Opinion Issued on December 22, 2006

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

No. 04-1200, and consolidated cases

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On the Partial Grant of Petitions for Review of a Final Rule
of the United States Environmental Protection Agency

PETITION FOR PANEL REHEARING BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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CONCISE STATEMENT OF ISSUES AND THEIR IMPORTANCE

On December 22, 2006, the Court upheld certain portions, and rejected others, of the Environmental Protection Agency's ("EPA's") 2004 rule implementing the revised "eight-hour" National Ambient Air Quality Standard ("NAAQS" or "standard") for ozone that EPA promulgated in 1997 to replace the old, less protective "one-hour" standard. 69 Fed. Reg. 23,951 (April 30, 2004) ("Rule" or "Phase 1 Rule"). EPA requests panel rehearing on five issues.

Rehearing is warranted because significant portions of the Opinion are based upon issues that were neither raised nor briefed by the parties. Without the benefit of briefing, the Court erred in replacing the 1-hour standard design value of 0.121 parts per million ("ppm") in Subpart 2 of the Act with "0.09 ppm on the eight-hour scale" to establish whether the 1-hour standard's level of protection has been achieved and to delineate the areas for which EPA has discretion to use Subpart 1 in lieu of Subpart 2 to implement the 8-hour standard. Based upon several faulty assumptions, the Court reached a technically and legally incorrect conclusion that will not address the Court's stated concerns, and that cannot be properly implemented on remand. The Court also incorrectly rejected EPA's reasons for regulating certain 8-hour nonattainment areas under Subpart 1. By precluding EPA from using Subpart 1 based upon any rationale that depends upon the greater flexibility that subpart affords, the Opinion effectively nullifies the very discretion that this Court, and the Supreme Court in Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001), concluded EPA has to use Subpart 1 in areas that fall within the statutory "gap" identified in Whitman. These errors jeopardize ongoing progress towards the expeditious achievement of the public health protection promised by the 8-hour standard.

Addressing the Rule's anti-backsliding provisions, the Court erred by applying Section 172(e), 42 U.S.C. § 7502(e), as a legally binding requirement to EPA's implementation of the more protective 8-hour standard, even though that section is legally binding only where EPA "relaxes" a standard. Because of this, the Court failed to consider EPA's sound reasons for not

retaining four 1-hour standard measures, such as Section 185 penalties, to prevent backsliding.

The Environmental Petitioners have authorized the undersigned counsel to represent that they support EPA's request that, for the following two issues, the Court modify the Opinion as recommended in Attachments A and B hereto.[1/] First, to avoid an improper construction of the Opinion's discussion of conformity, these Petitioners support EPA's request that the Court make the clarifying changes in Attachment A.

Second, the Environmental Petitioners support EPA's request that on rehearing the Court make the clarifying changes in Attachment B to address the Opinion's apparent remedy of vacating the entire Rule. That remedy is overbroad and inappropriate since significant portions of the Rule were not challenged or were expressly upheld by the Court, and the specific provisions rejected by the Court are readily segregable from those upheld or not challenged. By vacating the entire Rule, the decision will jeopardize important ongoing efforts necessary to achieve the public health protection promised by the 8-hour standard in all nonattainment areas, including those areas EPA placed into Subpart 2, which are not implicated by the decision. Rehearing is appropriate to fashion a more narrow remedy that vacates only the provisions of the Rule that were challenged and rejected by the Court, as proposed in Attachment B.

The five issues on which EPA requests further briefing and panel rehearing are:

1. Whether the Court erred in holding that the Supreme Court's decision in Whitman established a level of 0.09 ppm on the 8-hour scale to define the upper limit of the statutory gap identified by the Supreme Court, which delineates the range of areas for which EPA has discretion to utilize Subpart 1 instead of Subpart 2 to implement the 8-hour ozone standard?

2. Whether the Court erred in concluding that Whitman and the Clean Air Act prohibit EPA's rationale – that the flexibility of Subpart 1 makes it better suited than Subpart 2 for

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[1/] The Environmental Petitioners' support for the modifications in Attachments A and B should not be construed as their support for all of EPA's stated reasons requesting that relief. Nor should it be construed as support for any other portion of EPA's request for rehearing.

bringing "gap" areas into attainment with the 8-hour standard – and thus improperly nullified the very discretion the Supreme Court identified in Whitman for EPA to classify gap areas?

3. Whether the Court erred in concluding that Section 172(e) applies as a legally binding requirement when, as here, EPA promulgated a more protective NAAQS, and thus whether the Court failed to afford proper deference to EPA's decision not to retain certain 1-hour standard measures as anti-backsliding provisions?

4. Whether the Court erred in fashioning the remedy for conformity as an anti-backsliding measure, by requiring conformity for the 1-hour standard to apply to all federal activities rather than simply retaining the 1-hour motor vehicle emissions budgets?

5. Whether the Court erred in vacating the entire Rule even though many provisions of the Rule were not challenged or were upheld by the Court, and even though the specific provisions of the Rule rejected by the Court are segregable from those that were not?

ARGUMENT

I. The Court Erred in Concluding That the Upper Bound of the Statutory Gap, Which Delineates The Range of Areas for Which EPA Has Discretion to Utilize Either Subpart 1 or Subpart 2 to Implement the 8-hour Standard, Is Defined by a Level of 0.09 ppm on the 8-Hour Scale, Rather Than the 1-hour Design Value of 0.121 ppm.

The Court rejected the Environmental and State Petitioners' arguments that all areas must be placed in Subpart 2, concluding that EPA properly construed the Supreme Court's decision in Whitman to find that the Act contains a statutory "gap" that provides EPA discretion to utilize either Subpart 1 or Subpart 2 for "areas whose ozone levels are greater than the new [8-hour] standard (and thus nonattaining) but less than the approximation of the old standard codified by Table 1." Slip op. at 17 (quoting Whitman, 531 U.S. at 483). The Court next concluded, however, that EPA utilized the wrong value as "the approximation of the old standard codified by Table 1" to delineate the ceiling for this statutory gap. The Court concluded the ceiling should be "0.09 ppm on the eight-hour scale," slip op. at18, rather than the 1-hour based 0.121

ppm design value contained in the text of Table 1 of Section 181(a) upon which EPA relied.[2/]

The issue of which parameter defines the upper bound of the statutory gap identified in Whitman was not raised by any party. As a consequence, the Court's analysis rests upon several key errors that render its conclusion – that "0.09 ppm on the eight-hour scale" defines the gap's ceiling – both technically and legally incorrect. This issue is extremely important because the 0.09 level does not achieve the Court's stated goals of ensuring that areas not achieving the 1-hour standard's level of public health protection are placed in Subpart 2, whereas the 1-hour design value used in the Rule does. A remand will needlessly delay important ongoing efforts to implement the 8-hour standard in Subpart 1 areas. Because this issue is highly technical in nature, and was not previously briefed, the Court would benefit from additional briefing on rehearing so that this significant error can be corrected.

EPA interpreted the Supreme Court's reference to the gap's ceiling – "the approximation of the old standard codified by Table 1" – to be the 0.121 ppm design value based upon the 1-hour standard methodology. 69 Fed. Reg. at 23,960. In using the term "codified," the Supreme Court referred to the statutory text that includes "0.121" ppm as the lowest design value in Table 1, Whitman, 531 U.S. at 483 (setting out Table 1, in 42 U.S.C. § 7511(a)). By identifying an "approximation" of the 1-hour standard, the Supreme Court refers to the fact that the actual 1-hour standard's level is 0.12 ppm, and thus the 0.121 design value is an "approximation." This defines the gap's ceiling, because if an area previously designated nonattainment for the 1-hour standard has a design value at or above 0.121 ppm, then its air quality has still not achieved the level of protection Congress intended to address when it enacted Subpart 2. If an area's air quality falls below this value, then the area has achieved this level of protectiveness, and the area falls within the statutory gap identified by the Supreme Court. Thus, using the statute's 0.121

[2/] This Court explained in 1999 when first reviewing the 8-hour standard that "Subpart 2 requires the EPA to classify nonattainment areas based upon their design value, which is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary ozone standard." ATA 1, 175 F.3d 1027, 1046 & n.6 (D.C. Cir. 1999) (providing a more precise definition of the design value).

ppm design value ensures that EPA has discretion to place into Subpart 1 only those areas that have already achieved the 1-hour standard's level of protection. See EPA Br. at 38-44.

No party raised an issue or argued that the Supreme Court's reference to the codified 1-hour standard approximation was to a value other than the 0.121 design value in the statute. The lack of briefing on this issue led the Court to mistakenly conclude that EPA's approach in the Rule preserves discretion for EPA to place into Subpart 1 areas that had not yet achieved the 1-hour standard's level of protection, and thus allows those areas to avoid prescriptive Subpart 2 programs that Congress enacted in the 1990 to address this level of protection. Slip op. at 17 ("[T]his approach would mean that areas with air less healthful than what Congress thought it had addressed [by the 1990 Amendments enacting Subpart 2] could be freed from Subpart 2."). To the contrary, the Rule expressly addressed this concern, already achieving the Court's stated goal, because EPA's interpretation only allowed EPA to place into Subpart 1 areas that already had achieved the 1-hour standard's level of protectiveness. This was appropriate, because the statutory table is expressly based upon achieving the 1-hour standard's level of protection.

There was, therefore, no reason for the Court to consider whether an equivalent value for the 1-hour standard on the 8-hour scale exists. Several significant factual errors underlie the Court's belief that translating the statutory 0.121 ppm design value to a standard using 8-hour averaging was appropriate or required by the Supreme Court to define the gap's ceiling.

First, the Court incorrectly believed that an ozone NAAQS is defined by only two parameters, "the measuring stick and the target," and that "changes in the former provide no basis for the displacement of Congress's" scheme in Subpart 2 with Subpart 1. Id. at 16. In fact, a NAAQS is based upon three parameters that all establish its protectiveness: (1) averaging time; (2) level; and (3) form (the statistic establishing how many times or to what degree the level may be exceeded before an area violates a standard). In the 1997 rule, EPA determined that an 8-hour average time would be more protective than a 1-hour averaging time, because it is more directly associated with evidence of adverse health effects occurring at more prolonged exposures (6-8

hours) at lower concentrations for the most at-risk populations. 62 Fed. Reg. 38,856, 38,861-62 (July 18, 1997). EPA's analysis demonstrated that an 8-hour averaging time would better reduce these longer exposures to control adverse health effects, and would do so more consistently for areas across the nation, providing greater public health protection. Id. at 38,862.

Second, the Court incorrectly assumed that protectiveness can be directly equated between standards, just as, e.g., fahrenheit may be translated into celsius, and that this allows a simple comparison between levels to judge differences in protectiveness. EPA assesses protectiveness based on how a standard limits different exposures of concern linked to health effects for the most at-risk populations (e.g., children and asthmatics) for various areas, and reduces the risk of adverse health effects associated with those exposures. Because different averaging times (as well as different levels and forms) focus protection on different exposures of concern in different ways, and provide differences in uniformity of public health protection across areas, there is no such equivalency between the standards.[3/] Moreover, because each area's air quality patterns differ greatly over time (e.g., from hour to hour), even if a particular 8-hour level could be said to provide roughly equivalent protection to that provided by the 1-hour standard for one particular area, that same 8-hour level would not necessarily provide that same rough equivalence in another area. In other words, there is no 8-hour level that would be equivalent to the 1-hour standard for all areas across the nation and that would thus ensure Subpart 2 applies to areas not meeting the 1-hour level of protectiveness. See, e.g., JA 318.

Finally, the Court incorrectly assumed EPA determined that "the level of public health achieved by 0.121 ppm of 1-hour ozone is equivalent to the level of public health achieved by

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[3/] For similar reasons, the Court also incorrectly concluded that the 8-hour standard is only "marginally" more protective than the 1-hour standard, by simply comparing 0.09 and 0.08 levels on an 8-hour scale. Slip op. at 8. In fact, the 8-hour standard provides significantly more protection than the 1-hour standard, both in terms of the relative protectiveness afforded in any particular area, as well as in terms of the total number of additional people within the nation who reside in areas not attaining the 8-hour standard and who thus would receive health benefits from improved air quality meeting this standard. E.g.,1996 EPA Ozone NAAQS Staff Paper, at A-20.

0.09 ppm of eight-hour ozone." Slip op. at 16. In fact, as explained above, there is no such equivalency. In the 1997 rulemaking, EPA considered possible 8-hour standards using different levels and different forms than the level and form ultimately adopted by EPA in the 8-hour standard.[4] To provide some general context, EPA stated that certain alternative 8–hour standards set at 0.09 ppm using these different forms, which EPA included in its proposal, "generally represents the continuation of the present level of protection." 62 Fed. Reg. at 38,858/3 (em. added). This rough comparison, however, did not establish equivalency. Nor did it find that the same areas would be in nonattainment under the proposals then considered and under the 1-hour standard, and it said nothing about the differences in protectiveness between these standards for a given area. Moreover, in the Phase 1 Rule, EPA considered using a 0.09 or 0.091 ppm 8-hour design value (or other 8-hour level) as the cut-off between Subparts 1 and 2, but rejected that approach largely because of EPA's concerns that no such equivalency with the 1-hour standard could be properly established. JA 9 (Response to Comments); JA 318 n.2 (EPA analysis).

The Court's error warrants rehearing for several reasons. Because a NAAQS is defined by three parameters, rather than only the two reflected by the Court's reference to "0.09 ppm on the eight-hour scale," the Court's decision does not establish a standard that EPA could apply on remand. Nor would the 0.09 ppm alternatives discussed in EPA's 1996 Ozone NAAQS proposal serve this purpose, since they are based upon different forms than adopted in the 8-hour standard. Moreover, as explained above, 0.09 ppm on the 8-hour scale does not reflect a level of protection equivalent to the 1-hour standard. Requiring application of such a surrogate for equivalency, in lieu of the 1-hour approximation Congress codified in Table 1, would replace a technically correct and statutorily-based measure of whether the 1-hour standard's level of protectiveness has

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[4] For example, the referenced proposal considered alternatives with 0.09 ppm levels using various "exceedance" based forms. 61 Fed. Reg. 65,716, 65,728-30 (Dec. 13, 1996). The 8-hour standard utilizes a different form based on a concentration-based statistic. Thus, an area violates the 8-hour standard if the average of the fourth highest 8-hour concentration for each of three consecutive years is above 0.08 ppm. 40 C.F.R. § 50.10(b).

been attained, with a factually and conceptually inaccurate surrogate. Thus it would not achieve the Court's goal, whereas EPA's approach would, by ensuring that areas not achieving the 1-hour standard's level of protectiveness are subject to Subpart 2. Finally, requiring a remand would needlessly jeopardize ongoing implementation efforts under EPA's "Phase 2" Rule implementing the 8-hour standard. Already, approximately 61 of the 71 areas EPA placed in Subpart 1 are reporting air quality data that achieves the 8-hour standard. For the remaining Subpart 1 areas, States must submit to EPA by June 15, 2007, their plans to demonstrate how they will expeditiously attain the 8-hour standard. Infra at 15. A remand now would needlessly derail these efforts for those Subpart 1 areas still violating the 8-hour standard.

II. The Court's Conclusion That the Act Prohibits EPA's Rationale for Regulating Gap Areas Under Subpart 1 Rather than Subpart 2 Nullifies the Discretion Recognized by the Supreme Court in Whitman, and Leaves EPA No Discretion on Remand.

In Whitman, the Supreme Court concluded that the Act does not require that EPA utilize Subpart 2 for areas that fall within the statutory gap, and thus EPA has discretion to utilize Subpart 1 to implement the 8-hour standard for those areas. 531 U.S. at 484. The Supreme Court rejected EPA's 1997 implementation approach of using Subpart 1 exclusively to implement the 8-hour standard in all 8-hour nonattainment areas. As support, the Supreme Court broadly stated that "[t]he principal distinction between Subpart 1 and Subpart 2 is that the latter eliminates regulatory discretion that the former allowed." Id. Relying on this and other selected statements in Whitman, the Environmental and State Petitioners argued that the statutory gap identified by the Supreme Court affords EPA no discretion to place any areas into Subpart 1 to implement the 8-hour standard. States Br. at 8-10, Env. Br. at 50-52. This Court properly rejected this argument, explaining that "the Supreme Court in Whitman indicated otherwise," slip op. at 17, when it also stated that it could not "conclud[e] that Congress clearly intended Subpart 2 to be the exclusive, permanent means of enforcing a revised ozone standard in nonattainment areas." Id. (quoting Whitman, 531 U.S. at 484) (em. by the Panel). The Court thus concluded that EPA has discretion to utilize Subpart 1 for areas that fall within the statutory gap,

provided EPA's approach is reasonable and not barred by the Act. Slip op. at 17-18.

Although finding EPA has authority to place gap areas in Subpart 1, the Court effectively nullified that authority when it concluded that the Act precludes EPA's proffered reasons for placing such "gap areas" in Subpart 1. EPA explained in the Rule that the greater flexibility afforded by Subpart 1 makes that subpart better suited than Subpart 2 to ensure expeditious and efficient attainment of the 8-hour standard for the gap areas. EPA Br. at 44-51; see, e.g., 69 Fed. Reg. at 23,958/2-3. The Court concluded, however, that this approach, even if reasonable, is foreclosed by Whitman and Congress' intent to limit discretion and require the use of Subpart 2 to achieve the 1-hour standard's level of protectiveness. Slip op. at 19-20.

As with the preceding issue, the Court mistakenly presumed that EPA placed in Subpart 1 areas that had not yet achieved the level of protection Congress sought to address when it enacted Subpart 2 in 1990. Because the Supreme Court in Whitman concluded that the Act preserves discretion for EPA to place some areas in Subpart 1, Whitman's reference to Subpart 2 "eliminat[ing the] regulatory discretion" of Subpart 1, when read in context, only prohibits EPA from placing in Subpart 1 those areas that had not yet achieved the 1-hour standard's level of protectiveness – i.e., those whose ozone air quality falls outside the statutory gap identified by the Supreme Court. EPA did not exceed this limit on its discretion, because it placed in Subpart 1 only those areas that have already achieved this level of protection. The Court's alternative construction, that the Supreme Court intended Subpart 2 to eliminate the regulatory discretion of Subpart 1 for all areas, including gap areas, nullifies the discretion that Whitman preserved.

The Opinion also eliminates any discretion for EPA, on remand, to consider the proper subpart into which it should place these gap areas. Because the principal distinction between the subparts is that Subpart 1 affords greater regulatory flexibility to develop appropriate pollution control programs than the prescriptive provisions of Subpart 2, Whitman, 531 U.S. at 484, any possible basis EPA may adopt on remand to utilize Subpart 1 in lieu of Subpart 2 would necessarily be based upon the benefits provided by this greater flexibility. Yet the Opinion holds

that such a rationale is impermissible. Thus, any rationale EPA might provide to utilize Subpart 1 would, under the analysis in the Opinion, be construed as another species of retaining flexibility that the decision precludes. A remand for EPA to reconsider how to reclassify these gap areas is thus neither warranted nor workable. Accordingly, EPA requests rehearing on this issue.

III. Because the Court Erred in Applying the Terms of Section 172(e) as Legally Binding When EPA Promulgated a More Protective Ozone Standard, the Court Failed to Afford Proper Deference to EPA's Reasons For Not Retaining Four 1-Hour Measures as Anti-Backsliding Provisions.

EPA recognized that its decision in the Rule – not to delay revocation of the 1-hour standard that it replaced in 1997 with the more protective 8-hour standard – created the potential for backsliding if areas terminated their 1-hour based implementation programs before they submitted and implemented plans to attain the 8-hour standard. In the Rule, EPA thus retained nearly all of the Act's 1-hour-based programs as anti-backsliding measures. The Court held that this was inadequate, because EPA failed to retain four specific measures as they applied under the 1-hour standard that the Environmental and State Petitioners argued were necessary to prevent backsliding; namely, Section 185 penalties (or fees), Sections 172(c)(9) and 182(c)(9) contingency measures, 1-hour-based new source review, and 1-hour motor vehicle emission budgets for conformity. 42 U.S.C. §§ 7511d, 7502(c)(9), 7511a(c)(9). The Court reasoned that, under Chevron Step 1, these four provisions are "controls" under Section 172(e) of the Act and, therefore, must be retained. Slip op. at 31-40.

The Court erred by applying Section 172(e) as a legally binding requirement, even though it directly governs only where EPA "relaxes" a standard; not where, as here, EPA establishes a more protective standard. 42 U.S.C. § 7502(e). In the Rule, EPA explained that Section 172(e) and other sections of the Act support EPA's general authority to require anti-backsliding provisions, and EPA looked to this and other provisions to guide the Agency's discretion in fashioning reasonable anti-backsliding provisions. EPA Br. at 86-88; 69 Fed. Reg. at 23,972/2. This does not mean, however, that Section 172(e) governs as a matter of law. By treating it as

providing the binding legal standard, the Court failed to consider and accord the requisite deference to EPA's reasons for concluding that these particular four provisions under the 1-hour standard are neither necessary nor appropriate to prevent backsliding and thus should not be retained. The circumstances that apply here, where EPA has promulgated a more protective standard, are in certain significant respects different from those addressed by Section 172(e), which applies where a standard is relaxed. When EPA promulgates a more protective NAAQS significant new implementation obligations will be imposed to achieve the more protective standard. By failing to accord EPA the proper deference, the Court overlooked this important context and did not address EPA's primary reasons not to retain the four provisions in question.[5/] Rehearing on this issue is therefore warranted.

IV. The Court Erred in Apparently Requiring 1-Hour Conformity Determinations as an Anti-Backsliding Measure for All Federal Activities, Rather than Simply Retaining the 1-Hour Motor Vehicle Emissions Budgets ("MVEBs") Advocated by Petitioners.

EPA requests that the Court clarify that it intended only to require the continued use of 1-hour MVEBs when conformity determinations are made for the 8-hour standard as an anti-backsliding measure until appropriate 8-hour MVEBs are available. The Environmental Petitioners support EPA's request that the Court make the changes recommended in Attachment A. These modifications would ensure that the decision's relevant relief corresponds to the limited issue and arguments raised by the Environmental Petitioners. It would also eliminate the potential conflict with the Court's conclusion in Environmental Defense v. EPA, 467 F.3d 1329, 1335-36 (D.C. Cir., October 20, 2006), which requires the use of 1-hour MVEBs and establishes that 8-hour MVEBs may replace 1-hour MVEBs in making conformity determinations. The

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[5/] For example, EPA explained that it would be "counterproductive" to impose in the future Section 185 penalties on sources in 1-hour severe and extreme nonattainment areas based upon any future failure by these areas to timely attain the 1-hour standard, because that would impair the ability of States and sources to plan for, implement and attain the more protective 8-hour standard. 70 Fed. Reg. 30,592, 30,594/3-30,595 (May 26, 2005); EPA Br. at 111. These are proper concerns for EPA to consider in determining whether a 1-hour-based provision should be retained to prevent backsliding. The Court's mistaken reliance upon Section 172(e) and a Chevron Step 1 analysis, however, precluded it from properly considering these important concerns, and they are not addressed in the Opinion.

modifications recommended in Attachment A would clarify the proper relief, and eliminate this potential conflict, without altering resolution of the merits of this issue.

The Opinion appears to go well beyond the narrow issue presented by Environmental Petitioners. They raised the limited issue of whether the Rule's anti-backsliding provision impermissibly allows certain transportation conformity determinations to be made that are not based upon existing 1-hour MVEBs in approved State Implementation Plans ("SIPs"), arguing that 1-hour MVEBs must be used until proper findings are made to replace those budgets with 8-hour MVEBs. Env. Pet. Br. at 3 (issue 1.c) & 40-45. They did not argue that EPA must require 1-hour conformity determinations for all federal activities. Nor did they argue that simultaneous 1-hour and 8-hour conformity determinations are needed to prevent backsliding. Rather, they recognized that transportation conformity determinations could be made based upon 8-hour MVEBs in lieu of 1-hour MVEBs, provided proper procedures are followed. Id. at 43.

Environmental Petitioners confirmed that their issue could be rendered moot depending upon the outcome in a separate case then before this Court. Id. at 42 n.20. In fact, the petitioners did subsequently prevail in that case reviewing EPA conformity regulations. Environmental Defense v. EPA, 467 F.3d 1329, 1339 (D.C. Cir., October 20, 2006). Because there the Court agreed with these petitioners and vacated portions of that rule that allowed an interim test, 1-hour MVEBs must be used for conformity determinations until 8-hour MVEBs are available.[6]

In contrast to the narrow issue raised in this case (which was resolved in Environmental

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[6] By its terms, 40 CFR § 51.905(e)(3) eliminates the requirement to make conformity determinations with the 1-hour NAAQS after the NAAQS has been revoked. The rule text does not bar conformity with the 8-hour NAAQS, or the MVEBs adopted as part of a 1-hour ozone SIP. The conformity rule promulgated after the Phase 1 Rule requires that the MVEBs in a 1-hour ozone SIP be used for conformity determinations, with some exceptions, until replaced by new 8-hour MVEBs. 40 C.F.R. § 93.109(e); 69 Fed. Reg. 40,004 (July 1, 2004). The exceptions in the conformity rule were vacated by this Court in Environmental Defense, 467 F.3d at 1335-36. Retaining the rule text in § 51.905(e)(3) will therefore eliminate any obligation to make conformity determinations for the revoked 1-hour NAAQS, but will not eliminate the use of the MVEBs in approved 1-hour ozone SIPs for 8-hour conformity determinations, and Environmental Defense, supra, precludes any possibility that § 51.905(e)(3) permits eliminating the use of such MVEBs.

Defense, supra), portions of the Court's Opinion stating broadly that 1-hour conformity "determinations" must be retained, could be improperly construed to require conformity determinations for all federal activities based upon the 1-hour standard, and to require the use of 1-hour MVEBs when making transportation conformity determinations for the 8-hour standard even after appropriate 8-hour MVEBs are available. Accordingly, rehearing should be granted to clarify this issue, by making the changes recommended in Attachment A hereto.

V. The Apparent Remedy Issued by the Court, of Vacating the Entire Rule, Is Inappropriate, Because the Provisions Rejected by the Court are Segregable From Those That Were Upheld or Not Challenged, and Vacating the Entire Rule Jeopardizes Ongoing Efforts to Implement and Attain the 8-Hour Standard.

As noted above, the Environmental Petitioners support EPA's request that the Court adopt the recommended changes in Attachment B to address this issue.

Only certain provisions EPA promulgated in the Phase 1 Rule were challenged, and the Court upheld several of those. For example, the Environmental and State Petitioners raised three basic challenges, each of which was limited in scope. They challenged the Rule's provisions that placed certain 8-hour nonattainment areas in Subpart 1, arguing all areas should be in Subpart 2. They did not challenge EPA's decision placing the other 41 8-hour nonattainment areas in Subpart 2, which represents approximately three-quarters of the nation's population in areas not attaining the 8-hour standard.[7] While the Court rejected EPA's reasons for placing 8-hour nonattainment areas in Subpart 1, slip op. at 18-20, it did not reject EPA's placement of areas in Subpart 2. Moreover, the Court rejected all of the challenges raised by the Industry Petitioners, including direct challenges to the Subpart 2 implementation scheme. Id. at 20-26 (upholding the adaptation of Table 1 in Section 181(a) to establish classifications and attainment dates for areas EPA placed in Subpart 2). Notwithstanding this, by vacating the entire Rule, the Court vacated the portions it specifically upheld (as well as those not challenged), including the provisions that

[7] Under the Phase 1 Rule, 116 million people reside in Subpart 2 areas, while 43 million people reside in Subpart 1 areas. EPA Br. at 42.

placed areas into Subpart 2 and established their classifications and attainment dates.

Environmental and State Petitioners also argued that EPA lacks authority to revoke the 1-hour standard and that EPA's revocation decision was arbitrary. The Court rejected both challenges, upholding EPA's revocation of the 1-hour standard provided that EPA issue adequate 1-hour based anti-backsliding provisions. Id. at 28-29. Also, in rejecting the challenge raised by the Baton Rouge Chamber of Commerce, the Court upheld EPA's authority to retain 1-hour-based measures to prevent backsliding in areas that had not yet adopted the required measures. Id. at 29-31. Finally, the Environmental Petitioners challenged only EPA's decision not to retain four specific 1-hour measures to prevent backsliding, and the States raised the same challenge for only one of those four measures. Despite upholding only those limited challenge, the Court vacated all of the anti-backsliding provisions in the Rule as well as EPA's revocation of the 1-hour standard for all purposes, rather than only for purposes of retaining these four measures.

Because the provisions rejected by the Court are readily segregable from the rest of the Rule, vacating the entire Rule is overbroad. Even if no other portion of the Opinion is modified on rehearing, a more narrow remedy that vacates only the provisions rejected by the Court can be readily fashioned that would preserve the relief to which the Environmental and State Petitioners are entitled. EPA thus requests rehearing for the Court to revise the concluding paragraph of its Opinion, so that it vacates only those portions of the Phase 1 Rule that provide for regulation of 8-hour nonattainment areas under Subpart 1 in lieu of Subpart 2, as set forth in Attachment B. Regarding the anti-backsliding provisions, the Court should modify the remedy to vacate only those portions of the Rule to preserve the measures addressed in Part VI.C of the Opinion, as set forth in Attachment B. These changes would properly conform the remedy to the successful challenges, while retaining the portions of the Rule that were upheld or not challenged.

These changes are vitally important to EPA's ozone air pollution program, because they will ensure that the considerable ongoing efforts to attain the 8-hour standard, which do not depend upon the rejected portions of the Rule, are not jeopardized by the Court's Opinion. For

example, EPA's Phase 2 Implementation Rule, 70 Fed. Reg. 71,612 (Nov. 29, 2005), requires that areas EPA placed in Subpart 2, based upon the Phase 1 Rule, submit to EPA, no later than June 15, 2007, their State Implementation Plans ("SIPs") to demonstrate how they will attain the 8-hour standard not later than the outside attainment dates established by the Phase 1 Rule. Id. at 71,670.[8/] These SIPs, once approved by EPA, contain enforceable programs necessary for these areas to attain expeditiously the 8-hour standard. Because program requirements and outside attainment dates are linked to an area's specific classification for the 8-hour standard, vacating the Phase 1 Rule's classification scheme for all areas would delay the submission of requirements until classifications and attainment dates are newly established and program requirements are once again clarified. By narrowing the remedy as recommended in Attachment B, the Court will ensure that its decision is neither improperly construed nor applied to disrupt these ongoing implementation efforts. This is particularly important because Subpart 2 includes the areas of the nation with the most severe ozone pollution problems and largest populations.

Finally, EPA's request would not raise the difficult question of whether courts have authority to leave provisions they've rejected in place pending a remand. Where, as here, the regulatory provisions overturned are segregable from those that were upheld or not challenged, this Court routinely limits its vacatur to the specific provisions that were overturned. Nor would continued 8-hour implementation in Subpart 2 areas raise inequities vis-a-vis Subpart 1 areas under the Rule that EPA must reclassify on remand, since Subpart 2 areas include those with the nation's worst ozone air quality, while all of the areas the Rule placed in Subpart 1 have achieved the level of protectiveness provided by the 1-hour standard and most already are reporting air quality that achieves the 8-hour standard.

CONCLUSION

For the foregoing reasons, the Court should grant panel rehearing.

[8/] The Phase 2 Rule has been challenged in Natural Resources Defense Council v. EPA, Nos. 06-1045, et al. Briefing in those cases is underway; argument has not been scheduled.

Respectfully submitted,

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March 22, 2007

ATTACHMENTS A and B

ATTACHMENT A

The recommended changes below, identified by strike-out and underlining, are to the slip opinion issued on December 22, 2006, in South Coast Air Quality Management District v. EPA, Nos. 04-1200, et al.

Slip op. at 31:

* * * C

* * * The State and Environmental petitioners challenge this reinterpretation, as well as EPA's treatment of one-hour penalties, rate-of-progress milestones, contingency plans, and motor vehicle emission budgets ~~conformity demonstrations~~. We conclude that each of these measures is a "control[]"and that withdrawing any of them from a SIP would constitute impermissible backsliding. * * *

Slip op. at 39:

* * * Although section 176 provides a floor above which conformity determinations are required, EPA cannot conclude that conformity using one-hour SIP emission budgets ~~determinations~~ are unnecessary without confronting section 172(e). Because one-hour conformity emission budgets ~~determinations~~ constitute "controls" under section 172(e), they remain "applicable requirements" that must be retained. EPA cannot well respond to commenters' concerns that removing one-hour SIP emission budgets from conformity demonstrations would "allow large increases in motor vehicle emissions" by acknowledging that "requiring conformity for both ozone standards at the same time would be overly burdensome and confusing." Transportation

Slip op. at 40:

Conformity Rule Amendments, 69 Fed. Reg. at 40,009-10. EPA is required by statute to keep in place measures intended to constrain ozone levels—even the ones that apply to outdated standards—in order to prevent backsliding. This principle encompasses conformity ~~determinations.~~ based on one-hour SIP emission budgets. *See* 40 C.F.R. § 93.109(e); *Environmental Defense v. EPA*, 467 F.3d 1329 (D.C. Cir. 2006).

IV

* * *

ATTACHMENT B

The recommended changes below, identified by strike-out and underlining, are to the slip opinion issued on December 22, 2006, in South Coast Air Quality Management District v. EPA, Nos. 04-1200, et al.

Slip op. at 3:

* * * Because EPA has failed to heed the restrictions on its discretion set forth in the Act, we grant the petitions in part, vacate portions of the rule, and remand the matter [Slip Op. at 4] to EPA for further proceedings. * * *

Slip op. at 40:

* * * VII.

Consistent with *Whitman* and the Act, we grant the State petition and the Environmental petition, except with respect to the withdrawal of the one-hour NAAQS; we also deny the Industry petitions and we dismiss the Ohio petition. Accordingly, we vacate those portions of the 2004 Rule that provide for regulation of 8-hour nonattainment areas under Subpart 1 in lieu of Subpart 2, and those portions of the 2004 Rule that allow backsliding with respect to the measures addressed in parts VI.C.1 through VI.C.5 of this opinion, and remand the matter to EPA.

ADDENDUM

TABLE OF CONTENTS

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

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al.,	)	
Petitioners,	)	
v.	)	No. 04-1200 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

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

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record for Respondent United States Environmental Protection Agency ("EPA") submits this certificate as to parties, rulings and related cases.

A. Parties and Amici:

(i) Parties, intervenors, and amici who appeared below. Under Circuit Rule 28(a)(1)(A), the requirement to identify parties, intervenors, and amici who appeared below is inapplicable because the petitions seek review of informal agency rulemaking.

(ii) Persons who are parties, intervenors, and amici in this Court.

The parties to these consolidated cases are set forth in the Certificate of Parties statement contained in the brief filed by the Environmental Petitioners and the brief filed by the Industry Petitioners.

B. Rulings Under Review:

EPA seeks Panel rehearing of the opinion issued in these consolidated case on December 22, 2007. The petitioners challenges in these cases the following final agency actions:

1) 69 Fed.Reg. 23,951 (April 30, 2004) ("Final Rule to Implement the 8-Hour Ozone

National Ambient Air Quality Standard – Phase 1")

2) 70 Fed.Reg. 30,592 (May 26, 2005) ("Implementation of the 8-Hour Ozone National Ambient Air Quality Standard--Phase 1: Reconsideration")

3) 70 Fed.Reg. 39,413 (July 8, 2005) ("Nonattainment Major New Source Review Implementation Under 8-Hour Ozone National Ambient Air Quality Standard: Reconsideration"); and

4) 70 Fed. Reg. 44,470 (August 3, 2005) ("Identification of Ozone Areas for Which the 1-Hour Standard Has Been Revoked and Technical Correction to Phase 1 Rule").

As per the Court's order (dated Nov. 24, 2004), issues related to the challenges to the actions cited above that were raised in petitions for review challenging EPA's final action at 69 Fed.Reg. 23,858 (April 30,2004), titled "Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas With Deferred Effective Dates," were consolidated with these cases.

C. Related Cases:

The Panel issued its opinion in these consolidated cases on December 22, 2007. A decision issued by this Court on October 20, 2006, Environmental Defense v. EPA, 467 F.3d 1329 (D.C. Cir., 2006), is related to one of the issues on which EPA seeks Panel rehearing. In addition, challenges to EPA's "Phase 2" rule implementing the 8-hour ozone standard are pending in this Court. Natural Resources Defense Council v. EPA, Nos. 06-1045, et al.

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Dated: March 22, 2007.

CERTIFICATE OF SERVICE

I certify that on this 22nd day of March, 2007, a copy of the foregoing Petition for Panel Rehearing was served by First Class United States mail upon the following counsel at the indicated address.

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