BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
Final Rule to Implement the 8-Hour	)	
Ozone National Ambient Air Quality	)	RIN 2060-AJ99
Standard – Phase 1	)	Air Docket #OAR-2003-0079
	)	

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), the organizations named below[1] petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 69 Fed. Reg. 23951 (April 30, 2004)("NFRM" or "final rule"). The grounds for the objections raised in this petition arose after the period for public comment and are of central relevance to the outcome of the rule. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

INTRODUCTION

This petition raises objections to the final rule captioned above. Each objection is "of central relevance to the outcome of the rule," 42 U.S.C. § 7607(d)(7)(B), in that it demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 7607(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the NFRM published on April 30, 2004. 69 Fed. Reg. 23951-24000. The public comment period on the preamble to the rule closed on August 1, 2003; the public comment period on the regulatory text closed on September 5, 2003; and the comment period on certain classification approaches closed on November 5, 2003. 68 Fed. Reg. 32802, 32802/2 (June 2, 2003); 68 Fed. Reg. 46536, 46536/1 (August 6, 2003); 68 Fed. Reg. 60054 (October 21, 2003). The grounds for the objections raised in this petition thus "arose after the period for public comment." 42 U.S.C. § 7607(d)(7)(B). Because judicial review of the rule is available by the filing of a petition for review "by June 29, 2004," 69 Fed. Reg. at 23995/3, the grounds for the objections arose "within the time specified for judicial review." 42 U.S.C. § 7607(d)(7)(B).

[1] Petitioners are: American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy.

OBJECTIONS

I. Antibacksliding Issues

For reasons set forth in their comments of August 1, 2003 ("Prior Comments"),[2] Petitioners contend that EPA has no authority to revoke the 1-hour ozone NAAQS or to waive compliance with any requirements specified in the Act for 1-hour nonattainment and maintenance areas. Even assuming *arguendo* that EPA has authority to revoke the 1-hour standard or to waive compliance with requirements of the Act tied to the 1-hour standard, Petitioners have the following objections to EPA's final rule.

A. The Rule Unlawfully and Arbitrarily Allows Backsliding of NSR Requirements.

The final rule unlawfully and arbitrarily allows one-hour nonattainment areas to backslide from new source review (NSR) requirements. Specifically, those areas that are assigned to a less stringent classification for the eight-hour standard than for the one-hour (e.g., a one-hour serious area that is moderate or marginal under the eight-hour standard, or that is assigned to Subpart 1) may weaken their NSR provisions down to the level applicable to the eight-hour classification.

This entails at least two weakenings. First, it will raise the tonnage thresholds defining major new and modified sources subject to NSR. Second, for those sources that trigger NSR, it will reduce the ratio of emission offsets required.

This provision, and accompanying rationales, were added to the rule after the close of the public comment period -- and represent a diametric reversal of the position presented in the proposal, which would have listed NSR as an "applicable requirement" subject to the rule's anti-backsliding provisions. § 51.900(f)(3) and (4); 68 Fed. Reg. 32819 and 32821. Moreover, the final rule purports to make a nationwide determination under § 110(l) that backsliding from one-hour NSR requirements would not "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter." *See* 69 Fed. Reg. 23985/3, 23986/3. That determination was likewise made after the period for public comment had closed.

Thus, the grounds for our objections arose after the period for public comment, and the raising of those objections during the public comment period was impracticable.

[2] Comments of: Clean Air Task Force, American Lung Association, Conservation Law Foundation, Earthjustice, Environmental Defense, Natural Resources Defense Council, Southern Alliance for Clean Energy, Southern Environmental Law Center, U.S. Public Interest Research Group, August 1, 2003, EPA Docket No. OAR-2003-0079-0215, at 38-49.

See CAA § 307(d)(7)(B). Those objections are of central relevance to the rule, *see id.*, because they go to the core procedural and substantive validity of the NSR provisions of the rule -- including the public's opportunity to comment on those provisions, and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decisionmaking.

1. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Deletion of Key NSR Anti-Backsliding Provisions.

EPA unlawfully failed to present the NSR provision and accompanying rationales to the public for comment. Under § 307(d) (which EPA has found applicable to this proceeding), EPA must present for public comment "the major legal interpretations and policy considerations underlying the proposed rule." § 307(d)(3)(C). The same requirement would apply under the Administrative Procedure Act. 5 U.S.C. § 553. EPA's NSR provisions and accompanying rationales are not a logical outgrowth of the proposal.

First, they are diametrically opposite to that proposal. In contrast to the proposal, which included NSR among the "applicable requirements" subject to the rule's anti-backsliding provisions, the final rule omits NSR from those requirements, thus allowing the weakenings referenced above. Moreover, EPA made a nationwide § 110(l) determination that likewise post-dated the public comment period, and -- because it purports to allow deletion of the NSR provisions that would have been mandatory under the proposed rule -- was not a logical outgrowth of that rule.

Indeed, the proposal insisted: "We see no rationale under the CAA—given the Congressional intent for areas 'classified by operation of law' — why the existing NSR requirements should not remain 'applicable requirements' for the portion of the 8-hour nonattainment area that was classified higher for the 1-hour standard." 68 Fed. Reg. 32821/3 (emphasis added). Given that EPA itself could "see no rationale" for a result such as that embodied in the final rule, it would be untenable to assert that the public should have foreseen that result. Accordingly, EPA committed a procedural violation (*see* § 307(d)(9)(D)) by failing to solicit public comment on both its exclusion of NSR from applicable requirements, and its nationwide § 110(l) determination concerning NSR.

That procedural violation meets the criteria set forth in § 307(d)(9)(D) for reversal based on procedural violations. First, EPA's procedural dereliction is arbitrary and capricious. *See* § 307(d)(9)(D)(i). The agency has abruptly reversed course 180 degrees from its proposal, opting for an outcome for which the agency itself has indicated "[w]e see no rationale under the CAA." 68 Fed. Reg. 32821/3. Moreover, the agency has purported to make a blanket nationwide determination concerning the effect of eliminating an important CAA requirement. Yet the agency has not deigned to seek the public's views on either of those matters.

Second, via the present petition, petitioners have satisfied the requirements of § 307(d). *See* § 307(d)(9)(D)(ii).

Third, the challenged errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* § 307(d)(8), *cited in* § 307(d)(9)(D)(iii). EPA did not merely fail to seek public comment on some small aspect of the challenged provisions. Rather, it failed to seek comment on the fundamental approach they embody -- an approach that, as indicated above, is diametrically opposite to that embodied in the proposed rule. Had EPA obeyed the law by soliciting public comment, it would have learned of the serious substantive objections detailed below -- objections that address the lack of statutory basis for the challenged provisions, and those provisions' inconsistency with fundamental principles of reasoned agency decisionmaking.

2. By Allowing Backsliding of NSR Requirements, the Rule -- and Accompanying § 110(l) Determination -- Are Unlawful and Arbitrary.

EPA violated the Act, and fundamental standards of reasoned agency decisionmaking, by promulgating a rule allowing backsliding from one-hour NSR requirements, and by making a nationwide § 110(l) determination allowing removal of those requirements from SIPs.

(a) EPA Acted Unlawfully and Arbitrarily by Providing that One-Hour NSR Requirements Are Not Mandatory Requirements that Must Be Preserved in Eight-Hour Nonattainment Areas.

First, EPA acted unlawfully and arbitrarily by providing that one-hour NSR requirements are not mandatory requirements that must be preserved in eight-hour nonattainment areas. As the agency concedes, § 172(e) requires -- for areas that have not attained the preexisting one-hour standard -- "controls which are not less stringent" than the controls previously applicable to those areas. As EPA acknowledges: "Because Congress specifically mandated that such control measures need to be adopted or retained even when EPA relaxes a standard, we believe that Congress did not intend to permit States to remove control measures when EPA revises a standard to make it more stringent, as in the case of the 8-hour standard." 68 Fed. Reg. 32819/2.[3] Indeed, EPA noted that "The anti-backsliding provisions of the final rule retain applicable requirements by virtue of an area's classification under the 1-hour standard due to the fact that those requirements were placed on the 1-hour nonattainment area 'by operation of law.' EPA does not believe that Congress intended those requirements to no longer be mandatory upon revision of the NAAQS. As noted in the June 2, 2003 proposal, we will

[3]We agree with EPA that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent." 69 Fed. Reg. at 23972/2. Moreover, insofar as EPA interprets the new 8-hour standard as allowing the abrogation of existing pollution requirements such as NSR in some areas, then EPA's adoption of this standard is a relaxation for purposes of Section 172(e) and is expressly subject to that provision's requirement that EPA "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), CAA 172(e).

entertain requests for waivers of applicable requirements – such as subpart 2 mandatory measures – only in cases where implementation of such measures would cause an 'absurd result.'" Response to Comments ("RTC") at 99. *Accord*, *id.* 158.

While EPA's proposal included NSR requirements among those that cannot be less stringent, the final rule takes the opposite approach. EPA does not dispute that these NSR requirements have become applicable to one-hour nonattainment areas by operation of law. Nor does EPA claim that application of these NSR requirements would cause an "absurd result." Indeed, any such claim would be untenable, since the NSR requirements being waived control the same precursor pollutants (VOCs and NOx) that contribute to nonattainment of both the one-hour and eight-hour ozone NAAQS. As EPA has recognized, "controls designed to meet the 1-hour standard will also generally provide progress toward meeting the 8-hour standard." RTC 89.

Instead, EPA argues that NSR requirements do not constitute "controls" within the meaning of § 172(e). This contention is baseless.

Two decades ago, EPA told the Supreme Court that NSR is one of the "pollution-control measures" applicable in nonattainment areas. EPA Opening Merits Brief in *Chevron, U.S.A. v. NRDC*, S. Ct. 82-1005 (Aug. 31, 1983), 1982 Lexis U.S. Briefs 1005, at n.55. *Accord*, 67 Fed. Reg. 80187/2 (Dec. 31, 2002) ("The NSR provisions of the Act are a combination of air quality planning and air pollution control technology program requirements for new and modified stationary sources of air pollution.") (emphasis added). Indeed, no other conclusion is possible, as EPA itself recognized in the proposed rule. *See* p.3, *supra*. The Act's NSR provisions control emissions in several ways.

For example, sources subject to NSR must apply "lowest achievable emission rate," § 173(a)(2), which is a stringent "emission limitation." § 171(3). *See also* § 302(k) (defining "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter."). Other CAA provisions expressly confirm what is obvious from the above provisions: LAER is a control requirement. *See*, *e.g.*, §§ 173(d) ("The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other States and to the general public.") (emphasis added); 108(h) (provision entitled "RACT/BACT/LAER Clearinghouse" provides: "The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.") (emphasis added). *See also* 1990 House Report at 272 (RACT/BACT/LAER clearinghouse is to include *inter alia* information on "lowest achievable emission rate control requirements proposed or adopted in each State.")

(emphasis added). By weakening Subpart 2 requirements, EPA allows sources that would otherwise be "major" to escape NSR -- and the LAER control requirement.

Moreover, nonattainment NSR requires control through the offset requirement. Specifically, the permitting agency cannot issue an NSR permit unless it determines that "by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title)." § 173(a)(1)(A). *See also* § 171(a) (defining "reasonable further progress" as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date"). Section 173(c) provides:

> (1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.
>
> (2) Emission reductions otherwise required by this chapter shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).

Thus, in order to obtain an NSR permit, the source must arrange for emissions of other sources to be controlled -- indeed, controlled sufficiently to represent a net reduction in emissions. By weakening NSR requirements applicable to ozone nonattainment areas, EPA both excuses sources from having to obtain offsets at all (by virtue of falling below

the major source thresholds), and for those sources that exceed even the weakened thresholds, lowers the tonnages of offsets required.

Likewise, § 173(a)(5) requires an alternatives analysis that considers *inter alia* the source's "environmental control techniques." The analysis must demonstrate that the source's benefits significantly outweigh its environmental and social costs. Sources that escape NSR through the weakening of previously applicable requirements need not perform this analysis or make this demonstration.

Finally, the authors of the 1990 Subpart 2 provisions confirmed their understanding that NSR involves controlling emissions. Those authors described the "graduated control program" involving increasingly protective requirements for higher classifications, and included -- as the first three examples of that control program -- provisions relating to NSR. 1990 House Report at 234. In each instance, the requirement was characterized as a "control." *Id.* (describing major source thresholds, authors note that "small sources must be controlled"; "Also included in the graduated control requirements are increasing offset ratios"; "the graduated control requirements include continued use of 'netting' in other than extreme areas subject to increasingly stringent limitations for higher classifications") (emphasis added).

In short, the above-cited provisions lead to the inescapable conclusion that nonattainment NSR requirements constitute "controls." *See also* § 118(a) (requiring federal facilities to comply with requirements for "the control and abatement of air pollution," including "any requirement respecting permits"). EPA's argument to the contrary is untenable.

Moreover, EPA itself has concluded: "We believe Congress intended areas to continue to have control measures no less stringent than those that applied for the 1-hour NAAQS. Because the ROP obligation results in control obligations, we believe areas should remain obligated to adopt outstanding ROP obligations to ensure that the ROP milestones are met." RTC 113-14. Under this rationale, NSR must also be included in the rule's antibacksliding provisions, because it too "results in control obligations" -- *e.g.*, LAER and offsets.

Growth measure. EPA argues that "our revised approach is more consistent with our longstanding treatment of NSR as a growth measure. We have historically treated control measures differently from measures to control growth." 69 Fed. Reg. 23986/1. This characterization undermines rather than supports EPA's rule. EPA's apparent position that "measures to control growth" do not constitute "controls" within the meaning of § 172(e) is untenable.

The agency's efforts to create a dichotomy between "control measures" and "measures to control growth" ignores plain English: "measures to control growth" are a subset of "control measures." That purported dichotomy also disregards the agency's own prior characterization of NSR as among the Act's "control measures," and as "a combination of air quality planning and air pollution control technology program

requirements for new and modified stationary sources of air pollution." *See* p. 5, *supra* (quoting EPA).[4]

Emissions reductions. EPA also argues that "the NSR program is a growth measure and is not specifically designed to produce emissions reductions." 69 Fed. Reg. 23986/1. But § 172(e) broadly applies to "controls," and is not limited to that subset of controls designed to reduce emissions. To the contrary, controls designed to prevent emissions from increasing are equally encompassed within the broad reference to "controls."

In any event, NSR does provide for emissions reductions. First, NSR expressly requires "reductions" in the form of offsets. § 173(a)(1)(A). A key impact of EPA's unlawful and arbitrary final rule is to weaken offset ratios, thus exempting areas from emission reductions that would otherwise be required. Second, NSR requires application of LAER -- even when the impact of that application is to reduce emissions below levels previously emitted by the source. Indeed, the authors of the 1990 Subpart 2 provisions confirmed their understanding that those provisions would produce emission reductions. 1990 House Report at 234 ("Also included in the graduated control requirements are increasing offset ratios that require a greater level of pollution reductions from other sources in the nonattainment area to offset increases in pollution from new sources or modifications. This program is intended to allow economic growth and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced.") (emphasis added). *Accord*, *id.* 244 (explaining NSR requirements for extreme areas, committee notes that those areas "cannot afford to miss any opportunity for greater emission reductions") (emphasis added).

"Structural" arguments. EPA argues that "[t]he role of the NSR permitting program as a growth measure, rather than a control measure, is evident in the structure of the Act, which delineates nonattainment NSR and control measures as separate SIP requirements." 69 Fed. Reg. 23986/2. To the contrary, the Act's structure supports treating NSR as "controls" subject to § 172(e). *See* pp. 5-8, *supra*. EPA's arguments to the contrary fall flat.

First, EPA argues that "[i]n the general requirements for nonattainment plan provisions, NSR permits are listed in CAA 172(c)(5), while control measures are listed in CAA 172(c)(6)." 69 Fed. Reg. 23986/2. Nothing in § 172(c), however, offers the slightest hint of congressional intent contradicting the above-cited clear statutory evidence showing that -- as EPA itself has elsewhere conceded -- NSR is among the Act's controls. To the contrary, § 172(c) undermines rather than supports EPA's position. In § 172(c)(6), Congress expressly confirmed that "enforceable emission limitations" constitute "control

[4] EPA's citation of a prior Federal Register notice on maintenance plans is unavailing. *See* 69 Fed. Reg. 23986/1 (citing 68 Fed. Reg. 25418 (May 12, 2003)). A prior EPA decision cannot trump the Act's language. Moreover, the cited decision addressed the maintenance plan requirement, which applies to areas where the applicable NAAQS has been attained. That decision provides no support for weakening NSR requirements in areas that have not attained either the one-hour or eight-hour NAAQS.

measures." § 172(c)(6) (referencing "enforceable emission limitations, and such other control measures, means or techniques" as may be necessary or appropriate to timely attainment). NSR requires enforceable emission limitations in the form of offsets and LAER.

Second, EPA argues that "in defining implementation plan requirements, CAA 110(a)(2)(C) sets forth the requirement for permit programs and CAA 110(a)(2)(A) the control measures. As we explained in our 1994 policy memo, if the term 'measures,' as used in sections 110(a)(2)(A) and 110(a)(2)(C), had been intended to include PSD and part D NSR, there would have been no point to requiring that SIPs include both measures and preconstruction review." 69 Fed. Reg. 23986/2 (footnote omitted). As in the case of § 172(c), however, nothing in § 110(a) contradicts the above-cited evidence that NSR is among the Act's controls. Moreover, EPA's focus on "measures" ignores the language of § 172(e), which does not use that word, referring instead to "controls." As § 172(c)(6) confirms, the controls envisioned by Congress encompass "control measures, means or techniques." Thus, even if (contrary to EPA's own prior representation) NSR were not a control measure, it would certainly be included within the broader word "controls."

Finally, § 110(a)(2) undercuts rather than supports EPA's efforts to exempt NSR from antibacksliding. Section 110(a)(2)(C) provides that each SIP shall "include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter." Thus, NSR is among the programs statutorily defined as "necessary to assure that national ambient air quality standards are achieved." EPA's attempt to allow backsliding from that requirement must be rejected.

NSR's "Role." EPA also argues that "the statute is clear regarding the roles of the NSR program and control measures in nonattainment areas." 69 Fed. Reg. 23986/2. Specifically:

> CAA 172(a)(2) requires attainment as expeditiously as practicable considering control measures and CAA 172(c)(1) and (c)(6) require implementation of all control measures as expeditiously as practical to provide for attainment of the NAAQS by the area's attainment date. Conversely, CAA 173(a)(1)(A) requires only that growth due to proposed sources, when considered together with the other plan provisions required under section 172, be sufficient to ensure RFP. Thus, unlike the control measures required by section 172(c)(1) and (c)(6), NSR is not a measure in and of itself to assure attainment of the NAAQS. Rather, NSR should be considered in conjunction with a State's control measures to assure, consistent with the requirements in Section 172(c)(4), that the emissions from new sources will be consistent with RFP and not interfere with attainment of the applicable NAAQS.

Id. 23986/2-3. EPA errs in claiming that antibacksliding applies only to those controls linked to NAAQS attainment. Section 172(e) applies broadly to "controls," not merely to controls linked to NAAQS attainment. Indeed, EPA's final rule applies anti-backsliding to a number of controls that are not directly phrased in terms of NAAQS attainment -- such as inspection and maintenance programs, Stage II vapor recovery, and clean fuels for boilers. 69 Fed. Reg. 23997/1-2 (§ 51.900(f)).

In any event, NSR does contain key requirements linked to attainment. Specifically, NSR requires emission offsets that contribute to "reasonable further progress," § 173(a)(1)(A), which encompasses emission reductions "for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." § 171(1). EPA's own Clean Data Policy (cited by the agency in the April 2004 rule) indicates that "the stated purpose of RFP is to ensure attainment by the applicable attainment date." "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard" (May 10, 1995), at 3-4. Moreover, as noted above, § 110(a)(2)(C) expressly defines NSR as among the requirements "necessary to assure that national ambient air quality standards are achieved." For its part, EPA has previously insisted that NSR "is inextricably tied to the attainment or nonattainment of ambient air quality standards." EPA *Chevron* Merits Brief, 1982 Lexis U.S. Briefs 1005. The agency's contrary argument in the April 2004 rule must be rejected.

To the extent EPA is arguing that NSR will not produce attainment by itself -- i.e., that other measures are needed as well -- that argument does not support the exemption of NSR from antibacksliding. NSR may not be the only applicable control, but it is one of the applicable controls, and thus is within the scope of § 172(e). There is no more basis for plucking out NSR and demanding that it produce attainment all by itself, than there would be for plucking out any other nonattainment requirement (such as enhanced I/M or Stage II) and demanding that it produce attainment all by itself. EPA itself has recognized that the Subpart 2 requirements work in combination with one another. *See*, *e.g.*, RTC 50 ("In general, we believe that the[] [Subpart 2] controls will be effective in combination with other local controls as well as the national and regional control measures mentioned by the commenter.") (emphasis added).

Prior NSR Permits. EPA also argues that "major NSR only applies to new sources and to existing sources that have a physical change or change in the method of operation. Therefore, emission limitations and other requirements in NSR permits issued under 1-hour NSR programs will continue to be in force when the 1-hour NAAQS is revoked." 69 Fed. Reg. 23986/1. We agree that the provisions of previously issued NSR permits must remain in force. EPA's statutory obligations do not stop there, however. To the contrary, the statutory NSR requirements applicable to future physical and operational changes constitute "controls" that must also remain in force.

For all the foregoing reasons, EPA's decision to exclude NSR from the rule's antibacksliding provisions, and thus to allow weakening of the previously applicable NSR requirements in one-hour nonattainment areas, is unlawful and arbitrary.

As EPA itself has recognized: "Because we are transitioning to a more stringent and protective air quality NAAQS, we see no reason why there should be provisions that would provide less protection to public health." RTC 114. *Accord*, *id.* 138. It bears emphasis that the NSR requirements at issue here are already applicable by operation of law in areas that have been out of compliance with ozone health standards for many years. That law reflects a considered congressional judgment that these protective requirements are important for the areas at issue. *See*, *e.g.*, 1990 House Report at 234. In the fourteen years since that enactment, those areas have failed to attain the one-hour standard; EPA has concluded, based on extensive peer-reviewed science, that ozone concentrations harm health at lower concentrations than previously documented; in response to that science, the agency has promulgated a more protective NAAQS; and most recently, the agency has concluded that the areas at issue violate that new standard as well. It is untenable for EPA to suggest that these circumstances warrant relaxation of previously applicable NSR safeguards.

(b) EPA Acted Unlawfully and Arbitrarily by Purporting to Make a Blanket § 110(l) Determination Authorizing Weakening of NSR SIP Provisions.

Having erroneously concluded that NSR is not among the mandatory controls subject to the § 172(e) antibacksliding requirement, EPA went on to compound the error. The agency treated previously applicable NSR requirements as provisions that states can remove from their SIPs upon making the showing required by § 110(l), which provides: "The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter." Then EPA purported to make a nationwide blanket determination that § 110(l) allows removal of these previously applicable NSR requirements: "a State may request approval of a SIP revision to remove its 1-hour nonattainment NSR program from its SIP. We will approve such changes to a State's SIP because we have determined based on section 110(l) of the Act that such changes will not interfere with any State's ability to reach attainment of the 8-hour standard and will be consistent with reasonable further progress." 69 Fed. Reg. 23985/3. This purported § 110(l) determination is unlawful and arbitrary.

As shown above, the Act and its history confirm that NSR is a key part of the statutory program for attainment and reasonable further progress. EPA's attempt to argue the contrary[5] flies in the face of these authorities.

EPA argues that preexisting NSR requirements can be considered dispensable where an area submits an attainment and RFP demonstration that do not rely on those requirements. *See* 69 Fed. Reg. 23986/3 ("The essential question is whether the NSR program changes will hinder future air quality improvements based on future growth

[5] *See*, *e.g.*, 69 Fed. Reg. 23986/3 ("States do not rely on the NSR program to generate emissions reductions to move an area further toward attainment.").

projections. Such a question inherently involves a look at the present day air quality, which is best reflected by the current 8-hour classifications. As long as the State plans to manage growth within the emissions inventory and include growth in their attainment plans, new source growth will be consistent with RFP and not interfere with the State's ability to attain."). However, that argument proves too much. If it were accepted, a state could pluck out any other requirement (including requirements such as enhanced I/M or Stage II that are included in the April 2004 rule's antibacksliding provisions) and argue that the requirement is dispensable in light of the area's attainment and RFP plans. This approach would ignore Congress' decision not simply to require attainment and RFP as a general matter, but also to prescribe specific program elements like NSR. EPA is not entitled to second-guess that congressional decision.

EPA's approach to the §110(l) demonstration, and its finding that states will not interfere with the attainment of the eight-hour standard by compromising the one-hour NSR requirements, also ignores the continued applicability of the one-hour standard. The Act continues to require one-hour nonattainment areas to timely attain the one-hour standard, and to make reasonable further progress toward such attainment. Thus, EPA cannot find that a SIP revision comports with §110(l) unless the state can show that the revision will not interfere with attainment or RFP for either the eight-hour standard *or* the one-hour standard.

In addition to resting on a flawed statutory premise, EPA's purported § 110(l) finding lacks fundamental factual predicates and agency explanations. Agency action must rest on substantial evidence, and must be accompanied by a reasoned explanation pointing out the connection between the facts found and the choice made. *Assn. of Data Processing v. Board of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984); *Transactive Corp. v. US*, 91 F.3d 232, 236 (D.C. Cir. 1996); *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995). Here, EPA has included no evidence -- and certainly not substantial evidence -- that relaxation of previously applicable NSR requirements in each and every one-hour nonattainment area would produce no interference with attainment, RFP, or other CAA requirements.

For example, EPA advances the blanket assertion that "there will be no air quality degradation by virtue of this SIP change." 69 Fed. Reg. 23986/3. As an initial matter, this assertion about absence of degradation -- even if accepted *arguendo* -- would not establish a lack of interference with requirements applicable to nonattainment areas, where current ozone concentrations are too high and must be reduced in order to attain the NAAQS.

In any event, EPA's nondegradation assertion is utterly unsupported by any substantial evidence or reasoned analysis. Such evidence and analysis would need to address, for example, the specific circumstances of each individual nonattainment area involved, including for example an evaluation of which sources are located in the area and might undertake modifications triggering NSR; the area's growth rate (including the likelihood of future new sources locating there); and the area's SIP provisions (including the provisions that would allegedly make up for the weakened NSR elements). EPA has

presented no such evidence or analysis for any nonattainment area, much less for every area throughout the nation. Indeed, attainment and RFP SIPs have not even been submitted, much less approved, for the eight-hour NAAQS.

Even if EPA could show (which it has not done) a lack of impact on attainment by the Act's attainment deadlines, that would not justify a § 110(l) finding. To the contrary, the Act requires areas to attain sooner than those deadlines, if it is practicable to do so. §§ 181(a)(1), 172(a)(2) (requiring attainment "as expeditiously as practicable"). EPA has presented no evidence or analysis documenting that weakening of previously applicable NSR requirements would have no impact on when each area attains.

EPA's sole support for its nondegradation claim is to note that preexisting NSR permits would remain applicable.[6] That one requirement (*i.e.*, the requirement to comply with preexisting permits) is being retained does not constitute support for the assertion that removal of another requirement (*i.e.*, the requirement that future new sources and modifications comply with previously applicable major source thresholds and offset ratios) would produce no interference with attainment, RFP, or other CAA requirements.

In short, EPA's purported § 110(l) finding, like its exclusion of NSR from the "applicable requirements" subject to antibacksliding, is unlawful and arbitrary.

B. RFG Backsliding

The final rule unlawfully and arbitrarily allows one-hour nonattainment areas to backslide from requirements under the Act for the use of reformulated gasoline (RFG). Both the preamble and text of the proposed rule listed the RFG mandate under § 211(k) of the Act as an "applicable requirement" for severe and above 1-hour nonattainment areas. 68 Fed. Reg. 32802, 32867 (2003)("NPRM"); EPA, Proposed Rule for Implementation of the 8-Hour Ozone NAAQS, Draft Regulatory Text (July 31, 2003 version)("Reg Text"), 40 C.F.R. §51.900(f)(8). Thus, under the proposed rule, areas subject to the RFG mandate by virtue of their 1-hour classifications would have remained subject thereto regardless of their 8-hour classification.

In the final rule, EPA completely reversed course on this issue, deleting RFG from the list of "applicable requirements." 69 Fed. Reg. 23951, 23973, 23997 (2004). This change in the rule and accompanying rationales were not presented until after the close of the public comment period -- and represent a diametric reversal of the position presented in the proposal.

---

[6] EPA argues that "NSR is a prospective permitting program that only applies to future emissions from new and modified sources. Any source that is subject to the 1-hour NSR requirements is required to continue to comply with those requirements." 69 Fed. Reg. 23986/3. This is an apparent reference to EPA's earlier statement that "emission limitations and other requirements in NSR permits issued under 1-hour NSR programs will continue to be in force when the 1-hour NAAQS is revoked." *Id.* 23986/1 (emphasis added).

1. EPA Unlawfully and Arbitrarily Failed to Seek Public Comment on the Final Rule's Deletion of RFG From the List of Applicable Requirements.

EPA unlawfully failed to subject to public comment its deletion of RFG from the list of applicable requirements. That deletion was not a logical outgrowth of the proposed rule, as neither the NPRM nor the proposed regulatory text gave the slightest hint that EPA was considering such a course. Accordingly, EPA's deletion of RFG from the list of applicable requirements in the final rule was procedurally defective and unlawful for the same reasons specified in Part I.A.1 above with respect to EPA's deletion of NSR from the list of applicable requirements in the final rule.

2. EPA's exclusion of RFG from the list of applicable requirements was arbitrary, capricious and contrary to law

EPA's stated rationale for its final rule was that the RFG program "is not an applicable requirement under subpart 2" and "is not adopted as a State program in SIPs, as are the other 'applicable requirements,'" but "is required under a Federal program." 69 Fed. Reg. at 23972/3, 23973/1. This rationale is contrary to the statute, and utterly inconsistent with the agency's own stated basis for its antibacksliding policy. Section 172(e) of the Act requires EPA's rules to "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment" before relaxation of any NAAQS. EPA has correctly construed this mandate as applying as well as where EPA strengthens a NAAQS. RFG is plainly a control applicable to 1-hour nonattainment areas prior to adoption of the 8-hour NAAQS. That the RFG mandate is addressed in §211(k) of the Act does not make it any less "applicable" to these areas for purposes of §172(e), which by its terms is not limited to controls addressed exclusively in Subpart 2, or to controls that are required to be included in SIPs. As EPA itself has stated, the purpose of §172(e) is to prevent backsliding, and that purpose is plainly disserved by relaxing a control program applicable to a 1-hour nonattainment area. See, e.g., 69 Fed. Reg. at 23972/2 ("We believe that, if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent."); RTC 114 (" Because we are transitioning to a more stringent and protective air quality NAAQS, we see no reason why there should be provisions that would provide less protection to public health").

Although RFG does not have to be a subpart 2 requirement to be subject to § 172(e), the suggestion that RFG is not a subpart 2 requirement is in any event incorrect. Section 211(k) mandates the use of RFG in two sets of communities: 1) The 9 ozone nonattainment areas having a 1980 population in excess of 250,000 and having the highest ozone design value during the period 1987-89;[7] and 2) Any area reclassified "as a

[7] Independent of the Act's antibacksliding requirements, EPA is completely without authority to revoke the RFG mandate with respect to the 9 areas for which it was explicitly mandated under the 1990 Amendments. The requirement for RFG in those areas was fixed by law in 1990, based on the 1987-89 design values of those areas. 42 U.S.C. § 7545(k)(10)(D). Moreover, EPA's own RFG rules – not

Severe ozone nonattainment area under section 7511(b) of this title." 42 U.S.C. § 7545(k)(10)(D). By requiring the use of RFG in any area reclassified as Severe under subpart 2, the Act plainly makes RFG a subpart 2 requirement. Indeed, EPA itself concedes that RFG "would be [an] applicable requirement[s] *under subpart 2* for the 8-hour standard." 69 Fed. Reg. at 23972/3 (emphasis added). The agency therefore can hardly claim that RFG is not or was not a subpart 2 requirement under the 1-hour standard.

Deletion of the RFG mandate from the list of "applicable requirements" is also inconsistent with other rationales offered by EPA for antibacksliding. For example, EPA has justified its antibacksliding policy by noting that in the 1990 Amendments to the Act, Congress designated and classified ozone nonattainment areas "as a matter of law." 69 Fed. Reg. at 23972/2. The subpart 2 mandate to reclassify areas to "severe", and the related requirement that such areas implement the RFG mandate, were also dictated by Congress "as a matter of law," and are therefore no less deserving of antibacksliding treatment. In addition, EPA has correctly stated that allowing relaxation of controls mandated pursuant to subpart 2 would render those controls "prematurely obsolete" in contravention of the Supreme Court's decision in *Whitman v. American Trucking Assns',* 531 U.S. 457, 481-86 (2001). *Id*. 23972/2-3; 68 Fed. Reg. at 32819/1-2. As noted above, RFG is mandated in a number of areas by virtue of the reclassification of those areas to severe pursuant to Subpart 2. Thus, to be consistent with *Whitman* as construed by EPA itself, the agency can not render the RFG mandate "abruptly obsolete" any more than it can any other subpart 2 mandate.

Furthermore, EPA itself concedes at one point in its Response to Comments document that the RFG mandate must remain in effect once initiated under the Act:

> Comment: One commenter objected to the portion of the proposed rule that includes the requirement for reformulated gasoline in severe areas in its list of applicable requirements that will remain in effect after full revocation of the 1-hour standard. 68 Fed. Reg. 32802, Appendix B. The commenter requests that we remove the reformulated gas requirement from the list of applicable requirements that areas must continue to implement.
>
> Response: The requirement for reformulated gasoline (RFG) was listed in the June 2, 2003 and the draft regulatory text as an applicable requirement under subpart 2. **Subsequent analysis by EPA supports the position that RFG is actually a requirement under Title II** (the mobile source-related provisions) of the Clean Air Act, **and must remain in effect once initiated**. **Therefore, while not an "applicable requirement" under subpart 2 of Title I, it is nonetheless an applicable requirement under the Act and must remain in effect** and cannot be shifted to be a contingency measure after the area attains the NAAQS.

---

amended by the ozone implementation rule – explicitly require the use of RFG in these communities. 40 C.F.R. § 80.70(a)-(j). Accordingly, to the extent the NFRM purports to revoke (or allow revocation of) the RFG mandate in these communities, it is flatly contrary to law.

RTC at 109 (emphasis added). Having correctly concluded that the RFG mandate must remain in effect once initiated, EPA cannot lawfully or rationally exclude RFG from the list of applicable requirements that must remain in effect after revocation.

Although the above analysis applies regardless of the actual pollution control benefits of RFG, Petitioners note that those benefits are substantial. For example, in the Washington, D.C. area, use of RFG was estimated to cut regional VOC emissions by more than 19 tons per day and NOx emissions by 8.5 tons per day in the year 2000. The VOC emission cuts equate to more than 4% of baseline VOC emissions in the region, and more than enough to satisfy a full year's ROP requirement under the Act. Metropolitan Washington Council of Governments, Plan to Improve Air Quality in the Washington, DC-MD-VA Region, February 19 2004, at 12-2 (on file at EPA Region 3 and incorporated herein by reference). Additional information on the air quality benefits of RFG is provided at: http://www.epa.gov/otaq/rfg/information.htm, and websites with links therein (all incorporated herein by reference).

C. Findings of Failure to Attain, Bump Ups, and Section 185 fees:

In the NFRM, EPA took the position that after revocation of the 1-hour standard, areas classified as severe or extreme for the 1-hour standard would no longer be obligated to impose fees under sections 181(b)(4) and 185 based on failure to timely attain the 1-hour standard. 69 Fed. Reg. at 23985/1. EPA further amended the text of the final rule to so state. 40 C.F.R. § 51.905(e)(2)(B). EPA unlawfully failed to subject this new provision to public comment. The agency never proposed a rule that would waive the fee requirements of §§181(b)(4) and 185, and did not even discuss such a possibility in the NPRM. Accordingly, the final rule was not a logical outgrowth of the proposed rule, and was procedurally defective and unlawful for the same reasons specified in Part I.A.1 above with respect to NSR.

Further, EPA's waiver of the §181(b)(4) and 185 fee mandates was arbitrary, capricious, and contrary to law. In the NFRM, EPA sought to justify its waiver of the fee requirements by asserting that the states' obligation to impose fees under §181(b)(4) and 185 is "triggered by a finding of failure to attain," and therefore waived because EPA allegedly does not have to make such a finding once the 1-hour standard is revoked. Both the premise and the conclusion are in error. The fee obligations under §§181(b)(4) and 185 are not tied to a "finding" of failure to attain. Section 181(b)(4) triggers the fee requirements of §185 "[i]f any Severe Area fails to achieve" the standard by the applicable attainment date. Likewise, §185 requires each Severe Area SIP revision to provide for payment of emission fees by major sources "if the area to which the plan revision applies has failed to attain" the ozone standard by the applicable attainment date, No where does the Act require an EPA "finding" of failure to attain before these fee provisions are triggered.

Even if findings were required, our prior comments explained why EPA's waiver of such findings is contrary to the Act, and we incorporate those comments here. Prior

Comments at 46-47. In the NFRM, EPA seeks to justify waiver of such findings by asserting that "we do not believe there is a basis to determine whether an area has met the 1-hour NAAQS once that NAAQS no longer applies; once the 1-hour NAAQS is revoked, there will not be an applicable attainment date with which to make a determination as to whether an area has met its attainment date or not." 69 Fed. Reg. at 23985/1. That claim is both factually and legally incorrect. Plainly, EPA is capable of determining whether a 1-hour nonattainment area has or has not attained the 1-hour standard by the relevant 1-hour attainment date specified in the Act. The determination is a simple matter of comparing monitored air quality with the standard for the relevant time period. Moreover, EPA itself takes the position that the 1-hour standard will continue to have legal effect even after its revocation. Among other things, the agency is requiring 1-hour nonattainment areas lacking approved 1-hour attainment demonstrations to submit such demonstrations, unless they choose one of two other options provided by the final rule. 40 C.F.R. § 51.905(a)(1)(ii)(A). For those states that choose to submit a 1-hour attainment demonstration, EPA obviously can and must determine whether the demonstration adequately shows that the 1-hour standard will be met by the area's applicable 1-hour attainment date. It is wholly inconsistent, arbitrary, and capricious for the agency to nonetheless assert that it will be somehow powerless to determine whether an area has actually attained the 1-hour standard by its 1-hour attainment date.

For all the foregoing reasons, EPA must reverse the position taken in the NFRM that, after the 1-hour standard is revoked, the fee obligations under §§181(b)(4) and 185 no longer apply to areas classified as severe or extreme for the 1-hour standard. For the same reasons, EPA must withdraw the provisions of 40 C.F.R. § 51.905(e)(2)(B).

III. Other Issues

A. Future 8-hour nonattainment

Section 51.905(a)(3)(ii)(B) of the final rule addresses certain areas initially designated attainment for the 8-hour standard that subsequently violate the 8-hour standard prior to having an approved 8-hour maintenance plan. Under the final rule, such areas would be required to either submit a maintenance plan or a SIP providing for 3% increment of emissions reductions from the area's 2002 baseline. The rule does not provide for redesignation of such areas to nonattainment or for submission of nonattainment SIPs for such areas. 69 Fed. Reg. at 23980/3, 23981/1.

EPA unlawfully failed to subject this new provision to public comment. The agency did not propose such a provision or even suggest it as an option either in the NPRM or the regulatory text . Accordingly, the final rule was not a logical outgrowth of the proposed rule, and was procedurally defective and unlawful for the same reasons specified in Part I.A.1 above with respect to NSR.

The new provision is also contrary to the Act to the extent that it constrains EPA's authority to redesignate attainment areas to nonattainment when such areas violate the NAAQS, and thereby trigger an obligation for the state to submit a nonattainment SIP.

Section 107(d)(3) of the Act grants the Administrator the authority to "at any time" redesignate an area "on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." 42 U.S.C. §7407(d)(3). When the Administrator redesignates an ozone attainment area to nonattainment, he must also require the state to submit a nonattainment plan meeting the relevant requirements of subparts 1 and 2. 42 U.S.C. §§ 7502(b), 7511(b)(1). The requirements for a nonattainment plan go far beyond those for a maintenance plan, as they must include an attainment demonstration, RACT, NSR, and other provisions mandated under Part D of Title I of the act. Accordingly, EPA cannot lawfully adopt a rule indicating that a maintenance plan would be a sufficient response when an 8-hour attainment area falls into nonattainment.

To the extent the rule presumes to revoke or limit the Administrator's authority to redesignate 8-hour attainment areas to nonattainment, the rule goes beyond the agency's authority. The Administrator's redesignation authority is conferred by the Act itself, and the criteria for exercising that authority are set forth in the statute. 42 U.S.C. § 7407(d)(3). No where does the statute allow the agency to foreclose redesignation for an entire class of areas. See 63 Fed. Reg. 37258, 37267/1 ("There is no ambiguity in the language of section 107(d0(3), which grants the Administrator the authority to redesignate an area 'any time' she deems it appropriate" based on the statutory factors). In its response to comments in this rulemaking, EPA itself noted that the "federal government generally does not make rules that bind itself to take or refrain from taking certain actions." RTC 145 (rejecting suggesting that EPA bar itself from making findings of failure to attain the 1-hour standard after revocation). Moreover, EPA does not and cannot explain here how the statutory criteria in §107(d)(3)(A) could possibly justify a blanket decision to preclude in advance the redesignation of the entire affected class of 8-hour attainment areas to nonattainment. EPA cannot possibly know at this point in time how the statutory factors will play out in a given area at the time of a future violation. If, for example, one of these areas records numerous and extreme 8-hour violations – comparable to or worse than those recorded in areas already designated nonattainment, then redesignation to nonattainment would be warranted.

The mere fact that an area was meeting the 8-hour standard at the time EPA made its initial 8-hour designations (i.e., on April 30, 2004) does not justify any sort of rule precluding redesignation to nonattainment in the future. Current compliance is no assurance of continued compliance, given the complexity of ozone formation and changing nature of ozone forming emissions. For example, the San Francisco Bay area was redesignated to attainment for ozone in 1995 based on more than 3 consecutive years without ozone violations. 62 Fed. Reg. 66578, 66579/1 (1997). Almost immediately thereafter, however, the area began violating the standard again, recording 17 violations of the 1-hour standard. *Id*. EPA therefore found that it was "compelled to redesignate the Bay Area" back to nonattainment "because of the numerous and widespread violations of the 1-hour standard, a standard that was designed to protect public health." 63 Fed. Reg. 37258, 37259/3 (1998). EPA rejected suggestions that it simply allow the area's maintenance plan to correct the violations, finding that redesignation and new SIP obligations that came with it were "consistent with the overall structure and intent of the

CAA, and provide key public health benefits." Id. 37266/1. Thus, EPA itself has found that redesignation to nonattainment is in some cases the appropriate and necessary response called for under the Act. *See also id*. 37267/1 (finding that redesignation of the Bay area was "necessary" in light of circumstances).

The rule is further contrary to the Act to the extent that it allows a state to submit a SIP providing only for a 3% increment of progress in lieu of a SIP sufficient to cure an area's violation of the 8-hour standard. Under the Act, SIPs must assure timely attainment of the NAAQS – not merely some minimum level of emission reduction. E.g., 42 U.S.C. §§ 7410(a)(1), (a)(2), 7502(c)(1), (6), 7511a(b)(1)(A)(i), (c)(2)(A).

B. Limitation on Applicable Requirements

The proposed rule defined "applicable requirements" as including a list of specified requirements "to the extent such requirements applied to the area for the area's classification" for the 1-hour standard. Reg. Text §51.900(f). The antibacksliding language of the proposed rule applied to areas designated nonattaiment for the 1-hour standard "at the time of revocation of the 1-hour NAAQS." Reg. Text §51.905(a).Thus, under the proposal, the relevant applicable requirements would have been those that were applicable as of the date of revocation of the 1-hour standard. The final rule limits the applicable requirements to those that apply at the time the Administrator signs a final rule designating the area for the 8-hour standard. 40 C.F.R. § 51.900(f). This is a major change from the proposal, effectively moving up by more than year the relevant date for fixing applicable requirements. EPA unlawfully failed to subject this new provision to public comment. EPA never indicated in the NPRM or the proposed Regulatory Text that it was considering an option of limiting applicable requirements to those effective as of the date of 8-hour designation Accordingly, the final rule was not a logical outgrowth of the proposed rule, and was procedurally defective and unlawful for the same reasons specified in Part I.A.1 above with respect to NSR

The final rule is also unlawful, arbitrary and capricious, to the extent that it would allow backsliding from 1-hour obligations that are triggered after designation of an area for the 8-hour NAAQS, but before the 1-hour standard is revoked. As noted above, EPA has correctly construed the Act as precluding backsliding on measures required for an area under the 1-hour standard. The final rule conflicts with that interpretation, because it apparently allows backsliding from measures that will apply to a 1-hour nonattainment area before the 1-hour standard is revoked. For example, suppose an area classified as "serious" for the 1-hour standard is reclassified to "severe" after the area is designated nonattainment for the 8-hour standard, but before the 1-hour standard is revoked.[8] Upon reclassification, that area would be subject to the more stringent control requirements applicable to severe areas, including lower applicability thresholds for NSR and RACT, post 1999 ROP requirements, RFG, and requirements to offset any growth in motor vehicle emissions from growth in vehicle miles traveled. 42 U.S.C. §7511a(c)(2)(B), (d). Yet under the NFRM, the mandates for these stronger control requirements would

[8] The NFRM contemplates that findings of nonattainment and reclassifications under §181(b)(2) will continue until the 1-hour standard is revoked. E.g., 69 Fed. Reg. at 23984/3.

disappear when the 1-hour standard is subsequently revoked. Allowing such backsliding would be flatly contrary to §172(e) of the Act as well as EPA's stated rationales for precluding backsliding as discussed above.

C. Overwhelming Transport Classification

For the reasons described in our Prior Comments, EPA lacks a legal basis for regulating any 8-hour nonattainment areas under subpart 1. *See* Prior Comments at 93-94. Even assuming *arguendo* that the Agency has the authority to regulate such areas under subpart 1, however, the overwhelming transport classification, as described in the final rule, is unlawful, arbitrary and capricious.

(1) EPA's Final Rule Relies on Guidance That Was Not Publicly Available During the Comment Period and Is Still Unavailable.

EPA's proposed rule created a special classification that would apply to certain rural areas regulated under subpart 1, provided those areas can demonstrate that their nonattainment problem is due to "overwhelming transport" of pollution. 68 Fed. Reg. at 32814/1-2. EPA proposed that an area could qualify for the "overwhelming transport classification" if it met the criteria for "rural transport areas" established in CAA § 182(h) and a 1991 guidance document. *Id*. at 32814/1 (referring to EPA OAQPS, Criteria for Assessing the Role of Transport of Ozone/Precursors in Ozone Nonattainment Areas (May 1991)). In the NFRM, EPA shifted course and announced for the first time that the 1991 guidance document is outdated. According to the Agency, an area's eligibility for the "overwhelming transport classification" will be assessed according to as-of-yet-unspecified criteria set forth in a revised guidance document that has not yet been issued. 69 Fed. Reg. at 23965/1.

> The final rule (section 51.904(a)) provides for a subpart 1 area to be classified as an overwhelming transport area if it meets the criteria as specified for rural transport areas under section 182(h) of the CAA and overwhelming transport guidance that we will issue in the future.

Id. The final rule language makes no reference to the forthcoming guidance, however. Instead, it only requires that any candidate for the overwhelming transport classification must satisfy "the criteria as specified for the rural transport areas under section 182(h) of the CAA." 40 C.F.R. § 51.904(a)(1).

EPA's final rule for implementing the 8-hour ozone standard thus relies on a guidance document that was unavailable to the public at the time the rule was proposed, and is still unavailable. Furthermore, because EPA often does not follow the notice and comment procedures of CAA § 307(d) and APA § 553 when it issues guidance documents, there is no indication that the public will ever be given the chance to weigh in on this aspect of the final rule. EPA's reliance on materials that are not part of the rulemaking docket violates CAA § 307(d)(6)(C) and renders the rule arbitrary and capricious. The grounds for this objection arose after the close of the public comment

period; accordingly, raising that objection would have been impracticable. *See* CAA § 307(d)(7)(B). If, as suggested by the preamble to the final rule, EPA intends to rely on future guidance in assessing an area's eligibility for the overwhelming transport classification, it must first issue that guidance and then take comment on its application to this rule. Alternatively, if, as suggested by the language of the final rule, EPA does not plan to rely on that guidance, then EPA must so clarify.

(2) The Final Language of 40 C.F.R. §51.904(a) is Not a Logical Outgrowth of the Proposal and is Impermissibly Vague

EPA's proposed rule text would have allowed the Agency to classify an area being regulated under subpart 1 "as an overwhelming transport area if the area meets the criteria for rural transport areas under section 182(h) of the Act." Proposed 40 C.F.R. § 51.904(a). Section 182(h), in turn, describes the geographical criteria for "rural transport areas," CAA § 182(h)(1), and then authorizes EPA to treat an ozone nonattainment area as such "if the Administrator finds that sources of VOC (and, where the Administrator determines relevant, NOx) emissions within the area do not make a significant contribution to the ozone concentrations measured in the area or in other areas," CAA § 182(h)(2).

In the text of its final rule, EPA states that an area subject to subpart 1 can be classified as an "overwhelming transport area" if:

> (1) The area meets the criteria as specified for rural transport areas under section 182(h) of the CAA;
> (2) Transport of ozone and/or precursors into the area is so overwhelming that the contribution of local emissions to observed 8-hour ozone concentration above the level of the NAAQS is relatively minor; and
> (3) The Administrator finds that sources of VOC (and, where the
> Administrator determines relevant, NOX) emissions within the area do not make a significant contribution to the ozone concentrations measured in other areas.

40 C.F.R § 51.904(a).

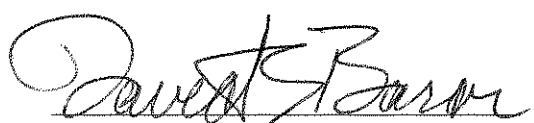
Unless §§51.904(a)(2) and (3) are redundant of §51.904(a)(1), EPA has promulgated a new interpretation of CAA § 182(h) that differs from the Agency's straightforward, unvarnished use of that section in proposed rule text. It appears from the final rule text that EPA may plan to consider whether sources in a potential overwhelming transport area make a "relatively minor" contribution to that area's ozone level – rather than considering whether those sources make a "significant contribution," as required by §182(h)(2). While EPA and the courts have previously given definition to the phrase "significant contribution", (see *Michigan v. EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000)), the phrase "relatively minor" is undefined and impermissibly vague. See, e.g.,

Amoco Production Co. v. FERC, 158 F.3d 593, 596 (D.C. Cir. 1998) (remanding agency decision that revenues were not "significant," where agency failed to explain how much revenue should be regarded as significant); *City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) (agency must explain threshold for "enough" evidence to establish a prima facie case, and cannot rely on a "know-it-when-we-see-it" approach).

To the extent that the new rule text at §51.904(a) indicates that EPA intends to determine whether an area makes a "relatively minor" (rather than "significant") contribution to its ozone level, the Agency has violated the plain language of CAA §182(h). It has also violated CAA §§ 307(d)(3), (5), and (6), by failing to provide notice and an opportunity for comment with respect to its "major new legal interpretation." As such, the rule's provisions are unlawful, arbitrary and capricious. It was impracticable for petitioners to raise these objections in their prior comments because EPA's new and unlawful interpretation of CAA § 182(h) appeared for the first time after the period for public comment had ended. *See* §307(d)(7)(B). Accordingly, EPA must convene a proceeding for reconsideration to explain whether it has reinterpreted CAA §182(h), and, if so, the legal basis for doing so. *Id.*; CAA § 307(d)(3).

This Petition is submitted on behalf of: American Lung Association, Environmental Defense, Natural Resources Defense Council, Sierra Club, Clean Air Task Force, Conservation Law Foundation, and Southern Alliance for Clean Energy.

DATED: June 29, 2004.



David S. Baron
Howard I. Fox
Earthjustice
1625 Massachusetts Avenue, N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel for Petitioners