them to take advantage of the transitional option,” 68 Fed. Reg. at 32844/3 n. 67, thus violates section 110(l).

c. Allowing an Eight-Hour Nonattainment Area to Ignore Control Requirements in Effect Due to the Area's Preexisting Nonattainment Status Under the One-Hour Standard Would Violate Congressional Intent Clearly Expressed in section 172(e).

EPA’s scheme is premised on the assumption that when the agency determines that the standard necessitating certain pollution control requirements is *not protective enough* to safeguard public health, the agency may allow those requirements to be *relaxed* in areas designated nonattainment under the new, more protective standard. The agency cites no statutory language to support this premise. EPA’s silence is not surprising, for the Act clearly

expresses a contrary Congressional intent.

Section 172(e) of the Act provides:

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

Id. at § 7502(e). In other words, EPA may not allow states to relax pollution control requirements even when the agency determines that the standard necessitating those requirements is more protective than necessary to safeguard public health. It cannot have been Congress' intent, then, to authorize EPA to allow states to relax pollution control requirements when the agency determines that the standard necessitating those requirements is not protective enough to safeguard public health.³⁹ The agency asserts that the eight-hour ozone standard is more protective than the one-hour ozone standard.⁴⁰ Therefore, EPA's scheme to allow areas not attaining the eight-hour ozone standard to apply requirements less stringent than those applicable in areas not attaining the one-hour ozone standard violates Congressional intent clearly expressed in section 172(e).⁴¹ The agency's scheme thus fails as "not in accordance with law" and as "arbitrary, [and] capricious." 42 U.S.C. § 7607(d)(9)(A).

d. The Act Does Not Authorize EPA to Grant Designated Ozone Nonattainment Areas the Type of Exemption Set Forth in Section VI of Appendix S Where the State's Duty to Revise the SIP is Triggered by the Promulgation of a More Protective Ozone NAAQS.

³⁹ See 61 Fed. Reg. 65752, 65753/3 (December 13, 1996) ("The EPA believes that a no-backsliding principle is even more important and by implication was intended by the Act to be a governing principle when an existing NAAQS is strengthened, as is the case with ozone.").

⁴⁰ See 68 Fed. Reg. at 32804/3 ("In general, the 8-hour standard is more protective of public health and more stringent than the 1-hour standard . . .").

⁴¹ See 68 Fed. Reg. at 32819/2 ("Because Congress specifically mandated that such control measures need to be adopted or retained even when EPA relaxes a standard, we believe that Congress did not intend to permit States to remove control measures when EPA revises a standard to make it more stringent, as in the case of the 8-hour standard.").

EPA cites section VI of the “Emission Offset Interpretive Ruling” (promulgated as appendix S to 40 C.F.R. § 51) as authority for its proposed scheme. In fact, however, section VI is inapplicable.

As amended in 1980, section VI reads, in part:

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 such cases, a new source locating in an area designated in 40 C.F.R. § 81.3000 *et seq.* as nonattainment (or, where Section III of this Ruling is applicable, a new source which would cause or contribute to a NAAQS violation) may be exempt from the Conditions of Section IV.A. so long as the new source meets the applicable emissions limitations and will not interfere with the attainment date specified in the SIP under Section 110 of the Act.

40 C.F.R. § 51, App. S, § VI. When Congress enacted more stringent preconstruction permitting requirements for nonattainment areas in 1977, the attainment deadlines for some areas designated nonattainment under the one-hour ozone standard had not yet passed. Believing that those areas would soon achieve attainment even without the aid of the new, more stringent preconstruction permitting requirements, EPA promulgated section VI to enable the requirements to be avoided in those areas.⁴²

But the current situation is different. Here EPA has made the ozone standard itself more stringent in order to safeguard public health. The agency does not suggest that the prevention of significant deterioration requirements currently applicable for ozone in the areas eligible for the transitional program will, in short order and without anything more, bring those areas into attainment of the eight-hour ozone standard (in fact, EPA is proposing to eliminate even those

⁴² See 68 Fed. Reg. at 32848/2-3 (“The exemption provided by section VI applied to areas whose attainment dates were shortly after the CAA was re-authorized in 1977 because these areas had already submitted their attainment plans to us, and we believed that these areas would reach attainment without having to impose LAER and offsets on new major sources.”).

requirements by revoking the one-hour standard). EPA cannot claim, then, that section IV of appendix S applies to any area designated nonattainment of the eight-hour standard; it cannot cite section VI as authority for allowing the nonattainment preconstruction permitting requirements to be ignored for any period of time in any eight-hour nonattainment area.⁴³ Because EPA's stated authority actually supplies no authority at all for the agency's proposed scheme, that scheme is "arbitrary, capricious, . . . [and] otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A).

e. EPA's Stated Justification for the Proposed Transitional NSR Program Fails to Present a Rational Basis for the Proposal.

EPA expresses the belief that

the transitional option, as we have constructed it, would result in a level of emissions reductions that is substantially similar to the level that would be achieved from traditional NSR for the small number of sources it will effect in the short period during which these areas are designated nonattainment.

68 Fed. Reg. at 32848/2; *see also id.* at 32847/2. The agency provides no basis for its assertion that the eight-hour nonattainment areas making use of the transitional option would be in nonattainment for only a "short period." Nor does EPA provide any basis for its assertion that only a small number of sources will avail themselves of the lax preconstruction permitting requirements under the transitional program. Even if the number of sources availing themselves of the weaker requirements were small, the public health consequences of EPA's proposal would nevertheless be dramatically negative, for the sources at issue – at power plants, oil refineries,

⁴³ In 1990, Congress amended the Clean Air Act to make the preconstruction permitting requirements for ozone nonattainment areas yet more stringent. In March 1991, EPA opined in a guidance document that Congress did not intend for the new requirements to take effect in areas already in nonattainment under the one-hour standard until the states revised their SIPs to adopt the requirements. John S. Seitz, "New Source Review (NSR) Program Transitional Guidance," March 11, 1991. As a guidance document, the Seitz memorandum did not effectuate an amendment to EPA's Appendix S regulation, and in any event does not address the current situation, where EPA has promulgated a more protective ozone standard to apply in many areas that are not currently applying any nonattainment requirements. EPA cannot, then, cite its 1991 guidance document as authority for allowing nonattainment requirements to be ignored for any period of time in any eight-hour nonattainment area.

chemical facilities, *etc.* – individually emit hundreds, or even thousands, of tons of ozone-forming pollution each year. Finally, the agency provides no basis for its assertion that the transitional requirements would result in a level of emissions reductions substantially similar to the level that would be achieved from traditional NSR. These failures render the proposal arbitrary and capricious. Moreover, even if EPA’s assertions were true, that would not change the fact that the proposal directly contravenes several clear statutory provisions. *See supra*, sections IV.B.1.a-d.

EPA’s proposals to relax NSR requirements are also contrary to the law for all of the reasons set forth above in Section III.

2. The Clean Air Development Community Concept is An Illegal Departure From the Text and Intent of the Clean Air Act

In addition to its transitional NSR proposal, EPA also has solicited comment on a proposal it calls “Clean Air Development Communities.” 68 Fed. Reg. at 32849. According to EPA, the CADC program would allow “a community that changes its development patterns in such a way that air emissions within the non-attainment area are demonstrably reduced.... [to] obtain certain flexibilities in implementing CAA programs.” *Id.* at col. 1. Although the environmental commenters strongly support the general goal of “smart growth” expressed in this proposal, the “flexibilities” EPA proposes are illegal departures from the Clean Air Act.

a. Option One: Exemptions From Statutory Requirements

Under EPA’s Option One, the agency proposes three exemptions from the statutory scheme for areas subject to subpart 2 NSR and has solicited comment on whether these “incentives” should be implemented separately or together. *Id.* at 32849/3-50/1. The first of the measures would allow CADCs in subpart 2 nonattainment areas to comply with only subpart 1 NSR if: (1) those areas adopt specific land use measures into their SIPs that reduced air

emissions, and (2) they demonstrate that air quality would not decrease as a result of using subpart 1 instead of subpart 2. *Id.* at 32849/3. The second proposed measure would “lower the NSR major source thresholds for CADC areas to make them similar to those under the PSD provisions.” *Id.* The third “flexibility” mechanism would allow CADCs “to receive NSR offsets from ‘pools’ or ‘banks’ of offsets established by the State.” *Id.*⁴⁴

The only statutory authority EPA has claimed for either Option One or Option Two, is CAA Section 173(a)(1)(B), 42 U.S.C. 7503(a)(1)(B), yet this provision does not carry the weight EPA asks of it. Section 173 commands generally that a stationary source permitting program in a nonattainment area must require five types of conditions on permits to construct and operate in that area. 42 U.S.C. § 7503(a). The conditions require that any proposed source must: (1) obtain sufficient emissions reductions offsets from existing sources in the region so as to represent reasonable further progress (as defined in Section 171); (2) comply with the lowest achievable emissions rate; (3) demonstrate that all major stationary sources owned or operated by the same owner or operator are in compliance or on schedule for compliance with applicable emissions limitations; (4) be located in a nonattainment area in which the Administrator has not found implementation problems with the SIP; and (5) establish that the source's benefits outweigh its environmental and social costs. CAA § 173(a), 42 U.S.C. 7503(a). 173(a)(1)(B) itself provides only that a stationary source locating within “a zone in which economic development should be targeted” may forego obtaining offsets if it can show that its emissions “will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 172(c).”⁴⁵ 42 U.S.C. §

⁴⁴ Because the legal objections to third measure in Option One are the same as the objections to Option Two, the issue of offset pools will be given full consideration in the discussion of Option Two.

⁴⁵ Section 172(c), which prescribes specific requirements for SIP submissions, provides no authority for EPA's CADC proposal. 42 U.S.C. § 7502(c).

7503(a)(1)(B). Thus, although location in an economic development zone might allow a source to avoid obtaining offsets under Section 173(a), it cannot exempt a new or modified source from complying with the other § 173 requirements. EPA's proposal unlawfully excludes these statutory safeguards.

Section 172(c), 42 U.S.C. § 7502(c), cross-referenced in Section 173(a)(1)(B), provides further statutory requirements that EPA has excluded from its CADC proposal. Pursuant to Section 172(c)(4), State Implementation Plans must "expressly identify and quantify" the emissions of sources constructed under Section 173(a)(1)(B) and demonstrate "that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date." 42 U.S.C. § 7502(c)(4). "Reasonable further progress," or RFP, in turn, varies depending on the subpart 2 classification of a nonattainment area, becoming more stringent at higher nonattainment classifications. *See* 42 U.S.C. §§ 7511a(b)(1)&(c)(2). EPA's proposal unlawfully excludes these Section 173's mandatory requirements, which are expressly incorporated into section 173(a)(1)(B).

Finally, as explained in detail earlier in these comments, the Clean Air Act requires that all ozone nonattainment areas be classified under subpart 2 and subject to that subpart's non-discretionary provisions. *See supra* Section II. Furthermore, "[w]hereas Subpart 1 gives the EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law....The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman*, 531 U.S. at 484-85; *see supra* Section I.C. Despite this Supreme Court ruling rejecting EPA's last attempt to implement the 8-hour standard, the first two "flexibility" mechanisms proposed under Option One, escaping

subpart 2 NSR and weakening the Act's major source thresholds, would yet again "nullify textually applicable provisions meant to limit [EPA's] discretion." *Whitman*, 532 U.S. at 484-85. EPA itself admits that Option One would "make changes to NSR." 68 Fed. Reg. at 32852/2 (citing this as an advantage of Option Two over Option One). As made clear in *Whitman*, such changes to the Act's mandatory scheme are unlawful.

In short, EPA's CADC proposal contravenes the Act, including the very provision (CAA § 173(a)(1)(B)) EPA cites to support it. Indeed, far from claiming that its CADC proposal complies with section 173(a)(1)(B), EPA concedes that its proposal "differs in many respects" from that provision. 68 Fed. Reg. 32852. Given that Congress (as illustrated by CAA § 173(a)(1)(B)) knew how to provide NSR development incentives, the absence of provisions authorizing NSR incentives of the kind described in EPA's proposal must be seen as a deliberate choice. *See, e.g., Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002).

b. Option Two: Creation of Offset Pools

Under the third component of Option One, EPA proposes creating offset pools where CADCs would earn credits for land use changes that have a beneficial impact on air emissions. Such pools would be created and governed by the States which would distribute the credits to new development in specially identified "development zones." 68 Fed. Reg. at 32849/3. Under Option Two, reduced emissions would be used to create offset pools to be used to "help steer development toward development zones." *Id.* at 32850/3. According to EPA, "the main advantage [of Option 2] to a CADC compared to option 1 is that the offset pool could start with considerable offset credits and, therefore, the credits would not have to be created through additional actions." *Id.* at 32850/1.

Section 173, cited by EPA's proposal and discussed above contains a specific provision governing the definition and use of offsets. CAA § 173(c), 42 U.S.C. § 7503(c). According to this subsection, a new or modified major stationary source may comply with the offset requirements of Part D “only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area,” except the State may allow the source to obtain offsets from another nonattainment area that has an equal or higher nonattainment classification if that area contributes to a violation of the NAAQS in the nonattainment area where the source is located. CAA § 173(c)(1), 42 U.S.C. § 7503(c)(1). Section 173(c)(1) further requires that emissions reductions must be “*in effect and enforceable* and *shall assure* that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant *from the same or other sources in the area.*” 42 U.S.C. § 7503(c)(1) (emphasis added).

EPA's CADC offset trading proposal does not comply with the requirements of Section 173(c), 42 U.S.C. § 7503(c). First, it does not ensure that offsets only will be provided by "the same or other sources in the same nonattainment area" or by another nonattainment area with "an equal or higher nonattainment classification" that "contribute[s] to a violation of the [NAQSS] in the nonattainment area in which the source is located." CAA § 173(c)(1), 42 U.S.C. § 7503(c)(1). While EPA lists several proposed geographic requirements for "development zones," *see* 68 Fed. Reg. 32850/1-2, none of these factors meets the geographic requirements of the statute. Second, EPA's proposal does not ensure that emissions reduction will be "in effect and enforceable" "by the time a new or modified source commences operation." CAA § 173(c)(1), 42 U.S.C. § 7503(c)(1). Indeed, EPA concedes that it may take several years before a

land use change results in air quality benefits. 68 Fed. Reg. 32851/1. Finally, EPA's proposal does not "*assure* that the total tonnage of increased emissions" from the new or modified source will be offset "by an equal or greater reduction...in the *actual* emissions" from other sources in the area. CAA § 173(c)(1), 42 U.S.C. § 7503(c)(1). Far from contending these statutory requirements are met by the CADC proposal, EPA repeatedly acknowledges that *assuring* reductions in *actual* emissions via CADCs is highly problematic. *See* 68 Fed. Reg. 32850/3-51/1 (noting difficulties with modeling and risks of "double-counting"), 32852/2 (noting difficulties in ensuring enforcement and designing penalties).

In short, the offset trading features of Options One and Two are unauthorized by, and indeed contravene the Act.

c. Environmental Justice Concerns

As one of the disadvantages of its CADC proposal, EPA acknowledges that "[b]y encouraging growth in established areas, this option may raise environmental justice concerns and unanticipated costs for low-income residents." 68 Fed. Reg. at 32852/2. Nevertheless, in its discussion of Executive Order 12898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994), EPA states that "it believes that this proposed rule should not raise any environmental justice issues." *Id.* at 32863/2. These statements are entirely inconsistent with each other and clearly demonstrate that a more searching review of the potential environmental justice impacts of all parts of this proposed rule should be conducted.

Executive Order 12898 provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs,

policies, and activities on minority populations and low-income populations.” Section 1-101. In the CADC portion of the proposed rule, EPA has stated a policy of directing industrial development and the siting of major stationary sources “in close proximity with transit, commercial/retail destinations, and workforce housing.” 68 Fed. Reg. at 32849/2. In particular, it has stated that brownfields, abandoned or underutilized properties that may be potentially contaminated, are especially appropriate for locating new major stationary sources, *id.*, and that “development zones” would have the potential “of more carefully targeting new development just to the development zone instead of anywhere in the CADC,” *id.* at 32850/1.

Directing new major emitting facilities to already urbanized areas may indeed have a significant impact on the surrounding communities. Even more than current siting decisions, which already disproportionately affect minority and low-income populations, *see* “Environmental Justice in the Permitting Process,” Nat’l Env’tl. Justice Advisory Council (EPA 300-R-00-004, Dec. 1999) [hereinafter EJ Advisory Report], a scheme which allowed emissions offsets not from other stationary sources but from land use and transportation measures in the surrounding and potentially less urbanized area would further injure such disadvantaged communities. Not only are such emissions reductions significantly more uncertain and delayed, as explained above, but they would also come from a more dispersed area.

As explained in the EJ Advisory Report, pre-existing conditions in low income and minority communities are major concerns for the siting of new facilities due to the cumulative impact of numerous pollution sources. *Id.* at 16 (noting that the Advisory Council heard “repeated and compelling testimony” that “polluting sources are being located in sufficient proximity to residential areas and/or to each other to form cancer alleys, cancer hotspots, or other health risks”). These pre-existing conditions are due in part to a history of racially

discriminatory zoning that has concentrated minorities in overcrowded areas that hosted polluting and other undesirable land uses. *Id.* at 19-20. Thus, whether or not outright racial discrimination persists, Executive Order 12898 requires EPA to take account of this history and the environmental justice consequences of any proposal to concentrate pollution sources in already industrialized areas. EPA has not undertaken such consideration for its CADC proposal in violation of Executive Order 12898.

C. EPA’s Draft 1999 Modeling Guidance Is Contrary to Law, and Relies On Flawed and Therefore Unreasonable Methods.

EPA asserts that it is taking comment on its “Draft Guidance on the Use of Models and Other Analyses in Attainment Demonstrations for the 8-Hour Ozone NAAQS,” EPA-454/R-99-004, (www.epa.gov/ttn/scram) (Modeling Guidance, File name: DRAFT8HR) (hereinafter “1999 Draft Guidance”). 68 Fed. Reg. 32,831/2&3-832 & n. 41. At the same time, however, EPA states that the 1999 Draft Guidance will not be part of, or have any affect on, the 8-hour implementation rule. EPA further states that it plans to make “substantial” changes in the Guidance, but does not describe the substance of those changes. Given these statements, and the agency’s failure to offer any separate explanation or justification for the 1999 Draft Guidance, the June 2, 2003 Federal Register Notice plainly does not qualify as a notice of proposed rulemaking to adopt that Guidance as a rule.

EPA cannot adopt or change the 1999 Draft Guidance, use it for regulatory purposes, or require states to use it for regulatory purposes, without subjecting it to separate notice and comment rulemaking. Such rulemaking is required by Administrative Procedure Act, as well as by EPA’s own rules. 40 C.F.R. Part 51 App. W §1.0(g). The 1999 Draft Guidance does not

merely lay out minor technical details, but rather purports to establish tests for determining whether attainment is demonstrated, and to authorize alternative analytical methods for application nationwide in predicting ozone attainment and nonattainment. These are matters of extraordinary import that warrant a full, separate rulemaking proceeding.

The 1999 Draft Guidance is not only procedurally defective, but also contrary to law in substance. Section 182(c)(2)(A) of the Act requires attainment demonstrations for areas classified as “serious” or higher to be based on photochemical grid modeling or any other analytic method EPA determines to be at least as effective. The same requirement applies to attainment demonstrations for multi-state ozone nonattainment areas, pursuant to section 182(j). Yet the 1999 Draft Guidance purports to allow states to set aside the results of photochemical grid modeling using a variety of techniques including “Weight of the Evidence” (WOE) methods. These techniques do not constitute photochemical grid modeling and have never been found by EPA to be “at least as effective.” Their use to supplant photochemical grid modeling results is therefore completely contrary to the above-cited mandates of the Act.

Aside from its illegality, EPA’s 1999 Draft Guidance is an invitation to states to game the process of ozone attainment demonstrations under the 8-hour standard using weight of evidence (WOE) and other methods. With respect to the 1-hour standard, we are aware of several instances, for example the Atlanta, New York, Washington, and Houston nonattainment areas, when EPA allowed use of such methods to set aside photochemical grid modeling results that decisively showed continued nonattainment. Yet these methods have never been subjected to scientific peer review or shown to reliably simulate real world conditions. They are based on speculation rather than sound science. EPA’s promotion of these elements of the 1999 Guidance for use in 8-hour attainment demonstrations therefore violates the criteria for model selection

that EPA has adopted in its regulatory Guideline for the Use of Models, Part 51, Appdx W, is an abuse of discretion and is contrary to the language and purpose of the Act.⁴⁶

Among other things, EPA has failed to scientifically justify the assumption of a linear relationship between NO_x and VOC emissions and ozone levels that is at the heart of the EPA weight-of-evidence and rollback methods for appraising the adequacy of attainment SIPs. There is no evidence that this assumption is supported by the science of ozone formation. The 1991 National Academy of Sciences study found the opposite, *i.e.*, that:

Nonlinearities in the response of ozone concentrations to emission changes generally result in smaller ozone reductions than might be expected or desired from reducing emissions. For example, by the year 2000, mobile sources in Los Angeles are expected to account for about 30% of total VOC emissions. Airshed model calculations indicate that removing this fraction of VOCs would decrease peak ozone 16% from 270 to 230 ppb for the particular set of episode conditions studied (Russell et al., 1989)...

Several recent studies have shown that ozone in rural areas of the eastern United States is limited by the availability of NO_x rather than hydrocarbons, and that reductions in NO_x probably will be necessary to reduce rural ozone values.⁴⁷

Without reliable evidence from atmospheric testing that contradicts these findings of the NAS panel, there is no basis for EPA to apply models that rely upon a continuing linear relationship between precursor emissions and ambient ozone. This assumption is even more questionable because EPA fails to account for the fact that when a control strategy reduces one precursor, *i.e.*, either VOC or NO_x, without corresponding reductions in the other precursor, the VOC to NO_x ratio is changed -- which further undermines any assumption in a linear relationship between emissions of one precursor and ambient concentrations.

⁴⁶ For all these reasons, and given the complexity of ozone formation, EPA must require use of photochemical grid modeling for prediction of ozone attainment and nonattainment in all areas, not just those where expressly mandated by the Act. It is well settled that agency's cannot rely on models or other analytical tools that lack demonstrated reliability, and photochemical grid modeling is the only method demonstrated to reliably predict ozone. Indeed, EPA itself so stated in connection with its NO_x waiver policy.

⁴⁷ National Research Council, *Rethinking the Ozone Problem in Urban and Regional Air Pollution*, National Academy Press, Washington, DC, 1991, page 361-363.

Under WOE, an area can circumvent the consequences of failure to attain and avoid the application of state-of-the-art photochemical grid modeling, if the agency “weighs” the evidence and determines that attainment of the NAAQS is still likely. The proposed guidance sets no outer limits on the use of these “weights” and provides no criteria to ensure their consistent application. It therefore is nothing more than an invitation to arbitrary decisionmaking based on unverified methods, rather than science-based analyses.⁴⁸ The Guidance states that once a screening test has been ‘passed’ a state may choose to use a WOE determination to estimate if attainment is likely. 1999 Draft Guidance at 3. The EPA model guidance opens the door for a variety of unverified, poorly applied and generally invalid approaches. Under WOE, the wide variety of methods for evaluating ozone SIPs allows states to choose methods, not necessarily to arrive at the correct science-based analysis of ozone, but rather to avoid their responsibilities under the Clean Air Act.

The relative reduction factor (RRF) approach has not been demonstrated by EPA to be a robust methodology nor equivalent to photochemical grid modeling required by CAA sections 182(c)(2)(A) and 182(j). Importantly, this method (like other techniques in the 1999 Guidance) has not undergone peer review independent of the agency, or been tested in real world applications to establish that it reasonably predicts the relationship between emissions and ambient ozone. The RRF approach is based on the assumption that the quantitative relationship between the emissions of ozone precursors (NO_x and VOCs) and the concentrations of ground-level ozone is consistently linear. EPA has yet to document that this assumption is scientifically

⁴⁸ For example, the guidance suggests that states can rely on data that has not been quality assured or collected by trained personnel, that analyses do not have to meet performance goals, that there are no clear tests for model performance, that whatever tests are set need not be met, and that states can rely on subjective judgments to set aside model results. See 1999 Draft Guidance at 29, 60, 132, 136. The Guidance also contains no requirements for setting boundary conditions, a critical omission that allows grossly inaccurate ozone predictions.

valid. Among issues of concern are NO_x/VOC relationships and the selection of boundary conditions for transported ozone to be input into the model. In fact the National Academy of Sciences in 1991 documented, *see supra*, that the relationship between the production of ozone precursor chemicals and ozone itself is far more complex. As a result, EPA has not confirmed that the RRF technique can predict, with any degree of precision or accuracy, the emissions reductions necessary to pass an attainment test. EPA's seeming determination to promote its use in ozone attainment demonstrations therefore is not only contrary to the Act's requirements, but arbitrary, capricious, and an abuse of EPA's discretion.

The methodologies embodied in the 1999 guidance are contrary to the Act, have not been demonstrated to be scientifically valid, encourage gaming, and thereby thwart Congress's intention that areas be required to reduce emissions so as to yield actual clean air (not air that is clean only when filtered through a gamed analytic scheme) as expeditiously as practicable.

D. EPA's Proposal Does Not Adequately Address Ozone Transport Issues, and Indeed Would Illegally Exacerbate Existing Problems

EPA's proposal contains a section describing the various federal actions that EPA has undertaken to deal with the tenacious problem of the interstate transport of ozone pollution and its precursors. 68 Fed. Reg 32827-30. The Agency also suggests several ways of dealing with interstate transport issues that will persist even after the federal actions are implemented, and requests comment on alternative approaches. While the Agency has taken several much needed steps in the past five years to combat this problem, the manner in which it has chosen to handle this issue in the present proposal contravenes the clear requirements the Clean Air Act. More

particularly, EPA has developed a preferred option for 8-hour ozone implementation that includes a classification scheme and a plan to revoke the 1-hour standard that will both promote additional ozone transport problems and undermine the existing federal programs on which the agency nominally is placing such reliance. Furthermore, the agency then offers in this proposal, as ‘solutions’ to the interstate transport problem, a selection of illegal offramps from local requirements for additional controls. This approach contravenes the Act's interstate transport provisions, as strengthened in 1990,⁴⁹ and furthermore is unreasonable and arbitrary.

EPA’s proposed classification option, as noted previously in these comments, will set up a scheme under which interstate transport of ozone and its precursors will be exacerbated. For example, the eastern seaboard states with areas now in nonattainment of the 1-hour standard, under EPA’s proposal would be classified and regulated under subpart 2 of the Act, and subject to the more stringent control requirements and nearer term attainment deadlines that characterize subpart 2. But under the EPA proposal, many of the nonattainment areas located upwind of these states would likely be regulated under subpart 1 of the Act, subjected to less stringent control requirements and attainment dates further into the future than the downwind areas that are burdened by pollution transported from the less regulated states.⁵⁰

In the proposal, EPA refers to the 1998 NO_x SIP Call and the agency’s response to eight of the twelve section 126 petitions⁵¹ that have been submitted to EPA since 1997, as providing

⁴⁹ See H.R. Rep. No. 101-490 (1990), reprinted in 2 Legislative History of the Clean Air Act Amendments of 1990, at 3298; S. Rep. NO 101-228 (1989), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1990, at 7357, 7464, 8361, and 8425.

⁵⁰ See Background Information Document, “Hypothetical Nonattainment Areas for Purposes of Understanding the EPA Proposed Rule for Implementing the 8-Hour Ozone National Ambient Air Quality Standard, EPA Docket No. A2001-31, No. I-E-23, Table 1 at 4-15(April 2003)(listing potential classifications under EPA’s preferred approaches in columns H and I). Table 1 demonstrates that many upwind areas are projected to be governed by subpart 1, while downwind areas burdened by ozone transport will be governed and classified under subpart 2.

⁵¹ Since 1997, the states of Maine, New Hampshire, Vermont, Massachusetts, New York, Pennsylvania, Rhode Island, Connecticut, Delaware, New Jersey, and Maryland, as well as the District of Columbia, have petitioned the Agency under section 126 of the Act seeking a finding that emissions from stationary sources in upwind states are

“certainty” to states, “unlike in the past,” that “the issue of interstate transport has already been addressed up front,” and that “they will benefit from substantial emissions reductions from upwind sources and . . . significantly improved boundary conditions” with respect to transported ozone and its precursors. This statement is misleading at best. First, the agency fails to mention that it has yet to take action on any of the four section 126 petitions, seeking remedies under the 1-hour and 8-hour standards, that have been pending with the agency since 1999. Second, EPA acknowledges in a footnote that it “stayed the 8-hour basis for both [the Section 110 and 126] rules” in 2000, but states that it “plans to take action *in the near future* to reinstate the 8-hour bases for both the NO_x SIP Call and the Section 126 Rule.” 68 Fed. Reg. 32827/3 n.35 (emphasis added). When we have asked about the time frame under which EPA envisions lifting the stays, however, environmental commenters have been informed that these actions are not on the agency’s planning calendar at all.⁵²

EPA also references the benefits it expects will accrue with respect to ozone generally and transported ozone in particular in years 2010-2020 by reference to some modeling it has completed to support the Clear Skies Act (CSA), the Bush Administration’s legislative proposal for power plant reductions. 68 Fed. Reg. 32828/1. There are two significant problems with the Agency’s reference to CSA. First, it is gross error to attempt to find legal or technical support in a bill that has not yet been enacted into law as of the publication date of a proposed rule -- and

impeding these jurisdictions ability to attain or maintain the NAAQS for ozone. Of these twelve petitions, EPA has responded (as a result of a lawsuit filed in the Southern District of New York, *Connecticut, et al. v. EPA*, No. 98Civ. 1376, settled in March 1998) to eight. EPA has never issued findings with respect to the four additional petitions (submitted in 1999 from Delaware, New Jersey, the District of Columbia and Maryland), despite the fact that the statute requires EPA to issue findings on , or deny, any petition, “within 60 days after receipt of any petition . . . and after a public hearing.” CAA § 126(b), 42 U.S.C. § 7426(b). Those petitions seek redress under both the 1-hour and 8-hour ozone standard. See “Fact Sheet: Three Actions Regarding Section 126 Petitions For Purposes of Reducing Interstate Ozone Transport” (6/15/99), found at http://www.epa.gov/ttn/oarpg/t1/fact_sheets/126a3fs.pdf; see also <http://yosemite.epa.gov/oepi/smallbus.nsf/0/05c885d43959fdd585256d3b00511983?Open>.

⁵² Ann B. Weeks, CATF personal communication with Carla Oldham, EPA OAQPS staff responsible for the Section 126 petition rule (July 22, 2003).

may never be enacted. Yet that is precisely what the Agency does here – it asserts that because of the benefits it believes will be achieved under CSA, that the problem of nonattainment areas “in many parts of the eastern U.S.” are simply likely to disappear, and that “[a] number of other areas would find it easier to meet the 8-hour standard because of the additional reductions in power plant emissions that would be required under Clear Skies.” *Id.* at 32828/1&2. EPA impliedly and explicitly justifies its proposal’s laxity on the transport issue on this basis. *Id.*

The second significant problem with the agency’s reference to CSA here is that the modeling cited by the agency, and found at <http://www.epa.gov/clearskies> has recently been reported to be faulty, particularly with respect to its results related to ozone transport.⁵³ EPA has selected nonrepresentative base case years from which to project future attainment and nonattainment under its legislative proposal.⁵⁴ *Id.*

Finally, EPA solicits comment on options to address transported ozone in rural nonattainment areas, multistate nonattainment areas, and in areas affected by intrastate transport. *Id.* at 32828-29. It is notable that the options EPA proposes here are in fact simply offramps from the requirements of the statute. As such, they are unlawful and invalid.

Proposed subpart 1 “overwhelming transport classification” -- EPA proposes to graft into subpart 1 a provision of subpart 2 that allows rural ozone nonattainment areas to escape certain prescriptive subpart 2 nonattainment requirements⁵⁵ if their nonattainment problem is caused by sources located outside the area boundary. *Id.* at 32814 ; *see also* 32828-29. Rather

⁵³ See J. Underhill, CALGRID Modeling Overview A First Look, presented at OTC/MANE-VU Annual Meeting, Philadelphia PA, July 21-23, 2003, Summary slide (noting “OTC modeling shows ‘substantial’ ozone nonattainment continuing after 2010”).

⁵⁴ This not only casts doubt on EPA’s assertions in this proposal with respect to the likely result of the CSA proposal, it also demonstrates the ease with which a modeling framework can be gamed – a fundamental problem with the methods proposed for use in attainment demonstrations as described above.

⁵⁵ Under section 182(h) of the Act, a rural transport area is treated by operation of law as having satisfied the requirements of subpart 2 if it makes the submissions required of a marginal area. CAA § 182(h)(1).

than classifying all ozone nonattainment areas under subpart 2 of the Act, as Congress intended (*see supra*), such that the provisions of section 182(h) are available, EPA proposes instead to recreate the section 182(h) provisions and make them applicable to rural areas governed by subpart 1 under its preferred classification scheme. According to EPA, these rural areas “would have to meet the same criteria as specified for rural transport areas under section 182(h)” of subpart 2, although the agency also says that they can meet the criteria “upon submission of a SIP that demonstrates, using modeling, that the nonattainment problem in the area is due to ‘overwhelming transport’ emissions” (which the agency does not further define). *Id.* at 32814/1&2; *compare* CAA § 182(h)(2) (“The Administrator may treat and 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.”).

Rather than attempt to create new offramps for areas from the requirements of the Act through a convoluted process of classification under both subpart 1 and subpart 2, the Agency must instead simply classify all ozone nonattainment areas under subpart 2, as Congress intended in 1990. Taking that approach will make available the specific authority crafted by Congress in section 182(h) of the act for these rural transport areas.

Multistate Transport Discussion: The Agency also refers back to the requirements of subpart 2 in addressing in the proposal concerns about ozone transport within areas that are in multiple states. EPA fails to address, however how it would justify the application of section 182(j) in a multistate nonattainment area if all or a portion of that area were governed by subpart 1.

E. Early Action Compacts Must Not Be Substituted for the Clean Air Act's Nonattainment Requirements.

Each and every one of the undersigned organizations is highly supportive of any serious and enforceable efforts made by federal, state, and local governments towards achieving cleaner air faster. For years, we have consistently encouraged state and local governments to take proactive steps to reduce ozone-causing emissions. We cannot, however, support Early Action Compacts (EACs), *see* 68 Fed. Reg. at 32859-60, which contravene the Clean Air Act, and will not serve the stated goal of producing cleaner air sooner.

1. Early Action Compacts Contravene the Clean Air Act.

Early Action Compacts involve deferring effective dates of nonattainment designations, and then allowing the Act's requirements applicable to nonattainment and maintenance areas to be shunted aside in favor of an alternative approach of EPA's choosing. EPA lacks authority to sideline the carefully crafted, mandatory requirements of the Act.

First, the Act requires nonattainment designations by date-certain deadlines. § 107(d), 42 U.S.C. § 7407(d); Pub. L. 105-178, § 6103, 112 Stat. 465 (June 9, 1998), *codified at* 42 U.S.C. § 7407 Note. Promulgating a noneffective nonattainment designation -- *i.e.*, a paper designation that sits in the books without being activated -- violates this requirement.

Second, the Act contains a detailed array of requirements, likewise governed by date-certain deadlines, applicable to nonattainment areas, including submission of implementation plans providing for attainment, rate-of-progress, and various specific programs such as new source review, conformity, and contingency measures. *See, e.g.*, CAA §§ 181, 182, 110, 172, 173, 176. By refusing to implement these various requirements, the EAC scheme violates those provisions.

Third, the Act likewise prescribes requirements governing redesignation of nonattainment areas to attainment (setting forth several prerequisites that must be met before such redesignation can be granted), CAA § 107(d)(3)(E), and requiring EPA-approved maintenance plans sufficient to remedy any relapse into nonattainment that occurs during the twenty-year period following redesignation. CAA §§ 107(d)(3)(E)(iv), 175A. By shunting these requirements aside, EPA violates those provisions as well.

Whitman confirmed that EPA cannot "nullif[y] textually applicable provisions" of the Act. 531 U.S. at 485. Unfortunately, that is precisely what Early Action Compacts do.⁵⁶

2. Early Action Compacts Are Unlikely To Result in Early Attainment.

The Clean Air Act requirements discussed above are an detailed, interconnected system for protecting public health from ozone pollution. By allowing participating areas to substitute unproven alternative measures for these requirements, EPA is gambling with the health of millions of Americans.

It is highly unlikely that EACs will provide participating areas with early relief from their ozone problems. The EAC scheme encourages participating areas to use pollution control strategies that are inadequate for the task.⁵⁷ Compared with measures such as transportation conformity and new source review that have already demonstrated their effectiveness,⁵⁸ the EAC strategies are untested. Areas where the EACs fail to produce attainment (and where the applicable nonattainment requirements thus will need to be activated in the years following

⁵⁶ Indeed, that is what participating states and localities want EACs to do. *See, e.g., Updated: Local Governments Sign Regional Clean Air Plan*, SAN ANTONIO EXPRESS NEWS, December 9, 2002 (EAC signed by local officials aimed at "avoiding mandatory measures imposed by the federal and state governments to meet ozone standards").

⁵⁷ *See* EPA, List of Early Action Compacts (www.epa.gov/ttn/naaqs/ozone/eac/#list). Although measures such as telecommuting promotions, ozone awareness programs, ride-sharing can serve as a valuable complement to the controls required by Part D of the Clean Air Act, they are insufficient on their own.

⁵⁸ *See* Section IV.A of these comments

2007) will suffer from substantial delays beyond the timeframes prescribed by the Act. Millions of Americans will breathe health-threatening ozone longer as a result.

Moreover, EPA errs in claiming that EACs will "achieve emissions reductions and clean air sooner than would otherwise be required under the CAA for implementing the 8-hour ozone NAAQS." 68 Fed. Reg. at 32859/2. For most EAC areas, the EAC deadline of December 31, 2007 is no earlier than, and indeed later than, the Clean Air Act attainment deadline proposed by EPA.

Specifically, approximately 63% of all nonattainment areas and 68% of the areas participating in the EAC program have design values between 0.085 ppm and 0.092 ppm.⁵⁹ According to EPA's modified classification table, *see* 68 Fed. Reg. at 32812, these areas would be in marginal nonattainment. Under subpart 2,⁶⁰ marginal nonattainment areas would have three years after designation – that is, until April 15, 2007 – to attain the 8-hour standard. 68 Fed. Reg. at 32817/1. Thus, for the majority of areas, the EAC attainment deadline is 8 ½ months *after* the Clean Air Act deadline proposed by EPA.

F. Other Issues

1. EPA Cannot Eliminate By Rule Either the Act's Rate Of Progress Requirements Under Subpart 2 or RFP Requirements Under Subpart 1.

EPA proposes an option for moderate 8-hour nonattainment areas that would waive the subpart 2 mandatory requirement for a 15% reduction in VOC emissions over the first 6 years

⁵⁹ EPA, Air Quality Data Update – 1999-2001 Ozone Air Quality Data, Table 4 (www.epa.gov/airtrends/data/AQupdate2001.pdf) (184 of the 291 counties that monitored nonattainment levels for ozone during the period from 1999 to 2001 had design values between 0.085 ppm and 0.092 ppm; 26 of the 38 counties participating in the EAC program that modeled nonattainment during that same period had design values between 0.085 ppm and 0.092 ppm; *see also* EPA, OZONE Early Action Compacts – List of Early Action Compacts (www.epa.gov/ttn/naaqs/ozone/eac/#list)).

⁶⁰ As discussed above, subpart 2 applies to all areas designated nonattainment under the eight-hour ozone NAAQS.

after the baseline year. The waiver would be allowed for any moderate area with a previously approved 15% rate of progress (ROP) plan under the 1-hour standard. EPA is completely without authority to waive the 15% ROP plan requirement, which is an explicit mandate of subpart 2. A 15% ROP plan under the 1-hour standard cannot possibly satisfy the 15% ROP plan obligation for the 8-hour standard, because the new rate of progress requirement is designed to implement a revised NAAQS and is measured from a different baseline year.

EPA offers no plausible legal rationale for waiving the 15% ROP requirement, and, indeed, none exists. Moreover, although the agency proposes to require ROP demonstrations for the first 6 years for serious and severe areas, there is no lawful or rational basis for exempting moderate areas from this statutory requirement. Allowing states to rely on their 1-hour 15% ROP demonstrations is further unsupportable because those demonstrations are almost certainly no longer valid. Recent analyses using EPA's updated motor vehicle emissions model, MOBILE6, show much higher motor vehicle emissions in both 1990 and subsequent years in most urban areas than assumed when states prepared their 15% ROP plans for the 1-hour standard. Thus, the old 15% plans almost certainly understate the emission reductions needed to in fact achieve a 15% reduction from the baseline year.

EPA also proposes to allow a 1 ½ year gap between December 31, 2008 and May 15, 2010 during which the 3% ROP requirement would not apply. Contrary to assertions in the proposal (68 Fed. Reg. at 32834/1), such a waiver of the 3% ROP requirement is not consistent with subpart 2. Under subpart 2, there are no "gap" periods during which minimum ROP requirements are waived. Rather, subpart 2 requires SIPs to provide for 15% ROP for the first 6 years, and 3% annually thereafter until attainment. EPA therefore has no authority to waive the minimum ROP requirement between 2008 and 2010.

We also object to EPA's proposal to allow states to claim ROP credit from any reductions achieved through post 1990-adoption of the types of measures listed in section 182(b)(1)(D). *See id.* at 32834/2&3. That list includes, among other things, any measure relating to motor vehicle exhaust or evaporative emissions. Section 182(b)(1)(D) prohibits granting ROP credit for any measures contained on the list. Although the list refers to pre-1991 versions of several of the listed measures, that cutoff simply evidenced Congress' clear intent to prevent states from claiming credit for reductions that were already federally-mandated in or before the baseline year. Congress wanted the ROP reductions to be new reductions rather than emission cuts that would have occurred anyway. In the case of 8-hour nonattainment areas, the baseline year (as proposed by EPA) will be 2002. Therefore, to be consistent with subpart 2, EPA must disallow ROP credit for measures listed in section 182(b)(1)(D) adopted any time prior to 2002.

2. EPA's Proposal to Allow Federal Measures That Result in Additional Emission Reductions Beyond ROP or Attainment to Qualify as "Contingency" Measures Is Legally Invalid.

EPA suggests that "[f]ederal measures that result in additional emission reductions beyond those needed for attainment or ROP in an area could serve as contingency measures for a failure to attain or meet the ROP requirements." *Id.* at 32837/2. This claim is legally incorrect and flouts the Act's contingency measure mandate. Contingency measures required by the Act are "specific measures *to be* undertaken *if* the area fails to make reasonable further progress, or to attain...by the attainment date." 42 U.S.C. §§ 7502(c)(9), 7511a(c)(9) (emphasis added). Thus, contingency measures must consist of control requirements that will be taken off the shelf and undertaken if and when an ROP or attainment failure occurs. They are plainly *not* measures

that have already been implemented, or that will be implemented whether or not the area fails to timely achieve progress or attainment.

3. Clean Data Policy

EPA's "clean data policy," 68 Fed. Reg. at 32,835/3, is unlawful with respect to both the 1-hour and 8-hour NAAQS for the reasons set forth in part III.B.1. above.

4. RFP Under Subpart 1.

EPA proposes to waive RFP requirements for areas designated nonattainment under subpart 1 with attainment dates 3 years or less after designation. EPA has no authority whatsoever to waive the RFP requirement, which is listed as a mandatory SIP component under § 172(c)(2). For the same reason, EPA also has no authority to adopt "Option 1" for areas with attainment dates between 3 to 6 years after designation, because that option would also waive any showing of RFP. Likewise, EPA lacks authority to waive the statutory requirement for an attainment demonstration for Subpart 1 areas with an attainment date three years or less after designation.

5. EPA May Not Relax the Act's RACT Requirements.

EPA proposes an option whereby RACT would be waived for areas covered only by subpart 1, where the area shows that RACT is not needed for timely attainment and would not advance the attainment date. This proposal is flatly contrary to section 172(c)(1) of the Act, which explicitly mandates RACT "at a minimum" in all nonattainment areas. Congress plainly intended to require RACT as a floor level of control technology in addition to any measures needed to demonstrate timely attainment. Moreover, even where RACT does not advance attainment, it is needed in order to "reduc[e] the severity and number of violations" of those NAAQS. CAA § 176(c)(1)(A).

Equally untenable is the aspect of the proposal exempting sources from the RACT requirement where the source is subject to a state's emissions cap-and-trade program and that program has been approved by EPA as meeting the NOx SIP Call requirements. The NOx SIP call did not purport to satisfy the RACT requirement for all sources subject to state cap-and-trade programs, nor could it. There are no exceptions to the RACT mandates in either subpart 1 or subpart 2 for sources subject to SIP call cap-and-trade programs, and EPA is completely without authority to invent such an exception here.

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