ORAL ARGUMENT SCHEDULED FOR MAY 12, 2011

No. 10-1056

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

On Petition for Review of an Action of the
United States Environmental Protection Agency

BRIEF OF INTERVENORS AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, WESTERN STATES PETROLEUM ASSOCIATION, SECTION 185 WORKING GROUP, TEXAS OIL AND GAS ASSOCIATION, TEXAS ASSOCIATION OF BUSINESS, TEXAS ASSOCIATION OF MANUFACTURERS, TEXAS CHEMICAL COUNCIL, NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT, LOS ANGELES AREA CHAMBER OF COMMERCE, SANITATION DISTRICTS OF LOS ANGELES COUNTY, NATIONAL ENVIRONMENTAL CALIFORNIA SMALL BUSINESS ALLIANCE, REGULATORY FLEXIBILITY GROUP, EDISON MISSION ENERGY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN CALIFORNIA GAS COMPANY, LOUISIANA CHEMICAL ASSOCIATION, BATON ROUGE AREA CHAMBER, AND LOUISIANA MID-CONTINENT OIL & GAS ASSOCIATION

Dated: January 31, 2011

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici

All parties, intervenors, and amici are listed in Petitioner Natural Resources Defense Council's (NRDC's) Opening Brief.

B. Rulings Under Review

NRDC seeks review of the Environmental Protection Agency's (EPA's) January 5, 2010 "Guidance on Developing Fee Programs Required By Clean Air Act Section 185 for the 1-hour Ozone NAAQS."

C. Related Cases

Intervenors are unaware of any related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenors submit the following corporate disclosure statement:

American Chemistry Council (ACC) has no parent companies, and no publicly-held company has a 10% or greater ownership interest in ACC.

American Petroleum Institute (API) has no parent companies, and no publicly-held company has a 10% or greater ownership interest in API.

National Association of Manufacturers (NAM) has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NAM.

National Petrochemical and Refiners Association (NPRA) has no parent companies, and no publicly-held company has a 10% or greater ownership interest in NPRA.

Western States Petroleum Association (WSPA) has no parent companies, and no publicly-held company has a 10% or greater ownership interest in WSPA.

The Section 185 Working Group (the Group) has no parent company, and no publicly held company has a 10% or greater ownership interest in the Group.

The Texas Oil and Gas Association (TxOGA) has no parent company, and no publicly held company has a 10% or greater ownership interest in TxOGA.

The Texas Association of Business (TAB) has no parent company, and no publicly held company has a 10% or greater ownership interest in TAB.

The Texas Association of Manufacturers (TAM) has no parent company, and no publicly held company has a 10% or greater ownership interest in TAM.

The Texas Chemical Council (TCC) has no parent company, and no publicly held company has a 10% or greater ownership interest in TCC.

The National Environmental Development Association's Clean Air Regulatory Project (NEDA/CAP) does not have any outstanding securities in the hands of the public, nor does NEDA/CAP have a publicly owned parent, subsidiary, or affiliate.

The Los Angeles Area Chamber of Commerce (LA Chamber) does not have a parent corporation. No publicly held entity owns 10% or more of the LA Chamber.

The Sanitation Districts of Los Angeles County (LACSD) does not have a parent corporation. No publicly-held entity owns 10% or more of the LACSD.

The California Small Business Alliance (SBA) does not have a parent corporation. No publicly-held entity owns 10% or more of the SBA.

The Regulatory Flexibility Group (RFG) does not have a parent corporation. No publicly-held entity owns 10% or more of the RFG.

Edison Mission Energy (EME) is a Delaware corporation. EME is a wholly owned subsidiary of Mission Energy Holding Company (a Delaware corporation), which is a wholly owned subsidiary of Edison Mission Group Inc. (a Delaware

corporation). Edison Mission Group Inc. is a wholly owned subsidiary of Edison International (a California corporation). Edison International is a publicly-traded entity. No publicly-held entity beneficially owns more than 10% of the stock of Edison International.

Southern California Edison (SCE) is a California corporation. SCE has issued equity or debt securities to the public and its preferred and preference stock is held by public investors. SCE is a subsidiary of Edison International, a California corporation and holding company that owns all of the common stock of SCE. Edison International is a publicly-traded entity. No publicly-held entity beneficially owns more than 10% of the stock of Edison International.

Southern California Gas Company (SoCalGas) is a publicly-traded corporation incorporated under the laws of the State of California (certain series of its preferred stock are traded on the NYSE Amex; however, those shares make up less than 1% of SoCalGas' total outstanding stock). 100% of SoCalGas' common stock and some of SoCalGas' preferred stock is owned by its parent corporation, Pacific Enterprises, a California corporation (PE). PE, in turn, is a publicly-traded corporation (all of PE's preferred stock is traded on the NYSE Amex; however, those shares make up less than 1% of PE's total outstanding stock). 100% of PE's common stock is owned by PE's parent corporation, Sempra Energy. Sempra Energy is a publicly-traded company incorporated in the State of California. 100%

of Sempra Energy's common stock is traded on the NYSE (Sempra Energy has no preferred stock). Sempra Energy has no parent corporation. No publicly-held entity owns 10% or more of the Sempra Energy.

The Louisiana Chemical Association has no parent companies, and no publicly-held company has a 10% or greater ownership interest.

The Louisiana Mid-Continent Oil & Gas Association has no parent companies, and no publicly-held company has a 10% or greater ownership interest.

The Baton Rouge Area Chamber has no parent companies, and no publicly-held company has a 10% or greater ownership interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Page(s)

CASES

[1] Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

OTHER AUTHORITIES

GLOSSARY

1-hour standard or NAAQS	The national ambient air quality standard limiting maximum hourly average ozone concentrations to 0.12 parts per million. *See* 40 C.F.R. § 50.9(a).
8-hour standard or NAAQS	The national ambient air quality standard limiting daily maximum eight-hour ozone concentrations to 0.08 parts per million. *See* 40 C.F.R. § 50.10(a).
Act	Clean Air Act, 42 U.S.C. §§ 7410 et seq.
APA	Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.
CAA	Clean Air Act, 42 U.S.C. §§ 7410 et seq.
CAAAC	Clean Air Act Advisory Committee
EPA	Respondent, United States Environmental Protection Agency
Guidance	Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, EPA, to Regional Air Division Directors, Regions I-X, EPA, "Guidance for Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS" (January 5, 2010).
Intervenors	American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, National Petrochemical and Refiners Association, Western States Petroleum Association, The Section 185 Working Group, The Texas Oil and Gas Association, The Texas Association of Business, The Texas Association of Manufacturers, The Texas Chemical Council, The National Environmental Development Association's Clean Air Regulatory Project, The Los Angeles Area Chamber of Commerce, The Sanitation Districts of Los Angeles County, The California Small Business Alliance, The Regulatory Flexibility Group, Edison Mission Energy, Southern California Edison, Southern California Gas Company, The Louisiana Chemical Association, The

	Louisiana Mid-Continent Oil & Gas Association, and The Baton Rouge Area Chamber
NAAQS	National Ambient Air Quality Standard
Nonattainment Area	An area designated by EPA as failing to meet a National Ambient Air Quality Standard
NO_x	Nitrogen oxides
NRDC	Petitioner Natural Resources Defense Council
SCAQMD	California's South Coast Air Quality Management District
SIP	A State Implementation Plan prepared by a State, and submitted to EPA for approval, that identifies the controls and programs the State will use to timely attain and maintain national ambient air quality standards.
Subpart 2	Subpart 2 of part D of title I of the Clean Air Act, 42 U.S.C. §§ 7511-7511f.
VOCs	Volatile organic compounds

STATEMENT OF ISSUES

EPA's Brief contains a complete statement of the issues. This Intervenors' Brief will focus on the following issue:

Whether EPA's interpretation of its authority under the Clean Air Act (CAA) § 172(e), 42 U.S.C. § 7502(e), as allowing it to accept state implementation plans (SIPs) that include equivalent alternatives to the fee program found in CAA § 185, 42 U.S.C. § 7511d, is a permissible construction of the statute.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum of NRDC's Opening Brief, *see* Doc. 1274833, Att. A, and in the addendum of EPA's Brief, *see* Doc. 1286838, Add.

STATEMENT OF FACTS

Background. This case concerns the interrelationship between §§ 172(e) and 185 of the CAA. Section 172(e) states in its entirety:

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

42 U.S.C. § 7502(e). The applicable requirements for ozone nonattainment areas are set forth in Subpart 2 of the CAA. 42 U.S.C. §§ 7511-7511f. Thus, with respect to ozone nonattainment areas for the prior standard, § 172(e) provides that when EPA *relaxes* the ozone National Ambient Air Quality Standard (NAAQS), it may allow alternatives to the controls required by Subpart 2 of the CAA prior to relaxing the standard, so long as those alternatives are "not less stringent." Section 172(e) does not directly address scenarios when the Agency makes the ozone NAAQS more stringent.

EPA adopted a more stringent NAAQS in 1997, when it issued an 8-hour standard which replaced the more lenient 1-hour standard that had been in place since 1971. *See* 62 Fed. Reg. 38,856 (July 18, 1997). Subsequently, in 2004, EPA revoked the 1-hour ozone standard, *see* 69 Fed. Reg. 23,951 (Apr. 30, 2004), leaving the 8-hour standard as the only applicable ozone NAAQS.

One of the controls under the 1-hour standard is found in § 185, which requires States with areas in severe or extreme nonattainment with the ozone NAAQS to include a fee collection program in their SIPs. *See* 42 U.S.C. § 7511d. This fee program is to apply to "major" stationary sources of volatile organic compounds (VOCs). 42 U.S.C. § 7511d(a). The fee is assessed as $5,000 per ton

(adjusted for inflation)[2] on every ton of emissions from a major stationary source that exceeds 80 percent of that source's baseline emission levels for VOC,[3] as determined by a statutory formula. *Id*. § 7511d(b). Thus, sources may avoid the fee if they are able to reduce their emissions to or below 80 percent of their baseline.

The question in this case is the reasonableness of EPA's interpretation that it may rely on § 172(e) to allow States to adopt SIPs with "not less stringent" alternatives to the fee program specified in § 185 when, as here, EPA has strengthened, rather than relaxed, the ozone NAAQS.

The *South Coast* Decision. In *South Coast Air Quality Management District v. EPA*, 472 F.3d 882, 899 (D.C. Cir. 2006), *rehearing denied*, 489 F.3d 1245 (D.C. Cir. 2007), this Court upheld EPA's revocation of the 1-hour standard so long as "adequate anti-backsliding provisions [required by CAA § 172(e)] are introduced." As the Court explained, although the terms of the anti-backsliding provision in CAA § 172(e) apply only when EPA "relaxes" a NAAQS, it was reasonable for EPA to apply the provision by analogy to the more stringent 8-hour standard. *South Coast*, 472 F.3d at 899-900. The *South Coast* decision did not address the issue of whether EPA may also rely on § 172(e) to provide for

[2] In 2010, CAA § 185 fees would have been equal to roughly $9,000 per ton.
[3] Section 182(f), 42 U.S.C. § 7511a, extends all of the § 185 requirements for VOC equally to nitrogen oxides (NO_x).

alternative equivalent controls. This Court also held in *South Coast* that the § 185 penalty fees are among the "controls" subject to the anti-backsliding provisions in § 172(e). *See* 472 F.3d at 902-03. As a result, EPA was charged with extending the "controls" of § 185 to areas in non-attainment of the revoked, 1-hour ozone standard, in accordance with § 172(e).

EPA's Response to *South Coast*. EPA convened the Clean Air Act Advisory Committee (CAAAC)[4] to advise it on implementation issues associated with the *South Coast* decision, including whether to provide guidance on potential alternative programs that States could develop consistent with CAA § 172(e). At EPA's request, on May 15, 2009, a task force of the CAAAC provided the Agency with a draft report regarding options for such alternative programs. Record Docs. 4 and 5 [JA __]. The task force's draft report identifies several potential strategies for the States as they implement a § 185 program or an alternative equivalent program. Record Doc. 5 at 4-6 [JA __]. On January 5, 2010, EPA issued "Guidance on Developing Fee Programs Required By Clean Air Act § 185 for the 1-hour Ozone NAAQS" (Guidance). Record Doc. 10 [JA __].

[4] The CAAAC is an advisory committee established by EPA to provide advice to the Agency on implementation of the CAA. *See* http://www.epa.gov/air/caaac/. It is comprised of about 40 individuals representing state and local government, environmental and public interest groups, academic institutions, unions, trade associations, utilities, industry, and other experts.

EPA's Guidance. The Guidance explains how EPA intends to exercise its discretionary authority under § 172(e) to authorize equivalent "not less stringent" programs as alternatives to the § 185 fee program. *Id.* [JA __]. As EPA notes, the object of the § 185 program is "to bring about attainment after a failure of an area to attain by its attainment date." *Id.* at 3 [JA __]. The Guidance explains that States can meet their obligations under the CAA "through a SIP revision containing either the fee program prescribed in section 185, or an equivalent alternative program" that is "consistent with the principles of section 172(e) of the CAA." *Id.* at 2-3 [JA __].

The Guidance does not eliminate the collection of fees under § 185. Rather, it explains States' flexibility to achieve emissions reductions through incentives, which may include fee assessments, in the context of a "not less stringent" program. "The subpart 2 provisions [which include § 185] are designed to provide an ever-growing incentive to reduce ozone-forming pollutant emissions to levels that achieve attainment of the ozone NAAQS." Guidance at 4 [JA__]. In designing an alternative program, the Guidance maintains it would be appropriate for States to continue to focus on fee assessments, achieving further emissions reductions, or a combination of both. *Id.* To demonstrate that an alternative program is "not less stringent," the Guidance provides that States should compare "expected fees and/or emissions reductions directly attributable to application of section 185 to the

expected fees and/or emissions reductions from the proposed alternative program." *Id.*

Because EPA's 8-hour standard is more stringent than the revoked 1-hour standard, the Guidance explains that a State's demonstrated attainment of the stronger 8-hour standard is another option for demonstrating that its approved SIP is "not less stringent" than the application of § 185 under the 1-hour standard: "[O]nce an area attains the 1997 8-hour ozone standard . . . the purpose of retaining the [§] 185 fee program as an anti-backsliding measure would also be fulfilled as the area would have attained the 8-hour standard for which the fee program was retained as a transition measure." *Id.* at 3-4 [JA__]. To not recognize 8-hour attainment as a sufficient alternative "would unfairly penalize sources in these areas to require that fees be paid after an area has attained the 8-hour standard." *Id.* at 4 [JA__].

While the Guidance identifies the circumstances in which EPA believes it can approve such an alternative program, the Guidance emphasizes that "[t]hese interpretations will only be finalized through EPA actions taken under notice-and-comment rulemaking to address the fee program obligations associated with each applicable nonattainment area."[5] *Id.* at 3.

[5] This includes EPA's recognition of any particular State's attainment of the 8-hour standard as an alternative to the § 185 fee program. No particular determination is

STANDARD OF REVIEW[6]

This case is governed by the two-step framework for judicial review of agency interpretations set forth in *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). "Under the familiar *Chevron* framework, [courts] defer to an agency's reasonable interpretation of a statute it is charged with administering." *Cuomo v. Clearing House Ass'n, LLC,* 129 S.Ct. 2710, 2715 (2009). In the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. If the statute in question is unambiguous, its plain meaning applies. *Id.* at 842-43. If the court determines that the statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

SUMMARY OF ARGUMENT

EPA's interpretation that CAA § 172(e) authorizes the approval of alternative equivalent programs to the fee program in CAA § 185 is both reasonable and consistent with *South Coast,* 472 F.3d 882. It therefore is entitled to deference. Specifically, EPA's conclusion—that States with areas classified as severe or extreme nonattainment for the now-revoked 1-hour ozone standard can

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at issue in this case, and any such determination, after full public notice and comment, would be subject to judicial review. 42 U.S.C. § 7607(b)(1).

[6] The Respondent's Brief contains a complete statement of the standard of review.

meet their CAA obligations through a SIP revision containing either the fee program in CAA § 185 or an equivalent alternative program—is permissible. EPA's Guidance confirms that any alternative program must be consistent with the principles of the anti-backsliding provision of the CAA.

Moreover, the Guidance explains that States have important flexibility to develop equivalent alternative programs that do not unfairly and inappropriately penalize well-controlled major stationary sources, including those operated by Intervenors and their members. These sources, which have already dramatically reduced their contribution to nonattainment with the ozone 1-hour NAAQS, are unable to achieve further reductions in emissions without a harmful drop in productivity. The Guidance provides States an option to curb ozone emissions more effectively by, for example, developing programs that shift the fee burden to mobile sources or other non-major sources of emissions that are contributing to nonattainment. Intervenors and their members will be harmed if States are not afforded this flexibility and they are required to reduce or even halt production despite their small present contribution to ozone nonattainment. The Guidance's direction is thus supported by sound policy.

ARGUMENT

I. EPA's Guidance Is A Permissible Construction Of §§ 172(e) And 185.

Section 185 can impose substantial fees on sources, including sources already subject to stringent requirements. EPA's Guidance interprets the Agency's authority under CAA § 172(e) as allowing it to accept SIPs that include equivalent alternatives to the fee program found in CAA § 185, including allowing the termination of such a program in those areas that have met the 8-hour standard. This interpretation is reasonable and entitled to deference.

A. Neither § 172(e) nor § 185 speak directly to EPA's authority in the circumstances at hand and thus do not foreclose EPA's interpretation at *Chevron* step 1.

Section 185, on its face, only applies when the 1-hour ozone standard is in effect. EPA has revoked that standard and replaced it with the more stringent 8-hour ozone standard. Thus, Section 185 now only comes into play because EPA has decided to apply the anti-backsliding requirement in § 172(e), which, under the statutory text, only applies when EPA *relaxes* the ozone NAAQS. When EPA relaxes a standard, § 172(e) permits EPA to approve SIPs with equivalent alternative controls to those specified in the CAA for the prior standard. Section 172(e), however, does not address EPA's authority when it makes the ozone NAAQS more stringent, as the Agency has done here. In the face of this statutory ambiguity, *and consistent with the EPA's earlier decision to apply the*

anti-backsliding provisions of § 172(e) in these circumstances, the Guidance interprets § 172(e) to provide the Agency authority to approve alternative fee programs "not less stringent" than the program identified in § 185. In the absence of explicit statutory instructions, the issue of whether EPA may rely on § 172(e) in this manner cannot be resolved under *Chevron* step 1. Indeed, this Court previously concluded that EPA's interpretation to apply the anti-backsliding provisions of § 172(e) in these circumstances could not be answered under *Chevron* step 1. *See South Coast*, 472 F.3d at 900. As a result, the issue is whether EPA's interpretation may be upheld as a permissible interpretation of § 172(e) under *Chevron* step 2.

B. EPA's interpretation of the relationship between §§ 172(e) and 185 is a reasonable and permissible construction of the CAA and should be upheld under *Chevron* step 2.

EPA's Guidance satisfies the second step of *Chevron* because it is a reasonable and permissible interpretation of §§ 172(e) and 185. Under *Chevron*, courts must defer to an agency's interpretation so long as it is "a permissible construction of the statute." 467 U.S. at 843.

Even though § 172(e) does not speak to situations where EPA tightens a standard, this Court has already found EPA's interpretation that the anti-backsliding principle of § 172(e) applies in such situations to be reasonable. In *South Coast*, 472 F.3d at 900, this Court upheld EPA's conclusion 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[7] not be weakened where the NAAQS is made more stringent." Specifically, this Court found that "EPA's interpretation of [§] 172(e) is to this extent consistent with Congress's expressed intent and therefore is reasonable." *Id.* NRDC also agrees that this application of § 172(e) is a "reasonable extension of Congressional intent." Doc. 1274833 at 17.

EPA's Guidance builds upon *South Coast* by concluding that not only does the *anti-backsliding* requirement of § 172(e) apply when it tightens the ozone NAAQS, so does the interrelated and critical authority for not less stringent alternative controls. 42 U.S.C. § 7502(e). Thus, EPA has reasonably concluded that § 172(e) provides it with discretion to approve alternative programs equivalent to the § 185 fee program. In the absence of any clear instruction from Congress, EPA's Guidance reasonably construes the statute. "*Chevron* recognized that '[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Mayo Foundation for Medical Educ. and Research v. United States*, 2011 WL 66433, *9, __ S.Ct.__

[7] Section 185 penalties are included among the "controls" referenced in Section 172(e). *See South Coast*, 472 F.3d at 902-03.

(Jan. 11, 2011) (citing *Chevron*, 467 U.S. at 843). EPA's Guidance exercises this inherent discretion by "filling the gap" left by the statute. EPA's Guidance thus comports with *South Coast*, in which this Court concluded that EPA's decision to extend § 172(e) to situations when EPA tightens the ozone NAAQS was a reasonable exercise of the Agency's discretion.

C. EPA's interpretation is consistent with Congressional intent.

EPA's Guidance implements the real purpose of § 185. As Section IV of this Brief explains, the prospect that § 185 would require sources with state-of-the-art controls to curtail operations or pay a penalty for not being able to control air pollution further was not intended by Congress. When Congress enacted § 185 in 1990, stationary sources represented a much larger percentage of the emissions inventory in the nation's ozone nonattainment areas. At the time, such facilities could take actions to achieve emissions reductions at a cost lower than the fee—the fee was intended as a backstop to "fine" major sources who failed to install control equipment to reduce emissions.[8] Today, however, most of these sources already operate some of the most effective controls available (pursuant to State regulations).

[8] While the explanatory statement regarding §185 in the Report of the Committee on Energy and Commerce on H.R. 3030 uses the word penalty, it also emphasizes that "this is an *enforcement fee* related to attainment of severe and extreme ozone areas." H.R. Rep. No. 101-490 at 257 (1990).

Without flexibility for States to submit equivalent fee program alternatives allowed by EPA's Guidance, § 185 becomes exceptionally punitive. Section 185 was structured so that sources could *either* achieve an emission reduction bringing it to 80 percent of its baseline *or* pay the fee. *See* 42 U.S.C. § 7511d(b). There is nothing in the legislative history to suggest that this provision was intended to penalize sources, including private and public emission sources, that already installed state-of-the-art controls and substantially reduced their emissions. If Congress wanted to impose fees on well-controlled sources, Congress could have imposed a global emissions fee; rather, it crafted § 185, which is entitled "Enforcement . . . for failure to attain," as an enforcement backstop to force sources, through threat of penalties, to install control equipment necessary to bring the area into attainment.

II. NRDC's Alternative Interpretation Of § 172(e) Is Unreasonable.

NRDC offers an alternative interpretation of § 172(e), asserting that the provision contains two distinct "principles:" (1) a "prohibitory principle," that prohibits backsliding by requiring that controls be maintained in areas that are not in attainment with a revoked standard; and (2) a "flexibility principle," providing that alternative controls can be authorized if they are "not less stringent" than those that were applicable before the new standard was adopted. *See* Doc. 1274833 at 16-18. Notwithstanding the fact the two "principles" are contained in the very

same sentence of § 172(e), NRDC then argues that the only reasonable interpretation of the statute is that it permits EPA to extend the "prohibitory principle" while barring the Agency from applying the "flexibility principle." *Id.* This argument is contrary to basic rules of statutory construction and makes no sense.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) *(quoting Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989)). Contrary to NRDC's position, portions of a statutory section should not be read in isolation. *Cf. Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 944 (D.C. Cir. 2004) (finding that the problem with petitioners argument "is that it reads the fourth sentence of [a provision of the CAA] in isolation, as if it were the only sentence in the section rather than the final sentence of four."); *United States v. Wilson*, 290 F.3d 347, 354-55 (D.C. Cir. 2002) (rejecting an argument that two sentences of a single statutory provision should be read as unrelated). It is a more faithful construction of the anti-backsliding provision to read it as a whole, instead of dissecting it as if it contains two unrelated parts. *Cf. Wilson*, 290 F.3d at 355 ("It is the 'classic judicial task' of construing related statutory provisions 'to "make sense" in combination.'"); *see also Holloway v.*

United States, 526 U.S. 1, 6 (1999) ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'").

Moreover, the two "principles" are contained in the same sentence of § 172(e) and are not distinct, as NRDC suggests. The statute reads: "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). If the provision requires EPA to ensure no backsliding, it plainly intends to allow the Agency to do so by allowing equivalent alternatives. NRDC's interpretation would improperly read § 185's text authorizing equivalent controls out of the provision. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps" and thus courts should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"); *Bilski v. Kappos*, 130 S.Ct. 3218, 3228 (2010) (statutory provisions must not be interpreted "in a manner that would render another provision superfluous"); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous").

NRDC's position, moreover, is inherently contradictory. NRDC correctly notes that sources are subject to the § 185 fee provisions because of the attainment

deadlines for severe and extreme nonattainment areas for the *1-hour* ozone NAAQS. Doc. 1274833 at 4. EPA, however, has revoked the 1-hour ozone NAAQS and replaced it with one more stringent. NRDC also correctly acknowledges that the statutory text of § 172(e) does not apply in these circumstances because the 8-hour ozone standard is *more* stringent than the 1-hour standard, and § 172(e) only applies when EPA *relaxes* a standard. Thus, § 185 only remains in effect because EPA decided to apply the anti-backsliding provisions of § 172(e). This leads to the logical conclusion that the legality of EPA's Guidance can be evaluated only under *Chevron* step 2. Yet NRDC argues that because § 172(e) does not expressly apply here, the Court, under *Chevron* step 1, must ignore the part of § 172(e) which authorizes "not less stringent" alternatives and conclude that EPA may not allow equivalent alternatives to § 185. NRDC's twisted reasoning is internally inconsistent and does not withstand close scrutiny.

Although EPA was not obligated to extend the anti-backsliding requirements of § 172(e) when it strengthens the NAAQS, once it did, it was entirely reasonable and appropriate for the Agency to bring along the flexibility contained in § 172(e) as well. EPA's preservation of the symmetry between § 172(e)'s twin policies—anti-backsliding protection on the one hand and flexibility on the other—is true to fundamental canons of construction that instruct courts to "place the statutory language in context and interpret the statute as a symmetrical and coherent

regulatory scheme." *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (quoting *Brown & Williamson*, 529 U.S. at 133) (quotation marks omitted); *see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2516 (2009) (applying the "principle of symmetry" in interpreting Voting Rights Act, to ensure that a compliance provision was symmetrical with its corresponding enforcement provision); *Home Health Care, Inc. v. Heckler*, 717 F.2d 587, 590 (D.C. Cir. 1983) ("These statutes, of course, must be read together 'to produce a symmetrical whole'").

NRDC's parsing of § 172(e) ignores the fundamental instruction in *Chevron* that an Agency's interpretation of an ambiguous provision must only be reasonable. *Chevron*, 467 U.S. at 843. EPA's interpretation of §§ 172(e) and 185 is clearly a permissible and reasonable reading of the statute. Indeed, NRDC seems to suggest that EPA's authority under § 172(e) depends on whether it approves of the outcome: EPA may fill the statutory gap to extend the backsliding prohibition when the Agency strengthens the NAAQS (thus ensuring the objectives of Congress are met), but is prohibited to allow *equivalent* alternative programs because NRDC does not approve of them. The reasonableness of EPA's interpretation, however, is not judged by whether NRDC agrees with the outcome. NRDC provides no valid distinction why EPA cannot also apply § 172(e)'s flexibility when it makes a standard more stringent.

NRDC's assertion that EPA's interpretation somehow reflects a decision to "avoid" the requirements of the CAA's Subpart 2 ozone implementation program (which includes § 185) also misses the mark. *See* Doc. 1274833 at 18-21. The Guidance does not excuse any State from complying with § 185. Rather, it explains how EPA may exercise the flexibility specifically provided by Congress in § 172(e) to allow alternative controls that are "not less stringent" than those specified in Subpart 2. Contrary to NRDC's argument, the Guidance does not claim "open-ended authority for EPA to find its own solutions to the problem of 1-hour ozone." Doc. 1274833 at 20-21. EPA's authority under § 172(e) is not unbridled; as the Guidance acknowledges, it is constrained by the statutory requirement that any such alternative controls be "not less stringent than" those set out in the statute. Thus, far from "avoiding" the statutory scheme, EPA's interpretation is entirely consistent with it and ensures that Congress's plan for achieving the ozone NAAQS is implemented.

III. NRDC's Concerns About The Applicability Of The Guidance To Areas That Might Not Have Attained The 1-Hour NAAQS Are Unfounded, Speculative, And Inconsistent With The Plain Language Of § 185.

NRDC last argues that to meet the anti-backsliding requirements, EPA must be able to show that the 1-hour standard is attained.[9] Doc. 1274833 at 21-25. We

[9] NRDC does not dispute the finding in the Guidance that an area that shows it has attained the 1-hour standard need not impose or may terminate the § 185 fee program.

agree that this is one way, but not the only way, to end the requirement for a § 185 fee program. As EPA has concluded, an area that has demonstrated compliance with the more protective 8-hour standard through permanent and enforceable reduction requirements also can demonstrate that these reductions are equivalent to the § 185 fees program to meet the 1-hour standard.

This conclusion follows from EPA's decision to revoke the 1-hour standard, which apparently NRDC seeks to re-litigate here. In promulgating the 8-hour standard, EPA found that it "would be very effective in limiting 1-hour exposures, and generally even more effective in limiting 1-hour exposures of concern than is the current 1-hour standard." 62 Fed. Reg. at 38,863. While NRDC suggests that "for certain areas . . . the 8-hour standard has not been enough to ensure 1-hour concentrations of concern are avoided," Doc. 1274833 at 24, this does not undermine EPA's Guidance interpreting § 172(e) as giving States the opportunity to make a showing that the reductions used to attain the more stringent 8-hour standard are no less stringent than imposing fees under § 185 to protect against backsliding.

Moreover, NRDC cites to an extra-record declaration, providing no record support that such a situation exists in any particular area. As a result, NRDC's concern is purely speculative and need not be resolved by this Court. EPA's

Guidance is clear that any State-developed fee-equivalent alternative program must be based on a demonstration "that the alternative program is no less stringent than the otherwise applicable section 185 fee program." Guidance at 3 [JA__]. The Court should defer consideration of this issue until the hypothetical situation posited by NRDC actually comes to pass, at which time there will be a full administrative record to assess the legality of any alternative program approved by EPA.[10] Indeed, nothing in the Guidance establishes how or even if a State will fashion its alternative demonstration.

This Court has declined to rule on the validity of an EPA action in similar circumstances. In *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1996), this Court declined to review the validity of EPA's regulations under CAA § 112(l), which established rules for submittal of alternative, equivalent State programs for control of hazardous air pollutants. The Court held that there was no "pressing concern that compels" a decision in "this matter at this time" and that the claim did not "demand immediate relief because the primary injury it alleges 'is not a present hardship resulting from the

[10] EPA's consideration of a proposed SIP revision containing an alternative program is subject to notice and comment and later judicial review upon approval. Guidance at 3 [JA__]. Such review would likely take place in the Circuit in which the State whose SIP is being revised is located given Congress' decision to provide for review of such "local" decisions in the regional Circuit courts. *See* 42 U.S.C. § 7607(b)(1).

regulations themselves, but rather a future injury that may result.'" *Id.* at 1385 (citing *Cronin v. FAA*, 73 F.3d 1126, 1133 (D.C. Cir. 1996)). So too, here, the establishment of guidelines for equivalent § 185 programs does not demand immediate relief because the primary injury alleged is from the program a State may adopt not from the Guidance itself.

In any event, NRDC's claim that a § 185 program must be kept even after attainment with the 8-hour NAAQS is inconsistent with the plain text of § 185. The § 185 fees program applies "until the area is redesignated as an attainment area for ozone." 42 U.S.C. § 7511d(a). NRDC reads into that provision the implicit requirement that the fees must continue to be imposed until the area attains the *prior, now revoked* 1-hour NAAQS. But the statute does not include that express requirement; rather, the statute only requires fees until EPA designates the area as attainment for ozone, without any specification as to which standard.

By providing for termination of the fee program for attainment areas, Congress evidenced its intent that these fees should not continue needlessly. EPA's Guidance thus recognizes that the goal of the fee program is to achieve attainment of the ozone NAAQS. Where a State's control program has led it to attain the more stringent 8-hour standard, even if EPA has not yet formally redesignated those areas as attainment areas, the fee program is no longer necessary to achieve

Congress' goal. Given that Congress specifically intended for EPA to revisit and revise the ozone NAAQS in the future,[11] EPA's interpretation that attainment of either the old 1-hour NAAQS or the stricter 8-hour NAAQS attainment eliminates the § 185 requirement or renders the State SIP equivalent to the § 185 fee program for those areas is eminently reasonable.[12]

NRDC asserts that EPA's decision to no longer redesignate the old 1-hour areas, irrespective of air quality, is a "red herring." Doc. 1274833 at 25. The red herring, however, is NRDC's claim that there may continue to be violations of the 1-hour standard in areas that have attained the 8-hour standard. This is a rehashing of NRDC's argument against EPA's decision to revoke the 1-hour standard rejected in *South Coast*. 472 F.3d at 898-899. Since the 1-hour ozone no longer exists, EPA reasonably interpreted § 172(e) to give it flexibility to determine when the § 185 fees could be terminated with respect to a revoked standard consistent with the anti-backsliding provisions.

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[11] *See* 42 U.S.C. §§ 7409(d)(1) (providing for review and revision of the NAAQS every five years), 7502(e) (authorizing alternative controls upon modification to the NAAQS); *South Coast*, 472 F.3d at 892-93.

[12] The Court in *South Coast* did not address the issue of what standard must be attained in order to terminate the fees or to approve an equivalent alternative requirement that would terminate the fees. Rather, the Court there only addressed and rejected EPA's previous conclusion that the fees no longer needed to be imposed because EPA had revoked the 1-hour standard. *See South Coast*, 472 F.3d at 903.

In sum, EPA's interpretation that § 172(e) authorizes alternative programs, including allowing the termination of § 185 fees upon a showing of attainment with the 8-hour NAAQS through permanent and enforceable emission reductions, so long as the alternatives are "not less stringent" than the § 185 program, is a reasonable and permissible construction of § 172(e).

IV. The Guidance Is Supported By A Sound Policy Basis.

Flexibility is necessary to achieve fundamental fairness and allow States to design programs tailored to their unique circumstances. NRDC seeks to write the flexibility out of CAA § 172(e).

A. The Guidance provides States flexibility to design programs that focus on the most important contributors to ozone.

The Guidance allows States to "develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to [§] 185, to other non-major sources of emissions, including owners/operators of mobile sources." Guidance at 5 [JA__]. This is critically important because the contribution of major stationary sources to overall ozone nonattainment has been dramatically reduced over the last 20 years. Record Doc. 5 at 3 [JA __]. For some emission sources, curtailment of production or shut down may be the only alternative to the roughly $9,000/ton fee. Guidance at Attachment B [JA __].Thus, EPA recognizes that "section 185 is not strategic in imposing emissions fees on all major stationary sources, including already well-controlled

sources that have few, if any, options for avoiding fees by achieving additional reductions." *Id.* at 5 [JA__].

The alternative equivalent programs described in the Guidance would provide significant benefits to Intervenors and their members, if adopted by States and approved by EPA. For example, States could adopt a "not less stringent" alternative program that shifts the fee burden from major stationary sources that have already installed the latest emission control technology, to other non-major sources of emissions that contribute more significantly toward nonattainment, such as mobile sources.[13] Guidance at 5 [JA__]. This flexibility allows States to design programs that are fairer and likely to be more effective in attaining the NAAQS. "States can be more strategic by crafting alternative programs that exempt or reduce the fee obligation on well-controlled sources, and assign the required fees to less well-controlled sources as an incentive for those sources to further reduce emissions of ozone-forming pollutants." *Id.*

B. Section 185 applies to a large number of well-controlled sources.

A broad range of private and public entities are affected by the § 185 fee provisions. Although these provisions apply only in "severe" and "extreme" nonattainment areas, these areas have significantly lower applicability thresholds at

[13] Examples of mobile sources include on-road vehicles, such as light, medium and heavy duty vehicles, and nonroad vehicles, such as airplanes, trains, construction equipment, etc.

which sources are categorized as "major stationary sources," *see* 40 C.F.R. § 51.165(a)(1)(iv)(A), making the universe of "major sources" much broader in these areas. Thus, for example, a small printing company or a municipal hospital would be subject to § 185 fees in these areas, while they are not regulated in a "moderate" nonattainment area.

California's South Coast Air Quality Management District (SCAQMD)[14] illustrates the substantial reach of the fee provisions and the severe economic results of NRDC's interpretation. Because the South Coast Air Basin was designated as "extreme" nonattainment for the 1-hour standard, *see* 40 C.F.R. § 81.305, it is subject to the lowest emissions threshold—only 10 tons per year of NO_x and VOCs —for determining what is a "major source" for purposes of § 185. *See* 40 C.F.R. § 51.165(a)(1)(iv)(A). As a result of this low threshold, major sources in the South Coast Air Basin include small businesses and essential public services, such as hospitals, schools, universities, police facilities, and sewage treatment plants—entities that are not "major sources" in other areas of the country. Examples of entities that would be subject to the § 185 fees for the revoked standard under NRDC's interpretation include Cajoleben, Inc. dba

[14] The SCAQMD is a political subdivision of the State of California that administers air quality requirements (both state and federal) in a region that covers all of Orange County and the urban portions of Los Angeles, Riverside and San Bernardino counties. *See* SCAQMD, "About South Coast AQMD," *available at* http://www.aqmd.gov/aqmd/index.html (last visited Jan. 20, 2011).

Galasso's Bakery, San Antonio Community Hospital, East Los Angeles College, Loma Linda University, and Los Angeles Sheriff's Department.[15] Additionally, major sources currently contribute less than 10% of the nitrogen oxide precursors to the ozone mix of the South Coast Air Basin; most emissions come from mobile sources. The State, therefore, must look to other means to achieve the current ozone NAAQS.

Despite providing little to no benefit for ozone nonattainment in these cases, the impact of the § 185 fees on these large and small private and public operators could be onerous. Because most of the major sources in the South Coast Air Basin already are required to have state-of-the-art emission control equipment for VOCs and NO_x,[16] those sources will have few, if any, options for reducing their emissions. As a result, those sources would either have to pay the about $9,000/ton annual fee for affected emissions as an annual operating cost or curtail operations to reduce emissions. For sources such as hospitals, curtailing operations may not be an option, and paying fees could require raising the cost of medical care. Universities and city police forces are also ill-equipped to curtail operations *or* pay

[15] A 2008 SCAQMD Staff Report lists 584 sources potentially subject to § 185 fees. SCAQMD, Attachment F to Dec. 5, 2008 Board Meeting Report, "Staff Report: Proposed Rule 317 – Clean Air Act Non-Attainment Fees" at 19-33 (Dec. 2008) (SC Staff Report), attached hereto at Exhibit 1.

[16] The SCAQMD imposes requirements on existing sources to achieve "best available retrofit control technology" and the nonattainment designation subjects new or modified major sources to the "lowest achievable emission rate." *See* 42 U.S.C. § 7503(a)(2).

the required fees. The effect on small businesses would be chilling as curtailment of operations or imposition of fees not only curtails economic recovery, but also could force layoffs or small businesses to shut down. Even if they could pay the fee, it achieves little because they cannot significantly, if at all, reduce their emissions, and overall stationary sources represent less than 10% of the emissions. "[T]he concern is that imposing the fee would be harmful, essentially penalizing early actors and sources that had done the most to control their activities and risking a degree of economic cost and potential loss of employment not commensurate with any corresponding air quality benefit." Record Doc. 5 at 3-4 [JA__].

Rather than forcing hospitals, universities, police forces and small businesses to curtail operations or pay fees they are not equipped to pay, EPA's Guidance allows States to, for example, "develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to section 185, to other non-major sources of emissions, including owners/operators of mobile sources." Guidance at 5 [JA __]. This potential alternative to allow fee-shifting to sources that generate the greatest proportion of emissions, is consistent with Congress' goal in enacting § 185 to "provide [sources] an ever-growing incentive to reduce ozone-forming pollutant emissions to levels that achieve attainment of the ozone NAAQS." Guidance at 4

[JA __]. By providing States with the flexibility to shift the fee burden to the emission sources that actually contribute to nonattainment, the Guidance would allow States to more effectively reduce ozone-forming pollutant emissions.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court deny NRDC's petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C) and in compliance with this Court's September 30, 2010 Order, Doc. 1268995, I hereby certify that the foregoing brief contains 6,509 words, as counted by Microsoft Word's word count feature.

Dated: January 31, 2010

/s/ Thomas G. Echikson
Thomas G. Echikson

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2010, I will cause the foregoing Opening Brief of Intervenors to be served by electronic means through the Court's CM/ECF system, on all counsel of record.

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