ORAL ARGUMENT HELD OCTOBER 12, 2006
DECISION ISSUED DECEMBER 22, 2006

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1200

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of a Final Rule
of the United States Environmental Protection Agency

JOINT PETITION FOR PANEL REHEARING OR REHEARING EN BANC OF INTERVENOR-RESPONDENTS AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND UTILITY AIR REGULATORY GROUP

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March 22, 2007

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

CERTIFICATE AS TO PARTIES AND AMICI

The following information is provided pursuant to Circuit Rules 28(a)(1)(A) and 35(c) on behalf of Industry Intervenor-Respondents American Chemistry Council, American Forest & Paper Association, American Petroleum Institute, National Association of Manufacturers, and Utility Air Regulatory Group:[1]

Except for TXI Operation, LP, which is no longer a petitioner in these cases pursuant to the Court's Order of December 2, 2005, permitting its withdrawal, and the State of Georgia, which withdrew as an intervenor in these cases on March 13, 2006, all parties, intervenors, and amici appearing in this Court are listed in the Petition for Rehearing *En Banc* of the Chamber of Greater Baton Rouge, *et al.*, dated March 21, 2007 (hereinafter "Chamber of Greater Baton Rouge Petition for

[1] A Rule 26.1 statement for these parties appears following this certificate.

Rehearing"). These cases involve direct review of administrative agency action and therefore no proceedings occurred in the district court.

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT OF INTERVENOR-RESPONDENTS AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND UTILITY AIR REGULATORY GROUP

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 35(c), intervenor-respondents American Chemistry Council ("ACC"), American Forest & Paper Association ("AF&PA"), American Petroleum Institute ("API"), National Association of Manufacturers ("NAM"), and Utility Air Regulatory Group ("UARG") file the following statement:

ACC is a nonprofit trade association that represents the leading companies engaged in the business of chemistry. ACC has no outstanding shares or debt

securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

AF&PA is the national trade association of the forest, paper, and wood products industry. AF&PA members are engaged in growing, harvesting, and processing wood and wood fiber; manufacturing pulp, paper, and paperboard products from both virgin and recycled fiber; and producing engineered traditional wood products. AF&PA does not have any parent corporations, and no publicly held company owns 10 percent of more of AF&PA's stock.

API is a nonprofit, nationwide trade association representing nearly 400 companies that are involved in all aspects of the oil and natural gas industry, including exploration and production, refining, marketing, pipeline, marine, and associated industries. API has no outstanding shares or debt securities in the hands of the public, and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM has no outstanding shares or debt securities in the hands of the public, and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

UARG is a not-for-profit association of individual electric generating companies and national trade associations that participate collectively in

administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in UARG.

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GLOSSARY

The following is a glossary of acronyms and abbreviations used in this petition:

CAA	Clean Air Act
EPA	Environmental Protection Agency
JA	Joint Appendix
NAAQS	National ambient air quality standards
NPRA	National Petrochemical & Refiners Association
NSR	New source review
SIP	State implementation plan

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

The panel's decision effects a sweeping revision of provisions of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§7401-7671q, that govern implementation of the national ambient air quality standards ("NAAQS") – the "heart" of the Act. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). Vacating rules for implementing a NAAQS that was adopted nearly a decade ago, the panel's decision raises questions of exceptional importance for the Act's implementation and conflicts with decisions of the Supreme Court and the Sixth Circuit. For these reasons, as explained further below, the Court should grant panel or *en banc* rehearing.

The decision expands a narrowly focused statutory provision, CAA §172(e), 42 U.S.C. §7502(e), from its intended role as a safeguard against "backsliding" where NAAQS are *relaxed* to a mandate for retention of "controls" geared to "outdated" NAAQS (slip op. at 40) that the Environmental Protection Agency ("EPA" or "Agency") has replaced with *more stringent* NAAQS. Proceeding from its extension of statutory text, the panel, directly contradicting EPA's conclusion, holds "there is no ambiguity as to the meaning of 'control'" in §172(e), *id.* at 34, a word that the Act leaves undefined. Based on its unfounded premise that Congress spoke precisely to whether – and which – provisions must be retained as "controls" where NAAQS are tightened, the panel's decision imposes continuing "control" requirements that EPA, the agency charged by Congress with overseeing NAAQS

implementation, rejected for sound reasons. The decision thus conflicts with principles of statutory construction and separation of powers applied in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and with the Supreme Court's directive, in the decision that gave rise to this case, that "it is left to the EPA to develop a reasonable interpretation of the nonattainment implementation provisions," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 486 (2001).

Even where it governs, in the case of NAAQS relaxations, §172(e) speaks of "controls" applicable *before* the NAAQS change. Yet the panel extended §172(e) broadly to encompass "controls" that would take effect only in the future, *after* the NAAQS change, including: (1) limitations, under criteria relevant to the old NAAQS, on emissions of sources that will exist only in the future; (2) fees under the old NAAQS that had never been imposed (and never been *required* to be imposed) at the time that NAAQS ceased to exist; and (3) never-triggered contingency plans for the old NAAQS. Imposition of these future, contingent provisions is not supported, much less compelled, by any language in the Act.

In recasting the CAA's language, the panel also ignored that the Act is silent regarding which kinds of "controls" need be applied after a NAAQS change. Even §172(e) directs EPA, where it relaxes a NAAQS, to "promulgate requirements" for controls "not less stringent than" those applicable before the NAAQS change – authorizing EPA to allow controls *different from* (but not less stringent than) those

under the old NAAQS. The panel in effect overrode this congressional delegation.

The decision also creates an inter-circuit conflict in the Act's interpretation that should be resolved through rehearing. In *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004), the Sixth Circuit held that EPA reasonably chose not to treat as a "measure" for air pollutant "control" one of the programs (nonattainment new source review ("NSR")) that the panel here holds *must* be defined as a "control." The panel's attempt to distinguish the Sixth Circuit's holding is unavailing.

STATEMENT OF FACTS

Pursuant to CAA §109, 42 U.S.C. §7409, EPA replaced the "1-hour" ozone NAAQS with the "more protective" 8-hour NAAQS in 1997. 69 Fed. Reg. 23951, 23987/3 (Apr. 30, 2004), JA94, 130. With the more stringent NAAQS in place, "the 1-hour NAAQS is not needed to protect health and welfare." *Id.*, JA130.

The Supreme Court in *Whitman* reviewed EPA's original policy for implementing the 8-hour NAAQS. Disagreeing with this Court's holding that EPA must implement the new standard solely under Subpart 2 (and not at all under Subpart 1) of Part D of Title I of the Act, the Supreme Court found the statute "ambiguous" in that respect and, applying *Chevron*, said it "would defer to the EPA's reasonable resolution of that ambiguity." *Whitman*, 531 U.S. at 484. EPA's wholesale abandonment of Subpart 2 in its original rules, however, went "over the edge of reasonable interpretation" because it "completely nullifie[d]"

Subpart 2's "textually applicable provisions." *Id.* at 485. On remand, it was "left to the EPA to develop a reasonable interpretation of the nonattainment implementation provisions…as they apply to revised ozone NAAQS." *Id.* at 486.

On remand, EPA developed new rules reflecting an interpretation of those provisions that, in contrast to its original rules, gives Subpart 2 a key role. Almost ten years after EPA promulgated the 8-hour NAAQS, however, these new rules were vacated by the panel in this case, further delaying NAAQS implementation.

The rules address an issue – transition to a more stringent NAAQS – that the CAA's text does not address. Where, as here, EPA replaces a less stringent with a more stringent NAAQS, the Act contains no analogue to §172(e)'s directive that,

> [i]f the Administrator [of EPA] *relaxes* a national primary ambient air quality standard…, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. §7502(e) (emphasis added). Based on the Act's plain language, EPA concluded that §172(e), "which imposes requirements on EPA *if it relaxes a NAAQS*," does not apply here, 70 Fed. Reg. 39413, 39420/1 (July 8, 2005) (emphasis added), JA162, 169, and that "the statute is silent about what requirements must remain when EPA promulgates a more stringent NAAQS," 70

Fed. Reg. 30592, 30593/3 (May 26, 2005), JA149, 150.[1] EPA, however, referred to §172(e) and other CAA provisions "to discern what Congress might have intended" where states must revise CAA implementation plans to transition from an old, superseded NAAQS to a new, more stringent NAAQS. *Id.* at 30593/3, JA150. From its review, EPA drew three conclusions about congressional intent.

First, to the extent relevant, the "[t]he term 'controls' as used in section 172(e) of the Act is ambiguous," *id.* at 39418/2, JA167, and undefined by the Act. Thus, EPA did not "attempt[] to assign a comprehensive definition to the term 'controls' as used in section 172(e)" but interpreted it "solely as it relates to" EPA's formulation of its policy for transition to a more stringent NAAQS. *Id.*

Second, EPA recognized that, where §172(e) does apply, it directs EPA to ensure that the control level after the NAAQS change is no less stringent than the control level "before" the NAAQS change. As EPA observed, §172(e) "provide[s] a cut-off date": the date of the NAAQS change. 70 Fed. Reg. at 30596/2-3, JA153. Thus, even where it applies, §172(e) does not require that the post-NAAQS-change controls be as stringent as those that might have *become*

[1] In its petition for rehearing, the National Petrochemical & Refiners Association ("NPRA") argues that EPA lacks authority to adopt any rules requiring retention of pre-existing provisions (which NPRA refers to as an "anti-backsliding" policy) as part of the transition to a more stringent NAAQS. If, on the merits, the Court were to agree with that argument, it would have no occasion to address arguments, such as those presented in this petition, that the panel erred in finding unlawful EPA's determinations regarding the specific elements of its transition rules discussed herein.

applicable in the future under the superseded NAAQS if that NAAQS had remained in effect. *See, e.g., id.* at 30593/3 (quoting CAA §172(e)), JA150.

Third, EPA recognized that, even where §172(e) governs, it does not require retention of the identical controls that applied under the old NAAQS. Instead, it directs EPA "to ensure the same *level* of control," 69 Fed. Reg. at 23975/1 (emphasis added), JA118, by promulgating "requirements" reflecting controls that are "not less stringent than" – and that therefore may be different from – "the controls applicable to areas…before such relaxation," 70 Fed. Reg. at 39419/2 (§172(e) "does not mandate that EPA's regulations require" retention of "each and every requirement that applied under the previous standard"), JA168; 69 Fed. Reg. at 23975/3-23976/1 (discussing rule provisions allowing different EPA-determined alternatives to the prior 1-hour attainment demonstration requirement), JA118-19.

In line with these principles, and with the Sixth Circuit's decision in *Greenbaum*, EPA determined that the nonattainment NSR permitting program is a program for managing growth – and is not itself an emission "control" – and that states with nonattainment areas need no longer use the major-source thresholds and emission offset ratios for new sources that applied under the areas' superseded 1-hour classifications. Instead, those areas would use the thresholds and offset ratios relevant to their currently applicable 8-hour classifications. 70 Fed. Reg. at 39419/2-3, JA168. EPA emphasized, however, that, as part of the transition to the

more stringent NAAQS, emission limits and offsets in 1-hour new-source permits issued before revocation of the 1-hour NAAQS would remain enforceable. 70 Fed. Reg. 17018, 17020/3 (Apr. 4, 2005); 69 Fed. Reg. at 23986/1, JA129.

EPA also determined that emission fees under CAA §185, 42 U.S.C. §7511d, for future "nonattainment" of the revoked 1-hour NAAQS are not "controls" that states must impose. For 1-hour purposes, the fees could be triggered only by certain areas' failure to attain the 1-hour NAAQS by their 1-hour attainment dates, CAA §§181(b)(4), 185(a), 42 U.S.C. §§7511(b)(4), 7511d(a), which would occur *after* the revocation. Thus, even if the fees were "controls," they were not applicable "before" the NAAQS change. 70 Fed. Reg. at 30593-95, JA150-52.

For similar reasons, EPA determined that the "applicable requirements" that states must retain do not include untriggered 1-hour contingency measures, *i.e.*, measures that (absent revocation of the 1-hour NAAQS) would become applicable only in the future if attainment, or "reasonable further progress" toward attainment, of the 1-hour NAAQS were not achieved at that future date. *Id.* at 30599-601, JA156-58. Under EPA's rules, however, already-implemented 1-hour contingency measures are emission controls, subject to the same constraints on removal that apply to other, comparable controls. *See id.* at 30599/2, JA156.

Giving no deference to EPA's development of a program for transition to a more stringent NAAQS in the face of congressional silence, the panel reversed the

Agency's determinations that states need not retain 1-hour NSR and untriggered future 1-hour fees and contingency plans in their implementation plans. The panel held that, when EPA replaces a less stringent with a more stringent NAAQS, it must accompany that revocation with "adequate anti-backsliding provisions" – *as if* the NAAQS had been relaxed. Slip op. at 28. The panel said EPA's rules for transition to a more stringent NAAQS are not "adequate" because, it held, these untriggered, future provisions under the revoked NAAQS are current "controls."

To reach this extraordinary conclusion, the panel first held that, although §172(e) "[b]y its terms" does not apply here because EPA had not relaxed the NAAQS, EPA nonetheless "interpreted it to apply here," *id.* at 30, a conclusion directly contradicted by EPA's statements in the record that "section 172(e) does not apply to the requirements for the 8-hour ozone standard." 70 Fed. Reg. at 39417/1, 39418/2, JA166, 167. Then, flatly overruling EPA's interpretation of "control," *see* slip op. at 32-33, the panel held that "there is *no ambiguity* as to the meaning of 'control' in Section 172(e)" and that anything "designed to constrain ozone levels is a 'control,'" *id.* at 34 (emphasis added). Further, rejecting EPA's decision to give effect to §172(e)'s cut-off date – *i.e.*, the date of the NAAQS change – the panel announced a new rule that "controls" are "'applicable' *before* they actually [a]re imposed" and that, "[f]or a provision to be 'applicable,'…it need not be currently enforceable." *Id.* at 36 (emphasis added). A provision that is

not currently imposed or enforceable is nonetheless "applicable," the panel said, "in th[e] sense" that it was intended "to influence state action prior to" the time of the NAAQS change. *Id.* On this basis, the panel held, as a *Chevron* step-one matter, that the 1-hour nonattainment NSR "permitting process," future 1-hour emission fees under §185, and untriggered 1-hour contingency measures are all "controls" that states must retain where EPA replaces a NAAQS with a more stringent NAAQS; "withdrawing any of them" from a state implementation plan ("SIP"), the panel held, "would constitute impermissible backsliding." *Id.* at 31.

ARGUMENT

I. The Panel's Decision Both Violates *Chevron* Principles of Deference to Reasonable Agency Interpretations of Statutory Language that Is Ambiguous and Contradicts Statutory Language that Is Clear.

At the outset, the panel erred by attributing to EPA a view that the Agency demonstrably did not hold: that CAA §172(e) governs transition from the 1-hour to the more stringent 8-hour NAAQS. In fact, EPA said it was formulating policy in an area of statutory "silence," which it viewed as providing it discretion under *Chevron* to develop an interpretation as to how best to meet relevant statutory objectives. As the Supreme Court held in *Whitman*, "if the statute is 'silent or ambiguous' with respect to the issue [in question], then we must defer to a 'reasonable interpretation made by the administrator of an agency.'" 531 U.S. at 481 (quoting *Chevron*, 467 U.S. at 844); *id.* at 486 ("it is left to the EPA to develop

a reasonable interpretation of the nonattainment implementation provisions"); *see Chevron*, 467 U.S. at 843, 866 (where "Congress has not directly addressed the precise question at issue," courts "have a duty to respect legitimate policy choices" made by the agency). EPA recognized that, because §172(e) does not govern here, it can at most provide background principles to help guide the Agency's exercise of its discretion. *See* 70 Fed. Reg. at 30593/3, JA150

Yet, after stating incorrectly that "EPA interpreted [§172(e)] to apply here," the panel treated §172(e) *as if* it applied – even while acknowledging that in fact it does *not* apply "[b]y its terms." Slip op. at 30. Given its acknowledgement that §172(e)'s text makes it inapplicable here, the panel might have been expected to correct the interpretation on this point that it thought EPA had adopted. Instead, the panel itself embraced that putative interpretation and used it to fashion a series of new requirements to govern transition to a more stringent NAAQS, requirements that it held are *statutorily* mandated. In the process, the panel improperly rejected – and in some respects ignored – the interpretations EPA actually made.

After incorrectly treating §172(e) as if it applies to tightening a NAAQS, the panel compounded its disregard for EPA's reasonable exercise of its interpretive discretion in three ways. First, it held that EPA had erred by "[f]inding ambiguity in the word 'controls.'" *Id.* at 31. Remarkably, the panel found that word entirely free of ambiguity. *Id.* at 34 ("there is *no ambiguity* as to the meaning of 'control'

in Section 172(e)") (emphasis added). Thus, for example, the panel concluded that, under §172(e), the 1-hour NSR "permitting process," *id.* at 31 – which would apply in the future to sources that do not yet exist, under a NAAQS that has ceased to exist – is *unambiguously* a *currently* applicable "control" that states must retain.

Despite its passing reference to "the Act's plain meaning," the panel in fact gave content to "controls" not from statutory text but from its own view of "the nature of 'control'" as including anything with an "effect on ozone levels." *Id.* at 33. As EPA noted, that view compels states "to retain all requirements in a SIP" upon NAAQS relaxation – something Congress "would have stated…expressly" if that were its intent. 70 Fed. Reg. at 17023/3. Unable to cite any statutory definition, the panel cited CAA §108(h), 42 U.S.C. §7408(h), but that merely addresses dissemination of "control technology information"; it does not say what "controls" *means*. In fact, both §108(h) and the past EPA statements and legislative history described by the panel (at 33-34) are consistent with EPA's requirement to retain emission limits in existing 1-hour NSR permits, *see, e.g.*, 69 Fed. Reg. at 23986/1, JA129, a requirement the panel wholly overlooked. And the panel undermined its conclusion, and supported EPA's, by noting correctly that NSR is a "process" in which controls are "impos[ed]," slip op. at 31, 33, and thus is not *itself* a "control."

Second, the panel read out of §172(e) the cut-off date that EPA properly discerned there. As discussed above, §172(e) directs EPA to determine the

requirements that will apply after NAAQS relaxation and to ensure that those requirements provide controls not less stringent than those applicable before the NAAQS change. "This timing provision," as EPA observed, "places a limit on which controls should be considered." 70 Fed. Reg. at 30596/3, JA153. The panel's decision erases that statutory limit; it holds that the "controls that section 172(e) requires to be retained" include "controls" that would be "imposed" and would become "enforceable" based on future contingencies that would occur only after the NAAQS change. Slip op. at 36. Under the decision's logic, all future controls are current controls, and nothing is left of the Act's timing language.

Third, the panel ignored EPA's authority to "promulgate requirements" that will apply after NAAQS relaxation to achieve control that is "not less stringent." Under this §172(e) language, EPA, where it relaxes a NAAQS (and thus where §172(e) does apply), may decide on controls that are different from, though on balance not less stringent than, those that applied before the NAAQS change.[2] The panel, however, ordered retention of the *identical* "controls" that it deemed applicable before the NAAQS change. *See, e.g.*, *id.* at 37 (1-hour §185 fees "must be enforced"); *id.* at 38 (1-hour contingency plans "must remain in place"); *id.* at 39 (1-hour conformity determinations "must be retained"). The decision thus contra-

[2] EPA acted consistently with this authority by allowing states to choose two different alternatives to the pre-existing 1-hour attainment demonstration requirement. *See supra* at 6. No petitioner challenged EPA's decision to do so.

dicts the principle that §172(e), where it applies, authorizes EPA – not a court – to decide which requirements are appropriate to achieve "not less stringent" control.

Moreover, the panel erred in construing other CAA provisions it viewed as bearing on NAAQS transition. For instance, it said that §110(*l*) of the Act, 42 U.S.C. §7410(*l*), provides that "no mandatory controls could be removed and nothing could be done that would hinder an area's ability to achieve prescribed annual incremental emissions reductions." Slip op. at 30. In fact, §110(*l*) on its face does not prohibit controls from being "removed"; it only bars EPA from approving SIP revisions that "would interfere with" an "applicable requirement."

The panel also read CAA §175A, 42 U.S.C. §7505a, as applying to this case a restriction on "remov[ing] controls," slip op. at 30, but §175A plainly does not govern here. It requires a nonattainment area that is redesignated to attainment to "shift controls from active enforcement to the contingency plan that would be automatically triggered should air quality again deteriorate." *Id.* Section 175A does not support the panel's decision because the subject of EPA's rules is not redesignation to attainment under a given NAAQS but transition from one NAAQS to a different, more stringent NAAQS, a matter §175A simply does not reach.

The panel's discussion of §175A "controls," *id.*, also undermines its ruling on §185 fees. According to the panel, those fees are §172(e) "controls" that must be retained and thus presumably, under its §175A analysis, also would have to

become a §175A contingency measure after an area's redesignation to attainment. But §185 on its face imposes the fees only "*until* the area is redesignated." CAA §185(a), 42 U.S.C. §7511d(a) (emphasis added). Because §185 fees thus cannot be §175A "controls," by the panel's logic they also could not be §172(e) "controls."

The array of problems described above illustrates how far the panel departed both from settled principles of deference to agencies and from the plain meaning of statutory language where that language is clear. Rehearing is needed to conform the decision to established administrative law and Supreme Court precedent.

II. The Panel's Decision Unnecessarily Creates an Inter-Circuit Conflict.

The panel decision conflicts with *Greenbaum v. EPA*, 370 F.3d 527, 535-38 (6th Cir. 2004), in which the Sixth Circuit held that EPA reasonably exercised its discretion by determining that nonattainment NSR requirements are not "measures with respect to the control of [an] air pollutant." CAA §175A(d), 42 U.S.C. §7505a(d). The panel's holding here that those same NSR requirements are "controls" that must be retained after a NAAQS change cannot reasonably be squared with the Sixth Circuit's holding, and the panel's attempt to reconcile the two decisions fails. That "controls" (under §172(e)) and "measures with respect to…control" (under §175A) are "different noun[s]," slip op. at 34, is a semantic distinction without substance – as illustrated by the panel's own treatment of those nouns as interchangeable. *Id.* at 30 (referring to §175A "measures" as "controls").

III. Rehearing Is Needed To Address Issues of Exceptional Importance to the Act's Implementation.

The NAAQS "are the engine that drives nearly all of Title I of the CAA." *Whitman*, 531 U.S. at 468. With the tenth anniversary of promulgation of the 8-hour NAAQS approaching, and with litigation over its validity having been fully resolved five years ago, *see American Trucking Ass'ns v. EPA*, 283 F.3d 355 (D.C. Cir. 2002), that NAAQS still remains unimplemented. EPA conducted extensive rulemaking, including reconsideration on key issues, to develop reasonable implementation rules to respond to the Supreme Court's remand in *Whitman* and to a wide range of public comments. The panel's vacatur of those rules, however, erects a further, and unjustified, obstacle to implementation. Given the central role of NAAQS implementation – in general and here specifically – in the Act's administration, rehearing should be granted to allow rational implementation to proceed.

CONCLUSION

The Court should grant panel or *en banc* rehearing of the panel's decision with respect to the rules' provisions for transitioning to the 8-hour ozone NAAQS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Petition for Panel Rehearing or Rehearing *En Banc* of Intervenor-Respondents American Chemistry Council, American Forest & Paper Association, American Petroleum Institute, National Association of Manufacturers, and Utility Air Regulatory Group has been served this 22nd day of March, 2007, on the following counsel by first-class mail, postage prepaid:

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