ORAL ARGUMENT NOT YET SCHEDULED

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

NO. 11-1256

AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION,

PETITIONER,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

RESPONDENTS.

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

BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND LISA JACKSON, ADMINISTRATOR

IGNACIA S. MORENO
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL
RESOURCES DIVISION

KIM SMACZNIAK
ENVIRONMENTAL DEFENSE SECTION
U.S. DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20026-3986
TEL: (202) 514-0165
FAX: (202) 514-8865

ATTORNEYS FOR RESPONDENT

OF COUNSEL:
MICHAEL HOROWITZ
OFFICE OF GENERAL COUNSEL (2344A)
P.O. BOX 23986
U.S. EPA
1200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20460

JUNE 6, 2012

RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties appearing in this Court are accurately identified in the Briefs for Petitioners.

B. Ruling Under Review

EPA's final approval of the challenged revision to the State Implementation Plan is set forth in the Federal Register at 76 Fed. Reg. 26,609 (2011).

C. Related Cases

Petitioner raises substantially the same challenges against the same final agency action in two related cases:

(1) American Road and Transportation Builders Association v. Environmental Protection Agency and Lisa P. Jackson, Administrator, Case No. 11-71897 (9th Cir.)

(2) American Road and Transportation Builders Association v. Environmental Protection Agency and Lisa P. Jackson, Administrator, No. 11-cv-1713 (JDB) (D.D.C.)

June 6, 2012

Respectfully submitted,

/s/ Kim Smaczniak
Kim Smaczniak, Attorney
U.S. Department of Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES[1]

[1] The pertinent statutes and regulations are set forth in the Addendum to Respondent's Brief.

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTERS

LEGISLATIVE HISTORY

GLOSSARY

AIR DISTRICT	San Joaquin Unified Air Pollution Control District
APA	Administrative Procedure Act
ARTBA	American Road and Transportation Builders Association
CAA	Clean Air Act
EMA	Engine Manufacturers Association
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NAHB	National Association of Homebuilders
NOx	nitrogen oxide
PM10	course particulate matter
SIP	State Implementation Plan
TSD	Technical Support Document

JURISDICTION

The petition filed by Petitioner American Road and Transportation Builders Association ("ARTBA") challenges the Environmental Protection Agency's (EPA or the "Agency") approval of a revision to a State Implementation Plan ("SIP") pursuant to Section 110 of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. § 7410. "Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District" 76 Fed. Reg. 26,609 (May 9, 2011). (J.A.___). Under Section 307(b)(1) of the CAA, a petition for review of EPA's action in approving a SIP "may be filed only in the United States Court of Appeals for the appropriate circuit."" 42 U.S.C. § 7607(b)(1). Review of EPA's approval of the California SIP would therefore properly be before the Ninth Circuit, not this Court. Second, that EPA declined to reconsider its nationally applicable regulations implementing section 209(e) of the Act on the basis of ARTBA's comments on the regional SIP revision does not render the SIP approval nationally applicable final action reviewable by this Court. Even if EPA had responded to ARTBA's comment and such response was deemed nationally applicable final agency action, because the nature of ARTBA's comment is an untimely and repeat challenge to preexisting regulations, which this Court has already reviewed and held is time-barred, the Court should dismiss ARTBA's petition for lack of jurisdiction. See infra, Argument Section II.

STATEMENT OF ISSUES

1. Whether, consistent with the plain language of Section 307(b)(1) of the Act, review of the Agency's approval of a regional SIP revision can only be had in the Ninth Circuit, rather than this Court?

2. Whether EPA's limited response to ARTBA's comments on the proposed SIP revision, and specifically EPA's statement that it would not revisit the broader preemption issues raised in those comments in the limited regional proceeding, constitutes nationally applicable final agency action subject to review separate from that of EPA's approval of the SIP revision itself?

3. Assuming that EPA's response to ARTBA's comments is separately reviewable by the Court as nationally applicable final agency action, whether challenge to that action is timely, given that the substance of ARTBA's challenge is the same as the petition for rulemaking filed in 2002 held time-barred by this Court and is not solely based upon EPA's regional SIP approval?

4. In the unlikely event that ARTBA's substantive challenge to EPA's regional SIP revision is reviewable in this Court rather than the Ninth Circuit, is EPA's determination that an indirect source review program focused on reducing emissions from certain construction and developmental projects is not preempted under section 209(e) of the Act arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

5. In the event that EPA's response to ARTBA's comments is separately reviewable by this Court, is EPA's decision not to revisit its longstanding regulations implementing CAA section 209(e) on the basis of the same grounds presented to the Agency in 2002 and to this Court in a 2009 proceeding arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

STATEMENT OF THE CASE

While this case ostensibly involves a petition for review of EPA's approval of a revision to a California SIP, the challenge is most clearly directed at EPA regulations implementing section 209(e) of the Clean Air Act, 42 U.S.C. § 7543(e), in an attempt to re-litigate this Court's decision in ARTBA v. EPA, 588 F.3d 1109 (D.C. Cir. 2009) cert. denied, 131 S. Ct. 388 (2010), holding judicial review of the issues raised by ARTBA's 2002 petition for rulemaking to be time-barred.

Under Section 209(e) of the Clean Air Act, certain state and local regulations of nonroad engines and vehicles are preempted, 42 U.S.C. § 7543(e)(1), and certain others require a waiver of preemption. Id. § 7543(e)(2).[2]

ARTBA represents users of nonroad engines (particularly construction equipment). This litigation arises out of ARTBA's attempts to reduce the ability of states and localities to regulate nonroad engines by establishing a broader scope of federal preemption under Section 209(e). Although ARTBA's 2008 petition for

[2] EPA's regulations that implement section 209(e) of the Act can be found at 40 C.F.R. Part 1074.

review was dismissed for lack of subject-matter jurisdiction, ARTBA nevertheless seeks a new avenue to obtain jurisdiction in this Court by petitioning for review of EPA's approval of a regional SIP that targets certain development sites in one non-attainment area of California. In its comments on the regional rulemaking, ARTBA appended a renewed petition for rulemaking seeking revisions of EPA's longstanding section 209(e) regulations that were not the subject of the proposed SIP revision. EPA declined to revisit matters it had addressed exhaustively in its earlier response to ARTBA's first petition for rulemaking, and approved the SIP revision.

ARTBA now petitions the Court for review of EPA's approval of the California SIP revision and refusal to grant its renewed petition for rulemaking. This Court lacks jurisdiction, as review of a regional SIP approval belongs in the Ninth Circuit and EPA's response to ARTBA's comment is not separately reviewable final agency action. Even if it were, ARTBA's renewed petition is again untimely.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. State Implementation Plans

1. EPA approval of SIPs

Title I of the Clean Air Act requires EPA to establish National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409. States must submit to EPA for approval state implementation plans that specify the measures that will be taken in "non-attainment" areas to meet and maintain compliance with the NAAQS. See 42

U.S.C. § 7410. The general requirements for SIPs are set forth in 42 U.S.C. § 7410(a)(2), and include enforceable emissions limitations and other control mechanisms to meet the requirements of the Act. Among other things, SIPs must include assurances that a State "is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof." 42 U.S.C. § 7410(a)(2)(E)(i).

States frequently submit to EPA for approval revisions to their respective SIPs due to changes in ambient air quality, changes in the NAAQS, or for other reasons. The plans thus may consist of a series of state and local rules that were adopted and submitted to EPA at various points in time. See Ohio Envtl. Council v. U.S. Dist. Court, 565 F.2d 393, 398 (6th Cir. 1977) (explaining that the Clean Air Act "clearly envisions the possibility of continuous adjustments in the basic [SIP] by the State and the EPA"). In California, SIP revisions are jointly developed by the California Air Resources Board and local air districts such as the San Joaquin Unified Air Pollution Control District (the "Air District").

Once submitted, EPA must act to approve, disapprove, or approve in part and disapprove in part, the SIP or SIP revision through notice-and-comment rulemaking. See 42 U.S.C. § 7410(k). If EPA approves the submission, the SIP or SIP revision becomes federally enforceable. See id.; 42 U.S.C. § 7413.

2. Indirect Source Review Programs

Section 110 of the Clean Air Act authorizes States to include indirect source review programs in their SIPs to further their efforts to reduce air pollution. 42 U.S.C. § 7410(a)(5). An "indirect source" is "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution." 42 U.S.C. § 7410(a)(5)(C). An "indirect source review program" means "the facility-by-facility review of indirect sources of air pollution." 42 U.S.C. § 7410(a)(5)(D). The Act authorizes a State to include in such a program measures to assure that new or modified indirect sources of air pollution will not, by attracting mobile sources of air pollution such as automobiles or construction vehicles, prevent the State from achieving or maintaining compliance with the NAAQS. See id.

B. CAA Section 209(e) Preemption of Emission Standards

1. Statutory Background

Title II of the CAA authorizes EPA to set emissions standards for new motor vehicles and new motor vehicle engines. 42 U.S.C. § 7521(a). In the 1990 amendments to the Act, Congress granted EPA authority pursuant to CAA Section 213, 42 U.S.C. § 7547, to promulgate emission standards for "new nonroad engines," including construction equipment.[3] See Pub. L. No. 101-549, § 213, 104 Stat. 2399,

[3] The term "nonroad engines" describes a wide variety of mobile, non-highway engines, including engines used in tractors, lawnmowers, construction equipment such as bulldozers and cranes, locomotives, and marine craft. See 40 C.F.R. § 1074.5; id. § 89.1.

2500 (1990); see also Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1080-82 (D.C. Cir. 1996) ("EMA") (describing the statutory background of EPA's regulation of nonroad engines). At the same time, Congress preempted many types of state requirements pertaining to emissions from nonroad engines.

Section 209 addresses the ability of states and local governments to regulate emissions from mobile sources of pollution. 42 U.S.C. § 7543. Section 209(a) preempts state and local government standards regulating emissions from new motor vehicles and new motor vehicle engines, providing that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a).[4] Section 209(d), however, reserves to the states the right to control the use, operation, and movement of motor vehicles, providing that "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d).

Section 209(e) sets forth similar provisions for nonroad vehicle engines. 42 U.S.C. § 7543(e). States are expressly preempted from adopting "any standard or

[4] Section 209(b) provides that the State of California may apply to EPA for a waiver permitting it to adopt its own "standards . . . for the control of emissions from new motor vehicles." 42 U.S.C. § 7543(b). Section 177 of the Act, 42 U.S.C. § 7507, provides that states other than California may adopt the California standards, if the provisions they adopt are "identical" to those of California.

other requirement relating to the control of emissions" from new engines that are used in construction or farm equipment or vehicles and that are under 175 horsepower, or from new locomotives or new engines used in locomotives. Id. § 7543(e)(1). For all other nonroad engines (including any engine that is no longer "new"), States are preempted from adopting "standards and other requirements relating to the control of emissions," except that California may adopt and enforce such regulations if EPA authorizes it to do so, according to specific enumerated criteria. Id. § 7543(e)(2)(A). If California's "standards and implementation and enforcement" are authorized, then other States may adopt and enforce those California provisions as their own. Id. § 7543(e)(2)(B).

Section 209(e) itself does not specify what type of regulation might constitute a "standard or other requirement relating to the control of emissions," and this Court has found the phrase to be ambiguous and therefore a proper subject for EPA interpretation. EMA, 88 F.3d at 1093. For example, EPA has interpreted the phrase "standards and implementation and enforcement" to preempt the same types of regulations as the phrase "standards and other requirements," and this Court has upheld that interpretation. See id. at 1093. If a state regulation is not a "standard" or an "implementation and enforcement" provision relating to the "control of emissions," by contrast, it is not preempted under Section 209(e). See 42 U.S.C. § 7543(e); EMA, 88 F.3d at 1093.

2. Regulatory Background

In 1994, EPA promulgated national regulations related to the control of emissions from nonroad engines. See 42 U.S.C. §§ 7543, 7547; "Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts," 59 Fed. Reg. 31,306 (June 17, 1994); "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 Fed. Reg. 36,969 (July 20, 1994). As part of those rulemakings, EPA addressed the scope of Section 209(e) preemption.

First, EPA's regulations define the scope of the statutory term "new engines." Under EPA's definition of the statutory term "new," engines are considered "new" until they are either placed into service or sold to an ultimate purchaser. See 40 C.F.R. § 1074.5; 59 Fed. Reg. at 31,328-31; 59 Fed. Reg. at 36,971-74. EPA considered the close parallels between statutory provisions relating to nonroad engines and motor vehicles to be particularly important, and it therefore incorporated the statutory definition of "new" for motor vehicles into the regulatory definition of "new" for nonroad engines. See 59 Fed. Reg. at 36,972 (describing relationship between the definitions of "new" for motor vehicles and nonroad engines)

Second, EPA's regulations give effect to the categories of engines created by Section 209(e). Those regulations define the subset of "new" engines for which States can never adopt or enforce standards and other requirements under Section 209(e)(1)

and the subset of engines for which States may adopt and enforce standards and other requirements if those requirements have been authorized under Section 209(e)(2). 40 C.F.R. § 1074.10(b)-(d); id. § 1074.101(a). The language of 40 C.F.R. § 1074.10 essentially tracks the express and implied preemption provisions of the statute. Compare 40 C.F.R. § 1074.10(b), (d) with 42 U.S.C. § 7543(e)(1), (e)(2); see also 59 Fed. Reg. at 36,986-87.

Finally, EPA also elaborated upon its interpretation of Section 209(e) in an interpretive rule. 59 Fed. Reg. at 31,313, 31,339; id. at 36,971-74. The pertinent portion of that interpretive rule, first adopted in 1994 and readopted in 1997, is now codified in 40 C.F.R. part 89, subpart A, Appendix A. The interpretation states:

> EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer new.

The rationale for Appendix A is that such "use restrictions" are not "standards or other requirements relating to the control of emissions." EMA, 88 F.3d at 1093-94. As a result, EPA believes that use restrictions are not preempted, and that all states may promulgate them without regard to the restrictions described in Section 209(e)(1) or (e)(2).

This Court reviewed EPA's interpretation of section 209(e) and, with certain exceptions, upheld EPA's regulations. EMA, 88 F.3d 1075. EPA then revised the regulations in 1997 to comport with the decision of this Court. See "Control of Air

Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 67 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 Fed. Reg. 67,733 (Dec. 30, 1997).

ARTBA petitioned EPA to amend its regulations implementing section 209(e) in 2002. EPA formally opened the petition for public comment in 2007, 72 Fed. Reg. 28,098, 28,209–10 (May 18, 2007), and then rejected the petition in 2008. 73 Fed. Reg. 59,034, 59,130 (Oct. 8, 2008). ARTBA sought review in this Court. After full briefing and hearing on the merits, this Court dismissed ARTBA's petition as time-barred under CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1). ARTBA v. EPA, 588 F.3d 1109 (2009). The Court concluded that EPA had not reopened consideration of its regulations implementing section 209(e) through the Agency's response to comments received as a result of the publication of ARTBA's own request to revise those regulations. Id. at 1114-15. Neither did EPA effectively open the totality of its Section 209(e) framework for reconsideration through a separate rulemaking in which EPA proposed and eventually adopted several discrete amendments to the regulations. Id.

II. Factual and Procedural Background

A. The San Joaquin Valley Unified Air Pollution Control District's Rule 9510

The Air District adopted Rule 9510 in December 2005, and it became effective as a matter of California state law in March 2006. Rule 9510 targets indirect sources

of air pollution within the San Joaquin Valley nonattainment area, with the goal of reducing emissions from construction projects and future operation of certain development projects. For construction project emissions, the Rule's targets are reductions in course particulate matter (or "PM10") and nitrogen oxide (or "NOx") emissions from construction activities. Rule 9510 provides that "[a]n applicant may reduce construction emissions on-site by using less-polluting construction equipment, which can be achieved by utilizing add-on controls, cleaner fuels, or newer lower emitting equipment." J.A. __. Further, the Rule's requirements can be satisfied through on-site measures, off-site fees, or any combination thereof. J.A. __. Rule 9510 was submitted to EPA for approval on December 29, 2006.

B. Challenges to Rule 9510

In 2008, prior to EPA action on the proposed SIP revision, the National Association of Home Builders ("NAHB") filed an action in federal district court seeking to invalidate Rule 9510. NAHB v. San Joaquin Valley Unified Air Pollution Dist., Case No. CV F 07-0820, 2008 WL 4330449 (E.D. Cal. Sept. 19, 2008). NAHB argued that the Rule's provisions concerning construction emissions were preempted by CAA Sections 209(e)(1)(A) and 209(e)(2)(A), which prohibit state and local governments from adopting a "standard or other requirement relating to emissions" from certain nonroad vehicles and nonroad vehicle engines. The district court disagreed. Id.

NAHB appealed, but the Ninth Circuit affirmed the District Court's ruling that Rule 9510 was not preempted by Section 209(e). NAHB v. San Joaquin Valley Unified Air Pollution Control Dist., 627 F.3d 730 (9th Cir. 2010) ("NAHB"), cert. denied, 132 S. Ct. 369 (2011). The court held that Section 209(e)(1) did not expressly preempt the challenged provisions of the Rule, because that section preempts only standards or requirements relating to the control of emissions from "new" construction equipment. Id. at 734-35. Under EPA's longstanding interpretation of that term, "section 209(e)(1) would not preempt Rule 9510 because none of the construction equipment that Rule 9510 regulates could possibly be 'showroom new.'" Id. The court also held that Section 209(e)(2) does not implicitly preempt the challenged provisions of Rule 9510. Id. at 735. The court reasoned that Rule 9510 does not target vehicles or engines, but instead targets and requires emissions reductions from a development site as a whole. Id. at 736-40. The Court based its holding on a finding that Rule 9510 is authorized by section 110(a)(5) of the Clean Air Act as an "indirect source review program." The feature that allows Rule 9510 to qualify as an indirect source review program, *i.e.*, its site-based regulation of emissions, is the same feature that allows the rule to avoid preemption under Section 209(e)(2). Id.

C. EPA SIP Action

Well before the Ninth Circuit issued its decision on NAHB's appeal of the preemption issue, EPA issued its notice proposing to approve the SIP revisions to

include Rule 9510. 75 Fed. Reg. 28,509 (May 21, 2010). In that notice and as set forth in greater detail in a Technical Support Document ("TSD"), EPA evaluated the proposed SIP revision pursuant to six criteria based on relevant statutory provisions and related guidance. Among the criteria, EPA evaluated whether the proposed rule met the requirement of enforceability set forth in section 110(a) of the Act. See 42 U.S.C. § 7410(a). In evaluating whether the Air District possessed adequate authority to implement Rule 9510, EPA discussed the then-pending legal challenge by NAHB. TSD at 11 (J.A. __). EPA assessed NAHB's argument that the Air District lacked the legal authority to establish an emission standard for new nonroad engines without first having received a waiver as required by CAA Section 209(e)(2), 42 U.S.C. § 7543(e)(2). EPA proposed that the Air District had the authority to adopt and implement Rule 9510 without such a waiver, because the Rule did not mandate, on its face or in effect, any changes in design or emission rates from nonroad engines. TSD at 12-13 (J.A.__). EPA solicited comments on its analysis of the Air District's legal authority to promulgate and enforce the Rule. TSD at 13 (J.A. __).

On May 9, 2011, EPA approved the revisions to the Air District's portion of the California SIP. "Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District" 76 Fed. Reg. 26,609. EPA responded to comments on the proposed rulemaking, including comments from both NAHB and ARTBA regarding alleged preemption of Rule 9510 by Section 209(e). 76 Fed. Reg. at 26,609-12 (Comments 1-7). EPA described the Ninth Circuit opinion

rejecting the contention that Rule 9510 was preempted and concluded that "any significant doubt about the [Air District's] authority to enforce the emissions requirements in section 6.1.1. has been removed." Id. at 26,610. EPA also responded to a comment from ARTBA that appeared to be "little more than a renewal of its earlier request for an amendment to EPA's rule implementing CAA section 209(e)." Id. at 26,611/3-612/1. EPA stated clearly that it "has already reviewed these issues several times and is not revisiting these broader issues in this limited proceeding." Id. at 26,612/1. EPA also noted that it could not make such amendments in the instant rulemaking, because it had not proposed making any such changes in the notice. Id.

EPA additionally responded to ARTBA's comment that EPA should find that its rulemaking has "nationwide scope or effect" such that the D.C. Circuit would have exclusive jurisdiction. EPA concluded that its SIP approval is clearly regional in scope and effect, and that the innovative nature of Rule 9510 or its potential precedential effect was insufficient to give EPA's action "nationwide scope or effect." Id.

D. Challenges to EPA Approval of SIP revision in the Ninth Circuit

ARTBA filed a petition for review of EPA's approval on July 8, 2011 in the Ninth Circuit (Case No. 11-71897).[5] ARTBA filed an unopposed motion to stay the

[5] NAHB also filed a petition for review of EPA's action in the Ninth Circuit on the same day. (Case No. 11-71905) The petitions were consolidated and stayed pending the outcome of a petition for writ of certiorari from NAHB v. San Joaquin Valley Unified Air Pollution Control Dist., 627 F.3d 730 (9th Cir. 2010), filed by ARTBA. After the petition for writ of certiorari was denied, NAHB voluntarily

case, which was granted, and the Ninth Circuit petition remains stayed pending the outcome of proceedings in this Court.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over ARTBA's petition for review. Jurisdiction over a petition for review of approval of a California SIP revision lies only in the Ninth Circuit. 42 U.S.C. § 7607(b)(1). The SIP is inherently regional, with legal effect over only certain development projects in one non-attainment district of California; ARTBA cannot change the nature of that action simply by appending a petition for national rulemaking to its comments on the proposed SIP approval. EPA's determination not to reopen its long-settled nationwide regulations in response to ARTBA's comments during the regional rulemaking is not reviewable final agency action. Even if it were, ARTBA's petition is again untimely because it does nothing more than assert the same legal arguments, grounded in statutory interpretation and legislative history, that ARTBA raised in its original 2002 petition for rulemaking to the Agency, and that were previously rejected by this Court. More of the same does not win a different result, and ARTBA cannot point to a new event or changed circumstance that is the sole basis of its petition. Without such "grounds arising after," ARTBA's attempts to reopen regulations that were established over a decade ago must fail for lack of jurisdiction. 42 U.S.C. § 7607(b)(1).

---

dismissed its petition in the Ninth Circuit. ARTBA, however, did not dismiss its petition for review.

In the unlikely event that the Court reaches the merits of EPA's approval of the SIP revision, it would have to deny the petition. ARTBA's succinct challenge to EPA's SIP approval as preempted by section 209(e) of the Clean Air Act does not even address EPA's primary grounds for finding that the regional permitting authority possesses adequate authority to carry out the SIP revision: that the object of the regulation is indirect sources of air pollution, not nonroad engines or vehicles. Moreover, the Ninth Circuit has already rejected the contention ARTBA presents here and held that the state regulation at issue is not preempted by section 209(e) of the Clean Air Act.

If the Court were to find EPA's refusal to grant the petition for rulemaking appended to ARTBA's comments subject to review in this Court, EPA's reasoning in denying the petition easily satisfies the uniquely deferential standard for review. EPA had already exhaustively addressed each of the points raised in ARTBA's comments in its 2008 response to ARTBA's first petition for rulemaking. EPA's decision not to reopen its national section 209(e) regulations during an unrelated proceeding on the basis of the same set of challenges it had already reviewed and responded to is entirely reasonable and falls easily within the discretion granted to an agency in deciding whether to initiate rulemaking procedures. ARTBA request for relief is wholly unjustified.

STANDARD OF REVIEW

If the Court reaches the merits, its review is subject to the standard of the Administrative Procedure Act. See 5 U.S.C. §§ 553(e), 555(e); 42 U.S.C. § 7607(b)(1). The Court may "hold unlawful and set aside agency action" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). An agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotations and citation omitted).

On questions of statutory interpretation, the Court must give effect to the clearly expressed intent of Congress, if any such intent is apparent. Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984). Where Congress has left room for the agency to interpret the statute, the court must uphold the agency's interpretation if it is based on a permissible and reasonable construction of the statute. Id. at 843. EPA's interpretation of its own regulations is entitled to even more deference, and must be afforded "controlling" weight unless "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted).

Finally, to the extent the Court reviews EPA's response to ARTBA's comments as final agency action, review of an agency's denial of a rulemaking petition is "extremely limited and highly deferential." Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007) (internal quotation and citation omitted). Indeed, that deference is "so broad as to make the process akin to non-reviewability." Cellnet Commc'n, Inc. v. FCC, 965 F.2d 1106, 1111 (D.C. Cir. 1992). In practice, this means that the denial of a petition for rulemaking may only be overturned "in the rarest and most compelling of circumstances, which have primarily involved plain errors of law, suggesting that the agency has been blind to the source of its delegated powers." Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987) (internal quotations and citations omitted).

ARGUMENT

I. Jurisdictional Argument

A. Review of EPA's approval of a California SIP revision is proper only before the Ninth Circuit.

The Clean Air Act provides that judicial review of "the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Notwithstanding that limitation, a petition for review may be filed only in the D.C. Circuit "if such action is based on a determination of nationwide scope or effect and if in taking such action

the Administrator finds and publishes that such action is based on such a determination." Id. ARTBA's petition is undeniably a petition for review of EPA's action "approving . . . [an] implementation plan under section 7410 of this title." EPA declined to publish a finding that its rulemaking is based on a determination of nationwide scope or effect, the necessary antecedent to obtain jurisdiction over a quintessentially regional action in this Court. 76 Fed. Reg. at 26,612/1-2. (Rule 9510 is only enforceable against certain development projects within the geographical jurisdiction of the Air District and is "clearly regional in scope and effect."). Under the plain language of the statute, that is the end of the matter.[6] Because ARTBA has already filed a timely petition for review of the regional SIP approval in the Ninth Circuit, this Court need only dismiss ARTBA's petition without further procedural action.

ARTBA offers two arguments to support its claim that EPA's approval of a SIP revision that narrowly applies to certain sites within a single regional non-attainment area is nonetheless "nationally applicable" action. Pet'r Br. at 71-72. First, ARTBA argues that EPA's approval of the SIP "fleshes out" EPA's section 209(e)

[6] There is no reason to believe EPA's determination not to issue such a finding is separately reviewable. In determining whether it has jurisdiction, this Court need only examine (1) whether the challenged action is "nationally applicable" and (2) if it is not, whether EPA made and published such a finding. 42 U.S.C. § 7607(b)(1). In any event, EPA's conclusion is a sensible one, supported by the facts and consistent with an ordinary reading of the terms "nationally applicable." ARBTA offers no argument that undermines its reasonableness.

regulations "in a specific context." Id. at 71. Yet, that is the very definition of the application of a general, nationally applicable rule to a specific set of facts. It is quite unremarkable to conclude that when an agency applies a rule of general effect to a particular case, it will "flesh out" the meaning of that rule in those particular factual circumstances. If such a banal application of a rule to the facts is all that is required for an action to obtain "nationally applicable" character, then there may well be no locally or regionally applicable final agency action under section 307(b)(1) of the Act. Congress clearly intended locally and regionally applicable actions to be reviewable in the appropriate regional circuit, and explicitly specified such actions to include SIP actions. ARTBA's reasoning conflicts with this very specific Congressional intent.

Moreover, while ARTBA suggests that the SIP approval is "sufficiently rule-like" to justify review, it makes no attempt to identify *what* the new legally binding rule could be. Id. EPA's analysis of whether the Air District has the authority to adopt and implement Rule 9510 consisted almost exclusively of discussion of features unique to Rule 9510, and particularly how Rule 9510 works to effect reductions in emissions from regulated project sites. TSD at 11-13 (J.A. __) (discussing, *inter alia*, options under the Rule to change design features of a site to obtain emission limits; process for reviewing applications under Rule 9510; how emission reductions are measured under Rule 9510). EPA then concluded that this particular Rule did not amount to a "standard controlling emissions of nonroad engines." Id. at 12 (J.A.__).

The analysis does not contain a single statement that could be misconstrued as a rule of general applicability, and ARTBA's assertion to the contrary is unsupported.

Second, ARTBA argues that approval of Rule 9510 is "not an isolated, one time incident, unique to [the Air District]." Pet'r. Br. at 72. ARTBA is simply wrong; the final agency action subject to challenge here is exactly that: approval of a revision to a regional SIP that has no legal consequences beyond those imposed on the regulated entities subject to the SIP. That other permitting authorities, courts, or potential future plaintiffs may point to Rule 9510 as a laudable example of another means to obtain "reasonable further progress" toward clean air objectives is irrelevant. Id. EPA's approval of the regional SIP has not changed the legal landscape, for either state and regional authorities who propose SIPs, or for regulated entities indirectly affected by EPA's section 209(e) preemption regulations. There simply is no nationally applicable final agency action lurking between the lines of this manifestly regional SIP approval.

ARTBA fails to address the utter impracticality of its proposal that a local or regional action obtains national character because of its potential precedential effect. As EPA explained in its response to comments, that EPA's approval of California's Rule 9510 might set a "precedent" for future SIP revisions is insufficient to establish the nationwide character of EPA's action, as EPA action on *any* SIP revision may have the same "precedential" effect. 76 Fed. Reg. at 26,612/2 ("the precedential effect in this instance is no different than for EPA actions approving or disapproving any

other SIP or SIP revision anywhere in the country.") ARTBA's reading would inappropriately collapse the two distinct grants of jurisdiction Congress provided for in section 307(b)(1), by transforming locally or regionally applicable action that has potential precedential effect into a nationally applicable action subject to review in this Court.[7]

B. ARTBA's comments on the regional SIP revision do not render EPA's approval "nationally applicable" action subject to review in this Court.

ARTBA submitted a letter in response to EPA's notice of proposed rulemaking titled "Comments and Rulemaking Petition." ("Comment Letter," J.A. __). In the Comment Letter, ARTBA requested that EPA deny the proposed SIP revision but also "renewed ARTBA's petition with respect to nonroad preemption rules." Comment Letter at 1. (J.A. __) ARTBA's request that EPA amend its section 209(e) regulations far exceeds the scope of EPA's proposed rulemaking, and sought to

[7] While ARTBA argues that review by this Court helps to "ensure nationwide uniformity," Pet'r Br. at 39-40, this litigation alone demonstrates the problems that may arise from review of a regionally applicable action in the D.C. Circuit rather than the regional Circuit. The Ninth Circuit has already reviewed a challenge to the Air District's adoption of Rule 9510, and held that it is not preempted by the Clean Air Act. NAHB v. San Joaquin Valley Unified Air Pollution Control Dist., 627 F.3d 730 (9th Cir. 2010). Likewise, in a parallel state court proceeding, California's Court of Appeals upheld the validity of Rule 9510. Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist., 178 Cal. App. 4th 120 (Ct. App. 2009). Review by the D.C. Circuit would open the possibility of a conflicting holding, muddying the waters for permitting authorities and regulated entities alike, rather than promoting uniformity. By contrast, the Court has already played its proper role in the statute's scheme for judicial review by reviewing challenges to EPA's 209(e) regulations back when they were promulgated in 1994. EMA, 88 F.3d 1075.

interject comments on EPA's preemption rules generally. The alleged infirmities of the regulations raised in ARTBA's Comment Letter do not specifically relate to EPA's proposed action to approve Rule 9510; in fact, in "renew[ing]" its petition, it appears ARTBA basically repackaged the same claims raised during its 2002 petition to EPA and its 2008 petition for review before this Court. First, ARTBA's own comments on the proposed rulemaking cannot alter the regional nature of EPA's action. Second, EPA's response to ARTBA's comments, declining to open its narrow rulemaking to consider broad and unrelated challenges to its 209(e) regulatory framework, does not constitute a separate, independently reviewable final agency action. Accordingly, ARTBA's Comment Letter, including the request for rulemaking contained therein, does not provide a basis for jurisdiction before this Court.

1. Raising comments beyond the scope of the proposed rulemaking does not alter the regional nature of the action.

ARTBA's Comment Letter raises general challenges to EPA's national section 209(e) regulations, focusing on four aspects of the section 209(e) regulations: (1) the treatment of standards affecting nonroad fleets, Comment Letter at 12-14 (J.A. __); (2) the applicability of preemption to standards affecting "new" nonroad vehicles, rather than throughout the nonroad vehicle's useful life, id. at 14 (J.A. __); (3) differences in the definitions of "new" as applied to locomotives and other nonroad vehicles, id. at 15 (J.A. __); and (4) the treatment of state regulations of the use and operation of nonroad vehicles, id. at 16-17 (J.A. __). Notably, while EPA addressed

comments regarding the application of section 209(e) to Rule 9510, EPA's approval of Rule 9510 ultimately hinged on the view, as articulated by the Ninth Circuit, that Rule 9510 is a regulation of emissions from indirect sources, i.e., construction and development sites, permissible under Clean Air Act section 110(a)(5). 42 U.S.C. § 7410(a)(5). ARTBA's comments are general grievances with EPA's section 209(e) regulations, and go well beyond any possible link to the approval of Rule 9510 proposed in EPA's notice of rulemaking.[8] As explained in its response to ARTBA's comments, EPA could not have adopted the amendments proposed by ARTBA, because they far exceeded the scope of the proposed SIP revision. 76 Fed. Reg. at 26,612/1. This Court has rejected attempts by petitioners to broaden the scope of matters addressed through comments on a rulemaking in other contexts, and the same principle applies here. See e.g., Am. Iron & Steel Inst. v. EPA, 886 F.2d 390, 398 (D.C. Cir. 1989) (Petitioner not permitted to use reopener rule and obtain jurisdiction by goading an agency to respond to comments on matters other than those at issue.). Merely appending comments directed to national regulations does not affect the legal scope of the proposed action.

[8] Indeed, ARTBA had already raised these same claims in its 2002 petition for rulemaking to EPA. See "Petition to Amend Rules Implementing Clean Air Act § 209(e)" (July 12, 2002) (J.A. __) at 1 (J.A. __)(petitioning EPA to list as preempted restrictions on the use, hours of operation, and fuel of both new and non-new nonroad vehicles; raising the "disparate regulatory treatment of locomotives and other nonroad vehicles"), 5 (J.A. __)(raising concerns about EPA definition of "new" for nonroad vehicles, 8 (J.A. __)(arguing "Section 209(e) Preempts Fleet Standards").

2. EPA's response to ARTBA's comment letter is not final agency action.

In its Comment Letter, ARTBA cited to the APA's provision directing that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" as the basis for the petition for rulemaking appended to its comments on the proposed SIP revision. Comment Letter at 1 (J.A. __) (citing 5 U.S.C. § 553(e)). Nothing in that statute, however, requires that an agency must provide the right to petition to amend a regulation in any administrative proceeding of the petitioner's choosing. Here, EPA's response to ARTBA's comments, indicating that EPA had "already reviewed [ARTBA's challenges to its section 209(e) regulations] several times" and declining to revisit those issues in the narrow rulemaking, is not a reviewable final agency action. 76 Fed. Reg. at 26,612/1.

EPA's response to ARTBA's comment displays none of the hallmarks of a final agency decision. EPA's short dispensation of ARTBA's general comments is not the mark of the "consummation of the agency's decisionmaking." Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (internal quotation and citation omitted). Nor is EPA's response to these comments the action from which "legal consequences [] flow." Id. As EPA explained in its response, ARTBA's renewed petition added nothing beyond the same challenges raised in its earlier 2002 petition, and EPA had already denied that petition in a decision published following formal notice and comment procedures in 2008. 76 Fed. Reg. at 26,612/1 (citing to 73 Fed. Reg. 59,034). It is EPA's original

rulemakings in 1994, or at latest the 2008 denial of ARTBA's petition, from which legal consequences flow, not the current SIP approval. EPA was not required to, and did not, reopen the substance of ARTBA's earlier 2002 petition to amend EPA's section 209(e) regulations in the narrow regional rulemaking.

That a denial of a petition for rulemaking may constitute a suitably final agency action subject to review in this Circuit, Massachusetts v. EPA, 415 F.3d 50, 53-54 (D.C. Cir. 2005), does not lead to the conclusion that EPA's refusal to open ARTBA's petition for consideration a second time is a final, separately reviewable action here. While ARTBA framed its Comment Letter as a petition for rulemaking, the circumstances of its submittal (as comments to an unrelated and decidedly regional, rather than national, rulemaking) and its substance (repetition of an earlier rejected challenges) warrant EPA's treatment of the "petition" as nothing more than a series of unpersuasive comments that lacked any real relationship to the proposed agency action. National Mining Ass'n v. United States Dep't of the Interior, 70 F.3d 1345, 1351 (D.C. Cir. 1995) ("Permitting any affected rule to be reopened for purposes of judicial review by a rulemaking that does not directly concern that rule would stretch the notion of 'final agency action' beyond recognition."). When properly understood as ill-placed comments, EPA has no further duty to respond to ARTBA's "petition." Further, the proper focus of judicial review is the final action actually taken by EPA, namely approval of the SIP revision, not EPA's responses to comments submitted during that process, however those comments are labeled. The Court should find that

EPA's response to ARTBA's comments, including the renewal of its 2002 petition, is not final agency action, and accordingly dismiss ARTBA's petition for lack of jurisdiction.

C. Even if EPA's response to ARTBA's comments constitutes final agency action, ARTBA's petition for rulemaking is untimely.

"The general rule is that it is a perfectly valid 'method of obtaining judicial review of agency regulations once the limitations period has run . . . to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision.'" ARTBA v. EPA, 588 F.3d at 1112 (quoting NLRB Union v. FLRA, 834 F.2d 191, 196 (D.C. Cir. 1987)). The general rule, however, is subject to an important exception. Id. at 1113. Where Congress incorporated specific language foreclosing jurisdiction except in specific circumstances, "a different outcome results: judicial review of a petition to repeal or revise rules is time-barred, except to the extent that the statute allows review based on later-arising grounds." Id. (quoting Nat'l Mining Ass'n v. U.S. Dep't of the Interior, 70 F.3d 1345, 1350 (D.C. Cir. 1995)). CAA section 307(b)(1)'s jurisdictional provision impose particularly strict constraints, requiring that a petition brought outside the original 60-day window for review must be filed within 60 days of the after-arising grounds, and that the petition must be "based solely on" those new grounds. 42 U.S.C. § 7607(b)(1); ARTBA v. EPA, 588 F.3d at 1113-14. Thus, to be timely filed, ARTBA must identify some new event, that

occurred no longer than 60 days before the date of its petition, that provides the sole basis for its petition.

The Court need not spend much time searching for such a new event in ARTBA's petition. The grounds that ARTBA points to as the basis for its challenge to EPA's section 209(e) regulations are nothing new. Supra note 7. They do not relate to EPA's approval of the regional SIP approval, and in fact this Court already rejected each of the events ARTBA relies upon in its renewed petition as too remote in time to satisfy section 307(b)(1)'s requirements. 588 F.3d at 1114 (Dismissing a 2001 Texas law imposing diesel emission limits, EPA 1998 rulemaking concerning scope of federal preemption of state regulation of new locomotive engines, 2004 Supreme Court opinion, and 2004 statutory amendment each as too remote in time to support a basis for review). The core of ARTBA's position, both in 2002 and again now, is that EPA's longstanding interpretation of Section 209(e) violates the Act, and that EPA must amend it now because it has been legally erroneous all along – purely legal arguments that have no foundation in new facts or circumstances.

The only new event referenced in ARTBA's Comment Letter is EPA's approval of the regional SIP revision. While this is an event falling within the requisite timeframe, it is transparently not the sole grounds, or even *a* ground upon which ARTBA's bases its renewed petition for rulemaking. The fact that ARTBA could – and did – raise exactly the same challenges to EPA's regulations in 2002 (in its petition to EPA) and 2009 (in the DC Circuit litigation) forecloses any argument that

it is the SIP revision that constitutes the new ground that is the sole basis for its petition. In fact, ARTBA concedes its reliance on grounds available as early as *1994*. Pet'r Br. at 41, note 11 ("[Section] 307(b) does not preclude ARTBA's reliance on grounds available in 1994.")

ARTBA offers three arguments why the Court may assert jurisdiction notwithstanding section 307(b)(1)'s jurisdictional limits and the Court's decision in ARTBA v. EPA. Pet'r. Br. at 39-41. First, ARTBA suggests that the All Writs Act, 28 U.S.C. § 1651, provides an alternate source of jurisdiction aside from the Clean Air Act's limited grant of jurisdiction. Pet'r Br. at 39-40. This argument cannot carry ARTBA far, as the statutory language itself precludes that result. The All Writs Act provides that a Circuit Court "may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). Federal courts, which are inherently creatures of a limited jurisdiction, must identify a positive source of jurisdiction in order to dispose of a case. Tuck v. Pan Am. Health Org., 668 F.2d 547, 549 (D.C. Cir. 1981). The All Writs Act does not provide that positive source of jurisdiction, instead offering a Circuit Court an "aid" to obtain review of matters that are otherwise within its jurisdiction by grant of another statute. Thus, whereas this Court has occasionally "drawn on the All Writs Act to protect our jurisdiction when agency conduct could plausibly make later merits review impossible," it has also held that exercising such jurisdiction is inappropriate as a means to circumvent jurisdictional limits in the

originating statute. Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1287-88 (D.C. Cir. 2007) (asserting jurisdiction under All Writs Act is "not appropriate" where plain terms of the statute dictate review elsewhere); see also Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999) ("the Act does not enlarge [existing statutory] jurisdiction"); Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985) (""Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."). ARTBA cannot use the All Writs Act to eliminate the jurisdictional limits of the Clean Air Act.

Second, ARTBA argues this Court has jurisdiction to review its challenge to EPA's regulations implementing section 209(e) because EPA's approval of the regional SIP revision is "agency action applying" EPA's 209(e) preemption regulations. Pet'r Br. at 40. ARTBA relies on Murphy Exploration & Prod. Co. v. Dep't of Interior, 270 F.3d 957 (D.C. Cir. 2001) ("Murphy"), in support of its argument. Murphy is inapposite and, if it stood for the broad proposition ARTBA claims it does, would contradict the Court's very specific holding on the limits on judicial review imposed by section 307(b) of the Clean Air Act in ARTBA v. EPA, 588 F.3d 1109 (D.C. Cir. 2009). As explained in ARTBA, the "general rule" is that judicial review is available where a petitioner contends that a regulation is substantively, as opposed to procedurally, invalid – even where that regulation is challenged beyond the statutory limitation period. 588 F.3d at 1112. Murphy is

simply an example of a case in which the general rule, rather than the exception, applied.

The holding in Murphy does not offer judicial review beyond circumstances meeting the specific criteria required by section 307(b). While Murphy did note that judicial review of a rule is available when a petitioner challenges further "agency action applying that rule," that conclusion is the unremarkable result of the so-called general rule that allows for substantive challenges to a rule beyond the statutory period. Indeed, Murphy relied on Functional Music Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958), to support the proposition that further review was available. 270 F.3d at 958-59. Functional Music was equally cited in ARTBA to demonstrate the existence of a general rule providing for challenges beyond the statutory limit. 588 F.3d at 1112. Murphy had no reason to discuss the subset of statutes, such as the Clean Air Act, in which Congress explicitly intended to foreclose judicial review of an action beyond the specified period. Murphy does not alter the sound conclusion that ARTBA must identify "grounds arising after" the promulgation of the 209(e) regulations, and not merely agency action "applying" the 209(e) regulations, as the sole basis for its petition to obtain review by this Court. And ARTBA has failed to identify any such new grounds.

Third, ARTBA argues that ARTBA v. EPA was wrongly decided, because it conflicts fatally with earlier precedent in Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) ("Oljato") Pet'r. Br. at 40-41. Oddly, in support of an

argument urging this panel to ignore the precedential effect of ARTBA v. EPA, ARTBA points to this Circuit's law that a three-judge panel lacks the authority to overturn Circuit precedent. Pet'r Br. at 40-41 (citing LaShawn v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*)). The Court need not make the unpalatable choice of selecting which precedent to follow, as Oljato and ARTBA are not in conflict. ARTBA appears to believe that Oljato's requirement to present new information believed to justify revision of a rule to the agency prior to judicial review is somehow in conflict with ARTBA's holding that its 2008 petition for judicial review must be treated as a challenge to the regulations directly, and is therefore time-barred. ARTBA does not elaborate on how ARTBA's holding must be premised upon overturning Oljato; the Court certainly did not purport to overturn the case explicitly. To the contrary, ARTBA discussed at length the requirement, first set forth in Oljato, to provide the agency the opportunity first to address the new grounds, and how that requirement interrelated to section 307(b) 60-day window for review.[9] ARTBA, 588 F.3d at 1114. ARTBA's meager protest aside, this Court is required to follow the precedent of both National Mining, 70 F.3d 1345, and ARTBA v. EPA, and find ARTBA's renewed petition time-barred.

[9] The Court specifically considered whether submission to the agency is the relevant measuring point to determine whether an event falls within the requisite 60-day period, but ultimately did not need to decide the matter – because none of the events cited by ARTBA fell within a 60 day period of ARTBA's 2002 submission of its petition for rulemaking to EPA. Id. Here too, the distinction is of no account, because ARTBA cannot identify any new grounds within 60 days of either its Comment Letter or its petition for review filed with the Court.

Finally, ARTBA does not argue that EPA reopened its section 209(e) regulation in the regional rulemaking, or that any of the claims in its Comment Letter have newly ripened as a result of EPA's approval of the SIP revision. As to the former, EPA's only mention of any revision to its existing regulations implementing Section 209(e) was in response to the request in ARTBA's Comment Letter, and EPA refused the request – the record could not more clearly demonstrate the intent not to reopen the regulation. See 76 Fed. Reg. at 26,611/3-612/1 (Comment 6) (EPA "is not revisiting these broader issues.") As to the latter, ARTBA suggests vaguely that it did not have standing in 1994 when certain grounds underlying its petition first arose, Pet'r Br. at 41, and that it "lacked a constitutionally ripe challenge until long after 1998." Id. at 59, note 18. Even assuming these unsupported assertions are true, they do not go far enough to support jurisdiction over ARTBA's petition for rulemaking, as ARTBA fails to identify the new grounds triggering that ripening. ARTBA's nebulous assertions sound much like the evaluation of retroactive ripeness that the Court has long been skeptical of in cases involving statutes with a judicial review time-bar. See Eagle-Picher Indus. v. EPA, 759 F.2d 905, 911-19 (D.C. Cir. 1985) (rare for a court to "look[] backward to divine whether the court would have considered the request for review ripe had it been brought in a timely fashion."). Moreover, ARTBA cannot argue that it is the regional SIP revision (the only event within the 60-day window) that first made the alleged injury from the challenged 209(e) regulations cognizable. The Court recognized ARTBA's standing to pursue the claims in its 2002

petition – which are the same claims it seeks to reassert in this proceeding – in the ARTBA decision. 588 F.3d at 1111-12 ("Standing, in short, is not ARTBA's problem.") ARTBA therefore cannot show that any of the claims asserted in its 2002 petition or 2008 briefing to the Court are newly justiciable due to events within 60 days of its petition.

II. Merits Argument

While EPA has presented multiple bases why this Court lacks jurisdiction to review EPA's approval of the regional SIP revision, if the Court reaches the merits of petitioner's claims, the petition still should be denied.

A. Rule 9510 is not preempted by Section 209(e) of the Clean Air Act

ARTBA's sole substantive challenge to EPA's approval of the regional SIP revision is that Rule 9510 is preempted by section 209(e).[10] Pet'r Br. at 73-74. ARTBA's perfunctory challenges to EPA's SIP approval miss the mark entirely. ARTBA characterizes Rule 9510 as a "standard" that applies to "fleets of in-use equipment." Id. at 73. ARTBA focuses its argument solely on whether Rule 9510 is a standard affecting fleets of nonroad vehicles, and entirely ignores EPA's – and the Ninth Circuit's – reasons for concluding that Rule 9510 is not preempted under section 209(e) of the Act. Moreover, to reach ARTBA's "easy" conclusion that

[10] ARBTA's argument on this point is contained within a single paragraph, again demonstrating that the thrust of ARTBA's challenge in this petition is not the SIP approval, but rather general, long-standing grievances with EPA's section 209(e) regulations.

section 209(e) preempts Rule 9510, Pet'r Br. at 73, the Court must first accept ARTBA's elaborate reinterpretation of the section 209(e) framework in place of the established interpretation embodied in EPA's section 209(e) regulation. The deferential standard of review simply does not allow the Court to replace EPA's regulations – already upheld in relevant part by this Court – with ARTBA's preferred framing of the statute.

1. EPA reasonably determined that Rule 9510 operates as standard to control emissions from development sites, not as a standard relating to control of emissions from engines.

In its analysis of whether the Air District had provided adequate assurances of legal authority to carry out the SIP revision, EPA evaluated whether Rule 9510 is a "standard or other requirement relating to the control of emissions from . . . new engines which are used in construction equipment or vehicles . . . and which are smaller than 175 horsepower" such that it is expressly preempted by section 209(e)(1). 42 U.S.C. § 7543(e)(1). EPA also considered whether Rule 9510 is a "standard or other requirement relating to the control of emissions" from any (including those that are no longer new) such vehicles or engines, such that it would be implicitly preempted under section 209(e)(2). The crux of EPA's determination that Rule 9510 is not preempted under either provision is that Rule 9510 is an *indirect* source review program authorized by section 110(a)(5) of the Act, 42 U.S.C. § 7410(a)(5), that

applies to construction sites, not to fleets of construction equipment.[11] 76 Fed. Reg. at 26,609/3-611 (Response to Comments 1-2, 5). Unlike prohibited standards targeting emission reductions from the vehicles or engines directly, the goal of Rule 9510 is to mitigate emission levels at a regulated site as a whole. TSD at 11-12 (J.A. __).

ARTBA points to section 6.1.1 of Rule 9510 as setting a "criterion" or "standard" for nitrous oxides and particulate matter for equipment, Pet'r Br. at 73, but fails to read section 6.1.1 with the remainder of section 6. Rule 9510 § 6 (J.A. __.) Read in its entirety, section 6.1 seeks to reduce emissions during the construction phase of project. While the amount of emission reductions to be attained is calculated as a percentage of the emissions from construction equipment at the site, the Rule does not mandate that those reductions must be achieved by actually reducing the levels of emissions from construction equipment engines. Pursuant to Rule 9510 sections 6.1.2 and 6.3, the emission reduction target may be achieved through any combination of on-site emissions reductions measures or off-site fees. Id. As EPA explained in its proposed approval of the SIP revision, "[a] developer has numerous options to meet the emission reduction obligation, including options that do not involve any changes to nonroad equipment," such as altering the site design by

[11] As an aside, EPA has stated several times that it agrees that, if a state law constitutes a standard relating to the control of emissions from nonroad vehicles or engines, then the fact that it applies to fleets rather than individual vehicles would not save the law from preemption. See e.g., 76 Fed Reg. at 22,611/2-3 (Response to Comment 5).

increasing the density of a residential project, adding bike paths or pedestrian walkways, or supporting commuter shuttles for construction workers at the site. TSD at 11-12 (J.A. __) EPA also examined the off-site fee structure, and determined that the upper level magnitudes of such fees for a site were not so large as to create, in effect, a mandate to use a particular engine. Id. at 12. Therefore, Rule 9510 is neither a direct nor a *de facto* requirement to purchase more efficient construction engines because the other options for attaining emission reductions, including other on-site measures and off-site fees, are genuinely available ones. Id.; 76 Fed. Reg. at 26,611/3.

The Ninth Circuit's reasoning in upholding Rule 9510 as an indirect source program separately authorized by the Clean Air Act parallels EPA's reasoning in reaching the same conclusion. The Ninth Circuit found that "the plain language of section 110(a)(5) affirmatively authorizes" Rule 9510 as an indirect source program. NAHB, 627 F.3d at 737. The Ninth Circuit further found that the distinction EPA draws here, that a standard targeting emissions from a site overall (which may, but does not necessarily, implicate changes in nonroad vehicles or their engines or controls on the use of nonroad vehicles) is different from a standard "relating to the control of emissions" from nonroad vehicles, is one derived from the provisions of the Clean Air Act itself. Id. at 739. The Ninth Circuit reasoned, "[t]he Act, by allowing states to regulate indirect sources of pollution, necessarily contemplates imputing mobile sources of pollution to an indirect source as a whole. If an indirect source review program could not attribute the emissions from mobile sources, while

they are stationed at an indirect source, to the indirect source as a whole, states could not adopt any indirect source review program." Id. The Ninth Circuit concluded that the particular features of Rule 9510 that allowed it to qualify as an indirect source review program under section 110(a)(5) are the same features that allow the Rule to avoid preemption under section 209(e). Id.

ARTBA's sole argument regarding the language in the Clean Air Act's indirect source review provision section 110(a)(5), 42 U.S.C. § 7410(a)(5) is contained in a summary footnote, Pet'r Br. at 73, note 21, and basically recites language of 42 U.S.C. § 7410(a)(5)(C), which states that "[d]irect emission sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources." The Ninth Circuit provided sound reasoning why Rule 9510 does not fall within the exception in section 110(a)(5)(C), "[t]he statutory proviso on which [petitioner] relies only makes sense if it is read to prohibit an indirect source review program from targeting direct sources "at, within, or associated with, any indirect source" apart from the program's regulation of an indirect source. If the proviso were read to prohibit a regulatory effect on direct sources while they are at an indirect source, there could be no indirect source review programs." NAHB, 627 F.3d at 736.

ARTBA offered no challenge to EPA's analysis of how Rule 9510 functions or other factual matters underlying its determination, and the Court must conclude that EPA has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." Motor Vehicle Mfrs. Ass'n., 463 U.S. at 43. EPA's conclusion that Rule

9510 is an indirect source review program that is not preempted by section 209(e), and therefore meets the CAA requirements of SIP enforceability, is soundly based in the factual record and should be upheld.

2. EPA reasonably applied its longstanding interpretation of section 209(e) in evaluating whether Rule 9510 is preempted.

ARTBA's attack on EPA's application of its section 209(e) regulations to Rule 9510 is little more than a repetition of its position that those regulations are inconsistent with the Act and should be amended in line with ARTBA's preferred reading of section 209 provisions. While it is unclear which in the litany of wrongs ARTBA perceives in EPA's existing interpretation are specifically at issue in the SIP approval, as ARTBA simply refers back to its entire substantive argument in Section II of its brief, it appears that ARTBA's argument is this: if the Court agrees with ARTBA's interpretation of section 209(e), then it is a simple matter to conclude that EPA wrongly decided Rule 9510 is not preempted. Pet'r. Br. at 73-74. Such an approach turns the standard of review on its head. ARTBA cannot succeed in showing EPA was unreasonable by applying its existing interpretation of 209(e), which was upheld in relevant part by this Court in EMA, 88 F.3d 1075, rather than an alternative reading urged by ARTBA. It is inherently reasonable for EPA to read section 209(e) exactly as it said it would in its rules promulgated in 1994, particularly where the reading has already been held to be a permissible one under the statute.

For example, ARTBA reads the "standards and other requirements" language in section 209(e) as unambiguously preempting all in-use controls of nonroad equipment, including use restrictions on such equipment. Pet'r Br. at 65-70, 73. Presumably, ARTBA believes that, if the Court accepted its Chevron step one argument against EPA's interpretation that allows for in-use regulations, Rule 9510 would no longer fall outside the preemptive reach of section 209(e).[12] The difficulty for ARTBA is the high hurdle of precedent. One of the exact issues presented in EMA was whether the phrase "other requirements" in Section 209(e) includes use restrictions. EMA, 88 F.3d. at 1093. The Court specifically considered arguments concerning the interrelationship among Sections 209(a), (d), and (e), as well as between Section 209 and Section 213 of the Act, 42 U.S.C. § 7547. Because the Court found these various provisions difficult to reconcile, it held that the relationship between them was ambiguous and that EPA has the discretion to interpret Section 209(e). Id. at 1094. The Court then upheld EPA's reasoning that because the term "require" and "requirements" in other parts of Section 209 generally refer to "certification, inspection, or . . . approval" requirements, that term does not include use restrictions. Id. at 1093. As ARTBA itself argues in another context, Pet'r Br. at

[12] However, such a conclusion does not follow from its premise. As discussed above, EPA's determination that Rule 9510 is not preempted by section 209(e) was based upon its features as an indirect source review program. Assuming *arguendo*, that direct state regulation of the use of construction equipment is a preempted "requirement," this does not mean that an indirect source program that allows sources to attain emissions reductions at a site through controls on the use of equipment is inevitably also such a preempted "requirement."

40-41, "[o]ne three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." LaShawn A., 87 F.3d at 1395.

The fact that the Court did not address each of ARTBA's arguments specifically is irrelevant. The EMA panel reached its holding based upon extensive consideration of the relationship between various sections of the statute, and this Court may not "construe afresh the statutory language." Nat'l Inst. of Mil. Justice v. U.S. Dep't of Def., 512 F.3d 677, 682 & n.7 (D.C. Cir. 2008), cert. denied, 555 US 1084 (2008). In sum, assuming the Court were able to divine from ARTBA's brief the specific flaw implicated in EPA's application of 209(e) in this case, ARTBA's arguments necessarily fail because they are wrongly premised on the notion that the Court may now override EPA's permissible interpretation with ARTBA's own proposed reading of 209(e).

B. EPA reasonably denied ARTBA's renewed petition for rulemaking

Assuming EPA's response to ARTBA's Comment Letter is separately reviewable agency action as a denial of petition for rulemaking and that such review is timely, EPA's refusal to revise its section 209(e) regulations easily meets the highly deferential standard of review applied to such actions. Massachusetts v. EPA, 549 U.S. at 527-28; Am. Horse Prot. Ass'n v. Lyng, 812 F.2d at 5. ARTBA's "renewal" of its petition for rulemaking simply repackaged the same grounds put forth for revising the regulations in its 2002 petition, and EPA had already addressed those grounds at length, after public notice and comment, in its August 21, 2008 "Response to the

Petition of American Road and Transportation Builders Association to Amend Regulations Regarding the Preemption of State Standards Regulating Emissions From Nonroad Engines" ("2008 Response") (J.A. __). EPA made this document available in its public docket while publishing its final decision not to grant ARTBA's petition for rulemaking. 73 Fed. Reg. 59,034, 59,130/2 (Oct. 8, 2008). At that time, EPA reviewed ARTBA's arguments, responded comprehensively, and determined no revision of its regulations was merited as a result; EPA is not obligated to undergo the process a second time to respond to the same substantive complaints, especially where, as here, they are merely appended to comments on a proposed regional SIP approval. In its final approval of the regional SIP revision, EPA pointed to its earlier denial, noted the subsequent litigation in the D.C. Circuit, and explained that it would not review the issues further. 76 Fed. Reg. at 26,612/1. In these particular circumstances, EPA's explanation of the denial meets the deferential standard of a "reasoned" agency decision. "As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." Massachusetts v. EPA, 549 U.S. at 527. EPA's decision not to expend resources revisiting the same set of requests raised in the context of an unrelated regional rulemaking, instead standing by its earlier, exhaustive response, is a wholly permissible exercise of that discretion.

CONCLUSION

For the reasons described above, the petition for review should be denied. EPA respectfully requests that the Court also find that EPA is entitled to an award of attorney fees for its costs in responding to the petition for review.[13] See 42 U.S.C. § 7607(f); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (Court may award attorney's fees to a prevailing defendant where plaintiff's action is found to be "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); see also Citizens for a Better Env't v. Steel Co., 230 F.3d 923, 930-31 (7th Cir. 2000); Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1094-96 (9th Cir. 1999).

[13] EPA is prepared to submit documentation substantiating its costs if the Court finds an award of such fees is warranted.

BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a) of the Federal Rules of Civil Procedure, I certify that the foregoing Brief For Respondent United States Environmental Protection Agency And Lisa Jackson, Administrator contains 12,166 words, including footnotes, as counted by the Microsoft Word 'word count' feature.

Dated: June 6, 2012 */s/Kim Smaczniak*

Kim Smaczniak

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondent U.S. Environmental Protection Agency were served upon the following counsel by operation of the Court's electronic filing system:

Lawrence J. Joseph
1250 Connecticut Ave., NW
Suite 200
Washington, DC 20036
Counsel for Petitioner ARTBA

Dated: June 6, 2012

/s/ Kim Smaczniak
Kim Smaczniak